

**ADDRESSING STATE (IR-)RESPONSIBILITY:
THE USE OF MILITARY FORCE AS SELF-
DEFENSE IN INTERNATIONAL COUNTER-
TERRORISM OPERATIONS**

MAJOR MICHAEL D. BANKS¹

I. Introduction

A. Hypothetical

You are the Chief Executive of a State. During a cabinet meeting, you receive a briefing concerning an imminent terrorist attack against your State. The terrorist organization concerned is presently based inside a State with whom you enjoy normal diplomatic relations. You discuss with your advisors the possibility of asking that State to deal with the problem for you. Based on the political climate in that State and the location of the terrorist organization, however, such a solution would be ineffective at best; at worst, the terrorists could learn of your intelligence and change their plans and location. Your military leadership strongly recommends an immediate military strike in the area, in order to capture or kill as many of the terrorists as possible. They recommend that the attack take place without any warning to the host State, to lessen the chances that the terrorist organization will learn of the plan and flee. Any delay in ordering the attack increases the likelihood the terrorists will either successfully attack your State, or learn of your intelligence and change their plans or location. What do you do?

Readers might assume that this scenario describes a potential terrorist attack by al Qaeda against the United States. It could equally well describe the situation faced by the fledgling Afghan government in its struggle against Taliban forces operating out of the Federally

¹ Judge Advocate, U.S. Army. Brigade Judge Advocate, 3d Brigade Combat Team, 3d Infantry Div., Fort Benning, Ga. Previous assignments include: Chief Legal Instructor, U.S. Army Intelligence Ctr. (USAIC), Fort Huachuca, Ariz.; Operational Law Attorney, V Corps, Heidelberg, F.R.G.; Brigade Judge Advocate, 18th Military Police Brigade, Baghdad, Iraq; Trial Counsel, Heidelberg, F.R.G.; Chief, Operational Law, U.S. Army Japan, Camp Zama, Japan; Admin. & Int'l Law Attorney, U.S. Army Japan, Camp Zama, Japan. This article was originally submitted as part of the course requirements for the 56th Graduate Course, The Judge Advocate General's Legal Ctr. & Sch., Charlottesville, Va.

Administered Tribal Areas (FATA) in Pakistan;² the situation faced by Turkey, confronted with attacks by the Kongra-Gel (also known as the Kurdistan Workers' Party, or PKK) based in northern Iraq;³ or any of a number of other States faced with terrorist threats.

B. The Issue

Despite global cooperation in the War on Terror,⁴ many States still face the threat of attack, and any could find themselves in the opening scenario. The scenario raises difficult issues under international law, including questions concerning the use of military force against non-State actors, issues of anticipatory self-defense, the responsibility of States for non-State actors operating within their borders, and how much warning to the host State is required, particularly if such warning is reasonably likely to be ineffective or even counter-productive. Each of these issues ultimately hinges on one primary question: whether an injured State may use military force against a non-State terrorist organization if the host State within which the organization is located or operating is unwilling or unable to stop that organization from committing terrorist attacks against the injured State.⁵

² U.S. DEP'T OF STATE, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2006, ch. 2, Country Reports: South and Central Asia Overview (2007), available at <http://www.state.gov/s/ct/rls/crt/2006/82734.htm> [hereinafter 2006 COUNTRY REPORTS—SOUTH AND CENTRAL ASIA]; FRONTLINE: Return of the Taliban: Interviews: Amrullah Saleh, PBS, Oct. 3, 2006, <http://www.pbs.org/wgbh/pages/frontline/taliban/interviews/saleh.html> [hereinafter *Saleh Interview*]; see also Ahmed Rashid, *Accept Defeat by Taliban, Pakistan Tells NATO*, TELEGRAPH, Nov. 29, 2006, available at <http://www.telegraph.co.uk/news/worldnews/1535524/Accept-defeat-by-Taliban-Pakistan-tells-Nato.html> (detailing likely locations of Taliban forces and leadership in Pakistan).

³ U.S. DEP'T OF STATE, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2006, ch. 6, Foreign Terrorist Organizations (2007), available at <http://www.state.gov/s/ct/rls/crt/2006/82738.htm> [hereinafter 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS]; Pam O'Toole, *Profile: The PKK*, BBC, Oct. 15, 2007, <http://news.bbc.co.uk/2/hi/europe/7044760.stm>.

⁴ The War on Terror has been described as “a battle of arms and a battle of ideas.” NAT'L STRATEGY FOR COMBATING TERRORISM 1 (2006). Note that the Obama Administration has phased out the term “War on Terror.” See, e.g., Jay Solomon, *U.S. Drops “War on Terror” Phrase, Clinton Says*, WALL ST. J., Mar. 31, 2009, at A16.

⁵ A brief note on anticipatory self-defense: The application of the analysis to an imminent terrorist attack is identical to the analysis following an actual terrorist attack. However, as few States officially acknowledge the idea of anticipatory self-defense, it is cleaner to assume, for purposes of this article, that a terrorist attack has actually taken place, and that a further attack is imminent, thereby maintaining the threat. Therefore,

Since the attacks of 11 September 2001, international legal scholars have struggled with this question. Some scholars attempt to rely on the traditional models of attribution and state responsibility, seeking to attribute the actions of the international terrorist organization to the State within which they are located or operating.⁶ These models of direct responsibility, endorsement, and vicarious responsibility all require some level of knowledge and action (or lack thereof) on the part of the host State, and often argue that the injured State cannot use force against or inside the host State absent such attribution.⁷ Relying on these models to justify the use of military force in self-defense leaves dangerous gaps that terrorist organizations may exploit. Weak or ineffective States, failing or failed States, or States faced with significant cultural, religious, or political schisms may be unwilling or unable to prevent terrorist organizations from operating within their borders. Those very challenges may also prevent the host State from requesting, welcoming, or even accepting external assistance from an injured State. Furthermore, it is not necessary to link the use of force against the terrorist organization to attribution of the terrorist attacks to the host State.

Other scholars argue that terrorist acts are simply criminal acts most properly dealt with through law enforcement means, rendering the use of military force in counter-terrorism operations a potential violation of international law.⁸ This argument is both illogical and untrue.⁹ Counter-

this article addresses the situation of an injured State, instead of a threatened State, but with the understanding that the injured State faces a continuing threat. The phrase “injured State” will denote this, rather than “threatened or injured State.”

⁶ See generally Davis Brown, *Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses*, 11 CARDOZO J. INT'L & COMP. L. 1 (Spring 2003) (discussing the various models of State responsibility); Vincent-Joel Proulx, *Babysitting Terrorists: Should States be Strictly Liable for Failing to Prevent Transborder Attacks?*, 23 BERKELEY J. INT'L L. 615 (2005) (setting forth a strict liability model for State responsibility). Attribution of the terrorist attacks to the host State is discussed in detail in Part VI.A of this article, *infra*.

⁷ See generally Brown, *supra* note 6 (discussing the various models of State responsibility).

⁸ See Avril McDonald, *Terrorism, Counter-Terrorism and the Jus in Bello*, in *TERRORISM AND INTERNATIONAL LAW: CHALLENGES AND RESPONSES* 57, 60 (Michael N. Schmitt ed., 2002) (detailing Professor McDonald's analysis of terrorism as international criminal activity). The question of terrorism as a crime is discussed in detail in Part V.A. of this article. See *infra* Part V.A.

⁹ Interview with John Norton Moore, Walter L. Brown Professor of Law, Dir., Ctr. for Nat'l Sec. Law, Univ. of Va. Law Sch., in Charlottesville, Va. (Jan. 16, 2008) [hereinafter Professor Moore Interview]; Telephone Interview with Dr. Walter Gary Sharp Sr., Senior Assoc. Deputy Counsel for Intelligence, Office of Gen. Counsel, Dep't of Def., in Charlottesville, Va. (Feb. 27, 2008) [hereinafter Dr. Sharp Interview]. The

terrorism law enforcement methodologies have their place, but they are not a panacea. States faced with a use of force that amounts to an armed attack under international law may use military force in self-defense under Article 51 of the Charter of the United Nations (U.N. Charter).¹⁰

Various scholars also argue for preventative, rather than curative, measures.¹¹ While the answer ultimately requires both, curative measures cannot take a back seat to preventative measures. Installing sprinklers in a business is a wonderful idea before a fire breaks out, but if your store is already on fire, your first priority needs to be extinguishing the fire, not preventing the next one.

The difficulty lies with the complexity of the analysis, not the legal framework. In fact, the legal framework currently in place allows States sufficient flexibility to respond to international terrorism in a fashion appropriate to the circumstances, including diplomacy, law enforcement, and the use of military force. The bottom line is simple: States have a legal responsibility to prevent the commission of terrorist acts from within their borders.¹² If a terrorist organization operates within a host State, and that host State cannot or will not act to prevent the terrorist organization from attacking another State, the injured State may act in self-defense against the terrorist organization, with or without the consent of the host State.¹³

II. Factual Predicates

In order to avoid, at least somewhat, allegations of American bias and provincialism, this article does not focus on the U.S. fight with al

views expressed by Dr. Sharp represent his personal views, and not the official position of the Department of Defense Office of General Counsel.

¹⁰ U.N. Charter art. 51. Article 51 of the U.N. Charter states, in part, that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” *Id.* The application of Article 51 to the use of military force in counter-terrorism operations is discussed in more detail in Part VII.A of this article, *infra*.

¹¹ See, e.g., Proulx, *supra* note 6 (setting forth a strict liability model for State responsibility).

¹² G.A. Res. 2625 (XXV), at 122–123, U.N. Doc. A/8028 (Oct. 24, 1970); G.A. Res. 49/60, at 5, U.N. Doc. A/RES/49/60 (Feb. 17, 1995); S.C. Res. 1373, ¶ 2(b), U.N. Doc. S/RES/1373 (Sept. 28, 2001); S.C. Res. 1566, ¶ 3, U.N. Doc. S/RES/1566 (Oct. 8, 2004).

¹³ Professor Moore Interview, *supra* note 9; Dr. Sharp Interview, *supra* note 9.

Qaeda. Granted, a discussion of current counter-terrorism operations must account for the attacks of 11 September 2001 and their aftermath. This is not solely a U.S. problem, however; it is an international problem. India, Indonesia, and Pakistan are just a few examples of other States facing significant terrorist threats.¹⁴ Terrorism and counter-terrorism operations must be addressed and analyzed in a fashion that applies to the global community, not just one country or region. For this reason, this article focuses on the threats faced by two States outside the Western hemisphere: Afghanistan and Turkey.

A. Afghanistan, Pakistan, and the Taliban

Afghanistan continues to face a threat from Taliban forces, arguably supported by al Qaeda fighters.¹⁵ Following the U.S.-led invasion, many al Qaeda and Taliban fighters fled into the FATA in northwestern Pakistan in an effort to escape coalition and Afghan troops.¹⁶ The FATA, a rugged, mountainous stretch of some 450 kilometers along the

¹⁴ See U.S. DEP'T OF STATE, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2006, ch. 2, Country Reports: East Asia and Pacific Overview (2007), available at <http://www.state.gov/s/ct/rls/crt/2006/82731.htm> (discussing the terrorist threats currently facing Indonesia); 2006 COUNTRY REPORTS—SOUTH AND CENTRAL ASIA, *supra* note 2 (discussing the terrorist threats currently facing India and Pakistan); *Death Toll from Mumbai Train Blasts Hits 200*, MSNBC, July 12, 2006, <http://www.msnbc.msn.com/id/10958641/> (reporting on an 11 July 2006 attack in which “[e]ight bombs ripped through packed trains at rush hour . . . kill[ing] at least 200 people and wound[ing] more than 700”); Maria Ressa et al., *At Least 183 Dead in Bali Bombings*, CNN, Oct. 13, 2002, <http://archives.cnn.com/2002/WORLD/asiapcf/southeast/10/13/bali.blast/index.html> (detailing how an al Qaeda-linked terrorist group detonated bombs in two Bali nightclubs on 12 October 2002, killing at least 183 people); Syed Mohsin Naqvi, *Death Toll Rises in Bhutto Attack*, CNN, Oct. 19, 2007, <http://www.cnn.com/2007/WORLD/asiapcf/10/18/pakistan.explosions/index.html?iref=newssearch> (detailing a suicide bombing that took place near Benazir Bhutto’s motorcade on 18 Oct. 2007, killing at least 136 people and wounding more than 387); Mohsin Naqvi, *Benazir Bhutto Assassinated*, CNN, Dec. 28, 2007, <http://www.cnn.com/2007/WORLD/asiapct/12/27/pakistan.bhutto/index.html?iref=newssearch> (reporting on the 27 December 2007 assassination of Benazir Bhutto).

¹⁵ *Saleh Interview*, *supra* note 2; see Rashid, *supra* note 2.

¹⁶ 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3; see FRONTLINE: Return of the Taliban: Introduction, PBS, Oct. 3, 2006, <http://www.pbs.org/wgbh/pages/frontline/taliban/etc/synopsis.html> (discussing the movement of Taliban forces after the U.S.-led invasion of Afghanistan, and the current resurgence); Rashid, *supra* note 2 (detailing likely locations of Taliban forces and leadership).

Pakistan-Afghanistan border, is largely autonomous.¹⁷ The central government in Pakistan plays little role in governing the tribes in the area, ensuring that “[i]nterference in local matters is kept to a minimum.”¹⁸ The Pakistani government allows the tribes to “regulate their own affairs in accordance with customary rules and unwritten codes, characterised by collective responsibility for the area under their control.”¹⁹ The politics of this area make it very difficult for the central government of Pakistan to take direct action.²⁰ Democracy and the rule of law have little place in the FATA, which follows the same basic tribal-rule model it has used for centuries.²¹ From the FATA, al Qaeda members may have moved elsewhere in Pakistan or even traveled to other States, such as Yemen or Saudi Arabia.²² Amrullah Saleh, the head of Afghanistan’s National Security Directorate, believes that the Taliban threat remains firmly based in the FATA.²³

B. Turkey, Iraq, and the Kongra-Gel

Turkey has been engaged in a running battle with the Kongra-Gel stretching back more than twenty years.²⁴ The Kongra-Gel, also known as the Kurdistan Workers’ Party or PKK, is a Marxist-Leninist separatist organization based primarily out of Turkey and Iraq.²⁵ Its goals are not completely clear. The Kongra-Gel originally sought to “establish an independent Kurdish state in southeast Turkey, northern Iraq, and parts

¹⁷ GOV’T OF PAKISTAN, PLANNING AND DEVELOPMENT DEP’T, FATA SUSTAINABLE DEVELOPMENT PLAN 2006–2015, at 3 (2006) [hereinafter FATA DEVELOPMENT PLAN].

¹⁸ *Id.* at 5.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 4–6 (discussing the internal tribal regulation according to customary rules and unwritten codes, as well as the role of political officers given judicial powers to decide both criminal and civil cases, through a *jirga* (council of elders) process).

²² 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3; *see* FRONTLINE: In Search of Al Qaeda: Introduction, PBS, Nov. 21, 2002, <http://www.pbs.org/wgbh/pages/frontline/shows/search/etc/synopsis.html> (discussing the movement of al Qaeda forces after the U.S.-led invasion of Afghanistan).

²³ *Saleh Interview*, *supra* note 2; Rashid, *supra* note 2.

²⁴ 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3; O’Toole, *supra* note 3.

²⁵ 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3; O’Toole, *supra* note 3.

of Iran and Syria.”²⁶ More recently, though, the Kongra-Gel has shifted its focus to cultural or linguistic freedom instead.²⁷ Its primary targets remain “Turkish Government security forces, local Turkish officials, and villagers who oppose the organization in Turkey.”²⁸ As Dr. Sadi Cayci²⁹ points out, “[t]he PKK’s terrorist campaign has claimed approximately 40,000 lives since 1986.”³⁰ Turkey believes that “the U.S.-led invasion of Iraq and the country’s subsequent instability . . . has enabled the PKK to regroup.”³¹ As of 2002, there were “an estimated 4,000–5,000 armed militants stationed in Northern Iraq.”³² While some of those may operate in southern Turkey instead, current estimates still place more than 3000 Kongra-Gel fighters in northern Iraq.³³

III. Defining Terrorism

At this point, some readers may question whether the Kongra-Gel or the Taliban represent international terrorist organizations. To address this question, it is first necessary to define terrorism. The definition used affects the discussion of whether terrorist acts are criminal acts or armed attacks, as well as the discussion of preventative or curative measures used in response.

The phrase “[o]ne man’s terrorist is another man’s freedom fighter” has become cliché, and tends to blur discussions on terrorism.³⁴ One

²⁶ U.S. DEP’T OF STATE, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2005, ch. 8, Foreign Terrorist Organizations 206 (2006) [hereinafter 2005 COUNTRY REPORTS].

²⁷ 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3. The 2006 Country Reports indicate a somewhat narrower current goal, though, moving away from an independent State, and more towards “cultural or linguistic rights.” *Id.*

²⁸ *Id.*

²⁹ Dr. (Colonel) Sadi Cayci served as a Military Judge and Legal Advisor for the Turkish General Staff. He currently works as an Associate Professor with the Avrasya Stratejik Araştırmalar Merkezi (ASAM, also known as the Eurasia Strategic Research Center), in Ankara, Turkey. Sadi Cayci, *Countering Terrorism and International Law: The Turkish Experience*, in TERRORISM AND INTERNATIONAL LAW: CHALLENGES AND RESPONSES 137, 137 (Michael N. Schmitt ed., 2002).

³⁰ *Id.* at 138; see also O’Toole, *supra* note 3.

³¹ Simon Hooper, *PKK’s Decades of Violent Struggle*, CNN, Oct. 11, 2007, <http://www.cnn.com/2007/WORLD/europe/10/10/pkk.profile/index.html>.

³² Cayci, *supra* note 29, at 139.

³³ 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3.

³⁴ See DR. BOAZ GANOR, *DEFINING TERRORISM: IS ONE MAN’S TERRORIST ANOTHER MAN’S FREEDOM FIGHTER?* 1 (1998), available at <http://www.ict.org.il> (search for

expert in international terrorism, Dr. Boaz Ganor, expresses a great deal of frustration with this cliché, taking the position that it actually hinders the fight against terrorism worldwide.³⁵ While truth is necessarily perspective-based, widely divergent positions make it difficult for the international community to reach a consensus on a definition of terrorism.³⁶ Dr. Ganor defines terrorism as “the intentional use of, or threat to use violence against civilians or against civilian targets, in order to attain political aims.”³⁷ The U.S. State Department similarly defines terrorism as the “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”³⁸ Another author has defined terrorism as “[t]he serious harming or killing of non-combatant civilians and the damaging of property . . . done for the purpose of intimidating a group of people or a population or to coerce a government or international organization”³⁹ The U.N. Security Council has also struggled to define terrorism in various resolutions. In one of the more recent attempts, U.N. Security Council Resolution (UNSCR) 1566, the Security Council defines terrorism as:

[C]riminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act⁴⁰

“Ganor”; then follow “Defining Terrorism” hyperlink under “Search>>Search Results”; then follow the “Free Download” hyperlink).

³⁵ *Id.*

³⁶ *Id.* at 3; see Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, 29 B.C. INT’L & COMP. L. REV. 23, 26–27 (Winter 2006).

³⁷ GANOR, *supra* note 34, at 6.

³⁸ 22 U.S.C. § 2656f(d)(2) (2006). The State Department’s definition is statutory, rather than purely regulatory. The State Department is required to produce annual reports for Congress providing detailed assessments of countries involved in terrorism, including countries “whose territory is being used as a sanctuary for terrorists or terrorist organizations.” *Id.* § 2656f(a)(1)(B).

³⁹ Young, *supra* note 36, at 64.

⁴⁰ S.C. Res. 1566, *supra* note 12, ¶ 3. Unfortunately, the definition in UNSCR 1566 also helps blur the line between terrorism as a criminal act and terrorism as a use of force, by sending mixed messages. In the body of UNSCR 1566, the Security Council identifies terrorism as a threat to international peace and security under Chapter VII, but goes on to describe it as a criminal act. In the *chapeau*, however, the Security Council reaffirms the

The various definitions share one element: the effort to effect some sort of political change. This political goal is also recognized by the Security Council, which noted that terrorist acts “are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature”⁴¹

The methods of terrorism, however, may cause greater concern than the goals of the terrorist organization.⁴² Political self-determination is a laudable goal for any population.⁴³ Similarly, the use of violence to achieve these goals is not necessarily unreasonable, provided the violence is directed against lawful targets.⁴⁴ When violence is directed against innocent civilians, however, it is hard to argue that “the end justifies the means.”⁴⁵ Most definitions of terrorism highlight this,

need to “combat terrorism in all its forms and manifestations by all means, in accordance with the Charter of the United Nations and international law.” *Id.* The issue of terrorism as criminality vice terrorism as an armed attack is developed further in Part V of this article. *See infra* Part V.

⁴¹ S.C. Res. 1566, *supra* note 12, ¶ 3.

⁴² *See* Cayci, *supra* note 29, at 139 (indicating that he has greater concerns over the means and methods used by the Kongra-Gel than he does their political aims). Dr. Cayci’s view makes sense, because if the terrorist organization had the requisite popular support, and believed they could achieve a legitimate victory within the existing political structure, they would likely do so without resorting to terror attacks. *See Hamas Sweeps to Election Victory*, BBC, Jan. 26, 2006, http://news.bbc.co.uk/1/hi/world/middle_east/4650788.stm; *Who are Hamas?*, BBC, Jan. 25, 2007, http://news.bbc.co.uk/2/hi/middle_east/1654510.stm. “In January 2006, Hamas translated its widespread popularity among Palestinians into a dramatic win in the Parliamentary elections.” *Id.* Although Hamas has been labeled a terrorist organization by a number of States, including the United States and the European Union, they nonetheless built significant popular support, entered the political arena, and took a majority of parliamentary seats in the election. *Id.*

⁴³ *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); Universal Declaration of Human Rights, G.A. Res. 217A, art. 21, at 75, U.N. Doc A/810 (Dec. 12, 1948) (“Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.”); G.A. Res. 1514 (XV) at 67, U.N. Doc. A/4684 (Dec. 14, 1960) (“All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”).

⁴⁴ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“[W]hensoever any Form of Government becomes destructive of those ends, it is the Right of the People to alter or to abolish it, and to institute new Government”).

⁴⁵ GANOR, *supra* note 34, at 11; *see* Hugh Muir & Rosie Cowan, *Four Bombs in 50 Minutes—Britain Suffers Its Worst-ever Terror Attack*, GUARDIAN, July 8, 2005, <http://www.guardian.co.uk/uk/2005/jul/08/terrorism.july74> (discussing the coordinated bombings that took place in London on 7 July 2005); Al Goodman & Christiane Amanpour, *Police Search for Madrid Bombers*, CNN, May 5, 2004, <http://www.cnn.com/2004/ WORLD/europe/03/11/spain.blasts/index.html> (reporting on

identifying that the primary targets of terrorist attacks tend to be civilians.⁴⁶

The Kongra-Gel and the Taliban also highlight the distinction between domestic and international terrorism. Purely domestic terrorism is arguably a domestic problem, rather than an international problem.⁴⁷ International terrorism involving non-State actors engaged in transnational operations from within a host State is an international problem, and one not amenable to purely domestic solutions.⁴⁸ This article focuses on international terrorism, and for purposes of clarity, relies upon Dr. Ganor's definition. Using this definition, coupled with the distinction of political goals and military-like methodology, we return briefly to the Kongra-Gel and the Taliban to address whether they constitute terrorist organizations.

As previously discussed, the Kongra-Gel seeks to establish an independent, democratic Kurdish State, or at least achieve some sort of independent political recognition for a united Kurdish people.⁴⁹ The problem with this is two-fold. First, the State envisioned encompasses territory and peoples currently within the sovereignty of four different

the bombing of the trains in Madrid); *Death Toll from Mumbai Train Blasts Hits 200*, MSNBC, July 12, 2006, <http://www.msnbc.msn.com/id/10958641/> (detailing the 11 July 2006 bombing of rush hour trains in Mumbai); Ressa et al., *supra* note 14 (reporting on the bombing of two Bali nightclubs); Naqvi, *Death Toll Rises in Bhutto Attack*, *supra* note 14.

⁴⁶ Rein Müllerson, *Jus ad Bellum and International Terrorism*, in 79 INT'L L. STUD. 107–17 (Fred L. Borch & Paul S. Wilson eds., 2003) (discussing how terrorists often treat attacks against civilians as part of their normal operations); see GANOR, *supra* note 34; see also 22 U.S.C. § 2656f(d)(2) (2006) (defining terrorism in terms of “politically motivated violence perpetrated against noncombatant targets.”).

⁴⁷ This idea is simply the logical extension of the idea of territorial and political independence. G.A. Res. 2625 (XXV), *supra* note 12, at 124. There can certainly be situations, such as the on-going situation in Somalia, where domestic threats create sufficient instability within the State to effectively represent a threat to international peace and security. See United Nations, United Nations Operation in Somalia I (UNOSOM I)—Background, http://www.un.org/Depts/dpko/dpko/co_mission/unosom1backgr2.html (last visited June 12, 2009) (discussing the first U.N. mission in Somalia); United Nations, United Nations Operation in Somalia II (UNOSOM II)—Background, http://www.un.org/Depts/dpko/dpko/co_mission/unosom2backgr2.html (last visited June 12, 2009) (detailing the follow-on U.N. mission in Somalia).

⁴⁸ Müllerson, *supra* note 46, at 116–17; see NAT'L STRATEGY FOR COMBATING TERRORISM, *supra* note 4, at 13. One key to combating terrorism is effective international partnerships. NAT'L STRATEGY FOR COMBATING TERRORISM, *supra* note 4, at 19.

⁴⁹ 2005 COUNTRY REPORTS, *supra* note 26, at 206; 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3.

States, none of which would be willing (understandably) to give up their territory for the creation of such an independent Kurdish State.⁵⁰ Second, and perhaps more importantly, the methodology of the Kongra-Gel includes attacking civilians, such as “local Turkish officials and villagers who oppose the organization in Turkey.”⁵¹ More recently, the Kongra-Gel has struck “over the border from bases within Iraq . . . engag[ing] in terrorist attacks in eastern and western Turkey.”⁵² These attacks have included attacks on “resort areas on the western coast where foreign tourists, among others, have been killed.”⁵³ Despite several attempts throughout their history to shift to peaceful political activities, the Kongra-Gel continues to fall back on violence to achieve its ends.⁵⁴

The Taliban, on the other hand, had de facto control of Afghanistan from 1996 until the U.S.-led invasion in 2001.⁵⁵ In December 2001, after al Qaeda and the Taliban fled Afghanistan, a new government was formed under the Bonn Agreement,⁵⁶ which paved the way for Hamid

⁵⁰ 2005 COUNTRY REPORTS, *supra* note 26, at 206 (indicating that that the Kongra-Gel’s “goal has been to establish an independent Kurdish state in southeast Turkey, northern Iraq, and parts of Iran and Syria”); *see also* 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3 (indicating a somewhat narrower current goal, moving away from an independent State toward “cultural or linguistic rights”).

⁵¹ 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3; *see* Cayci, *supra* note 29, at 143 (listing some of the Kongra-Gel’s criminal acts).

⁵² 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3. Turkish attacks into Iraq have continued, including some quite recently. *See* Ivan Watson, *Turkey Bombs Suspected Kurdish Rebel Targets in Iraq*, CNN, Mar. 13, 2009, <http://www.cnn.com/2009/WORLD/meast/03/13/turkey.iraq.kurds/index.html?iref=newssearch> (reporting on a 12 March 2009 Turkish attack against Kurdish targets in northern Iraq).

⁵³ 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3.

⁵⁴ *Id.*; *see also* Cayci, *supra* note 29, at 139 (claiming that the name change from PKK to KADEK in 2002 was “an effort to camouflage its terrorist past”); 2005 COUNTRY REPORTS, *supra* note 26 (indicating that a similar logic appears to have been behind the name change to Kongra-Gel in 2003).

⁵⁵ *See Panel I Discussion—Jus ad Bellum*, in 79 INT’L L. STUD. 143 (Fred L. Borch & Paul S. Wilson, eds. 2003) [hereinafter *Panel I Discussion*] (reporting Christopher Greenwood’s comments during the Panel I discussion); John Ford Shroder, *Taliban*, MSN ENCARTA ONLINE ENCYCLOPEDIA 2007, http://encarta.msn.com/encyclopedia_7615_88418/Taliban.html (last visited June 12, 2009); *Background on Afghanistan: History of the War*, HUMAN RIGHTS WATCH, Oct. 2001, <http://www.hrw.org/backgrounder/asia/afghan-bck1023.htm#Other%20sources>.

⁵⁶ Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions (Bonn Agreement), Dec. 5, 2001, *available at* <http://www.mfa.gov.af/Documents/ImportantDoc/The%20Bonn%20Agreement.pdf>.

Karzai's election in 2002.⁵⁷ Since that time, the Taliban has engaged in attacks against both military and civilian targets, although over the last few years the Taliban has focused on "targeting . . . civilians in order to weaken the will of the Afghan people."⁵⁸ The Taliban, wanting to regain control of Afghanistan, attempted to control population areas, but ultimately fell back on terrorist attacks in an effort to achieve its goals.⁵⁹

Both the Kongra-Gel and the Taliban clearly have a political goal in mind. The Taliban's past history indicates that a religious goal is part of their planning.⁶⁰ Both of these groups operate outside of the State they seek to change or control and both are engaged in attacking civilians in addition to legitimate military targets.⁶¹ The Kongra-Gel and the Taliban are representative of international terrorist organizations seeking to impose political change through terrorist attacks against the civilian population. Therefore, these groups serve as appropriate test subjects for the recommended analysis governing the legality of the use of military force in counter-terrorism operations.

IV. The Analysis: An Overview

The analysis of the legality of the use of military force in counter-terrorism operations involves several distinct steps. A brief overview follows, although each of these steps will be broken down in detail in this section.

⁵⁷ See LIBRARY OF CONGRESS, FEDERAL RESEARCH DIVISION, COUNTRY PROFILE: AFGHANISTAN 3-4 (May 2006), available at <http://lcweb2.loc.gov/frd/cs/profiles/Afghanistan.pdf>.

⁵⁸ Saleh Interview, *supra* note 2; see also Farhad Piekar, *Afghan Blast Death Toll Reaches 75*, CNN, Nov. 9, 2007, <http://www.cnn.com/2007/WORLD/asiapcf/11/09/afghanistan.blast/index.html?iref=newssearch>.

⁵⁹ Barbara Starr, *Military Chief: Attacks Up in Afghanistan*, CNN, Dec. 11, 2007, <http://www.cnn.com/2007/US/12/11/us.afghanistan/index.html?iref=newssearch>.

⁶⁰ Declan Walsh, *Taliban Reaches Beyond Swat Valley in Pakistan*, GUARDIAN, Apr. 25, 2009, available at <http://www.guardian.co.uk/world/2009/apr/25/taliban-mingora-pakistan-swat-islamists> (detailing the Taliban's goal to create a religious Islamic caliphate covering the entire Muslim world).

⁶¹ These groups operate both within and outside of the States in question—the key here is that both groups operate in a transnational fashion, taking their actions outside of the model of a purely domestic insurgency. See Saleh Interview, *supra* note 2; Piekar, *supra* note 58; 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3.

The first step requires determining whether the terrorist attack rises to the level of an armed attack triggering the self-defense provisions of Article 51.⁶² Terrorist attacks that do not rise to the level of an armed attack may still be dealt with through law enforcement, but the use of military force would be impermissible under international law.⁶³

Second, the injured State must identify the host State within which the terrorist organization operates. This is not to say that the actions of the terrorist organizations must be attributable to the host State; some sort of geographic nexus is sufficient.⁶⁴ This geographic nexus is necessary to establish which State bears the responsibility to prevent the commission of terrorist attacks originating from within its territory.⁶⁵

Third, the injured State must provide the host State with some warning, and either request that the host State handle the problem itself, or seek the host State's permission to handle the problem.⁶⁶ If the host State effectively addresses the problem or consents to the presence of military or law enforcement personnel from the injured State, the analysis ends.⁶⁷ On a more practical note, this is also the stage where the injured State should determine whether to address the problem through law enforcement, military force, or both.

Fourth, if the host State cannot or will not address the problem, then the injured State may act in place of the host State.⁶⁸ In this case, the injured State will almost certainly utilize military force, either in lieu of or in addition to law enforcement. The third and fourth steps are

⁶² U.N. Charter art. 51; see Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L.J. 41, 47–48 (Winter 2002); see *infra* Part V.

⁶³ *Military and Paramilitary Activities (Nicar. v. U.S.)* 1986 I.C.J. 14, 101 (June 27); Dr. Sharp Interview, *supra* note 9; MICHAEL N. SCHMITT, *COUNTER-TERRORISM AND THE USE OF FORCE IN INTERNATIONAL LAW* 17–19 (2002).

⁶⁴ Professor Moore Interview, *supra* note 9; Dr. Sharp Interview, *supra* note 9; see *infra* Part VII.

⁶⁵ G.A. Res. 2625 (XXV), *supra* note 12, at 122–23; G.A. Res. 49/60 *supra* note 12, at 5; S.C. Res. 1373, *supra* note 12, ¶ 2(b); S.C. Res. 1566, *supra* note 12, ¶ 3; see *infra* Part VI.

⁶⁶ Professor Moore Interview, *supra* note 9; Dr. Sharp Interview, *supra* note 9; see *infra* Part VII.

⁶⁷ Professor Moore Interview, *supra* note 9; Dr. Sharp Interview, *supra* note 9; G.A. Res. 56/83, Annex, art. 20, U.N. Doc. A/RES/56/83 (Jan. 28, 2002); SCHMITT, *supra* note 63, at 66; see *infra* Part VIII.

⁶⁸ Professor Moore Interview, *supra* note 9; Dr. Sharp Interview, *supra* note 9; SCHMITT, *supra* note 63, at 66.

necessary to overcome the prohibition against the use of force contained in Article 2(4) of the U.N. Charter.⁶⁹ Assuming the injured State uses military force without the consent of the host State, the injured State must comply with Daniel Webster's proportionality, necessity, and immediacy requirements from the *Caroline* case.⁷⁰

V. Step One: Terrorism as an Armed Attack

Let us assume that the terrorist attack discussed in the hypothetical actually occurred, and a second attack is imminent. As the Chief Executive, it falls upon your shoulders to determine whether or not the terrorist attack is tantamount to an armed attack, allowing the use of force in self-defense under Article 51.⁷¹

Unfortunately, this is the first area that tends to trigger significant debate, as some scholars believe that terrorism is nothing more than criminal activity, to be dealt with as such, rendering the use of military force in counter-terrorism operations illegal under international law.⁷² The language used in UNSCR 1373 and UNSCR 1566 tends to blur this discussion as well, by sending mixed messages concerning whether terrorism is a crime or an armed attack permitting States to respond in self-defense.⁷³

⁶⁹ U.N. Charter art. 2, para. 4.

⁷⁰ TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA, VOLUME 4, DOCUMENTS 80-121: 1836-1846, at 449 (Hunter Miller ed., 1934) (detailing the 1842 letter from Daniel Webster to Lord Ashburton regarding the *Caroline* incident); *see infra* Part VIII.B.

⁷¹ *See* U.N. Charter art. 51.

⁷² *See, e.g.*, McDonald, *supra* note 8, at 62.

⁷³ S.C. Res. 1373, *supra* note 12, ¶ 1, 2; S.C. Res. 1566, *supra* note 12, ¶ 3. Security Council Resolution 1373 followed in the footsteps of Security Council Resolution 1368, and was published as part of the further response by the U.N. Security Council to the attacks of 11 September 2001. S.C. Res. 1373, *supra* note 12. Security Council Resolution 1566 was drafted as a result of a series of attacks in September and October 2004. U.N. SCOR, 59th Sess., 5053d mtg. at 2-4, 6-7, U.N. Doc. S/PV.5053 (Oct. 8, 2004). The mixed messages have been present in other Security Council resolutions on terrorism as well. *See, e.g.*, S.C. Res. 1456, U.N. Doc. S/RES/1456 annex, ¶ 3 (Jan. 20, 2003) (referring to acts of terrorism as "criminal and unjustifiable" and discussing the need to bring terrorists "to justice").

A. Terrorism as Criminality

The view that terrorist attacks are merely criminal acts was dominant prior to the attacks of September 11th; it took an attack by a non-State actor of a scale comparable to an armed attack by a State to alter that view.⁷⁴ It is also true that small-scale terrorism essentially mirrors normal criminal activity, just with a different goal. A criminal who kills or kidnaps someone, for example, represents normal criminal activity, sufficiently addressed within domestic criminal codes.⁷⁵ The essential elements of these crimes do not change if they are instead committed by members of an international terrorist organization for political purposes, although the terrorist acts would likely be charged somewhat differently in a terrorism case.⁷⁶ There are also a number of international conventions addressing terrorism which address the criminalization of terrorist acts under domestic law.⁷⁷

Professor Avril McDonald believes that law enforcement is the solution, stating:

It seems clear that it is ridiculous to characterize what is obviously international criminality, committed for the most part in peacetime, as armed attacks or armed conflict. Al Qaeda and other terrorist organizations must

⁷⁴ John Murphy, *International Law and the War on Terrorism: The Road Ahead*, in 79 INT'L L. STUD. 395 (Fred L. Borch & Paul S. Wilson eds., 2003); Murphy, *supra* note 62, at 45–50; SCHMITT, *supra* note 63, at 1; see U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM 2001, at v (2002) [hereinafter 2001 TERRORISM REPORTS].

⁷⁵ See 18 U.S.C. § 1111 (2006) (Murder); *id.* § 1201 (Kidnapping).

⁷⁶ See *id.* § 2332 (Criminal Penalties); *id.* § 2332b (Acts of Terrorism Transcending National Boundaries). Chapter 113b of Title 18 of the U.S. Code codifies the various criminal aspects of terrorism. It primarily addresses terrorist acts committed outside the United States and transnational terrorist acts. As an interesting counterpoint, the acts leading to the 1993 bombing of the World Trade Center primarily took place inside the United States, and were not charged under Chapter 113b of Title 18. THE 9/11 COMMISSION REPORT 71–73 (n.d.) [hereinafter 9/11 COMMISSION REPORT]. Since 9/11, Chapter 113b has been amended to include sections addressing the harboring of terrorists and providing material support and financing to terrorism or terrorist organizations. See 18 U.S.C. § 2339–2339D.

⁷⁷ See U.S. DEP'T OF STATE, TREATIES IN FORCE, A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2007, SECTION 2: MULTILATERAL AGREEMENTS 24, at 179–80 (2007). The Convention on Offences and Certain Other Acts Committed on Board Aircraft, the International Convention Against the Taking of Hostages, and the International Convention for the Suppression of the Financing of Terrorism are three examples of treaties or conventions to which the United States is a party addressing the criminalization of terrorist acts. *Id.*

be defeated for the most part by detection (good intelligence) and by prosecution, among other techniques. This can be (and is being) achieved successfully for the most part under domestic criminal legislation.⁷⁸

Dr. Gary Sharp provides a facially similar viewpoint, stating that “[e]ven horrific acts of international terrorism committed by non-state actors remain a law enforcement issue.”⁷⁹ He further notes that “[f]rom a legal perspective, *all* acts of international terrorism are either non-state sponsored and thus a crime addressed by national and peacetime treaty law, or are state sponsored terrorism and thus a use of force governed by the law of conflict management.”⁸⁰ Dr. Sharp’s view includes a caveat, as he argues that the failure of the host State to cooperate with law enforcement requests by the injured State could potentially be viewed as State sponsorship, a topic that will be addressed shortly.⁸¹

The concern with the application of law enforcement methodologies to counter-terrorism operations relates to their efficacy under the circumstances. Professor McDonald appears to place significant credence in the value of law enforcement, although even her opinion leaves room for doubt.⁸² Dr. Sharp, on the other hand, directly addresses his concerns about the effectiveness of law enforcement, pointing out that “when the location of a terrorist or a terrorist base camp is known and the territorial state refuses to cooperate with American law enforcement, the law enforcement response is completely ineffective in defending Americans and American interests abroad.”⁸³ Any State could

⁷⁸ McDonald, *supra* note 8, at 62. Dr. Avril McDonald is an Associate Researcher in International Humanitarian Law and International Criminal Law at the T.M.C. Asser Institute for International Law, the Hague. Dr. Avril McDonald, <http://www.wihl.nl/> (follow “Our researchers” hyperlink; then follow “Dr. Avril McDonald” hyperlink) (last visited June 12, 2009).

⁷⁹ Walter Gary Sharp, *American Hegemony and International Law: The Use of Armed Force Against Terrorism: American Hegemony or Impotence?*, 1 CHI. J. INT’L L. 37, 46 (Spring 2000). Dr. Walter Gary Sharp currently serves as a Senior Associate Deputy General Counsel for Intelligence at the Department of Defense, and as an Adjunct Professor of Law at Georgetown University Law Center. Dr. Sharp has a significant background in International Law and National Security Law. Walter Gary Sharp, http://www.law.georgetown.edu/faculty/facinfo/tab_faculty.cfm?Status=Faculty&ID=192 (last visited Mar. 30, 2009).

⁸⁰ Sharp, *supra* note 79, at 47.

⁸¹ *Id.* at 44.

⁸² McDonald, *supra* note 8, at 62.

⁸³ Sharp, *supra* note 79, at 38.

experience this same difficulty in utilizing the law enforcement approach to counter-terrorism.

As Dr. Sharp points out, law enforcement approaches arguably function well in States that follow the rule of law, but are unlikely to work in States where the injured State's law enforcement agencies cannot function or where the host State's law enforcement agencies cannot or will not act.⁸⁴ Furthermore, the purpose or intent of the terrorist organizations themselves may hinder counter-terrorism law enforcement efforts. As then-Lieutenant Colonel William K. Lietzau notes:

In contrast to most criminals who are driven by private gain, terrorists generally are motivated by political ideology or religious extremism. This distinction renders it difficult for law enforcement agents to exploit a suspect's selfish motives as an inducement to turn on fellow conspirators, leaving terrorists less susceptible to law enforcement techniques that have proven successful in combating organized crime and other traditional criminal activity.⁸⁵

Professor John Norton Moore expresses a similar concern, stating:

It is debatable . . . whether the provisions and processes of criminal law regarding the prohibition of terrorist acts and the apprehension, prosecution, and punishment of those who commit them can be an effective deterrent to terrorism. The terrorist, by definition, is an ideologically motivated offender who rejects the legal characterization of his acts as criminal

⁸⁴ *Id.* at 38.

⁸⁵ Lieutenant Colonel William K. Lietzau, *Combating Terrorism: Law Enforcement or War?*, in *TERRORISM AND INTERNATIONAL LAW: CHALLENGES AND RESPONSES* 75, 78 (Michael N. Schmitt ed., 2002). Colonel Lietzau currently serves as the Commander, Headquarters Battalion, Marine Corps National Capital Region, and has previously served as the Staff Judge Advocate for the U.S. European Command, a research fellow at the National War College, and a Special Advisor to the General Counsel of the Department of Defense for International Law matters associated with the Global War on Terrorism. Colonel William K. Lietzau, <http://hqinet001.hqmc.usmc.mil/hh/bnco.htm>. (last visited June 12, 2009).

and who may regard the prospect of a prison term as a small price to pay for furthering his cause.⁸⁶

In situations where counter-terrorism law enforcement is ineffective, a different solution must be adopted in order to protect those at risk. More importantly, terrorist acts need not, and should not, be viewed solely as criminal acts to be dealt with only through law enforcement methodologies. Some may argue that a soldier arguing for the application of military force is an example of the old adage: “If the only tool you have is a hammer, [you] treat everything as if it were a nail.”⁸⁷ This is untrue. Counter-terrorism law enforcement methodologies present valid, valuable long-term solutions; they merely suffer from some significant short-term limitations.⁸⁸ If law enforcement methodologies are not applicable to all situations, then there must be some other solution that may be applied. Admittedly, this follows a traditional Western worldview—every problem must have a solution and every wrong a remedy—but there is a strong logical component to this argument, particularly from the perspective of a State’s need to protect its citizens.

Large-scale terrorism, particularly that involving a high-explosive, nuclear, biological, chemical, or radiological attack, is simply *not* a mirror of normal criminal activity. These weapons threaten more than just a few people, but rather thousands of people, an entire city, or even an entire State, depending on its size and stability. No State facing an imminent threat from a terrorist organization armed with a weapon of

⁸⁶ JOHN NORTON MOORE & ROBERT F. TURNER, NATIONAL SECURITY LAW 460 (2d ed. 2005). Professor John Norton Moore sits on the faculty at the University of Virginia School of Law as the Director of both the Center for National Security Law and the Center for Oceans Law and Policy, and has chaired or served on a number of International Law committees. John Norton Moore, <http://www.law.virginia.edu/lawweb/Faculty.nsf/FHPbi/1359> (last visited Mar. 30, 2009).

⁸⁷ This adage is one of a number of common paraphrases of a quote by psychologist Abraham Harold Maslow. The full quote appears in his book on the psychology of science: “I suppose it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail.” ABRAHAM HAROLD MASLOW, THE PSYCHOLOGY OF SCIENCE: A RECONNAISSANCE 15 (1966).

⁸⁸ During the reign of the Taliban, the Security Council acted on a number of occasions under Chapter VII of the U.N. Charter, including passing two resolutions which specifically directed that the Taliban turn Osama bin Laden over to a country in which he had been indicted. None of these resolutions were effective in securing the extradition of Osama bin Laden or preventing the attacks of September 11th. See S.C. Res. 1267, ¶ 2, U.N. Doc. S/RES/1267 (Oct. 15, 1999); S.C. Res. 1333, ¶ 2, U.N. Doc. S/RES/1333 (Dec. 19, 2000). This problem is discussed further in Part VI.A, *infra*.

mass destruction can afford to ignore that threat, nor can that State necessarily gamble with the speed and effectiveness of law enforcement methodologies. While there is danger in haste, there is also danger in waiting, and the threatened State must exercise risk management in determining the appropriate solution under the circumstances.

While the threatened State could look to both offensive and defensive solutions, it would be foolhardy to rely upon a purely defensive solution of trying to prevent the entry of such a weapon into the threatened State. If the threatened State had actionable intelligence regarding the location of the terrorist organization armed with such a weapon, the State could reasonably exercise an offensive option, either through law enforcement or through a military strike against the terrorist organization. Unfortunately, the possibility of a terrorist organization armed with a nuclear or radiological weapon is not unimaginable. While counter-terrorism law enforcement may be the appropriate long-term solution, this can leave an active, dangerous threat free to roam the world in the short-term. The key that opens the door to the use of military force is whether or not the terrorist attack is tantamount to an armed attack.⁸⁹

B. Terrorism as an Armed Attack

The determination of whether a nominally criminal terrorist act is tantamount to an armed attack depends on the “scale and effect” of the terrorist attack.⁹⁰ This test arose out of the International Court of Justice case between Nicaragua and the United States.⁹¹ In *Nicaragua*, the court determined that not all uses of force against a State actually trigger the application of Article 51, stating that it was “necessary to distinguish the most grave forms of the use of force (those constituting an armed attack)

⁸⁹ See U.N. Charter art. 51. In addition to the exercise of individual or collective self-defense under Article 51 of the U.N. Charter, there is the possibility that the Security Council, acting under Chapter VII and Article 42, could authorize the use of military force in such an operation. See *id.* art. 42. No Security Council resolutions to date have provided such Article 42 authorization for counter-terrorism operations. The discussion of whether such an authorization could arise in the future, and its implications, lies outside the scope of this article.

⁹⁰ *Military and Paramilitary Activities (Nicar. v. U.S.)* 1986 I.C.J. 14, 103 (June 27); see Brown, *supra* note 6, at 27 (discussing the definition of aggression from General Assembly Resolution 3314 in relation to the decision in *Nicaragua*); SCHMITT, *supra* note 63, at 64; Murphy, *supra* note 62, at 45.

⁹¹ *Nicaragua*, 1986 I.C.J. 14.

from other less grave forms.”⁹² The court further noted that a State may commit an armed attack through the use of irregular forces, if those forces “carry out acts of armed forces against another State of such gravity as to amount to (inter alia) an actual armed attack conducted by regular forces.”⁹³ Again ignoring the issue of attribution for the moment, the court’s decision in *Nicaragua* established that the actions of irregular forces can amount to an armed attack, “if such an operation, because of its *scale and effects*, would have been classified as an armed attack . . . had it been carried out by regular armed forces.”⁹⁴

The September 11th attacks clearly represented a change in scope for terrorist attacks.⁹⁵ As Professor Sean Murphy points out:

[T]he scale of the incidents was certainly akin to that of a military attack. The destruction wrought was as dramatic as the Japanese attack on Pearl Harbor on December 7, 1941: the complete destruction of famous twin towers in the heart of the United States’ financial center and severe damage to the nerve center of the United States’ military. Further, the death toll from the incidents was worse than Pearl Harbor; to find U.S. deaths on the same scale in a single day requires going back to the U.S. Civil War.⁹⁶

Although the fatalities that occurred on September 11th are only a small percentage of the total fatalities resulting from terrorist attacks worldwide,⁹⁷ the attacks of September 11th represent the high-water

⁹² *Id.* at 101.

⁹³ *Id.* at 103.

⁹⁴ *Id.* (emphasis added).

⁹⁵ See 2001 TERRORISM REPORTS, *supra* note 74 (detailing the introductory comments by Ambassador Taylor).

⁹⁶ Murphy, *supra* note 62. Professor Sean Murphy sits on the faculty at George Washington University Law School, and has previously served as a legal counselor to the U.S. Embassy in the Hague, and as a legal advisor with the U.S. Department of State. Sean D. Murphy, <http://www.law.gwu.edu/Faculty/Profile.aspx?id=1756> (last visited Mar. 30, 2009).

⁹⁷ 2001 TERRORISM REPORTS, *supra* note 74, at 173. The State Department estimates that terrorist attacks in 1996 resulted in approximately 3200 casualties, while attacks in 1998 resulted in more than 6000 casualties. *Id.* During 2005, there were approximately 11,111 incidents of terrorism world-wide which targeted non-combatants, resulting in the deaths of more than 14,000 people. 2005 COUNTRY REPORTS, *supra* note 26, Statistical Annex vi.

mark of fatalities from a single attack.⁹⁸ Even more disturbing, the U.S. deaths resulting from the attacks on September 11th were greater than those resulting from some of the United States' international armed conflicts.⁹⁹ Additionally, terrorist attacks cannot always be viewed as singular events. Turkey has been involved in an active, on-going conflict with the Kongra-Gel for over twenty years.¹⁰⁰ "The PKK's terrorist campaign has claimed approximately 40,000 lives since 1986."¹⁰¹ It is difficult to label 40,000 deaths, including many civilian deaths, as nothing more than the activities of criminals; even when spread out over twenty-four years, these numbers instead seem more akin to casualty figures for an armed conflict.¹⁰²

The Security Council has also recognized the scope of the terrorist threat. Acting under Chapter VII of the U.N. Charter, the Security Council has characterized international terrorism as a threat to international peace and security, and reiterated the right of self-defense.¹⁰³ Resolution 1566 couches this in particularly strong terms, stating that the Security Council "[c]ondemns in the strongest terms all acts of terrorism irrespective of their motivation . . . as one of the most serious threats to peace and security."¹⁰⁴

⁹⁸ See 2001 TERRORISM REPORTS, *supra* note 74 (detailing the introductory remarks by Ambassador Taylor).

⁹⁹ U.S. DEP'T OF VETERANS AFFAIRS, AMERICA'S WARS 1 (July 2007), available at <http://www1.va.gov/opa/fact/docs/amwars.pdf> [hereinafter VA, AMERICA'S WARS]. For example, the War of 1812 resulted in 2260 battle deaths, and there were only 4435 battle deaths during the Revolutionary War. *Id.*

¹⁰⁰ 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3.

¹⁰¹ Cayci, *supra* note 29. This number is particularly interesting when considered in light of the U.S. battle deaths which occurred during World War I, the Korean War, or the war in Vietnam, all of which had similar figures. VA, AMERICA'S WARS, *supra* note 99. During the two-years the United States was involved in World War I, it suffered 53,402 battle deaths. The three years of the Korean War resulted in 33,741 dead. Vietnam, covering eleven years, resulted in 47,424 killed in combat. *Id.*

¹⁰² These figures should be viewed in comparison to the relative populations. Turkey's population is estimated to be around seventy-one million. CENT. INTELLIGENCE AGENCY, CIA—THE WORLD FACTBOOK—TURKEY, Mar. 6, 2008, <https://www.cia.gov/library/publications/the-world-factbook/geos/tu.html>. The United States, on the other hand, has a population of almost four-and-a-half times that of Turkey; more than 303 million. U.S. Census Bureau, U.S. and World Population Clocks, <http://www.census.gov/main/www/popclock.html> (last visited June 15, 2009).

¹⁰³ See S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001) *chapeau*, ¶ 1; S.C. Res. 1373, *supra* note 12; S.C. Res. 1566, *chapeau*, ¶ 1.

¹⁰⁴ S.C. Res. 1566, *supra* note 12, ¶ 1. During the session vote on Security Council Resolution 1566, the members of the Security Council highlighted a number of recent

Some may argue that simply because terrorism represents a threat to “international peace and security” does not automatically mean that a terrorist attack rises to the level of an armed attack.¹⁰⁵ This is true, but it likewise does not mean that a terrorist attack cannot rise to that level. The determination of whether a given terrorist threat or attack is tantamount to an armed attack is necessarily factual, and essentially mirrors a normal *jus ad bellum* analysis.¹⁰⁶ Unfortunately, this is an area that creates confusion, as some scholars tend to either skip the initial *jus ad bellum* analysis in favor of a *jus in bello* analysis, or tend to conduct the two analyses simultaneously, either of which can result in a false dilemma.¹⁰⁷

Professor McDonald, for example, effectively applies a *jus in bello* analysis to a *jus ad bellum* problem.¹⁰⁸ She states that “Al Qaeda could not be considered legally competent to declare war on a State, so the attacks of September 11 could not have initiated an international armed conflict” under Common Article 2 of the Geneva Conventions.¹⁰⁹ She then looks at the international character of the conflict, and determines that it is clearly not a non-international armed conflict under Common Article 3 of the Geneva Conventions.¹¹⁰ Her conclusion that the laws of war do not apply to the terrorist threat therefore leads to conclusion that the terrorist threat is purely criminal.¹¹¹ In reaching this conclusion, she

terrorist attacks, including attacks in Pakistan, Russia, Egypt and France. U.N. SCOR, 59th Sess., 5053d mtg., at 2-4, 6-7, U.N. Doc. S/PV.5053 (Oct. 8, 2004).

¹⁰⁵ U.N. Charter art. 51.

¹⁰⁶ Brown, *supra* note 6, at 27; SCHMITT, *supra* note 63, at 64; Murphy, *supra* note 62, at 45. The *jus ad bellum* provides the legal framework governing the use of force by States, primarily governing when States may use force. Michael N. Schmitt, *21st Century Conflict: Can the Law Survive*, 8 MELB. J. INT’L L. 443, 443 (2007).

¹⁰⁷ McDonald, *supra* note 8, at 58–60; *see* Schmitt, *supra* note 106, at 444 (discussing *jus in bello*).

¹⁰⁸ McDonald, *supra* note 8, at 58–60; *see* Schmitt, *supra* note 106, at 444 (discussing *jus in bello*).

¹⁰⁹ McDonald, *supra* note 8, at 60; *see* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. The application of the full body of the *jus in bello* typically depends on whether or not the conflict is an “international armed conflict[] within the meaning of Common Article 2.” Geoffrey S. Corn, Hamdan, *Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VAND. J. TRANSNAT’L L. 295, 305 (Mar. 2007).

¹¹⁰ Corn, *supra* note 109, at 307 (detailing that non-international conflicts trigger the protections contained in Common Article 3); *see* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

¹¹¹ McDonald, *supra* note 8, at 62.

concludes that only a State actor can engage in an armed attack, without analyzing whether or not the attacks themselves, regardless of source, rise to the level of an armed attack.¹¹² Although Professor McDonald's discussion of the application of Common Article 2 to international armed conflicts and Common Article 3 to non-international armed conflicts is accurate, and her conclusion about the legal capability (or lack thereof) of a non-State terrorist organization to declare war on a State is also correct, she incorrectly identifies the question to be answered.¹¹³ The question should not be whether or not al Qaeda can "declare war on a State";¹¹⁴ the question should instead be whether the military-like actions of al Qaeda were tantamount to an armed attack, thereby allowing the United States to use military force in self-defense.¹¹⁵ Professor McDonald does not address this issue.

International terrorism has been recognized as a threat to international peace and security.¹¹⁶ No State can afford to ignore the threat of a terror organization armed with a weapon of mass destruction, nor is any State immune from this threat.¹¹⁷ While small scale terrorist attacks mirror, and may well represent, normal criminal activity, large scale terrorist attacks do not. Large-scale terrorist attacks can, in fact, be of sufficient "scale and effect" to represent an armed attack.¹¹⁸ Similarly, an ongoing series of small-scale terrorist attacks may, in a cumulative

¹¹² *Id.* at 58–62.

¹¹³ *Id.*; see Corn, *supra* note 109, at 305–07 (highlighting the difference between the *jus ad bellum* and *jus in bello* analyses).

¹¹⁴ McDonald, *supra* note 8, at 60.

¹¹⁵ Murphy, *supra* note 62, at 47; Brown, *supra* note 6, at 24. This is not to say that the provisions of Article 51 are inapplicable to international armed conflicts; on the contrary, self-defense under Article 51 may serve as the initiation of an international armed conflict that then triggers the application of the entire Geneva Conventions under Common Article 2. There is not, however, a required connection between the Article 51 self-defense analysis and the *jus in bello* analysis detailed by Professor McDonald. McDonald, *supra* note 8, at 59–62; see also Schmitt, *supra* note 106, at 471–76 (discussing the separation between *jus ad bellum* and *jus in bello*, and the current challenges).

¹¹⁶ See S.C. Res. 1368, *supra* note 103, ¶ 1; S.C. Res. 1373, *supra* note 12, *chapeau*, ¶ 4; S.C. Res. 1566, *supra* note 12, ¶ 1.

¹¹⁷ See generally U.S. DEP'T OF STATE, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2006 (2007), available at <http://www.state.gov/s/ct/rls/crt/2006/> (detailing the various terrorist threats around the world).

¹¹⁸ Military and Paramilitary Activities (Nicar. v. U.S.) 1986 I.C.J. 14, 103 (June 27); Brown, *supra* note 6, at 27; SCHMITT, *supra* note 63, at 64; Murphy, *supra* note 62, at 45.

fashion, rise to the level of an armed attack.¹¹⁹ Under both customary international law and the U.N. Charter, a State threatened or injured by an armed attack may use military force in self-defense, either to prevent the armed attack or in response to it.¹²⁰ This rule applies equally to the use of military force in self-defense against a State-actor or against a non-State actor.¹²¹

Returning to your role as the Chief Executive, you have concluded that the terrorist attack against your State constituted an armed attack for purposes of Article 51. You must now determine a geographic nexus and whether the host State should be assigned responsibility for failing to prevent the attack that occurred, and for allowing the continuing threat represented by an imminent attack.

VI. Step Two: Geographic Nexus and State Responsibility

Unfortunately, even a terrorist organization has to have a home of some sort. Because the organization is located inside a host State, some scholars treat the question of the use of military force in counter-terrorism operations as a question of State responsibility, questioning whether the actions of the non-State terrorist organization may be attributed to the host State.¹²² Application of the traditional models poses practical and legal concerns. Practical, because the host State may not be aware of the terrorist infestation, or may be unable to operate against the terrorists, and legal, because a failure to attribute the actions of the terrorist organization to the host State could prohibit the use of military

¹¹⁹ SCHMITT, *supra* note 63, at 64. Arguably, this is precisely what Turkey has been facing with the Kongra-Gel. Although each individual attack by the Kongra-Gel is relatively minor, taken across the spectrum of time and effect, the threat posed by the Kongra-Gel becomes significant. Cayci, *supra* note 29; O'Toole, *supra* note 3; 2005 COUNTRY REPORTS, *supra* note 26.

¹²⁰ U.N. Charter art. 51; *see* Müllerson, *supra* note 46, at 116–19 (discussing the idea that counter-terrorism may involve “deterrence, anticipation and reprisal”).

¹²¹ Professor Moore Interview, *supra* note 9; Dr. Sharp Interview, *supra* note 9; Jordan J. Paust, *Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond*, in SYMPOSIUM: TERRORISM: THE LEGAL IMPLICATIONS OF THE RESPONSE TO SEPTEMBER 11, 2001, 35 CORNELL INT'L L.J. 533, 534 (Winter 2002); SCHMITT, *supra* note 63, at 25–26.

¹²² *See generally* Brown, *supra* note 6 (discussing the various models of State responsibility); Proulx, *supra* note 6 (setting forth a strict liability model for State responsibility).

force within the territory of that host State, at least in the eyes of those applying these models.¹²³

A. Attribution of the Terrorist Attack: A Red Herring

Discussions of States' responsibility for terrorist acts committed from within their borders are frequently couched in terms of whether or not the actions of the terrorist organization can be attributed to the host State.¹²⁴ Although the concept of attribution applies to situations of State-sponsored terrorism, it is a red herring when addressing a State's right of self-defense when faced with an imminent or actual terrorist attack.¹²⁵

Attribution is an issue in State-sponsored terrorism, as the force used may need to be directed against both the State sponsor and the terrorist organization.¹²⁶ In the case of non-State-sponsored terrorism, however, the force used is directed primarily against the terrorist organization itself, and not necessarily against host State forces or facilities.¹²⁷ Similarly, if the injured State is seeking to hold the host State liable for the damages caused by the attack, attribution would be an issue.¹²⁸ It is not an issue, however, for self-defense.¹²⁹ A brief examination of attribution and State responsibility may help clear up this confusion.

There are three basic models of State responsibility—direct responsibility, endorsement, and vicarious responsibility.¹³⁰ A State is directly responsible for the acts of its government officials,¹³¹ for the acts

¹²³ Brown, *supra* note 6, at 3.

¹²⁴ See generally *id.* (discussing the various models of State responsibility); Proulx, *supra* note 6 (setting forth a strict liability model for State responsibility).

¹²⁵ Michael N. Schmitt, *Deconstructing October 7th: A Case Study in the Lawfulness of Counterterrorist Military Operations*, in *TERRORISM AND INTERNATIONAL LAW: CHALLENGES AND RESPONSES* 39, 45 (Michael N. Schmitt ed., 2002).

¹²⁶ Paust, *supra* note 121, at 540.

¹²⁷ *Id.*

¹²⁸ Professor Moore Interview, *supra* note 9.

¹²⁹ Schmitt, *supra* note 125.

¹³⁰ Brown, *supra* note 6, at 7.

¹³¹ G.A. Res. 56/83, *supra* note 67, at 2; *State Responsibility*, [2001] 2 Y.B. Int'l L. Comm'n 40-42, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) (2007) [hereinafter *Commentaries on State Responsibility*] (providing commentary to G.A. Res. 56/83, Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/RES/56/83 (Jan. 28, 2002)).

of those empowered to act for the government,¹³² and for the conduct of those acting “under the direction or control” of the State.¹³³ Direct responsibility is a function of the actions or omissions of State actors.¹³⁴

For particular conduct to be characterized as an internationally wrongful act, it must first be attributable to the State. The State is a real organized entity, a legal person with full authority to act under international law. But to recognize this is not to deny the elementary fact that the State cannot act of itself. An “act of the State” must involve some action or omission by a human being or group: “States can act only by and through their agents and representatives.”

. . . For the purposes of the international law of State responsibility . . . [t]he State is treated as a unity, consistent with its recognition as a single legal person in international law. In this as in other respects the attribution of conduct to the State is necessarily a normative operation. What is crucial is that a given event is sufficiently connected to conduct (whether an act or omission) which is attributable to the State under one or other of the rules set out in Chapter II [referring to the Responsibility of States for Internationally Wrongful Acts].¹³⁵

Direct responsibility applies to situations in which the host State plays a direct role in supporting, training, or otherwise assisting the terror organization.¹³⁶ Arguably, a State that “breaches its obligations not to promote, train, arm, equip or finance terrorist organization[s] must be held responsible . . . and international law should allow the injured State to respond just as if the delinquent State itself had committed the

¹³² G.A. Res. 56/83, *supra* note 67, at 3; *Commentaries on State Responsibility*, *supra* note 131, at 42–43.

¹³³ G.A. Res. 56/83, *supra* note 67, at 3; *Commentaries on State Responsibility*, *supra* note 131, at 47–49.

¹³⁴ *Commentaries on State Responsibility*, *supra* note 131, at 35; Proulx, *supra* note 6, at 624.

¹³⁵ *Commentaries on State Responsibility*, *supra* note 131, at 35.

¹³⁶ Brown, *supra* note 6, at 8; Proulx, *supra* note 6, at 624; SCHMITT, *supra* note 63, at 44–45.

attack.”¹³⁷ Similarly, current positions support the idea that a State cannot commit aggression by proxy and shield itself. In other words, a State that “sends terrorists to operate on its behalf must be held responsible for the terrorist aggression, just as if the state had itself committed it.”¹³⁸ As the link between the host State and the terrorist organization becomes less direct, though, or in a situation where there simply is no direct link, the model of direct responsibility fails, and with it fails the ability to use military force directly against the host State (as opposed to against the terrorists within the host State).¹³⁹

A State endorses an action when the State has “the duty to exercise due diligence to prevent wrongdoing and to punish those who commit wrongful acts on its territory, that injure other states.”¹⁴⁰ The Iran hostage crisis in the *Diplomatic and Consular Staff* case serves as a prime example of state responsibility by endorsement.¹⁴¹

On 4 November 1979, approximately 3000 militants, self-described “Muslim Student Followers of the Imam’s Policy,” invaded the U.S. Embassy in Tehran.¹⁴² The Iranian government arguably had no direct role in planning or executing the attack on the U.S. Embassy.¹⁴³ The International Court of Justice did note, however, that “the Iranian Government failed altogether to take any ‘appropriate steps’ to protect the premises, staff and archives of the U.S. mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion.”¹⁴⁴ The Iranian government’s endorsement of the takeover was of particular importance.¹⁴⁵ State

¹³⁷ Brown, *supra* note 6, at 52–53; *see also* Proulx, *supra* note 6, at 624 (discussing a possible strict liability standard).

¹³⁸ Brown, *supra* note 6, at 52.

¹³⁹ Proulx, *supra* note 6, at 624.

¹⁴⁰ Brown, *supra* note 6, at 10; *see* G.A. Res. 56/83, *supra* note 67, at 4 (indicating that attribution can arise when a State “acknowledges and adopts the conduct in question”); *Commentaries on State Responsibility*, *supra* note 131, at 52–54 (providing commentary to Article 11 of G.A. Res. 56/83, Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/RES/56/83 (Jan. 28, 2002)).

¹⁴¹ Brown, *supra* note 6, at 10 (discussing the Iran Hostage Crisis case).

¹⁴² U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 12 (May 24). The U.S. Consulates in Tabriz and Shiraz were also seized, but since operations at those consulates had previously been suspended, no U.S. personnel were seized in the attacks on the consulates. *Id.* at 13.

¹⁴³ *Id.* at 30.

¹⁴⁴ *Id.* at 31.

¹⁴⁵ *Id.* at 34. The court found that “Ayatollah Khomeini himself made crystal clear the endorsement by the State both of the take-over of the Embassy and Consulates and of the

responsibility by endorsement fails from a counter-terrorism perspective, though, as it too requires some attribution of the non-State actor's actions to the State itself.¹⁴⁶ Without some fairly significant link between the host State and the terrorist organization, the injured State cannot rely upon endorsement to justify its use of military force against the host State.¹⁴⁷ If the *Diplomatic and Consular Staff* case is any guide, the host State effectively has to claim the actions of the terrorist organization as its own for the injured State to be allowed to use force in self-defense.¹⁴⁸

Finally, even the fairly open model of vicarious responsibility requires some level of knowledge and inaction by the host State.¹⁴⁹ As Davis Brown¹⁵⁰ points out:

[A] state may be held responsible for acts not committed by state organs, and not endorsed or adopted by it. The difference between original responsibility and vicarious responsibility is that in the former, responsibility flows from the injurious act, and in the latter, responsibility flows from the failure to take measures to prevent or punish the act.¹⁵¹

Thus, a State that “knowingly allows terrorist activity to take place within its borders must also be held responsible for the resulting injuries suffered by other states, just as if the state itself has committed the

detention of the Embassy staff as hostages,” both by expressing his approval of the take-over and by forbidding “members of the Revolutionary Council and all responsible officials to meet the special representatives sent by President Carter to try and obtain the release of the hostages and evacuation of the Embassy.” *Id.* The final seal of governmental approval came when Ayatollah Khomeini declared that “the premises of the Embassy and the hostages would remain as they were until the United States had handed over the former Shah for trial and returned his property to Iran.” *Id.* at 35.

¹⁴⁶ Brown, *supra* note 6, at 10.

¹⁴⁷ *Id.* at 12. The initial plans for Operation Eagle Claw focused on the terrorists holding the U.S. Embassy staff in Tehran hostage. The possibility of Iranian involvement, however, required the inclusion of contingency plans for dealing with Iranian interference. COLONEL (RETIRED) CHARLIE A. BECKWITH & DONALD KNOX, *DELTA FORCE* 249–55 (1983).

¹⁴⁸ *U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, 34–35 (May 24).

¹⁴⁹ Brown, *supra* note 6, at 13.

¹⁵⁰ Davis Brown is the former Deputy Staff Judge Advocate, Defense Information Systems Agency. *Id.* at 1.

¹⁵¹ *Id.*

injuries.”¹⁵² As with other types of State responsibility, vicarious responsibility requires some degree of knowledge on the part of the host State coupled with some act or omission by that State, such as a knowing acquiescence to a planned attack against another State, to justify the exercise of force against the host State.¹⁵³

In any case, the fact that the current terrorist threat is leaning away from State sponsorship or overt support of terrorism poses a major problem with applying any of these models to the current threat.¹⁵⁴ State-sponsored terrorism is less likely now than when host States only had to contend with law enforcement operations, allowing them to comply or not, as they chose, with little concern of retribution.

Afghanistan, under the Taliban regime, provides an unfortunate example of this situation. The Taliban regime was subject to no less than seven Security Council resolutions between 1996 and 11 September 2001 addressing the presence of terrorist organizations in Afghanistan.¹⁵⁵ Three of those resolutions were decided under Chapter VII,¹⁵⁶ and several resolutions called upon the Taliban government to deny the

¹⁵² *Id.* at 52.

¹⁵³ *Id.* at 13.

¹⁵⁴ In 2000, the Department of State listed seven States, including Libya, as being State sponsors of terrorism, further noting that these States had been on that list since 1993. U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM 1999, at 2 (2000). The 1999 report also indicated that direct State support to terrorism was declining. *Id.* Since that time, Libya has improved its cooperation in the fight against terror, which finally resulted in Libya being removed from the list of State sponsors of terrorism in 2006. U.S. DEP'T OF STATE, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2006, CHAPTER 3, STATE SPONSORS OF TERRORISM OVERVIEW (2007), available at <http://www.state.gov/s/ct/rls/crt/2006/82736.htm>. As of the 2006 Country Reports, the Department of State listed only three countries—Cuba, Iran, and Syria—who had neither “renounced terrorism [n]or made efforts to act against Foreign Terrorist Organizations.” *Id.*; see also Schmitt, *supra* note 106, at 458 (highlighting that only State sponsors of terrorism need to be concerned with the current interpretations of *jus ad bellum* principles).

¹⁵⁵ S.C. Res. 1076, U.N. Doc. S/RES/1076 (Oct. 22, 1996); S.C. Res. 1189, U.N. Doc. S/RES/1189 (Aug. 13, 1998) (referring to the 1998 attacks in Nairobi, Kenya and Dar es Salaam, Tanzania that were later linked to al Qaeda); S.C. Res. 1193, U.N. Doc. S/RES/1193 (Aug. 28, 1998); S.C. Res. 1214, U.N. Doc. S/RES/1214 (Dec. 8, 1998) (linking UNSCR 1189 to the Taliban and Afghanistan, tied to their harboring of al Qaeda and Usama bin Laden); S.C. Res. 1267, *supra* note 88; S.C. Res. 1333, *supra* note 88; S.C. Res. 1363, U.N. Doc. S/RES/1363 (July 30, 2001).

¹⁵⁶ S.C. Res. 1267, *supra* note 88; S.C. Res. 1333, *supra* note 88; S.C. Res. 1363, *supra* note 155.

terrorists safe-haven and to turn Osama bin Laden over for trial.¹⁵⁷ Despite these actions, the attacks of September 11th still occurred.

As a result, on 12 September 2001 the Security Council issued a new resolution stating that it was “[d]etermined to combat by all means threats to international peace and security caused by terrorist acts,” and that it “[r]ecogniz[ed] the inherent right of individual or collective self-defence in accordance with the Charter.”¹⁵⁸ In the end, multiple iterations of non-military pressure failed to prevent the catastrophic attacks of September 11th.¹⁵⁹ Given the global effort and use of military force to combat terrorism since that time, States are arguably less willing to directly sponsor terror organizations in the face of potential military strikes in response to such support.¹⁶⁰

If the use of military force against terrorist organizations in self-defense were required to follow one of the traditional models of State responsibility, then the legality of the use of military force would depend on the ability of the injured State to attribute the actions of the terrorist organization to the host State.¹⁶¹ This could leave a dangerous gap. International terrorist organizations located within States who cannot or will not effectively combat terrorism within their borders could rely on host States turning a blind eye to the terrorist organization launching attacks from within their borders. It could also leave a gap where States could provide covert or tacit support to terrorist organizations operating within their borders. Ultimately, it could leave terrorist organizations

¹⁵⁷ S.C. Res. 1267, *supra* note 88, ¶ 2; S.C. Res. 1333, *supra* note 88, ¶ 2.

¹⁵⁸ S.C. Res. 1368, *supra* note 103, *chapeau*.

¹⁵⁹ Admittedly, the United States engaged in military strikes in Afghanistan before this time, such as the cruise missile strike on 7 August 1998. There is a significant difference, however, between a cruise missile strike and large-scale military operations. See Jamie McIntyre & Andrea Koppel, *U.S. Missiles Pound Targets in Afghanistan, Sudan*, CNN, Aug. 21, 1998, <http://www.cnn.com/US/9808/20/us.strikes.02/index.html?iref=newssearch>.

¹⁶⁰ As discussed *supra* note 154, there has been a decrease in State sponsorship of terrorism over the last decade, with a particularly noticeable drop in the post-September 11th timeframe. The post-9/11 response seems to bear out the idea that most regime elites are rational utility maximizers, based on their desire to remain in power. This is part of the idea behind the U.S. National Strategy for Combating Terrorism, both in terms of using sticks with State-sponsors and carrots with international partners. NAT'L STRATEGY FOR COMBATING TERRORISM, *supra* note 4, at 15–21.

¹⁶¹ *But see* Sharp, *supra* note 79, at 47 (suggesting an alternate analysis, that “all acts of international terrorism are either non-state sponsored and thus a crime addressed by national and peacetime treaty law, or are state sponsored and thus a use of force governed by the law of conflict management”). Dr. Sharp’s analysis, however, was published in early 2000, more than a year before the 9/11 attacks.

free to operate within permissive environments, with little fear of reprisal.

Fortunately, there is no need to attribute the terrorist attacks to the host State when analyzing the right of self-defense in response to such attacks.¹⁶² If the force used in self-defense is directed solely against the terrorist organization, questions of attributing the terrorist act to the host State are nothing more than a distraction.¹⁶³ Attribution is only important if either the injured State intends to use force against host State forces or facilities, or seeks to hold the host State liable for the damages resulting from the terrorist attack.¹⁶⁴ Instead, it is simply necessary to establish a geographic nexus.

B. Geographic Nexus

A geographic nexus is necessary, both logically and legally. First, the injured State should not be allowed to engage in random terrorist hunting expeditions throughout a given region or corner of the globe. The injured State must instead pinpoint the location of the terrorist organization posing the threat, thereby identifying the host State. Second, having identified the host State, the injured State may now call upon the legal responsibility of the host State to prevent the commission of terrorist attacks from within its borders, setting the stage for a required balancing of the injured State's right of self-defense and the host State's right to territorial integrity.¹⁶⁵

¹⁶² Professor Moore Interview, *supra* note 9; Dr. Sharp Interview, *supra* note 9; Paust, *supra* note 121, at 533.

¹⁶³ Schmitt, *supra* note 125; Professor Moore Interview, *supra* note 9; Dr. Sharp Interview, *supra* note 9; *see* Paust, *supra* note 121, at 540.

¹⁶⁴ Professor Moore Interview, *supra* note 9; Paust, *supra* note 121, at 540.

¹⁶⁵ Arguably an injured State could use force in self-defense even if the host State had no responsibility to prevent the commission of terrorist acts from occurring within its borders. This would likely depend on the severity and frequency of attacks; it is not clear how severe or frequent the attacks would have to be in order to overcome the general presumption that States are not responsible for the purely private conduct of non-State actors. The existence of legal responsibility on the part of the host State, however, lends greater credence to the injured State acting inside the host State in self-defense, and helps overcome this presumption. *Commentaries on State Responsibility*, *supra* note 131, at 52–54; *see* SCHMITT, *supra* note 63, at 32 (discussing the balancing of self-defense and territorial integrity).

The first step in addressing this balance is establishing a geographic nexus; with that nexus comes the establishment of the host State's responsibility to prevent terrorist attacks from within its borders. This affirmative duty renders attribution of the terrorist act to the host State a non-issue, at least for purposes of establishing the right of self-defense against the terrorist organization. Simply put, States have an affirmative responsibility under international law to prevent the commission of terrorist acts from within their borders, both generally and specifically.¹⁶⁶ While this general duty originally rose as guidance from the U.N. General Assembly, since September 11th it has morphed into a specific legal obligation on the part of all States, as will be discussed in more detail below.¹⁶⁷

The general duty arises from the concept of sovereignty; implied within the concept of sovereignty is the idea of control over territory, including territorial and political independence.¹⁶⁸ The actions of non-State actors within the host State that do not affect another State and do not affect international peace and security are generally the concern of only the host State.¹⁶⁹ The actions of non-State actors within the host State that do affect another State or which do affect international peace and security are the concern of more than just the host State; they are also the concern of the injured State, and in some cases, of the international community.¹⁷⁰

¹⁶⁶ G.A. Res. 2625 (XXV), *supra* note 12, at 122–23; G.A. Res. 49/60, at 5, U.N. Doc. A/RES/49/60 (Feb. 17, 1995); S.C. Res. 1373, *supra* note 12, ¶ 2(b); S.C. Res. 1566, *supra* note 12, ¶ 3.

¹⁶⁷ The original form of the obligation arose from General Assembly Resolution 2625, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*. G.A. Res. 2625 (XXV), *supra* note 12, at 122–23. The basic outline became more specific with the publication of General Assembly Resolution 49-60, *Measures to Eliminate International Terrorism*. G.A. Res. 49/60, at 5, U.N. Doc. A/RES/49/60 (Feb. 17, 1995). With the publication of Security Council Resolution 1373, the U.N. Security Council clearly established the legal responsibility of States to take steps to prevent terrorism from within their borders. S.C. Res. 1373, *supra* note 12, ¶ 2(b). This was re-affirmed in Security Council Resolution 1566. S.C. Res. 1566, *supra* note 12, ¶ 3.

¹⁶⁸ G.A. Res. 2625 (XXV), *supra* note 12, at 124.

¹⁶⁹ This idea is simply the logical extension of the concept of territorial and political independence. *Id.*

¹⁷⁰ *Commentaries on State Responsibility*, *supra* note 131, at 52–54. As discussed *supra* note 47, the situation in Somalia provided a great example of this principle in action. What began as a purely domestic situation eventually began to destabilize the region. United Nations, United Nations Operation in Somalia I (UNOSOM I)—Background, http://www.un.org/Depts/dpko/dpko/co_mission/unosom1backgr2.html (last visited June 12, 2009). Eventually, the Security Council, acting under Chapter VII, authorized the use

States have an obligation not to use force in their international relations, directly or indirectly, including a “duty to refrain from organizing or encouraging the organization of irregular forces or armed bands . . . for incursion into the territory of another State.”¹⁷¹ States are also supposed to “take appropriate practical measures to ensure that their respective territories are not used for terrorist installations or training camps, or for the preparation or organization of terrorist acts intended to be committed against other States or their citizens.”¹⁷²

Actions by the U.N. Security Council since September 11th have clarified that these requirements are not just guidance—they are legal obligations. The Security Council explicitly set forth the responsibility of every State to prevent the commission of terrorist acts from within its borders in UNSCR 1373 and UNSCR 1566.¹⁷³ Per UNSCR 1373, States shall “[t]ake the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information.”¹⁷⁴ UNSCR 1566 reinforces that prohibition, “[c]all[ing] upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.”¹⁷⁵ Even assuming the validity of the argument that the general duties are aspirational in nature, no such argument follows with respect to the specific requirements of UNSCR 1373: States are required to comply with the decisions of the Security Council.¹⁷⁶ While the language used in UNSCR 1566 casts some doubt as to whether or not it is binding, the language in paragraph 2 of UNSCR 1373 does not.¹⁷⁷ States are ultimately responsible for preventing terrorists acts committed from within their borders.¹⁷⁸ A breach of this responsibility opens the door to

of force to address the situation. S.C. Res. 794, ¶ 10, U.N. Doc. S/RES/794 (Dec. 3, 1992).

¹⁷¹ G.A. Res. 2625 (XXV), *supra* note 12, at 123; *see also* G.A. Res. 49/60, at 5, U.N. Doc. A/RES/49/60 (Feb. 17, 1995) (containing similar language aimed specifically at terrorism).

¹⁷² G.A. Res. 49/60, at 5, U.N. Doc. A/RES/49/60.

¹⁷³ S.C. Res. 1373, *supra* note 12, ¶ 2(b); S.C. Res. 1566, *supra* note 12, ¶ 3.

¹⁷⁴ S.C. Res. 1373, *supra* note 12, ¶ 2(b).

¹⁷⁵ S.C. Res. 1566, *supra* note 12, ¶ 3.

¹⁷⁶ U.N. Charter art. 25.

¹⁷⁷ *See* S.C. Res. 1566, *supra* note 12, ¶ 3. Paragraph 3 “calls upon all States” to prevent terrorist acts. *Id.* By comparison, paragraph 2 of UNSCR 1373 directs States to act. S.C. Res. 1373, *supra* note 12, ¶ 2(b).

¹⁷⁸ G.A. Res. 2625 (XXV), *supra* note 12, at 122–23; G.A. Res. 49/60, at 5, U.N. Doc. A/RES/49/60 (Feb. 17, 1995); S.C. Res. 1373, *supra* note 12, ¶ 2(b); S.C. Res. 1566, *supra* note 12, ¶ 3.

possible action by injured States, although there are additional actions that must first take place.¹⁷⁹

As the Chief Executive, having determined the location of the terrorist threat, you must now determine how much warning to provide the host State, including the scope and specificity of your warning, and how much time you will give the host State to act in response. These steps are necessary to overcome the prohibition against the use of force in Article 2(4).¹⁸⁰

VII. Step Three: Duty to Warn; Opportunity to Act

A. Prohibition on the Use of Force

A State's failure to fulfill its international obligations ordinarily would not justify the use of military force against that State or within its territories.¹⁸¹ States are generally prohibited from using force against other States; this includes a prohibition against "the threat or use of force against the territorial integrity or political independence of any state"¹⁸² This prohibition arises from a variety of sources; the two most commonly cited are the Kellogg-Briand Pact, which outlaws "war for the solution of international controversies, and renounce[s] it as an instrument of national policy" in international relations,¹⁸³ and Article 2(4) of the U.N. Charter.¹⁸⁴ The prohibition against the use of force includes not only attacking a State, its forces, or facilities, but also the use of force inside a State's territory without the State's permission.¹⁸⁵

The use of force is permitted, however, when authorized by the Security Council under Article 42,¹⁸⁶ or when acting in self-defense

¹⁷⁹ *Commentaries on State Responsibility*, *supra* note 131, at 54–57.

¹⁸⁰ U.N. Charter art. 2, para. 4.

¹⁸¹ *Id.*; *see also* G.A. Res. 2625 (XXV), *supra* note 12, at 122; *Commentaries on State Responsibility*, *supra* note 131, at 131–32; SCHMITT, *supra* note 63, at 43–44.

¹⁸² U.N. Charter art. 2, para. 4.

¹⁸³ Treaty Providing for the Renunciation of War as an Instrument of National Policy art. 1, July 24, 1929, T.S. 796, 6 Stat. 2343, 2 Bevans 732, 94 L.N.T.S. 57.

¹⁸⁴ U.N. Charter art. 2, para. 4.

¹⁸⁵ *Id.*; *see also* G.A. Res. 3314 (XXIX), at 143, U.N. Doc. A/9631 (1974); G.A. Res. 2625 (XXV), *supra* note 12, at 122–23.

¹⁸⁶ U.N. Charter art. 42. Article 42 allows the Security Council to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and

under Article 51.¹⁸⁷ The Security Council has identified international terrorism as a threat to international peace and security on a number of occasions, and while the Security Council has authorized some actions under Article 41, to date it has not specifically authorized military action under Article 42.¹⁸⁸ Article 41 covers the entire spectrum of actions not rising to the level of the use of armed force; the various Security Council resolutions directing the criminalization of terrorist acts, the freezing of funds, and the prohibition on providing weapons or equipment to terrorist organizations fall within its scope.¹⁸⁹ None of the various Security Council resolutions addressing international terrorism as a threat to international peace and security under Chapter VII, including UNSCR 1368, the most explicit concerning the use of force, include any reference to the use of military force under Article 42 of the U.N. Charter.¹⁹⁰

The Security Council has implicitly and explicitly allowed injured States to deal with terrorist threats under Article 51.¹⁹¹ The language in UNSCR 1368 recognizes “the inherent right of individual or collective self-defence in accordance with the Charter.”¹⁹² Although UNSCR 1368 does not outright refer to Article 51, there is no other possible reading of

security. Such action may include demonstrations, blockage, and other operations by air, sea, or land forces” *Id.*

¹⁸⁷ *Id.* art. 51.

¹⁸⁸ S.C. Res. 1267, *supra* note 88, *chapeau*; S.C. Res. 1333, *supra* note 88, *chapeau*; S.C. Res. 1368, *supra* note 103, ¶ 1; S.C. Res. 1373, *supra* note 12, *chapeau*, ¶ 4; S.C. Res. 1438, ¶ 1, U.N. Doc. S/RES/1438 (2002) (Oct. 14, 2002); S.C. Res. 1440, ¶ 1, U.N. Doc. S/RES/1440 (2002) (Oct. 24, 2002); S.C. Res. 1450, ¶ 1, U.N. Doc. S/RES/1450 (2002) (Dec. 13, 2002); S.C. Res. 1465, ¶ 1, U.N. Doc. S/RES/1465 (2003) (Feb. 13, 2002); S.C. Res. 1516, ¶ 1, U.N. Doc. S/RES/1516 (2003) (Nov. 20, 2003); S.C. Res. 1530, ¶ 1, U.N. Doc. S/RES/1530 (2004) (Mar. 11, 2004); S.C. Res. 1566, *supra* note 12, ¶ 1; S.C. Res. 1611, ¶ 1, U.N. Doc. S/RES/1611 (July 7, 2005); S.C. Res. 1618, ¶ 1, U.N. Doc. S/RES/1618 (Aug. 4, 2005); *see also* S.C. Res. 1540, S/RES/1540 (Apr. 28, 2004) (discussing the danger of weapons of mass destruction).

¹⁸⁹ *See* S.C. Res. 1566, *supra* note 12 (calling upon member States to criminalize terrorist acts); S.C. Res. 1617, U.N. Doc. S/RES/1617 (July 29, 2005) (calling upon member States to freeze the financial assets associated with al Qaeda and prevent the provision of arms or equipment to al Qaeda).

¹⁹⁰ SCHMITT, *supra* note 63, at 9; *see* S.C. Res. 1267, *supra* note 88, *chapeau*; S.C. Res. 1368, *supra* note 103, ¶ 1; S.C. Res. 1373, *supra* note 12, *chapeau*, ¶ 4; S.C. Res. 1566, *supra* note 12, ¶ 1.

¹⁹¹ S.C. Res. 1368, *supra* note 103, *chapeau* (explicitly “[r]ecognizing the inherent right of individual and collective self-defense in accordance with the Charter”); *see* S.C. Res. 1566, *supra* note 12, *chapeau* (implicitly leaving the door open for force in self-defense, by “[r]eaffirming also the imperative to combat terrorism in all its forms and manifestations *by all means*” (emphasis added)).

¹⁹² S.C. Res. 1368, *supra* note 103, *chapeau*.

its reference to “the inherent right of individual or collective self-defence,” a phrase straight out of Article 51.¹⁹³ Security Council Resolution 1373 also refers to the inherent right of self-defense, identifying “the need to combat by all means, in accordance with the U.N. Charter, threats to international peace and security caused by terrorist acts.”¹⁹⁴ Similarly, UNSCR 1566 does not include any reference to self-defense, but reiterates “the imperative to combat terrorism in all its forms and manifestations by all means”¹⁹⁵

Scholars have debated whether the Security Council truly intended to allow injured States to use military force to combat terrorism, despite the reference to self-defense and the use of the term “combat.”¹⁹⁶ Professor Jordan Paust takes this position:

[P]hrases such as “combat by all means” and “suppress terrorist attacks and take action against perpetrators of such acts” are broad enough to provide an authorization to use military force against the perpetrators and the fact that the resolution does not contain phrases used previously in Security Council authorizations to use military force in Korea, during the Gulf War, or in Bosnia-Herzegovina, such as “by all necessary means” as opposed to “combat by all means” and “take action against,” is not determinative.¹⁹⁷

Others further question the applicability of Article 51 to terrorist threats, arguing that it only applies to State-on-State violence.¹⁹⁸ This position is further supported by the International Court of Justice’s advisory opinion on Israel’s construction of a wall in the occupied

¹⁹³ *Id.*; see U.N. Charter art. 51.

¹⁹⁴ S.C. Res. 1373, *supra* note 12, *chapeau*.

¹⁹⁵ S.C. Res. 1566, *supra* note 12, *chapeau*.

¹⁹⁶ Paust, *supra* note 121, at 544.

¹⁹⁷ *Id.* at 544–45; see also Frederic L. Kirgis, *ASIL Insights—Terrorist Attacks on World Trade Center and Pentagon*, ASIL, Sept. 2001, <http://www.asil.org/insights/insigh77.htm> (containing a fascinating three-month running debate by a number of international legal scholars concerning the attacks, and questions of prosecution and the use of force).

¹⁹⁸ McDonald, *supra* note 8, at 62; see also MOORE & TURNER, *supra* note 86, at 490 (citing Muna Ndulo, *International Law and the Use of Force: America’s Response to September 11*, 28 CORNELL L. F. 5 (Spring 2002), in which Professor Ndulo indicates a belief that the self-defense construct under Article 51 of the U.N. Charter only applies to State-on-State violence, and would only apply to the actions of non-State actors if their actions could be attributed to a specific State).

Palestinian territories.¹⁹⁹ In the *Wall* opinion, the court stated that “Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack *by one State against another State*.”²⁰⁰

Nothing in the language of Article 51, however, limits the right of self-defense to attacks by other States.²⁰¹ As Professor Moore points out, “[t]he language of Article 51 . . . does not support this interpretation: there is no explicit statement that an ‘armed attack’ must be committed by a state.”²⁰² Professor Paust concurs, stating:

Although there is widespread agreement that an “armed attack” must occur, nothing in the language of Article 51 requires that such an armed attack be carried out by another state, nation, or belligerent, as opposed to armed attacks by various other non-state actors²⁰³

Even judges within the International Court disagreed on this finding. In his dissenting opinion, Judge Buergenthal points out that “the U.N. Charter, in affirming the inherent right of self-defence, does not make its exercise dependent upon an armed attack by another State.”²⁰⁴ In her dissenting opinion, Judge Higgins concurs, stating that “[t]here is, with respect, nothing in the text of Article 51 that thus stipulates that self-defence is available only when an armed attack is made by a State.”²⁰⁵

Furthermore, the Security Council’s actions in response to the United States after September 11th indicated an acknowledgement of the right of self-defense under Article 51.²⁰⁶ In *Wall*, the International Court of

¹⁹⁹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 136 (July 9).

²⁰⁰ *Id.* at 194 (emphasis added).

²⁰¹ MOORE & TURNER, *supra* note 86, at 490; Paust, *supra* note 121.

²⁰² MOORE & TURNER, *supra* note 86, at 490.

²⁰³ Paust, *supra* note 121.

²⁰⁴ 2004 I.C.J. 136, 242 (declaration of Judge Buergenthal).

²⁰⁵ *Id.* at 215 (separate opinion of Judge Higgins).

²⁰⁶ S.C. Res. 1368, *supra* note 103, *chapeau*; S.C. Res. 1373, *supra* note 12, *chapeau*. The Security Council published UNSCR 1368 on 12 September 2001, the day after the attack. This resolution recognized the severity of the attacks, and specifically references the right of self-defense. S.C. Res. 1368, *supra* note 103, *chapeau*. On 20 September 2001, President George W. Bush issued a statement to the Taliban, directing them to turn over Osama bin Laden and take other acts in order to prevent retaliation. Transcript of President Bush’s Address, CNN, Sept. 21, 2001, <http://archives.cnn.com/2001/US/09/20/>

Justice attempted to distinguish the situation faced by Israel as a purely domestic threat, thereby taking that threat out of the self-defense rubric contained in UNSCRs 1368 and 1373.²⁰⁷ The court's decision in this area has significant weaknesses as well. As Judge Buergenthal pointed out in his dissent, "[i]n neither of these resolutions did the Security Council limit their application to terrorist attacks by State actors only, nor was an assumption to that effect implicit in these resolutions. In fact, the contrary appears to have been the case."²⁰⁸

Finally, some may argue that the Security Council has "taken measures necessary to maintain international peace and security" under Article 51, thereby eliminating the right of States to act in self-defense against terrorism.²⁰⁹ Although this argument could be addressed in terms of whether Article 51 requires the Security Council to take effective action, it is not necessary to go down that road. It is sufficient to point out that Security Council actions under Chapter VII bar the right of self-defense only when its actions "maintain international peace and security."²¹⁰ The Security Council acted under Chapter VII on a number of occasions prior to September 11th; none of these actions prevented the attacks.²¹¹ Since September 11th, the Security Council has taken further action, including establishing the Counter-Terrorism Committee under UNSCR 1373.²¹² None of the Security Council's actions since that time have prevented the further commission of terrorist attacks across the globe, a fact borne out by the current conflict between Turkey and the Kongra-Gel in northern Iraq.²¹³

gen.gush.transcript. On 28 September 2001, the Security Council published UNSCR 1373, "[r]eaffirming the inherent right of individual or collective self-defense as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001)." S.C. Res. 1373, *supra* note 12, *chapeau*.

²⁰⁷ 2004 I.C.J. 136, 194.

²⁰⁸ *Id.* at 242 (declaration of Judge Buergenthal).

²⁰⁹ U.N. Charter art. 51.

²¹⁰ *Id.*

²¹¹ See S.C. Res. 1267, *supra* note 88; S.C. Res. 1333, *supra* note 88; S.C. Res. 1363, *supra* note 155. All three of these resolutions were decided under Chapter VII of the U.N. Charter. As discussed above, none of the Security Council resolutions pertaining to al Qaeda discouraged it, nor did they prompt the Taliban regime in Afghanistan to act to prevent the attacks which ultimately took place.

²¹² See Counter-Terrorism Committee, UN, <http://www.un.org/sc/ctc/> (last visited June 12, 2009).

²¹³ After a period of diplomatic discussions as well as air strikes, Turkish forces finally entered northern Iraq and spent approximately one week hunting Kongra-Gel fighters. *Turkey Sends More Troops Into Iraq*, CNN, Feb. 27, 2008, <http://www.cnn.com/2008/WORLD/meast/>

Given the numerous Security Council Resolutions highlighting international terrorism's continuing threat, the Security Council clearly has not restored international peace and security in this area.²¹⁴ It is difficult to conclude that the Security Council is successfully "maintaining international peace and security" against the threat of international terrorism.²¹⁵ States therefore retain their right of self-defense under Article 51.²¹⁶ No State would be willing to allow terrorist organizations to attack its citizens with impunity, simply because the Security Council, acting under Chapter VII, has directed States to prevent the commission of terrorist acts from within their borders. Such directives have not prevented the Taliban from attacking Afghanistan from their bases in the FATA area of Pakistan,²¹⁷ nor have they stopped the Kongra-Gel from attacking Turkey from Iraq.²¹⁸

Returning to the question of self-defense under Article 51, the right of self-defense must still be balanced against the right of territorial integrity. In a situation involving State-sponsored terrorism, Articles 2(4) and 51 do not conflict, as these articles work in concert against an aggressor State.²¹⁹ In a situation involving non-State actors, however, there is still a conflict between Articles 2(4) and 51—the right of the injured State to defend itself versus the right of the host State to its territorial integrity.²²⁰

02/27/turkey.iraq/index.html; *Iraq Incursion Finished, Turkey Says*, CNN, Feb. 29, 2008, <http://www.cnn.com/2008/WORLD/meast/02/29/iraq.main/index.html>. Since that time, Turkey has again opened fire on Kongra-Gel positions in northern Iraq. Mohammed Tawfeeq & Talia Kayali, *Turkish Troops Shell Northern Iraq*, CNN, Mar. 5, 2008, <http://www.cnn.com/2008/WORLD/meast/03/05/turkey.iraq/index.html?iref=newssearch>.

²¹⁴ S.C. Res. 1267, *supra* note 88, *chapeau*; S.C. Res. 1333, *supra* note 88, *chapeau*; S.C. Res. 1368, *supra* note 103, ¶ 1; S.C. Res. 1373, *supra* note 12, *chapeau*, ¶ 4; S.C. Res. 1438, *supra* note 188, ¶ 1; S.C. Res. 1440, *supra* note 188, ¶ 1; S.C. Res. 1450, ¶ 1, U.N. Doc. S/RES/1450 (2002) (Dec. 13, 2002); S.C. Res. 1465, ¶ 1, U.N. Doc. S/RES/1465 (2003) (Feb. 13, 2002); S.C. Res. 1516, *supra* note 188, ¶ 1; S.C. Res. 1530, *supra* note 188, ¶ 1; S.C. Res. 1566, *supra* note 12, ¶ 1; S.C. Res. 1611, U.N. Doc. S/RES/1530 (2004) (Mar. 11, 2004), ¶ 1; S.C. Res. 1618, ¶ 1, U.N. Doc. S/RES/1618 (Aug. 4, 2005).

²¹⁵ U.N. Charter art. 51.

²¹⁶ *Id.*

²¹⁷ *Saleh Interview*, *supra* note 2.

²¹⁸ Hooper, *supra* note 31.

²¹⁹ *Panel I Discussion*, *supra* note 55, at 141–42 (reporting Robert Turner's comments); SCHMITT, *supra* note 63. This assumes that the State-sponsored terrorist act rose to the level of an armed attack.

²²⁰ U.N. Charter art. 2, para. 4; G.A. Res. 2625 (XXV), *supra* note 12, at 122; *Commentaries on State Responsibility*, *supra* note 131, at 131–32; Schmitt, *supra* note 106, at 455–56.

While the host State has the responsibility to prevent the commission of terrorist attacks from within its borders, a breach of that duty does not necessarily render the host State responsible for the terrorist attacks, nor does it automatically render the host State or its territory susceptible to attack by the injured State.²²¹ The legal framework involved is not one of strict liability; instead, the proper balancing of the interests of the injured State and the host State requires some act or omission on the part of the host State, even in cases where the actions of the terrorist organization cannot be attributed to the host State itself.²²² In order to establish the act or omission, the injured State must warn the host State, and provide the host State with some opportunity to act, subject to the requirements of self-defense.²²³

B. Duty to Warn; Opportunity to Act

While the injured State should provide some warning to the host State, no clear standard exists concerning the quantity, quality, and timing of such warning.²²⁴ The injured State will be reluctant to sacrifice any level of operational surprise in providing the host State with warnings and an opportunity to act. This is true of both the warning and the amount of time provided to the host State to act on the warnings. Professor Moore supports this position. He states that the warnings do not need to be so detailed that the injured States loses operational surprise, nor do they need to immediately precede the use of military force in self-defense—“it is not necessary to give away the tactical advantage.”²²⁵ Unfortunately, the provision of knowledge can be a

²²¹ U.N. Charter art. 2, para. 4; G.A. Res. 2625 (XXV), *supra* note 12, at 122; *Commentaries on State Responsibility*, *supra* note 131, at 131–32; SCHMITT, *supra* note 63, at 43–44.

²²² SCHMITT, *supra* note 63, at 31–33; *see* Proulx, *supra* note 6, at 624 (expressing his concern that “passiveness or indifference toward terrorist agendas within its own territory might trigger its responsibility . . . as though it had actively participated”).

²²³ G.A. Res. 56/83, *supra* note 67, Annex, art. 43; *Commentaries on State Responsibility*, *supra* note 131, at 119–20; Professor Moore Interview, *supra* note 9; SCHMITT, *supra* note 63, at 66; Schmitt, *supra* note 106, at 455–56.

²²⁴ G.A. Res. 56/83, *supra* note 67, Annex, art. 43; *Commentaries on State Responsibility*, *supra* note 131, at 119–20; *see* Brown, *supra* note 6, at 30 (discussing the primary right of the host State to police up terrorists within its borders); *see also* Convention with Respect to the Laws and Customs of War on Land, with annex of regulations, annex art. 26, Oct. 18, 1907, 36 Stat. 2277.

²²⁵ Professor Moore Interview, *supra* note 9. The injured State could likely meet this requirement by providing general statements to the U.N. General Assembly or Security

problem; providing sufficiently detailed knowledge to the host State could be counterproductive, and generically worded communications may be insufficient to establish sufficient knowledge on the part of the host State to allow vicarious liability.²²⁶

Some warning is necessary, if only to avoid a pretextual use of force.²²⁷ In theory, the warning could come after the injured State engages in its counter-terrorism operation, rather than before, but this entails some risks. First, justifications provided after the fact may be seen as less credible. Second, if the host State does not understand the reason behind the injured State's actions, it may legitimately view an incursion by the injured State as an illegal use of force.²²⁸

Part of the problem in this regard is that counter-terrorism operations, both law enforcement and military, are typically based on intelligence. Every State seeks to protect sources, means, and methods of intelligence collection. As Professor Michael Schmitt notes:

[T]he information necessary to establish the material facts will be extraordinarily sensitive. Releasing it may endanger lives of human sources, jeopardize ongoing intelligence operations of use in targeting the terrorists or foiling future attacks, surrender the element of surprise, and reveal critical information.²²⁹

Council, or even directly to the host State itself, detailing a general concern about the presence of the terrorist organization and the ongoing threat. *Id.*

²²⁶ SCHMITT, *supra* note 63, at 70–72.

²²⁷ Professor Moore Interview, *supra* note 9. If the injured State fails to warn the host State, the forces of the host State could attack the forces of the injured State, assuming that the use of force by the injured State violated international law. On the other hand, if the injured State provides proper warning to the host State, and the host State still attempts to interfere with the legitimate exercise of self-defense by the injured State, then the injured State can legitimately respond against host State forces. *Id.*

²²⁸ Brown, *supra* note 6, at 30. The danger with explaining, rather than warning, is that the host State may initially claim that the use of force by the injured State is illegal, and may attack injured State forces based on that declaration. The injured State cannot effectively claim that the host State should have known better than to interfere with the injured State's actions if the host State did not know why the injured State was using force within the territory of the host State. A failure to warn could result in the host State viewing the situation from a *jus ad bellum* perspective. *See* Schmitt, *supra* note 106, at 443.

²²⁹ SCHMITT, *supra* note 63, at 71.

All of this leaves open a question of evidence and proof—how much is necessary, how much must be shared with the general public vice being shared at high levels of government, and the global perception of using force based on secret evidence. Critics of the 2003 Iraq invasion cite Secretary of State Colin Powell’s speech before the U.N., and question what he knew and did not know.²³⁰

Turkey’s current operations in northern Iraq serve as an example of this as well. Although Turkey has provided general information concerning the threat posed by the Kongra-Gel, it has not provided the general public much specific information concerning that threat. Although it need not provide the public specific information, Turkey should be prepared to provide specific information in other forums, such as in a private meeting with Iraq, in front of the Security Council, or before the International Court of Justice, if required.²³¹

The difficulty lies in establishing the precise standard. Professor Schmitt suggests using a clear and compelling standard, mirroring the standard used by the United States prior to the invasion of Afghanistan.²³² However, he acknowledges that evidence might not be disclosed due to its sensitivity or, if disclosed, may be disclosed only “to the extent practicable in the circumstances.”²³³

²³⁰ See MICHAEL ISIKOFF & DAVID CORN, HUBRIS: THE INSIDE STORY OF SPIN, SCANDAL, AND THE SELLING OF THE IRAQ WAR 175–90 (2006) (detailing the lead-up to Secretary Powell’s speech); S. REP. NO. 108-301, at 365–70 (2004) (detailing the Senate hearing concerning the intelligence relied upon by Secretary Powell).

²³¹ *But see* Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 189–99 (Nov. 6) (establishing that the burden of proof falls on the party acting in self-defense, but not otherwise establishing the standard).

²³² SCHMITT, *supra* note 63, at 70 (citing the Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001) [hereinafter Negroponte Letter]). Professor Schmitt defines this standard as somewhere between a preponderance of the evidence and beyond a reasonable doubt. *Id.* at 69–70. In the Negroponte Letter, *supra*, Ambassador Negroponte simply stated that the United States had “clear and compelling information that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks.” Ambassador Negroponte did not provide any specifics on the information that linked Al-Qaeda to the attacks in that letter (although such information had arguably been provided earlier); the letter instead discussed the role of the Taliban as the de facto government in Afghanistan. Negroponte Letter, *supra*.

²³³ SCHMITT, *supra* note 63, at 70–71.

Dr. Sharp also believes that the information provided to the general public need only be general, and that the injured State has the right to protect its intelligence sources, means, and methodologies.²³⁴ In his view, the term “burden of proof” effectively has no meaning because the decision to use force is a political one. The threshold ultimately depends on the audience and the level of evidence necessary to persuade them, such as persuading the host State to allow intervention, or persuading the domestic population to allow for the use of military force.²³⁵

Although it may seem that warning the host State will hinder the injured State, this step has a positive side. The injured State is not limited to simply asking the host State to deal with the problem; the injured State can also ask the host State’s permission to act in its place, inside its territory.²³⁶ If the host State consents to the presence of law enforcement or military operations by the injured State, the analysis effectively ends.²³⁷ Consent eliminates the conflict between the injured State’s right of self-defense and the host State’s right of territorial integrity.²³⁸

Additionally, at this stage the injured State needs to determine whether the counter-terrorism operation will involve law enforcement, military force, or both. This determination is very fact dependent, both in terms of the situation faced and in terms of the capabilities of, and relationship with, the host State. If the injured State has good relations with the host State, and if the host State tends to follow the rule of law, then law enforcement is likely to be the most appropriate response.²³⁹ On the other hand, if the injured State does not have good relations with the host State, if the host State does not follow the rule of law, or if the

²³⁴ Dr. Sharp Interview, *supra* note 9.

²³⁵ *Id.* International courts have not established a clear level of proof. See *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, 189–99 (Nov. 6). The burden of proof in the domestic courts of injured States is also unclear. This raises the question, could the host State hold the injured State liable for damages caused by the injured State, should the intelligence turn out to be inaccurate? If the standard of proof is low, then liability may be necessary to limit pretextual uses of force; if high, however, such liability may not be necessary.

²³⁶ Dr. Sharp Interview, *supra* note 9; Professor Moore Interview, *supra* note 9.

²³⁷ Dr. Sharp Interview, *supra* note 9; Professor Moore Interview, *supra* note 9; G.A. Res. 56/83, *supra* note 67, Annex, art. 20; *Commentaries on State Responsibility*, *supra* note 131, at 72–74; SCHMITT, *supra* note 63, at 66.

²³⁸ Dr. Sharp Interview, *supra* note 9; Professor Moore Interview, *supra* note 9; G.A. Res. 56/83, *supra* note 67, Annex, art. 20; *Commentaries on State Responsibility*, *supra* note 131, at 72–74; Schmitt, *supra* note 106, at 455.

²³⁹ Dr. Sharp Interview, *supra* note 9.

host State lacks the capability to address the problem, then military force may be permissible.²⁴⁰

Returning yet again to your role as the Chief Executive, you have determined that military force is necessary to stop the terrorist threat. Your diplomatic personnel make contact with the host State, providing them with the necessary warnings and asking them either to act or to allow your personnel to act in their stead. Although the host State acknowledges the existence of the terrorists, they indicate that they are unable to police that portion of their country and unwilling to allow you to do so. The host State believes that the presence of your troops in their State would destabilize the political situation and could trigger riots or insurrection. This brings you to step four in the analysis; you must now determine whether your right of self-defense is subordinate or superior to the host State's right to territorial integrity.

VIII. Step Four: Use of Military Force in Self-Defense

At this stage in the hypothetical, let us assume that the injured State has sufficient intelligence to prove the existence and location of the terrorist threat, and you, as Chief Executive, have determined that the host State has the legal responsibility to prevent the type of attack that has occurred and is about to recur. You have also determined that the host State is unwilling or unable to comply with its international legal obligations, and that its breach of those obligations poses a continuing threat to your civilians. So which prevails—the right of self-defense, or the right of territorial integrity?

A. Authority to Use Military Force

As discussed earlier, Article 2(4) of the U.N. Charter prohibits “the threat or use of force against the territorial integrity or political independence of any state.”²⁴¹ A State's failure to fulfill its international obligations would not normally justify the use of military force against

²⁴⁰ *Id.*; see also MOORE & TURNER, *supra* note 86; Lietzau, *supra* note 85; Sharp, *supra* note 79, at 39.

²⁴¹ U.N. Charter art. 2, para. 4.

that State or within its territories.²⁴² In this situation, however, the host State's continuing breach poses a risk to the injured State. Based on the principle of self-defense, the injured State may use military force inside the territory of the host State to eliminate the threat.²⁴³ As Professor Schmitt discusses:

Lest the right to self-defense be rendered empty in the face of terrorism, in certain circumstances the principles of territorial integrity must yield to that of self-defense against terrorists.

. . . [T]he balancing of self-defense and territorial integrity depends on the extent to which the State in which the terrorists are located has complied with its own responsibilities vis-à-vis the terrorists.²⁴⁴

At this point, the problem can be approached in two possible ways. First, the failure of the host State to act could be viewed as de facto state sponsorship, a position espoused by Dr. Sharp.²⁴⁵ This approach follows the attribution models discussed earlier, and allows the injured State to use force against host State facilities and personnel, as well as against terrorist facilities and personnel.²⁴⁶ Despite some deterrent appeal, this course of action creates a greater risk of expanding the conflict beyond what is necessary to address the threat.²⁴⁷

Second, the injured State could rely on the host State's unwillingness or inability to address the threat, avoid the question of attribution, and simply act in place of the host State, limiting operations to terrorist targets only.²⁴⁸ This position better preserves the friendly relations between the injured and host States, while simultaneously retaining the ability of the injured State to act directly against the host State, if it

²⁴² *Id.*; see also G.A. Res. 2625 (XXV), *supra* note 12, at 122; *Commentaries on State Responsibility*, *supra* note 131, at 132–32; SCHMITT, *supra* note 63, at 43–44.

²⁴³ U.N. Charter art. 51; G.A. Res. 56/83, *supra* note 67, annex, art. 21; *Commentaries on State Responsibility*, *supra* note 131, at 74–75; SCHMITT, *supra* note 63, at 66.

²⁴⁴ SCHMITT, *supra* note 63, at 32.

²⁴⁵ Sharp, *supra* note 79, at 44.

²⁴⁶ *Id.* at 47.

²⁴⁷ SCHMITT, *supra* note 63, at 73.

²⁴⁸ Professor Moore Interview, *supra* note 9; SCHMITT, *supra* note 63, at 66; Paust, *supra* note 121, at 540.

actively interferes with the counter-terrorism operation.²⁴⁹ The proportionality analysis, discussed briefly in the next section, is also somewhat cleaner following this model.

The extent and duration of the use of military force by the injured State will depend on the circumstances. Regardless of whether the injured State views the lack of cooperation by the host State as de facto State-sponsorship, the injured State's military operations should demonstrate "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."²⁵⁰ Additionally, the actions of the injured State must not be "unreasonable or excessive."²⁵¹ These requirements are often expressed as a three-pronged test of necessity, proportionality, and imminency.²⁵² While a full analysis of the application of necessity, proportionality, and imminency is outside the scope of this article, a brief discussion places their role in the context of the suggested analysis.

B. Necessity, Proportionality, and Imminency

Employing the traditional view of necessity and imminency, the State was not supposed to take military action while other avenues of problem solving, such as diplomacy, still remained.²⁵³ Counter-terrorism operations face different challenges in adhering to these principles when the terrorist threat is hard to locate, often acts from within civilian population bases, and generally does not provide the warnings that tend to appear in more traditional armed conflicts, such as breaking off

²⁴⁹ Professor Moore Interview, *supra* note 9; SCHMITT, *supra* note 63, at 66–67; Müllerson, *supra* note 46, at 109–10, 122. This is another aspect to the requirement to warn. See *supra* note 225. If the injured State fails to warn the host State, the forces of the host State could attack the forces of the injured State, assuming that the use of force by the injured State was a violation of international law; in such situation, it would be hard for the injured State to successfully argue that the host State should not have interfered. On the other hand, if the injured State provides proper warning to the host State, and the host State still attempts to interfere with the legitimate exercise of self-defense by the injured State, then the injured State can legitimately respond against host State forces. Professor Moore Interview, *supra* note 9.

²⁵⁰ TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA, VOLUME 4, DOCUMENTS 80–121: 1836–1846, at 449 (Hunter Miller ed., 1934) (detailing the 1842 letter from Daniel Webster to Lord Ashburton regarding the *Caroline* incident).

²⁵¹ *Id.*

²⁵² Brown, *supra* note 6, at 38.

²⁵³ Schmitt, *supra* note 106, at 454.

diplomatic communications.²⁵⁴ Professor Schmitt expresses concern with this standard in that “acts of self-defence must occur only during the last feasible window of opportunity in the face of an attack that is almost certainly going to occur.”²⁵⁵ He further proposes an alternative method of evaluating the requirement for self-defense: “the confluence of an attacker’s capability and intent to conduct an attack with a defender’s last reasonable chance to foil an attack before it begins.”²⁵⁶ His proposed model recognizes the inherent difficulties in fighting a non-traditional enemy, and recognizes that the terrorist threat tends to model criminal activity with military effects.²⁵⁷

The current fight between the United States and al Qaeda provides a good example of the application of this model. Osama bin Laden made it clear as early as 1998 that al Qaeda intended to attack American targets.²⁵⁸ Some of al Qaeda’s pre-September 11th attacks on Americans, such as the bombing of the embassies in Kenya and Tanzania, provided evidence of its capability.²⁵⁹ Unfortunately, the true proof of al Qaeda’s capability to attack American targets was not presented until September 11th.²⁶⁰ Since then, many have questioned whether the United States had the opportunity to eliminate Osama bin Laden prior to September 11th, and if so, why the opportunity was not taken.²⁶¹ This hindsight view highlights a truism in counter-terrorism

²⁵⁴ *Id.* at 463–68; *see also* GANOR, *supra* note 34, at 6–8.

²⁵⁵ Schmitt, *supra* note 106, at 454.

²⁵⁶ *Id.*; *see also* Jane Dalton, *Panel V Commentary—The Road Ahead*, in 79 INTERNATIONAL LAW STUDIES 479 (Fred L. Borch & Paul S. Wilson eds., 2003) (discussing the use of indicators and past conduct to gauge the need for action).

²⁵⁷ *See* Schmitt, *supra* note 106, at 458–68 (discussing the asymmetric aspects of the war on terror).

²⁵⁸ Jerrold M. Post, *Killing in the Name of God: Osama Bin Laden and Al Qaeda*, in 18 COUNTERPROLIFERATION PAPERS FUTURE WARFARE SERIES 2002, at 8 (Nov. 2002), available at <http://www.au.af.mil/au/awc/awcgate/cpc-pubs/post.pdf>; THE 9/11 COMMISSION REPORT 47 (n.d.) [hereinafter 9/11 COMMISSION REPORT].

²⁵⁹ *See* Jamie McIntyre & Andrea Koppel, *U.S. Missiles Pound Targets in Afghanistan, Sudan*, CNN, Aug. 21, 1998, <http://www.cnn.com/US/9808/20/us.stoles/02/index.html?i ref=newssearch> (reporting on the link between the embassy bombings and al Qaeda, and subsequent cruise missile strikes); 2005 COUNTRY REPORTS, *supra* note 26, at 218 (detailing al Qaeda’s involvement in the bombings of the U.S. Embassies); S.C. Res. 1267, *supra* note 86, *chapeau* (directing that Osama bin Laden be turned over for prosecution for his involvement in the bombing of the U.S. Embassies).

²⁶⁰ *See* 9/11 COMMISSION REPORT, *supra* note 258. Although the entire report is devoted to the background and events of September 11th, chapter 9 focuses on the actual attacks. *Id.* at 278–323.

²⁶¹ *See id.* Chapter 4, in particular, looks at a number of pre-9/11 situations in which action could have been taken against Osama bin Laden. Although we cannot change the

operations: it is sometimes difficult to recognize a “final opportunity” when it appears, and States need to take advantage of these opportunities when they become available.²⁶² Based on the difficulty in establishing traditional necessity and immediacy principles with respect to terrorist threats, States should be able to rely to some degree upon the demonstrated capability and stated intent of the terrorist organization.²⁶³

Proportionality also poses some difficulties in counter-terrorism operations. The proportionality analysis in this context often depends on whether the attack has already taken place, or is merely imminent.²⁶⁴ If the attack is imminent, proportional force may be viewed as the force reasonably necessary to stop the attack, gauged against the likely severity of the attack.²⁶⁵ In the case of an actual attack, proportionality may be viewed in relation to both the actual damage from the terrorist attack, and the deterrence of future attacks by the terrorist organization.²⁶⁶ While military operations should focus on the current terrorist threat, dealing with imminent future threats is acceptable as well.²⁶⁷ “[W]hen a terrorist organization is responsible for an attack, a state may use counter-force not only against the individuals, but also against the entire organization.”²⁶⁸

past, we can look to the lessons contained in *The 9/11 Commission Report*, and apply Professor Schmitt’s formula to future opportunities to kill or capture terrorists, both operatives and leaders.

²⁶² Schmitt, *supra* note 106, at 454; NAT’L STRATEGY FOR COMBATING TERRORISM, *supra* note 4, 11–13. To put it another way—sometimes the best time to hit a moving target is when you have it in your sights. Dalton, *supra* note 256, at 478 (discussing the use of indicators and past conduct to gauge the need for action).

²⁶³ Schmitt, *supra* note 106, at 454. This argument seems to relax the traditional standards for the use of force in self-defense. However, its purpose is not to relax the standards, but to recognize the need for different methods and types of proof, and the need to tighten the observe-orient-decide-act loop when dealing with an imminent terrorist attack. Failure to act quickly can provide terrorist organizations sufficient freedom of maneuver to escape and go to ground. Worse, disrupting a terrorist organization’s base of operations will not necessarily prevent the imminent attack. Thus, this author recommend adopting some version of Professor Schmitt’s “final opportunity” model. *Id.*

²⁶⁴ SCHMITT, *supra* note 63, at 65–66; Müllerson, *supra* note 46, at 116–19, 122.

²⁶⁵ SCHMITT, *supra* note 63, at 65–66; Müllerson, *supra* note 46, at 116–19, 122; Brown, *supra* note 6, at 35.

²⁶⁶ SCHMITT, *supra* note 63, at 65–66; Brown, *supra* note 6, at 3–4, 35.

²⁶⁷ SCHMITT, *supra* note 63, at 65–66; Müllerson, *supra* note 46, at 116–19, 122; Brown, *supra* note 6, at 35.

²⁶⁸ Brown, *supra* note 6, at 3–4.

It is also critical to distinguish targeting host State's facilities and personnel from using force solely against the terrorist organization.²⁶⁹ If the host State has been warned, given the opportunity to address the problem, and fails to do so, then the injured State may act in self-defense against the terrorist threat, regardless of whether the actions of the terrorist organization are attributable to the host State.²⁷⁰ Under these circumstances, however, the injured State can use force only against terrorist facilities and personnel.²⁷¹ Host-state facilities and personnel are not lawful targets unless the injured State warns the host State, and the host State then attempts to interfere with the injured State's response to the terrorist threat.²⁷²

There are two primary exceptions to the prohibition against targeting host State facilities and personnel. First, if the lack of host State cooperation is viewed as *de facto* State sponsorship, then the injured State may target host State facilities and personnel as well as terrorist targets.²⁷³ In this situation, proportionality may also be gauged by the need to discourage future host State sponsorship of terrorism, or to encourage the host State to cooperate in counter-terrorism operations.²⁷⁴ Second, if the host State, having been warned of the injured State's actions and supporting reasons, nonetheless attacks the forces of the injured State, then the host State may be seen as supporting the terrorist organization or engaging in its own illegal act, instead of defending its territory.²⁷⁵ This would allow the injured State to defend itself against the attacking host State troops.²⁷⁶ It may also open the door to further attacks against host State forces to accomplish the counter-terrorism mission.²⁷⁷

²⁶⁹ Professor Moore Interview, *supra* note 9; Dr. Sharp Interview, *supra* note 9; Paust, *supra* note 121, at 540; Brown, *supra* note 6, at 17; Sharp, *supra* note 79, at 47.

²⁷⁰ SCHMITT, *supra* note 63, at 33; Müllerson, *supra* note 46, at 122.

²⁷¹ Professor Moore Interview, *supra* note 9; Dr. Sharp Interview, *supra* note 9; Paust, *supra* note 121, at 540; Brown, *supra* note 6, at 17; Sharp, *supra* note 79, at 47.

²⁷² Professor Moore Interview, *supra* note 9; Dr. Sharp Interview, *supra* note 9; Paust, *supra* note 121, at 540; Brown, *supra* note 6, at 17; Sharp, *supra* note 79, at 47.

²⁷³ Brown, *supra* note 6, at 17; Sharp, *supra* note 79, at 47; Müllerson, *supra* note 46, at 122.

²⁷⁴ SCHMITT, *supra* note 63, at 65–66; Müllerson, *supra* note 46, at 116–19, 122; Brown, *supra* note 6, at 3–4, 35.

²⁷⁵ SCHMITT, *supra* note 63, at 52–53; Sharp, *supra* note 79, at 47; Müllerson, *supra* note 46, at 122.

²⁷⁶ SCHMITT, *supra* note 63, at 52–53; Sharp, *supra* note 79, at 47; Müllerson, *supra* note 46, at 122.

²⁷⁷ SCHMITT, *supra* note 63, at 52–53; Sharp, *supra* note 79, at 47; Müllerson, *supra* note 46, at 122. An additional danger of both possibilities is mission creep, in which a

IX. Factual Predicates: Revisited

Returning to the hypothetical, the first question is whether or not the attacks by the Kongra-Gel and the Taliban may be considered armed attacks triggering Article 51. Although the Taliban has taken some reconciliation actions, “the Taliban-led insurgency remain[s] a capable and resilient threat to stability.”²⁷⁸ As discussed earlier, the Taliban continues to attack civilians.²⁷⁹ Similarly, continuing attacks by the Kongra-Gel into Turkey resulted in the Turkish Parliament authorizing the use of military force in northern Iraq.²⁸⁰ In both cases, Turkey and Afghanistan appear to be sufficiently justified to claim that they are the subject of armed attacks by terrorist organizations, thereby triggering their right of self-defense under Article 51.

Second is the question of the geographic nexus. Both Turkey and Afghanistan have provided some information to the general public expressing their belief as to the locations of terrorist threats.²⁸¹ Assuming, *arguendo*, that they have established the geographic nexus, international law in turn establishes the legal obligation on the part of the host States to prevent the commission of terrorist attacks from within their borders.²⁸²

Third, Afghanistan and Turkey have both warned host States concerning the presence of the terrorist threats. At this point the situations diverge. Although Afghanistan has alleged some level of

surgical strike operation enlarges significantly in scope, perhaps even rising to an attempt to impose political change on the host state. Depending on the circumstances, political change may be viewed as disproportionate, if not outright illegal. In addition, without indicators of an imminent attack, the use of force in a host state would violate Article 2(4). U.N. Charter art. 2(4); G.A. Res. 2625, *supra* note 12, at 122–23.

²⁷⁸ 2006 COUNTRY REPORTS—SOUTH AND CENTRAL ASIA, *supra* note 2; see Saleh Interview, *supra* note 2 (detailing his concerns about the current Taliban threat).

²⁷⁹ Saleh Interview, *supra* note 2.

²⁸⁰ 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3; Martin Fletcher & Suna Erdem, Interview with Recep Tayyip Erdogan, TIMES ONLINE, Oct. 21, 2007, <http://www.timesonline.co.uk/tol/news/world/europe/article2707933.ece> [hereinafter *Erdogan Interview*] (transcribing the *London Times* interview with Turkish Prime Minister Recep Tayyip Erdogan).

²⁸¹ Saleh Interview, *supra* note 2; Andrew Purvis & Pelin Turgut, *Bracing for a Turkish Strike in Iraq*, CNN, Oct. 17, 2007, <http://www.time.com/time/world/article/0,8599,1672508,00.html?xid=feed-cnn-topics>.

²⁸² G.A. Res. 2625 (XXV), *supra* note 12, at 122–23; G.A. Res. 49/60, at 5, U.N. Doc. A/RES/49/60 (Feb. 17, 1995); S.C. Res. 1373, *supra* note 12, ¶ 2(b); S.C. Res. 1566, *supra* note 12, ¶ 3.

Pakistani government involvement with the Taliban, it has continued to seek a diplomatic solution without sending troops into Pakistan.²⁸³ The failure of the Pakistani government to suppress the activities of the Taliban in the FATA may be seen as Pakistan's failure to live up to its international obligations. Given the history of the FATA, however, Pakistan faces enormous challenges in imposing any significant degree of control over that historically unstable area.²⁸⁴ The Pakistani government arguably has its own problems with the Taliban-al Qaeda alliance in Pakistan.²⁸⁵ Given the religious and political situation in Pakistan, the Pakistani government is not necessarily in a good position to invite non-Pakistani forces into Pakistan to assist in combating the Taliban, particularly Afghan troops, whose mere presence could easily be seen as an invasion. Just the same, failure to control the misuse of the FATA as a jumping-off point for terrorist attacks leaves Pakistan in breach of its international legal obligations, and leaves the door open for Afghanistan, or an ally tied to Afghanistan through a mutual security treaty, to use military force in Pakistan against the Taliban. Afghanistan remains, for the time being, at step three.

Turkey took a different tack, which carried them through to step four. It is clear that Iraqi President Jalal Talabani and Prime Minister Nouri al-Maliki, facing a situation in which many resources are tied up in national reconciliation and sectarian violence, may be unable to shift resources to suppress the Kongra-Gel in the largely autonomous regions of northern Iraq.²⁸⁶ Nonetheless, Iraq's failure to suppress the terrorist activities of the Kongra-Gel opens the door for Turkey to effect counter-terrorism operations of its own, including the use of military force in

²⁸³ *Saleh Interview*, *supra* note 2.

²⁸⁴ FATA DEVELOPMENT PLAN, *supra* note 17, at 5–6.

²⁸⁵ On 27 December 2007, Benazir Bhutto, recently returned from exile and considered a significant political opponent to President Musharraf, was assassinated. Naqvi, *Benazir Bhutto Assassinated*, *supra* note 14. Following Bhutto's assassination, opposition parties achieved staggering victories in the Parliamentary election. Reza Sayah, *Anti-Musharraf Parties to Form New Government*, CNN, Mar. 9, 2008, <http://www.cnn.com/2008/WORLD/asiapcf/03/09/pakistan/index.html?iref=newssearch> (detailing the current plan of the two opposition party leaders whose parties took more than half of the Pakistani Parliament seats in a recent election to work together).

²⁸⁶ See 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3; O'Toole, *supra* note 3; Hooper, *supra* note 31; *Iraq's PM Longs to Leave Office*, BBC, Jan. 3, 2007, http://news.bbc.co.uk/2/hi/middle_east/6226953.stm; Mohammed Tawfeeq & Joe Sterling, *In One Day, Bombings, Battles and Shooting Kill 48 in Iraq*, CNN, Mar. 12, 2008, <http://www.cnn.com/2008/WORLD/meast/03/11/iraq.main/index.html?iref=newssearch> (discussing a series of attacks which took place on Mar. 11, 2008).

self-defense, a position with which Turkey clearly concurs.²⁸⁷ In September and October 2007, Kongra-Gel forces, supposedly operating from within northern Iraq, again attacked Turkish forces.²⁸⁸ After negotiations with Iraq failed to resolve the situation, and without any further action by Iraq to deal with the terrorists, the Turkish Parliament voted overwhelmingly to authorize the use of military force in Iraq.²⁸⁹ Turkish Prime Minister Erdogan characterized the situation admirably, stating that “[t]he target of this operation is definitely not Iraq’s territorial integrity or its political unity. The target of this operation is the terror organisation based in the north of Iraq.”²⁹⁰

Following a series of airstrikes on Kongra-Gel positions, Turkey sent troops into Iraq to engage the terrorists directly.²⁹¹ This attack lasted approximately one week, after which Turkish troops withdrew.²⁹² The attacks appear to have been focused on terrorist facilities and personnel, and do not appear to have involved either Iraqi or coalition forces.²⁹³ Turkey’s actions in northern Iraq appear to have complied with the proportionality, necessity, and immediacy principles from the *Caroline* case, as well as with Professor Schmitt’s capability, intent, and final opportunity test.²⁹⁴

In the end, both Iraq and Pakistan provide examples of States that are unwilling or unable to act effectively against the terrorist organizations present within their borders. This failure opens the door for the use of military force in self-defense by Turkey and Afghanistan, respectively, regardless of whether the actions of the Taliban or Kongra-Gel may be

²⁸⁷ *Erdogan Interview*, *supra* note 280.

²⁸⁸ Purvis & Turgut, *supra* note 281.

²⁸⁹ *Erdogan Interview*, *supra* note 280.

²⁹⁰ *Id.*

²⁹¹ *Turkish Copters Pound Kurd Rebels*, CNN, Oct. 30, 2007, <http://www.cnn.com/2007/WORLD/meast/10/30/turkey.kurds.ap/index.html?iref=newssearch>; *Turkey Sends More Troops Into Iraq*, CNN, Feb. 27, 2008, <http://www.cnn.com/2008/WORLD/meast/02/27/turkey.iraq/index.html>.

²⁹² *Iraq Incursion Finished, Turkey Says*, CNN, Feb. 29, 2008, <http://www.cnn.com/2008/WORLD/meast/02/29/iraq.main/index.html>; Mohammed Tawfeeq & Talia Kayali, *Turkish Troops Shell Northern Iraq*, CNN, Mar. 5, 2008, <http://www.cnn.com/2008/WORLD/meast/03/05/turkey.iraq/index.html?iref=newssearch>.

²⁹³ *Iraq Incursion Finished, Turkey Says*, *supra* note 292.

²⁹⁴ Although debatable, Turkey appears to believe it met the final opportunity test. Jomana Karadshah et al., *Turkey “Can’t Wait Forever” on PKK*, CNN, Oct. 23, 2007, available at http://paperdragon.newsvine.com/_news/2007/10/24/1045933-turkey-cant-wait-forever-on-pkk-.

attributed to the host States.²⁹⁵ Although the Security Council has acted under Chapter VII in the past, and will likely do so in the future, neither Turkey nor Afghanistan has lost its inherent right of self-defense under Article 51. This right does not, however, give them an open license to invade northern Iraq or western Pakistan and engage in extended “hunting expeditions”; any military operations must comply with the basic requirements of proportionality, necessity and immediacy, and their forces must withdraw once the objectives are met.²⁹⁶

X. Conclusion

States have a responsibility to protect their citizens from terrorist attacks. For purposes of analyzing the right of self-defense against a terrorist organization, it is immaterial whether the terrorist attack originates with a State or a non-State actor, nor does it matter whether the actions of a non-State actor can be attributed to the host State itself. To require otherwise would leave the citizens of the injured State unprotected from a wide variety of threats that could arise simply because a host State turns a blind eye to the terrorist threats within its borders. This unacceptable answer calls to Professor Moore’s mind “a comment made by former U.S. Secretary of State Dean Acheson that the ‘law is not a suicide pact.’”²⁹⁷ The U.S. *National Strategy for Combating Terrorism* discusses this point as well, stating that “[a] government has no higher obligation than to protect the lives and livelihoods of its citizens.”²⁹⁸

Host States are responsible for preventing the commission of terrorist attacks from within their borders. If they cannot live up to this responsibility, their failure to do so may trigger the injured State’s right of self-defense under Article 51 of the U.N. Charter. As the suggested analysis details, the injured State, having determined that the terrorist threat constitutes an armed attack, and having determined the geographic nexus, should then provide the host State with some warning and opportunity to respond to the problem. This overcomes the prohibition against the use of force under Article 2(4) of the U.N. Charter, because

²⁹⁵ Dr. Sharp Interview, *supra* note 9; Professor Moore Interview, *supra* note 9; SCHMITT, *supra* note 63, at 33.

²⁹⁶ SCHMITT, *supra* note 63, at 33.

²⁹⁷ MOORE & TURNER, *supra* note 86, at 490.

²⁹⁸ NAT’L STRATEGY FOR COMBATING TERRORISM, *supra* note 4, at 11.

the host State must then address the problem, provide consent for the injured State to act inside its territory, or subordinate its right of territorial integrity to the injured State's right of self-defense. If the host State cannot or will not resolve the problem or allow the injured State to act inside its borders, then the injured State may act without the host State's consent, provided their actions comply with the basic requirements of proportionality, necessity, and immediacy.

As current events have shown, Afghanistan and Turkey have reached this conclusion. Afghanistan relied mostly on diplomatic efforts to get Pakistan to engage the Taliban, with some limited use of force by allies on its behalf, while Turkey, having determined that Iraq either cannot or will not resolve the problem of the Kongra-Gel in northern Iraq, has engaged in much larger scale uses of military force. In both cases, Turkey and Afghanistan, as injured States, are applying what should be the model for the use of military force in counter-terrorism operations, a model that falls within the scope of current international law.