State Responsibility and Self-Defence in International Law Post 9/11: Has the Scope of Article 51 of the United Nations Charter Been Widened as a Result of the US Response to 9/11?

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Abstract

In the aftermath of 9/11, there has been a general consensus that an armed attack of sufficient gravity is still a requisite element to establish the right of self-defence in international law. Debate has however surrounded the level of state responsibility required to invoke this right. It has been suggested that a new threshold has arisen post 9/11 and that state responsibility now encompasses the 'harbouring' of non-state actors. The author examines this argument in light of the international community's support for the US response to 9/11, the two Security Council Resolutions affirming the right and State practice post 9/11. The author then proposes a suitable threshold of state responsibility appropriate for today's threats.

Introduction

Six years following the terrorist attacks of September 11 2001 the images of that day still resonate in the international community, while the United States' response in apparent self-defence against the attacks has fuelled the current debate about the scope of the right of self-defence in international law. The prohibition on the use of force in international law is paramount to the preservation of international peace and security. article 51 of the *United Nations Charter* ('*UN Charter*') gives States a right to defend themselves against an armed attack, and is one of only two exceptions to the prohibition on the use of force in article 2(4).[1] Not many States have in the past resorted to article 51 to justify responses to terrorist attacks.[2] Traditionally, in order for a State to resort to armed force in self-defence, it needs to demonstrate that it has suffered an armed attack

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1 *Charter of the United Nations*, adopted 26 June 1945, 892 UNTS 119 (entered into force 24 October 1945), art 51 and art 2(4).

2 Christine Gray, *International Law and the Use of Force* (2nd ed, 2004) at 160.

of sufficient gravity, and for which another State is responsible.[3] In terms of a terrorist attack, the settled law at present states that the level of State responsibility verges on that State having an active role in supporting the terrorist group responsible, that is, the State against which force will be used needs to have been an active participant.[4]

This view however has recently been challenged. Following the September 11 2001 terrorist attacks in New York and Washington (hereafter 9/11), the United States, claiming to be exercising its right to self-defence,[5] launched 'Operation Enduring Freedom'[6] in Afghanistan, declaring that the 9/11 attacks were made possible 'by the decision of the Taliban regime to allow parts of Afghanistan that it controls to be used by Al-Qaeda as a base of operation'.[7] This claim alluded to passive, rather than active support by the Taliban, and such justifications for the use of force in self-defence were in the past met with condemnation from the international community.[8] The US justification was however seemingly met with approval by the international community, with the Security Council passing Resolutions 1368 and 1373 condemning the 9/11 attacks and reaffirming the right of self-defence.

As a result of the two Security Council resolutions and the overwhelming support of the international community, it has been suggested that the scope of self-defence under article 51 has become wider with respect to the level of state responsibility required to attribute the acts of terrorists to a State which supports them.[9] Many are now suggesting that active participation by a State is no longer the required standard, and that States which 'harbour' terrorists make themselves subject to the use of force in self-defence by the victim State.[10]

When one considers that the prohibition on the use of force in the *UN Charter* has at its core the protection of the international community against the ravages of war through the preservation of international peace and security, any arguments as to the widening of the scope of the right of self-defence should be carefully examined. Part one of this paper provides a brief overview of the right of self-defence under the *UN Charter*. The scope of the right of self-defence is examined pre and post 9/11, in parts two and three respectively. Whether there has been a change in the law of self-defence is addressed in

3 Greg Travalio & John Altenburg, 'Terrorism, State Responsibility, and the Use of Military Force' (2003) 4 *Chicago Journal of International Law* 97 at 102.

4 See for example *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America (Merits)* [1986] ICJ Rep 14 ('*Nicaragua*').

5 Letter from the Permanent United Nations Representative of the United States to the President of the United Nations Security Council, UN Doc S/2001/946, (7 October 2001).

6 The US describes the Operation as "… a multinational coalition military operation … to counter terrorism and bring security to Afghanistan in collaboration with Afghan forces.' *Press Release 31 January* 2006 at 13,The United States Embassy in the United Kingdom <http://www.usembassy.org.uk/ukpapress23.html> accessed November 2006.

7 Letter from the Permanent United Nations Representative of the United States to the President of the United Nations Security Council, UN Doc S/2001/946, (7 October 2001).

8 Gray, above n2 at 112–114.

9 Tom Ruys & Sten Verhoeven, 'Attacks by Private Actors and the Right of Self-Defence' (2005) 10(3) *Journal of Conflict and Security Law* 289 at 311.

10 Id at 312; Travalio & Altenburg above n3 at 105.

Part four, while Part five looks at the need to distinguish between varying levels of State support. The author argues that, despite the support of the international community for the US response to 9/11, it is unlikely that the scope of self-defence has been widened to encapsulate state responsibility in the form of harbouring non-state actors. The author further argues that there is a need to set a new threshold of state responsibility, one that is wider than the threshold set down in *Nicaragua v The United States* ('*Nicaragua*')[11] but narrower than harbouring.

1. Self-Defence in International Law: The United Nations Charter Framework

Among the purposes of the 1945 *UN Charter* is that the preservation of international peace and security is paramount. This is achieved through article 2(4), which states:

> 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.

Article 2(4) of the *UN Charter* prohibits the use of armed force, whether it amounts to war or not, and represents an absolute prohibition on the use of force but for a number of exceptions within the *UN Charter*. One of the exceptions is article 51, which in part states that:

> 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.

2. Article 51 and Self-Defence Pre-9/11

In 1950 Kelsen argued that article 51 only applies in the case of an armed attack and noted that 'the right of self-defence must not be exercised in case of any other violation of the legally protected interests of a Member (of the UN)'.[12] In 1958 Brownlie suggested that the concept of 'armed attack' in article 51 probably refers to 'some grave breach of the peace, or invasion by a large organised force acting on the orders of a government.'[13] He supplemented this view in 1963, noting that that the limits imposed on article 51 would be meaningless if a wider right to self-defence was applicable under the *UN Charter*.[14]

11 *Nicaragua* (1986) ICJ Rep 14 at 195.

12 Hans Kelsen, *Law of the United Nations* (1950) at 269.

13 Ian Brownlie, 'International Law and the Activities of Armed Bands' (1958) 7(4) *International and Comparative Law Quarterly* 712 at 731.

14 Ian Brownlie, *International Law and the Use of Force* (1963) at 162.

A. Nicaragua v United States: the Concept of Armed Attack

The International Court of Justice ('ICJ'), in 1986, in the case of *Nicaragua v The United States*, endorsed a narrow view of article 51.[15] The ICJ held that a State's right to self-defence under article 51 is subject to that State having suffered an actual armed attack,[16] and in 2003, in the *Oil Platforms Case*, confirmed that an armed attack is still the prerequisite element for the use of force in self-defence.[17]

The ICJ in *Nicaragua* stated that in order for a State to resort to armed force in self-defence, it needs to demonstrate that it has suffered an armed attack of sufficient gravity, and for which another State is responsible.[18] Thus, an armed attack which invites the application of the right of self-defence was considered by the Court as constituting two elements, sufficient gravity and state responsibility, both of which have to be satisfied before a victim State can use force under article 51.

(i) Sufficient Gravity

The ICJ noted that the element of sufficient gravity is necessary in order to distinguish between the gravest forms of the use of force, which amount to an armed attack, from other less grave forms.[19] This element however is not a controversial concept in international law and its applicability in current international law was accepted by the ICJ in the *Oil Platforms Case*, where the Court applied the sufficient gravity test set down in *Nicaragua* to hold that attacks by Iran on US ships were not of sufficient gravity to constitute an armed attack and justify the use of force by the US against Iranian oil platforms.[20] The ICJ's confirmation of the sufficient gravity test adopted in *Nicaragua* is quite significant as it maintains the high threshold at which a State's right of self-defence is triggered.[21]

(ii) State Responsibility

The Annex to General Assembly Resolution 3314 entitled *Definition of Aggression* lists the acts which constitute an armed attack when carried out by a State's armed forces. article 3(g) of the Annex however reiterates that such acts, even if not carried out by a State's armed forces, will be regarded as an armed attack if supported by the State. The ICJ in *Nicaragua* affirmed article 3(g) of the Annex and concluded that an armed attack must be understood as including 'not merely actions 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

15 *Nicaragua* 1986) ICJ Rep 14 at 195

16 *Nicaragua* (1986) ICJ Rep 14 at 195.

17 *Oil Platforms (Islamic Republic of Iran v United States of America) (Merits)* [6 November 2003].

18 *Nicaragua* (1986) ICJ Rep 14.

19 *Nicaragua* (1986) ICJ Rep 14 at 191.

20 *Oil Platforms (Islamic Republic of Iran v United States of America) (Merits)* [6 November 2003].

21 Andrew Garwood-Gowers, 'Case Concerning Oil Platforms (Islamic Republic of Iran v the United States of America) Did the ICJ Miss the Boat on the Law on the Use of Force?' (2004) 5 *Melbourne Journal of International Law* 241 at 249.

State of such gravity as to amount to' (inter alia) an actual armed attack conducted by regular forces, 'or its substantial involvement therein'.[22]

The question in *Nicaragua* was whether the US, because of its financing, organising, training, equipping and planning of the operations of organised Nicaraguan rebels in Nicaragua, was responsible for violations of international humanitarian law committed by those rebels. The ICJ held that such support did not meet the threshold of state responsibility and that the US did not commit an armed attack.[23]

The ICJ in *Nicaragua* developed the 'effective control' test under which to assess whether actions of non-state actors could be attributed to a State.[24] The Court stated that in order to attribute the acts of the rebels to the US it would have to be proved that the US had 'effective control' of the rebels.[25] This, and the references to 'sending by or on behalf,' suggests that pre-9/11 there was a requirement of direct state involvement. The Court found that the US financed, trained, equipped, armed and organised the rebels but expressly excluded such assistance from attributing the acts of the rebels to the US.[26] While the ICJ did not expressly consider a lesser degree of state involvement, such as harbouring, it is implicit from its judgment that armed attack was narrower than this.[27]

In attempts to justify its use of military force against some Arab States, Israel has in the past asserted that even passive state involvement, such as the provision of financial aid, weapons or logistical support to terrorists by a State or the acquiesce of a State in the terrorists seeking refuge before and after the commission of terrorist acts, gives rise to the right of self-defence.[28] These assertions have however not been accepted by the Security Council.[29]

B. *1999: Prosecutor v Tadić*

It is interesting to note that the 'effective control' test formulated in *Nicaragua* was formulated in the context of paramilitary forces, and not unorganised groups such as many terrorists, and yet, almost all commentators have used this test to evaluate the actions of terrorist groups. The applicability of this test to terrorist groups was affirmed in the decision of *Prosecutor v Duško Tadić* ('*Tadić*').[30]

In its 1999 decision, *Prosecutor v Duško Tadić*, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ('the Tribunal') considered the concept of state responsibility in international law. Some have suggested that the

22 *Nicaragua* (1986) ICJ Rep 14 at 195.

23 *Nicaragua* (1986) ICJ Rep 14 at 195.

24 Derek Jinks, 'State Responsibility for the Acts of Private Armed Groups' (2003) 4(1) *Chicago Journal of International Law* 83 at 88.

25 *Nicaragua* (1986) ICJ Rep 14 at 115.

26 *Nicaragua* (1986) ICJ Rep 14 at 108, 228.

27 Antonio Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 *European Journal of International Law* 993 at 999.

28 Id at 600. Also see the discussion below under the heading 'State Practice Pre-9/11.'

29 Cassese, above n27 at 600.

30 *Prosecutor v Duško Tadić* [IT-94-1-A] (Appeals Chamber) (15 July 1999) ('*Tadić*') <http://www.un.org/icty/tadic/appeal/judgement/index.htm> accessed 1 November 2006.

'effective control' test in *Nicaragua* was 'softened' in the *Tadić* decision by lowering the standard to that of 'overall control'.[31] This conclusion however is incorrect. The Tribunal began with an analysis of the decision in *Nicaragua*, and at first instance did suggest that the 'effective control' test set down in *Nicaragua* was not persuasive.[32] However, the Tribunal went on to distinguish the conduct of individuals and unorganised groups from the conduct of military or paramilitary groups, and the way in which the *Nicaragua* 'effective control' test would apply to each type of group. It was noted that the 'effective control' test was not 'persuasive' with respect to military and paramilitary groups because the test is at variance with judicial and State practice.[33] A less stringent test, one of 'overall control,' is in the Tribunal's view, the correct test with respect to military and paramilitary groups.[34]

With respect to the conduct of, in the words of the Tribunal, 'individuals and unorganised groups,' which includes some non-state actors, the Tribunal was clear in stating that the 'overall control' test does not apply. In relation to individuals and unorganised groups, it was noted that courts consider an overall or general level of control insufficient, instead requiring that there be 'specific instructions or directives aimed at the commission of specific acts,' or in the alternative, that there be public approval of those acts following their commission.[35] The Tribunal further noted that such an approach is supported by State practice.[36]

This reasoning by the Tribunal affirms that the stricter 'effective control' test laid down in *Nicaragua* was applicable pre-9/11 to non-state actors, which the Tribunal considered to require a 'high degree of control'.[37] In order to meet this test, the Tribunal asks 'whether specific instructions concerning the commission of that particular act had been issued by that State to the individual or group in question,' or whether the State in question publicly endorsed or approved of the act *ex post facto*.[38] The Tribunal also added that the requirements of the 'effective control' test are 'dependence' of the terrorists on the State to which terrorist acts are sought to be attributed to, and control by this State over the terrorists.[39] It is possible to argue that 'dependence' could include the provision of arms, finances and logistics, but this is inconsistent with the ICJ's acceptance of the 'effective control' test which excludes such support.

C. State Practice Pre-9/11

Gray notes that in the past only Israel and the United States have invoked the right of self-defence to justify their responses to terrorist attacks against States that allegedly 'harboured' terrorists. Israel's attack on the Beirut Airport in 1968 was condemned by

31 Jinks, above n24.
32 *Tadić* [IT-94-1-A] (Appeals Chamber) (15 July 1999) at 115.
33 *Tadić* [IT-94-1-A] (Appeals Chamber) (15 July 1999) at 124–129.
34 *Tadić* [IT-94-1-A] (Appeals Chamber) (15 July 1999) at 122.
35 *Tadić* [IT-94-1-A] (Appeals Chamber) (15 July 1999) at 132.
36 *Tadić* [IT-94-1-A] (Appeals Chamber) (15 July 1999) at 136.
37 *Tadić* [IT-94-1-A] (Appeals Chamber) (15 July 1999) at 99.
38 *Tadić* [IT-94-1-A] (Appeals Chamber) (15 July 1999) at 137.
39 *Tadić* [IT-94-1-A] (Appeals Chamber) (15 July 1999) at 112.

the Security Council,[40] while its 1985 bombing of the Palestine Liberation Organisation's headquarters in Tunis was considered by the Security Council as an act of armed aggression in deliberate violation of the *UN Charter*.[41] In 1986 the US bombed Libya and the international community did not accept its claim to self-defence.[42] While a proposed Security Council resolution condemning the attack was vetoed by the US, the UK and France,[43] the General Assembly did adopt a resolution censuring the US attack.[44] In 1993 the US attacked Iraq claiming it acted in self-defence .[45] While the Security Council seemed to sympathise with the US, it was only Russia and the UK that accepted its legal argument.[46] In 1998, the US attacked a terrorist training camp in Afghanistan and an alleged chemical weapons factory in Sudan.[47] While there was no condemnation by the Security Council, those States that refrained from condemnation or expressed support were careful not to adopt the US view on the scope of self-defence.[48] It is important to note that the failure to condemn the US should not be taken as acceptance of a legal doctrine permitting the use of force in circumstances where a State harbours terrorists.[49] It can thus be concluded that prior to 9/11, States were hesitant, if not unwilling, to accept that force could be used in self-defence against States harbouring terrorists.

3. Article 51 and Self-Defence Post-9/11

It was previously mentioned that the element of sufficient gravity is not in issue and that an armed attack must be sufficiently grave to invoke the right of self-defence. The real issue in light of the seemingly sudden emergence of large scale international terrorism is the degree of State involvement required in order to hold a State responsible for the actions of terrorists operating from its territory. As discussed earlier, the pre-9/11 requirements dictated that a State would only be responsible if it could be shown that it exercised 'effective control' over terrorists, and under *Nicaragua* this did not include the provision of weapons, financial or logistical support, and one can thus easily accept that harbouring of terrorist groups was also not adequate. This strict requirement was affirmed in 1999 by the International Criminal Tribunal for the Former Yugoslavia Appeals Chamber ('ICTY'). In light of 9/11 however the level of state responsibility as propounded in *Nicaragua* is being challenged.[50]

40 SC Res 262 UN Doc S/RES/262 (1968).
41 SC Res 573 UN Doc S/RES/573 (1985).
42 Stanimir Alexandrov, *Self-Defense Against the Use of Force in International Law* (1996) at 185–186.
43 Id at 186.
44 Ibid.
45 Gray, above n2 at 162.
46 Ibid.
47 Id at 163.
48 Ibid.
49 Devika Hovell, 'Chinks in the Armour: International Law, Terrorism and the Use of Force' (2004) 27(2) *University of New South Wales Law Journal*, 398 at 413.
50 Jackson Nyamuya Maogoto, 'War on the Enemy: Self-Defence and State-Sponsored Terrorism' (2003) 4 *Melbourne Journal of International Law* 406 at 407.

A. State Responsibility: Widening the Scope of Article 51: From 'Effective Control' to 'Harbouring'

The United States and Israel have long been advocating a less stringent test than that of 'effective control' put forth in *Nicaragua*.[51] Prior to 9/11 however, this assertion did not receive much support from other States, and was in fact highly controversial.[52] After 9/11 however some have argued that the 'effective control' test is no longer applicable to non-state actors.[53] It has been suggested that the attribution requirement remains part of 'armed attack,' but that its threshold has been lowered.[54] It has been suggested that any level of support, or even willingly hosting, tolerating or harbouring terrorists, will be sufficient to make a State that provides such support responsible for the actions of terrorists.[55] This new standard however is qualified by the pre-condition that the State in question willingly assists the terrorists, as it would be illogical to hold those States that are unable to prevent terrorist groups from operating in their territory accountable for the actions of such groups.[56]

This notion of the emergence of a new standard of attribution is supported by two factors. The first is the overwhelming support of the international community for the US-led military campaign in Afghanistan, and the second refers to the two Security Council resolutions affirming the right to self-defence. The following part of this paper looks at these two factors and the arguments for and against these factors being an indication of a change in the law.

(i) State Support for US Action in Afghanistan

After the 9/11 terrorist attacks in the US, attacks which were attributed to the Al-Qaeda terrorist organisation based in Afghanistan, the US Congress authorised the use of military force against those involved in the attacks, including those who 'harboured' the alleged terrorists or terrorist groups.[57] The 2002 *National Security Strategy* of the US stated that no distinction is to be made 'between terrorist and those who knowingly harbour or provide aid to them,'[58] representing a marked shift from the level of state involvement required pre-9/11.

While the US justification for self-defence, the harbouring of Al-Qaeda by the Taliban, was not the first time that the US used such a justification,[59] it was the first time that such a claim was met with wide support from the international community, with the European Union declaring its 'wholehearted support for the action that is being taken in self-defence in conformity with the UN Charter'.[60] This overwhelming support has been

51 For example see the four incidents mentioned above under 'State Practice Pre-9/11.'

52 Garwood-Gowers, above n21.

53 Ibid; Travalio & Altenburg, above n3.

54 Garwood-Gowers, above n21.

55 Ibid.

56 Mary Ellen O'Connell, 'Lawful Self-Defense to Terrorism' (2002) 63 *University of Pittsburgh Law Review* 889 at 899–901.

57 Jinks, above n24 at 85.

58 Ruys & Verhoeven, above n9 at 311.

59 See for example the claims by the US in 1998 referred to in this paper under 'State Practice Pre-9/11.'

seen as an acceptance by the international community of a new standard of state responsibility in attributing the acts of terrorists to States that harbour them.[61] There have been suggestions that even though the US did not provide sufficient evidence to meet the 'effective control' test, there seems to have emerged a sudden and significant change in the international community's interpretation of the level of state responsibility required.[62]

While many authors have pointed to the international support the US received, some note that no State voiced an objection to the US military campaign, save for objections from Iraq, Iran, Sudan, North Korea, Cuba and Malaysia,[63] and that the lack of an objection to the US' consistent references to harbouring is the 'strongest manifestation of evolving customary international law regarding the use of force against terrorism'.[64] Whether there was positive support or whether States failed to object, their acceptance of *Operation Enduring Freedom* suggests to some that there has been a change in the interpretation of the scope of article 51, either through instant custom, or by universal acceptance by States of a new legal rule.[65]

Gray notes however that the immediate agreement by States of the right to use force in Afghanistan has since dispersed in their disagreements whether military force should be used in Iraq.[66] Despite this, it is important to recognise that US actions in Iraq were based on the doctrine of pre-emptive self-defence, a doctrine whose legality is quite questionable under current international law.[67] Due to this, any disagreements as to the US actions in Iraq do not have much relevance in assessing the international community's acceptance of the widening of the scope of self-defence to include harbouring as a means of acceptable State support.

Ratner has suggested that perhaps the international community accepted the US campaign against Afghanistan, not because they accepted the concept of harbouring as valid in international law, but because they saw a sufficiently close relationship between Al-Qaeda and the Taliban in order to hold the Taliban regime responsible.[68] Ratner further suggests that many States seemed to accept the US response to 9/11 due to the gravity of the attacks whereby many would have reacted with emotion and empathy, as opposed to an express acceptance of the US arguments as lawful in international law.[69]

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60 Gray, above n2 at 160.

61 See for example Jinks, above n24; Michael Byers, 'Terrorism, the Use of Force and International Law After 11 September' (2002) 51 International & Comparative Law Quarterly 401.Travalio & Altenburg, above n3; Ruys & Verhoeven, above n9.

62 Cassese, above n27 at 1000.

63 Steven R Ratner, 'Jus ad Bellum and Jus in Bello After September 11' (2002) 96 *American Journal of International Law* 905 at 910.

64 Travalio & Altenburg, above n3 at 109.

65 Gray, above n2 at 164.

66 Id at 160.

67 Justine Dearsley, 'The Use of Force in International Law: A Case Study – The Invasion of Iraq, 2003' (2004) 10 *Canterbury Law Review* 121 at 122.

68 Ratner, above n63 at 913.

69 Id at 919.

It is unclear whether, due to the support of the global community for the US actions against Afghanistan, the majority of States now accept a wider view of self-defence. The events of 9/11 were quite catastrophic and a response different to that actually expressed would have been quite unimaginable, especially among the European Union and the North Atlantic Treaty Organisation members. In light of the facts surrounding the US claims to self-defence, especially with respect to attributing the attacks to the Taliban regime, it is open to debate whether such a favourable response actually shows an acceptance of harbouring as being adequate to attribute the acts of non-state actors to the harbouring State. The international community's lack of support for subsequent responses to terrorist acts against States harbouring terrorists accords with this view.[70]

(ii) Security Council Resolutions 1368 and 1373

In the aftermath of 9/11, the Security Council adopted Resolutions 1368 and 1373,[71] affirming the right of self-defence. This has prompted some to suggest that both Resolutions have expanded the definition of armed attack.[72] However, the reference to the inherent right of self-defence appears in the preambles of both Resolutions, rather than in the operative part, which makes one question whether the resolutions support self-defence against States that harbour terrorists.[73] Ulfstein contrasts these two resolutions with Resolution 678, adopted in 1990 following the Iraqi invasion of Kuwait, which in its operative part 'authorises' all member States to 'use all necessary means' to force Iraq to implement the Council's Resolutions and restore international peace and security in the region. Despite the fact that the right of self-defence is expressed in both Resolutions' preambles, Gray argues that, considering the immediate international reaction to the US response, the members of the Security Council were willing to accept the use of force in self-defence by the US.[74] More importantly, she points out that even though it does not appear that the references to self-defence are authoritative due to their location, the mention of the right of self-defence is important in itself, as the Security Council seldom refers to this right.[75]

It is however important to note that neither resolution provides an explicit acknowledgement for the US to use force in self-defence against another State. In addition, Gray notes that even though there was wide support for the US, there still remains ambiguity as to the exact scope of this right.[76] In Resolution 1368, the Security Council made it clear that those that aided, supported or harboured the perpetrators of the 9/11 attacks would be held accountable.[77] It is however unclear what repercussions the Security Council meant to subject the perpetrators to by using the word

70 For example Syria in 2001 and Lebanon in 2003. See below under 'State Practice Post-9/11.'

71 SC Res 1368 UN Doc S/RES/1368 (2001); SC Res 1373 UN Doc S/RES/1373 (2001).

72 Thomas M Franck, 'Terrorism and the Right of Self-Defense' (2001) 95(4) *American Journal of International Law* 839 at 842.

73 Gray, above n2 at 165.

74 Ibid.

75 Ibid.

76 Ibid.

77 SC Res 1368 UN Doc S/RES/1368 (2001).

'accountable.' Whether the use of force in self-defence would be a consequence, or whether less serious ramifications would be put in place is unclear. The strict prohibition on the use of force would support the conclusion that less serious consequences than the use of force would be more acceptable. It is however important to recognise that because the use of force is a far-reaching intrusion into State sovereignty it ought to require clear and unambiguous legal authority, and this is not provided in either Resolution.

It has also been pointed out that both resolutions were adopted while it was still unclear who had committed or was responsible for the attacks in the United States, and that this means that neither resolution authorises the use of force against the Taliban who harboured Al-Qaeda.[78] Resolution 1368 has been described as ambiguous and contradictory,[79] and many have argued that this Resolution did not authorise the US to use force in self-defence in accordance with article 51.[80] Similar arguments surround Resolution 1373, with some noting that this Resolution in particular is not a call upon States to take action against those States that merely harbour terrorists.[81] It is thus unclear whether either Resolution really signifies a shift in the law. While it is significant that the Security Council referred to the inherent right of self-defence, both Resolutions are ambiguous and their significance has been construed as having different meanings between commentators. In addition, the Security Council has remained silent on the right of self-defence with respect to other terrorist attacks post 9/11, even though many of the attacks were of sufficient gravity to amount to an armed attack.[82] This perhaps signifies the possibility that 9/11 was an exceptional situation which did warrant some type of statement by the Security Council but a statement that did not clearly establish the scope of the right of self-defence. The two Resolutions should perhaps be seen as the Security Council exercising restraint from making an explicit endorsement of the right to use force in self-defence against States that harbour terrorists.

(iii) State Practice Post-9/11

In 2001, Israel attacked Syrian positions in Lebanon in response to Hezbollah attacks on Israeli forces, claiming that Syria supported Hezbollah and allowed it to maintain training camps. The European Union considered the Israeli response disproportionate but it did not enter into debate about the legality of Israel's use of force.[83] In 2003 after a Palestinian bombing in Haifa, Israel attacked Syria claiming that it was acting in self-defence on the basis that Syria was harbouring terrorists. The UN Secretary-General criticised Israel's actions, while in the Security Council Israel's response was condemned

78 Jordan J Paust, 'Use of Armed Force Against Terrorists in Afghanistan, Iraq and Beyond' (2002) 35 *Cornell International Law Journal* 533 at 540.

79 Cassese, above n27 at 996.

80 Cassese, above n27 at 996; Paust, above n79 at 544.

81 Paust, above n78 at 545.

82 Ruys and Verhoeven, above n9 at 319.

83 *Presidency Statement on the Recent Developments in Israel and Lebanon* (2006) Finland's EU Presidency <http://www.eu2006.fi/news_and_documents/cfsp_statements/vko28/en_GB/1152797537796/> accessed 11 November 2006.

by a majority of States as a violation of international law.[84] These condemnations point to a restraint by States to approve the use of force in such circumstances.

In 2006, Israel launched a massive attack against Lebanon in response to the kidnapping and killing of its soldiers by Hezbollah, a terrorist organisation thought to have been provided a safe harbour by Lebanon. Israel invoked its right to self-defence and the US wholeheartedly supported this claim. The actions of Israel have however been condemned by the UN Secretary-General[85] and many in the international community have seen the Israeli response to the kidnapping of its soldiers as disproportionate.[86] Whether the international community supported Israel's right to self-defence is unclear. No State, apart from the US, has commented on the legality of the Israeli claim to self-defence, and this in itself cannot be taken as evidence of the international community's acceptance of a new threshold of state responsibility.

If one compares the international community's reactions to the US response to 9/11 and then its reactions to Israel's actions against States harbouring terrorists in 2001 and 2003, it is clear that harbouring has not definitively been accepted as adequate to impute the acts of terrorists to a State that harbours them. It is important to keep in mind that harbouring was used by the US in 2001, and then by Israel in 2001, 2003 and 2006, both States which have long been advocating a wide right of self-defence. The use of the concept of 'harbouring' by two such States should be viewed cautiously, notwithstanding the support shown for the US in the aftermath of 9/11. Such support should perhaps be taken to indicate sympathy and understanding on the part of the international community, rather than acceptance of a new legal doctrine.

4. Has There Really Been a Change in the Law of Self-Defence?

In light of the numerous authors arguing for a wider right to self-defence, a right which would allow States to use force in self-defence against those States that harbour terrorists, some authors have advocated a more narrow view where direct involvement by a State is still necessary.[87] Paust has pointed out that attributing the acts of terrorists to the State that harbours them is impermissible.[88] He notes that:

> Absent Security Council authorisation to use military force against a State that merely harbours terrorists, and absent direct involvement by such a State in a process of armed attack that triggers the right of self-defence against that State, the use of military force against such a State would be impermissible under the Charter.[89]

84 The States that condemned Israel's actions were Spain, France, China, Pakistan, Germany, Mexico and Jordan. See Gray, above n2 at 174–175.

85 *Hezbollah Warns Israel Over Raids* (2006) BBC News <http://news.bbc.co.uk/2/hi/middle_east/5173078.stm > accessed 2 October 2006.

86 See the statements of the European Union, the Egyptian Foreign Minister, Jordan, Russia and the French Foreign Minister in: *In Quotes: Lebanon Reaction* (2006) BBC News <http://news.bbc.co.uk/2/hi/middle_east/5175886.stm> accessed 12 November 2006.

87 Paust, above n78 at 539.

88 Ibid.

89 Id at 540.

Gray notes that some have used the US Joint Resolution of Congress, which authorised the use of force against those who harboured terrorists as a justification for widening the scope of self-defence, but also notes that the US in its letter to the Security Council had not referred to 'harbouring' but instead argued that it had found compelling evidence that the Taliban Government of Afghanistan actively supported Al-Qaeda.[90] In considering these discrepancies, Gray points out that the US left uncertain what degree of involvement by Afghanistan, if any, was necessary to justify the use of force against its territory.[91] If one accepts this, it is then unclear what the international community gave support to, that is, did the international community agree with the US references to harbouring or did it merely support the US action as it seemed to be supported by the Security Council?

It has however been noted that even though the US used the language of harbouring, the relationship between Al-Qaeda and the Taliban was sufficiently close to come under a higher threshold for attributability than mere harbouring. Why the language of harbouring may have been used if there was sufficient evidence to link Al-Qaeda to the Taliban under the pre-9/11 attribution threshold, may be a result of a strategic approach by the US.[92] Byers has noted that the US choice of justification has been directed at loosening the legal limitations on the use of force, and that having seized the opportunity to establish self-defence as an accepted basis for its actions in Afghanistan, the US will be able to invoke the right again, even in circumstances less serious, which is clearly very advantageous to the US.[93]

Viewing things from a different perspective, Gray asks whether there has really been any change in the law of self-defence as a result of 9/11.[94] She puts forth the possibility that *Operation Enduring Freedom* was essentially a 'one-off' response, a response based on Security Council affirmation and wide acceptance by States, rather than the acceptance of a new legal norm.[95] In light of all the above, it is quite open to debate whether there really has been any radical change in the scope of self-defence. While one may consider that the 'effective control' test developed in *Nicaragua* may be too restrictive, it should not immediately be concluded that the provision of a safe haven is enough to attribute the acts of non-State actors to the State that provides a safe harbour. If in fact the *Nicaragua* threshold of attributability is too restrictive, and it appears that it may in fact be too narrow for today's threats, what then is, or should be, the new threshold of attributability?

5. The Need to Distinguish Between the Provision of Arms, Finances and Logistics from Mere Harbouring

The decision in *Nicaragua* made it clear that assistance in the form of arms, finances and logistical support was not adequate to attribute the acts of non-State actors to a State. Randelshofer has asked why the provision of arms, financial and logistical support and

90 Gray, above n2 at 166.
91 Ibid.
92 Byers, above n61 at 410.
93 Ibid.
94 Gray, above n2 at 160.
95 Ibid.

the harbouring of terrorists should be a lesser participation in the acts of the terrorists than the 'sending' of terrorists, as set out in *Nicaragua*.[96] Similarly, the current debate surrounding the level of state responsibility required to attribute the acts of non-State actors to a State has tempted many commentators to lower this threshold to encapsulate the provision of arms, finances, logistics and a safe haven to the terrorists. What is troubling about this extension of the threshold of attributability is that it appears that we have gone from a threshold of attributability whereby the provision of arms, finances and logistics is not adequate to impute the acts of terrorists to the State providing such support, to a level of attributability which seeks to include the provision of a safe haven as sufficient to attribute such acts to the supporting State and in turn justify the use of force in self-defence against this State.

It is the author's view that the level of support should be limited to that stated in the dissenting opinions of Judges Schwebel and Jennings in *Nicaragua*, who suggested that the provision of weapons, financial and logistical support should be adequate to amount to an armed attack. There is no reason why the level of support should stop at the provision of arms, finances and logistics. The rationale for this is found in the contribution of such support to any consequent attack by the supported terrorist group. A State that provides arms, finances and logistical support, such as training camps, to a terrorist organisation, no doubt knows what the weapons and finances will be used for, that is, it knows that it is providing direct support for the commission of terrorist acts against another State. This support naturally needs to be coupled with an actual armed attack of sufficient gravity in order to attribute the actions of the terrorists to the supporting State. Without an armed attack, support alone should not be enough.

While one can argue that the provision of arms, finances and logistics is quite different from the provision of a safe haven, in that such support directly allows the supported terrorist group to commit acts of violence against another State, as opposed to a safe haven, one may also ask why the provision of a safe haven should not be adequate. If a State willingly provides a safe haven to a terrorist group, knowing full well who the group is and what they are capable of doing, should this too not invite responsibility for the actions of the terrorists, as a safe haven may be required for, for example, planning and organising terrorist activities? While this may be so, a distinction does need to be made between support in the form of arms, finances and logistics, and the mere provision of a safe haven. To do otherwise would just be too dangerous if international peace and security is to be maintained. This danger is perfectly illustrated in an exchange that took place between President Bush and his advisors in the aftermath of 9/11. The President had made it clear that his intentions are to punish those States that harbour terrorists, after which the CIA Director replied that this would involve action against at least 60 countries.[97] The President was not fazed by this and replied '[l]et's pick them off one at a time'.[98] While support in the form of arms and finances

96 B Simma, H Mosler & B Randelshofer (eds), *The Charter of the United Nations: A Commentary* (2nd ed, 2002) at 801.

97 Dan Balz & Bob Woodward, 'America's Chaotic Road to War' *Washington Post* (27 January 2002).

98 Ibid.

may be attributed to a few States, such as Syria and Iran in the case of Hezbollah, the provision of a safe haven, as the above shows, is potentially much more widely spread, and it should not be permissible for States to immediately resort to the use of force against those suspected of harbouring terrorists. Cassese has argued that 'the use of force against these [S]tates might expand the political and military crisis and eventually lead to a world conflict, contrary to the supreme goal of the UN'.[99] Such action, Cassese notes, runs contrary to the concept of self-defence.[100]

Considering that the provision of a safe haven is also something that contributes to the development of a terrorist organisation and its activities, but that it is not serious enough to be equated with the provision of arms, finances and logistical support so as to constitute an armed attack, measures other than the use of military force may need to be taken against those States that willingly harbour terrorists. The ICJ in *Nicaragua* suggested that the use of force not amounting to an armed attack might breach the principles of non-intervention and non-use of force[101] but would only invite the resort to 'proportionate countermeasures' by the victim State, and not the right of self-defence.[102] The Court however did not contemplate the scope of available countermeasures. The ICJ in 2004, in the *Oil Platforms Case*, was again presented with an opportunity to clarify the law on self defence but unfortunately failed to do so. Having decided that the use of force against the US did not amount to an armed attack, the ICJ did not discuss the permissible countermeasures available to the US. While this has been viewed by some as a 'missed opportunity' for the ICJ,[103] others have considered the Court's restraint as prudent.[104] Paust has suggested that in the case of 'harbouring States,' we need to consider alternative forms of punishment as opposed to the use of force, such as political, diplomatic, economic and juridical sanctions, including international claims for reparations.[105]

Conclusion

A State may use force in self-defence if it has suffered an armed attack. In the pre-9/11 context, an armed attack constituted an act that was sufficiently grave and in which another State was directly involved. With respect to State involvement the ICJ formulated a strict 'effective control' test under which the provision of arms, finances and logistics was not adequate support to satisfy this test. In 1999, the ICTY affirmed the applicability of this test to terrorist groups.

In 2001 however, after the US suffered massive terrorist attacks, it made it clear that it would punish those States that harboured terrorists, and subsequently launched a

99 Cassese, above n27 at 1000.

100 Ibid.

101 *Nicaragua* (1986) ICJ Rep 14 at 108, 205.

102 *Nicaragua* (1986) ICJ Rep 14 at 109–10, 209.

103 Garwood-Gowers, above n21 at 249.

104 Natalia Ochoa-Ruiz & Esther Salamanca-Aguado, 'Exploring the Limits of International Law Relating to the Use of Force in Self-defence' (2005) 16(5) *European Journal of International Law*.

105 Paust, above n78 at 540.

military campaign against Afghanistan, claiming that the Taliban Government had harboured the terrorists who had committed the terrorist attacks against the US. The international community showed overwhelming support for the US, and the Security Council adopted two Resolutions affirming the right to self-defence. In light of this, many commentators have suggested that there has been a change in the law of self-defence, a change which lowers the attribution threshold to encapsulate the mere harbouring of terrorist as adequate State support in order to invite the use of force against the harbouring State by the victim State. Others have however questioned whether there really has been any real change in the law, suggesting that the response to 9/11 was an exceptional reaction to an exceptional set of circumstances. These commentators have pointed to the ambiguity of both Security Council Resolutions and the lack of subsequent affirmations by the Security Council in light of other terrorist attacks to support the view that neither resolution, adopted in the wake of 9/11, actually permits States to use force in self-defence against those States that merely harbour terrorists.

In addition, overwhelming support by the international community to the US actions in Afghanistan has prompted some to argue that this in itself represents an acceptance by States that the use of force against 'harbouring States' is permissible. Others have however argued that the US actions were supported due to the sufficiently close relationship between Al-Qaeda and the Taliban, a relationship that went beyond mere harbouring. Furthermore, subsequent condemnations by the international community of post-9/11 claims to self-defence against States that allegedly harboured terrorists point to a restraint by the international community to approve the use of force in such circumstances. It is thus doubtful whether the threshold of attributability has been lowered to allow victim States to use force against those States that harbour terrorists.

While the level of attributability adopted in *Nicaragua* may be too restrictive for today's threats, the inclusion of harbouring is going too far too quickly. While recognising that international terrorism poses a different threat than it may have done in 1986, we still need to adopt some limits under which terrorist acts can be attributed to a State. Lowering the attributability to the provision of arms, finances and even logistics may be adequate. The provision of a safe haven, while also a crucial factor for a terrorist organisation, is nowhere as direct as the former types of support and accordingly needs to be addressed with countermeasures other than recourse to force. To do otherwise will give States like Israel and the US, two nations that have advocated a very wide right of self-defence, too much leeway in a world where small scale recourses to military force have a real possibility of quickly turning into devastating conflicts. The prohibition on the use of force in the *UN Charter* is at the helm of the preservation of international peace and security, the paramount goal of the UN. It is for this reason that the exception to this prohibition, the right to resort to force in self defence, needs to be strictly construed. To do any less would undermine the purpose of the United Nations.