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A Critical Overview of International Law With Regard to the Problem of
Terrorism in the Aftermath of the September 11, 2001 Terrorist Attacks

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**“A CRITICAL OVERVIEW OF INTERNATIONAL LAW WITH
REGARD TO THE PROBLEM OF TERRORISM IN THE
AFTERMATH OF THE SEPTEMBER 11, 2001
TERRORIST ATTACKS”**

by

Joon Hyuk Yoon

Thesis submitted to the Faculty of Law of the University of Ottawa

in partial fulfilment of the requirements

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Joon Hyuk Yoon
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ABSTRACT

The terrorist attacks of September 11, 2001 have dramatically shaken world order and altered our perception of terrorism as being a serious threat to the national security of any State. These events are unprecedented in modern history, first, by their sheer magnitude and destructiveness, and also because of the suicidal fanaticism of its perpetrators. Nevertheless, there is a need to explore and analyze some of the international legal issues with regard to the problem of terrorism, especially in the aftermath of the September 11 events. To achieve this, the thesis will first examine the historical and definitional background of the problem of international terrorism. It will then explore the thorny subject of terrorism and State responsibility in order to determine under what circumstances can a State be held internationally liable for the commission of a terrorist act. Finally, in the last part of the thesis, the issue of self-defence against terrorist attacks will be thoroughly analyzed.

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INTRODUCTION

On a calm morning of September 11, 2001, four commercial jetliners were hijacked over the skies of eastern United States. Their cockpits were taken over by Middle Eastern terrorists in an apparent suicide mission. The hijacked aeroplanes were subsequently diverted from their flight paths and two of them crashed at both towers of the World Trade Center in New York City. In a matter of hours, the two towers of the World Trade Center imploded, taking with them thousands of lives. These attacks totally paralysed the city of New York, if not the entire United States of America. Commercial flights were grounded; the financial markets were closed; and the general public was in a state of total panic. The immediate economic loss of the towers' collapse was estimated to be in the billions of dollars. But the attacks did not end with the collapse of the Twin Towers. A third jetliner crashed against the Pentagon, symbol of American military power, taking with it more than two hundred or so lives. The fourth jetliner was also bound to Washington D.C., either the White House or the Capitol, but crashed somewhere in Pennsylvania¹.

¹For a detailed account of the events of September 11, 2001, see generally: Sean D. Murphy, "Contemporary Practice of the United States Relating to International Law: Terrorist Attacks on World Trade Center and Pentagon" (2002) 96 Am. J. Int'l L. 237; *Inside 9-11*, The Editors of *Der Spiegel* (New York: St. Martin Press, 2002); *The Age of Terror: America and the World After September 11*, Strobe Talbott & Nayan Chandra (eds.) (New York: Basic Books, 2001); *How did this Happened? Terrorism and the New War*, Gideon Rose & James F. Hoge Jr. (eds.) (New York: Public Affairs, 2001); "Hijacked Airlines Strike at the Heart of America", 12 September 2001, online at <www.janes.com> (Date accessed: May 8, 2002); "September 11: Chronology of Terror", online at <www.cnn.com> (Date accessed: May 1, 2002); "Special Report: September 11, 2001 Terrorist Attacks", online at <www.airdisaster.com> (Date accessed: May 1, 2002); "The September 11 Digital Archive", online at <www.911digitalarchive.org> (Date accessed: May 1, 2002); "The United States and the Global Coalition Against Terrorism: September-December 2001: A Chronology", 26 December 2001, United State Department of State, online at <www.usinfo.state.gov> (Date accessed: May 1, 2002).

Right after the attacks of September 11, President George W. Bush declared that these attacks were not merely terrorist acts, but “acts of war” against the United States². The American President stated that these attacks represented an affront to freedom itself³ and that the United States would do everything that is necessary in order to defend itself and bring those responsible to justice⁴. Bush vowed that in its “war on terrorism”, the United States would make no difference between those who plan and carry out acts of terrorism and those who harbour them⁵. He particularly warned the Taliban regime in Afghanistan of forceful repercussions if Osama bin Laden, the main suspect behind these attacks, was not extradited or delivered to the United States. However, the Taliban simply refused to hand over bin Laden⁶.

On October 7, 2001, the United States launched military strikes with cruise missiles and heavy bombers against Al Qaeda and Taliban targets in Afghanistan. The Afghan Northern Alliance took this opportunity to militarily exploit the situation and soon the Taliban regime

²“President Denounces Terrorists Attacks in New York and Washington. Transcript: President Bush Address to the Nation”, September 11, 2001, online at <www.usinfo.state.gov> (Date accessed: April 19, 2002)

³*Address to a Joint Session of Congress and the American People*, September 20, 2001, The White House, Office of the Press Secretary, online at <www.usinfo.state.gov> (Date accessed: March 29, 2002)

⁴Ibid.

⁵Some right-wing commentators have criticized Bush’s inconsistent standing in the war on terrorism against Al Qaeda and his approach of the Israeli-Palestinian conflict. Most notably, they pretend that the United States should unconditionally support Israel and treat the Palestinians in the same way as the Taliban and Al Qaeda. See: Gary L. Bauer, “Christian Right Teams with Israel”, *American Values*, April 11, 2002, online at <www.freerepublic.com> (Date accessed: May 7, 2002); “Bush’s ‘Terror Doctrine’ Doesn’t Fit Palestinians”, *USA Today*, April 2, 2002, online at <www.usatoday.com> (Date accessed: May 7, 2002); Howard Gleckman, “Bush’s Mideast Bungle”, *Businessweek*, April 2, 2002, online at <www.businessweek.com> (Date accessed: May 7, 2002).

⁶Rajiv Chandrasekaran, “Taliban Refuses to Surrender bin Laden: U.S. Develops Options for Military Action”, *Washington Post*, September 19, 2001, at A1

collapsed and its operatives retreated to the mountains and caves of the Hindu Kush. Subsequently, Western ground forces joined the campaign and were soon embarked on a ground invasion. At the time of writing this thesis, Western nations were continually engaging in military operations against Taliban and Al Qaeda operatives in the rugged mountains of Afghanistan. Some commentators and politicians were even advocating the expansion of the “war on terrorism” against other countries, the so-called “axis of evil”⁷.

The terrorist attacks of September 11 in New York City and Washington D.C. have dramatically shaken world order and our perception of terrorism as a substantial and credible threat to the national security of any nation-State. It is true that terrorism itself has always existed and the problem is not new. But the terrorist attacks of September 11 merit special attention because of their sheer magnitude and barbarity, and also because these attacks appeared to have been carried out by a non-State actor (that is, the Al Qaeda terrorist organization), that may have planned, organized and financed key aspects of its activities in various States⁸. In fact, the attacks of September 11 cannot accurately be described as either an inter-State armed conflict or an internal armed conflict, but as a case where a group of individuals belonging to a non-State entity, and based in various States, have launched an attack against the United States⁹.

⁷The words “axis of evil” derive from President Bush’s speech to the United States Congress on January 29, 2002, referring to those regimes (particularly those of Iran, Iraq and North Korea) that are hostile to America’s global interests. Some commentators have referred this as the new “Bush Doctrine”. See: “President Bush’s State of the Union Address”, January 29, 2002, The White House, Office of the Press Secretary, online at <www.usinfo.state.gov> (Date accessed: May 1, 2002)

⁸Robert K. Goldman, “Certain Legal Questions and Issues Raised by the September 11th. Attacks” (2001) 9 Human Rights Brief 2, at p. 2

⁹John Cerone, “Acts of War and State Responsibility in ‘Muddy Waters’: The Non-State Actor Dilemma” in *Terrorist Attacks on the World Trade Center and the Pentagon*, ASIL Insight, September 2001, online at <www.asil.org> (Date accessed: April 25, 2002)

Despite the so-called “war on terrorism” unleashed by the United States and its allies against the Taliban and Al Qaeda, there seems to be no easy solution for the eradication of the scourge of terrorism on the international scene. On the contrary, there are several specific reasons to believe that international terrorism will increasingly constitute an important aspect of inter-State relations. First, as evidenced by the attacks of September 11, terrorist incidents have been relatively successful “in attracting publicity, disrupting the activities of government and business, and causing significant death and destruction”¹⁰. Secondly, the material availability of arms, supplies, financing, and secret communications makes terrorism an attractive venue for clandestine groups, such as the Al Qaeda organization, to further pursue their objectives¹¹. Third, there already exists a sophisticated international support network of groups and States which greatly facilitates the undertaking of terrorist activities¹². In addition, the lack of effective suppression mechanisms on the part of many States resulting from severe budgetary constraints on their security apparatus or “an abiding regard in democratic countries for the individual’s right not to be subject to arbitrary surveillance, search and seizure, seem to guarantee that terrorist incidents will continue to be perpetrated in the future”¹³.

This thesis has for objective the exploration and analysis of some of the issues arising in public international law with regard to the problem of terrorism, especially in the aftermath of the attacks of September 11. To achieve this, the thesis has been divided in three major parts. Part I gives a brief historical and definitional background of the problem of terrorism. It mainly states

¹⁰Yonah Alexander, “Terrorism in the Twenty-First Century: Threats and Responses” (1999/2000) 12 DePaul Bus. L. J. 59, at p. 79

¹¹Ibid.

¹²Ibid.

¹³Lyal S. Sunga, *The Emerging System of International Criminal Law* (The Hague: Kluwer Law International, 1997), at p. 194

that a normative formulation of the word “terrorism” is a difficult one since there has been no international consensus on what terrorism is. In fact, the subjective nature of terror renders the search for a universal definition of terrorism into some kind of a “quest for the Holy Grail”¹⁴. On the other hand, various international legal instruments have severely condemned the commission of certain specific criminal acts, such as aircraft hijacking, taking innocent hostages or the perfidious bombings of civilian targets. These documents recognize the commission of such acts as acts of terrorism. Part II explores the thorny subject of terrorism and State responsibility and determines under what circumstances a State can be held internationally liable for the commission of a terrorist act. Generally, a State will be exonerated from responsibility if there is no State involvement, or at least if that involvement cannot be clearly traced and established through unequivocal factual elements. On the other hand, responsibility could be inferred if a State willingly provides weapons, training and sanctuary to terrorists and this facilitates them in carrying out their subversive operations. Part III points out the preliminary obligation of States to solve any dispute amongst themselves in a peaceful manner. Indeed, if a State is victim of terrorist attack, it must first consider whether measures short of armed force, such as diplomatic protests or economic sanctions, can be more effective and appropriate than having a direct recourse to military force. It also explains whether a terrorist act constitutes an armed attack in the sense of Article 51 of the United Nations Charter and elaborates on the right to self-defence that a State could have recourse to against the different types of terrorist targets or the States that actively sponsor them. The thesis explains that in some instances, self-defensive measures could be deemed appropriate as long as it is necessary and proportional to the original aggression. But it is important to note also that any measure that goes beyond what is imposed by international law can carry “the danger of raising anti-terrorist activities to the level of unrestrained violence

¹⁴G. Levitt, “Is ‘Terrorism’ Worth Defining?” (1986) 13 Ohio N. U. L. Rev. 97, at p. 97

and moving the responses beyond the legal limits of self-defence"¹⁵. Finally, due to the limitations imposed on it, the thesis has deliberately omitted most of the international humanitarian aspects of the war on terrorism¹⁶ or the impact of domestic counter-terrorist legislation on human rights and civil liberties¹⁷.

¹⁵Oscar Schachter, "The Extraterritorial Use of Force Against Terrorist Bases" (1989) 11 *Houston J. Int'l L.* 309, at p. 316

¹⁶For an in-depth discussion on the issue of captured Taliban and Al Qaeda fighters being considered prisoners of war and the legality of the establishment of military tribunals to try suspected terrorists, see: Kenneth Anderson, "What to Do With bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base" (2002) 25 *Harv. J. L. & Pub. Pol'y* 591; Juan R. Torruella, "On the Slippery Slopes of Afghanistan: Military Commissions and the Exercise of Presidential Power" (2002) 4 *U. Pa. J. Const. L.* 648; Dary A. Mundis, "The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts" (2002) 96 *Am. J. Int'l L.* 320; Ruth Wedgwood, "Al Qaeda, Terrorism, and Military Commissions" (2002) 96 *Am. J. Int'l L.* 328; Harold Hongju Koh, "The Case Against Military Commissions" (2002) 96 *Am. J. Int'l L.* 337; Joan Fitzpatrick, "Jurisdiction of Military Commissions and the Ambiguous War on Terrorism" (2002) 96 *Am. J. Int'l L.* 345; Michael J. Matheson, "U.S. Military Commissions: One of Several Options" (2002) 96 *Am. J. Int'l L.* 354; Sean D. Murphy, "Decision Not to Regard Persons Detained in Afghanistan as POWs" (2002) 96 *Am. J. Int'l L.* 475

¹⁷On the issue of terrorism and civil liberties, see: Philip B. Heymann, "Civil Liberties and Human Rights in the Aftermath of September 11" (2002) 25 *Harv. J. L. & Pub. Pol'y* 440; Viet D. Dinh, "Freedom and Security After September 11" (2002) 25 *Harv. J. L. & Pub. Pol'y* 399; Emanuel Gross, "Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights" (2001) 6 *UCLA J. Int'l L. & Foreign Aff.* 89; Emanuel Gross, "Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights versus the State's Duty to Protect its Citizens" (2001) 15 *Temp. Int'l & Comp. L. J.* 195; Frédéric Megret, "War? Legal Semantics and the Move to Violence" in *European Journal of International Law*, online at <www.ejil.org> (Date accessed: August 1, 2002), at p. 7-9

I) BACKGROUND

A) THE PROBLEM OF TERRORISM

1) History of Terrorism

The roots of terrorism can be traced to ancient times. For instance, it is well-known that terroristic tactics were used by Jewish extremists, known as Zealot Sicarii, against the Romans in Palestine, as well as by the Hashashins¹⁸ against the invading Crusaders in the late Middle Ages¹⁹. From the sixteenth to late eighteenth centuries, various European naval powers employed pirates to terrorize the seas, not only for the purpose of looting and pillaging, but also to advance specific foreign policy objectives²⁰. During the French revolution, the Jacobin government instituted a *règne de la terreur* over the populace by executing political opponents and confiscating their property²¹. In the early XXth century, some terrorist acts became catalysts of major historical events, most notably the murder of Austrian Archduke Francis Ferdinand in

¹⁸The modern word “assassin” derives from the Arabic *hashashin*, which literally means hashish-eater. The Hashashins belonged to a sectarian group of Muslims who were, in many instances, under the influence of hashish or other drugs, employed by their leaders to spread terror in the form of murder and destruction among religious enemies. See: Cindy C. Combs, *Terrorism in the Twenty-First Century* (New Jersey: Prentice Hall, 1997), at p. 21

¹⁹Yonah Alexander, “Terrorism in the Twenty-First Century: Threats and Responses”, *supra*, note 10, at p. 65

²⁰*Ibid.*

²¹See: Donald Kagan, Steven Ozment & Frank M. Turner, *The Western Heritage* (New York: Macmillan Publishing, 1991), at p. 679 et ss.; Joaquin Alcaide Fernandez, *Las actividades terroristas ante el derecho internacional contemporaneo* (Madrid: Tecnos, 2000), at p. 56

Sarajevo which drew the major European powers into World War I²². But it was not until the assassination of King Alexander I of Yugoslavia and French foreign minister Louis Barthou on October 9, 1934 that the international community felt the need to elaborate on a multilateral treaty for the prevention and suppression of terrorist activities²³. However, this latter initiative never materialized²⁴.

During the Cold War, the issue of terrorism was reflected in the bipolar rivalry between the United States and the Soviet Union. Both superpowers would blame each other for supporting and engaging in terrorist activities²⁵. Indeed, terrorist tactics were often used (and are still being used to a large extent) in the various struggles of peoples for freedom or self-determination, as evidenced by the present conflicts in Africa, Latin America, the Middle East and South Asia²⁶.

Although today the Cold War is over, the scourge of terrorism constitutes more than ever a threat to international peace and security. As evidenced by the attacks of September 11, the most significant challenges that evolve from modern day terrorism are not only those relating to the safety and welfare of ordinary civilians, but also “the stability of the State system, the health of economic development, the expansion of democracy, and possibly the survival of civilization

²²Yonah Alexander, “Terrorism in the Twenty-First Century: Threats and Responses”, *supra*, note 10, at p. 66

²³Joaquin Alcaide Fernandez, *Las actividades terroristas ante el derecho internacional contemporaneo*, *supra*, note 21, at p. 28

²⁴*Ibid.*

²⁵Louis René Beres, “The Meaning of Terrorism - Jurisprudential and Definitional Clarifications” (1995) 28 *Vanderbilt J. Transnat’l L.* 239, at p. 248

²⁶Lyal S. Sunga, *The Emerging System of International Criminal Law*, *supra*, note 13, at p. 192

itself”²⁷. However, the difficulty has always resided in the meaning and the normative conceptualization of the word “terrorism”.

2) Definition of Terrorism

The framing of a legally coherent definition of terrorism in international law has always remained extremely difficult. Historically, the use of the term “terrorism” has been so broad and so imprecise that it has embraced “even the most discrepant activities”²⁸ of a political or social nature. Even to these days, the term is often used in a pejorative sense, “attached as a label to those groups whose political objectives one finds objectionable”²⁹. It is not surprising therefore that, as far as international law is concerned, no single uniform definition of terrorism has been agreed upon in any comprehensive multilateral treaty³⁰.

The first attempt to define “terrorism” was in the 1937 Draft Convention on Terrorism³¹. This Convention described terrorism as a criminal act “directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons, or the general public”³². However, this Convention was ratified by only one entity (the Indian

²⁷Yonah Alexander, “Terrorism in the Twenty-First Century: Threats and Responses”, *supra*, note 10, at p. 66

²⁸Louis René Beres, “The Meaning of Terrorism - Jurisprudential and Definitional Clarifications”, *supra*, note 25, at p. 240

²⁹Cindy C. Combs, *Terrorism in the Twenty-First Century*, *supra*, note 18, at p. 5

³⁰Oscar Schachter, “The Extraterritorial Use of Force Against Terrorist Bases”, *supra*, note 15, at p. 309

³¹*League of Nations Documents*. C.94.M.47.1938.V & C.222.M.162.1937.V.7

³²Georg Schwarzenberger, *International Law and Order* (London: Stevens & Sons, 1971), at p. 222

Dominion) and never came into force³³. It is said that the failure of the latter Convention was due to the fact that “a number of States were reluctant to ratify because of the breadth of its definition of terrorism”³⁴.

Presently, the difficulty of framing an inclusive and acceptable definition of terrorism is reflected in the formulation of various international legal instruments relating to the commission of certain criminal acts. For instance, the Convention for the Suppression of the Financing of Terrorism³⁵ provides an indirect definition of terrorism. Article 2 of this Convention states that any person commits an offence within the meaning of this Convention if that person by any means provides or collects funds in order to carry out:

- a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex³⁶; or

³³John F. Murphy, “Defining International Terrorism: A Way Out of the Quagmire” (1989) 19 Israel Yb. Hum. Rts. 13, at p. 15

³⁴*Ibid.*

³⁵*International Convention for the Suppression of the Financing of Terrorism*, UNGA, 9 December 1999, Res. A/RES/54/109

³⁶Those treaties are: *Convention for the Suppression of Unlawful Seizure of Aircraft*, done at The Hague on 16 December 1970, (1971) 860 UNTS 105; *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, done at Montreal on 23 September 1971, (1971) 974 UNTS 177; *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, adopted by the General Assembly of the United Nations on 14 December 1973, (1977) 1035 UNTS 167; *International Convention against the Taking of Hostages*, adopted by the General Assembly of the United Nations on 17 December 1979, (1983) 1316 UNTS 205; *Convention on the Physical Protection of Nuclear Material*, adopted at Vienna on 26 October 1979, (1987) 1456 UNTS 124; *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, done at Montreal on 24 February 1988, (1990) 1589 UNTS 474; *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, done at Rome on 10 March 1988, (1992) 1678 UNTS 221; *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf*, done at Rome on 10 March 1988 (1992) 1678 UNTS 304; *International Convention for the Suppression*

b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act³⁷.

Equally, Resolution 40/61 of the General Assembly loosely defines terrorism as all those acts “which endanger or take innocent human lives, jeopardize fundamental freedoms, and seriously impair the dignity of human beings”³⁸. This Resolution further recalls the existence of international treaties and conventions relating to various aspects of the problem of international terrorism³⁹. Various States have also defined terrorism through their own domestic legislation⁴⁰. For instance, the United States defines terrorism as “premeditated, politically motivated violence perpetrated against non combatant targets by subnational groups or clandestine agents”⁴¹. For its part, Canada defines terrorism as “any act or omission committed by a person or a group of persons for a political or ideological purpose that intentionally causes death or serious bodily

of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997, Doc. A/RES/52/164.

³⁷*International Convention for the Suppression of the Financing of Terrorism*, supra, note 35, at Articles 2 (a) & (b)

³⁸*Measures to Prevent International Terrorism Which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms and Study of the Underlying Causes of Those Forms of Terrorism and Acts of Violence which Lie in Misery, Frustration, Grievance and Despair and Which Cause Some People to Sacrifice Human Lives, Including their Own, in an Attempt to Effect Radical Changes*, Res. 40/61, UNGA, 9 December 1985, UN Doc. A/40/53/(1985), at (1986) 25 I.L.M. 239

³⁹These are the same treaties and conventions listed in note 36.

⁴⁰See generally: Alex P. Schmid & Albert J. Jongman, *Political Terrorism* (Amsterdam: North Holland, 1988), at p. 32-38

⁴¹22 *United States Code*, (1994), at Section 2656 f(d)(2)

harm to a person by the use of violence”⁴². Furthermore, in *Suresh v. Canada*, the Supreme Court of Canada stated that the term “terrorism” provides a sufficient basis for adjudication and hence is not “unconstitutionally vague”⁴³. In this case, the Supreme Court adopted the definition formulated in the International Convention for the Suppression of the Financing of Terrorism referred to above⁴⁴. However, the Court stated that it was not persuaded of the necessity or advisability to altogether “eschew a stipulative definition of the term in favour of a list that may change over time and that may in the end necessitate distinguishing some acts from others by reliance on a term like terrorism”⁴⁵.

Various authors have also defined terrorism in their own words. For instance, Bassiouni defines terrorism as “a strategy of violence designed to instill terror in a segment of society in order to achieve a power-outcome, propagandize a cause, or inflict harm for vengeful political purposes”⁴⁶. For its part, Sunga argues that acts of terrorism “involve the premeditated use or threat of violence calculated to create a climate of fear with a view to provoking the government into overreaction, or to intimidate the government or a section of the population into changing a particular policy or course of action”⁴⁷. Reisman notes that terrorism, like any other form of political violence, has three main characteristics: “an immediate effect of killing or injuring people, who are deemed, either for all purposes or in that context, to constitute an internationally

⁴²*Antiterrorism Act*, S.C. 2001, 49-50 E. II, Chap. 41, at Section 83.01

⁴³*Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 1, at p. 43

⁴⁴*Ibid.*, at p. 45 & 46

⁴⁵*Ibid.*, at p. 45

⁴⁶M. Cherif Bassiouni, “Legal Control of International Terrorism: A Policy-Oriented Assessment” (2002) 43 Harv. Int’l L. J. 83, at p. 84

⁴⁷Lyal S. Sunga, *The Emerging System of International Criminal Law*, *supra*, note 13, at p. 191

prohibited target; an intermediate effect of intimidating a larger number of people and thereby influencing their political behaviour and that of their government; and an aggregate effect of undermining inclusive public order”⁴⁸.

From such formulations, one could conclude that terrorism generally involve the commission of a serious criminal act for the pursuance of a political or ideological objective. The terrorist act is always a conspicuous and violent one, which is often (but not always) intended to focus public attention and coerce a State or a group of people to behave in a particular manner⁴⁹. Motive, whether political, religious or ideological, is the primal element of terrorism. Therefore, the commission of criminal acts for purely pecuniary reasons or for other private motives (for instance, hijacking an aircraft to solely demand ransom money) would not be considered terrorist acts⁵⁰.

Although terrorist acts are usually perpetrated by non-State groups or organizations, it would not be accurate to affirm that terrorism exclusively belongs to the realm of non-State actors. States themselves may utilize terrorist agents or perform terrorist acts by their own

⁴⁸Michael Reisman, “International Legal Responses to Terrorism” (1999) 22 Houston J. Int’l L. 3, at p. 7

⁴⁹“The Origins and Fundamental Causes of International Terrorism” in *International Terrorism and Political Crimes*, M. Cherif Bassiouni (ed.) (Springfield: Charles C. Thomas Pub., 1975), at p. 6

⁵⁰Oscar Schachter, “The Extraterritorial Use of Force Against Terrorist Bases”, *supra*, note 15, at p. 309

officials⁵¹. The latter is commonly referred to as “State terrorism”⁵². As a matter of fact, terrorist tactics have been widely used by certain governments to eliminate political opposition, consolidate power, justify an illegal occupation, or simply to convey fear among the subjected populace⁵³. Also, during the course of an armed conflict, legitimate belligerents may often have recourse to terrorist acts⁵⁴. For instance, a government force or an armed opposition group may use terrorist tactics, “directly or through proxies, as a way of weakening an adversary; distracting its attention and resources; undermining a policy it pursues; communicating an unwillingness to

⁵¹See generally: Joaquin Alcaide Fernandez, *Las actividades terroristas ante el derecho internacional contemporaneo*, supra, note 21, at p. 54; Alex P. Schmid & Albert J. Jongman, *Political Terrorism*, supra, note 40, at p. 72-79; Harry Henderson, *Global Terrorism* (New York: Checkmark Books, 2001), at p.5; Cindy C. Combs, *Terrorism in the Twenty-First Century*, supra, note 18, at p. 76 et ss.

⁵²The United Nations General Assembly has not only condemned terrorism in general, but also the practice of State terrorism:

“...State terrorism has lately been practised ever more frequently in relations between States and that military and other actions are being taken against the sovereignty and political independence of States and the self-determination of peoples.

Noting that all this seriously endanger the independent existence of States and the possibility of ensuring peaceful relations and mutual trust between them and leads to a sharp exacerbation of tensions and a growing threat of war”.

See: *Inadmissibility of the Policy of State Terrorism and any Actions by States Aimed at Undermining the Socio-Political System in Other Sovereign States*, UNGA, 17 December 1984, Res. A/RES/39/159

⁵³During the recent meeting of the Organization of the Islamic Conference, Malaysian Foreign Minister Syed Hamid Albar voiced the following opinion with regard to Israel’s ongoing military actions in Palestine:

“The Israeli military action clearly demonstrates the practice of State terrorism. We have urged the international community to assume its responsibility in putting an end to the Israeli military aggression and have called for the immediate and total withdrawal of all Israeli military forces from the occupied territories”.

See: Ron Synovitz, “World: Islamic Conference Fails To Define ‘Terrorism’, Condemns Israel”, 3 April 2002, Radio Free Europe, online at <www.rferl.org> (Date accessed: May 23, 2002)

⁵⁴Joaquin Alcaide Fernandez, *Las actividades terroristas ante el derecho internacional contemporaneo*, supra, note 21, at p. 31

acquiesce in a policy that the target is pursuing; or raising the cost of the pursuit of that policy”⁵⁵.

On the other hand, there exists a theoretical distinction between terrorism and conventional warfare. Wedgwood differentiates terrorism and conventional warfare in the following manner:

“Modern terrorism has salient differences from traditional warfare. The actors are often not States, but rather ideological, political, or ethnic factions. States have a host of international commitments and aspirations that create an incentive to avoid all-out warfare and to avoid undermining the rules of war, while a single-purpose terrorist organization may operate without mitigation. A terrorist group often calculates that it will win attention for its cause and undermine a target government by the very atrocity of its tactics. A terrorist group is less vulnerable to international sanctions, as it does not possess a visible economy, land area, or identified population. With an uncertain membership and inchoate form, terrorist networks lie outside the web of civil responsibility that constrains private and public actors in international society”⁵⁶.

Nonetheless, terrorism can occur (and it often does) in any armed conflict where basic human rights are grossly violated⁵⁷. It is said that terrorist acts (whether committed by insurgents or by government agents) are unlawful under the laws of armed conflict⁵⁸, either because of their

⁵⁵Michael Reisman, “International Legal Responses to Terrorism”, *supra*, note 48, at p. 10

⁵⁶Ruth Wedgwood, “Responding to Terrorism: The Strikes Against bin Laden” (1999) 24 *Yale J. Int’l L.* 559, at p. 559

⁵⁷Alex P. Schmid & Albert J. Jongman, *Political Terrorism*, *supra*, note 40, at p. 18

⁵⁸Among those international humanitarian provisions that explicitly condemn the practice of “terrorism”, see: Article 3 *Common to the Geneva Conventions of 1949* in Adam Roberts & Richard Guelff (eds.) *Documents on the Laws of War* (Oxford: Oxford University Press, 2000); Article 75(2) of the 1977 *Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, (1979) 1125 UNTS 3; Article 4(2) of the *Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II) (1979) 1125 UNTS 609; Article 2 of the 1993 *Statute of the International Criminal Tribunal for the Former Yugoslavia*, (1993) 32 ILM 1192; Article 4 of the 1994 *Statute of the International Criminal Tribunal for Rwanda*, (1994) 33 ILM 1598; Article 20(f)(iv) of the *Draft Code of Crimes Against the Peace and Security of Mankind*, adopted by the International Law Commission at its 48th. Sess. (1996) (A/48/10), online at <www.un.org> (Date accessed: July

explicit choice of illegitimate targets or the context in which they are planned and carried out⁵⁹. As evidenced by the armed conflicts raging in today's world, terrorism is increasingly becoming "an irregular technique of armed conflict, sometimes intentionally used as part of the ensemble of techniques that constitute contemporary *Totalkrieg*"⁶⁰. During the drafting of the Rome Statute of the International Criminal Court, some States, particularly India, Sri Lanka and Turkey, proposed that terrorism be considered as one of the international crimes subjected to this new Court⁶¹. Nevertheless, this proposal was subsequently rejected⁶².

The other distinction is between domestic and international terrorism. The first is normally dealt with in the same way as any other criminal offence⁶³, although domestic terrorism is also distinct from ordinary criminality because, as was previously explained, terrorism is

31, 2002); Articles 7 & 8 of the *Rome Statute of the International Criminal Court*, (1998) 37 ILM 999.

⁵⁹See: Michael Reisman, "International Legal Responses to Terrorism", *supra*, note 48, at p. 12; Joaquin Alcaide Fernandez, *Las actividades terroristas ante el derecho internacional contemporaneo*, *supra*, note 21, at p. 68

⁶⁰Michael Reisman, "International Legal Responses to Terrorism", *supra*, note 48, at p. 12

⁶¹Many States, including the United States, opposed such proposal on four grounds:

- 1) the offence was not well defined;
- 2) the inclusion of this crime would politicize the Court;
- 3) some acts of terrorism were not sufficiently serious to warrant prosecution by an international tribunal;
- 4) prosecution and punishment by national courts were considered more efficient.

See: A. Cassese, "Terrorism is also Disrupting Some Crucial Legal Categories of International Law" (2001) 12 EJIL 993, at p. 994

⁶²*Ibid.*

⁶³Emanuel Gross, "Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights", *supra*, note 17, at p. 100

“dedicated to an altruistic ideological or political cause”⁶⁴. Examples of domestic terrorists are Timothy McVeigh and the Unabomber in the United States⁶⁵. International terrorism on the other hand has the characteristic of being transnational in nature and constitutes a woeful but cruel reality of international relations⁶⁶. International terrorism is normally (but not always) manifested through the terrorist activities which are encouraged or sponsored by a State (or a national liberation movement) against another State, either inside the latter’s territory or on the territory of a third State⁶⁷. In other words, international terrorism always necessitates the implication (whether willingly or not) of more than one State. However, the phenomenon of terrorism as an international problem is always difficult to apply to concrete political realities. For instance, not every State views a particular violent act of a political nature as being necessarily a terrorist act. In fact, it is widely viewed that terrorism exists in the mind of the beholder, and it “differs upon one’s political views and national origins”⁶⁸.

3) “One Person’s Terrorist is Another Person’s Freedom Fighter”

One of the main difficulties in constructing a uniform and universalist definition of terrorism resides in the wide held cliché that one person’s terrorist is another person’s freedom

⁶⁴*Control of Terrorism: International Documents*, Yonah Alexander, et al., (eds.) (New York: Crane Russak, 1979), at p. ix

⁶⁵Harry Henderson, *Global Terrorism*, supra, note 51, at p. 134-135

⁶⁶Joaquin Alcaide Fernandez, *Las actividades terroristas ante el derecho internacional contemporaneo*, supra, note 21, at p. 53

⁶⁷*Ibid.*, at p. 54

⁶⁸Thilo Marauhn, “Terrorism” in *Encyclopedia of Public International Law*, Vol. 4 (Amsterdam: North-Holland, 2000), at p. 846

fighter⁶⁹. In fact, formal discussions denouncing terrorism have often been “combined with statements stressing the need to recognize the right of national liberation groups to continue their fight for independence, for a new political and economic order, for basic human rights”⁷⁰. This contradictory attitude is no more prevalent than in the various declarations and resolutions of the United Nations which clearly condemn all acts, methods and practices of terrorism, but on the other hand, recognize the right of peoples to struggle for self-determination and national independence⁷¹. This has often translated as a justification by armed opposition groups fighting for freedom or self-determination to have recourse to terrorist tactics⁷². Consequently, the

⁶⁹In *City of God*, Saint Augustine set forth a conversation between Alexander the Great and a captured pirate. When asked by Alexander what right the pirate had to infest the seas, the pirate replied: “The same right that you have to infest the world. But because I do it in a small boat I am called a robber, while because you do it with a large fleet you are called an emperor”. See: Saint Augustine, *City of God* (New York: Image Books, 1958), at p. 89

⁷⁰*Control of Terrorism: International Documents*, supra, note 64, at p. xiii

⁷¹For instance, see: Res. 40/61, supra, note 38, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, GA Res. 2625, UN GAOR, 26th. Session, Supp. No. 28, at 121, UN Doc. A/8028 (1971); *Declaration on the Principle of Refraining from the Threat or Use of Force in International Relations*, UNGA Res. 42/22 of 18 November 1987, 73rd. Meet., A/RES/42/22

⁷²During the meeting in Kuala Lumpur of the Foreign Ministers of member States of the Organization of the Islamic Conference, the delegates were unable to agree on a uniform definition of terrorism. At one point, Malaysian Prime Minister Mahatir Mohammed declared that all attacks on civilians -either by government forces or by suicide bombers- should be classified as terrorism. On the other hand, Iranian Foreign Minister Kamal Kharazi was among the many delegates who argued that Palestinian suicide bombers were not terrorists. In their final communiqué, the Conference refused to label Palestinian suicide bombers as terrorists and rejected any attempt to associate Islamic States or Palestinian and Lebanese resistance movements with terrorism. See: Ron Synovitz, “World: Islamic Conference Fails to Define ‘Terrorism’, Condemns Israel”, supra, note 53; “Muslim Nations Refuse to Link Terrorism with Palestinian Attacks”, 3 April 2002, CBC News, online at <www.cbc.ca> (Date accessed: May 23, 2002); “Saudi Arabia Confirms in its Address Before the OIC Foreign Ministers Conference its Rejection of Linking Terrorism to Islam”, 5 April 2002, Ain-Al-Yaqeen, online at <www.ain-al-yaqeen.com> (Date accessed: May 23, 2002)

difficulty resides in the fact that various “governments have used the term ‘terrorist’ loosely to condemn not only real terrorists, but legitimate national liberation movements whose political aims they may not share”⁷³. For this, Beres explains:

“During the Cold War, both the United States and Soviet leaders accepted a narrow, geopolitical definition of terrorism. The United States characterized any insurgent force operating against an allegedly pro-Soviet regime as lawful, regardless of the means used in the insurgency. Reciprocally, any activity by an insurgent force operating against a pro-United States regime was automatically characterized as terrorism. The Soviet leaders believed that the United States was using the term “terrorism” to discredit what the Soviets alleged were legitimate movements for self-determination and associated human rights. Under the Soviet view, insurgency against what the United States freely called authoritarian regimes - for example, the regimes in El Salvador, Guatemala, and Chile - was not terrorism, as the United States had maintained, but national liberation”⁷⁴.

Thus, whether the African National Congress⁷⁵ (the “ANC”) in South Africa or the Hizbollah in Lebanon were considered legitimate representatives of peoples struggling for

⁷³Lyal S. Sunga, *The Emerging System of International Criminal Law*, supra, note 13, at p. 192. For this, nothing has been more blatant than the Reagan and Brezhnev doctrines, which branded as terrorist any political movement that was contrary to their respective geopolitical interests. See: Joaquin Alcaide Fernandez, *Las actividades terroristas ante el derecho internacional contemporaneo*, supra, note 21, at p. 45; Jeane Kirkpatrick & Allan Gerson, “The Reagan Doctrine, Human Rights and International Law” in *Right v. Might: International Law and the Use of Force*, Louis Henkin, et al. (eds.) (New York: Council on Foreign Relations, 1989) at p. 19; Stephen M. Schwebel, “The Brezhnev Doctrine Repealed and Peaceful Co-Existence Enacted (1972) 66 Am. J. Int’l L. 816

⁷⁴Louis René Beres, “The Meaning of Terrorism - Jurisprudential and Definitional Clarifications”, supra, note 25, at p. 248

⁷⁵See generally: C.J. Botha, “Anticipatory Self-Defence and Reprisals Re-examined. South African Attacks on ANC Bases in Neighbouring States: The ‘Guns of Gaborone’ or Raids Disease?” (1985-1986) 11 South African Y.B. Int’l L. 138; David Steward, “Terrorism and Revolutionary Violence: A View from South Africa” in *Terrorism & Political Violence: Limits & Possibilities of Legal Control*, Henry H. Han (ed.) (New York: Oceana Publications, 1993), at p. 105 et ss.

freedom and self-determination, or on the contrary, as terrorist organizations, “depended not so much on the means and methods they may have employed to reach their objectives, but on purely political considerations reflecting particular ideological proclivities and self-interests”⁷⁶. In the case of the ANC in South Africa⁷⁷ during the apartheid era, the United States characterized the ANC not as a terrorist organization⁷⁸, but as “some dissident group”⁷⁹. But on the other hand, the United States and other countries have widely viewed the Hizbollah as a terrorist organization⁸⁰. The American State Department also has a permanent list of States that, according to it, actively support terrorism⁸¹. From this, one can conclude that each sovereign State has always reserved to

⁷⁶Lyal S. Sunga, *The Emerging System of International Criminal Law*, supra, note 13, at p. 193

⁷⁷In the 1980s, the South African representative at the Security Council defended his government’s action against the ANC as follows:

“South Africa will not tolerate activities endangering our security...we will not hesitate to take whatever action may be appropriate for defence and security of our own people and for the elimination of terrorist elements who are intent on sowing death and destruction in our country and in our region. We will not allow ourselves to be attacked with impunity. We shall take whatever steps are appropriate to defend ourselves”.

See: Michael Reisman, “No Man’s Land: International Legal Regulation of Coercive Responses to Protracted and Low Level Conflict” (1989) 11 *Houston J. Int’l L.* 317, at p. 325

⁷⁸In the 1990s, the South African Truth and Reconciliation Commission clearly stated that the ANC was engaged in a number of attacks in its fight against the apartheid regime which could accurately be described as terrorism. For example, ANC guerrillas have planted bombs in bars, restaurants, and other public places to intimidate or punish supporters of the apartheid government. See: Rich Mkhondo, “Terrorism”, in *Crimes of War*, Roy Gutman, et al., (eds.) (London: Norton & Co., 1999), at p. 350

⁷⁹Michael Reisman, “No Man’s Land: International Legal Regulation of Coercive Responses to Protracted and Low Level Conflict”, supra, note 77, at p. 325

⁸⁰See: Harry Henderson, *Global Terrorism*, supra, note 51, at p. 256; David Matas, “Made-in-Canada Suicide Bombers”, *The Ottawa Citizen*, April 12, 2002, at A.19

⁸¹Among others: Iran, Iraq, Lybia, Syria, North Korea, Cuba and Sudan. See: “Overview of State-Sponsored Terrorism” in *Patterns of Global Terrorism*, online at <www.state.gov>

itself the right to define terrorism in the context of its own domestic and foreign affairs⁸². As a matter of fact, every State perceives terrorism in function of its own historical experience, its own values and its own interests in relation with other States⁸³.

But one of the main flaws deriving from this subjective categorization of terrorism is that not all armed opposition groups necessarily have recourse to terrorist tactics. For instance, Argentinian revolutionary Che Guevara did draw a theoretical distinction between legitimate armed struggle and terrorism. He said:

“It is necessary to distinguish clearly between sabotage, a revolutionary and highly effective method of warfare, and terrorism, a measure that is generally ineffective and indiscriminate in its results, since it often makes victims of innocent people and destroys a large number of lives that would be valuable to the revolution...”⁸⁴

Equally, Schachter states that “guerrilla forces fighting in organized, distinguishable units against governmental troops are not terrorists unless they perform terrorist acts such as deliberately slaughtering civilians”⁸⁵. Schwarzenberger elaborates this point further by explaining that:

“Terrorists tend to use force indiscriminately and on an excessive scale. The reason is that whenever their aim is not merely revenge or retaliation, they seek to attain their objective, whatever it may be, by the creation of fear...Guerrilleros think primarily in

(Date accessed: May 1, 2002)

⁸²Yonah Alexander, “Terrorism in the Twenty-First Century: Threats and Responses”, *supra*, note 10, at p. 61

⁸³Joaquin Alcaide Fernandez, *Las actividades terroristas ante el derecho internacional contemporaneo*, *supra*, note 21, at p. 29

⁸⁴Ernesto Che Guevara, *Guerrilla Warfare* (Lincoln: University of Nebraska Press, 1985), at p. 61

⁸⁵Oscar Schachter, “The Extraterritorial Use of Force Against Terrorist Bases”, *supra*, note 15, at p. 310.

military terms. Thus they tend to concentrate on the military and police forces of the political system against which they are fighting. In the typical case, they are short of weapons and ammunition and, therefore, likely to use force economically. Their irregularity is of a different order. It lies in the revolutionary character of their organization and the specific techniques of guerrilla warfare”⁸⁶.

It is thus said that a freedom fighter is not necessarily a terrorist and a terrorist is not necessarily engaged in the cause of freedom⁸⁷. But this differentiation between terrorists and legitimate freedom fighters does not undermine the fact that a person fighting for freedom could have recourse to terrorist acts. Therefore, terrorism must be defined by specific actions and not solely by the political or ideological cause it is intended to serve. For instance, intentionally killing innocent civilians, hijacking commercial aeroplanes, or sending suicide bombers⁸⁸ to shopping malls clearly constitute terrorist acts “even though those responsible see them as a means toward liberation or some other ideal”⁸⁹. In fact, even if one sympathizes with the political aims of the group in question, the explicit selection of unlawful targets or the indiscriminate nature of their attacks transform their actions from legitimate forms of armed struggle into “international legal pathologies that require arrest and deterrence as urgent

⁸⁶Georg Schwarzenberger, *International Law and Order*, supra, note 32 at p. 220

⁸⁷Jordan J. Paust, “An Introduction to and Commentary on Terrorism and the Law” (1987) 19 Conn. L. R. 697, at p. 705

⁸⁸However, it is argued that suicide bombers are helping Palestinians level the battlefield. In this respect, a Hamas spokesman says:

“...we don’t have F-16s, Apache helicopters and missiles...they (the Israelis) are attacking us with weapons against which we can’t defend ourselves. And now we have a weapon they can’t defend themselves against...We believe this weapon creates a kind of balance, because this weapon is like an F-16”.

See: Molly Moore & John W. Anderson, “Suicide Bombers Change Mideast’s Military Balance”, *The Washington Post*, August 18, 2002, at p. A01

⁸⁹Oscar Schachter, “The Extraterritorial Use of Force Against Terrorist Bases”, supra, note 15, at p. 310

international goals”⁹⁰. A report from the United Nations to the Secretary General has made it clear that there must be limits to the activities of any group, no matter how noble its ultimate aim is. It reads:

“Even when the use of force is legally and morally justified, there are some means, as in every form of human conflict, which must not be used”⁹¹.

Furthermore, Article 5 of the International Convention for the Suppression of Terrorist Bombings stipulates that:

“...criminal acts within the scope of this Convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature”⁹².

It is thus said that the right of resistance against oppression or any other form of political or ideological struggle do not justify the commission of terrorist acts⁹³. Therefore, the commission of terrorist acts cannot be conceived as a legitimate form of armed struggle for liberation or self-determination. This has also been a principle recognized in the customary law of armed conflict⁹⁴.

⁹⁰Michael Reisman, “International Legal Responses to Terrorism”, supra, note 48, at p. 8

⁹¹*Secretary General’s Report on Terrorism*, 27 UNGAOR, A/C6/418 (1972)

⁹²*International Convention for the Suppression of Terrorist Bombings*, supra, note 36, at Article 5

⁹³Joaquin Alcaide Fernandez, *Las actividades terroristas ante el derecho internacional contemporaneo*, supra, note 21, at p. 63

⁹⁴“The Origins and Fundamental Causes of International Terrorism” in *International Terrorism & Political Crimes*, supra, note 49, at p. 7

B) INTERNATIONAL LEGAL INSTRUMENTS RELATING TO THE COMMISSION OF TERRORIST ACTS

1) Main International Treaties

Although a normative conceptualization of terrorism has always been difficult, various international legal instruments have nonetheless condemned the phenomenon of terrorism and implicitly considered the commission of certain crimes as terrorist acts⁹⁵. This is evidenced by several international treaties and conventions which have been adopted relative to specific situations, such as “hijacking, unlawful acts against the safety of civil aviation, crimes against internationally protected person, hostage-taking, unlawful acts against the safety of maritime navigation, and unlawful acts against the safety of fixed platforms at sea”⁹⁶. Generally, the basic purpose of these treaties has been to “establish a framework for international cooperation among States to prevent and suppress international terrorism by requiring State parties to cooperate in the prevention and investigation of terrorist acts, to criminalize terrorist acts, to assist other States in the prosecution of terrorists, and to either prosecute or extradite terrorist found in their

⁹⁵It is important to point out that certain treaties have stipulated a “political offence” exception. For instance, Article 2 of the Convention on Offences and Certain Other Acts Committed on Board Aircraft states:

“Without prejudice to the provisions of Article 4 and except when the safety of the aircraft or of persons or property on board so requires, no provision of this Convention shall be interpreted as authorizing or requiring any action in respect of offences against penal laws of a political nature or those based on racial or religious discrimination”.

See: *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, signed at Tokyo on 14 September 1963 (the “Tokyo Convention”), 106 UNTS 860, at Article 2. But it is interesting to note that the latter provision is relatively old (since it was signed on 1963), and that more recent international instruments relating to the commission of terroristic acts do not contain such reservations.

⁹⁶Lyal S. Sunga, *The Emerging System of International Criminal Law*, supra, note 13, at p. 196. On the treaties relating to these activities, see, note 36.

territory”⁹⁷. As an example, there is no doubt that the attacks of September 11 constitute terrorism as contemplated in some of these conventions, particularly those relating to civil aviation and safety. For instance, Article 1(b) of the Convention on Offences and Certain Other Acts Committed on Board Aircraft⁹⁸ states that it constitutes an offence under this Convention any act which may or do jeopardize the safety of an aircraft or of persons or property therein⁹⁹. In the same manner, Article 1(a) and 1(b) of the Convention for the Suppression of Unlawful Seizure of Aircraft¹⁰⁰ states that any person who on board an aircraft in flight unlawfully, by force or threat, or by any form of intimidation, seizes or exercises control of that aircraft, or attempts to perform any such act, or is an accomplice of a person who performs or attempts to perform any such act commits an offence under this Convention¹⁰¹. Equally, Article 1 and 2 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation¹⁰² states the following:

Art. 1. Any person commits an offence if he unlawfully and intentionally:
(a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
(b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
...

⁹⁷Walter Gary Sharp, “The Use of Armed Force Against Terrorism: American Hegemony or Impotence?” (2000) 1 Chi. J. Int’l L. 37, at p. 39

⁹⁸*Convention on Offences and Certain Other Acts Committed on Board Aircraft*, supra, note 95.

⁹⁹*Ibid.*, at Article 1(b)

¹⁰⁰*Convention for the Suppression of Unlawful Seizure of Aircraft*, supra, note 36.

¹⁰¹*Ibid.*, at Article 1

¹⁰²*Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, supra, note 36.

(d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight;¹⁰³

...

Art. 2. Any person also commits an offence if he:

- (a) attempts to commit any of the offences mentioned in paragraph 1 of this Article; or
- (b) is an accomplice of a person who commits or attempts to commit any such offence¹⁰⁴.

Furthermore, Article 2 of the Convention for the Suppression of Terrorist Bombings provides that a person commits an offence if he intentionally “delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility...with the intent to cause death or serious bodily injury...or...with the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss”¹⁰⁵. While it is clear that the drafters of this latter Convention had in mind the more conventional bomb or explosive device, one could argue that a plane filled with tons of fuel and used as an explosive missile might fall within the scope of Article 2 of this Convention¹⁰⁶.

In addition, all of the above-mentioned treaties require that “a State party which apprehends an alleged offender in its territory either extradite him or submit his case to its own authorities for purposes of prosecution”¹⁰⁷. Furthermore, most of these conventions do not

¹⁰³Ibid., at Article 1

¹⁰⁴Ibid., at Article 2

¹⁰⁵*International Convention for the Suppression of Terrorist Bombings*, supra, note 36, at Article 2

¹⁰⁶Arnold N. Pronto, “Comment” in *Terrorist Attacks on the World Trade Center and the Pentagon*, supra, note 9.

¹⁰⁷John F. Murphy, “Defining International Terrorism: A Way Out of the Quagmire”, supra, note 33, at p. 18 and 19

exclude any criminal jurisdiction exercised in accordance with national law¹⁰⁸.

However, these treaties “are binding only on those States that have ratified or acceded to the relevant treaties and, even then, only on a strictly reciprocal basis; in other words, they are not universally applicable”¹⁰⁹. Another major flaw relating to these treaties resides in the fact that they are essentially extradition treaties and by themselves are of little use if the terrorist activity in question is State-sponsored and the latter is unwilling to cooperate in the investigation, conviction and extradition of those responsible¹¹⁰. The United States is party to most of these treaties¹¹¹. Equally, Afghanistan has ratified three of the conventions mentioned above, namely the Tokyo Convention of 1963, the Hague Convention of 1970 and the Montreal Convention of 1971¹¹².

¹⁰⁸See: *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, supra, note 36, at Article 5(3); *Convention for the Suppression of Unlawful Seizure of Aircraft*, supra, note 36, at Article 4(3); *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, supra, note 95, at Article 3(3); *International Convention for the Suppression of Terrorist Bombing*, supra, note 36, at Article 6(5).

¹⁰⁹Antonio Cassese, “The International Community’s “Legal” Response to Terrorism” (1989) 38 Int’l & Comp. L. Quarterly 589, at p. 591

¹¹⁰Michael Reisman, “International Legal Responses to Terrorism”, supra, note 48, at p. 25

¹¹¹See: United Nations Treaty Collection, *Conventions on Terrorism*, online at <www.un.org> (Date accessed: May 23, 2002); Sean D. Murphy, “Contemporary Practice of the United States Relating to International Law: International Criminal Law” (2002) 96 Am. J. Int’l L. 255, at p. 255 & 256

¹¹²*Ibid.*

2) Other International Documents

In addition to the various multilateral treaties and conventions dealing with specific terrorist activities as the ones mentioned above, terrorism has also been generally condemned by both the United Nations Security Council and the General Assembly. On a number of occasions, both have “adopted resolutions which either prohibit terrorist acts generally or relate specifically to particular terrorist incidents”¹¹³. For instance, the Friendly Relations Declaration has affirmed that every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts against another State or acquiescing in organized activities within its territory directed towards the commission of such acts¹¹⁴. Equally, Resolution 40/61 of the General Assembly condemns as criminal “all acts, methods and practices of terrorism wherever and by whomever committed”¹¹⁵, including those which jeopardize friendly relations among States and their security. This resolution calls upon States to fulfill their obligations under international law to refrain from organizing, instigating, assisting or participating in terrorist acts in other States, or acquiescing in activities within their territory directed towards the commission of such acts¹¹⁶. It urges all States to cooperate with one another more closely, especially through the exchange of information concerning the prevention and combatting of terrorism or the extradition or prosecution of terrorists¹¹⁷. But on the other hand, both the

¹¹³Lyal S. Sunga, *The Emerging System of International Criminal Law*, supra, note 13, at p. 197

¹¹⁴*Declaration on Principles of International Law concerning Friendly Relations*, supra, note 71.

¹¹⁵Res.40/61, supra, note 38.

¹¹⁶*Ibid.*

¹¹⁷*Ibid.*

Friendly Relations Declaration and Resolution 40/61 also declare that the action and resistance of peoples under alien subjugation, domination and exploitation constitute a legitimate exercise of their right to self-determination. Resolution 40/61 specifically reaffirms “the inalienable right to self-determination and independence of all peoples under the colonial and racist regimes and other forms of alien domination, and upholding the legitimacy of their struggle”¹¹⁸. Some governments have viewed this latter provision as being an exemption for national liberation groups “from any constraints on methods they might employ to realize their goals”¹¹⁹.

In 1994, the General Assembly adopted Resolution 49/60 concerning ways to eliminate international terrorism¹²⁰. Resolution 49/60 basically confirms the general consensus about international terrorism by virtue of which the international community takes conscience of the need to prevent and suppress terrorist acts¹²¹. The resolution states that acts of terrorism constitute a grave violation of the purposes and principles of the United Nations, pose a threat to international peace and security, jeopardize friendly relations among States, hinder international cooperation and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society¹²². Equally, on December 11, 1995, the General Assembly adopted Resolution 50/53, entitled ‘Measures to Eliminate Terrorism’, which calls on the need for further

¹¹⁸Ibid.

¹¹⁹John F. Murphy, “Defining International Terrorism: A Way Out of the Quagmire”, *supra*, note 33, at p. 19

¹²⁰*Measures to Eliminate International Terrorism*, UNGA Res. 49/60 of 17 February 1995, 49th. Sess., A/RES/49/60

¹²¹Joaquin Alcaide Fernandez, *Las actividades terroristas ante el derecho internacional contemporaneo*, *supra*, note 21, at p. 42

¹²²*Measures to Eliminate International Terrorism*, UNGA Res. 50/53 of 11 December 1995, A/RES/50/53

international cooperation to combat terrorism¹²³. It reiterates that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them¹²⁴. The resolution urges all States to strengthen cooperation with one another to ensure that those who participate in terrorist activities, whatever the nature of their participation, find no safe haven anywhere, and recalls the role of the Security Council in combatting international terrorism whenever it poses a threat to international peace and security¹²⁵.

Nevertheless, the major conceptual deficiencies that exist in the above-mentioned international documents are that they are either case-specific, incident-specific or overtly ambiguous and do not generally give a coherent position with regard to the problem of terrorism. While terrorism in itself has been widely condemned by the international community, some governments have expressed deep reservations about certain actions taken by groups or organizations fighting for their freedom and/or self-determination. For instance, the Organization of the Islamic Conference stated that a distinction must be made between “acts of terror” and legitimate resistance to foreign aggression, domination and occupation¹²⁶. As previously mentioned, the Conference expressly refused to equate Palestinian suicide bombers

¹²³Ibid.

¹²⁴Ibid,

¹²⁵Ibid.

¹²⁶Ron Synovitz, “World: Islamic Conference Fails to Define ‘Terrorism’, Condemns Israel”, supra, note 53. For a contrary view, see: Louis Rene Beres, “The Meaning of Terrorism - Jurisprudential and Definitional Clarifications”, supra, note 25, at p. 244 et ss.

with terrorism¹²⁷.

On the other hand, it could be said that the above mentioned treaties and documents represent nonetheless an important step in the progress of international law because they do not only stress the obligation to prevent the commission of certain terrorist acts, but they also contribute to the formation of a general obligation in international law to prevent and suppress the commission of terrorist acts¹²⁸.

3) Developments After September 11, 2001

The terrorist attacks of September 11 were unequivocally condemned by the international community and by the United Nations. Right after the attacks, on September 12, 2001, the Security Council unanimously approved Resolution 1368, which unreservedly condemned in the strongest terms the terrorist attacks against the United States¹²⁹. The resolution regarded these events as a threat to international peace and security¹³⁰. The resolution called “on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist acts”¹³¹, and it stressed that those responsible for aiding, supporting or harboring them will be held accountable¹³². The resolution also recognized the right to individual and collective

¹²⁷See note 72.

¹²⁸Joaquin Alcaide Fernandez, *Las actividades terroristas ante el derecho internacional contemporaneo*, supra, note 21 at p. 136

¹²⁹Res. 1368 (2001), S.C., 12 September 2001, S/RES/1368

¹³⁰Ibid.

¹³¹Ibid.

¹³²Ibid.

self-defence under the Charter and called on the international community to redouble their efforts to prevent and suppress terrorist acts¹³³. The General Assembly adopted a similar resolution¹³⁴, although it did not made reference to the right of individual or collective self-defence.

On September 28, 2001, the Security Council further adopted Resolution 1373¹³⁵. In a nutshell, this resolution constitutes a comprehensive declaration about the steps and strategies to adopt by the international community in order to combat international terrorism. In it, the Security Council calls on all States to prevent and suppress the financing of terrorism, as well as criminalize the willful provision or collection of funds for such acts¹³⁶. The Security Council also decided that States should refrain from providing any form of support to entities or persons involved in terrorist acts; take the necessary steps to prevent the commission of terrorist acts; deny safe haven to those who finance, plan, support, commit terrorist acts and provide safe haven as well¹³⁷.

For its part, Resolution 1377 of the Security Council¹³⁸ states that acts of international terrorism constitute one of the most serious threats to international peace and security in the XXIst. century¹³⁹. The resolution reaffirms its unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their

¹³³Ibid.

¹³⁴Res. 56/1, UNGA, 56th. Sess, 18 September 2001, A/RES/56/1

¹³⁵Res. 1373 (2001), S.C., 28 September 2001, SC/7158

¹³⁶Ibid.

¹³⁷Ibid.

¹³⁸Res. 1377 (2001), S.C., 12 November 2001, SC/7207

¹³⁹Ibid.

forms and manifestations, wherever and by whomever committed¹⁴⁰. It stresses that acts of international terrorism are contrary to the purposes and principles of the Charter and that the financing, planning and preparation of as well as any other form of support for acts of international terrorism are similarly contrary to the purposes and principles of the Charter¹⁴¹. However, the resolution also stresses that continuing international efforts to broaden the understanding among civilizations and to address regional conflicts and the full range of global issues, including development issues, will contribute to international cooperation and collaboration, which themselves are necessary to sustain the broadest possible fight against international terrorism¹⁴².

Furthermore, Resolution 1390 of the Security Council affirms that all States shall take the following measures with respect to Osama bin Laden, members of Al Qaeda and Taliban, and other individuals, groups, undertakings and entities associated with them:

- a) freeze without delay the funds and other assets or economic resources of these individuals, groups, undertakings and entities, including funds derived from property owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly, for such persons' benefit, by their nationals or by any persons within their territory;
- b) prevent the entry into or the transit through their territories of these individuals, provided that nothing in this paragraph shall oblige any State to deny entry into or require the departure from its territories of its own nationals and this paragraph shall not apply where entry or transit is necessary for the fulfilment of a judicial process or the Committee determines on a case by case basis only that entry or transit is justified;
- c) prevent the direct or indirect supply, sale and transfer, to these individuals, groups, undertakings and entities from their territories or by their nationals outside their

¹⁴⁰Ibid.

¹⁴¹Ibid.

¹⁴²Ibid.

territories, or using their flag vessels or aircraft, of arms and related materiel of all types including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned and technical advice, assistance, or training related to military activities¹⁴³.

The above resolution urges all States to take immediate steps to enforce and strengthen through legislative enactments the measures imposed under domestic laws or regulations against their nationals and other individuals or entities operating on their territory, and invites States to report the results of all related investigations or enforcement actions unless to do so would compromise the investigation or enforcement actions¹⁴⁴.

Overall, the above resolutions from the Security Council represent the international community's response to the events of September 11. While Resolutions 1373 and 1377 stress the general obligation to prevent and suppress the financing of terrorist activities, Resolution 1390 specifically condemns the Al Qaeda for the commission of various terrorist acts and the Taliban for allowing Afghanistan to be used as a base for terrorist training and activities¹⁴⁵. However, it does not appear that these instruments, in themselves, have brought anything new to the general obligation in international law to prevent and suppress acts of terrorism. The novelty consists rather on the unprecedented support and endorsement by the international community of the principles found within these resolutions in response to the attacks of September 11.

¹⁴³Res. 1390 (2002), S.C., 28 January 2002, S/RES/1390

¹⁴⁴Ibid.

¹⁴⁵Ibid.

C) IS TERRORISM A USE OF FORCE?

1) General Principles

The United Nations Charter¹⁴⁶ (the “Charter”) is the starting point in modern international law with regard to the use of force by a State against another. In general, the Charter forbids not only the recourse to war, but more generally the use or threat of force¹⁴⁷ for the solution of inter-State disputes. According to the Charter, the use or threat of force by a State against another State otherwise than in self-defence or with the authority of an organ of the United Nations is prohibited. Article 2(4) of the Charter enunciates the key prescription in international law regarding recourse to armed conflict. It reads:

“All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations”¹⁴⁸.

This provision remains the most explicit Charter rule against any type of armed coercion, whether direct or indirect¹⁴⁹. According to Henkin, Article 2(4) is the most important norm of international law because it is “the distillation and embodiment of the primary value of the inter-State system, the defence of State independence and State autonomy”¹⁵⁰. It prohibits war and

¹⁴⁶*Charter of the United Nations*, of June 26, 1945, UNCIO XV, 335, as amended.

¹⁴⁷Michel Virally, “Article 2 paragraphe 4”, in *La Charte des Nations Unies*, Jean-Pierre Cot, et al. (eds.) (Paris: Editions Economica, 1985), at p. 114

¹⁴⁸*Charter of the United Nations*, supra, note 146, at Article 2(4)

¹⁴⁹Oscar Schachter, *International Law in Theory and Practice* (Dordrecht: Martinus Nijhoff, 1991), at p. 111

¹⁵⁰Louis Henkin, *International Law: Politics and Values* (Dordrecht: Martinus Nijhoff, 1995), at p.113

other acts of armed force by one State against another¹⁵¹. Force cannot be used in order to gain territory, to change the government of another State¹⁵², to alter in any way the existing world political divisions, or even to correct a past injustice¹⁵³. Justifications for the use of force by individual States must, in the framework of the Charter, be specific and in a strict sense exceptional¹⁵⁴. Such exceptions would be the right to self-defence in case of armed attack or armed action authorized by the Security Council under Chapter VII of the Charter¹⁵⁵. This is mainly because Article 2(4) constitutes “a deeply rooted rule of international law embodying a

¹⁵¹Louis Henkin, “Use of Force: Law & U.S. Policy” in *International Law*, Barry E. Carter et al. (ed.) (Boston: Little, Brown & Co., 1991), at p.1234

¹⁵²The present military action by the United States and its allies in Afghanistan do not only set a precedent for armed intervention to suppress terrorism, but some have also viewed the operation as a humanitarian intervention to expel the Taliban regime from power. However, there have traditionally been intense debate among legal scholars about the legitimacy of the use of force to overthrow tyrannical governments or for humanitarian purposes. About the arguments in favor of such interventions, see generally: Michael Reisman, “Coercion and Self-Determination: Construing Charter Article 2(4)” (1984) 78 Am. J. Int’l L. 642; Anthony D’Amato, “The Invasion of Panama Was a Lawful Response to Tyranny” (1990) 84 Am. J. Int’l L. 516; Thomas M. Franck, ‘Intervention Against Illegitimate Regimes’ in *Law and Force in the New International Order*, L. Fisler Damrosch, et al. (eds.) (Boulder: Westview Press, 1991) at p. 159. Against such interventions: Lori Fisler Damrosch, ‘Commentary on Collective Military Intervention to Enforce Human Rights’ in *Law and Force in the New International Order*, supra, note 152, at p. 215; Oscar Schachter, “The Legality of Pro-Democratic Invasion” (1984) 78 Am. J. Int’l L. 645; Michael Barutciski, “Peut-on justifier l’intervention de l’OTAN au Kosovo sur le plan humanitaire? Analyse de la politique occidentale et ses conséquences en Macédoine” (2000) 38 Can. Yb. Int’l L. 121

¹⁵³Anthony Clark Arend, “The Obligation to Pursue Peaceful Settlement of International Disputes During Hostilities” (1983) 24 Virginia J. Int’l L. 97, at p. 102

¹⁵⁴Ian Brownlie, “The Principle of Non-Use of Force in Contemporary International Law” in *The Non-Use of Force in International Law*, William E. Butler (ed.) (Dordrecht: Martinus Nijhoff, 1989) at p. 22

¹⁵⁵See: Oscar Schachter, *International Law in Theory and Practice*, supra, note 149, at p. 106; Stanimir A. Alexandrov, *Self-Defence Against the Use of Force in International Law* (The Hague: Kluwer Law International, 1996), at p. 77

fundamental presumption that the use of force by States in pursuit of their national interests poses an unacceptable danger to the larger community”¹⁵⁶.

Furthermore, other international legal provisions, which were drafted subsequent to the adoption of the Charter, equally prohibit the use of force by one State against another. Among others, the Declaration on the Inadmissibility of Intervention in the Domestic Affairs¹⁵⁷; the Declaration of Principles of International Law Concerning Friendly Relations¹⁵⁸; and the Definition of Aggression¹⁵⁹. According to Brownlie, the above legal instruments do not have any legislative effect in the sense that they are not legally binding treaties. Nonetheless, they constitute an essential part of the “subsequent practice of member States of the United Nations and must be given appropriate weight for the purpose of interpreting the provisions of the Charter”¹⁶⁰.

2) Does Terrorism Amount to a Use of Force as Envisaged in Article 2(4) of the Charter?

To answer the above question, one must examine the meaning of the terms “use of force”.

¹⁵⁶Edward Gordon, “Article 2(4) in Historical Context” (1985) 10 Yale J. Int’l L. 271, at p.275

¹⁵⁷*Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States and the Protection of their Independence and Sovereignty*, GA Res. 2131, UN GAOR, 20th Sess., Supp. No.14, UN Doc. A/6014 (1965), at 108

¹⁵⁸*The Friendly Relations Declaration*, supra, note 71.

¹⁵⁹*United Nations General Assembly Resolution on the Definition of Aggression* (hereinafter Definition of Aggression) GA Res. 3314, UN GAOR, 29th. Sess., Supp. N.31, UN Doc. A/9631 (1975), at 142

¹⁶⁰Ian Brownlie, “The Principle of Non-Use of Force in Contemporary International Law” in *The Non-Use of Force in International Law*, supra, note 154, at p. 19

First, it is understood that the word “force” is often used to justify certain types of coercive actions, be that economic, political, psychological or physical¹⁶¹. Some governments (particularly from the Third World) have sought to give the prohibition on the use of force a wider meaning, “particularly to include economic measures that were said to be coercive”¹⁶². However, this expansive interpretation of Article 2(4) was strongly resisted by Western States¹⁶³. In fact, Waldock has argued that when the Charter was first adopted, the meaning of the word “force” only covered armed or physical force¹⁶⁴. Reisman also writes that customary international law with regard to the use of force has normally rested on a set of inherent assumptions about the conduct of military conflicts:

“...conflict is territorial, between organized communities; conducted by certain types of specialists in violence or “regular forces” who are clearly identified; they concentrate their efforts against each other in a war zone; the conflict itself is preceded by formal notification, suspended by some formal arrangement, and terminated in an explicit and often ceremonialized fashion”¹⁶⁵.

But can a terrorist attack, which does not neatly fit into the traditional notion of military action occurring in a determined physical environment, and conducted by identifiable military personnel, be considered an unlawful use of force? To answer this, one must first assess the nature of the terrorist act in question and, secondly, determine whether that particular terrorist act

¹⁶¹Oscar Schachter, *International Law in Theory and Practice*, supra, note 149, at p. 111

¹⁶²*Ibid.*

¹⁶³*Ibid.*

¹⁶⁴C.H.M. Waldock, “The Regulation of the Use of Force by Individual States in International Law” (1952) 81/2 *Recueil des Cours* 455, at p. 492

¹⁶⁵Michael Reisman, “No Man’s Land: International Legal Regulation of Coercive Responses to Protracted and Low Level Conflict”, supra, note 77, at p. 320

received any form of State sponsorship, which would entail State responsibility. With regard to the first requirement, if a terrorist act is intended to severely injure, destroy or cripple the economic, political or military infrastructures of the victim State and seed terror among its populace, such as the attacks of September 11, then it would certainly be considered an unlawful use of force, and sometimes even an armed attack. This latter point will be further analysed in the section on self-defence. In fact, if a terrorist attack kills many innocent lives with highly dangerous methods, such as the use of commercial jetliners as guided missiles slamming into high rise buildings, the latter would have the constituting elements of a use of force¹⁶⁶. Such type of operation would be no different than a conventional military strike against the intended target. Various resolutions from the Security Council and the General Assembly previously mentioned have also stated that terrorism constitutes a menace to international peace and security¹⁶⁷. For instance, in March 1992, the Security Council explicitly associated a State's involvement with terrorism to its obligations under Article 2(4) of the Charter. In its Resolution 748, the Security Council imposed sanctions on Libya for its involvement with terrorist activities and for its refusal to extradite two Libyan nationals alleged to have planned the 1988 bombing of a Pan Am airline over Lockerbie¹⁶⁸. Resolution 748 reads:

"In accordance with Article 2(4) of the Charter of the United Nations, every State has a duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed toward the

¹⁶⁶However, Reisman argues that "an approach which invites quibbles about how many victims of a terrorist attack warrant a military action in self-defence does not seem to be a satisfactory criterion for legal decision". See: Michael Reisman, "International Legal Responses to Terrorism", *supra*, note 48, at p. 37

¹⁶⁷Among others, see: Res. 40/61, *supra*, note 38, Res. 49/60, *supra*, note 120, Res. 50/53, *supra*, note 122. Res. 1377 (2001), *supra*, note 138. See also: Luigi Condorelli, "Les attentats du 11 septembre et leurs suites: où va le droit international?" (2001) 105 RGDIP 829, at p. 840

¹⁶⁸Res. 748(1992), S.C., 31 March 1992, S/RES/748

commission of such acts, when such acts involve a threat or use of force”¹⁶⁹.

Therefore, the commission of terrorist acts against another State that amount to an actual use of force would constitute an illegitimate use of force in the sense of Article 2(4) of the Charter¹⁷⁰. On the other hand, it is said that relatively isolated or limited injuries caused by an attack on a few citizens may not constitute a use of force¹⁷¹. For instance, if a group of antiglobalization protestors from one State cross the border of another State to participate in a political march (for instance, as the ones in Seattle, Quebec City and Ottawa), and in the end, they end up vandalizing some shops and businesses, such acts might not be considered as a use of force by the State where the protestors come from. The nature of such acts would not be considered a use of force as envisaged in Article 2(4) of the Charter since these minor incidents would not normally alter or even threaten the territorial integrity or political independence of the State concerned. Political agitation that is only intended to cause minor nuisances or disturbances would usually not meet the required elements of a use of force. Such actions would be better dealt with domestic criminal legislation. However, the situation would have been radically different if those protestors were armed with Kalashnikovs or Rocket-Propelled-Grenades and threatened to kill people and/or inflict serious damage on their intended targets. In such case, the State would have had sufficient reason to fear for its territorial integrity or political independence, and would therefore implement the appropriate State measures. Thus, it is imperative to look at each situation on its own merit.

¹⁶⁹Ibid.

¹⁷⁰Jack M. Beard, “America’s New War on Terror: The Case for Self-Defense Under International Law” (2002) 25 Harv. J. L. & Pub. Pol’y 559, at p. 574 & 575

¹⁷¹Ibid., at p. 579

II) TERRORISM AND STATE RESPONSIBILITY

A) PRINCIPLE OF STATE RESPONSIBILITY

1) General Principles

The term “State responsibility” refers to a situation when a State which has committed an internationally wrongful act is legally responsible for it¹⁷². Article 1 of the Draft Articles on State Responsibility states: “Every internationally wrongful act of a State entails the international responsibility of that State”¹⁷³. This responsibility is governed by international law¹⁷⁴ and is essentially of a civil nature¹⁷⁵. The term also denotes the extent of the rights that the injured State can claim against the tortfeasor State and the obligations of the latter arising from its wrongful act¹⁷⁶. State responsibility for the commission of an illicit act arises when two essential elements are present¹⁷⁷. First, there must be breach of an international duty set either by treaty or general

¹⁷²K. Zemanek, “The Legal Foundations of the International System. General Course on Public International Law” (1997) 266 *Recueil des Cours* 9, at p. 254

¹⁷³*Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission at its 53rd. Sess. (November 2001), Supp. No. 10 (A/56/10), Chap. IV, E.1, online at <www.un.org> (Date accessed: July 22, 2002), at Article 1

¹⁷⁴*Ibid.*, at Article 3

¹⁷⁵However, since the late 1970s, the ILC has also considered the concept of State criminal responsibility, which has been received with a great deal of opposition. See: M. Cherif Bassiouni, “Legal Control of International Terrorism: A Policy-Oriented Assessment”, *supra*, note 46, at p. 96; J. Barboza, “International Criminal Law”, (1999) 278 *Recueil des Cours* 9, at p. 96 et ss.

¹⁷⁶K. Zemanek, “The Legal Foundations of the International System. General Course on Public International Law”, *supra*, note 172, at p. 255

¹⁷⁷In this respect, Article 2 of the Draft Articles on State Responsibility states: “There is an internationally wrongful act of a State when conduct consisting of an action

international law¹⁷⁸. Second, the illicit action or omission complained of must be attributed to a State¹⁷⁹. In the context of terrorism, State responsibility could take various forms¹⁸⁰.

2) Specific Instances of State Responsibility

a) Act of State Organs

Can responsibility be attributed to a State for the perpetration of specific terrorist acts undertaken by its own State organs? Condorelli suggests that “the imputability to a State of a terrorist act is unquestionable if evidence is provided that the author of such act was a State organ acting in that capacity”¹⁸¹. In this respect, Article 4(1) of the Draft Articles on State Responsibility provides that:

“The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its

or omission:

- a) Is attributable to the State under international law: and
- b) Constitutes a breach of an international obligation of the State”.

See: *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, supra, note 173, at Article 2.

¹⁷⁸According to Brownlie, this breach can be manifested in the form of intent (*dolus*) or negligence (*culpa*). See: Ian Brownlie, *System of the Law of Nations: State Responsibility Part I* (Oxford: Clarendon Press, 1983), at p. 30.

¹⁷⁹Ian Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 1998), at p. 438

¹⁸⁰Ian Brownlie, *System of the Law of Nations: State Responsibility Part I*, supra, note 178, at p. 22

¹⁸¹Luigi Condorelli, “The Imputability to States of Acts of International Terrorism” (1989) 19 Israel Y.B. Hum. Rts. 233, at p. 234

character as an organ of the central government or of a territorial unit of the State”¹⁸².

This would be the case, for instance, when State X orders agent 001 (who belongs to State X’s intelligence services) to carry out a specific terrorist attack against State Y. Here, the action of agent 001 will be directly attributed to State X because agent 001 is an organ of State X and also because the latter State is giving the specific order to that agent to carry out a terrorist attack. But what if the State organ for which the terrorist act is attributed was acting *ultra vires*? In our case, agent 001 (from State X) carries out a terrorist attack against State Y; it is not clear if State X gave the directive to agent 001 to carry out that specific attack, but it is well known that State X has a hostile relationship with State Y and generally orders agent 001 to undertake subversive actions against State Y. In theory, a State cannot discharge itself of responsibility for an official act perpetrated by one of its organs, regardless of whether that organ was acting *ultra vires*¹⁸³. Article 7 of the Draft Articles on State Responsibility states:

“The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organs, person or entity acts in that capacity even if it exceeds its authority or contravenes instructions”¹⁸⁴.

State responsibility arises when the act is perpetrated by its organs, even if the operational

¹⁸²*Draft Articles on Responsibility of States for Internationally Wrongful Acts*, supra, note 173, at Article 4(1)

¹⁸³Luigi Condorelli, “The Imputability to States of Acts of International Terrorism”, supra, note 181, at p. 236

¹⁸⁴*Draft Articles on Responsibility of States for Internationally Wrongful Acts*, supra, note 173, at Article 7

details of that act has not been explicitly sanctioned by that State¹⁸⁵. Such acts are therefore a source of vicarious liability for the State¹⁸⁶. On the other hand, the State could perhaps be exempted from any liability if it is demonstrated that the author of the terrorist behaviour was acting purely as a private individual and not in the capacity of any State organ¹⁸⁷.

b) Act of *De Facto* Organs

States can be held responsible not only for the acts of their *de jure* organs, “but also for acts of individuals who must be included among the State agents as *de facto* organs”¹⁸⁸. Essentially, *de facto* organs of State undertake specific assignments from the assigning State, with the implicit or explicit understanding that the *de facto* organs would conduct those operations “as if they were entirely private undertakings”¹⁸⁹. Article 8 of the Draft Articles on State Responsibility states:

“The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct”¹⁹⁰.

¹⁸⁵Luigi Condorelli, “The Imputability to States of Acts of International Terrorism”, *supra*, note 181, at p. 236

¹⁸⁶*Ibid.*

¹⁸⁷J. Barboza, “International Criminal Law”, *supra*, note 175, at p. 83

¹⁸⁸Luigi Condorelli, “The Imputability to States of Acts of International Terrorism”, *supra*, note 181, at p. 237

¹⁸⁹Joaquin Alcaide Fernandez, *Las actividades terroristas ante el derecho internacional contemporaneo*, *supra*, note 21, at p. 146

¹⁹⁰*Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *supra*, note 173, at Article 8

According to the ILC, an individual becomes a *de facto* organ of a State when two conditions are present: first, the person or group of persons concerned was in fact acting for or on behalf of a State; secondly, the occurrence of such a situation is established¹⁹¹. It does not matter that the persons committing the act are private individuals nor whether their conduct involves governmental activity¹⁹², as long as their actions are directed or controlled by a State. This would often arise “where State organs supplement their own action by recruiting or instigating private persons or groups who act as ‘auxiliaries’ while remaining outside the official structure of the State”¹⁹³.

The responsibility originating from *de facto* organs of State was exposed in the case concerning United States Diplomatic and Consular Staff in Tehran¹⁹⁴ (The Tehran Case). In this case, the ICJ ruled that the attacks on the American embassy by Iranian radical activists could not be imputed to the Iranian State, stating that “such imputability could have been retained only if it were established that in fact on the occasion in question the militants acted on behalf of the State, having been charged by some competent organ of the Iranian State to carry out a specific

¹⁹¹Report of the International Law Commission, 32nd. Sess., 1980 II(2) Yearbook of the International Law Commission, UN Doc. A/CN.4/Ser.A/1980/Add.1 (Part 2), at p. 58. See also: Luigi Condorelli, “The Imputability to States of Acts of International Terrorism”, *supra*, note 181, at p. 238

¹⁹²*Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the ILC, 53rd. Sess., (2001), Supp. No. 10 (A/56/10), Chap. IV, E.2, at p. 104

¹⁹³*Ibid.*

¹⁹⁴*The United States Diplomatic and Consular Staff in Tehran* (The Tehran Case), (1980) ICJ Rep. 3

operation”¹⁹⁵. On the other hand, the fact that those individuals who subsequently detained the hostages were the same people who stormed the embassy did not preclude appraisal of the detention as an act of State¹⁹⁶. The militants had then become agents of the Iranian State, because it appeared to the ICJ that in holding the American diplomats, they were acting in accordance with orders given by State officials, in the State’s interest, and in the framework of a State policy¹⁹⁷. In fact, without the support provided by the Iranian government, the detention of the hostages could hardly have continued for more than a year¹⁹⁸. Tomuschat argues that in this case, “responsibility did not derive from the acts perpetrated by private individuals concerned, but from the failure of the Iranian authorities to take the requisite remedial measures”¹⁹⁹. Therefore, one could argue that if a State orders, finances or provides logistical support to a person or group of persons in the commission of a terrorist act, and the latter serves for the pursuance of that State’s policy, such act would be imputed as if they were the acts of their own State organs²⁰⁰.

¹⁹⁵*Ibid.*, at p. 30

¹⁹⁶Luigi Condorelli, “The Imputability to States of Acts of International Terrorism”, *supra*, note 181, at p. 238

¹⁹⁷*Ibid.*

¹⁹⁸C. Tomuschat, “International Law: Ensuring the Survival of Mankind on the Eve of a New Century. General Course on Public International Law” (1999) 281 *Recueil des Cours* 9, at p. 277

¹⁹⁹*Ibid.*

²⁰⁰Michael Reisman, “International Legal Responses to Terrorism”, *supra*, note 48, at p.

c) Act of Individuals

In principle, no State can assume responsibility for the actions of its citizens who are not subject to governmental control²⁰¹. Thus, a terrorist act perpetrated by a private person cannot be imputed to the State that he or she belongs to, except when it is established that “the act in question was performed by that individual on behalf of that State, that is, under the effective direction and control of its organs”²⁰². For instance, Saudi Arabia could not possibly be accused for the attacks of September 11 simply because Osama bin Laden and the great majority of the hijackers were Saudi nationals. In fact, many individual terrorists with no State sponsorship are not affiliated with any particular State and conduct their operations on their own behalf²⁰³. While they may be passively monitored by the intelligence agency of the State that is aware of its activities and possible plans, if they are not assisted by that State’s agency, the latter cannot incur liability for their actions²⁰⁴.

However, a State could incur international liability if it fails in its international obligation to reasonably prevent the perpetration of terrorist acts and/or has failed to prosecute its author(s), in accordance with basic principles of international law of due diligence²⁰⁵. Indeed, each State has an obligation to protect within its own territory the rights of other States, in particular their

²⁰¹C. Tomuschat, “International Law: Ensuring the Survival of Mankind on the Eve of a New Century. General Course on Public International Law”, *supra*, note 198, at p. 274

²⁰²Luigi Condorelli, “The Imputability to States of Acts of International Terrorism”, *supra*, note 181, at p. 244

²⁰³Michael Reisman, “International Legal Responses to Terrorism”, *supra*, note 48, at p. 55

²⁰⁴*Ibid.*

²⁰⁵See: Luigi Condorelli, “The Imputability to States of Acts of International Terrorism”, *supra*, note 181, at p. 240; Joaquin Alcaide Fernandez, *Las actividades terroristas ante el derecho internacional contemporaneo*, *supra*, note 21, at p. 90

right to integrity and inviolability, “together with the rights which each State may claim for its nationals in foreign territory”²⁰⁶. Special obligations of due diligence have been identified in international decisions²⁰⁷. For instance, in the Tehran case, the ICJ indicated that, if a rule of international law imposes a duty of due diligence, the act of individuals catalyse the State’s international responsibility when the latter’s authorities were aware of the need for action on their part, had the means at their disposal to perform their obligations, but failed to use the means which were at their disposal²⁰⁸.

The positive obligation of due diligence in international law extends also to the prevention and suppression of terrorist acts²⁰⁹. For instance, following the attacks of September 11, Resolution 1368 of the Security Council called on all States to work jointly to bring to justice the perpetrators, organizers and sponsors of the terrorist attacks of September 11 and stressed that those responsible for aiding, supporting or harbouring the perpetrators will be held accountable²¹⁰. Equally, Resolution 1377 affirmed that a “sustained and comprehensive approach involving the active participation and collaboration of all Member States of the United

²⁰⁶Michael Reisman, “International Legal Responses to Terrorism”, supra, note 48, at p. 51

²⁰⁷Luigi Condorelli, “The Imputability to States of Acts of International Terrorism”, supra, note 181, at p. 240

²⁰⁸*The Tehran Case*, supra, note 194, at p. 33. Additionally, in the Lotus case, Judge Moore, dissenting, indicated that “it is well settled that a State is bound to use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people”. See: *SS Lotus* (France v. Turkey) 1927 P.C.I.J. (ser.A) No.10, 4, (Moore J., dissenting), at p. 88

²⁰⁹Joaquin Alcaide Fernandez, *Las actividades terroristas ante el derecho internacional contemporaneo*, supra, note 21, at p. 149

²¹⁰Res. 1368 (2001), supra, note 129.

Nations...is essential to combat the scourge of international terrorism”²¹¹. It called on all States “to become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, and encourages Member States to take forward work in this area”²¹².

B) ESTABLISHING STATE RESPONSIBILITY

1) Evidentiary Threshold

What is the evidentiary threshold to determine if a State is responsible for the commission of a terrorist act? Generally, the evidentiary requirement will vary with the charge imputed to the State presumed to sponsor terrorism²¹³. On one hand, Schachter argues that detailed factual evidence may not be necessary to blame a State for having failed to take appropriate control of the terrorist activities occurring on its own territory²¹⁴. On the other hand, accusing a State of actively supporting or encouraging terrorists acts would require more specific details and concrete evidence²¹⁵. This point is also shared by Charney and Lobel, who argue that in order to accuse a State of actively supporting terrorism, the accusing State must present clear and convincing evidence destined to prove that the accused State is in fact supporting terrorist

²¹¹Res. 1377 (2001), *supra*, note 138.

²¹²*Ibid.*

²¹³Oscar Schachter, “The Extraterritorial Use of Force Against Terrorist Bases”, *supra*, note 15, at p. 314

²¹⁴*Ibid.*

²¹⁵*Ibid.*

activities²¹⁶. In order to make such accusation, the accusing State should at a minimum require:

- “1) that the State carefully evaluate the evidence to ensure a high degree of certainty that it has identified those responsible for an attack and that more attacks are imminent;
- 2) that the facts relied upon be made public; and
- 3) that the facts are subject to international scrutiny and investigation”²¹⁷.

At a first glance, these requirements might seem unduly stringent. In fact, it is generally difficult “to prove the degree of involvement of a State in terrorism justifying the affirmation that the State in question may be considered as the perpetrator of a given terrorist act”²¹⁸. But even if the evidentiary threshold is deemed stringent, Lobel states that the requesting State should at least be required to have some reasonable certainty and concrete evidence of wrongdoing by the accused State before it undertakes forcible measures against it²¹⁹. Equally, Cassese notes that it would be “unwarranted to grant the State victim of terrorist attacks sweeping discretionary powers that would include the power to decide which States are behind the terrorist organizations and to what degree they have tolerated, or approved or instigated and promoted terrorism”²²⁰. Thus, the accusing State must present, in each instance, the evidentiary burden necessary “to

²¹⁶See: Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan* (1999) 24 *Yale J. Int'l L.* 537, at p. 547; Jonathan I. Charney, “The Use of Force Against Terrorism and International Law” (2001) 95 *Am. J. Int'l L.* 835, at p. 836

²¹⁷Jules Lobel, “The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan”, *supra*, note 216, at p. 547

²¹⁸Luigi Condorelli, “The Imputability to States of Acts of International Terrorism”, *supra*, note 181, at p. 239

²¹⁹Jules Lobel, “The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan”, *supra*, note 216, at p. 551

²²⁰A. Cassese, “Terrorism is Also Disrupting Some Crucial Legal Categories of International Law”, *supra*, note 61, at p. 1000

support its actions, normally before these irreversible and irreparable measures are taken”²²¹. Nevertheless, State responsibility could strongly be inferred if there is convincing evidence to suggest that the latter State “aids and abets by encouraging, inducing, inciting, or soliciting a terrorist act against another State; assists in the planning or otherwise facilitates the commission of a terrorist act; or, knowingly receives, harbours, or assists in the escape of a non-State terrorist”²²².

The need for a substantial burden of proof to demonstrate State complicity in the commission of a terrorist act was put to the test during the American bombing of Libya in 1986. During this incident, the international community insisted that the United States provide proof of Libyan involvement in the West Berlin terrorist attack which prompted US retaliatory air strikes²²³. The United States presented material evidence to the Security Council about the activities of the Libyan government in the commission of various terrorists acts. Among others:

- 1) Cable intercepts of messages between Tripoli and the Libyan embassy in Berlin that allegedly ordered the bombing of a West Berlin night club frequently by American servicemen;
- 2) A series of alleged terrorist incidents occurring within a week of the West Berlin bombing, planned or committed by Libyan agents who were arrested or expelled by police in Istanbul and officials in Paris; and
- 3) Evidence that the Libyan embassy in Vienna was in the process of plotting a terrorist operation against an unknown target on April 17, 1986, and that Libya was planning

²²¹Jonathan I. Charney, “The Use of Force Against Terrorism and International Law”, *supra*, note 216, at p. 836

²²²Walter Gary Sharp, “The Use of Armed Force Against Terrorism: American Hegemony or Impotence?”, *supra*, note 97, at p. 44

²²³See generally: Gregory Francis Intocchia, “American Bombing of Libya: An International Legal Analysis” (1987) 19 Case W. Res. J. Int’l L. 177; Jeffrey Allen McCredie, “The April 14, 1986 Bombing of Libya: Act of Self-Defense or Reprisals?” (1987) 19 Case W. Res. J. Int’l L. 215; Jack M. Beard, “America’s New War on Terror: The Case for Self-Defense Under International Law”, *supra*, note 170, at p. 561

widespread attacks against Americans in the following weeks²²⁴.

The air strikes against Afghanistan and Sudan in 1998 have also been another example of unilateral State action against States suspected of sponsoring terrorism. Although the United States informed the Security Council that the attacks against Afghanistan and Sudan were carried out “pursuant to the right to self-defence confirmed by Article 51 of the Charter of the United Nations”²²⁵, the American strikes (particularly those against Sudan) have been harshly criticized by various authors²²⁶. Following these attacks, the Security Council discussed the matter only briefly, ultimately deferring requests to send an international team of inspectors to the bombed facility in Khartoum to search for evidence of chemical weapons. The United States rebuffed Sudan’s requests to produce such evidence²²⁷. At the end, no conclusive evidence was adduced to support the allegation that the pharmaceutical factory in Sudan was dedicated in producing chemical agents for terrorist organizations²²⁸.

With regard to the September 11 attacks, several elements seem to indicate that these

²²⁴Marian Nash Leigh, “Contemporary Practice of the United States Relating to International Laws” (1986) 80 Am. J. Int’l L. 612, at p. 633-635

²²⁵See: UN Doc. S/1998/780 (1998)

²²⁶See generally: Jules Lobel, “The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan”, *supra*, note 216; Leah M. Campbell, “Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan” (2000) 74 Tulane L. Rev. 1067; Jack M. Beard, “America’s New War on Terror: The Case for Self-Defense Under International Law”, *supra*, note 170, at p. 576; Sean D. Murphy, “Contemporary Practice of the United States Relating to International Law” (2000) 94 Am. J. Int’l L. 348, at p. 368

²²⁷Jack M. Beard, “America’s New War on Terror: The Case for Self-Defense Under International Law”, *supra*, note 170, at p. 564

²²⁸C. Tomuschat, *supra*, note 198, at p. 214

attacks were planned by Osama bin Laden and perpetrated by the Al Qaeda network²²⁹. For instance, even prior to the attacks of September 11, Al Qaeda was suspected of involvement in the 1993 bombing of the same World Trade Center; the 1996 bombing of a U.S. military barrack in Saudi Arabia; the 1998 bombings of U.S. embassies in Tanzania and Kenya (which prompted the US air strikes against Afghanistan and Sudan in 1998); and the October 2000 bombing of the frigate USS Cole in Yemen²³⁰. All these attacks had for target the United States. Furthermore, on October 4, 2001, Prime Minister Tony Blair said that three of the 19 terrorists who hijacked the jetliners on September 11 were “positively identified as associates of Osama bin Laden and his Al Qaeda organization”²³¹. Blair also said that “one of the three identified was also directly involved in the attacks on two US embassies in East Africa and the USS Cole bombing in Yemen”²³². Equally, the United States publicly released a videotape depicting bin Laden as having prior knowledge of the September 11 attacks²³³, although there have been some questions about the authenticity of the mysterious tapes²³⁴. More recently, Al Jazeera Television transmitted a videotape where one of the hijackers was declaring: “the time of humiliation and enslavement is over and the time has come to kill the Americans on their own turf...next to their

²²⁹Sean D. Murphy, “Contemporary Practice of the United States Relating to International Law: Terrorist Attacks on World Trade Center and Pentagon”, *supra*, note 1, at p. 241

²³⁰*Ibid.*, at p. 239

²³¹“Blair Reveals Evidence Against bin Laden, al-Qaeda”, October 4, 2001, U.S. Department of State, online at <www.usinfo.state.gov> (Date accessed: March 29, 2002)

²³²*Ibid.*

²³³“Cheney Confirms that U.S. Has Incriminating bin Laden Videotape”, December 9, 2001, U.S. Department of State, online at <www.usinfo.state.gov> (Date accessed: March 29, 2002)

²³⁴“Latest bin Laden Video Still Doesn’t Sway Some Muslims”, April 16, 2002, USA Today, online at <www.usatoday.com> (Date accessed: April 22, 2002)

forces and intelligence services”²³⁵.

But can the activities of Al Qaeda be directly attributable to the Taliban regime? It is well known that Al Qaeda provided the Taliban with material, financial and military support. In exchange, the Taliban have allowed bin Laden to operate his training camps and activities from Afghanistan and protected him from attacks from outside. Indeed, Osama bin Laden could not have had the capacity to carry out his activities without the alliance and support of the Taliban²³⁶. However, it is fair to say that Osama bin Laden (and his Al Qaeda operatives) is more of an independent terrorist, who have found refuge in Afghanistan, rather than a contractor retained by a particular State. In fact, it is not clear whether the Taliban regime had any command authority over Al Qaeda²³⁷. Therefore, the actions of Osama bin Laden and Al-Qaeda cannot necessarily be imputed to the Taliban regime²³⁸, although the latter is certainly guilty of willingly providing shelter and logistical support to a terrorist organization.

Another difficulty resides on the amount of evidence needed in order to undertake forceful measures against a State suspected of helping or promoting terrorism. One interesting point to mention is the statement by the Permanent Representative of the United States to the United Nations, Mr. John D. Negroponte, who addressed the Security Council by stating:

“Since 11 September, my Government has obtained clear and compelling information

²³⁵“Al-Jazeera Shows September 11 Suicide Bomber Reading Last Will”, April 16, 2002, AFP-Reuters, online at <www.yahoo.com> (Date accessed: April 22, 2002)

²³⁶Jack M. Beard, “America’s New War on Terror: The Case for Self-Defense Under International Law”, *supra*, note 170, at p. 578

²³⁷Oliver Corten & François Dubuisson, “Opération ‘Liberté Immuable’: une extension abusive du concept de légitime défense” (2002) 106 RGDIP 51, at p. 67

²³⁸In certain occasions, the Taliban and Al Qaeda were working closely together in the exercise of some military operations, most notably the assassination of General Massoud of the Northern Alliance on September 9, 2001.

that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks. There is still much we do not know. Our inquiry is in its early stages. We may find that our self-defence requires further actions with respect to other organizations and other States”²³⁹.

The United States launched the air strikes against Afghanistan on the same day (October 7, 2001) the American representative had delivered the above letter to the Security Council. Here, the United States was arguing that there was sufficient evidence to justify self-defence against the Taliban regime in Afghanistan, since the latter was providing training grounds and facilities to Al Qaeda. But in the letter, the American representative openly admits that although Al Qaeda had a central role in the attacks, there is still much they do not know. The question then is: should the victim State gather more evidence before launching a military strike or, as Mr. Negroponte suggests, should the victim State gather the necessary evidence through military action? In principle, international law does not seem to accord such right of evidence gathering through military coercion²⁴⁰. But with regard to the September 11 attacks, the resolutions of the

²³⁹“Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council”, Security Council, 7 October 2001, S/2001/946

²⁴⁰In this respect, the ICJ, in the Corfu Channel Case, stated:

“According to the [British] Government, the *corpora delicti* must be secured as quickly as possible, for fear they should be taken away, without leaving traces, by the authors of the minelaying or by the Albanian authorities...It was presented first as a new and special application of the theory of intervention, by means of which the State intervening would secure possession of evidence in the territory of another State, in order to submit it to an international tribunal and thus facilitate its task. The Court cannot accept such a line of defence. The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organizations, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most

Security Council and the widespread and unprecedented support by several countries to the US-led military action against the Al Qaeda and the Taliban were strong evidence of the international community's assessment on the propriety of the measures taken by the United States vis-a-vis Afghanistan²⁴¹.

2) International Investigation

To accuse a State of involvement in a terrorist activity could raise complex factual issues that are often not present at the time of the accusation²⁴². In order to clarify these issues, some authors have suggested that in certain cases, a State victim of a terrorist attack should first initiate an international investigation to determine if the terrorist attack can be attributed to a specific State²⁴³. Such right to international investigation would derive from Article 34 of the Charter, which states:

“The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of

powerful States, and might easily lead to perverting the administration of international justice itself. See: *The Corfu Channel Case* (United Kingdom v. Albania) (1949) ICJ Rep. 4, at p. 34 & 35.

²⁴¹Jack M. Beard, “America’s New War on Terror: The Case for Self-Defense Under International Law”, *supra*, note 170, at p. 573

²⁴²Jules Lobel, “The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan”, *supra*, note 216, at p. 539

²⁴³*Ibid.*

international peace and security”²⁴⁴.

This is the main international legal provision that prescribes an investigation concerning an international dispute which might endanger international peace and security. At any moment, the Security Council could assign an investigation “in order to establish whether the pre-conditions for determining the existence of a threat to peace, of a breach of the peace or of an act of aggression have been fulfilled”²⁴⁵. Such investigation can be essential because the ability of the Security Council to maintain international peace and security depends to a large extent “on its acquiring detailed knowledge about the factual circumstances of any dispute or situation, the continuance of which might threaten the maintenance of international peace and security”²⁴⁶. In fact, an international investigation “can facilitate the establishment of disputed questions of fact, and also enable the parties to establish an objective basis for their future relationships”²⁴⁷. Investigations can thus operate as a method of settlement²⁴⁸. The functions of investigation and observation can be organized “to establish close cooperation between the investigating mission

²⁴⁴*Charter of the United Nations*, supra, note 146, at Article 34

²⁴⁵Simma, Bruno, et al., (eds.), *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press, 1994), at p. 516

²⁴⁶*Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security*, 9 December 1991, A/RES/46/59, UN Press Release GA/8307 January 21, 1992, at (1992) 30 I.L.M. 235-240

²⁴⁷Raman, “The Ways of the Peacemaker in Dispute Settlement Through The United Nations” in *International Law Cases and Materials*, Louis Henkin, et al., (eds.) (Saint Paul: West Publishing Co., 1987), at p. 582

²⁴⁸*Ibid.*

and the parties concerned with the aim of restoring friendly relations”²⁴⁹.

Furthermore, Article 34 of the Charter encourages the “possible deployment of one of the more powerful weapons in the armoury of the Security Council”²⁵⁰. For instance, if the outcome of an international investigation confirms the involvement of a State in a terrorist act, “the avenue of pacification through agreement of the parties may no longer be open to the Security Council”²⁵¹. More recently, Resolution 1373 of the Security Council provides that every State must “afford assistance in connection with criminal investigations or other criminal proceedings relating to the financing or support of terrorist acts”²⁵². Furthermore, Resolution 1377 underlines “the obligation on States to deny financial and all other forms of support and safe haven to terrorists and those supporting terrorism”²⁵³.

However, the idea of a preliminary investigation to determine State involvement in the commission of a terrorist act has been received with scepticism by some authors²⁵⁴. They argue that it would be foolish to initiate an international investigation because terrorists could simply hide or escape, and for that, a more assertive action is necessary to counteract terrorist operations.

²⁴⁹Ibid.

²⁵⁰Ibid.

²⁵¹Ibid.

²⁵²Res. 1373 (2001), *supra*, note 135.

²⁵³Res. 1377 (2001), *supra*, note 138.

²⁵⁴See generally: Ruth Wedgwood, “Responding to Terrorism: The Strikes Against bin Laden”, *supra*, note 56; Walter Gary Sharp, “The Use of Armed Force Against Terrorism: American Hegemony or Impotence?”, *supra*, note 97; Michael Reisman, “In Defense of World Public Order” (2001) 95 Am. J. Int’l L. 833.

They also maintain that it is simply unrealistic to require that a State share the information on which a targeting decision can be based. This could seriously compromise intelligence sources or render such sources less valuable in the future²⁵⁵. But the counterargument to such position would be that if each State is able to attack another based on secret information, then the fundamental premise of the Charter prohibiting the use of force would be rendered meaningless²⁵⁶. Besides, what happens if the “secret information” is simply wrong or misleading? Thus, the need of some sort of international review is essential in order “to preserve some meaningful legal restraints on the use of force in the fight against terrorism”²⁵⁷.

C) FORMS OF SUPPORT TO TERRORISM THAT COULD INVOLVE STATE RESPONSIBILITY

1) When a State Provides Refuge or Safe Haven to Terrorists

Following the attacks of September 11, President Bush declared that the United States would punish not only the terrorists who planned or sponsored the attacks, but also those regimes that have harboured the terrorists responsible for these attacks²⁵⁸. First of all, what is the

²⁵⁵Ruth Wedgwood, “Responding to Terrorism: The Strikes Against bin Laden”, *supra*, note 56, at p. 567-568

²⁵⁶Jules Lobel, “The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan”, *supra*, note 216, at p. 554

²⁵⁷*Ibid.*

²⁵⁸“President Denounces Terrorists Attacks in New York and Washington. Transcript: President Bush Address to the Nation”, September 11, 2001, *supra*, note 2.

meaning of the words “harbouring or providing refuge”? Essentially, it denotes a situation where a State provides a physical space to the terrorists inside its territory or acquiesces to the existence of such facilities inside its territory²⁵⁹. But why would a State harbour or provide refuge to terrorists inside its territory? There could be several reasons. For instance, certain governments could act as safe havens for presumed terrorists, whether for material gain, contingent performance of services, ideological affinity, or simply to project a certain sphere of influence through the commission of terrorist attacks²⁶⁰. In exchange, terrorists with safe havens are able to increase their effectiveness and pursue their efforts without any constraint or hindrance²⁶¹. Sometimes, terrorists operating from the hosting State could remain inactive for extended periods of time, “but that should not make their presence there any less cognizable under international law”²⁶². These “dormant cells”, could be stored like any other weapon in an arsenal for future contingencies. In many instances, the “host” State’s intelligence services may closely monitor the activities of the terrorists and explicitly prohibit certain types of actions that could deem too risky or too dangerous for the “host” State²⁶³. In other circumstances, the terrorists operating in the “host” State could become direct instruments of the latter and function like governments-in-

²⁵⁹A. Cassese, “The International Community’s Legal Response to Terrorism”, *supra*, note 109, at p. 598

²⁶⁰See: Michael Reisman, “International Legal Responses to Terrorism”, *supra*, note 48, at p. 41; Joaquin Alcaide Fernandez, *Las actividades terroristas ante el derecho internacional contemporaneo*, *supra*, note 21, at p. 55

²⁶¹*Control of Terrorism: International Documents*, *supra*, note 64, at p. x

²⁶²Michael Reisman, “International Legal Responses to Terrorism”, *supra*, note 48, at p.

²⁶³*Ibid.*

exile, “an ostensibly independent entity actually subject to whatever degree of control the host State government wishes to exercise”²⁶⁴. In the latter case, the “host” State may be the actual author or instigator of a terrorist act²⁶⁵.

Nevertheless, accusing a State of sheltering or providing refuge to terrorists or terrorist organizations could present many diplomatic and evidentiary challenges. For instance, the base of operation of the alleged terrorists cannot always be easily identified or the State which harbors them may not be fully aware of their specific operational activities²⁶⁶. But in the case of the September 11 attacks, it appears that the Al-Qaeda organization was being openly supported and sheltered by the Taliban regime and that the former had extensive training grounds and infrastructures in parts of Afghanistan controlled by the Taliban²⁶⁷. In fact, the international community had on various occasions condemned the Taliban regime for willingly supporting and harbouring terrorist organizations and stated that this represented a threat to international peace and security²⁶⁸. In addition, the American representative to the United Nations reiterated after the September 11 events that these attacks, “and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as

²⁶⁴Ibid.

²⁶⁵Ibid.

²⁶⁶Ronald J. Sievert, “Meeting the Twenty-First Century Terrorist Threat Within the Scope of Twentieth Century Constitutional Law” (2000) 37 Houston L. Rev. 1421, at p. 1427

²⁶⁷See the section on evidentiary threshold.

²⁶⁸See the following resolutions of the Security Council: Res. 1267 (1999), S.C., 15 October 1999, S/RES/1267; Res. 1333 (2000), S.C., 19 December 2000, S/RES/1333

a base of operations”²⁶⁹.

Is a State violating international law when that State harbours or provides refuge to terrorists inside its territory? In theory, a State that willingly harbours a terrorist or a terrorist organization could be in breach of international law. With regard to this principle, the ICJ in the Corfu Channel Case argued that every State has an obligation “not to allow knowingly its territory to be used for acts contrary to the rights of other States”²⁷⁰. In the same way, that State could incur responsibility if it provides direct material support to terrorist groups operating against another State. In the Nicaragua Case, the ICJ stated that:

“...the Court does not believe that the concept of “armed attack” includes not only acts by armed bands where such acts occur on a significant scale but also assistance or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States.”²⁷¹

Although the ICJ seems to exclude acts of support for insurgents within a neighbouring State, “including the provision of arms, safe havens, training facilities, and logistical support or direction”²⁷², as being armed attacks, it clearly suggests that those acts are nonetheless illegal

²⁶⁹Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, *supra*, note 239.

²⁷⁰*The Corfu Channel Case*, *supra*, note 240, at p. 22

²⁷¹*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, (1986) I.C.J. Rep. 14, at p.104, parag. 195

²⁷²Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995), at p. 269

under international law and could be regarded as a threat or use of force²⁷³. Furthermore, the Declaration on the Inadmissibility of Intervention states that “no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State”²⁷⁴. The Declaration on Principles concerning Friendly Relations also expresses a similar position²⁷⁵. More recently, Resolution 1373 of the Security Council reiterates that States must refrain from providing safe havens not only to terrorists, but also to those who finance, plan and support terrorist acts²⁷⁶.

Accordingly, one could say that a State cannot invoke the principle of State sovereignty “when it knowingly offers a piece of its territory for terrorist activity against other States”²⁷⁷. In fact, the well-established rule of international law “forbidding States to permit their territory to be used as a base for armed bands of whatever nature to operate against in the territory of another State has been suggested as a basis for international claims against States providing active support for terrorists”²⁷⁸. Therefore, the direct or indirect support to irregular groups, including the harbouring and/or the provision of safe havens to terrorist organizations, could in many cases

²⁷³Ibid.

²⁷⁴*Declaration on the Inadmissibility of Intervention*, supra, note 157, at parag. 2

²⁷⁵*Declaration on Principles concerning Friendly Relations*, supra, note 71, at parag. 9

²⁷⁶Res. 1373 (2001), supra, note 135.

²⁷⁷Gregory H. Fox, “Addendum to ASIL Insight on Terrorist Attacks” in *Terrorist Attacks on the World Trade Center and the Pentagon*, supra, note 9.

²⁷⁸“Terrorists in International Law” in *International Law Cases & Materials*, supra, note 247, at p. 370

constitute a breach of international law²⁷⁹. States have thus a positive duty not to shelter terrorists and to take all appropriate measures to forbid the use of its territory as a safe haven for terrorists engaging in attacks against other States.

One must also establish the difference between a State that willingly harbours terrorists and a State where a terrorist attack simply emanates. In principle, the State from where the attacks emanate cannot be held liable if that State was not implicated in the planning or in the logistical support of those terrorists that carried out the attacks. For instance, suppose the aeroplanes that crashed at the World Trade Center took off from Toronto and not from Boston or Washington. In such case, the United States could not accuse Canada of terrorism on the sole ground that the aeroplanes took off from Toronto. Equally, the fact that some of the hijackers might have been recruited in Hamburg does not imply that Germany was responsible for the commission of the terrorist acts. The question of State inability to control the terrorists operating inside its territory will be discussed later.

2) When a State is Unwilling to Cooperate in the Suppression of Terrorism

What if a suspected terrorist is captured in a State and the latter, while unequivocally condemning the practice of terrorism, refuses to punish or extradite that particular suspect? As previously stated, such refusal could in some instances amount to a breach of an international obligation. However, the fact that the State in question is unwilling to extradite or even arrest the

²⁷⁹Michel Virally, "Article 2 paragraphe 4", in *La Charte des Nations Unies*, supra, note 147, at p. 121

suspected terrorist(s) would not in itself constitute a direct support or sponsorship of terrorism. As a matter of fact, a surprising number of Western European governments “have been reluctant to detain suspects in cases of political terrorism, worrying that it will make them an attractive target for retaliatory actions by supporters”²⁸⁰.

An interesting case relates to the pursuit and apprehension of Abdullah Ocalan, the leader of a Kurdish secessionist movement. In this case, Ocalan was first detained in Italy but this latter country refused his extradition to Turkey. For its part, Germany, despite an outstanding warrant for his arrest, declined to request extradition from Italy²⁸¹, presumably because of fear of the reactions of its Turkish and Kurdish minorities²⁸². Ocalan was finally apprehended in Kenya by means of a covert operation, and returned to Turkey²⁸³. This rather bizarre case demonstrates that some States, even those prominently involved in efforts to create international regimes against terrorism, “may still grant or withhold rendition of terrorists in particular cases, depending on whether they seek some other accommodation from the State seeking the terrorist”²⁸⁴.

However, some commentators have argued that States who are unwilling to go after the terrorists operating inside its territory are as guilty as the terrorists themselves. For instance,

²⁸⁰Ruth Wedgwood, “Responding to Terrorism: The Strikes Against bin Laden”, *supra*, note 56, at p. 561

²⁸¹Joaquin Alcaide Fernandez, *Las actividades terroristas ante el derecho internacional contemporaneo*, *supra*, note 21, at p. 74

²⁸²Michael Reisman, “International Legal Responses to Terrorism”, *supra*, note 48, at p. 28 & 29

²⁸³Harry Henderson, *Global Terrorism*, *supra*, note 51, at p. 39

²⁸⁴Michael Reisman, “International Legal Responses to Terrorism”, *supra*, note 48, at p. 28 & 29

Sharp states that:

“The complete refusal or unwillingness of a State, for example, to cooperate in the suppression or prevention of an acknowledged non-State-sponsored terrorist activity that originates in its sovereign territory constitutes State-sponsorship of a use of force *ipso facto* - thereby invoking the law of conflict management which authorizes a use of necessary and proportional force in self-defence against such a State or the non-State actors in that State. A State either cooperates and is a part of the solution to control non-State-sponsored terrorism, or it becomes a part of the problem and a sponsor of terrorism by aiding and abetting or offering a safe harbour”²⁸⁵.

This position was clearly reflected in President Bush’s State of the Union Address, who declared that “you are either with us, or you are with the terrorists”²⁸⁶. However, this rather simplistic view leaves a lot to desire. For instance, if the Cuban government accuses anti-Castro dissidents living in Miami of being terrorists, will the United States extradite them to Cuba²⁸⁷? Or what about the Iraqi National Congress²⁸⁸ or the Kosovo Liberation Army? Should they be

²⁸⁵Walter Gary Sharp, “The Use of Armed Force Against Terrorism: American Hegemony or Impotence?”, *supra*, note 97, at p. 47

²⁸⁶*Address to a Joint Session of Congress and the American People*, *supra*, note 3.

²⁸⁷Indeed, there have been some instances of anti-Castro exile groups based in Miami that are presumed to have carried out various terrorist acts, most notably the destruction of a Cuban aircraft on October 1976 and the bombing of the offices of an airline in 1977 (apparently to force the carrier to cancel proposed flights to Cuba). See: Alona E. Evans, “Aircraft and Aviation Facilities” in *Legal Aspects of International Terrorism*, Alona E. Evans, et al. (eds.) (Lexington: D.C. Heath and Co., 1978), , at p. 5 & 6

²⁸⁸See: “Who’s Who in Iraqi Opposition?”, BBC News, March 21, 2002, online at <www.news.bbc.co.uk> (Date accessed: July 23, 2002); Tim Weiner, “CIA Drafts Covert Plan to Topple Saddam”, Federation of American Scientists, February 26, 1998, online at <www.fas.org> (Date accessed: July 23, 2002); Kim Sengupta, “Exiles Gather in London to Plot Iraq Revolution”, The Independent, July 23, 2002, online at <www.news.independent.co.uk> (Date accessed: July 23, 2002).

extradited to Baghdad and Belgrade, or say that these are “our”²⁸⁹ terrorists and therefore not subject to the same rules? This demonstrates that the dilemma is essentially a political one and that a strict application of the so-called “commitment to fight terrorism” can always be more complicated than what it appears to be. In fact, there might be situations when even States with apparently converging or complementary interests in suppressing terrorism may not agree on the specific policies or the concrete actions to be taken against a particular group. Does that mean they sponsor terrorism? Certainly not. Mere inaction or unwillingness to go after the terrorists presumed to be operating inside its territory (even if it has the means to do it) do not necessarily constitute a direct support or sponsorship of terrorism²⁹⁰. But in certain cases and depending on the gravity of the situation, it could be viewed as a violation of an international obligation²⁹¹.

²⁸⁹This infamous expression comes from a conversation between (U.S.) Secretary of State Cordel Hull and President Roosevelt about Anastasio Somoza:

Hull - “This Somoza is a perfect son of a b__!”

Roosevelt - “Of course, but he is “our” son of a b__”.

See: Domingo Laino, *Somoza: El General Comerciante* (Asuncion: Intercontinental Editora, 1989), at p. 25

²⁹⁰Oliver Corten & François Dubuisson, “Opération ‘Liberté Immuable’: une extension abusive du concept de légitime défense”, *supra*, note 237, at p. 56

²⁹¹For instance, Paust argues that the refusal by a State to prosecute or extradite international terrorists residing on its territory could itself be violative of international law, on the basis that “no State can permissibly grant immunity of any sort for international crimes”. See: Jordan J. Paust, “Responding Lawfully to International Terrorism: The Use of Force Abroad” (1986) 8 Whittier L. Rev. 711, at 726

III) TERRORISM AND SELF-DEFENCE

A) PRELIMINARY OBLIGATION OF PEACEFUL SETTLEMENT

1) General Principles

In international law, States have a preliminary obligation, prior to using force, to seek a peaceful but just settlement of their differences²⁹². For this, active efforts to solve the dispute must be conducted in a spirit of good faith and cooperation²⁹³. According to Article 2(3) of the Charter, members of the United Nations are pledged to act in accordance with the following principle:

“All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered”²⁹⁴.

Equally, the Declaration on Friendly Relations prescribes that “States shall seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice”²⁹⁵. They have a duty, “in the event of failure to reach a solution by any one of the above peaceful means, to continue to seek a settlement of the dispute by other peaceful

²⁹²Bruno Simma, et al., *supra*, note 245, at p.101

²⁹³*Ibid.*

²⁹⁴*Charter of the United Nations*, *supra*, note 146, Article 2(3)

²⁹⁵*Declaration on Friendly Relations*, *supra*, note 71.

means agreed upon by them”²⁹⁶. In fact, the Declaration on Friendly Relations sets out the “duties of States with respect to peaceful settlement in significantly more detail than the Charter”²⁹⁷. For instance, States are encouraged to “seek early and just settlement of their international disputes by the procedures enumerated and, in the event of a failure to reach a solution by one procedure, to continue to seek a peaceful settlement by other procedures”²⁹⁸. Also, various international instruments oblige States to strive for the resolution of a dispute existing between themselves to the best of their abilities²⁹⁹. This means that the disputing States must first seek all possible solutions in a spirit of cooperation to solve their differences³⁰⁰. The choice of means is up to the parties³⁰¹. But there could be situations when a thorny dispute cannot be successfully solved by the interested parties. In such case, they are not required to behave in a manner that may adversely affect their legitimate interests. From the language of Article 2(3), there seems to be no overriding obligation to settle peacefully every single international dispute³⁰². This means Article 2(3) does not mandate a specific result from their

²⁹⁶Ibid.

²⁹⁷G.G. Shinkaretskaia, “Peaceful Settlement of International Disputes: An Alternative to the Use of Force” in *The Non-Use of Force in International Law*, supra, note 154, at p. 43

²⁹⁸Ibid.

²⁹⁹Bruno Simma, et al., supra, note 245, at p.101

³⁰⁰*Charter of the United Nations*, supra, note 146, Article 33(1)

³⁰¹John F. Murphy, “Force and Arms” in *The United Nations and International Law*, Christopher C. Joyner (ed.) (Cambridge: Cambridge University Press, 1997), at p. 100

³⁰²Anthony Clark Arend, “The Obligation to Pursue Peaceful Settlement of International Disputes During Hostilities”, supra, note 153, at p. 100

negotiations, only that the parties strive in good faith for the resolution of their disputes. As previously discussed, the Security Council is also authorized under Chapter VI of the Charter “to investigate any dispute, or any situation which might lead to international friction or give rise to a dispute”³⁰³. The Security Council is further empowered to call upon the parties to settle their disputes by the mechanisms provided in Article 33(1)³⁰⁴ and “to assume jurisdiction over any dispute which is likely to endanger peace for the purpose of securing its pacific settlement”³⁰⁵.

In case of a terrorist attack perpetrated by a State (either directly or through *de facto* organs) against another, the latter must first seek to solve the problem by peaceful means. However, “to require a State to allow an attack to continue without resistance on the ground that peaceful settlement should be sought first would nullify the right of self-defence”³⁰⁶. The victim State has therefore the right to use necessary and proportional force as an immediate response if an armed attack is taking place³⁰⁷. But what are the consequent obligations once armed hostilities have started on both sides? One author suggests that “the principle of peaceful settlement, being a generally recognized imperative principle of international law, cannot cease to be operative under any circumstances, irrespective of the state of relations between subjects of international

³⁰³*Charter of the United Nations*, supra, note 146, at Article 34

³⁰⁴*Ibid.*, at Article 33(1)

³⁰⁵C.H.M. Waldock, supra, note 164, at p. 489

³⁰⁶Oscar Schachter, “The Lawful Resort to Unilateral Use of Force” (1985) 10 *Yale J. Int’l L.* 291, at p. 292

³⁰⁷*Ibid.*

law”³⁰⁸. In fact, “it would be a mistake to eliminate the idea of seeking other means as a condition of necessity or to assume that other forms of redress would always be ineffective”³⁰⁹. Thus, the obligation to pursue peaceful settlement continues even during the course of hostilities³¹⁰.

Finally, the State victim of a terrorist attack could always bring the matter to the Security Council³¹¹. The latter could determine whether a terrorist attack is likely to endanger international peace and security and, if so, whether it is necessary for the Security Council to undertake appropriate measures for the maintenance of international peace and security³¹². On the other hand, the Security Council could also come to a conclusion that an incident of a terroristic nature does not constitute a threat to international peace and security on the basis that “the corresponding acts or their consequences do not have a sufficiently serious character”³¹³.

³⁰⁸G.G. Shinkaretskaia, “Peaceful Settlement of International Disputes: An Alternative to the Use of Force” in *The Non-Use of Force in International Law*, supra, note 154, at p. 48

³⁰⁹Oscar Schachter, “The Extraterritorial Use of Force Against Terrorist Bases”, supra, note 15, at p. 314

³¹⁰Anthony Clark Arend, “The Obligation to Pursue Peaceful Settlement of International Disputes During Hostilities”, supra, note 153, at p. 119

³¹¹Rein Mullerson, “Self-Defense in the Contemporary World” in *Law & Force in the New International Order*, supra, note 152, at p. 18

³¹²*Charter of the United Nations*, supra, note 146, Article 39

³¹³Rein Mullerson, “Self-Defense in the Contemporary World” in *Law & Force in the New International Order*, supra, note 152, at p. 18

2) Specific Measures

a) Diplomatic Protest

Diplomacy refers to the peaceful conduct of official relations between sovereign States and/or intergovernmental organizations³¹⁴. As previously discussed, States have a preliminary obligation to solve an international dispute through diplomatic channels. Diplomacy must serve to avert war³¹⁵. Therefore, one could affirm that even if there is sufficient evidence linking a terrorist attack with a State, the victim State must first find a diplomatic solution or at least file a diplomatic protest against the State presumed to have encouraged or sponsored the attacks or sheltered its perpetrators. The avenue of diplomatic protest “is always open and frequently worth taking”³¹⁶. The protesting State does not lose anything by making such protest against the State believed to have links with terrorist activities.

It is also said that a diplomatic protest could be made even if no nationals or interests belonging to the protesting State are among the terrorists’ victims³¹⁷. In fact, every State “has a vital interest in inducing other States to refrain from aiding and abetting international terrorism”³¹⁸, because it is an interest that “transcends the question whether its nationals may be

³¹⁴Manfred Wilhelmy, *Politica internacional: enfoques y realidades* (Buenos Aires: Grupo Editor Latinoamericano, 1988), at p. 230

³¹⁵*Ibid.*, at p. 231

³¹⁶John F. Murphy, “State Self-Help and Problems of Public International Law” in *Legal Aspects of International Terrorism*, *supra*, note 287, at p. 569

³¹⁷*Ibid.*

³¹⁸*Ibid.*

endangered or injured in the course of any particular incident”³¹⁹. The diplomatic protest must induce all States “to cooperate more fully with efforts to control international terrorism”³²⁰. For its part, the victim State should also “make every effort to induce other States to become parties to and abide by applicable international conventions”³²¹, such as the ones discussed previously.

Following the September 11 attacks, the United States immediately protested and sent a stern warning to the Taliban government in Afghanistan³²². The Americans made the Taliban know that the terrorist attacks were the works of Osama bin Laden and that he was taking refuge in Afghanistan³²³. The United States asked the Taliban government to extradite or deliver bin Laden in order to face the accusations laid against him³²⁴. The Taliban refused his extradition for the reason that they did not believe bin Laden was behind the attacks and that they would only

³¹⁹Ibid.

³²⁰Ibid.

³²¹Ibid.

³²²“Ultimatum to Taliban: Hand Over bin Laden or Face Attack”, September 16, 2001, Institute for Counter Terrorism, online at <www.ict.org.il> (Date accessed: May 12, 2002)

³²³Ibid.

³²⁴In the joint session of the U.S. Congress, President Bush issued the following demand to the Taliban regime:

“...the United States of America makes the following demands on the Taliban: Deliver to United States authorities all the leaders of Al Qaeda who hide in your land...Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist and every person in their support structure to appropriate authorities. Give the United States full access to terrorist training camps, so we can make sure they are no longer operating. These demands are not open to negotiation or discussion. The Taliban must act and act immediately. They will hand over the terrorists, or they will share in their fate”.

See: *Address to a Joint Session of Congress and the American People*, supra, note 3.

deliver him if there were more convincing evidence linking bin Laden with the terrorist attacks of September 11³²⁵. The Taliban also held the view that in any case, bin Laden could only be tried by an Islamic court³²⁶.

In this context, one could say that the United States had little choice but to act more forcefully, particularly “after having given the Taliban regime several opportunities to avoid an armed response”³²⁷. Justifying its actions, the United States, through its representative to the UN, stated:

“Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad”³²⁸.

Even after the air strikes had commenced, President Bush offered the Taliban a “second chance to turn over Osama bin Laden, but that offer was also rejected”³²⁹. From the following, one can conclude that the United States exhausted all diplomatic and peaceful means to convince the Taliban regime to deliver Osama bin Laden, but these measures proved inadequate and the

³²⁵“Taliban Leader: Prepare for Holy War”, September 14, 2001, CNN, online at <www.cnn.com/world> (Date accessed: May 12, 2002)

³²⁶Ibid.

³²⁷Jack M. Beard, “America’s New War on Terror: The Case for Self-Defense Under International Law”, *supra*, note 170, at p. 588 & 589

³²⁸Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, *supra*, note 239.

³²⁹Jack M. Beard, “America’s New War on Terror: The Case for Self-Defense Under International Law”, *supra*, note 170, at p. 566

United States had no option but to have recourse to more forcible measures³³⁰.

b) International Claim

An international claim could arise if a State violating its international obligation incurs responsibility for an international wrong. This principle was first explained in the *Chorzow* case, where the Permanent Court of International Justice stated:

“Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed. Restitution in kind, or if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law”³³¹.

More recently, the ILC adopted Article 31 of the Draft Articles on State Responsibility which provides:

1. “The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally

³³⁰ Apparently, the Taliban reacted to the air strikes by reiterating its offer to hand bin Laden over to a neutral third country if the United States provided evidence connecting him to the September 11 attacks. President Bush rejected such offer, by stating that the United States demands were non negotiable. See: Sean D. Murphy, “Contemporary Practice of the United States Relating to International Law: Terrorist Attacks on World Trade Center and Pentagon”, *supra*, note 1, at p. 248

³³¹ *Case Concerning the Factory at Chorzow (Claim for Indemnity)* 3, No. 17, PCIJ, at p. 47

wrongful act of a State”³³².

But are these principles applicable in the attribution of responsibility for the commission of terrorist acts? It is said that a State could be held liable for failing to prevent injuries caused by a terrorist attack or for failure to apprehend, punish, or extradite those who commit acts of terrorism³³³. Indeed, the mere bringing of an international claim “might serve a useful function in that they would focus attention on the illegal acts of the respondent State and raise the consciousness of the world community as to the legal principles involved and the respondent State’s violation of them”³³⁴. As Murphy observes, it is highly unlikely that in the majority of cases, the respondent State will acknowledge international responsibility for its actions (or inaction) or that it would agree to any form of third-party settlement³³⁵. However, this does not undermine the fact that a State violating an international obligation “is in principle obliged to provide redress to States injured by the violation”³³⁶.

On the other hand, any international claim against a State accused of sponsoring terrorism must be weighted by taking into consideration existing economic and political realities. For instance, in the case of the September 11 attacks, it would have been pointless, for political and

³³²*Draft Articles on Responsibility of States for Internationally Wrongful Acts*, supra, note 173, at Article 31

³³³John F. Murphy, “State Self-Help and Problems of Public International Law” in *Legal Aspects of International Terrorism*, supra, note 287, at p. 567

³³⁴*Ibid.*, at p. 568

³³⁵*Ibid.*

³³⁶Oscar Schachter, *International Law in Theory and Practice*, supra, note 149, at p. 203

economic reasons, to claim monetary compensation against the Taliban regime for the losses incurred by the collapse of the Twin Towers and the damage inflicted on the Pentagon³³⁷.

c) Economic Sanctions

The term “economic sanction” refers to any coercive economic measure “taken against one or more countries to force a change in policies, or at least to demonstrate a country’s opinions about the other’s policies”³³⁸. Sanctions are usually imposed in the form of “trade embargoes, restrictions on imports and exports, denial of foreign assistance, freezing of foreign assets, and the prohibitions of economic transactions between [the sanctioning State] and the sanctioned State”³³⁹. Economic sanctions can be imposed unilaterally by a State against another (for instance, America’s trade restrictions against Cuba), or multilaterally, through the proper

³³⁷More recently, a civil lawsuit was launched by the families of the September 11 victims against those persons and governments (including some Saudi government officials) alleged to have financed Al Qaeda and Osama bin Laden. See the text of the lawsuit in: Thomas Burnett et. al. v. Al Baraka Investment & Development Corp. et al., online at <www.findlaw.com> (Date accessed: August 21, 2002). See also: Laurie Kellman, “September 11 Families Sue Sudan, Saudis”, Associated Press, August 15, 2002, online at <www.dailynews.yahoo.com> (Date accessed: August 15, 2002); “\$116 Trillion Lawsuit Filed by 9/11 Families”, CNN, August 15, 2002, online at <www.cnn.com> (Date accessed: August 15, 2002); Seth Stern, “Can a Trillion - Dollar Lawsuit Stop Saudi Terror - Cash Flow?”, The Christian Science Monitor, August 20, 2002, online at <www.csmonitor.com> (Date accessed: August 23, 2002); Roula Khalaf, “Saudis Withdraw Billions of Dollars from US”, The Financial Times, August 20, 2002, online at <www.ft.com> (Date accessed: August 23, 2002).

³³⁸Alan Einisman, “Ineffectiveness at its Best: Fighting Terrorism with Economic Sanctions” (2000) 9 Minn. J. Global Trade 299, at p. 302

³³⁹Ibid.

international organs (for instance, the UN sanctions against Iraq). Article 41 of the Charter explicitly prescribes that economic sanctions can be imposed by the Security Council. This provision states:

“The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations”³⁴⁰.

While imposing the sanctions regime, the Security Council must “observe the principles of human rights law and international humanitarian law when designing, monitoring and reviewing sanctions regimes”³⁴¹. The power to impose economic sanctions must be viewed in the context of the Charter “as a whole and should be exercised in accordance with the purposes and principles of the Charter, which include the promotion of human rights and the prevailing norms of international law”³⁴². But what are the parameters for the international community to impose economic sanctions against a State accused of promoting or sponsoring terrorism? Murphy argues that the resort by a State to economic sanctions as a punitive measure³⁴³ against a State accused of supporting terrorism should be imposed subject to the following conditions:

³⁴⁰*Charter of the United Nations*, supra, note 146, at Article 41

³⁴¹Anna Segall, “Economic Sanctions: Legal and Policy Constraints” (December 1999) 81 No. 836 Int’l Rev. Red Cross 763, at p. 765

³⁴²*Ibid.*

³⁴³However, it has been argued that economic sanctions should not be used as a form of punishment, but as an incentive to modify a behaviour of a State that threatens international peace and security. See: Linos-Alexandre Sicilianos, “L’autorisation par the Conseil de Sécurité de recourir à la force: une tentative d’évaluation” (2002) 106 RGDIP 5, at p. 12

- 1) there must have been a prior international delinquency against the claimant State;
- 2) redress by other means must be either exhausted or unavailable; and
- 3) the economic measures taken must be limited to the necessities of the case and be proportionate to the wrong done³⁴⁴.

A good example of an economic sanction against a State accused of sponsoring terrorism has been the sanctions imposed by the United Nations on Libya for its alleged involvement in the Lockerbie bombing³⁴⁵. On the other hand, the use of economic sanctions has not received unanimous support. For instance, Bassiouni thinks that sanctions have the effect of a collective punishment against a given population³⁴⁶. Also, some governments, particularly those of Western Europe, have not regarded economic measures, particularly trade embargoes, as useful instruments of policy for coercive or punitive purposes³⁴⁷. One author suggests that economic sanctions in the context of terrorism are “blunt weapons and expensive for those who use them, and this no doubt reinforces the European preference for diplomatic, political and cultural

³⁴⁴John F. Murphy, “State Self-Help and Problems of Public International Law” in *Legal Aspects of International Terrorism*, supra, note 287, at p. 566

³⁴⁵On the nature and scope of the economic sanctions imposed by the United Nations against Libya, see: Ramesh Jaura, “United Nations: Special Security Council Body For Sanctions Urged”, Inter-Press Service, online at <www.ips.org> (Date accessed: May 1, 2002); “Economic Sanctions: Libya”, Institute for International Economics, online at <www.iie.com> (Date accessed: May 1, 2002); Hugh Stevens, “Libya, Lockerbie, Sanctions and International Law”, online at <www.geocities.com/Athens/8744/Hugh/htm> (Date accessed: May 1, 2002).

³⁴⁶M. Cherif Bassiouni, “Legal Control of International Terrorism: A Policy Oriented Assessment”, supra, note 46, at p. 96

³⁴⁷Margaret Doxey, “International Sanctions in Recent Practice: Trends and Problems” in *Contemporary Problems of International Law: Essays in Honour of Georg Schwarzenberger*, Bin Cheng, et al., (eds.) (London: Stevens & Sons, 1988), at p. 53 & 54

measures at the mild end of the sanctions spectrum”³⁴⁸.

In fact, there might be situations when economic sanctions against States sponsoring terrorism can be deemed unproductive, if not completely futile. For instance, it is not sure if economic sanctions have been effective against States such as Iran, Iraq³⁴⁹ or Sudan. In the case of the September 11 attacks, one could argue that having imposed economic sanctions on Afghanistan would have been practically useless against the Taliban regime.

d) Assistance to the State Where Terrorists Operate

There might be situations when it would not be in the interest of the State victim of a terrorist attack to make aggressive claims or impose economic sanctions against the State presumed to be “hosting” the terrorists, especially if the latter enjoys a friendly relation with the victim State, or that State has a higher strategic interest in keeping good diplomatic relations with the State where the terrorists operate. In such situation, the victim State can always offer various types of assistance to the “host” State if the latter is unable or does not have the material resources to effectively suppress the activities of terrorists operating inside its territory. These

³⁴⁸Ibid.

³⁴⁹On the ineffectiveness of economic sanctions against Iraq, see generally: Samuel D. Porteous, “Financial Sanctions: A Better Way to Target Rogue Nations”, C.D. Howe Institute, December 7, 2000, online at <www.cdhowe.org> (Date accessed: July 21, 2002); Meghan L. O’Sullivan, “Iraq: Time for a Modified Approach”, The Brookings Institution, February 2001, Policy Brief #71, online at <www.brook.edu> (Date accessed: July 21, 2002); Anthony Arnove, “Iraq Under Siege: Ten Years On”, Monthly Review, December 2000, online at <www.monthlyreview.org> (Date accessed: July 21, 2002).

foreign “assistance” initiatives can take in many forms. For instance, the State interested in suppressing the terrorist elements inside the “host” State could provide military assistance and training of security personnel to the latter. They could also make intelligence sharing arrangements and cooperation for the extradition and suppression of terrorist elements from one country to another.

However, the State where the terrorists operate must first accept such an offer. The acceptance must be genuine³⁵⁰ and valid³⁵¹. With regard to the question of genuineness of an invitation by the “host” government, it is largely a question of fact, “and hence likely to turn in most cases on heavily evidentiary considerations that draw on common sense and the concepts of ordinary discourse that one uses in distinguishing the real from the spurious”³⁵². A notice to the Security Council is not a legally necessary condition in order to show consent³⁵³, but such a notice would be of strong evidentiary value³⁵⁴.

Following the attacks of September 11, the United States government offered various

³⁵⁰It is said that a consent is genuine in two ways: 1) it is freely-given; and 2) it is communicated in an effective manner. See: John L. Hargrove, “Intervention by Invitation and the Politics of the New World Order” in *Law and Force in the New International Order*, supra, note 152, at p. 117

³⁵¹It is said that a consent is valid if: 1) the entity from which the consent emanates is a State); and 2) the agent purporting to give consent is the legitimate government of the consenting State. See: John L. Hargrove, “Intervention by Invitation and the Politics of the New World Order” in *Law and Force in the New International Order*, supra, note 152, at p. 117

³⁵²John L. Hargrove, “Intervention by Invitation and the Politics of the New World Order” in *Law and Force in the New International Order*, supra, note 152, at p. 119

³⁵³*Ibid.*, at p. 118

³⁵⁴*Ibid.*

countries, such as the Philippines³⁵⁵, Yemen³⁵⁶ and Georgia³⁵⁷, the provision of military aid and advisers in order to fight and capture suspected Al Qaeda cells in these countries³⁵⁸. However, the main danger with many of these military assistance programs could be that these “military advisers” can easily be used and manipulated by the State where the terrorists operate in order to pursue its own political aims, for instance, in the suppression of legitimate dissident groups.

B) THE RIGHT TO SELF-DEFENCE

1) The Requirement of an Armed Attack

The exercise of the right to self-defence constitutes one of the most complex and controversial issues surrounding the prohibition of the use of force³⁵⁹. In general, international

³⁵⁵See: Walden Bello, “A ‘Second Front’ in the Phillipines”, March 18, 2002, *The Nation*, online at <www.commondreams.org> (Date accessed: July 3, 2002); Mariter Sison, “Phillipine Reaction to the Return of U.S. Troops: ‘Welcome Back’, GI Joe”, February 19, 2002, *World Press Review*, online at <www.worldpress.org> (Date accessed: July 3, 2002).

³⁵⁶See: Richard Engel, “Yemen Cautious on Battle Against Al Qaeda”, January 23, 2002, *BBC News*, online at <www.news.bbc.co.uk> (Date accessed: July 3, 2002).

³⁵⁷See: Jill Dougherty, “U.S. Troops Set For Ex-Soviet Republic of Georgia”, February 28, 2002, *CNN/World*, online at <www.cnn.com> (Date accessed: July 3, 2002).

³⁵⁸About the provision of military aid and advisers by the United States to oppressive regimes, see generally: “United States: Dangerous Dealings. Changes to U.S. Military Assistance After September 11”, February 2002, Vol.14, No.1, *Human Rights Watch*, online at <www.hrw.org> (Date accessed: July 3, 2002).

³⁵⁹Albrecht Randelzhofer, “Use of Force” in *Encyclopedia of Public International Law*, Vol. 4, *supra*, note 68, at p. 1253

law allows States to use force lawfully in individual or collective self-defence³⁶⁰. The Charter explicitly provides in its Article 51 the inherent right of every State to defend itself against an armed attack:

“Nothing 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. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security”³⁶¹.

This provision stipulates that a State can exercise its right to self-defence only if that State is the object of armed attack. In fact, the existence of an “armed attack” is a condition *sine qua non* for the lawful exercise of the right to self-defence³⁶². But what is the definition of “armed attack”? In the Nicaragua case, the International Court of Justice (the “ICJ”) stated that an “armed attack” constitutes the most grave form of use of force³⁶³. Whereas an “armed attack” always presupposes a use of force, and therefore a violation of Article 2(4) of the Charter, not

³⁶⁰It is widely viewed that the inherent right to self-defence predates the adoption of the Charter. See: Nicholas Rostow, “The International Use of Force After the Cold War” (1985) 32 Harv. Int’l L. J. 411, at 416. In fact, it is viewed that the right to self-defence was not a right given by the Charter but was, on the contrary, a pre-existing right in international law which was subsequently recognized by the Charter. See: Peter McRae, “Non Use of Force and Collective Security” in *Proceedings of the Conference on International Law: Critical Choices for Canada 1985-2000* (Kingston: Queen’s Law Journal, 1986), at p. 97

³⁶¹*Charter of the United Nations*, supra, note 146, at Article 51

³⁶²*The Nicaragua Case*, supra, note 271, at p. 122, at parag. 227

³⁶³*Ibid.*, at p.101, parag. 191

every use of force constitutes “armed attack”³⁶⁴. The latter only exists when force is used on a relatively large scale and with substantial effect³⁶⁵. The ICJ stated in this respect:

“...an armed attack must be understood as including not merely action by regular armed forces across an international border, but also the sending by or on behalf, of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to an actual armed attack conducted by regular forces, or its substantial involvement therein”³⁶⁶.

However, the ICJ did not elaborate on what threshold must be reached for a use of force to qualify as armed attack³⁶⁷. Mullerson suggests that an unrestrictive interpretation of the concept of armed attack could lead to political abuses and “open the way for international provocations which serve as a pretext for large-scale use of force”³⁶⁸. This would go against the stated purpose of the Charter³⁶⁹. Dealing with the threshold issue, Brownlie notes that:

³⁶⁴Bruno Simma, et al., *supra*, note 245, at p. 669

³⁶⁵*Ibid.*

³⁶⁶*The Nicaragua case*, *supra*, note 271, at p. 103, parag. 195

³⁶⁷Stanimir A. Alexandrov, *Self-Defense Against the Use of Force in International Law*, *supra*, note 155, at p. 120

³⁶⁸R.A. Mullerson, “The Principle of Non-Threat and Non-Use of Force in the Modern World” in *The Non-Use of Force in International Law*, *supra*, note 154, at p. 34

³⁶⁹Article 1 of the Charter states that the purposes of the United Nations are:

- To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.
- To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples; and
- To achieve international cooperation in solving international problems of an economic,

“Since the phrase ‘armed attack’ strongly suggests a trespass, it is very doubtful if it applies to the case of aid to revolutionary groups and forms of annoyance which do not involve offensive operations by the forces of a State. Sporadic operations by armed bands would also seem to fall outside the concept of ‘armed attack’. However, it is conceivable that a co-ordinated and general campaign by powerful bands of irregulars, with obvious or easily proven complicity of the government of a State from which they operate, would constitute an ‘armed attack’, more especially if the object were the forcible settlement of a dispute or the acquisition of territory”³⁷⁰.

Thus, we could argue that violent activities of a political nature which do not have any material effect or significant damage to the victim State would hardly be considered an armed attack in itself. However, such a situation derives from a subjective perception where the victim State would judge by itself if a terrorist attack does have significant detrimental effects on its sovereignty and national security.

In light of these considerations, can a terrorist act amount to an “armed attack”? It appears so when one considers the aftermath of the September 11 events. In this case, even if only box cutters were used as arms, it is difficult to imagine “what more than the transformation of an airliner into a fuel-laden precision-guided missile would be needed to make the attack an armed one”³⁷¹. Furthermore, the unprecedented response by the international community and important factual distinctions between the circumstances surrounding the September 11 attacks and previous terrorist acts giving rise to the use of force by the United States, “demonstrate the

social, cultural or humanitarian character.
See: *Charter of the United Nations*, supra, note 146, at Article 1.

³⁷⁰Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963), at p. 278 & 279

³⁷¹Frédéric Mégret, “War? Legal Semantics and the Move to Violence”, supra, note 17, at p. 12

propriety of the exercise of self-defence in this case under the Charter and customary international law³⁷². For instance, the Security Council through its resolutions 1368 and 1373 seemed to have equated these terrorist attacks with armed attacks in the sense of Article 51 of the Charter³⁷³, since it refers to the events of September 11 as “a threat to international peace”³⁷⁴ and states that “all necessary steps to respond to the terrorist attacks of September 11, 2001”³⁷⁵, including the inherent right of individual or collective self-defence. The North Atlantic Treaty Organization (“NATO”) has also expressed the view that these terrorist acts amounted to an armed attack³⁷⁶. Equally, the Permanent Council of the Organization of American States (the “OAS”) indicated that the attacks of September 11 were armed attacks on American territory in the context of the OAS Charter³⁷⁷. Similar views were also expressed by other States, including

³⁷²Jack M. Beard, “America’s New War on Terror: The Case for Self-Defense Under International Law”, *supra*, note 170, at p. 560

³⁷³Said Mahmoudi, “Comment on Fox Addendum” in *Terrorist Attacks on the World Trade Center and the Pentagon*, *supra*, note 9.

³⁷⁴Resolution 1368 (2001), *supra*, note 129.

³⁷⁵*Ibid.*

³⁷⁶NATO’s Response to Terrorism: Statement Issued at the Ministerial Meeting of the North Atlantic Council held at NATO Headquarters, Brussels, on 6 December 2001, Press Release M-NAC-2 (2001) 159, 6 December 2001, online at <www.nato.int> (Date accessed: February 14, 2002); Michael Reisman, “In Defense of World Public Order”, *supra*, note 254, at p. 833

³⁷⁷Montserrat Gorina-Ysern, “Addendum: Inter-American Regional Security Against Terrorism: A Shield and a Sword” in *Terrorist Attacks on the World Trade Center and the Pentagon*, *supra*, note 9.

Korea, Japan, Australia, New Zealand, Russia and China³⁷⁸.

2) Responding to the Armed Attack

If a State is subject to an armed attack (whether the attack is itself a military armed attack or a terrorist attack that amounts to an armed attack) by another State, the attacked State has the unequivocal right to defend itself against the attacker³⁷⁹. Self-defensive actions can be taken immediately, even without prior recourse to the Security Council³⁸⁰. On this point, the ILC has stated:

“[if] a State considers itself...to be the victim of an attack and takes the view that it must therefore use armed force immediately in order to repel it, the extremely urgent situation obviously leaves it no time or means for requesting other bodies, including the Security Council, to undertake the necessary defensive action”³⁸¹.

However, Article 51 also circumscribes the exercise of the right to self-defence “temporally and substantively”³⁸². This means that the right to self-defence must be used only to

³⁷⁸Jack M. Beard, “America’s New War on Terror: The Case for Self-Defense Under International Law”, *supra*, note 170, at p. 569 & 570. However, a handful of States, namely Iran, Iraq, North Korea, Cuba and Malaysia, have openly criticized the subsequent military action by the United States and its allies in Afghanistan. See: Luigi Condorelli, “Les attentats du 11 septembre et leurs suites: où va le droit international?”, *supra*, note 167, at p. 840

³⁷⁹C.H.M. Waldock, *supra*, note 164, at p. 495

³⁸⁰Olivier Corten & François Dubuisson, “Opération ‘Liberté Immuable’: une extension abusive du concept de légitime défense”, *supra*, note 237, at p. 75

³⁸¹Report of the International Law Commission, 32nd. Sess., 1980 II(1), Yearbook of the International Law Commission, UN Doc. A/CN.4/SER.A/1980/Add.1 (Part 1), at p. 70

³⁸²Nicholas Rostow, *supra*, note 360, at p. 416

push back (*repousser*) an armed attack and prevent it from succeeding (*empêcher sa réussite*)³⁸³. The self-defensive action “lasts only as long as the immediate threat persists and only until the Security Council responds effectively to the situation”³⁸⁴. The exercise of the right to self-defence must be reevaluated as soon as the Security Council takes the measures necessary to restore international peace³⁸⁵. The ICJ in the Nicaragua case also noted that Article 51 of the Charter requires that measures taken by States in exercise of their right to self-defence must be immediately reported to the Security Council³⁸⁶. Once that done, the final word “on whether there is an armed attack under Article 51 and whether the danger of an armed attack is grave and imminent”³⁸⁷, would always fall on the shoulders of the Security Council³⁸⁸.

On numerous occasions, both sides in an armed conflict have justified the use of force by

³⁸³Olivier Corten & François Dubuisson, “Opération ‘Liberté Immuable’: une extension abusive du concept de légitime défense”, *supra*, note 237, at p. 71

³⁸⁴John W. Head, “The United States and International Law After September 11” (2001) 11 Kan. J. L. & Pub. Pol’y 1, at p. 4

³⁸⁵Stanimir A. Alexandrov, *Self-Defense Against the Use of Force in International Law*, *supra*, note 155, at p. 104

³⁸⁶*The Nicaragua Case*, *supra*, note 271, at p. 105, parag. 200

³⁸⁷*Ibid.*, at p. 100

³⁸⁸On this point, Corten and Dubuisson write:

“Laisser à l’État, même victime d’une agression, la possibilité de décider seul quels sont les objectifs et les modalités de sa riposte revient à nier l’existence même d’un ordre juridique international dont la vocation première est d’assurer un système de sécurité collective”.

See: Olivier Corten & François Dubuisson, “Opération ‘Liberté Immuable’: une extension abusive du concept de légitime défense”, *supra*, note 237, at p. 73

invoking the right to self-defence³⁸⁹. But to clearly draw the line between a legitimate right to self-defence and an illegitimate use of force has always been very difficult³⁹⁰. In this respect, Schwarzenberger notes:

“In three typical situations, it may become difficult, if not impossible, for the Security Council to ascertain the truth in an escalating sequence of events: (a) in the case of action by armed forces of one of the parties across an ill-defined and contested frontier; (b) in the case of action in self-defence against infiltrators alleged to have acted on behalf, or with the connivance, of the other party; (c) in the case of action in self-defence in anticipation of an imminent attack”³⁹¹.

International law stipulates that during the exercise of the right to self-defence, the

³⁸⁹The difficulty of differentiating between an illegitimate act of aggression and a legitimate recourse to self-defence was illustrated in the Falkland War, where each State claimed that the other State was the aggressor and that its own military action was taken in self-defence. During this incident, the United Kingdom argued that it acted in self-defence in response to the attack by Argentinian forces and the subsequent military occupation of the islands. For its part, Argentina stated that its use of force was justified on the basis of self-defence of its territorial rights, since the islands were historically part of the territory of Argentina. Argentina claimed that the necessity of the use of force was supported by many factors including the illegal use of force by the United Kingdom 149 years ago to usurp the islands. Thus, Argentina’s claim for its use of armed force in self-defence was apparently based on the initial and continuous use of force by the United Kingdom. See: Stanimir A. Alexandrov, *Self-Defense Against the Use of Force in International Law*, supra, note 155, at p. 132; Christiane Alibert, *Du droit de se faire justice dans la société internationale depuis 1945* (Paris: Librairie Générale de Droit et de Jurisprudence, 1983), at p. 127-137. More recently, some concerns were raised on the dispute of the Perejil Islands between Spain and Morocco, which eventually terminated without bloodshed. See: “The Story of Perejil: Between a Rock and a Hard Place”, July 18, 2002, The Independent, online at <www.news.independent.co.uk> (Date accessed: July 20, 2002); Paul Reynolds, “Analysis: Spanish or Moroccan Land”, July 16, 2002, BBC News, online at <www.bbc.co.uk> (Date accessed: July 20, 2002); Martin Wollacott, “What Spain Could Teach Us About Island Grabbing” July 19, 2002, The Guardian, online at <www.guardian.co.uk> (Date accessed: July 20, 2002); “Spain Retakes Uninhabited Island, Evicts Moroccan Troops”, July 18, 2002, CBC News, online at <www.cbc.ca> (Date accessed: July 20, 2002).

³⁹⁰Georg Schwarzenberger, *International Law and Order*, supra, note 32, at p. 165

³⁹¹*Ibid.*

exercising power must follow certain parameters. According to the ICJ in the Nicaragua case, self-defence “would warrant only measures which are proportional to the armed attack and necessary to respond to it”³⁹².

a) Necessity

A State exercising its right to self-defence should only take those necessary measures which are indispensable for repelling or neutralizing an armed attack. These measures must be lawful according to the modern law and usages of war. In principle, a State under armed attack has the initial right to decide by itself whether a self-defensive measure is necessary, but this initial determination is not, as a matter of law, final or decisive³⁹³. As stated previously, a State using force cannot escape the ultimate review by the Security Council and the General Assembly if other States challenge or question the legality of such use of force³⁹⁴.

The question of what measures are necessary to defend itself against terrorism can only be answered on the basis of the particular facts and the political context evolving around the specific situation. According to Schachter, all acts of terrorism are illegal under international law and therefore, there is a need to “call for sanctions and preventive action”³⁹⁵ to deter further

³⁹²*The Nicaragua Case*, supra, note 271, at p. 94, parag. 176

³⁹³Oscar Schachter, “The Extraterritorial Use of Force Against Terrorist Bases”, supra, note 15, at p. 313

³⁹⁴*Ibid.*

³⁹⁵*Ibid.*

terrorist acts. But not every terrorist incident sparks the justification for the use of armed force. Isolated or sporadic terroristic acts³⁹⁶, even where apparently carried out under the orders or with the support of another State might not justify a massive retaliatory bombings or armed invasion³⁹⁷ (this point will be further discussed in the section dealing with proportionality). Other more appropriate responses such as diplomatic protests, international claims or sanctions, could be deemed more productive. A critical determinant of the magnitude of the terrorist threat “would often be the pattern of prior attacks”³⁹⁸.

b) Proportionality

The self-defensive action (*la riposte*) also requires that any such measure be proportional to the aggression intended to defend against. Proportionality is described “in terms of a required relation between the alleged initiating coercion and the supposed responding coercion”³⁹⁹. For a measure to be proportional, any response to an attack should be intended to inflict roughly the same scale of harm as the initial armed attack⁴⁰⁰. In the Nicaragua case, the ICJ indicated that

³⁹⁶Walter Gary Sharp, “The Use of Armed Force Against Terrorism: American Hegemony or Impotence?”, *supra*, note 97, at p. 42

³⁹⁷Oscar Schachter, “The Extraterritorial Use of Force Against Terrorist Bases”, *supra*, note 15, at p. 313

³⁹⁸*Ibid.*

³⁹⁹Myres S. McDougall & Florentino P. Feliciano, *Law and Minimum World Public Order* (New Haven: Yale University Press, 1961), at p. 241

⁴⁰⁰*Ibid.*

pre-existing requirements of proportionality survived the adoption of the Charter and continued to govern any action undertaken by Article 51⁴⁰¹. According to this principle, a defender should attempt to focus its self-defensive measure only against the source of the initial assault⁴⁰².

However, if a defensive measure consists of a “reasonable relation of means to ends, it would not be disproportionate if in some cases the retaliatory force exceeded the original attack in order to serve its deterrent aim”⁴⁰³.

The application of the proportionality principle could be relatively simple when, for instance, the air defence system of the defending State shoots down an intruder fighter plane after a failed attempt to warn it off⁴⁰⁴. In this case, the defender is not destroying the intruder’s entire air force but only the jet fighter that violated the defending State’s airspace⁴⁰⁵. Equally, a State subject to an isolated border incursion is not entitled to bomb the aggressor’s cities or launch a massive ground invasion⁴⁰⁶. Such measures would not be proportional to neutralize the original border incursion. In light of the attacks of September 11, Cassese has argued that any use of military force against the terrorists be proportionate, “not to the massacre caused by the terrorists

⁴⁰¹*The Nicaragua Case*, supra, note 271, at p. 94

⁴⁰²Mark R. Schulman, “Discrimination in the Laws of Information Warfare” (1999) 37 Col. J. Transnat’l L. 939, at p. 948

⁴⁰³Oscar Schachter, “The Extraterritorial Use of Force Against Terrorist Bases”, supra, note 15, at p. 315

⁴⁰⁴Mark R. Schulman, supra, note 402, at p.948

⁴⁰⁵*Ibid.*

⁴⁰⁶Oscar Schachter, “The Lawful Resort to Unilateral Use of Force”, supra, note 306, at p.

on 11 September, but to the purpose of such use, which is to detain the persons allegedly responsible for the crimes, and to destroy military objectives, such as infrastructures, training bases and similar facilities used by the terrorists”⁴⁰⁷. In fact, there have recently been serious criticisms of the United States attacking civilian targets and inflicting a heavy toll of innocent casualties through their indiscriminate bombing of Afghanistan⁴⁰⁸.

Nevertheless, it would be fair to say that proportionality is not always easily achievable and measurable. In the context of State-sponsored terrorism, the attacker may not always be a single, readily identifiable entity, such as an intruding aeroplane or a group of armed individuals with distinctive uniforms crossing a border⁴⁰⁹. On the contrary, terrorists have the distinctive characteristic of being clandestine. One must not also forget that any armed response (whether proportionate or disproportionate) against acts of terrorism may do nothing more than provoke another terrorist attack seeking to even the score⁴¹⁰.

⁴⁰⁷A. Cassese, “Terrorism is Also Disrupting Some Crucial Legal Categories of International Law”, *supra*, note 61, at p. 999

⁴⁰⁸See generally: Paul Koring “US Warned About Civilian Casualties”, *The Globe and Mail*, July 31, 2002, at p. A9; David Osborne, “UN Keeps Damning Report on Afghan Massacre Secret”, *The Independent*, July 31, 2002, online at <www.independent.co.uk> (Date accessed: August 3, 2002); “Accountability for Civilian Death Tolls”, Amnesty International, July 2, 2002, online at <www.amnestyusa.org> (Date accessed: August 3, 2002); Marc W. Herold, “A Dossier on Civilian Victims of United States’ Aerial Bombing of Afghanistan: A Comprehensive Accounting”, online at <www.cursor.org/stories/civilian_deaths.htm> (Date accessed: August 4, 2002); Jill Treanor, “US Raids Killed 800 Afghan Civilians”, *The Guardian*, July 22, 2002, online at <www.guardian.co.uk> (Date accessed: August 4, 2002).

⁴⁰⁹Mark R. Schulman, *supra*, note 402, at p. 948

⁴¹⁰Ronald J. Sievert, “Meeting the Twenty-First Century Terrorist Threat Within the Scope of Twentieth Century Constitutional Law”, *supra*, note 266, at p. 1427. The current situation in Israel and Palestine demonstrates that disproportional and heavy military tactics seed more anger and hatred between each other. On a historical account of the various Arab-Israeli

3) Determining State Responsibility in Order to Exercise the Right to Self-Defence

As mentioned previously, certain acts of terrorism could very much constitute an “armed attack” in the sense of Article 51 of the Charter. Although the term ‘armed attack’ envisaged in Article 51 necessarily entails an armed action against a Member State of the United Nations, this provision is unclear on who or what might commit an armed attack⁴¹¹. On one hand, Gaja argues that Article 51 of the Charter does not specify that “an armed attack has to originate from a State”⁴¹². In this respect, it has been questioned whether, in the present conflict between Israel and the Palestinians, the Palestinian Authority represents a State, such that it would be capable of an armed attack that could trigger Israel’s right to self-defence⁴¹³. For this, it is said that “if a political body has the attributes of a government of a population in a reasonably well defined territory, it could be considered capable of perpetrating an armed attack under international law, whether or not it is a State that has been officially recognized by other governments or by the United Nations”⁴¹⁴.

On the other hand, Article I of the Definition of Aggression stipulates that aggression

conflicts, see: Benny Morris, “Arab-Israeli War” in *Crimes of War*, supra, note 78, at p. 28 et ss.

⁴¹¹Sean D. Murphy, “Terrorism and the Concept of ‘Armed Attack’ in Article 51 of the U.N. Charter” (2002) 43 Harv. J. Int’l L. 41, at p. 50

⁴¹²Giorgio Gaja, “In What Sense Was There an ‘Armed Attack’?” in *Forum: The Attack on the World Trade Center: Legal Responses*, European Journal of International Law, online at <www.ejil.org> (Date accessed: August 1, 2002)

⁴¹³Emanuel Gross, “Thwarting Terrorist Acts by Attacking the Perpetrators or their Commanders as an Act of Self-Defense: Human Rights versus the State’s Duty to Protect its Citizens”, supra, note 17, at p. 196

⁴¹⁴Frederic L. Kirgis, “Israel’s Intensified Military Campaign Against Terrorism” ASIL Insight, December 2001, online at <www.asil.org> (Date accessed: May 28, 2002)

must clearly come from a State⁴¹⁵. The ILC, in its studies and reports on State responsibility, also concluded that self-defence applies only against a State that had itself wrongfully used force⁴¹⁶.

The ILC specifically noted that:

“...for action of the State involving recourse to the use of armed force to be characterized as action taken in self-defence, the first and essential condition is that it must have been preceded by a specific kind of internationally wrongful act, entailing wrongful recourse to the use of force, by the subject against which the action is taken”⁴¹⁷.

Equally, Condorelli suggests that the scope of the Charter, and more specifically its Articles 2(4) and 51, is only limited to conflicts between States or conflicts having some form of inter-State involvement⁴¹⁸. For instance, one cannot assert that the Oklahoma City bombing of 1995 was an armed attack in the sense of Article 51 of the Charter because this act was the result of home-grown terrorism⁴¹⁹ and did not have any foreign or transnational involvement.

Thus, a victim State cannot invoke the right to self-defence if a terrorist act does not have any State sponsorship since the law on the use of force relates only to actions between member

⁴¹⁵*Definition of Aggression*, supra, note 159, at Article I. However, Reisman notes that the intention of the Definition of Aggression appeared to have been not to characterize terrorist acts as armed attacks “unless they amounted to an actual armed attack conducted by regular military forces, as described in Article 3(a) of the Definition of Aggression”. See: Michael Reisman, “International Legal Responses to Terrorism”, supra, note 48, at p. 37.

⁴¹⁶Oscar Schachter, *International Law in Theory and Practice*, supra, note 149, at p. 165

⁴¹⁷Report of the International Law Commission, supra, note 191, at p. 53

⁴¹⁸Luigi Condorelli, “Les attentats du 11 septembre et leurs suites: où va le droit international?”, supra, note 167, at p. 838

⁴¹⁹Harry Henderson, *Global Terrorism*, supra, note 51, at p. 135

States⁴²⁰. On the other hand, if a terrorist attack, which amounts to an armed attack, was clearly supported and sponsored by a State against another, the latter could invoke Article 51 of the Charter and take self-defensive measures against the State that supported the attack. In this case, the victim State must present clear and convincing evidence indicating that the accused State supported the said terrorist attack in order to make its *casus belli*.

But what would be the threshold for a ‘State support’ or ‘State sponsorship’ to amount to an actual armed attack? In the Nicaragua case, the ICJ held that where a State is involved with the organization of “armed bands” operating in the territory of another State, this could amount to an armed attack, depending on its “scale and effects”⁴²¹. Nevertheless, the ICJ pointed out that although providing irregular groups with logistical support, financial aid and/or weapons may well violate international law (especially the fundamental principle of non-interference in the domestic affairs of another State), such assistance was not in and of itself an “armed attack”⁴²². Accordingly, such assistance alone could not justify the resort to force in self-defence, whether individual or collective, because of the inherent restrictions imposed by Article 2(4) of the

⁴²⁰It is also said that a State could not be at “war” with an entity that has a status less than that of an insurgent (within the meaning of common Article 3 of the 1949 Geneva Conventions) unless that entity is directly involved with others engaged in a “war”. A State could be at war with another State, or with a group of people recognizably having a particular status even though they have no territorial base and there is no recognition of relevant statehood status (for instance, the various leftists liberation movements in the Third World). However, a State could not be at “war” with a private individual (for instance, Osama bin Laden). See: Jordan Paust, “Addendum: War and Responses to Terrorism” in *Terrorist Attacks on the World Trade Center and the Pentagon*, supra, note 9.

⁴²¹*The Nicaragua Case*, supra, note 271, at p. 103

⁴²²*Ibid.*, at p. 103-104

Charter⁴²³. On the other hand, dissenting Judges Schwebel⁴²⁴ and Jennings⁴²⁵ viewed that providing insurgents with logistical support, or at least logistical support coupled with weapons, will generally be sufficient to render the assisting State responsible for an armed attack carried out by the insurgents⁴²⁶. Schachter elaborates this point further by stating:

“...it would go too far to say that the mere presence of terrorists in a State meant that the State was involved in their armed attacks, but when a government provides weapons, technical advice, transportation aid and encouragement to terrorists on a substantial scale, it is not unreasonable to conclude that the armed attack is imputable to that government”⁴²⁷.

As for logistical support, it may take in many forms. Cassese argues that at one end, logistical support may involve “the entire training, moving, lodging and equipping of an insurgent army, assistance which should engage the State’s responsibility for attacks by the troops; at the other end, it may involve merely permitting insurgents to sleep in disused huts in remote border areas, assistance which should not of itself engage the State’s responsibility for an armed attack”⁴²⁸. One can concede therefore that “the rules are far from clear and States still have plenty of room for manoeuvre”⁴²⁹. According to one author, State practice has often been so

⁴²³Ibid.

⁴²⁴Ibid., at p. 346-347

⁴²⁵Ibid., at p. 543

⁴²⁶Ibid.

⁴²⁷Oscar Schachter, *International Law in Theory and Practice*, supra, note 149, at p. 165

⁴²⁸Antonio Cassese, “The International Community’s “Legal” Response to Terrorism”, supra, note 109, at p. 599

⁴²⁹Ibid., at p. 600

inconsistent and even contradictory from one case to another as “to be of little utility as a body of practice from which the content and evolution of its substantive principles can be ascertained”⁴³⁰. However, the international community has generally been critical of unilateralist practices⁴³¹, such as the American bombing of Libya in 1986 and the Israeli attack of Tunis in 1985. During the Libyan incident, the United Nations evinced unambiguous disapproval of the American behaviour, and the then Secretary General of the United Nations, Mr. Perez de Cuellar, condemned the military action of the United States⁴³². The General Assembly also adopted Resolution 41/38⁴³³ denouncing the raid. Even the Security Council attempted to issue a resolution (which was eventually vetoed by the United States, Great Britain and France) stating that the American attack “violated the Charter and rejecting President Reagan’s invocation of Article 51 as justification”⁴³⁴. Equally, the Security Council rejected Israel’s alleged claim to self-defence when it attacked the PLO headquarters in Tunis in 1985⁴³⁵ and issued Resolution

⁴³⁰John L. Hargrove, “Intervention by Invitation and the Politics of the New World Order” in *Law and Force in the New International Order*, supra, note 152, at p. 115

⁴³¹Olivier Corten & François Dubuisson, “Opération ‘Liberté Immuable’: une extension abusive du concept de légitime défense”, supra, note 237, at p. 60-62

⁴³²Michael Reisman, “International Legal Responses to Terrorism”, supra, note 48, at p. 34

⁴³³*Declaration of the Assembly of Heads of State and Government of the Organization of African Unity on the Aerial and Naval Military Attack Against the Socialist People’s Libyan Arab Jamahiriza by the Present United States Administration in April 1986*, Resolution 41/38, UNGA, 20 November 1986, UN Doc. A/RES/41/38 (1986)

⁴³⁴Michael Reisman, “International Legal Responses to Terrorism”, supra, note 48, at p. 34

⁴³⁵Gregory H. Fox, “Addendum to ASIL Insight on Terrorist Attacks” in *Terrorist Attacks on the World Trade Center and the Pentagon*, supra, note 9.

573 which condemned Israel's behaviour by a vote of 14 to zero (the United States abstaining). This resolution condemned "vigorously the act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the United Nations, international law and norms of conduct"⁴³⁶. It described the raid as a "threat to peace and security in the Mediterranean region"⁴³⁷ and requested the United Nations "to take measures to dissuade Israel from resorting to such acts against the sovereignty and territorial integrity of all States"⁴³⁸.

However, the reaction from the world community was different with regard to the events of September 11. The attack itself was devastating and, as the United States was responding to an attack on its soil, there appeared to be open support by the Taliban to Al Qaeda. For instance, one author indicates that it does not seem unreasonable to apply the language of Article 51 "to encompass the terrorist attacks of September 11"⁴³⁹. It has also been said that the absence of any serious criticism of the American actions against Afghanistan could be interpreted as an indication of acquiescence by the international community of forcible actions against those regimes that sponsor or support organized terrorist groups that commit armed attacks against other States⁴⁴⁰. This liberal interpretation of Article 51 is supported by NATO's invocation of

⁴³⁶Res. 573 (1985), S.C., 4 October 1985, S/17509

⁴³⁷*Ibid.*

⁴³⁸*Ibid.*

⁴³⁹John W. Head, "The United States and International Law After September 11", *supra*, note 384, at p. 3

⁴⁴⁰See: Frederic L. Kirgis, "Israel's Intensified Military Campaign Against Terrorism", *supra*, note 414; Luigi Condorelli, "Les attentats du 11 septembre et leurs suites: où va le droit international?", *supra*, note 167, at p. 836

Article 5 of the North Atlantic Treaty, following the September 11 attacks, expressing its “understanding that an armed attack against the United States occurred”⁴⁴¹.

The willingness by various States and the Security Council to concede the United States’ right to self-defence in response to the attacks of September 11 contrasts sharply with previous instances of terrorist attacks. Before the September 11 attacks, the Security Council had never approved a resolution explicitly invoking and reaffirming the inherent right of individual and collective self-defence in response to a particular terrorist attack⁴⁴². The Security Council’s unprecedented willingness to invoke and reaffirm self-defence under Article 51 in response to these attacks is an important precedent and, for some authors, “helped legitimized the U.S. military response as a legal use of force”⁴⁴³ under the rubric of self-defence.

4) Anticipatory ‘Self-Defence’ (or Pre-emptive Strike)

Anticipatory self-defence, also known as the right to pre-emptive strike, refers to a situation when a State faced with a perceived danger of immediate attack does not wait until that attack actually happens, but takes the appropriate military measure before the attack occur in

⁴⁴¹Frederic L. Kirgis, “Israel’s Intensified Military Campaign Against Terrorism”, *supra*, note 414.

⁴⁴²Jack M. Beard, “America’s New War on Terror: The Case for Self-Defense Under International Law”, *supra*, note 170, at p. 565

⁴⁴³*Ibid.*, at p. 566

order to defend itself⁴⁴⁴.

There seems to be no consensus among international legal scholars on whether anticipatory self-defence constitutes good law⁴⁴⁵. On one hand, Simma suggests that “an anticipatory right of self-defence would be contrary to the wording of Article 51 of the Charter, as well as to its object and purpose, which is to cut to a minimum the unilateral use of force in international relations”⁴⁴⁶. It is said that the manifest risk of abuse of that discretion would undoubtedly undermine the restrictions imposed by Article 2(4)⁴⁴⁷. Therefore, the Charter must be construed restrictively as to prohibit any measure which would justify a pre-emptive strike⁴⁴⁸.

On the other hand, a major criticism against this narrow interpretation of the Charter has been that a State faced with an imminent danger of attack, especially from terrorist organizations, cannot be expected to wait until the attack actually happens⁴⁴⁹, and after the attack, to pick up the

⁴⁴⁴Stanimir A. Alexandrov, *Self-Defense Against the Use of Force in International Law*, supra, note 155, at p. 149

⁴⁴⁵See: Ian Brownlie, *International Law and the Use of Force by States*, supra, note 370, at p. 272-278; Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order*, supra, note 399, at p. 239-241; Rex J. Zedalis, “Preliminary Thoughts on Some Unresolved Questions Involving the Law of Anticipatory Self-Defense” (1987) 19 Case W. Res. J. Int’l L. 129, at p. 130; C. Tomuschat, “International Law: Ensuring the Survival of Mankind on the Eve of a New Century. General Course on Public International Law”, supra, note 198, at p. 216-217; Olivier Corten & François Dubuisson, “Opération ‘Liberté Immuable’: une extension abusive du concept de légitime défense”, supra, note 237, at p. 71

⁴⁴⁶Bruno Simma, et al., supra, note 245, at p.676.

⁴⁴⁷Ibid.

⁴⁴⁸Ibid.

⁴⁴⁹See: Oscar Schachter, “The Right of States to Use Armed Force” (1984) 82 Mich. L. R. 1620, at p. 1634; more recently: Michal J. Glennon, “The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter” (2002) 25 Harv. J. L. & Pub. Pol’y,

pieces. From an operational perspective, this can be detrimental, even devastating, for the defending State. In a speech to the West Point Military Academy, President Bush proclaimed his “pre-emptive response” doctrine:

“...our security will require all Americans to be forward looking and resolute, to be ready for pre-emptive action when necessary to defend our liberty and to defend our lives”⁴⁵⁰.

Similar views were also expressed by some authors in the aftermath of the September 11 attacks. For instance, Glennon notes that a preemptive strike could be justified in order to prevent further terrorist attacks:

“Waiting for an aggressor to fire the first shot may be a fitting code for television westerns, but it is unrealistic for policy-makers entrusted with the solemn responsibility of safeguarding the well-being of their citizenry. If a State has developed the capability of inflicting substantial harm upon another, indicated explicitly or implicitly its willingness or intent to do so, and to all appearances is waiting only for the opportunity to strike, preemptive use of force is justified”⁴⁵¹.

In light of these divergent views, could anticipatory self-defence be permissible under some narrow circumstances (such as to prevent terrorist attacks) or should this doctrine be discarded altogether because of its inherent potential for political abuse? On one hand, there can be but little international consensus, in each instance, “on the circumstances and contingencies in

at p. 553

⁴⁵⁰“President Bush Delivers Graduation Speech at West Point”, June 1, 2002, *The White House, Office of the Press Secretary*, online at <www.whitehouse.gov> (Date accessed: July 23, 2002)

⁴⁵¹Michael J. Glennon, “The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter”, *supra*, note 449, at p. 552

which preemptive action may be necessary”⁴⁵². This is unequivocally reflected in the recent declarations of the United States with regard to a possible strike against Iraq⁴⁵³, where the only remaining superpower seems now to advocate the right to attack pre-emptively, and thus “extending far beyond the right of self-defence enshrined in Article 51 of the Charter, and amounting to *carte blanche* for Washington to intervene as how and when it chooses”⁴⁵⁴. It could be argued that such conduct violates Article 2(4) of the Charter, which prohibits the use of force as an instrument of international relations. Furthermore, predominant State practice demonstrates that anticipatory self-defence has not often been invoked by the international

⁴⁵²Michael Reisman, “International Legal Responses to Terrorism”, *supra*, note 48, at p. 17

⁴⁵³About the political and military arguments for and against a military invasion on Iraq, see generally: “First, Make the Case: Bush Has Far to Go to Warrant Support for an Attack on Iraq”, Michigan Live, August 13, 2002, online at <www.mlive.com> (Date accessed: August 14, 2002); Bruce Anderson, “The US Has Got it Right: The Case for War is Irresistible”, The Guardian, August 13, 2002, online at <www.guardian.co.uk> (Date accessed: August 14, 2002); “Saddam’s Promises and Threats”, The Economist, August 12, 2002, online at <www.economist.com> (Date accessed: August 14, 2002); Godfrey Sperling, “Bush and Iraq: Time is of the Essence”, The Christian Science Monitor, August 13, 2002, online at <www.csmonitor.com> (Date accessed: August 14, 2002); Helena Cobban, “The Elusive Case for a US-Iraq War”, The Christian Science Monitor, August 15, 2002, online at <www.csmonitor.com> (Date accessed: August 15, 2002); Brent Scowcroft, “Don’t Attack Saddam”, The Wall Street Journal, August 15, 2002, online at <www.opinionjournal.com> (Date accessed: August 17, 2002); Zbigniew Brzezinski, “If We Must Fight...”, The Washington Post, August 18, 2002, at p. B07

⁴⁵⁴Rupert Cornwell, “We’re Coming to Get You, Saddam (but it may take a little while)”, The Independent, July 21, 2002, online at <www.news.independent.co.uk> (Date accessed: July 23, 2002)

community since the adoption of the Charter⁴⁵⁵. Even the very few governments⁴⁵⁶ that have invoked anticipatory self-defence have been far from consistent in their own State practice⁴⁵⁷. This is because, as a matter of political reality, anticipatory actions tend to have other political considerations⁴⁵⁸.

But could a pre-emptive strike serve a much broader objective of the Charter, such as the maintenance of international peace and security? In our opinion, it does not. The doctrine of anticipatory strike constitutes essentially a social Darwinian view of an unruly international system⁴⁵⁹, which could play further havoc “with other Charter norms and purposes, such as the need to serve peace and to attempt to solve disputes with another State through peaceful means”⁴⁶⁰. In the case of Iraq, there is little evidence to indicate that the United States itself is an object of Saddam’s menace⁴⁶¹. In fact, Brzezinski argues that a war against Iraq “is too serious a business and too unpredictable in its dynamic consequences...to be undertaken because of a

⁴⁵⁵Stanimir A. Alexandrov, *Self-Defense Against the Use of Force in International Law*, supra, note 155, at p. 149

⁴⁵⁶In the post-Charter era, anticipatory self-defence was invoked by Britain, France and Israel during the Suez Canal Crisis in 1956, by Israel during the Six Days War in 1967 and during the Iraqi nuclear reactor crisis in 1981, among others. See: Stanimir A. Alexandrov, *Self-Defense Against the Use of Force in International Law*, supra, note 155, at p. 150-165

⁴⁵⁷Ian Brownlie, “The Principle of Non-Use of Force in Contemporary International Law” in *The Non-Use of Force in International Law*, supra, note 152, at p. 24

⁴⁵⁸Ibid.

⁴⁵⁹Zbigniew Brzezinski, “If We Must Fight...”, supra, note 453.

⁴⁶⁰Jordan J. Paust, “Responding Lawfully to International Terrorism: The Use of Force Abroad”, supra, note 291, at 720

⁴⁶¹Brent Scowcroft, “Don’t Attack Saddam”, supra, note 453.

personal peeve, demagogically articulated fears or vague factual assertions”⁴⁶².

5) Collective Self-Defence

a-Principle of Collective Self-Defence

Collective self-defence refers to the idea that if “one State commits an act of aggression against another, it is in the interest of the entire community to unite in a collective enforcement action to suppress the recalcitrant State”⁴⁶³. This right of collective self-defence has been recognized in the Nicaragua case as being part of customary international law⁴⁶⁴. However, the exercise of collective self-defence requires two conditions. First, the request must come from the State being attacked or a previous authorization to intervene has been granted by the State directly injured⁴⁶⁵. Second, any collective self-defence arrangement must respect the spirit of Article 1(1) of the Charter which states that among the purposes of the United Nations is “to take effective collective measures for the suppression of acts of aggression or other breaches of the

⁴⁶²Zbigniew Brzezinski, “If We Must Fight...”, *supra*, note 453. Furthermore, there is a much feared possibility that if the United States attack Iraq, Saddam will more likely unleash his weapons of mass destruction against the invading forces and against Israel. The latter, in its turn, would respond with nuclear retaliation, and thus unleashing an Armageddon of unimaginable proportions. See: Ze’ev Schiff, “If Attacked, Israel Might Nuke Iraq”, *Ha’aretz*, August 16, 2002, online at <www.haaretzdaily.com> (Date accessed: August 16, 2002).

⁴⁶³Anthony Clark Arend, *supra*, note 153, at p. 106

⁴⁶⁴*The Nicaragua case*, *supra*, note 271, at p. 103, parag. 194

⁴⁶⁵*Ibid.*, at p. 104-105 & 120

peace⁴⁶⁶.

A collective approach to combat terrorism obviously broadens the “base of support among other countries, thus increasing the possibility of success in the overall anti-terrorist campaign”⁴⁶⁷. For instance, the attacks of September 11 and the subsequent measures taken by NATO reinforces, as we will discuss in more details later, the determination by the international community to suppress and combat terrorism⁴⁶⁸. However, a collective or multilateral undertaking could present various challenges. On one hand, the efficiency of a unilateral action (in most cases that of the United States) can “sometimes outweigh the political advantages and moral strengths of multilateralism”⁴⁶⁹. In fact, one of the disadvantages in acting collectively, whether through the United Nations or any other international organization, is that it would warn in advance the terrorists or the State that sponsor them, allowing them time “to take evasive action and increasing the likelihood and extent of casualties which would be suffered by the State (or States) contemplating the attack”⁴⁷⁰. The use of force through the exercise of collective self-defence can also be the object of political abuse⁴⁷¹. In many instances, force in alleged collective

⁴⁶⁶*Charter of the United Nations*, supra, note 146, at Article 1(1)

⁴⁶⁷John W. Head, “The United States and International Law After September 11”, supra, note 384, at p. 8

⁴⁶⁸Luigi Condorelli, “Les attentats du 11 septembre et leurs suites: où va le droit international?”, supra, note 167, at p. 832 et ss.

⁴⁶⁹Michael Reisman, “In Defense of World Public Order”, supra, note 254, at p. 834

⁴⁷⁰Michael Reisman, “International Legal Responses to Terrorism”, supra, note 48, at p. 17

⁴⁷¹Collective self-defence has been invoked during the Soviet invasion of Hungary in 1956, the Soviet invasion of Czechoslovakia in 1968, the American invasion of Grenada in

self-defence has been used “without there being an armed attack or even an external threat against the alleged victim State, or the victim State has not considered itself attacked or threatened, and has not requested assistance”⁴⁷².

b-Collective Self-Defence Through Regional Organizations (The Case of Article 5 of the NATO Treaty)

Henry Kissinger once argued that collective security works best when “all nations or at least all nations relevant to collective defence, share nearly identical views about the nature of the challenge and are prepared to use force or apply sanctions on the “merits” of the case, regardless of the specific national interest they may have in the issues at hand”⁴⁷³. Such sense of common purpose was clearly demonstrated right after the attacks of September 11, where NATO declared that these terrorist attacks were not only an armed attack against the United States, but also an attack against all NATO countries⁴⁷⁴. NATO Secretary General, Lord Robertson, stated that if the terrorist attacks were directed from abroad against the United States⁴⁷⁵, it should be regarded

1983 and the American intervention in Vietnam, among many others. See: Stanimir A. Alexandrov, *Self-Defense Against the Use of Force in International Law*, supra, note 155, at p. 215, et ss.

⁴⁷²Stanimir A. Alexandrov, *Self-Defense Against the Use of Force in International Law*, supra, note 155, at p. 215

⁴⁷³Henry Kissinger, *Diplomacy* (New York: Simon & Schuster, 1994), at p. 247

⁴⁷⁴NATO’s Response to Terrorism: Statement Issued at the Ministerial Meeting of the North Atlantic Council held at NATO Headquarters, supra, note 376.

⁴⁷⁵On October 2, 2001, the North Atlantic Council, NATO’s top decision making body, determined that the individuals who carried out the attacks belonged to the terrorist network of

as a case covered by Article 5 of the North Atlantic Treaty⁴⁷⁶ which provides that:

“The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area”.

“Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security”⁴⁷⁷.

This was the first time since NATO’s inception that Article 5 has ever been invoked⁴⁷⁸.

This invocation within a day of the terrorist attacks was a powerful testimony of the condemnation of these barbarous attacks and “demonstrated that NATO’s overall approach to security can include the possibility of collective action in response to a terrorist attack from abroad on an ally”⁴⁷⁹. Indeed, it is viewed that the North Atlantic Treaty was founded “on a liberal interpretation of collective self-defence as allowing armed action by any State when

Al-Qaeda, headed by Osama bin Laden and protected by the Taliban regime in Afghanistan. See: “Invocation of Article 5 Confirmed”, 2 October 2001, online at <www.nato.int> (Date accessed: February 14, 2002)

⁴⁷⁶*The North Atlantic Treaty*, April 4, 1949, 34 U.N.T.S. 243

⁴⁷⁷*Ibid.*, at Article 5

⁴⁷⁸“What is Article 5?”, 21 September 2001, online at <www.nato.int> (Date accessed: February 14, 2002)

⁴⁷⁹“Statement on Combatting Terrorism: Adapting the Alliance’s Defence Capabilities”, Press Release (2001) 173, 18 December 2001, online at <www.nato.int> (Date accessed: February 14, 2002)

another member of the group is attacked”⁴⁸⁰.

Lord Robertson reaffirmed that NATO allies would take such actions as deemed necessary, including the use of force, adding that member States shall respond commensurate with their judgment and resources⁴⁸¹.

Although the principle of collective self-defence enunciated in Article 5 of the North Atlantic Treaty was first adopted during a very different time than those that exist today, the Alliance has noted that this principle remain “no less valid and no less essential today, in a world subject to the scourge of international terrorism”⁴⁸². The Council reiterated the Alliance’s

⁴⁸⁰Oscar Schachter, *International Law in Theory and Practice*, supra, note 149, at p. 155

⁴⁸¹“NATO reaffirms Treaty commitments in dealing with terrorist attacks against the US”, 12 September 2001, online at <www.nato.int> (Date accessed: February 14, 2002).

The NATO allies agreed to take eight measures, individually and collectively, to expand the options available in the military campaign against terrorism. Specifically, they agreed to:

- 1) enhance intelligence sharing and cooperation relating to the threats posed by terrorism;
- 2) provide assistance to Allies and other States which are or may be subject to increased terrorist threats as a result of their support for the campaign against terrorism;
- 3) take necessary measures to provide increased security for facilities of the United States and other Allies on their territory;
- 4) backfill selected Allied assets in NATO’s area of responsibility that are required to directly support operations against terrorism;
- 5) provide blanket overflight clearances for the United States and other Allies’ aircraft;
- 6) provide access for the United States and other Allies to ports and airfields on the territory of NATO nations for operations against terrorism;
- 7) deploy elements of its Standing Naval Forces to the Eastern Mediterranean; and
- 8) deploy elements of its NATO Airborne Early Warning force to support operations against terrorism.

See: “Statement to the Press by NATO Secretary General, Lord Robertson, on the North Atlantic Council Decision On Implementation of Article 5 of the Washington Treaty following the 11 September Attacks against the United States”, 4 October 2001, online at <www.nato.int> (Date accessed: February 14, 2002)

⁴⁸²Statement by the North Atlantic Council, Press Release (2001)124, 12 September 2001, online at <www.nato.int> (Date accessed: February 14, 2002) Lord Robertson informed the

determination to combat the threat of terrorism for as long as necessary⁴⁸³.

However, any collective self-defence undertaken by a multilateral entity requires that any such measure be in accordance with the principles of the United Nations Charter. In its preamble, the North Atlantic Treaty states that the “Parties to this Treaty reaffirm their faith in the purposes and principles of the Charter of the United Nations and their desire to live in peace with all peoples and all governments”⁴⁸⁴. This means that any military action undertaken by NATO must follow the parameters of Articles 2(4) and 51 of the Charter⁴⁸⁵.

C) OTHER FORCIBLE MEASURES

1) The “State of Necessity” Doctrine?

Unlike self-defence, which can only be invoked by a State against another, state of necessity is invocable in response “to dangers from non-State entities or individuals”⁴⁸⁶.

According to the ILC, the term ‘state of necessity’ refers to a situation where a State “whose sole means of safeguarding an essential interest threatened by a grave and imminent peril adopts

United Nations Secretary General Kofi Annan, that the North Atlantic Council has agreed to this position. See: “NATO reaffirms Treaty commitments in dealing with terrorist attacks against the US”, 12 September 2001, online at <www.nato.int> (Date accessed: February 14, 2002).

⁴⁸³“NATO’s Response to Terrorism: Statement Issued at the Ministerial Meeting of the North Atlantic Council held at NATO Headquarters”, supra, note 376 .

⁴⁸⁴*The North Atlantic Treaty*, supra, note 476, at Preamble

⁴⁸⁵*Ibid.*, at Article 1

⁴⁸⁶Oscar Schachter, *International Law in Theory and Practice*, supra, note 149, at p. 170

conduct not in conformity with what is required of it by an international obligation to another”⁴⁸⁷.

Article 25(1) of the Draft Articles on State Responsibility states that:

“Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole”⁴⁸⁸.

Schwarzenberger states that “necessity does not give any right, but may provide a good excuse”⁴⁸⁹. The state of necessity doctrine has been recognized by the ICJ as customary international law⁴⁹⁰. However, to invoke a state of necessity, the situation confronting the State must be such as to threaten its essential interest⁴⁹¹. On this issue, the ILC stated that in order to rightfully justify a “state of necessity”:

“...the interest concerned has to be essential, but need not relate only to the “existence” of the State. Indeed, the defence of the “existence” of the State (as distinct from the preservation of human life or of the environment) has rarely been considered a justification, since the purpose of the positive law of self-defence is to safeguard that existence...The extent to which a given interest is essential naturally depends on all the circumstances in which the State is placed in different specific situations; the extent must therefore be judged in the light of the particular case into which the interest enters, rather

⁴⁸⁷Report of the International Law Commission, *supra*, note 191, at p. 34

⁴⁸⁸*Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *supra*, note 173, at Article 25(1)

⁴⁸⁹G. Schwarzenberger, “Fundamental Principles of International Law” (1955-I) 87 *Recueil des Cours* 91, at p. 343

⁴⁹⁰*Case Concerning the Gabčíkovo-Nagymaros Project (The Nagymaros Case)*, (1997) ICJ Rep. 3, at p. 40

⁴⁹¹Report of the International Law Commission, *supra*, note 191, at p. 34

than be predetermined in the abstract”⁴⁹².

Generally, the State invoking necessity must “have found itself in a situation that left no other effective means of action”⁴⁹³. In the case concerning the Gabčíkovo-Nagymaros Project (the Nagymaros case), the ICJ ruled that the state of necessity doctrine can only be invoked on an exceptional basis⁴⁹⁴. In this respect, the ICJ said:

“The state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met”⁴⁹⁵.

According to the ICJ in this case, a state of necessity cannot exist without a peril duly established at a relevant point in time⁴⁹⁶. The mere apprehension of a possible peril cannot suffice in that respect. The peril must be objectively established and not merely apprehended as possible⁴⁹⁷. In addition to being grave, the peril has to be imminent in the sense of proximate⁴⁹⁸:

“Imminence is synonymous with immediacy or proximity and goes far beyond the concept of possibility...the extremely grave and imminent peril must have been a threat to

⁴⁹²International Law Commission, *Second Report on State Responsibility*, UNGA, 3 May - 23 July 1999, A/CN.4/498/Add.2, at p. 27

⁴⁹³Jean Raby, “The State of Necessity and the Use of Force to Protect Nationals” (1988) 26 Can. Y.B. Int’l L. 253, at p. 262

⁴⁹⁴*The Nagymaros Case*, supra, note 490, at p. 40

⁴⁹⁵*Ibid.*

⁴⁹⁶*Ibid.*, at p. 41-42

⁴⁹⁷*Ibid.*

⁴⁹⁸*Ibid.*

the interest at the actual time”⁴⁹⁹.

...

“...[the peril] must have been occasioned by an essential interest of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a grave and imminent peril; the act being challenged must have been the only means of safeguarding that interest; that act must not have seriously impaired an essential interest of the State towards which the obligation existed; and the State which is the author of that act must not have contributed to the occurrence of the State of necessity”⁵⁰⁰.

However, the ICJ indicated that a “peril appearing in the long term might be held to be imminent as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable”⁵⁰¹.

The state of necessity doctrine has often been invoked to protect a wide variety of interests, “including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population”⁵⁰². But can a State invoke the state of necessity doctrine in order to justify an armed action against terrorists operating in another State? In the *Caroline* case, although “frequently referred to as an instance of self-defence”⁵⁰³, British colonial troops stationed in Canada entered the United States and destroyed a cargo ship (the “*Caroline*”) which was supplying weapons to Canadian

⁴⁹⁹*Ibid.*, at p. 42

⁵⁰⁰*Ibid.*, at p. 40 & 41

⁵⁰¹*Ibid.*, at p. 42

⁵⁰²*Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *supra*, note 192, at p. 202

⁵⁰³*Ibid.*, at p. 196

insurgents⁵⁰⁴. The British representative, Daniel Webster, underlined his government's position in the following terms:

"...it will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it"⁵⁰⁵.

According to Webster, the intended measure must be "instant, overwhelming, leaving no choice of means, and no moment for deliberation"⁵⁰⁶. But opinions today differ on whether the principles espoused in the Caroline case survived the adoption of the Charter. On one hand, some legal scholars have expressed the view that in certain cases, it would be more appropriate for a State to invoke the state of necessity doctrine instead of relying on the right to self-defence⁵⁰⁷. For instance, Raby suggests that an armed intervention to protect nationals could be justified by the existence of a state of necessity, as long as the State's action remain within well-defined parameters⁵⁰⁸. Furthermore, Reisman indicates that the state of necessity doctrine could

⁵⁰⁴For a detailed account of the Caroline incident, see: Robert Jennings, "The Caroline and McLeod Cases" (1938) 32 Am. J. Int'l L. 82 et ss.

⁵⁰⁵Robert Jennings, "The Caroline and McLeod Cases", supra, note 504, at p. 89

⁵⁰⁶Ibid.

⁵⁰⁷See generally: Oscar Schachter, "The Lawful Use of Force by a State Against Terrorists in Another Country" in *Terrorism & Political Violence: Limits and Possibilities of Legal Control*, supra, note 75, at p. 256; John Alex Romano, "Combating Terrorism and Weapons of Mass Destruction: Reviving the Doctrine of a State of Necessity" (1999) 87 Georgetown L. J. 1023, at p. 1046 et ss.; Michael Reisman, "International Legal Responses to Terrorism", supra, note 48, at p. 47

⁵⁰⁸Jean Raby, "The State of Necessity and the Use of Force to Protect Nationals", supra, note 493, at p. 267

be applied in case of a terrorist attack, where a victim State acts unilaterally against a planned terrorist act emanating from the territory of another State, if it was clear that:

- 1) “the State from whose territory the action was emanating could not, even with the information supplied to it by the target, respond in timely fashion to prevent the terrorist act because of a shortage of time; or
- 2) the State from whose territory the action was emanating could not, even with adequate notice, act effectively to arrest the terrorist action. A military action against terrorists in another State would be justified only if it could be related to deterrence of further terrorist actions”⁵⁰⁹.

One could reason, for instance, that a State threatened by an imminent terrorist attack could rely on the state of necessity doctrine if the attack would originate from a State where its authority has completely broken down and which lacked any adequate means to prevent the attack (i.e. the “failed” State). On the other hand, it has been argued that the Caroline doctrine goes back to a time when self-defence and state of necessity were not clearly distinguished⁵¹⁰. Brownlie thinks that the Caroline doctrine cannot justify today the use of force against another State. He states that:

“If the customary law is still relevant, it must be that of 1945, immediately prior to the Charter, and not that of 1842. In any case, the subsequent practice of the parties to the Charter must now be considered as the logically dominant practice, and States generally have shown a marked disinclination to recognize the legality of the use of force as an instrument of policy”⁵¹¹.

⁵⁰⁹Michael Reisman, “International Legal Responses to Terrorism”, *supra*, note 48, at p. 47

⁵¹⁰Olivier Corten & François Dubuisson, “Opération ‘Liberté Immuable’: une extension abusive du concept de légitime défense”, *supra*, note 237, at p. 73

⁵¹¹Ian Brownlie, “The Principle of Non-Use of Force in Contemporary International Law” in *The Non-Use of Force in International Law*, *supra*, note 152, at p. 19

Zemanek also argues that the state of necessity doctrine may not be invoked in order to justify a violation of *jus cogens*, such as the prohibition of the use of force⁵¹². This position is reflected in Article 26 of the Draft Articles on State Responsibility which provides:

“Nothing in this Chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law”⁵¹³.

The ILC has explicitly stated that the plea of necessity “cannot excuse the breach of a peremptory norm”⁵¹⁴ of international law. Such peremptory norms would include “the prohibition of aggression...and the right to self-determination”⁵¹⁵. However, Schachter argues that a distinction must be made “between aggression, conquest and forcible annexation on the one hand, and lesser acts of force such as temporary incursions and intervention to apprehend criminals or to prevent injury to people and property”⁵¹⁶. In fact, the ILC seems to suggest that “an assault on the very existence of another State or on the integrity of its territory or the independent exercise of its sovereignty is a contravention of a norm of *jus cogens* and cannot

⁵¹²K. Zemanek, “The Legal Foundations of the International System. General Course on Public International Law”, *supra*, note 172, at p. 329

⁵¹³*Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *supra*, note 173, at Article 26

⁵¹⁴*Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *supra*, note 192, at p. 208

⁵¹⁵*Ibid.*

⁵¹⁶Oscar Schachter, *International Law in Theory and Practice*, *supra*, note 149, at p. 171

possibly be justified by the doctrine of necessity”⁵¹⁷. But on the other hand, the ILC has also said that “not all conduct infringing the territorial sovereignty of a State need necessarily be considered an act of aggression, or otherwise as a breach of a peremptory norm”⁵¹⁸. Thus, the argument goes that brief and circumscribed interventions against terrorists residing in another State would fall short of aggression⁵¹⁹, and therefore would be covered by the state of necessity doctrine.

2) Reprisals?

Reprisals are different from measures involving the right to self-defence⁵²⁰. In fact, the

⁵¹⁷International Law Commission, *Second Report on State Responsibility*, supra, note 492, at p. 25

⁵¹⁸Ibid.

⁵¹⁹Oscar Schachter, *International Law in Theory and Practice*, supra, note 149, at p. 171

⁵²⁰The doctrine of reprisals was explained during the *Naulilaa* incident. In this case, three German officers in South West Africa were killed and two others interned by Portuguese colonial troops in Angola. This occurred in October 1914, when Portugal was still neutral. Following this, the German governor ordered reprisals and sent German forces into Angola to destroy several forts and outposts and compelled the Portuguese to evacuate Naulilaa. With respect to the doctrine of reprisals, the arbitration tribunal stated:

“La représaille est un acte de propre justice de l’État lésé, acte répondant - après sommation restée infructueuse - à un acte contraire au droit des gens de l’État offensé. Elle a pour effet de suspendre momentanément, dans les rapports des deux États, l’observation de telle ou telle règle du droit des gens. Elle est limitée par les expériences de l’humanité et les règles de la bonne foi, applicables dans les rapports d’État à État. Elle serait illégale si un acte préalable, contraire au droit des gens, n’en avait fourni le motif. Elle tend à imposer, à l’État offensé, la réparation de l’offense ou le retour à la légalité, en évitation des nouvelles offenses”

See: *Responsabilité de l’Allemagne à Raison des dommages causées dans les colonies portugaises du Sud de l’Afrique*, 2 *Recueil des Sentences Arbitrales* (1928), 1012, at p. 1026.

ILC has drawn a distinction between armed reprisals and self-defence on the basis that the purpose of reprisals is always punitive rather than defensive, and “they take place after the event and when the harm has already been inflicted”⁵²¹. Bowett also argues that self-defence and reprisals differ significantly in their aim and purpose:

“Self-Defence is permissible for the purpose of protecting the security of the State and the essential rights - in particular the rights of territorial integrity and political independence - upon which that security depends. In contrast, reprisals are punitive in character: they seek to impose reparation for the harm done, or to compel a satisfactory settlement of the dispute created by the initial illegal act, or to compel the delinquent state to abide by the law in the future. But, coming after the event and when the harm has already been inflicted, reprisals cannot be characterized as a means of protection”⁵²².

But can armed reprisals be nevertheless justifiable to prevent and suppress the commission of terrorist acts? This is a much debated point. On one hand, Roberts suggests that reasonable reprisal measures might be necessary and justifiable to combat terrorism⁵²³. For instance, he argues that the accumulation of minor terrorist events could justify a single, larger retaliatory response in certain circumstances⁵²⁴. In fact, a pattern of continuous terrorist attacks

Reprisals are generally forbidden in international humanitarian law. But during the ratification of Additional Protocol I of 1977, a number of States made interpretative declarations which appeared to keep open the possibility of reprisals. For instance, the declarations which most clearly maintain a right of reprisal are those of Italy, Germany, Egypt and Great Britain. See: *Documents on the Laws of War*, supra, note 58, at p. 32

⁵²¹Report of the International Law Commission, supra, note 191, at p. 53-54

⁵²²D. Bowett, “Reprisals Involving Recourse to Armed Force” (1972) 66 Am. J. Int’l L. 1, at p.3

⁵²³Guy R. Roberts, “Self-Help In Combatting State-Sponsored Terrorism: Self-Defense and Peacetime Reprisals” (1987) 19 Case W. Res. J. Int’l L. 243, at 285

⁵²⁴*Ibid.*, at 282

could justify a large retaliation only “if they are part of a continuous, overall plan of attack that relies on numerous small raids”⁵²⁵. Thus, reprisal measures “should not be condemned on their illegality alone, but rather, on the basis of reasonableness determined primarily on a case-by-case basis which takes into account the proportionality of the reprisal more than any other factor”⁵²⁶.

However, the majority of the doctrine is of the view that armed reprisals are not justifiable under any circumstances, even in the so-called ‘war on terrorism’. Authors such as MacDonald, Waldock and Brownlie argue that armed reprisals have no place in the era of the Charter⁵²⁷, “for reprisals are a primitive instrument”⁵²⁸ in international relations and have proved to be productive of greater violence rather than a deterrent to violence⁵²⁹. Equally, the ICJ in the Corfu Channel Case made clear that prohibition of the use of force bans the use of military force in the form of reprisals⁵³⁰. In the same vein, the Friendly Relations Declaration prescribes that States have a duty to refrain from acts of reprisal involving the use of force⁵³¹.

⁵²⁵Ibid.

⁵²⁶Ibid., at 284

⁵²⁷See: R.S.J. MacDonald, “The Nicaragua Case: New Answers to Old Questions”, (1986) 24 Can. Y.B. Int’l L. 127, at p. 130; R. S. J. MacDonald, “L’emploi de la force par les états en droit international” in *Droit International: Bilan et perspectives*, Tome 2, Mohammed Bedjaoui (ed.) (Paris: Editions A. Pedone, 1991), at p. 774; C.H.M. Waldock, *supra*, note 164, at p. 493; Ian Brownlie, *International Law & the Use of Force by States*, *supra*, note 370, at p. 281

⁵²⁸A. Cassesse, *International Law in a Divided World* (Oxford: Clarendon Press, 1986) at p. 274

⁵²⁹D. Bowett, “Reprisals Involving Recourse to Armed Force”, *supra*, note 522, at p. 32

⁵³⁰*The Corfu Channel Case*, *supra*, note 240, at p. 35

⁵³¹*Declaration on Principles concerning Friendly Relations*, *supra*, note 71, at parag. 9

It is not surprising that there is much resistance to accept reprisals since, because of their punitive nature, they can aggravate an already precarious situation and create other unintended political and legal challenges. For instance, the present conflict between Israelis and Palestinians is, in our view, a clear demonstration that reprisals do not work⁵³². This results from the fact that reprisals do not generally deter acts of terrorism, but on the contrary, it often results in an escalation of terrorist violence and a spiralling cycle of retaliation and counter-retaliation⁵³³ to the point of becoming simply absurd. Hence, the adage “violence breeds more violence”.

3) Forcible Actions by the United Nations

The United Nations also has the power to undertake from its own initiative, any forcible measure to maintain or restore international peace and security. This can be taken in three forms: by the United Nations under Chapter VII of the Charter⁵³⁴, by a regional arrangement under

⁵³²For a comprehensive and historical account of Israel’s policy of reprisals, see: Christiane Alibert, *Du droit de se faire justice dans la société internationale depuis 1945*, supra, note 389, at p. 29-58

⁵³³See: Jules Lobel, “The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan”, supra, note 216, at p. 555; Frits Kalshoven, “Reprisal” in *Crimes of War*, supra, note 78, at p. 309

⁵³⁴This has been the case with the UN intervention during the Congo crisis in the 50s and 60s. See: Stanimir A. Alexandrov, *Self-Defense Against the Use of Force in International Law*, supra, note 155, at p. 278 et ss; Manfred Wilhelmy, *Politica internacional: enfoques y realidades*, supra, note 314, at p. 166. More recently, the establishment of the International Security Assistance Force (ISAF) to assist the Afghan interim government in the maintenance of security in Kabul represents another example of armed intervention under Chapter VII of the Charter. See: Res.1386 (2001), S.C., 20 December 2001, S/RES/1386

Chapter VIII as authorized by the Security Council⁵³⁵, or by a group of States with authorization from the United Nations⁵³⁶. For this, Article 39 of the Charter states the following:

“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”⁵³⁷.

However, there have been some debate with regard to the exact meaning of the words “to maintain or restore international peace and security” from Article 39. On one hand, Sharp argues that the threshold of Article 39 is considerably lower than the one of Articles 2(4) and 51, “giving the Security Council the power to authorize States to use armed force under circumstances where States do not independently have the right to use armed force in self-defence”⁵³⁸. According to him, threats to international peace and security within the meaning of Article 39 could include “the failure of a State to surrender terrorists in accordance with an order of the Security Council”⁵³⁹.

⁵³⁵This is the case with NATO’s participation in IFOR (later SFOR) and KFOR in the Balkans. See: Linos-Alexandre Sicilianos, “L’autorisation par le Conseil de Sécurité de recourir à la force: une tentative d’évaluation”, *supra*, note 343, at p. 20

⁵³⁶This is what happened in 1950 when the Security Council authorized the deployment of military force to assist South Korea in order to repel the armed attack (by North Korea) and to restore international peace and security in the Korean peninsula; and in 1990, when the Security Council authorized coalition forces to expel Iraq out of Kuwait. See: John W. Head, “The United States and International Law After September 11”, *supra*, note 384, at p. 6

⁵³⁷*Charter of the United Nations*, *supra*, note 146, at Article 39

⁵³⁸Walter Gary Sharp, “The Use of Armed Force Against Terrorism: American Hegemony or Impotence?”, *supra*, note 97, at p. 42

⁵³⁹*Ibid.*

Article 42 constitutes the only Charter provision that expressly empowers the Security Council to take military action as may be necessary for the enforcement and/or the maintenance of international peace and security⁵⁴⁰. This provision states:

“Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”⁵⁴¹

Schachter argues that Article 42 presupposes the necessity of employing non-violent sanctions before military force is authorized by the Security Council⁵⁴². On the other hand, Scheffer argues that a rigid interpretation of the Charter “may have the unintended result of creating unnecessary obstacles to the effective implementation of critical Charter provisions”⁵⁴³. He states that there is no need to wait until sanctions are proven ineffective⁵⁴⁴ because Article 42 states that “should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land as may be necessary”⁵⁴⁵. Thus, the Security Council could make a determination at any time of the

⁵⁴⁰Oscar Schachter, “Authorized Uses of Force by the United Nations and Regional Organizations” in *Law & Force in the New International Order*, supra, note 152, at p. 67

⁵⁴¹*Charter of the United Nations*, supra, note 146, at Article 42

⁵⁴²Oscar Schachter, *International Law in Theory and Practice*, supra, note 149, at p. 392

⁵⁴³David J. Scheffer, “Commentary on Collective Self-Defence” in *Law and Force in the New International Order*, supra, note 152, at p. 104

⁵⁴⁴*Ibid.*

⁵⁴⁵*Charter of the United Nations*, supra, note 146, at Article 42

inadequacy of such measures and resort directly to the use of force to maintain or restore international peace and security⁵⁴⁶.

Unlike ISAF⁵⁴⁷, the current military campaign by the United States against the Al Qaeda and the Taliban was not launched under the direct auspices of the United Nations. In fact, there have been some criticism of the wording of resolutions 1368 and 1373 as falling short of authorizing the use of military force⁵⁴⁸. However, there seems to have been a tacit approval⁵⁴⁹ from the international community to allow the victim State (that is, the United States) to undertake all necessary measures, including the use of force, in order to go after the terrorist activities of Al-Qaeda⁵⁵⁰. Besides, Resolution 1378 (2001) of the Security Council, which was drafted after the allies started to attack Afghanistan, did not condemn the allies' bombing but blamed the Taliban for allowing the territory of Afghanistan to be used as a base for the export of terrorism by Al Qaeda and other terrorist groups and for providing safe haven to Osama bin Laden, Al Qaeda and others associated with them⁵⁵¹. In this context, the latter resolution

⁵⁴⁶David J. Scheffer, "Commentary on Collective Self-Defence" in *Law and Force in the New International Order*, supra, note 152, at p. 104

⁵⁴⁷See note 534.

⁵⁴⁸Frederic Megret, "War? Legal Semantics and the Move to Violence", supra, note 17, at p.13-15

⁵⁴⁹One author calls this the theory of "implicit authorization". See: Linos-Alexandre Sicilianos, "L'autorisation par le Conseil de Sécurité de recourir à la force: une tentative d'évaluation", supra, note 343, at p. 46 et ss.

⁵⁵⁰Luigi Condorelli, "Les attentats du 11 septembre et leurs suites: où va le droit international?", supra, note 167, at p. 840

⁵⁵¹Res. 1378 (2001), S.C., 20 December 2001, S/RES/1378

supported “the efforts of the Afghan people to replace the Taliban regime”⁵⁵². In addition, following the American-led military response to the attacks of September 11, the Security Council met for two hours to hear America’s justification for its actions in Afghanistan, and subsequently, the president of the Security Council stated that the unanimity of support expressed in the Security Council’s two prior resolutions was absolutely maintained⁵⁵³. The UN Secretary General Kofi Annan also expressed the determination of the Security Council “to combat, by all means, threats to international peace and security caused by terrorist acts”⁵⁵⁴.

⁵⁵²Ibid.

⁵⁵³Sean D. Murphy, “Contemporary Practice of the United States Relating to International Law: Terrorist Attacks on World Trade Center and Pentagon”, *supra*, note 1, at p. 246

⁵⁵⁴“UN Secretary General Affirms U.S. Right to Self-Defence” October 8, 2001, U.S. Department of State, online at <www.usinfo.state.gov> (Date Accessed: March 29, 2002)

CONCLUSION

Although terrorism has always been synonymous with extreme forms of political violence, the attacks of September 11 are unprecedented in modern history, first, by their sheer magnitude and destructiveness, and also because of the suicidal fanaticism of its perpetrators. These attacks are vicious reminders of the danger that terrorism poses to humankind⁵⁵⁵.

From a legal standpoint, the fight against terrorism raises challenging questions for international law. One issue is the need to differentiate terrorism from other forms of armed conflict, in order to determine, in turn, the appropriate response that a State victim of a terrorist attack, as well as the international community at large, can take against those responsible for such acts. In order to achieve this, various aspects of international law that deals with terrorism must be addressed.

The first relates to the paradigm of who is a terrorist and what is the definition of terrorism. The thesis has demonstrated that it is extremely difficult to formulate a unifying and coherent definition of terrorism, in part because of the variety of acts that could amount to terrorism⁵⁵⁶. Another problem resides in the conceptual and practical difficulties of qualifying a person or an entity as being a terrorist. As we have seen, many States and governments, driven by political self-interest, have often used the term ‘terrorist’ to condemn and repress those

⁵⁵⁵Emanuel Gross, “Thwarting Terrorist Acts by Attacking the Perpetrators or their Commanders as an Act of Self-Defense: Human Rights versus the State’s Duty to Protect its Citizens”, *supra*, note 17, at p. 195

⁵⁵⁶Joaquin Alcaide Fernandez, *Las actividades terroristas ante el derecho internacional contemporaneo*, *supra*, note 21, at p. 44

individuals or groups they find objectionable. While various international legal instruments have indicated that terrorism constitutes a threat to international peace and security and that the international community must take all appropriate measures to combat this threat, many of the same instruments have also expressed the view that certain forms of armed struggle represent legitimate ways for peoples to achieve freedom or self-determination. But despite these difficulties, the search for a universal definition of terrorism is one which international law cannot give up⁵⁵⁷. It is therefore imperative that a more precise and accepted definition be formulated in order to better understand the problem of international terrorism⁵⁵⁸.

Secondly, international law must further clarify the issue of State responsibility in the commission of a terrorist act. The particularity of the September 11 attacks resides in the fact that these acts were directly carried out by a non-State organization (the Al Qaeda), and therefore cannot strictly be classified as an inter-State armed conflict. However, it has been argued that the Taliban regime in Afghanistan sheltered and provided logistical support to Al Qaeda, thus entailing the international responsibility of that regime. The thesis has demonstrated that State responsibility for the commission of a terrorist act can take various forms. If a State openly directs, encourages and facilitates the commission of a terrorist act, inferences can be made that the latter State is responsible for the perpetration of such acts, and therefore the victim State would have the right to respond with all appropriate measures. While such inference is less clear if a State is either unwilling or unable to control the terrorists operating on its territory,

⁵⁵⁷Alex P. Schmid & Albert J. Jongman, *Political Terrorism*, supra, note 40, at p. 3

⁵⁵⁸Joaquin Alcaide Fernandez, *Las actividades terroristas ante el derecho internacional contemporaneo*, supra, note 21, at p. 48

unreasonable refusal to cooperate could in some instances amount to a breach of international law. Establishing State responsibility will thus depend to a large extent on the evidence presented to the international community and whether a thorough investigation has been made to substantiate a given claim.

The third and maybe the most critical issue facing international law concerns the right to self-defence against terrorist attacks originating from another State. In the case of September 11, the United States has claimed that its military action against the Al Qaeda and Taliban was justified as a case of self-defence. Legal analysis demonstrates that in order to justify a self-defensive action, a terrorist attack must first amount to an 'armed attack' as stipulated in Article 51 of the Charter. Secondly, this 'armed attack' must implicate clear State responsibility from another State. Without the latter's involvement, a terrorist act, no matter how horrendous it is, cannot be considered as an armed attack that justifies the right to self-defence. In addition, any self-defensive response must respect the legal parameters of necessity and proportionality.

Some authors have tried to extend the right to self-defence by arguing that in certain instances, especially when facing a terrorist threat, a State should have the ability to strike those terrorists residing in another State before they strike first. For example, the doctrines of anticipatory self-defence and that of 'state of necessity' have been cited as justifications by the imminent victim State to undertake forcible actions against States presumed to support terrorism. However, it is our view that such expansive view of the right to self-defence would lead to more international chaos and undermine the spirit of Article 2(4) of the Charter. Despite its flaws and ambiguities, the Charter is nonetheless an essential instrument that enshrines basic international values concerning inter-State relations and to overstretch its parameters would undoubtedly lead

to political abuses. In fact, in many instances, diplomacy could be deemed as a much more effective tool than the recourse to armed force. On the other hand, one should not also forget that a measure of realism is sometimes needed and to over constraint the Charter principles would simply render this into an ineffective instrument of no practical use. Thus, it could be that the solution lies in a very strict interpretation of the right to an anticipatory strike, allowing a State to take such action only if the threat is clearly on the verge of occurring.

Finally, it is important to stress that in the long term, the best strategy to fight terrorism has to encompass measures to tackle the root causes that motivate certain individuals to commit terrorist acts⁵⁵⁹ rather than exclusively relying on the use of legal and military mechanisms to prevent and suppress terrorist activities. The fundamental flaw with this latter approach is that it merely represses the symptoms but does not cure the illness. For instance, if Osama bin Laden is eventually captured or killed, this could make him a martyr to some, and possibly rally many to his movement or encourage them to engage in further attacks against the United States and the Western world⁵⁶⁰. Therefore, in order to grasp the main problem and understand the issues, we must not only rely exclusively on the immediate legal means needed to combat terrorism but also ask ourselves hard questions such as why did this happen.

⁵⁵⁹Antonio Cassese, "The International Community's "Legal" Response to Terrorism", *supra*, note 109, at p. 607

⁵⁶⁰M. Cherif Bassiouni, "Legal Control of International Terrorism: A Policy-Oriented Assessment", *supra*, note 46, at p. 87

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ANNEX A

No. 14118

MULTILATERAL

Convention for the suppression of unlawful acts against the safety of civil aviation (with Final Act of the International Conference on Air Law held under the auspices of the International Civil Aviation Organization at Montreal in September 1971). Concluded at Montreal on 23 September 1971

Authentic texts: English, French, Russian and Spanish.

Registered by the United States of America, the United Kingdom of Great Britain and Northern Ireland and the Union of Soviet Socialist Republics on 18 July 1975.

MULTILATÉRAL

Convention pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile (avec Acte final de la Conférence internationale de droit aérien tenue sous les auspices de l'Organisation de l'aviation civile internationale à Montréal en septembre 1971). Conclue à Montréal le 23 septembre 1971

Textes authentiques : anglais, français, russe et espagnol.

Enregistrée par les États-Unis d'Amérique, le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord et l'Union des Républiques socialistes soviétiques le 18 juillet 1975.

CONVENTION¹ FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF CIVIL AVIATION

The States Parties to the Convention

Considering that unlawful acts against the safety of civil aviation jeopardize the safety of persons and property, seriously affect the operation of air services, and undermine the confidence of the peoples of the world in the safety of civil aviation;

Considering that the occurrence of such acts is a matter of grave concern;

Considering that, for the purpose of deterring such acts, there is an urgent need to provide appropriate measures for punishment of offenders;

Have agreed as follows:

Article 1. 1. Any person commits an offence if he unlawfully and intentionally:

- (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
- (b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or

¹ Came into force on 26 January 1973 in respect of the following States, on behalf of which an instrument of ratification or accession had been deposited with the Governments of the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland or the United States of America, i.e. 30 days following the date (27 December 1972) of deposit of the instruments of ratification of ten signatory States having participated in the Montreal Conference, in accordance with article 15(3):

State	Date of deposit of instrument of ratification or accession (a) at London (L), Moscow (M) or Washington (W)	
Brazil*	24 July	1972 (L,M,W)
Canada.....	19 June	1972 (L)
	20 June	1972 (W)
Chad.....	23 July	1972 (M)
	12 July	1972 (L,W)
German Democratic Republic*	17 August	1972 (M)
Guyana	9 July	1972 (M)
Hungary*.....	21 December	1972 a (W)
Israel	27 December	1972 (L,M,W)
	30 June	1972 (L)
	6 July	1972 (W)
Malawi*.....	10 July	1972 (M)
Mali	21 December	1972 a (W)
Mongolia*.....	24 August	1972 a (W)
	5 September	1972 (W)
	14 September	1972 (L)
Niger	20 October	1972 (M)
Panama	1 September	1972 (W)
Republic of China.....	24 April	1972 (W)
South Africa*.....	27 December	1972 (W)
Spain	30 May	1972 (W)
Trinidad and Tobago.....	30 October	1972 (W)
United States of America.....	9 February	1972 (W)
	1 November	1972 (W)
	15 November	1972 (L)
Yugoslavia.....	22 November	1972 (M)
	2 October	1972 (L,M,W)

(Continued on p. 179)

- (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or
- (d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or
- (e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

2. Any person also commits an offence if he:

- (a) attempts to commit any of the offences mentioned in paragraph 1 of this Article; or
- (b) is an accomplice of a person who commits or attempts to commit any such offence.

(Footnote 1 continued from p. 178)

Subsequently, the Convention came into force for the States listed below 30 days after the date of deposit of their instrument of ratification or accession with the Governments of the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland or the United States of America, in accordance with article 15 (4):

<i>State</i>	<i>Date of deposit of instrument of ratification or accession (a) at London (L), Moscow (M) or Washington (W)</i>	
Argentina..... (With effect from 25 December 1973)	26 November	1973 (L,M,W)
Australia..... (With effect from 11 August 1973)	12 July	1973 (L,M,W)
Austria..... (With effect from 13 March 1974)	11 February	1973 (L,M,W)
Bulgaria*..... (With effect from 24 March 1973)	22 February 28 March 20 March	1973 (L) 1973 (W) 1974 (M)
Byelorussian Soviet Socialist Republic*..... (With effect from 2 March 1973)	31 January	1973 (M)
Chile..... (With effect from 30 March 1974)	28 February	1974 a (W)
Costa Rica..... (With effect from 21 October 1973)	21 September	1973 (W)
Cyprus..... (With effect from 14 September 1973)	27 July 30 July 15 August	1973 (L) 1973 (M) 1973 (W)
Czechoslovakia*..... (With effect from 9 September 1973)	10 August	1973 (L,M,W)
Denmark..... (With effect from 16 February 1973. Decision reserved as regards the application of the Convention to the Faroe Islands and Greenland)	17 January	1973 (L,M,W)
Dominican Republic..... (With effect from 28 December 1973)	28 November	1973 (W)
Fiji..... (With effect from 4 April 1973)	5 March 18 April 28 April	1973 (W) 1973 (L) 1973 (M)
Finland..... (With effect from 12 August 1973)	13 July	1973 a (L,M,W)
Ghana..... (With effect from 11 January 1974)	12 December	1973 a (W)
Greece..... (With effect from 14 February 1974)	15 January	1974 (W)
Iceland..... (With effect from 29 July 1973)	29 June	1973 (M)
Iran..... (With effect from 9 August 1973)	29 June 10 July	1973 a (L,W) 1973 a (L,M,W)
Iraq*..... (With effect from 10 October 1974)	10 September	1974 a (M)

(Continued on p. 180)

Article 2. For the purposes of this Convention:

(a) an aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation; in the case of a forced landing, the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board;

(Footnote 1 continued from p. 179)

<i>State</i>	<i>Date of deposit of instrument of ratification or accession (a) at London (L), Moscow (M) or Washington (W)</i>	
Italy	19 February	1974 (L,M,W)
(With effect from 21 March 1974)		
Ivory Coast	9 January	1973 a (W)
(With effect from 8 February 1973)		
Japan	12 June	1974 a (L,W)
(With effect from 12 July 1974)		
Jordan	13 February	1973 (L)
(With effect from 15 March 1973)	19 February	1973 (M)
	25 April	1973 (W)
Libyan Arab Republic	19 February	1974 a (W)
(With effect from 21 March 1974)		
Mexico	12 September	1974 (L,M,W)
(With effect from 12 October 1974)		
Netherlands	27 August	1973 (L,M,W)
(With effect from 26 September 1973 for the Kingdom in Europe and Surinam, and with a declaration to the effect that the Convention shall apply to the Netherlands Antilles from 11 June 1974)		
New Zealand	12 February	1974 (L,M,W)
(With effect from 14 March 1974)		
Nicaragua	6 November	1973 (W)
(With effect from 6 December 1973)		
Nigeria	3 July	1973 a (W)
(With effect from 2 August 1973)	9 July	1973 a (L)
	20 July	1973 a (M)
Norway	1 August	1973 a (L,M,W)
(With effect from 31 August 1973)		
Pakistan	16 January	1974 a (M)
(With effect from 15 February 1974)	24 January	1974 a (L,W)
Paraguay	5 March	1974 (W)
(With effect from 4 April 1974)		
Philippines	26 March	1973 (W)
(With effect from 25 April 1973)		
Poland*	26 January	1975 (L,M)
(With effect from 27 February 1975)		
Portugal	15 January	1973 (L)
(With effect from 14 February 1973)		
Republic of Korea*	2 August	1973 a (W)
(With effect from 1 September 1973)		
Saudi Arabia*	14 June	1974 a (W)
(With effect from 14 July 1974)		
Sweden	10 July	1973 a (L,M,W)
(With effect from 9 August 1973)		
Ukrainian Soviet Socialist Republic*	26 February	1973 (M)
(With effect from 28 March 1973)		
Union of Soviet Socialist Republics*	19 February	1973 (L,M,W)
(With effect from 21 March 1973)		
United Kingdom of Great Britain and Northern Ireland*	25 October	1973 (L,M,W)
(With effect from 24 November 1973. In respect of the United Kingdom of Great Britain and Northern Ireland and Ter- ritories under the territorial sovereignty of the United Kingdom as well as the British Solomon Islands Protectorate)		
United Republic of Cameroon*	11 July	1973 a (W)
(With effect from 10 August 1973)		

* See p. 223 of this volume for the text of the reservations and declarations made upon ratification or accession.

(b) an aircraft is considered to be in service from the beginning of the preflight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing; the period of service shall, in any event, extend for the entire period during which the aircraft is in flight as defined in paragraph (a) of this Article.

Article 3. Each Contracting State undertakes to make the offences mentioned in Article 1 punishable by severe penalties.

Article 4. 1. This Convention shall not apply to aircraft used in military, customs or police services.

2. In the cases contemplated in subparagraphs (a), (b), (c) and (e) of paragraph 1 of Article 1, this Convention shall apply, irrespective of whether the aircraft is engaged in an international or domestic flight, only if:

- (a) the place of take-off or landing, actual or intended, of the aircraft is situated outside the territory of the State of registration of that aircraft; or
- (b) the offence is committed in the territory of a State other than the State of registration of the aircraft.

3. Notwithstanding paragraph 2 of this Article, in the cases contemplated in subparagraphs (a), (b), (c) and (e) of paragraph 1 of Article 1, this Convention shall also apply if the offender or the alleged offender is found in the territory of a State other than the State of registration of the aircraft.

4. With respect to the States mentioned in Article 9 and in the cases mentioned in subparagraphs (a), (b), (c) and (e) of paragraph 1 of Article 1, this Convention shall not apply if the places referred to in subparagraph (a) of paragraph 2 of this Article are situated within the territory of the same State where that State is one of those referred to in Article 9, unless the offence is committed or the offender or alleged offender is found in the territory of a State other than that State.

5. In the cases contemplated in subparagraph (d) of paragraph 1 of Article 1, this Convention shall apply only if the air navigation facilities are used in international air navigation.

6. The provisions of paragraphs 2, 3, 4 and 5 of this Article shall also apply in the cases contemplated in paragraph 2 of Article 1.

Article 5. 1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offences in the following cases:

- (a) when the offence is committed in the territory of that State;
- (b) when the offence is committed against or on board an aircraft registered in that State;
- (c) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;
- (d) when the offence is committed against or on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.

2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offences mentioned in Article 1, paragraph 1 (a), (b) and (c), and in Article 1, paragraph 2, in so far as that paragraph relates to those offences, in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Article 6. 1. Upon being satisfied that the circumstances so warrant, any Contracting State in the territory of which the offender or the alleged offender is present, shall take him into custody or take other measures to ensure his presence. The custody and other measures shall be as provided in the law of that State but may only be continued for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary enquiry into the facts.

3. Any person in custody pursuant to paragraph 1 of this Article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national.

4. When a State, pursuant to this Article, has taken a person into custody, it shall immediately notify the States mentioned in Article 5, paragraph 1, the State of nationality of the detained person and, if it considers it advisable, any other interested State of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 2 of this Article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 7. The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

Article 8. 1. The offences shall be deemed to be included as extraditable offences in any extradition treaty existing between Contracting States. Contracting States undertake to include the offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. Each of the offences shall be treated, for the purpose of extradition between Contracting States, as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction in accordance with Article 5, paragraph 1 (b), (c) and (d).

Article 9. The Contracting States which establish joint air transport operating organizations or international operating agencies, which operate aircraft which are subject to joint or international registration shall, by appropriate means, designate for each aircraft the State among them which shall exercise the jurisdiction and have the attributes of the State of registration for the purpose of this Convention and shall give notice thereof to the International Civil Aviation Organization which shall communicate the notice to all States Parties to this Convention.

Article 10. 1. Contracting States shall, in accordance with international and national law, endeavour to take all practicable measure for the purpose of preventing the offences mentioned in Article 1.

2. When, due to the commission of one of the offences mentioned in Article 1, a flight has been delayed or interrupted, any Contracting State in whose territory the aircraft or passengers or crew are present shall facilitate the continuation of the journey of the passengers and crew as soon as practicable, and shall without delay return the aircraft and its cargo to the persons lawfully entitled to possession.

Article 11. 1. Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences. The law of the State requested shall apply in all cases.

2. The provisions of paragraph 1 of this Article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters.

Article 12. Any Contracting State having reason to believe that one of the offences mentioned in Article 1 will be committed shall, in accordance with its national law, furnish any relevant information in its possession to those States which it believes would be the States mentioned in Article 5, paragraph 1.

Article 13. Each Contracting State shall in accordance with its national law report to the Council of the International Civil Aviation Organization as promptly as possible any relevant information in its possession concerning:

- (a) the circumstances of the offence;
- (b) the action taken pursuant to Article 10, paragraph 2;
- (c) the measures taken in relation to the offender or the alleged offender and, in particular, the results of any extradition proceedings or other legal proceedings.

Article 14. 1. Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other Contracting States shall not be bound by the preceding paragraph with respect to any Contracting State having made such a reservation.

3. Any Contracting State having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the Depositary Governments.

Article 15. 1. This Convention shall be open for signature at Montreal on 23 September 1971, by States participating in the International Conference on Air Law held at Montreal from 8 to 23 September 1971 (hereinafter referred to as the Montreal Conference). After 10 October 1971, the Convention shall be open to all States for signature in Moscow, London and Washington. Any State which does not sign this Convention before its entry into force in accordance with paragraph 3 of this Article may accede to it at any time.

2. This Convention shall be subject to ratification by the signatory States. Instruments of ratification and instruments of accession shall be deposited with the Governments of the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, which are hereby designated the Depositary Governments.

3. This Convention shall enter into force thirty days following the date of the deposit of instruments of ratification by ten States signatory to this Convention which participated in the Montreal Conference.

4. For other States, this Convention shall enter into force on the date of entry into force of this Convention in accordance with paragraph 3 of this Article, or thirty days following the date of deposit of their instruments of ratification or accession, whichever is later.

5. The Depositary Governments shall promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification or accession, the date of entry into force of this Convention, and other notices.

6. As soon as this Convention comes into force, it shall be registered by the Depositary Governments pursuant to Article 102 of the Convention on International Civil Aviation (Chicago, 1944).¹

Article 16. 1. Any Contracting State may denounce this Convention by written notification to the Depositary Governments.

2. Denunciation shall take effect six months following the date on which notification is received by the Depositary Governments.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their Governments, have signed this Convention.

DONE at Montreal, this twenty-third day of September, one thousand nine hundred and seventy-one, in three originals, each being drawn up in four authentic texts in the English, French, Russian and Spanish languages.

¹ United Nations, *Treaty Series*, vol. 15, p. 295. For the texts of the Protocols amending this Convention, see vol. 320, pp. 209 and 217; vol. 418, p. 161; vol. 514, p. 209; vol. 740, p. 21, and vol. 893, p. 117.

ANNEX B

No. 12325

MULTILATERAL

Convention for the suppression of unlawful seizure of aircraft. Signed at The Hague on 16 December 1970

Authentic texts: English, French, Russian and Spanish.

Registered by the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America on 8 March 1973.

MULTILATÉRAL

Convention pour la répression de la capture illicite d'aéronefs. Signée à La Haye le 16 décembre 1970

Textes authentiques: anglais, français, russe et espagnol.

Enregistrée par l'Union des Républiques socialistes soviétiques, le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord et les États-Unis d'Amérique le 8 mars 1973.

CONVENTION¹ FOR THE SUPPRESSION OF UNLAWFUL SEIZURE OF AIRCRAFT

PREAMBLE

The States parties to this Convention

CONSIDERING that unlawful acts of seizure or exercise of control of aircraft in flight jeopardize the safety of persons and property, seriously affect the operation of air services, and undermine the confidence of the peoples of the world in the safety of civil aviation;

¹ Came into force on 14 October 1971 for the States indicated hereafter, i.e. 30 days following the date (14 September 1971) by which the instruments of ratification of ten signatory States having participated in The Hague Conference had been deposited with the Governments of the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland or the United States of America, designated as the depositary Governments, in accordance with article 13 (3):

State	Date of deposit of the instrument of ratification at London (L), Moscow (M) or Washington (W)	
Japan	19 April	1971 (L, M, W)
Bulgaria	19 May	1971 (W)
	26 May	1971 (L)
	23 February	1972 (M)
Ecuador	14 June	1971 (W)
Sweden	7 July	1971 (L, M, W)
Costa Rica	9 July	1971 (W)
Gabon	14 July	1971 (L)
Hungary	13 August	1971 (L, M, W)
Israel	16 August	1971 (L, M, W)
Norway	23 August	1971 (L, M, W)
Switzerland	14 September	1971 (L, M, W)
United States of America	14 September	1971 (W)
	21 September	1971 (L)
	23 September	1971 (M)

Subsequently, the Convention came into force for each of the following States 30 days following the date of deposit of their instrument of ratification or accession, in accordance with article 13 (4):

State	Date of deposit of the instrument of ratification or accession (a) at London (L), Moscow (M) or Washington (W)		Date of entry into force	
Argentina	11 September	1972 (W)	11 October	1972
	20 September	1972 (M)		
	21 September	1972 (L)		
Australia	9 November	1972 (L, M, W)	9 December	1972
Brazil	14 January	1972 (L, M, W)	13 February	1972
Byelorussian Soviet Socialist Republic	30 December	1971 (M)	29 January	1972
Canada	19 June	1972 (L)	19 July	1972
	20 June	1972 (W)		
	23 June	1972 (M)		
Chad	12 July	1972 (W)	11 August	1972
	12 July	1972a (L)		
	17 August	1972a (M)		
Chile	2 February	1972 (L)	3 March	1972
Cyprus	6 June	1972a (L)	6 July	1972
	8 June	1972a (M)		
	5 July	1972a (W)		
Czechoslovakia	6 April	1972 (L, M, W)	6 May	1972
Dahomey	13 March	1972 (W)	12 April	1972
Denmark	17 October	1972 (L, M, W)	16 November	1972

(Decision reserved as regards the application of the Convention to the Faeroe Islands and Greenland.)

CONSIDERING that the occurrence of such acts is a matter of grave concern;

CONSIDERING that, for the purpose of deterring such acts, there is an urgent need to provide appropriate measures for punishment of offenders;

Have agreed as follows:

Article 1. Any person who on board an aircraft in flight:

- (a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or
- (b) is an accomplice of a person who performs or attempts to perform any such act

commits an offence (hereinafter referred to as "the offence").

Article 2. Each Contracting State undertakes to make the offence punishable by severe penalties.

Article 3. 1. For the purposes of this Convention, an aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. In the case of a forced landing, the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board.

State	Date of deposit of the instrument of ratification or accession (a) at London (L), Moscow (M) or Washington (W)		Date of entry into force	
Fiji	27 July	1972 (W)	26 August	1972
	14 August	1972 (L)		
	29 August	1972 (M)		
Finland	15 December	1971 (L, M, W)	14 January	1972
France	18 September	1972 (L, M, W)	18 October	1972
German Democratic Republic	3 June	1971 (M)	14 October	1971
Iran	25 January	1972 (L, W)	24 February	1972
	2 February	1972 (M)		
Iraq	3 December	1971 (M)	2 January	1972
	4 January	1972 (L)		
Jordan	16 November	1971 (M)	16 December	1971
	18 November	1971 (W)		
	1 December	1971 (L)		
Mali	17 August	1971a (M)	14 October	1971
	29 September	1971a (W)		
Mexico	19 July	1972 (L, M, W)	18 August	1972
Mongolia	8 October	1971 (M)	7 November	1971
Niger	15 October	1971 (W)	14 November	1971
Panama	10 March	1972 (W)	9 April	1972
Paraguay	4 February	1972 (W)	5 March	1972
Poland	21 March	1972 (L, M, W)	20 April	1972
Portugal	27 November	1972 (L)	27 December	1972
Republic of China	27 July	1972 (W)	26 August	1972
Romania	10 July	1972 (L, M, W)	9 August	1972
South Africa	30 May	1972 (W)	29 June	1972
Spain	30 October	1972 (W)	29 November	1972
Trinidad and Tobago	31 January	1972 (L)	1 March	1972
Uganda	27 March	1972a (L)	26 April	1972
Ukrainian Soviet Socialist Republic	21 February	1972 (M)	22 March	1972
Union of Soviet Socialist Republics	24 September	1971 (L, M, W)	24 October	1971
United Kingdom of Great Britain and Northern Ireland	22 December	1971 (L, M, W)	21 January	1972
(In respect of the United Kingdom of Great Britain and Northern Ireland and Territories under the territorial sovereignty of the United Kingdom, as well as the British Solomon Islands Protectorate.)				
Yugoslavia	2 October	1972 (L, M, W)	1 November	1972

2. This Convention shall not apply to aircraft used in military, customs or police services.

3. This Convention shall apply only if the place of take-off or the place of actual landing of the aircraft on board which the offence is committed is situated outside the territory of the State of registration of that aircraft; it shall be immaterial whether the aircraft is engaged in an international or domestic flight.

4. In the cases mentioned in article 5, this Convention shall not apply if the place of take-off and the place of actual landing of the aircraft on board which the offence is committed are situated within the territory of the same State where that State is one of those referred to in that Article.

5. Notwithstanding paragraphs 3 and 4 of this article, articles 6, 7, 8 and 10 shall apply whatever the place of take-off or the place of actual landing of the aircraft, if the offender or the alleged offender is found in the territory of a State other than the State of registration of that aircraft.

Article 4. 1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence, in the following cases:

- (a) when the offence is committed on board an aircraft registered in that State;
- (b) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;
- (c) when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.

2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Article 5. The Contracting States which establish joint air transport operating organizations or international operating agencies, which operate aircraft which are subject to joint or international registration shall, by appropriate means, designate for each aircraft the State among them which shall exercise the jurisdiction and have the attributes of the State of registration for the purpose of this Convention and shall give notice thereof to the International Civil Aviation Organization which shall communicate the notice to all States Parties to this Convention.

Article 6. 1. Upon being satisfied that the circumstances so warrant, any Contracting State in the territory of which the offender or the alleged offender is present, shall take him into custody or take other measures to ensure his presence. The custody and other measures shall be as provided in the law of that State but may only be continued for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary enquiry into the facts.

3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national.

4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the State of registration of the aircraft, the State mentioned in article 4, paragraph 1(c), the State of nationality of the detained person and, if it considers it advisable, any other interested States of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 2 of this Article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 7. The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

Article 8. 1. The offence shall be deemed to be included as an extraditable offence in any extradition treaty existing between Contracting States. Contracting States undertake to include the offence as an extraditable offence in every extradition treaty to be concluded between them.

2. If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offence. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offence as an extraditable offence between themselves subject to the conditions provided by the law of the requested State.

4. The offence shall be treated, for the purpose of extradition between Contracting States, as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 4, paragraph 1.

Article 9. 1. When any of the acts mentioned in article 1(a) has occurred or is about to occur, Contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft.

2. In the cases contemplated by the preceding paragraph, any Contracting State in which the aircraft or its passengers or crew are present shall facilitate the continuation of the journey of the passengers and crew as soon as practicable, and shall without delay return the aircraft and its cargo to the persons lawfully entitled to possession.

Article 10. 1. Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offence and other acts mentioned in article 4. The law of the State requested shall apply in all cases.

2. The provisions of paragraph 1 of this article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters.

Article 11. Each Contracting State shall in accordance with its national law report to the Council of the International Civil Aviation Organization as promptly as possible any relevant information in its possession concerning:

- (a) the circumstances of the offence;
- (b) the action taken pursuant to article 9;
- (c) the measures taken in relation to the offender or the alleged offender, and, in particular, the results of any extradition proceedings or other legal proceedings.

Article 12. 1. Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other Contracting States shall not be bound by the preceding paragraph with respect to any Contracting State having made such a reservation.

3. Any Contracting State having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the Depositary Governments.

Article 13. 1. This Convention shall be open for signature at The Hague on 16 December 1970, by States participating in the International Conference on Air Law held at The Hague from 1 to 16 December 1970 (hereinafter referred to as The Hague Conference). After 31 December 1970, the Convention shall be open to all States for signature in Moscow, London and Washington. Any State which does not sign this Convention before its entry into force in accordance with paragraph 3 of this article may accede to it at any time.

2. This Convention shall be subject to ratification by the signatory States. Instruments of ratification and instruments of accession shall be deposited with the Governments of the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, which are hereby designated the Depositary Governments.

3. This Convention shall enter into force thirty days following the date of the deposit of instruments of ratification by ten States signatory to this Convention which participated in The Hague Conference.

4. For other States, this Convention shall enter into force on the date of entry into force of this Convention in accordance with paragraph 3 of this article, or thirty days following the date of deposit of their instruments of ratification or accession, whichever is later.

5. The Depositary Governments shall promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification or accession, the date of entry into force of this Convention, and other notices.

6. As soon as this Convention comes into force, it shall be registered by the Depositary Governments pursuant to Article 102 of the Charter of the United Nations and pursuant to Article 83 of the Convention on International Civil Aviation (Chicago, 1944).

Article 14. 1. Any Contracting State may denounce this Convention by written notification to the Depositary Governments.

2. Denunciation shall take effect six months following the date on which notification is received by the Depositary Governments.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorised thereto by their Governments, have signed this Convention.

DONE at The Hague, this sixteenth day of December, one thousand nine hundred and seventy, in three originals, each being drawn up in four authentic texts in the English, French, Russian and Spanish languages.

ANNEX C

No. 10106

MULTILATERAL

Convention on offences and certain other acts committed on board aircraft. Signed at Tokyo on 14 September 1963

Authentic texts: English, French and Spanish.

Registered by the International Civil Aviation Organization on 22 December 1969.

MULTILATÉRAL

Convention relative aux infractions et à certains autres actes survenant à bord des aéronefs. Signée à Tokyo le 14 septembre 1963

Textes authentiques : anglais, français et espagnol.

Enregistrée par l'Organisation de l'aviation civile internationale le 22 décembre 1969.

CONVENTION ¹ ON OFFENCES AND CERTAIN OTHER ACTS COMMITTED ON BOARD AIRCRAFT

The States Parties to this Convention

¹ Came into force on 4 December 1969 between the following States, i.e., on the ninetieth day after the date of deposit with the International Civil Aviation Organization of the twelfth instrument of ratification by the said States, in accordance with article 21:

<i>State</i>	<i>Date of deposit of the instrument</i>
Portugal	25 November 1964 ^a
Philippines	26 November 1965
Republic of China	28 February 1966
Denmark	17 January 1967 ^b
Norway	17 January 1967 ^c
Sweden	17 January 1967
Italy	18 October 1968
United Kingdom of Great Britain and Northern Ireland	29 November 1968
(With a declaration.) ^d	
Mexico	18 March 1969 ^e
Upper Volta	6 June 1969
Niger	27 June 1969 ^f
United States of America	5 September 1969

Subsequently, in accordance with article 21, the Convention came into force for the following State on the ninetieth day after the deposit of its instrument of ratification:

<i>State</i>	<i>Date of deposit of the instrument</i>
Israel	19 September 1969 (With effect from 18 December 1969).

^a Signature affixed on 11 March 1964: Ed. Brazão.

^b Signature affixed on 21 November 1966: Mogens Juhl.

^c Signature affixed on 19 April 1966: Bredo Stabell.

^d See p. 254 of this volume for the text of the declaration made upon ratification.

^e Signature affixed on 24 December 1968: José Rodríguez Torres.

^f Signature affixed on 14 April 1969: Adamou Mayaki.

Have agreed as follows:

CHAPTER I
SCOPE OF THE CONVENTION

Article 1

1. This Convention shall apply in respect of:
 - (a) offences against penal law;
 - (b) acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board.
2. Except as provided in Chapter III, this Convention shall apply in respect of offences committed or acts done by a person on board any aircraft registered in a Contracting State, while that aircraft is in flight or on the surface of the high seas or of any other area outside the territory of any State.
3. For the purposes of this Convention, an aircraft is considered to be in flight from the moment when power is applied for the purpose of take-off until the moment when the landing run ends.
4. This Convention shall not apply to aircraft used in military, customs or police services.

Article 2

Without prejudice to the provisions of Article 4 and except when the safety of the aircraft or of persons or property on board so requires, no provision of this Convention shall be interpreted as authorizing or requiring any action in respect of offences against penal laws of a political nature or those based on racial or religious discrimination.

CHAPTER II
JURISDICTION

Article 3

1. The State of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board.

2. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction as the State of registration over offences committed on board aircraft registered in such State.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Article 4

A Contracting State which is not the State of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board except in the following cases:

- (a) the offence has effect on the territory of such State;
- (b) the offence has been committed by or against a national or permanent resident of such State;
- (c) the offence is against the security of such State;
- (d) the offence consists of a breach of any rules or regulations relating to the flight or manœuvre of aircraft in force in such State;
- (e) the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under a multilateral international agreement.

CHAPTER III

POWERS OF THE AIRCRAFT COMMANDER

Article 5

1. The provisions of this Chapter shall not apply to offences and acts committed or about to be committed by a person on board an aircraft in flight in the airspace of the State of registration or over the high seas or any other area outside the territory of any State unless the last point of take-off or the next point of intended landing is situated in a State other than that of registration, or the aircraft subsequently flies in the airspace of a State other than that of registration with such person still on board.

2. Notwithstanding the provisions of Article 1, paragraph 3, an aircraft shall for the purposes of this Chapter, be considered to be in flight at any

time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. In the case of a forced landing, the provisions of this Chapter shall continue to apply with respect to offences and acts committed on board until competent authorities of a State take over the responsibility for the aircraft and for the persons and property on board.

Article 6

1. The aircraft commander may, when he has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an offence or act contemplated in Article 1, paragraph 1, impose upon such person reasonable measures including restraint which are necessary:

- (a) to protect the safety of the aircraft, or of persons or property therein; or
- (b) to maintain good order and discipline on board; or
- (c) to enable him to deliver such person to competent authorities or to disembark him in accordance with the provisions of this Chapter.

2. The aircraft commander may require or authorize the assistance of other crew members and may request or authorize, but not require, the assistance of passengers to restrain any person whom he is entitled to restrain. Any crew member or passenger may also take reasonable preventive measures without such authorization when he has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or of persons or property therein.

Article 7

1. Measures of restraint imposed upon a person in accordance with Article 6 shall not be continued beyond any point at which the aircraft lands unless:

- (a) such point is in the territory of a non-Contracting State and its authorities refuse to permit disembarkation of that person or those measures have been imposed in accordance with Article 6, paragraph 1 (c) in order to enable his delivery to competent authorities;
- (b) the aircraft makes a forced landing and the aircraft commander is unable to deliver that person to competent authorities; or

(c) that person agrees to onward carriage under restraint.

2. The aircraft commander shall as soon as practicable, and if possible before landing in the territory of a State with a person on board who has been placed under restraint in accordance with the provisions of Article 6, notify the authorities of such State of the fact that a person on board is under restraint and of the reasons for such restraint.

Article 8

1. The aircraft commander may, in so far as it is necessary for the purpose of subparagraph (a) or (b) of paragraph 1 of Article 6, disembark in the territory of any State in which the aircraft lands any person who he has reasonable grounds to believe has committed, or is about to commit, on board the aircraft an act contemplated in Article 1, paragraph 1 (b).

2. The aircraft commander shall report to the authorities of the State in which he disembarks any person pursuant to this Article, the fact of, and the reasons for, such disembarkation.

Article 9

1. The aircraft commander may deliver to the competent authorities of any Contracting State in the territory of which the aircraft lands any person who he has reasonable grounds to believe has committed on board the aircraft an act which, in his opinion, is a serious offence according to the penal law of the State of registration of the aircraft.

2. The aircraft commander shall as soon as practicable and if possible before landing in the territory of a Contracting State with a person on board whom the aircraft commander intends to deliver in accordance with the preceding paragraph, notify the authorities of such State of his intention to deliver such person and the reasons therefor.

3. The aircraft commander shall furnish the authorities to whom any suspected offender is delivered in accordance with the provisions of this Article with evidence and information which, under the law of the State of registration of the aircraft, are lawfully in his possession.

Article 10

For actions taken in accordance with this Convention, neither the

aircraft commander, any other member of the crew, any passenger, the owner or operator of the aircraft, nor the person on whose behalf the flight was performed shall be held responsible in any proceeding on account of the treatment undergone by the person against whom the actions were taken.

CHAPTER IV UNLAWFUL SEIZURE OF AIRCRAFT

Article 11

1. When a person on board has unlawfully committed by force or threat thereof an act of interference, seizure, or other wrongful exercise of control of an aircraft in flight or when such an act is about to be committed, Contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft.

2. In the cases contemplated in the preceding paragraph, the Contracting State in which the aircraft lands shall permit its passengers and crew to continue their journey as soon as practicable, and shall return the aircraft and its cargo to the persons lawfully entitled to possession.

CHAPTER V POWERS AND DUTIES OF STATES

Article 12

Any Contracting State shall allow the commander of an aircraft registered in another Contracting State to disembark any person pursuant to Article 8, paragraph 1.

Article 13

1. Any Contracting State shall take delivery of any person whom the aircraft commander delivers pursuant to Article 9, paragraph 1.

2. Upon being satisfied that the circumstances so warrant, any Contracting State shall take custody or other measures to ensure the presence of any person suspected of an act contemplated in Article 11, paragraph 1 and of any person of whom it has taken delivery. The custody and other

measures shall be as provided in the law of that State but may only be continued for such time as is reasonably necessary to enable any criminal or extradition proceedings to be instituted.

3. Any person in custody pursuant to the previous paragraph shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national.

4. Any Contracting State, to which a person is delivered pursuant to Article 9, paragraph 1, or in whose territory an aircraft lands following the commission of an act contemplated in Article 11, paragraph 1, shall immediately make a preliminary enquiry into the facts.

5. When a State, pursuant to this Article, has taken a person into custody, it shall immediately notify the State of registration of the aircraft and the State of nationality of the detained person and, if it considers it advisable, any other interested State of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 4 of this Article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 14

1. When any person has been disembarked in accordance with Article 8, paragraph 1, or delivered in accordance with Article 9, paragraph 1, or has disembarked after committing an act contemplated in Article 11, paragraph 1, and when such person cannot or does not desire to continue his journey and the State of landing refuses to admit him, that State may, if the person in question is not a national or permanent resident of that State, return him to the territory of the State of which he is a national or permanent resident or to the territory of the State in which he began his journey by air.

2. Neither disembarkation, nor delivery, nor the taking of custody or other measures contemplated in Article 13, paragraph 2, nor return of the person concerned, shall be considered as admission to the territory of the Contracting State concerned for the purpose of its law relating to entry or admission of persons and nothing in this Convention shall affect the law of a Contracting State relating to the expulsion of persons from its territory.

Article 15

1. Without prejudice to Article 14, any person who has been disembarked in accordance with Article 8, paragraph 1, or delivered in accordance with Article 9, paragraph 1, or has disembarked after committing an act contemplated in Article 11, paragraph 1, and who desires to continue his journey shall be at liberty as soon as practicable to proceed to any destination of his choice unless his presence is required by the law of the State of landing for the purpose of extradition or criminal proceedings.

2. Without prejudice to its law as to entry and admission to, and extradition and expulsion from its territory, a Contracting State in whose territory a person has been disembarked in accordance with Article 8, paragraph 1, or delivered in accordance with Article 9, paragraph 1 or has disembarked and is suspected of having committed an act contemplated in Article 11, paragraph 1, shall accord to such person treatment which is no less favourable for his protection and security than that accorded to nationals of such Contracting State in like circumstances.

CHAPTER VI
OTHER PROVISIONS

Article 16

1. Offences committed on aircraft registered in a Contracting State shall be treated, for the purpose of extradition, as if they had been committed not only in the place in which they have occurred but also in the territory of the State of registration of the aircraft.

2. Without prejudice to the provisions of the preceding paragraph, nothing in this Convention shall be deemed to create an obligation to grant extradition.

Article 17

In taking any measures for investigation or arrest or otherwise exercising jurisdiction in connection with any offence committed on board an aircraft the Contracting States shall pay due regard to the safety and other interests of air navigation and shall so act as to avoid unnecessary delay of the aircraft, passengers, crew or cargo.

Article 18

If Contracting States establish joint air transport operating organizations or international operating agencies, which operate aircraft not registered in any one State those States shall, according to the circumstances of the case, designate the State among them which, for the purposes of this Convention, shall be considered as the State of registration and shall give notice thereof to the International Civil Aviation Organization which shall communicate the notice to all States Parties to this Convention.

CHAPTER VII

FINAL CLAUSES

Article 19

Until the date on which this Convention comes into force in accordance with the provisions of Article 21, it shall remain open for signature on behalf of any State which at that date is a Member of the United Nations or of any of the Specialized Agencies.

Article 20

1. This Convention shall be subject to ratification by the signatory States in accordance with their constitutional procedures.

2. The instruments of ratification shall be deposited with the International Civil Aviation Organization.

Article 21

1. As soon as twelve of the signatory States have deposited their instruments of ratification of this Convention, it shall come into force between them on the ninetieth day after the date of the deposit of the twelfth instrument of ratification. It shall come into force for each State ratifying thereafter on the ninetieth day after the deposit of its instrument of ratification.

2. As soon as this Convention comes into force, it shall be registered with the Secretary-General of the United Nations by the International Civil Aviation Organization.

Article 22

1. This Convention shall, after it has come into force, be open for accession by any State Member of the United Nations or of any of the Specialized Agencies.

2. The accession of a State shall be effected by the deposit of an instrument of accession with the International Civil Aviation Organization and shall take effect on the ninetieth day after the date of such deposit.

Article 23

1. Any Contracting State may denounce this Convention by notification addressed to the International Civil Aviation Organization.

2. Denunciation shall take effect six months after the date of receipt by the International Civil Aviation Organization of the notification of denunciation.

Article 24

1. Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other Contracting States shall not be bound by the preceding paragraph with respect to any Contracting State having made such a reservation.

3. Any Contracting State having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the International Civil Aviation Organization.

Article 25

Except as provided in Article 24 no reservation may be made to this Convention.

Article 26

The International Civil Aviation Organization shall give notice to all States Members of the United Nations or of any of the Specialized Agencies:

- (a) of any signature of this Convention and the date thereof;
- (b) of the deposit of any instrument of ratification or accession and the date thereof;
- (c) of the date on which this Convention comes into force in accordance with Article 21, paragraph 1;
- (d) of the receipt of any notification of denunciation and the date thereof; and
- (e) of the receipt of any declaration or notification made under Article 24 and the date thereof.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorized, have signed this Convention.

DONE at Tokyo on the fourteenth day of September One Thousand Nine Hundred and Sixty-three in three authentic texts drawn up in the English, French and Spanish languages.

This Convention shall be deposited with the International Civil Aviation Organization with which, in accordance with Article 19, it shall remain open for signature and the said Organization shall send certified copies thereof to all States Members of the United Nations or of any Specialized Agency.

ANNEX D

International Convention for the Suppression
of Terrorist Bombings

The States Parties to this Convention,

Having in mind the purposes and principles of the Charter of the United Nations concerning the maintenance of international peace and security and the promotion of good-neighbourliness and friendly relations and cooperation among States,

Deeply concerned about the worldwide escalation of acts of terrorism in all its forms and manifestations,

Recalling the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations of 24 October 1995,

Recalling also the Declaration on Measures to Eliminate International Terrorism, annexed to General Assembly resolution 49/60 of 9 December 1994, in which, inter alia, "the States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States",

Noting that the Declaration also encouraged States "to review urgently the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism in all its forms and manifestations, with the aim of ensuring that there is a comprehensive legal framework covering all aspects of the matter",

Recalling further General Assembly resolution 51/210 of 17 December 1996 and the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, annexed thereto,

Noting also that terrorist attacks by means of explosives or other lethal devices have become increasingly widespread,

Noting further that existing multilateral legal provisions do not adequately address these attacks,

Being convinced of the urgent need to enhance international cooperation between States in devising and adopting effective and practical measures for the prevention of such acts of terrorism, and for the prosecution and punishment of their perpetrators,

Considering that the occurrence of such acts is a matter of grave concern to the international community as a whole,

Noting that the activities of military forces of States are governed by rules of international law outside the framework of this Convention and that the exclusion of certain actions from the coverage of this Convention does not condone or make lawful otherwise unlawful acts, or preclude prosecution under other laws,

Have agreed as follows:

Article 1

For the purposes of this Convention:

1. "State or government facility" includes any permanent or temporary facility or conveyance that is used or occupied by representatives of a State, members of Government, the legislature or the judiciary or by officials or employees of a State or any other public authority or entity or by employees or officials of an intergovernmental organization in connection with their official duties.
2. "Infrastructure facility" means any publicly or privately owned facility providing or distributing services for the benefit of the public, such as water, sewage, energy, fuel or communications.
3. "Explosive or other lethal device" means:
 - (a) An explosive or incendiary weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage; or
 - (b) A weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage

through the release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances or radiation or radioactive material.

4. "Military forces of a State" means the armed forces of a State which are organized, trained and equipped under its internal law for the primary purpose of national defence or security, and persons acting in support of those armed forces who are under their formal command, control and responsibility.

5. "Place of public use" means those parts of any building, land, street, waterway or other location that are accessible or open to members of the public, whether continuously, periodically or occasionally, and encompasses any commercial, business, cultural, historical, educational, religious, governmental, entertainment, recreational or similar place that is so accessible or open to the public.

6. "Public transportation system" means all facilities, conveyances and instrumentalities, whether publicly or privately owned, that are used in or for publicly available services for the transportation of persons or cargo.

Article 2

1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility: .

(a) With the intent to cause death or serious bodily injury; or

(b) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.

2. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1.

3. Any person also commits an offence if that person:

(a) Participates as an accomplice in an offence as set forth in paragraph 1 or 2; or

(b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 2; or

(c) In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.

Article 3

This Convention shall not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in the territory of that State and no other State has a basis under article 6, paragraph 1, or article 6, paragraph 2, of this Convention to exercise jurisdiction, except that the provisions of articles 10 to 15 shall, as appropriate, apply in those cases.

Article 4

Each State Party shall adopt such measures as may be necessary:

(a) To establish as criminal offences under its domestic law the offences set forth in article 2 of this Convention;

(b) To make those offences punishable by appropriate penalties which take into account the grave nature of those offences.

Article 5

Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature.

Article 6

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when:

(a) The offence is committed in the territory of that State; or

(b) The offence is committed on board a vessel flying the flag of that State or an aircraft which is registered under the laws of that State at the time the offence is committed; or

(c) The offence is committed by a national of that State.

2. A State Party may also establish its jurisdiction over any such offence when:

(a) The offence is committed against a national of that State; or

(b) The offence is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises of that State; or

(c) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State; or

(d) The offence is committed in an attempt to compel that State to do or abstain from doing any act; or

(e) The offence is committed on board an aircraft which is operated by the Government of that State.

3. Upon ratifying, accepting, approving or acceding to this Convention, each State Party shall notify the Secretary-General of the United Nations of the jurisdiction it has established in accordance with paragraph 2 under its domestic law. Should any change take place, the State Party concerned shall immediately notify the Secretary-General.

4. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2.

5. This Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

Article 7

1. Upon receiving information that a person who has committed or who is alleged to have committed an offence as set forth in article 2 may be present in its territory, the State Party concerned shall take such measures as may be necessary under its domestic law to investigate the facts contained in the information.

2. Upon being satisfied that the circumstances so warrant, the State Party in whose territory the offender or alleged offender is present shall take the appropriate measures under its domestic law so as to ensure that person's presence for the purpose of prosecution or extradition.

3. Any person regarding whom the measures referred to in paragraph 2 are being taken shall be entitled to:

(a) Communicate without delay with the nearest appropriate representative of the State of which that person is a national or which

is otherwise entitled to protect that person's rights or, if that person is a stateless person, the State in the territory of which that person habitually resides;

(b) Be visited by a representative of that State;

(c) Be informed of that person's rights under subparagraphs (a) and (b).

4. The rights referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the State in the territory of which the offender or alleged offender is present, subject to the provision that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.

5. The provisions of paragraphs 3 and 4 shall be without prejudice to the right of any State Party having a claim to jurisdiction in accordance with article 6, subparagraph 1 (c) or 2 (c), to invite the International Committee of the Red Cross to communicate with and visit the alleged offender.

6. When a State Party, pursuant to this article, has taken a person into custody, it shall immediately notify, directly or through the Secretary-General of the United Nations, the States Parties which have established jurisdiction in accordance with article 6, paragraphs 1 and 2, and, if it considers it advisable, any other interested States Parties, of the fact that such person is in custody and of the circumstances which warrant that person's detention. The State which makes the investigation contemplated in paragraph 1 shall promptly inform the said States Parties of its findings and shall indicate whether it intends to exercise jurisdiction.

Article 8

1. The State Party in the territory of which the alleged offender is present shall, in cases to which article 6 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the

case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

2. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State to serve the sentence imposed as a result of the trial or proceeding for which the extradition or surrender of the person was sought, and this State and the State seeking the extradition of the person agree with this option and other terms they may deem appropriate, such a conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 1.

Article 9

1. The offences set forth in article 2 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties before the entry into force of this Convention. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be subsequently concluded between them.

2. When a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition in respect of the offences set forth in article 2. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in article 2 as extraditable offences between themselves, subject to the conditions provided by the law of the requested State.

4. If necessary, the offences set forth in article 2 shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with article 6, paragraphs 1 and 2.

5. The provisions of all extradition treaties and arrangements between States Parties with regard to offences set forth in article 2 shall be deemed to be modified as between State Parties to the extent that they are incompatible with this Convention.

Article 10

1. States Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in article 2, including assistance in obtaining evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph 1 in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in accordance with their domestic law.

Article 11

None of the offences set forth in article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

Article 12

Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

Article 13

1. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of testimony, identification or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offences under this Convention may be transferred if the following conditions are met:

(a) The person freely gives his or her informed consent; and

(b) The competent authorities of both States agree, subject to such conditions as those States may deem appropriate.

2. For the purposes of this article:

(a) The State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;

(b) The State to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;

(c) The State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person;

(d) The person transferred shall receive credit for service of the sentence being served in the State from which he was transferred for time spent in the custody of the State to which he was transferred.

3. Unless the State Party from which a person is to be transferred in accordance with this article so agrees, that person, whatever his or her nationality, shall not be prosecuted or detained or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts or convictions anterior to his or her departure from the territory of the State from which such person was transferred.

Article 14

Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international law of human rights.

Article 15

States Parties shall cooperate in the prevention of the offences set forth in article 2, particularly:

(a) By taking all practicable measures, including, if necessary, adapting their domestic legislation, to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories, including measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize, knowingly finance or engage in the perpetration of offences as set forth in article 2;

(b) By exchanging accurate and verified information in accordance with their national law, and coordinating administrative and other measures taken as appropriate to prevent the commission of offences as set forth in article 2;

(c) Where appropriate, through research and development regarding methods of detection of explosives and other harmful substances that can cause death or bodily injury, consultations on the development of standards for marking explosives in order to identify their origin in post-blast investigations, exchange of information on preventive measures, cooperation and transfer of technology, equipment and related materials.

Article 16

The State Party where the alleged offender is prosecuted shall, in accordance with its domestic law or applicable procedures, communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to the other States Parties.

Article 17

The States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

Article 18

Nothing in this Convention entitles a State Party to undertake in the territory of another State Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other State Party by its domestic law.

Article 19

1. Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law.

2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.

Article 20

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of the Court.

2. Each State may at the time of signature, ratification, acceptance or approval of this Convention or accession thereto declare that it does not consider itself bound by paragraph 1. The other States Parties shall not be bound by paragraph 1 with respect to any State Party which has made such a reservation.

3. Any State which has made a reservation in accordance with paragraph 2 may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 21

1. This Convention shall be open for signature by all States from 12 January 1998 until 31 December 1999 at United Nations Headquarters in New York.
2. This Convention is subject to ratification, acceptance or approval. The instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.
3. This Convention shall be open to accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 22

1. This Convention shall enter into force on the thirtieth day following the date of the deposit of the twenty-second instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.
2. For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 23

1. Any State Party may denounce this Convention by written notification to the Secretary-General of the United Nations.
2. Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations.

Article 24

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention, opened for signature at New York on 12 January 1998.

ANNEX E

**INTERNATIONAL CONVENTION
FOR THE SUPPRESSION
OF THE FINANCING
OF TERRORISM**



**UNITED NATIONS
1999**

International Convention for the Suppression of the Financing of Terrorism

Preamble

The States Parties to this Convention,

Bearing in mind the purposes and principles of the Charter of the United Nations concerning the maintenance of international peace and security and the promotion of good-neighbourliness and friendly relations and cooperation among States,

Deeply concerned about the worldwide escalation of acts of terrorism in all its forms and manifestations,

Recalling the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, contained in General Assembly resolution 50/6 of 24 October 1995,

Recalling also all the relevant General Assembly resolutions on the matter, including resolution 49/60 of 9 December 1994 and its annex on the Declaration on Measures to Eliminate International Terrorism, in which the States Members of the United Nations solemnly reaffirmed their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States,

Noting that the Declaration on Measures to Eliminate International Terrorism also encouraged States to review urgently the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism in all its forms and manifestations, with the aim of ensuring that there is a comprehensive legal framework covering all aspects of the matter,

Recalling General Assembly resolution 51/210 of 17 December 1996, paragraph 3, subparagraph (f), in which the Assembly called upon all States to take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organizations, whether such financing is direct or indirect through organizations which also have or claim to have charitable, social or cultural goals or which are also engaged in unlawful activities such as illicit arms trafficking, drug dealing and racketeering, including the exploitation of persons for purposes of funding terrorist activities, and in particular to consider, where appropriate, adopting regulatory measures to prevent and counteract movements of funds suspected to be intended for terrorist purposes without impeding in any way the freedom of legitimate capital movements and to intensify the exchange of information concerning international movements of such funds,

Recalling also General Assembly resolution 52/165 of 15 December 1997, in which the Assembly called upon States to consider, in particular, the implementation

of the measures set out in paragraphs 3 (a) to (f) of its resolution 51/210 of 17 December 1996,

Recalling further General Assembly resolution 53/108 of 8 December 1998, in which the Assembly decided that the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 should elaborate a draft international convention for the suppression of terrorist financing to supplement related existing international instruments,

Considering that the financing of terrorism is a matter of grave concern to the international community as a whole,

Noting that the number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain,

Noting also that existing multilateral legal instruments do not expressly address such financing,

Being convinced of the urgent need to enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators,

Have agreed as follows:

Article 1

For the purposes of this Convention:

1. "Funds" means assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit.
2. "A State or governmental facility" means any permanent or temporary facility or conveyance that is used or occupied by representatives of a State, members of Government, the legislature or the judiciary or by officials or employees of a State or any other public authority or entity or by employees or officials of an intergovernmental organization in connection with their official duties.
3. "Proceeds" means any funds derived from or obtained, directly or indirectly, through the commission of an offence set forth in article 2.

Article 2

1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

2. (a) On depositing its instrument of ratification, acceptance, approval or accession, a State Party which is not a party to a treaty listed in the annex may declare that, in the application of this Convention to the State Party, the treaty shall be deemed not to be included in the annex referred to in paragraph 1, subparagraph (a). The declaration shall cease to have effect as soon as the treaty enters into force for the State Party, which shall notify the depositary of this fact;

(b) When a State Party ceases to be a party to a treaty listed in the annex, it may make a declaration as provided for in this article, with respect to that treaty.

3. For an act to constitute an offence set forth in paragraph 1, it shall not be necessary that the funds were actually used to carry out an offence referred to in paragraph 1, subparagraphs (a) or (b).

4. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of this article.

5. Any person also commits an offence if that person:

(a) Participates as an accomplice in an offence as set forth in paragraph 1 or 4 of this article;

(b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 4 of this article;

(c) Contributes to the commission of one or more offences as set forth in paragraphs 1 or 4 of this article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

- (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of this article; or
- (ii) Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of this article.

Article 3

This Convention shall not apply where the offence is committed within a single State, the alleged offender is a national of that State and is present in the territory of that State and no other State has a basis under article 7, paragraph 1, or article 7, paragraph 2, to exercise jurisdiction, except that the provisions of articles 12 to 18 shall, as appropriate, apply in those cases.

Article 4

Each State Party shall adopt such measures as may be necessary:

- (a) To establish as criminal offences under its domestic law the offences set forth in article 2;
- (b) To make those offences punishable by appropriate penalties which take into account the grave nature of the offences.

Article 5

1. Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, civil or administrative.
2. Such liability is incurred without prejudice to the criminal liability of individuals having committed the offences.
3. Each State Party shall ensure, in particular, that legal entities liable in accordance with paragraph 1 above are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions. Such sanctions may include monetary sanctions.

Article 6

Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

Article 7

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when:

(a) The offence is committed in the territory of that State;

(b) The offence is committed on board a vessel flying the flag of that State or an aircraft registered under the laws of that State at the time the offence is committed;

(c) The offence is committed by a national of that State.

2. A State Party may also establish its jurisdiction over any such offence when:

(a) The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), in the territory of or against a national of that State;

(b) The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), against a State or government facility of that State abroad, including diplomatic or consular premises of that State;

(c) The offence was directed towards or resulted in an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), committed in an attempt to compel that State to do or abstain from doing any act;

(d) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State;

(e) The offence is committed on board an aircraft which is operated by the Government of that State.

3. Upon ratifying, accepting, approving or acceding to this Convention, each State Party shall notify the Secretary-General of the United Nations of the jurisdiction it has established in accordance with paragraph 2. Should any change take place, the State Party concerned shall immediately notify the Secretary-General.

4. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is

present in its territory and it does not extradite that person to any of the States Parties that have established their jurisdiction in accordance with paragraphs 1 or 2.

5. When more than one State Party claims jurisdiction over the offences set forth in article 2, the relevant States Parties shall strive to coordinate their actions appropriately, in particular concerning the conditions for prosecution and the modalities for mutual legal assistance.

6. Without prejudice to the norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

Article 8

1. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth in article 2 as well as the proceeds derived from such offences, for purposes of possible forfeiture.

2. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the forfeiture of funds used or allocated for the purpose of committing the offences set forth in article 2 and the proceeds derived from such offences.

3. Each State Party concerned may give consideration to concluding agreements on the sharing with other States Parties, on a regular or case-by-case basis, of the funds derived from the forfeitures referred to in this article.

4. Each State Party shall consider establishing mechanisms whereby the funds derived from the forfeitures referred to in this article are utilized to compensate the victims of offences referred to in article 2, paragraph 1, subparagraph (a) or (b), or their families.

5. The provisions of this article shall be implemented without prejudice to the rights of third parties acting in good faith.

Article 9

1. Upon receiving information that a person who has committed or who is alleged to have committed an offence set forth in article 2 may be present in its territory, the State Party concerned shall take such measures as may be necessary under its domestic law to investigate the facts contained in the information.

2. Upon being satisfied that the circumstances so warrant, the State Party in whose territory the offender or alleged offender is present shall take the appropriate measures under its domestic law so as to ensure that person's presence for the purpose of prosecution or extradition.

3. Any person regarding whom the measures referred to in paragraph 2 are being taken shall be entitled to:

(a) Communicate without delay with the nearest appropriate representative of the State of which that person is a national or which is otherwise entitled to protect that person's rights or, if that person is a stateless person, the State in the territory of which that person habitually resides;

(b) Be visited by a representative of that State;

(c) Be informed of that person's rights under subparagraphs (a) and (b).

4. The rights referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the State in the territory of which the offender or alleged offender is present, subject to the provision that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.

5. The provisions of paragraphs 3 and 4 shall be without prejudice to the right of any State Party having a claim to jurisdiction in accordance with article 7, paragraph 1, subparagraph (b), or paragraph 2, subparagraph (b), to invite the International Committee of the Red Cross to communicate with and visit the alleged offender.

6. When a State Party, pursuant to the present article, has taken a person into custody, it shall immediately notify, directly or through the Secretary-General of the United Nations, the States Parties which have established jurisdiction in accordance with article 7, paragraph 1 or 2, and, if it considers it advisable, any other interested States Parties, of the fact that such person is in custody and of the circumstances which warrant that person's detention. The State which makes the investigation contemplated in paragraph 1 shall promptly inform the said States Parties of its findings and shall indicate whether it intends to exercise jurisdiction.

Article 10

1. The State Party in the territory of which the alleged offender is present shall, in cases to which article 7 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

2. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State to serve the sentence imposed as a result of the trial or proceeding for which the extradition or surrender of the person was sought, and this State and the State seeking the extradition of the person agree with this option and other terms they may deem appropriate,

such a conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 1.

Article 11

1. The offences set forth in article 2 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties before the entry into force of this Convention. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be subsequently concluded between them.

2. When a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition in respect of the offences set forth in article 2. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in article 2 as extraditable offences between themselves, subject to the conditions provided by the law of the requested State.

4. If necessary, the offences set forth in article 2 shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with article 7, paragraphs 1 and 2.

5. The provisions of all extradition treaties and arrangements between States Parties with regard to offences set forth in article 2 shall be deemed to be modified as between States Parties to the extent that they are incompatible with this Convention.

Article 12

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings in respect of the offences set forth in article 2, including assistance in obtaining evidence in their possession necessary for the proceedings.

2. States Parties may not refuse a request for mutual legal assistance on the ground of bank secrecy.

3. The requesting Party shall not transmit nor use information or evidence furnished by the requested Party for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested Party.

4. Each State Party may give consideration to establishing mechanisms to share with other States Parties information or evidence needed to establish criminal, civil or administrative liability pursuant to article 5.

5. States Parties shall carry out their obligations under paragraphs 1 and 2 in conformity with any treaties or other arrangements on mutual legal assistance or information exchange that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in accordance with their domestic law.

Article 13

None of the offences set forth in article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a fiscal offence. Accordingly, States Parties may not refuse a request for extradition or for mutual legal assistance on the sole ground that it concerns a fiscal offence.

Article 14

None of the offences set forth in article 2 shall be regarded for the purposes of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

Article 15

Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

Article 16

1. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offences set forth in article 2 may be transferred if the following conditions are met:

- (a) The person freely gives his or her informed consent;
- (b) The competent authorities of both States agree, subject to such conditions as those States may deem appropriate.

2. For the purposes of the present article:

(a) The State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;

(b) The State to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;

(c) The State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person;

(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State to which he or she was transferred.

3. Unless the State Party from which a person is to be transferred in accordance with the present article so agrees, that person, whatever his or her nationality, shall not be prosecuted or detained or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts or convictions anterior to his or her departure from the territory of the State from which such person was transferred.

Article 17

Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law.

Article 18

1. States Parties shall cooperate in the prevention of the offences set forth in article 2 by taking all practicable measures, *inter alia*, by adapting their domestic legislation, if necessary, to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories, including:

(a) Measures to prohibit in their territories illegal activities of persons and organizations that knowingly encourage, instigate, organize or engage in the commission of offences set forth in article 2;

(b) Measures requiring financial institutions and other professions involved in financial transactions to utilize the most efficient measures available for the identification of their usual or occasional customers, as well as customers in whose interest accounts are opened, and to pay special attention to unusual or suspicious transactions and report transactions suspected of stemming from a criminal activity. For this purpose, States Parties shall consider:

(i) Adopting regulations prohibiting the opening of accounts the holders or beneficiaries of which are unidentified or unidentifiable, and measures to ensure that such institutions verify the identity of the real owners of such transactions;

(ii) With respect to the identification of legal entities, requiring financial institutions, when necessary, to take measures to verify the legal existence and the structure of the customer by obtaining, either from a public register or from the customer or both, proof of incorporation, including information concerning the customer's name, legal form, address, directors and provisions regulating the power to bind the entity;

(iii) Adopting regulations imposing on financial institutions the obligation to report promptly to the competent authorities all complex, unusual large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose, without fear of assuming criminal or civil liability for breach of any restriction on disclosure of information if they report their suspicions in good faith;

(iv) Requiring financial institutions to maintain, for at least five years, all necessary records on transactions, both domestic or international.

2. States Parties shall further cooperate in the prevention of offences set forth in article 2 by considering:

(a) Measures for the supervision, including, for example, the licensing, of all money-transmission agencies;

(b) Feasible measures to detect or monitor the physical cross-border transportation of cash and bearer negotiable instruments, subject to strict safeguards to ensure proper use of information and without impeding in any way the freedom of capital movements.

3. States Parties shall further cooperate in the prevention of the offences set forth in article 2 by exchanging accurate and verified information in accordance with their domestic law and coordinating administrative and other measures taken, as appropriate, to prevent the commission of offences set forth in article 2, in particular by:

(a) Establishing and maintaining channels of communication between their competent agencies and services to facilitate the secure and rapid exchange of information concerning all aspects of offences set forth in article 2;

(b) Cooperating with one another in conducting inquiries, with respect to the offences set forth in article 2, concerning:

(i) The identity, whereabouts and activities of persons in respect of whom reasonable suspicion exists that they are involved in such offences;

(ii) The movement of funds relating to the commission of such offences.

4. States Parties may exchange information through the International Criminal Police Organization (Interpol).

Article 19

The State Party where the alleged offender is prosecuted shall, in accordance with its domestic law or applicable procedures, communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to the other States Parties.

Article 20

The States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

Article 21

Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, international humanitarian law and other relevant conventions.

Article 22

Nothing in this Convention entitles a State Party to undertake in the territory of another State Party the exercise of jurisdiction or performance of functions which are exclusively reserved for the authorities of that other State Party by its domestic law.

Article 23

1. The annex may be amended by the addition of relevant treaties that:
 - (a) Are open to the participation of all States;
 - (b) Have entered into force;
 - (c) Have been ratified, accepted, approved or acceded to by at least twenty-two States Parties to the present Convention.
2. After the entry into force of this Convention, any State Party may propose such an amendment. Any proposal for an amendment shall be communicated to the depositary in written form. The depositary shall notify proposals that meet the requirements of paragraph 1 to all States Parties and seek their views on whether the proposed amendment should be adopted.
3. The proposed amendment shall be deemed adopted unless one third of the States Parties object to it by a written notification not later than 180 days after its circulation.
4. The adopted amendment to the annex shall enter into force 30 days after the deposit of the twenty-second instrument of ratification, acceptance or approval of such amendment for all those States Parties having deposited such an instrument. For each State Party ratifying, accepting or approving the amendment after the deposit of the twenty-second instrument, the amendment shall enter into force on the thirtieth day after deposit by such State Party of its instrument of ratification, acceptance or approval.

Article 24

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of the Court.
2. Each State may at the time of signature, ratification, acceptance or approval of this Convention or accession thereto declare that it does not consider itself bound by paragraph 1. The other States Parties shall not be bound by paragraph 1 with respect to any State Party which has made such a reservation.
3. Any State which has made a reservation in accordance with paragraph 2 may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 25

1. This Convention shall be open for signature by all States from 10 January 2000 to 31 December 2001 at United Nations Headquarters in New York.
2. This Convention is subject to ratification, acceptance or approval. The instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.
3. This Convention shall be open to accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 26

1. This Convention shall enter into force on the thirtieth day following the date of the deposit of the twenty-second instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.
2. For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 27

1. Any State Party may denounce this Convention by written notification to the Secretary-General of the United Nations.
2. Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations.

Article 28

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention, opened for signature at United Nations Headquarters in New York on 10 January 2000.

Annex

1. Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970.
2. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971.
3. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973.
4. International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.
5. Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980.
6. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988.
7. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988.
8. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988.
9. International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.

ANNEX F

United Nations

A/RES/49/60

**General Assembly**

Distr. GENERAL

9 December 1994

ORIGINAL:
ENGLISH

A/RES/49/60
84th plenary meeting
9 December 1994

49/60. Measures to eliminate international terrorism

The General Assembly,

Recalling its resolution 46/51 of 9 December 1991 and its decision 48/411 of 9 December 1993,

Taking note of the report of the Secretary-General,

Having considered in depth the question of measures to eliminate international terrorism,

Convinced that the adoption of the declaration on measures to eliminate international terrorism should contribute to the enhancement of the struggle against international terrorism,

1. Approves the Declaration on Measures to Eliminate International Terrorism, the text of which is annexed to the present resolution;

2. Invites the Secretary-General to inform all States, the Security Council, the International Court of Justice and the relevant specialized agencies, organizations and organisms of the adoption of the Declaration;

3. Urges that every effort be made in order that the Declaration becomes generally known and is observed and implemented in full;

4. Urges States, in accordance with the provisions of the Declaration, to take all appropriate measures at the national and international levels to eliminate terrorism;

5. Invites the Secretary-General to follow up closely the implementation of the present resolution and the Declaration, and to submit to the General Assembly at its fiftieth session a report thereon, relating, in particular, to the modalities of implementation of paragraph 10 of the Declaration;

6. Decides to include in the provisional agenda of its fiftieth session the item entitled "Measures to eliminate international terrorism", in

order to examine the report of the Secretary-General requested in paragraph 5 above, without prejudice to the annual or biennial consideration of the item.

ANNEX

Declaration on Measures to Eliminate International Terrorism

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations,

Recalling the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, the Declaration on the Strengthening of International Security, the Definition of Aggression, the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights,

Deeply disturbed by the world-wide persistence of acts of international terrorism in all its forms and manifestations, including those in which States are directly or indirectly involved, which endanger or take innocent lives, have a deleterious effect on international relations and may jeopardize the security of States,

Deeply concerned by the increase, in many regions of the world, of acts of terrorism based on intolerance or extremism,

Concerned at the growing and dangerous links between terrorist groups and drug traffickers and their paramilitary gangs, which have resorted to all types of violence, thus endangering the constitutional order of States and violating basic human rights,

Convinced of the desirability for closer coordination and cooperation among States in combating crimes closely connected with terrorism, including drug trafficking, unlawful arms trade, money laundering and smuggling of nuclear and other potentially deadly materials, and bearing in mind the role that could be played by both the United Nations and regional organizations in this respect,

Firmly determined to eliminate international terrorism in all its forms and manifestations,

Convinced also that the suppression of acts of international terrorism, including those in which States are directly or indirectly involved, is an essential element for the maintenance of international peace and security,

Convinced further that those responsible for acts of international terrorism must be brought to justice,

Stressing the imperative need to further strengthen international cooperation between States in order to take and adopt practical and effective measures to prevent, combat and eliminate all forms of terrorism that affect the international community as a whole,

Conscious of the important role that might be played by the United

Nations, the relevant specialized agencies and States in fostering widespread cooperation in preventing and combating international terrorism, inter alia, by increasing public awareness of the problem,

Recalling the existing international treaties relating to various aspects of the problem of international terrorism, inter alia, the Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963, the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, concluded at Montreal on 23 September 1971, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted in New York on 14 December 1973, the International Convention against the Taking of Hostages, adopted in New York on 17 December 1979, the Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980, the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 24 February 1988, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988, the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988, and the Convention on the Marking of Plastic Explosives for the Purpose of Detection, done at Montreal on 1 March 1991,

Welcoming the conclusion of regional agreements and mutually agreed declarations to combat and eliminate terrorism in all its forms and manifestations,

Convinced of the desirability of keeping under review the scope of existing international legal provisions to combat terrorism in all its forms and manifestations, with the aim of ensuring a comprehensive legal framework for the prevention and elimination of terrorism,

Solemnly declares the following:

I

1. The States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States;

2. Acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security, jeopardize friendly relations among States, hinder international cooperation and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society;

3. Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them;

II

4. States, guided by the purposes and principles of the Charter of the United Nations and other relevant rules of international law, must refrain

from organizing, instigating, assisting or participating in terrorist acts in territories of other States, or from acquiescing in or encouraging activities within their territories directed towards the commission of such acts;

5. States must also fulfil their obligations under the Charter of the United Nations and other provisions of international law with respect to combating international terrorism and are urged to take effective and resolute measures in accordance with the relevant provisions of international law and international standards of human rights for the speedy and final elimination of international terrorism, in particular:

(a) To refrain from organizing, instigating, facilitating, financing, encouraging or tolerating terrorist activities and 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;

(b) To ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts, in accordance with the relevant provisions of their national law;

(c) To endeavour to conclude special agreements to that effect on a bilateral, regional and multilateral basis, and to prepare, to that effect, model agreements on cooperation;

(d) To cooperate with one another in exchanging relevant information concerning the prevention and combating of terrorism;

(e) To take promptly all steps necessary to implement the existing international conventions on this subject to which they are parties, including the harmonization of their domestic legislation with those conventions;

(f) To take appropriate measures, before granting asylum, for the purpose of ensuring that the asylum seeker has not engaged in terrorist activities and, after granting asylum, for the purpose of ensuring that the refugee status is not used in a manner contrary to the provisions set out in subparagraph (a) above;

6. In order to combat effectively the increase in, and the growing international character and effects of, acts of terrorism, States should enhance their cooperation in this area through, in particular, systematizing the exchange of information concerning the prevention and combating of terrorism, as well as by effective implementation of the relevant international conventions and conclusion of mutual judicial assistance and extradition agreements on a bilateral, regional and multilateral basis;

7. In this context, States are encouraged to review urgently the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism in all its forms and manifestations, with the aim of ensuring that there is a comprehensive legal framework covering all aspects of the matter;

8. Furthermore States that have not yet done so are urged to consider, as a matter of priority, becoming parties to the international conventions and protocols relating to various aspects of international terrorism referred to in the preamble to the present Declaration;

III

9. The United Nations, the relevant specialized agencies and intergovernmental organizations and other relevant bodies must make every effort with a view to promoting measures to combat and eliminate acts of terrorism and to strengthening their role in this field;

10. The Secretary-General should assist in the implementation of the present Declaration by taking, within existing resources, the following practical measures to enhance international cooperation:

(a) A collection of data on the status and implementation of existing multilateral, regional and bilateral agreements relating to international terrorism, including information on incidents caused by international terrorism and criminal prosecutions and sentencing, based on information received from the depositaries of those agreements and from Member States;

(b) A compendium of national laws and regulations regarding the prevention and suppression of international terrorism in all its forms and manifestations, based on information received from Member States;

(c) An analytical review of existing international legal instruments relating to international terrorism, in order to assist States in identifying aspects of this matter that have not been covered by such instruments and could be addressed to develop further a comprehensive legal framework of conventions dealing with international terrorism;

(d) A review of existing possibilities within the United Nations system for assisting States in organizing workshops and training courses on combating crimes connected with international terrorism;

IV

11. All States are urged to promote and implement in good faith and effectively the provisions of the present Declaration in all its aspects;

12. Emphasis is placed on the need to pursue efforts aiming at eliminating definitively all acts of terrorism by the strengthening of international cooperation and progressive development of international law and its codification, as well as by enhancement of coordination between, and increase of the efficiency of, the United Nations and the relevant specialized agencies, organizations and bodies.

ANNEX G

United Nations

A/RES/50/53



General Assembly

Distr. GENERAL

11 December 1995

ORIGINAL:
ENGLISHA/RES/50/53
87th plenary meeting
11 December 1995

50/53. Measures to eliminate international terrorism

The General Assembly,

Recalling its resolution 49/60 of 9 December 1994, by which it adopted the Declaration on Measures to Eliminate International Terrorism,

Recalling also that, in the statement issued on 31 January 1992 by the President of the Security Council on the occasion of the meeting of the Security Council at the level of heads of State and Government, the members of the Council expressed their deep concern over acts of international terrorism, and emphasized the need for the international community to deal effectively with all such acts,

Recalling further the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations,

Deeply disturbed by the persistence of terrorist acts, which have taken place worldwide,

Stressing the need further to strengthen international cooperation between States and between international organizations and agencies, regional organizations and arrangements and the United Nations in order to prevent, combat and eliminate terrorism in all its forms and manifestations,

Having examined the report of the Secretary-General of 24 August 1995,

1. Strongly condemns all acts, methods and practices of terrorism as criminal and unjustifiable;

2. Reiterates that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them;

3. Reaffirms the Declaration on Measures to Eliminate International Terrorism annexed to resolution 49/60;

4. Urges all States to promote and implement effectively and in good faith the provisions of the Declaration in all its aspects;

5. Also urges all States to strengthen cooperation with one another to ensure that those who participate in terrorist activities, whatever the nature of their participation, find no safe haven anywhere;

6. Calls upon all States to take the necessary steps to implement their obligations under existing international conventions, to observe fully the principles of international law and to contribute to the further development of international law on this matter;

7. Recalls the role of the Security Council in combating international terrorism whenever it poses a threat to international peace and security;

8. Requests the Secretary-General to follow up closely the implementation of the Declaration and to submit an annual report on the implementation of paragraph 10 of the Declaration, taking into account the modalities set out in his report and the views expressed by States in the debate of the Sixth Committee during the fiftieth session of the General Assembly;

9. Decides to include in the provisional agenda of its fifty-first session the item entitled "Measures to eliminate international terrorism".

ANNEX H

United Nations

A/RES/40/61

**General Assembly**

Distr. GENERAL

9 December 1985

ORIGINAL:
ENGLISHA/RES/40/61
9 December 1985
108th plenary meeting

Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes

The General Assembly,

Recalling its resolutions 3034 (XXVII) of 18 December 1972, 31/102 of 15 December 1976, 32/147 of 16 December 1977, 34/145 of 17 December 1979, 36/109 of 10 December 1981 and 38/130 of 19 December 1983,

Recalling also the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the Declaration on the Strengthening of International Security, the Definition of Aggression and relevant instruments on international humanitarian law applicable in armed conflict,

Further recalling the existing international conventions relating to various aspects of the problem of international terrorism, inter alia, the Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963, the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, signed at New York on 14 December 1973, and the International Convention against the Taking of Hostages, adopted at New York on 17 December 1979,

Deeply concerned about the world-wide escalation of acts of terrorism in all its forms, which endanger or take innocent human lives, jeopardize fundamental freedoms and seriously impair the dignity of human beings,

Taking note of the deep concern and condemnation of all acts of international terrorism expressed by the Security Council and the Secretary-General,

Convinced of the importance of expanding and improving international co-operation among States, on a bilateral and multilateral basis, which will contribute to the elimination of acts of international terrorism and their underlying causes and to the prevention and elimination of this criminal scourge,

Reaffirming the principle of self-determination of peoples enshrined in the Charter of the United Nations,

Reaffirming also the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination, and upholding the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and principles of the Charter and of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,

Mindful of the necessity of maintaining and safeguarding the basic rights of the individual in accordance with the relevant international human rights instruments and generally accepted international standards,

Convinced of the importance of the observance by States of their obligations under the relevant international conventions to ensure that appropriate law enforcement measures are taken in connection with the offences addressed in those Conventions,

Expressing its concern that in recent years terrorism has taken on forms that have an increasingly deleterious effect on international relations, which may jeopardize the very territorial integrity and security of States,

Taking note of the report of the Secretary-General,

1. Unequivocally condemns, as criminal, all acts, methods and practices of terrorism wherever and by whomever committed, including those which jeopardize friendly relations among States and their security;

2. Deeply deplores the loss of innocent human lives which results from such acts of terrorism;

3. Also deplores the pernicious impact of acts of international terrorism on relations of co-operation among States, including co-operation for development;

4. Appeals to all States that have not yet done so to consider becoming party to the existing international conventions relating to various aspects of international terrorism;

5. Invites all States to take all appropriate measures at the national level with a view to the speedy and final elimination of the problem of international terrorism, such as the harmonization of domestic legislation with existing international conventions, the fulfilment of assumed international obligations, and the prevention of the preparation and organization in their respective territories of acts directed against other States;

6. Calls upon all States to fulfil their obligations under international law to refrain from organizing, instigating, assisting or participating in terrorist acts in other States, or acquiescing in activities within their territory directed towards the commission of such acts;

7. Urges all States not to allow any circumstances to obstruct the application of appropriate law enforcement measures provided for in the relevant conventions to which they are party to persons who commit acts of international terrorism covered by those conventions;

8. Also urges all States to co-operate with one another more closely, especially through the exchange of relevant information concerning the prevention and combating of terrorism, the apprehension and prosecution or extradition of the perpetrators of such acts, the conclusion of special treaties and/or the incorporation into appropriate bilateral treaties of special clauses, in particular regarding the extradition or prosecution of terrorists;

9. Further urges all States, unilaterally and in co-operation with other States, as well as relevant United Nations organs, to contribute to the speedy elimination of the causes underlying international terrorism and

to pay special attention to all situations, including colonialism, racism and situations involving mass and flagrant violations of human rights and fundamental freedoms and those involving alien occupation, that may give rise to international terrorism and may endanger international peace and security;

10. Calls upon all States to observe and implement the recommendations of the Ad Hoc Committee on International Terrorism contained in its report to the General Assembly at its thirty-fourth session;

11. Also calls upon all States to take all appropriate measures as recommended by the International Civil Aviation Organization and as set forth in relevant international conventions to prevent terrorist attacks against civil aviation transport and other forms of public transport;

12. Encourages the International Civil Aviation Organization to continue its efforts aimed at promoting universal acceptance of and strict compliance with the international air security conventions;

13. Requests the International Maritime Organization to study the problem of terrorism aboard or against ships with a view to making recommendations on appropriate measures;

14. Requests the Secretary-General to follow up, as appropriate, the implementation of the present resolution and to submit a report to the General Assembly at its forty-second session;

15. Decides to include the item in the provisional agenda of its forty-second session.

ANNEX I



General Assembly

Distr.: General
18 September 2001

Fifty-sixth session
Agenda item 8

Resolution adopted by the General Assembly

[without reference to a Main Committee (A/56/L.1)]

56/1. Condemnation of terrorist attacks in the United States of America

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations,

1. *Strongly condemns* the heinous acts of terrorism, which have caused enormous loss of human life, destruction and damage in the cities of New York, host city of the United Nations, and Washington, D.C., and in Pennsylvania;
2. *Expresses its condolences and solidarity* with the people and Government of the United States of America in these sad and tragic circumstances;
3. *Urgently calls* for international cooperation to bring to justice the perpetrators, organizers and sponsors of the outrages of 11 September 2001;
4. *Also urgently calls* for international cooperation to prevent and eradicate acts of terrorism, and stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of such acts will be held accountable.

*1st plenary meeting
12 September 2001*

ANNEX J



Security Council

Distr.: General

12 September 2001

Resolution 1368 (2001)

**Adopted by the Security Council at its 4370th meeting, on
12 September 2001**

The Security Council,

Reaffirming the principles and purposes of the Charter of the United Nations,

Determined to combat by all means threats to international peace and security caused by terrorist acts,

Recognizing the inherent right of individual or collective self-defence in accordance with the Charter,

1. *Unequivocally condemns* in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and *regards* such acts, like any act of international terrorism, as a threat to international peace and security;

2. *Expresses* its deepest sympathy and condolences to the victims and their families and to the people and Government of the United States of America;

3. *Calls* on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and *stresses* that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable;

4. *Calls also* on the international community to redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions, in particular resolution 1269 (1999) of 19 October 1999;

5. *Expresses* its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations;

6. *Decides* to remain seized of the matter.



ANNEX K



Security Council

Distr.: General

28 September 2001

Resolution 1373 (2001)

**Adopted by the Security Council at its 4385th meeting, on
28 September 2001**

The Security Council,

Reaffirming its resolutions 1269 (1999) of 19 October 1999 and 1368 (2001) of 12 September 2001,

Reaffirming also its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts,

Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security,

Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001),

Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts,

Deeply concerned by the increase, in various regions of the world, of acts of terrorism motivated by intolerance or extremism,

Calling on States to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism,

Recognizing the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism,

Reaffirming the principle established by the General Assembly in its declaration of October 1970 (resolution 2625 (XXV)) and reiterated by the Security Council in its resolution 1189 (1998) of 13 August 1998, namely that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts,

Acting under Chapter VII of the Charter of the United Nations,



1. *Decides* that all States shall:

- (a) Prevent and suppress the financing of terrorist acts;
- (b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
- (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;
- (d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;

2. *Decides also* that all States shall:

- (a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;
- (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;
- (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
- (d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;
- (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;
- (f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;
- (g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;

3. *Calls upon all States to:*

(a) Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups;

(b) Exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts;

(c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts;

(d) Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999;

(e) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001);

(f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;

(g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists;

4. *Notes with concern the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials, and in this regard emphasizes the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security;*

5. *Declares that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations;*

6. *Decides to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise, and calls upon all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement this resolution;*

7. *Directs the Committee to delineate its tasks, submit a work programme within 30 days of the adoption of this resolution, and to consider the support it requires, in consultation with the Secretary-General;*

8. *Expresses* its determination to take all necessary steps in order to ensure the full implementation of this resolution, in accordance with its responsibilities under the Charter;

9. *Decides* to remain seized of this matter.

ANNEX L



Security Council

Distr.: General
12 November 2001

Resolution 1377 (2001)

**Adopted by the Security Council at its 4413th meeting, on
12 November 2001**

The Security Council,

Decides to adopt the attached declaration on the global effort to combat terrorism.



Annex

The Security Council,

Meeting at the Ministerial level,

Recalling its resolutions 1269 (1999) of 19 October 1999, 1368 (2001) of 12 September 2001 and 1373 (2001) of 28 September 2001,

Declares that acts of international terrorism constitute one of the most serious threats to international peace and security in the twenty-first century,

Further declares that acts of international terrorism constitute a challenge to all States and to all of humanity,

Reaffirms its unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed,

Stresses that acts of international terrorism are contrary to the purposes and principles of the Charter of the United Nations, and that the financing, planning and preparation of as well as any other form of support for acts of international terrorism are similarly contrary to the purposes and principles of the Charter of the United Nations,

Underlines that acts of terrorism endanger innocent lives and the dignity and security of human beings everywhere, threaten the social and economic development of all States and undermine global stability and prosperity,

Affirms that a sustained, comprehensive approach involving the active participation and collaboration of all Member States of the United Nations, and in accordance with the Charter of the United Nations and international law, is essential to combat the scourge of international terrorism,

Stresses that continuing international efforts to broaden the understanding among civilizations and to address regional conflicts and the full range of global issues, including development issues, will contribute to international cooperation and collaboration, which themselves are necessary to sustain the broadest possible fight against international terrorism,

Welcomes the commitment expressed by States to fight the scourge of international terrorism, including during the General Assembly plenary debate from 1 to 5 October 2001, *calls on* all States to become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, and encourages Member States to take forward work in this area,

Calls on all States to take urgent steps to implement fully resolution 1373 (2001), and to assist each other in doing so, and *underlines* the obligation on States to deny financial and all other forms of support and safe haven to terrorists and those supporting terrorism,

Expresses its determination to proceed with the implementation of that resolution in full cooperation with the whole membership of the United Nations, and *welcomes* the progress made so far by the Counter-Terrorism Committee established by paragraph 6 of resolution 1373 (2001) to monitor implementation of that resolution,

Recognizes that many States will require assistance in implementing all the requirements of resolution 1373 (2001), and *invites* States to inform the Counter-Terrorism Committee of areas in which they require such support,

In that context, invites the Counter-Terrorism Committee to explore ways in which States can be assisted, and in particular to explore with international, regional and subregional organizations:

- the promotion of best-practice in the areas covered by resolution 1373 (2001), including the preparation of model laws as appropriate,
- the availability of existing technical, financial, regulatory, legislative or other assistance programmes which might facilitate the implementation of resolution 1373 (2001),
- the promotion of possible synergies between these assistance programmes,

Calls on all States to intensify their efforts to eliminate the scourge of international terrorism.

ANNEX M

**Security Council**

Distr.: General

14 November 2001

Resolution 1378 (2001)**Adopted by the Security Council at its 4415th meeting, on
14 November 2001***The Security Council,**Reaffirming* its previous resolutions on Afghanistan, in particular resolutions 1267 (1999) of 15 October 1999, 1333 (2000) of 19 December 2000 and 1363 (2001) of 30 July 2001,*Supporting* international efforts to root out terrorism, in keeping with the Charter of the United Nations, and *reaffirming* also its resolutions 1368 (2001) of 12 September 2001 and 1373 (2001) of 28 September 2001,*Recognizing* the urgency of the security and political situation in Afghanistan in light of the most recent developments, particularly in Kabul,*Condemning* the Taliban for allowing Afghanistan to be used as a base for the export of terrorism by the Al-Qaida network and other terrorist groups and for providing safe haven to Usama Bin Laden, Al-Qaida and others associated with them, and in this context supporting the efforts of the Afghan people to replace the Taliban regime,*Welcoming* the intention of the Special Representative to convene an urgent meeting of the various Afghan processes at an appropriate venue and *calling on* the United Front and all Afghans represented in those processes to accept his invitation to that meeting without delay, in good faith and without preconditions,*Welcoming* the Declaration on the Situation in Afghanistan by the Foreign Ministers and other Senior Representatives of the Six plus Two of 12 November 2001, as well as the support being offered by other international groups,*Taking note* of the views expressed at the meeting of the Security Council on the situation in Afghanistan on 13 November 2001,*Endorsing* the approach outlined by the Special Representative of the Secretary-General at the meeting of the Security Council on 13 November 2001,*Reaffirming* its strong commitment to the sovereignty, independence, territorial integrity and national unity of Afghanistan,

Deeply concerned by the grave humanitarian situation and the continuing serious violations by the Taliban of human rights and international humanitarian law,

1. *Expresses* its strong support for the efforts of the Afghan people to establish a new and transitional administration leading to the formation of a government, both of which:

- should be broad-based, multi-ethnic and fully representative of all the Afghan people and committed to peace with Afghanistan's neighbours,
- should respect the human rights of all Afghan people, regardless of gender, ethnicity or religion,
- should respect Afghanistan's international obligations, including by cooperating fully in international efforts to combat terrorism and illicit drug trafficking within and from Afghanistan, and
- should facilitate the urgent delivery of humanitarian assistance and the orderly return of refugees and internally displaced persons, when the situation permits;

2. *Calls* on all Afghan forces to refrain from acts of reprisal, to adhere strictly to their obligations under human rights and international humanitarian law, and to ensure the safety and security and freedom of movement of United Nations and associated personnel, as well as personnel of humanitarian organizations;

3. *Affirms* that the United Nations should play a central role in supporting the efforts of the Afghan people to establish urgently such a new and transitional administration leading to the formation of a new government and *expresses* its full support for the Secretary-General's Special Representative in the accomplishment of his mandate, and calls on Afghans, both within Afghanistan and among the Afghan diaspora, and Member States to cooperate with him;

4. *Calls* on Member States to provide:

- support for such an administration and government, including through the implementation of quick-impact projects,
- urgent humanitarian assistance to alleviate the suffering of Afghan people both inside Afghanistan and Afghan refugees, including in demining, and
- long-term assistance for the social and economic reconstruction and rehabilitation of Afghanistan and welcomes initiatives towards this end;

5. *Encourages* Member States to support efforts to ensure the safety and security of areas of Afghanistan no longer under Taliban control, and in particular to ensure respect for Kabul as the capital for all the Afghan people, and especially to protect civilians, transitional authorities, United Nations and associated personnel, as well as personnel of humanitarian organizations;

6. *Decides* to remain actively seized of the matter.

ANNEX N

**Security Council**

Distr.: General
20 December 2001

Resolution 1386 (2001)

**Adopted by the Security Council at its 4443rd meeting, on
20 December 2001**

The Security Council,

Reaffirming its previous resolutions on Afghanistan, in particular its resolutions 1378 (2001) of 14 November 2001 and 1383 (2001) of 6 December 2001,

Supporting international efforts to root out terrorism, in keeping with the Charter of the United Nations, and reaffirming also its resolutions 1368 (2001) of 12 September 2001 and 1373 (2001) of 28 September 2001,

Welcoming developments in Afghanistan that will allow for all Afghans to enjoy inalienable rights and freedom unfettered by oppression and terror,

Recognizing that the responsibility for providing security and law and order throughout the country resides with the Afghan themselves,

Reiterating its endorsement of the Agreement on provisional arrangements in Afghanistan pending the re-establishment of permanent government institutions, signed in Bonn on 5 December 2001 (S/2001/1154) (the Bonn Agreement),

Taking note of the request to the Security Council in Annex 1, paragraph 3, to the Bonn Agreement to consider authorizing the early deployment to Afghanistan of an international security force, as well as the briefing on 14 December 2001 by the Special Representative of the Secretary-General on his contacts with the Afghan authorities in which they welcome the deployment to Afghanistan of a United Nations-authorized international security force,

Taking note of the letter dated 19 December 2001 from Dr. Abdullah Abdullah to the President of the Security Council (S/2001/1223),

Welcoming the letter from the Secretary of State for Foreign and Commonwealth Affairs of the United Kingdom of Great Britain and Northern Ireland to the Secretary-General of 19 December 2001 (S/2001/1217), and *taking note* of the United Kingdom offer contained therein to take the lead in organizing and commanding an International Security Assistance Force,



Stressing that all Afghan forces must adhere strictly to their obligations under human rights law, including respect for the rights of women, and under international humanitarian law,

Reaffirming its strong commitment to the sovereignty, independence, territorial integrity and national unity of Afghanistan,

Determining that the situation in Afghanistan still constitutes a threat to international peace and security,

Determined to ensure the full implementation of the mandate of the International Security Assistance Force, in consultation with the Afghan Interim Authority established by the Bonn Agreement,

Acting for these reasons under Chapter VII of the Charter of the United Nations,

1. *Authorizes*, as envisaged in Annex I to the Bonn Agreement, the establishment for 6 months of an International Security Assistance Force to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment;
2. *Calls upon* Member States to contribute personnel, equipment and other resources to the International Security Assistance Force, and invites those Member States to inform the leadership of the Force and the Secretary-General;
3. *Authorizes* the Member States participating in the International Security Assistance Force to take all necessary measures to fulfil its mandate;
4. *Calls upon* the International Security Assistance Force to work in close consultation with the Afghan Interim Authority in the implementation of the force mandate, as well as with the Special Representative of the Secretary-General;
5. *Calls upon* all Afghans to cooperate with the International Security Assistance Force and relevant international governmental and non-governmental organizations, and welcomes the commitment of the parties to the Bonn Agreement to do all within their means and influence to ensure security, including to ensure the safety, security and freedom of movement of all United Nations personnel and all other personnel of international governmental and non-governmental organizations deployed in Afghanistan;
6. *Takes note* of the pledge made by the Afghan parties to the Bonn Agreement in Annex I to that Agreement to withdraw all military units from Kabul, and calls upon them to implement this pledge in cooperation with the International Security Assistance Force;
7. *Encourages* neighbouring States and other Member States to provide to the International Security Assistance Force such necessary assistance as may be requested, including the provision of overflight clearances and transit;
8. *Stresses* that the expenses of the International Security Assistance Force will be borne by the participating Member States concerned, *requests* the Secretary-General to establish a trust fund through which contributions could be channelled to the Member States or operations concerned, and encourages Member States to contribute to such a fund;

9. *Requests* the leadership of the International Security Assistance Force to provide periodic reports on progress towards the implementation of its mandate through the Secretary-General;

10. *Calls on* Member States participating in the International Security Assistance Force to provide assistance to help the Afghan Interim Authority in the establishment and training of new Afghan security and armed forces;

11. *Decides* to remain actively seized of the matter.

ANNEX O



Security Council

Distr.: General
28 January 2002

Resolution 1390 (2002)

**Adopted by the Security Council at its 4452nd meeting, on
16 January 2002**

The Security Council,

Recalling its resolutions 1267 (1999) of 15 October 1999, 1333 (2000) of 19 December 2000 and 1363 (2001) of 30 July 2001,

Reaffirming its previous resolutions on Afghanistan, in particular resolutions 1378 (2001) of 14 November 2001 and 1383 (2001) of 6 December 2001,

Reaffirming also its resolutions 1368 (2001) of 12 September 2001 and 1373 (2001) of 28 September 2001, and *reiterating* its support for international efforts to root out terrorism, in accordance with the Charter of the United Nations,

Reaffirming its unequivocal condemnation of the terrorist attacks which took place in New York, Washington and Pennsylvania on 11 September 2001, expressing its determination to prevent all such acts, *noting* the continued activities of Usama bin Laden and the Al-Qaida network in supporting international terrorism, and expressing its determination to root out this network,

Noting the indictments of Usama bin Laden and his associates by the United States of America for, inter alia, the 7 August 1998 bombings of the United States embassies in Nairobi, Kenya and Dar es Salaam, Tanzania,

Determining that the Taliban have failed to respond to the demands in paragraph 13 of resolution 1214 (1998) of 8 December 1998, paragraph 2 of resolution 1267 (1999) and paragraphs 1, 2 and 3 of resolution 1333 (2000),

Condemning the Taliban for allowing Afghanistan to be used as a base for terrorists training and activities, including the export of terrorism by the Al-Qaida network and other terrorist groups as well as for using foreign mercenaries in hostile actions in the territory of Afghanistan,

Condemning the Al-Qaida network and other associated terrorist groups, for the multiple criminal, terrorist acts, aimed at causing the deaths of numerous innocent civilians, and the destruction of property,

* Reissued for technical reasons.



Reaffirming further that acts of international terrorism constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* to continue the measures imposed by paragraph 8 (c) of resolution 1333 (2000) and *takes note* of the continued application of the measures imposed by paragraph 4 (b) of resolution 1267 (1999), in accordance with paragraph 2 below, and *decides* to terminate the measures imposed in paragraph 4 (a) of resolution 1267 (1999);

2. *Decides* that all States shall take the following measures with respect to Usama bin Laden, members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them, as referred to in the list created pursuant to resolutions 1267 (1999) and 1333 (2000) to be updated regularly by the Committee established pursuant to resolution 1267 (1999) hereinafter referred to as "the Committee";

(a) Freeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, including funds derived from property owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly, for such persons' benefit, by their nationals or by any persons within their territory;

(b) Prevent the entry into or the transit through their territories of these individuals, provided that nothing in this paragraph shall oblige any State to deny entry into or require the departure from its territories of its own nationals and this paragraph shall not apply where entry or transit is necessary for the fulfilment of a judicial process or the Committee determines on a case by case basis only that entry or transit is justified;

(c) Prevent the direct or indirect supply, sale and transfer, to these individuals, groups, undertakings and entities from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related materiel of all types including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned and technical advice, assistance, or training related to military activities;

3. *Decides* that the measures referred to in paragraphs 1 and 2 above will be reviewed in 12 months and that at the end of this period the Council will either allow these measures to continue or decide to improve them, in keeping with the principles and purposes of this resolution;

4. *Recalls* the obligation placed upon all Member States to implement in full resolution 1373 (2001), including with regard to any member of the Taliban and the Al-Qaida organization, and any individuals, groups, undertakings and entities associated with the Taliban and the Al-Qaida organization, who have participated in the financing, planning, facilitating and preparation or perpetration of terrorist acts or in supporting terrorist acts;

5. *Requests* the Committee to undertake the following tasks and to report on its work to the Council with its observations and recommendations;

(a) to update regularly the list referred to in paragraph 2 above, on the basis of relevant information provided by Member States and regional organizations;

(b) to seek from all States information regarding the action taken by them to implement effectively the measures referred to in paragraph 2 above, and thereafter to request from them whatever further information the Committee may consider necessary;

(c) to make periodic reports to the Council on information submitted to the Committee regarding the implementation of this resolution;

(d) to promulgate expeditiously such guidelines and criteria as may be necessary to facilitate the implementation of the measures referred to in paragraph 2 above;

(e) to make information it considers relevant, including the list referred to in paragraph 2 above, publicly available through appropriate media;

(f) to cooperate with other relevant Security Council Sanctions Committees and with the Committee established pursuant to paragraph 6 of its resolution 1373 (2001);

6. *Requests* all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement the measures referred to in paragraph 2 above;

7. *Urges* all States, relevant United Nations bodies, and, as appropriate, other organizations and interested parties to cooperate fully with the Committee and with the Monitoring Group referred to in paragraph 9 below;

8. *Urges* all States to take immediate steps to enforce and strengthen through legislative enactments or administrative measures, where appropriate, the measures imposed under domestic laws or regulations against their nationals and other individuals or entities operating on their territory, to prevent and punish violations of the measures referred to in paragraph 2 of this resolution, and to inform the Committee of the adoption of such measures, and *invites* States to report the results of all related investigations or enforcement actions to the Committee unless to do so would compromise the investigation or enforcement actions;

9. *Requests* the Secretary-General to assign the Monitoring Group established pursuant to paragraph 4 (a) of resolution 1363 (2001), whose mandate expires on 19 January 2002, to monitor, for a period of 12 months, the implementation of the measures referred to in paragraph 2 of this resolution;

10. *Requests* the Monitoring Group to report to the Committee by 31 March 2002 and thereafter every 4 months;

11. *Decides* to remain actively seized of the matter.

ANNEX P

Draft articles on

Responsibility of States for internationally wrongful acts

adopted by the
International Law Commission
at its fifty-third session (2001)

(extract from the Report of the International Law Commission on the work of its Fifty-third session,
Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.1)

November 2001

E. Text of the draft articles on Responsibility of States for internationally wrongful acts

1. Text of the draft articles

76. The text of the draft articles adopted by the Commission at its fifty-third session are reproduced below.

RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

PART ONE

THE INTERNATIONALLY WRONGFUL ACT OF A STATE

CHAPTER I

General principles

Article 1

Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2

Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) Is attributable to the State under international law; and
- (b) Constitutes a breach of an international obligation of the State.

Article 3

Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

CHAPTER II

Attribution of conduct to a State

Article 4

Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Article 5

Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 6

Conduct of organs placed at the disposal of a State by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Article 7

Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Article 8

Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Article 9

Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Article 10

Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.
2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.
3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

Article 11

Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

CHAPTER III

Breach of an international obligation

Article 12

Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Article 13

International obligation in force for a State

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Article 14

Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.
2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.
3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Article 15

Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

CHAPTER IV

Responsibility of a State in connection with the act of another State

Article 16

Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.

Article 17

Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.

Article 18

Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

- (a) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and
- (b) The coercing State does so with knowledge of the circumstances of the act.

Article 19

Effect of this chapter

This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.

CHAPTER V

Circumstances precluding wrongfulness

Article 20

Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Article 21

Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Article 22

Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three.

Article 23

Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(a) The situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(b) The State has assumed the risk of that situation occurring.

Article 24

Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

(a) The situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(b) The act in question is likely to create a comparable or greater peril.

Article 25

Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) The international obligation in question excludes the possibility of invoking necessity; or

(b) The State has contributed to the situation of necessity.

Article 26

Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

Article 27

Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

- (a) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;
- (b) The question of compensation for any material loss caused by the act in question.

PART TWO

CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

CHAPTER I

General principles

Article 28

Legal consequences of an internationally wrongful act

The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in this Part.

Article 29

Continued duty of performance

The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached.

Article 30

Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

- (a) To cease that act, if it is continuing;
- (b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Article 31

Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Article 32

Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.

Article 33

Scope of international obligations set out in this Part

1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.
2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

CHAPTER II

Reparation for injury

Article 34

Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Article 35

Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

- (a) Is not materially impossible;
- (b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article 36

Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Article 37

Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Article 38

Interest

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.
2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Article 39

Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

CHAPTER III

Serious breaches of obligations under peremptory norms of general international law

Article 40

Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Article 41

Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.

PART THREE

THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

CHAPTER I

Invocation of the responsibility of a State

Article 42

Invocation of responsibility by an injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

- (a) That State individually; or
- (b) A group of States including that State, or the international community as a whole, and the breach of the obligation:
 - (i) Specially affects that State; or
 - (ii) Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Article 43

Notice of claim by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.
2. The injured State may specify in particular:
 - (a) The conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;
 - (b) What form reparation should take in accordance with the provisions of Part Two.

Article 44

Admissibility of claims

The responsibility of a State may not be invoked if:

(a) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;

(b) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Article 45

Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

(a) The injured State has validly waived the claim;

(b) The injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Article 46

Plurality of injured States

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

Article 47

Plurality of responsible States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

(a) Does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;

(b) Is without prejudice to any right of recourse against the other responsible States.

Article 48

Invocation of responsibility by a State other than an injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
 - (a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
 - (b) The obligation breached is owed to the international community as a whole.
2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:
 - (a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
 - (b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.
3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

CHAPTER II

Countermeasures

Article 49

Object and limits of countermeasures

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.
2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.
3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

Article 50

Obligations not affected by countermeasures

1. Countermeasures shall not affect:
 - (a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
 - (b) Obligations for the protection of fundamental human rights;
 - (c) Obligations of a humanitarian character prohibiting reprisals;
 - (d) Other obligations under peremptory norms of general international law.
2. A State taking countermeasures is not relieved from fulfilling its obligations:
 - (a) Under any dispute settlement procedure applicable between it and the responsible State;
 - (b) To respect the inviolability of diplomatic or consular agents, premises, archives and documents.

Article 51

Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Article 52

Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:
 - (a) Call on the responsible State, in accordance with article 43, to fulfil its obligations under Part Two;
 - (b) Notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.
2. Notwithstanding paragraph 1 (b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(a) The internationally wrongful act has ceased; and

(b) The dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Article 53

Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act.

Article 54

Measures taken by States other than an injured State

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

PART FOUR

GENERAL PROVISIONS

Article 55

Lex specialis

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

Article 56

Questions of State responsibility not regulated by these articles

The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.

Article 57

Responsibility of an international organization

These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

Article 58

Individual responsibility

These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

Article 59

Charter of the United Nations

These articles are without prejudice to the Charter of the United Nations.