HOW THE USE OF FORCE AGAINST NON-STATE ACTORS TRANSFORMED THE LAW OF SELF-DEFENCE AFTER 9/11

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1 Introduction

In spite of the general ban on the use of force by states, there are threats to the integrity of the international system. These threats come mainly from transnational terrorist organisations (NSAs),[1] the proliferation of weapons of mass destruction (WMD)[2] and the growth of failed states. The idea is that these NSAs may acquire and launch these WMD from the territories of failed states, hence the three threats are linked. The problem, however, is how to hold these NSAs directly accountable for their conduct when international law recognises the use of force in self-defence against an NSA only where the conduct of that NSA is attributable to another state.[3] Prior to the 9/11 terrorist attacks, states that employed force against NSAs without imputing their activities to another state, were condemned. It has therefore become necessary to transform the rules regulating the resort to force (*jus ad bellum*) to include these contemporary threats. In consonance with the above thinking, certain steps have been taken to show that self-defence is indeed also available to states that fall victim to armed attacks by NSAs.

First, following the devastating 9/11 attacks orchestrated by Al-Qaeda and its associates, the Security Council (SC) adopted Resolutions 1368 and 1373 in 2001.[4] Varying interpretations of these resolutions have been advanced by legal scholars. While some have argued that these resolutions in no way permit the use of force against NSAs in self-defence, others persuasively contend that the legal purport of these resolutions is to the effect that it is permissible for states, who suffer armed attacks from NSAs, to use force in self-defence against such NSAs.[5] This appears

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1 'A More Secure World: Our Shared Responsibility' Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, UN Doc A/59/565, paras 145–146.

2 Id para 107.

3 *Nicaragua v US* (Merits) 1986 ICJ Reports 14 para 195.

4 S/RES/1368 (12 September 2001) and S/RES/1373 (28 September 2001).

5 D Bethlehem 'Self-Defence Against an Imminent or Actual Armed Attack by Non-state Actors' (2012) 106 *American Journal of International Law* 1 6; M Byers 'Terrorism, the Use of Force and International Law after 11 September' (2002) 51

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to suggest a departure from the position of the law prior to 9/11, which required that the conduct of NSAs could only trigger a response in self-defence if it can be attributed to another state. Secondly, the strict requirement of active involvement by states in the activities of NSAs by way of being in effective control, appears to have been largely disregarded. Instead, contemporary international law has shown that merely hosting an NSA engages the international responsibilities of the host state.[6] This also manifests a shift in the body of international law. Thirdly, post 9/11 state practice has shown that states now employ self-defence against NSAs if they suffer armed attacks without imputing the conduct of such NSAs to other states.[7] For instance, both Turkey and the United States (US) have used force in self-defence against the Kurdish Workers Party (PKK) and Al-Qaeda respectively without imputing the conduct of these NSAs to any state. These actions constituted responses in self-defence, allowed under article 51 of the United Nations (UN) Charter.[8] Fourthly,

International and Comparative Law Quarterly 401 409. Byers stated that: 'Similarly, the Security Council resolutions adopted on 12 and 28 September were carefully worded to affirm, within the context of a broader response to terrorism, the right of self-defence in customary international law'.

6 CJ Tams 'The Use of Force against Terrorists' (2009) 20 *European Journal of International Law* 359 385.

7 M Hakimi 'Defensive Force against Non-state Actors: The State of Play' (2015) 91 *International Law Studies* 2 20–25.

8 'Letter Dated 2001/10/07 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council' (7 October 2001) S/2001/946 available at http://repository.un.org/handle/11176/31401 (accessed 5 December 2016); M Byers 'Crisis, what Crisis? Transatlantic Differences and the Foundations of International Law' in J Anderson, GJ Ikenberry & T Risse (eds) *The End of the West? Crisis and Change in the Atlantic Order* (2008) 91. See, also, Tams (note 6 above) 380, where Tams maintains that in the 1990s, Iran invoked self-defence under art 51 of the Charter to use force against Mujahedin-e Khalq Organisation (MKO) and PKK bases in Iraq. According to him, the US also relied on art 51 of the Charter to justify its bombardment of Afghanistan and Sudan in the wake of the Al-Qaeda orchestrated terrorist attacks on the US embassies in Kenya and Tanzania respectively, although the US did not allege any substantial involvement of the states of Afghanistan or Sudan. Similarly, Israel has consistently maintained that its forcible measures taken against NSAs, such as Hamas in the Occupied Palestinian Territories and Hezbollah in Lebanon, fall under the art 51 right of self-defence. See *The Public Committee against Torture in Israel v The Government of Israel* HCJ 769/02 para 10; see, also, D Gillerman 'Identical Letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and the President of the Security Council' (12 July 2006) UN Doc A/60/937 S/2006/515 available at https://unispal.un.org/DPA/DPR/unispal.nsf/0/E807FC933A355C94852571AA00517B18 (accessed 20 November 2016). During the debates on the Israel/Hezbollah war of 2006 in the Security Council, Israel imputed the conduct of Hezbollah to

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the preponderance of legal scholarship weighs heavily in support of the contention that self-defence is available — and may be invoked — against NSAs by states victim to terrorist attacks, without specific and clear-cut attribution of their conduct to another state.[9] Fifthly, this state of affairs, which brings to the fore a crucial question of whether a broader right to use force in self-defence against NSAs now exists, is exacerbated by the international community's overwhelming support for forcible actions in self-defence against NSAs. International support was undoubtedly evident in the US campaign against NSAs in Afghanistan.[10]

Nevertheless, in the face of sustained calls for transformation of the law of self-defence to allow for the use of force against NSAs without attribution to states, the ICJ jurisprudence has steadfastly maintained the traditional position of the law, which requires attribution of the conduct of NSAs to other states to trigger a response in self-defence.[11] This position of the court has, however, been criticised for being outdated; compelling arguments suggest that the expansion of the self-defence paradigm includes responsibility by the NSAs.[12]

Lebanon — see UN Doc S/PV5489.

9 Byers (note 5 above) 409–410; ES Wilmshurst 'Anticipatory Self-defence against Terrorists' in L van den Herik & N Schrijver (eds) *Counter-terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (2013) 358; H Duffy *The War on Terror and the Framework of International Law* 2 ed (2015) 298.

10 JM Beard 'Military Action against Terrorists under International Law: America's War on Terror: The Case for Self-Defense under International Law' (2002) 25 *Harvard Journal of Law and Public Policy* 559 572; A Arnold 'The US Use of Force in Afghanistan: A Study of its Legality' (2008) *Journal of Politics and International Affairs* 63 64. Over 40 countries, including India, China, Russia, the United Kingdom, Japan, South Korea, Pakistan, Australia, Canada, Germany, Czech Republic, Italy, the Netherlands, New Zealand, Turkey and Liberia, offered the US assistance in one form or another to prosecute Operation Enduring Freedom (OEF); in addition, some of Afghanistan's regional neighbours sought to sever diplomatic relations with the Taliban. Nevertheless, the absence of serious condemnation of unilateral actions by the US, such as the raid of Al-Qaeda bases in Afghanistan, points to the conclusion that the action was not illegal. Neither the SC nor the General Assembly of the UN strongly condemned OEF. See, also, L Henkin 'Kosovo and the Law of "Humanitarian Intervention"' (1999) 93 *American Journal of International Law* 824 827; E Benvenisti 'The US and the Use of Force: Double-edged Hegemony and the Management of Global Emergencies' (2004) 15 *European Journal of International Law* 677 675; 'Inside Afghanistan' *Washington Post* 4 October 2001 A20.

11 *Nicaragua* case (note 3 above) paras 115 and 195; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* 2004 ICJ Reports 136 (*Wall* case) para 139; *Armed Activities on the Territory of the Congo* (*DRC v Uganda*) 2005 ICJ Reports 168 para 146.

12 SA Barbour & ZA Salzman '"The Tangled Web": The Right of Self-defense against

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2 NSAs and the Law of Self-defence

Primarily, international law regulates only the conduct of states, and not of NSAs. To that extent, even concepts such as the 'use of force' and 'self-defence' appertain exclusively to the relations between states. This has created difficulty in determining the accountability of NSAs.[13] It is therefore becoming increasingly necessary to widen the scope of international law to regulate the conduct of NSAs and individuals within its sphere of concern.[14] The use of force by states in the territories of one another is generally prohibited by the UN Charter,[15] though with limited exceptions in terms of articles 42 and 51. While article 42 provides that coercive action by air, sea or land forces may be employed by states upon the authorisation of the SC, article 51 provides that force may be used in individual or collective self-defence by a state victim to armed attacks without any permission from the SC as self-defence is deemed an inherent right of states.[16] Ordinarily, a state may not use self-defence against NSAs, except if such a state can establish that: (a) it is a victim of attacks from an NSA and that these attacks meet the gravity threshold of an armed attack, that is to say, mere frontier attacks may not trigger a response in self-defence; (b) the conduct of the NSA can be attributed to another state;[17] and (c) the force in self-defence complies with the requirements of necessity and proportionality.[18] This remained the position in international law without much challenge prior to the catastrophic 9/11 attacks.

There is, however, a contrary view that justifies the use of force in self-defence against NSAs without strict attribution to other states. This reasoning is borne out by arguments that some NSAs are as powerful as their host states and they are not under any effective control. They can perpetrate attacks that are comparable in gravity and effect to attacks emanating from regular armed forces.[19] This view manifested in the 9/11 attacks that were orchestrated by Al-Qaeda and its associates against

Non-state Actors in the *Armed Activities* Case' (2008) 40 *International Law and Politics* 53 57.

[13] L Zegveld *Accountability of Armed Opposition Groups in International Law* (2002) 134.

[14] Z Daboné 'International Law: Armed Groups in a State-centric System' (2011) 93 *International Review of the Red Cross* 395 396–397.

[15] Art 2(4) of the UN Charter.

[16] Art 51 of the UN Charter.

[17] *Nicaragua* case (note 3 above) para 195.

[18] A Garwood-Gowers 'Self-defence against Terrorism in the Post–9/11 World' (2004) 4 *Queensland University of Technology, Law and Justice Journal* 167 173.

[19] R Värk 'State Responsibility for Private Armed Groups in the Context of Terrorism' (2006) 11 *Juridica International* 184.

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the US. The NSAs remain a serious threat to international peace and security, particularly in an era where some of them have procured WMD and are also in control of failed states or ungoverned territories from which to launch cross-border attacks. Hence, there are calls to transform the law of self-defence to reconcile it with the rising threats from NSAs, the proliferation of WMD and the growth of failed states. Interestingly, there is also evidence that tacit support for the use of force against NSAs can be gleaned from SC Resolutions 1368 and 1373[20] as well as the multilateral support for states that are using force in self-defence against NSAs.

3 Imperatives for the transformation of the law of self-defence

The proliferation of WMD, the growth in transnational terrorism as well as state failure have been identified as key threats to international peace and security[21] that have necessitated a change to the 1945 *jus ad bellum* rules. These threats are all linked to NSAs, because it is feared that they may acquire and use these WMD, just as they may also use failed states as launching pads for cross-border attacks.

3.1 Grave Threats from Transnational Terrorist Organisations

In the context of this article, transnational terrorist organisations are NSAs that have an organised command structure, are operating outside the control of a state and are using force to achieve political and ideological ends.[22] The incidents of transnational terrorism have increased in recent times owing to religious extremism, pressures of modernisation, political differences and the alienation of young persons living in developed societies.[23] The growing number of terrorist cells and networks, such as Al-Qaeda, Islamic State of Iraq and the Levant (ISIL), Al-Qaeda in the Arabian Peninsula (AQAP), Al-Nusrah Front (ANF), al-Shaabab, Boko Haram and others, pose serious challenges to the international security system. Devastating transborder terrorist activities have been conducted by these groups in several countries. Among the most prominent of these activities were the 9/11 attacks on the US in 2001 and the US embassy attacks in Kenya and Tanzania in 1998. There

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[20] Bethlehem (note 5 above) 5.

[21] C Gray *International Law and the Use of Force* (2008) 3 ed 214–215; 'European Security Strategy — A Secure Europe in a Better World' (2003) available at http://www.consilium.europa.eu/uedocs/cmsupload/78367.pdf (accessed 1 October 2015).

[22] N Lubell *Extraterritorial Use of Force against Non-state Actors* (2010) 14–15.

[23] 'European Security Strategy' (note 21 above) 3.

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are also the Madrid train attacks of 11 March 2004,[24] the detonation of bombs targeting the London underground train stations and buses on 7 July 2005[25] and the attack on the UN building in Abuja in August 2011.[26] Although it was apparent that NSAs possessed the capacity to carry out cross-border attacks against states, the 9/11 attacks raised such awareness to an unanticipated level.[27] Apart from the apprehension that WMD may be acquired by the NSAs, necessitating the establishment of the Nuclear Terrorism Convention,[28] there is also the fear that they may produce biological weapons with bacteria, viruses and toxins capable of disseminating infectious diseases that previously existed naturally or have never existed at all.[29] Terrorism is described as an affront to the values that lie at the heart of the UN Charter, because it violates human rights, the rule of law, the protection of civilians and the peaceful modalities of conflict resolution.[30] The urgency of tackling the new threats posed by terrorism is underscored by the attacks on UN facilities domiciled in member states by these NSAs and their continuing threat to the UN.[31]

The threat to international peace and security by terrorism appears to be more of a concern now than it was at the time before the 9/11 attacks. The little relief that states witnessed as a result of weakening the central command of Al-Qaeda in Afghanistan seems to have evaporated. ISIL, a splinter group of the original Al-Qaeda which metamorphosed from the Iraqi branch of the organisation, poses a greater threat than Al-Qaeda because of its desire to replace certain regimes in the Middle East with an Islamic caliphate to be administered according to the Sharia Code.[32] It has taken control of financial and natural resources and refineries and has been responsible for the massacre of Iraqi and Syrian soldiers and

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24 C Vitzthum, K Johnson & M Champion 'Train Bombings Kill at Least 198 in Spain' *The Wall Street Journal* 12 March 2004.

25 'Report of the Official Account of the Bombings in London on 7th July 2005' available at https:/www.gov.uk/government/uploads/system/uploads/attachment_data/file/228837/1087.pdf (accessed 23 October 2015) 2.

26 S Murray & A Nossiter 'Suicide Bomber Attacks UN Building in Nigeria' *New York Times* 26 August 2011.

27 SD Murphy '*Protean Jus ad Bellum*' (2009) 27 *Berkeley Journal of International Law* 22 34.

28 The 2005 International Convention for the Suppression of Acts of Nuclear Terrorism.

29 Murphy (note 27 above) 36.

30 'A More Secure World' (note 1 above) para 145.

31 Id para 146.

32 M Doran 'The Pragmatic Fanaticism of Al Qaeda: An Anatomy of Extremism in Middle East Politics' (2002) 117 *Political Science Quarterly* 177; Benvenisti (note 10 above) 679–680.

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civilians along ethnic and religious lines, the destruction and smuggling of antiquities, the capturing of cities and the surge by volunteer Islamic fighters to join ISIL forces in Iraq and Syria.[33] The SC has, by virtue of Resolution 2170, condemned the activities of ISIL and the ANF in Iraq and Syria and, through Annex 1 of the resolution, imposed sanctions on some members of these groups.[34] To stop the serious threats from these NSAs, there is a need to transform the law of self-defence.

3.2 The Proliferation of Weapons of Mass Destruction

The proliferation of WMD has been described as potentially the greatest threat to international security, and the need to stop their spread remains a priority in the collective security agenda.[35] As a result, states are genuinely apprehensive that, in the event of the acquisition of these weapons by terrorists, coupled with the spread of missile technology, the possibility of large-scale violence exists that may pose a challenge to the international security infrastructure.[36] This explains why the SC called on all states to refrain from supporting NSAs in the development, acquisition, manufacture and transportation of WMD.[37] In addition, there is a corresponding need to transform the character of the international norms and institutions to provide a standard of behaviour regarding the relations of states,[38] ultimately aimed at denying the NSAs access to these weapons.

In this regard, even before the 9/11 attacks, proactive unilateral and coalition-based counter-proliferation efforts had been made to deny certain states and NSAs from obtaining WMD or related materials and technologies.[39] At unilateral level, the US and a few allies erroneously brought pre-emptive forcible measures to bear on Iraq in 2003 with regard to non-existent WMD.[40] This incident, however, contributed to the suspension of Libya and Iran's nuclear programmes in 2003.[41]

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33 C Cirlig 'The International Coalition to Counter ISIL/Da'esh (the "Islamic State")' 2015 *European Parliamentary Research Service* (*EPRS*) 1 2.
34 S/RES/2170 (15 August 2014).
35 'A More Secure World' (note 1 above) para 107.
36 'European Security Strategy' (note 21 above) 3–4.
37 S/RES/1540 (28 April 2004).
38 D Joyner '*Jus ad Bellum* in the Age of WMD Proliferation' (2008) 40 *George Washington International Law Review* 233.
39 Id 237.
40 Gray (note 21 above) 210; C Gray 'The Bush Doctrine Revisited: The 2006 National Security Strategy of the USA' (2006) 5 *Chinese Journal of International Law* 555 561.
41 J Joffe & JW Davis 'Less than Zero: Bursting the New Disarmament Bubble' (2011) 90 *Foreign Affairs* 7 9.

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Similarly, in its determination to control the development and shipment of WMD, Israel had employed military force against Iraq in 1981, against Sudan in 2009 and against Syria in 2007 and 2013 respectively.[42] Notwithstanding the fact that some of the methods adopted by the US and Israel to curb the proliferation — including the prohibition against the transfer of sensitive items and the pre-emptive use of force against actual and potential possessors of WMD — were successful, they remain controversial.[43]

On the other hand, coalition-based counter-terrorism efforts witnessed the establishment of the Treaty on the Non-proliferation of Nuclear Weapons with a membership of about 190 states. This treaty entered into force on 5 March 1970 and it remains the foremost multilateral instrument with the objective of preventing the spread of nuclear weapons and weapons technology.[44] The challenge to the treaty is that states, while being parties to it, covertly acquire materials and expertise to develop WMD, and, when they are ready for weaponisation, withdraw from the treaty to avoid legal constraints.[45] As a result, a 2005 report indicated that there are stockpiles of about 1 300 kilograms of highly enriched uranium (HEU) in 27 countries and that there have been 200 incidents of illicit trafficking in nuclear materials.[46] The possibility therefore exists that even NSAs could acquire nuclear weapons. Furthermore, the US entered into bilateral agreements with other states to accord one another the right to board, search, or detain and seize missiles of WMD cargo.[47] Accordingly, some states formed the

[42] ME O'Connell & R El Molla 'The Prohibition on the Use of Force for Arms Control: The Case of Iran's Nuclear Program' (2013) 2 *Penn State Journal of Law & International Affairs* 315 321.

[43] JD Ellis 'The Best Defense: Counterproliferation and US National Security' (2003) 26 *Washington Quarterly* 115 115–117; RS Litwak 'The New Calculus of Pre-emption' (2002) 44 *Survival* 53 54; DH Joyner 'The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law' (2005) 30 *Yale Journal of International Law* 507 520.

[44] Arts 1 and 2 of the 1968 Treaty on the Non-proliferation of Nuclear Weapons.

[45] 'A More Secure World' (note 1 above) paras 108–109.

[46] Id para 112.

[47] Art 3 of the 2004 Agreement between the Government of the United States of America and the Government of the Republic of Liberia Concerning the Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea; the 2004 Amendment to the Supplementary Arrangement between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement between the Government of the United States and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice; see, also, the 2002 National Strategy to Combat Weapons of Mass

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Proliferation Security Initiative (PSI) with the intention of collaborating to intercept or stop the movement or shipment of WMD, related items or technologies from one point or country to another.[48] In addition, the Global Zero organisation has since called for the phased verified elimination of all nuclear weapons worldwide with a view to terminating nuclear threats through proliferation and nuclear terrorism.[49] The Global Zero organisation has argued that, although force may be relevant in the fight against the proliferation of WMD, it is not an effective way of stopping the spread of nuclear weapons, because 'the US nuclear bombing of Japan in 1945, accelerated, rather than discouraged, the Soviet Union's lagging nuclear weapons program'.[50] Nevertheless, this author holds the view that just as the attack on Iraq in 2003, though erroneous, deterred both Libya and Iran from accelerating their own nuclear programmes, the use of force, if authorised by the SC, remains one of the best options in the fight against weapons proliferation. More so, the SC has repeatedly advocated non-proliferation and has affirmed that such proliferation constitutes a threat to international peace and security.[51]

The collaboration of states appears to have positive results. For instance, in December 2002 a North Korean freighter, the MV *So San,* which was crossing the Arabian Sea, was intercepted by Spanish officials.[52] In addition, a successful seizure of a German freighter — the MV *BBC China*, destined for Libya while transporting parts of gas centrifuges for uranium enrichment — took place at an Italian port; this incident may also have persuaded Libya to abandon its WMD programme.[53] While there are some feasible successes in the collaboration of states to interdict the movement of weapons, certain nuclear-power aspiring states, such

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Destruction available at http;//www.state.gov/documents/organisation/16092.pdf (accessed 10 October 2015); the 2006 National Security Strategy of the United States.

48 M Byers 'Policing the High Seas: The Proliferation Security Initiative' (2004) 98 *American Journal of International Law* 526; Joyner (note 38 above) 238–239.

49 Joffe & Davis (note 41 above) 7.

50 B Blair et al 'Can Disarmament Work? Debating the Benefits of Nuclear Weapons' (2011) 90 *Foreign Affairs* 173 174.

51 S/RES/687 (8 April 1991); S/RES/1172 (6 June 1998) paras 7 and 8; S/RES/1373 (28 September 2001); and S/RES/1540 (28 April 2004).

52 Byers (note 48 above) 526. The North Korean freighter, the *MV So San* was intercepted on the request of the US and searched. It was carrying fifteen Scud missiles hidden under the bags of cement listed in the manifest, and were destined for Yemen. Yemen confirmed that the Scud missiles were being delivered to it.

53 Byers (note 48 above) 529; see, also, R Wright 'Ship Incident May Have Swayed Libya' *Washington Post* 1 January 2004 A18; WJ Broad & DE Sanger 'After Ending Arms Program, Libya Receives a Surprise' *New York Times* 29 May 2004 A6.

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as India, Pakistan and North Korea, have shown reluctance to cooperate with the PSI.[54] In fact, North Korea described the activities of the PSI as 'a brigandish naval blockade'.[55] This uncooperative attitude is a result of the feeling that the manufacturing and exporting of weapons attach to the sovereign rights of a state.[56] Accordingly, the desire for greater latitude by certain states to interdict, board and search foreign shipping in order to curb trafficking in weapons must, therefore, be done cautiously and must comply with the law on the right of navigation. This caution is important, because the resolve by some states to prevent at all costs the illegal boarding of their vessels in order to protect their sovereignty on the high seas, has resulted in armed conflicts.[57] This caution becomes even more compelling when regard is given to the calls by both the US and other commentators that article 51 of the UN Charter can be invoked to intercept foreign-flagged ships suspected of conveying WMD to terrorist NSAs.[58]

Unfortunately, these prevention strategies have not succeeded in curbing the proliferation of WMD, hence the calls for the transformation of the law on self-defence to permit more elaborate measures.

3.3 Failed states

Failed states are entities whose governments have been so weakened that they cannot provide security or social and economic services and consequently also lack territorial integrity.[59] State failure, which is brought about by bad governance, abuse of power, corruption, weak institutions and a lack of accountability, may lead to an increase in terrorism. This is because failed states provide the enabling environment, such as safe havens, sanctuary or ungoverned territories, for terrorist groups to use as bases from which to launch cross-border attacks.[60] Furthermore, owing to the ineffective control of territorial borders by the failed states, NSAs may exploit the porous borders to traffic nuclear material and

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54 MR Shulman 'The Proliferation Security Initiative and the Evolution of the Law on the Use of Force' (2006) 28 *Houston Journal of International Law* 774 804.

55 Ibid.

56 SE Logan 'The Proliferation Security Initiative: Navigating the Legal Challenges' (2004–2005) 14 *Journal of Transnational Law and Policy* 253 268.

57 Arts 92 and 110 of the 1982 UN Convention on the Law of the Sea (UNCLOS); Shulman (note 54 above) 803–804; see, also, MA Fitzgerald 'Seizing Weapons of Mass Destruction from Foreign-flagged Ships on the High Seas under Article 51 of the UN Charter' (2009) 49 *Virginia Journal of International Law* 473 474–475.

58 Byers (note 48 above) 526 and 545; see, also, Fitzgerald (note 57 above) 476–477 and 481.

59 J Yoo 'Fixing Failed States' (2011) 99 *California Law Review* 95 100.

60 'European Security Strategy' (note 21 above) 4.

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technology.[61] The state-failure phenomenon has nothing to do with the unwillingness of the failed state to prevent attacks from its territory. Instead the phenomena contributes indirectly, in that such a state is incapable of preventing NSAs from using its territory.[62]

Even though no functional government may exist in a failed state, to which the conduct of terrorists may be imputed in consonance with the law of attribution to warrant a response in self-defence, it is argued that self-defence ought to be used against NSAs. This is because such failed states may provide safe havens for terrorist groups if their victim states are barred from exercising any right of self-defence. For instance, Ethiopia relied on a similar argument to strike at the Union of Islamic Court's (UIC) bases in Somalia (a failed state), just as Israel also invoked the incapacity of Lebanon to prevent terrorist attacks from the ungoverned parts of its territory. As justification to attack failed (neighbouring) states, Turkey, Rwanda, Iran and several other countries have invoked the inability of their respective neighbouring countries to prevent terrorist attacks from their territories.[63] However, Ruys and Verhoeven have argued that attacks against failed states cannot serve as legal precedents, because most of the aforementioned invasions were condemned by the SC[64] and failed states remain sovereign states protected by the Charter's prohibition on the use of force. The incapacity to effectively govern parts of a state's territory does not equate to loss of sovereignty.[65]

Arguably, it appears difficult to support the contention that no action should be taken against a failed state on the basis that there is no functional government upon whose shoulders attribution of the conduct of the NSAs may be placed. If such reasoning is accepted, terrorist activities within such a failed state may be limitless, because armed groups will rely on the sovereignty of the failed state as protection to flourish. Instead, the better view will be to require prior authorisation of the SC before attacks on such failed states are undertaken. This will prevent unwarranted raids in purported self-defence by powerful states, whose motives could include the desire to control the natural resources in such territories.

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61 'A More Secure World' (note 1 above) paras 20–21.

62 T Ruys & S Verhoeven 'Attacks by Private Actors and the Right of Self-defence' (2005) 10 *Journal of Conflict and Security Law* 289 317.

63 Ibid.

64 S/RES/474 (17 June 1980); S/RES/483 (17 December 1980).

65 Ruys & Verhoeven (note 62 above) 318.

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4 Proposals to Reform the United Nations to Cope with the New Threats to International Peace and Security

The abovementioned threats to international peace and security, namely the rise in transnational terrorism, the proliferation of WMD and the increased number of failed states, have led to calls for the reformation of the UN, the body charged with the responsibility of maintaining such international peace and security. The proponents of reform have suggested a reformation of both the institutional framework (touching on the political organs of the UN) and the normative framework (touching on the UN constitutive instrument). Commentators have argued, first, that the current UN security system has loopholes in the traditional rules regulating the use of force[66] and, secondly, that the traditional military components for the deterrence of these threats are inadequate.[67] Indeed, the need to contain the threats to international security has made a change to the law of self-defence imperative; as a result, certain states have taken forcible self-defence measures against NSAs directly and with little regard for attribution. This article now turns to an evaluation of the specific factors responsible for such transformation.

5 Factors to Consider in the Determination of a Change in the Law of Self-Defence

5.1 Security Council Resolutions 1368 and 1373 of 2001

Resolutions 1368 and 1373,[68] which were adopted in the aftermath of the 9/11 attacks, appear to intensify the ongoing debate on whether the law of self-defence has been transformed or not. Adopting these resolutions arguably signaled the first time that the SC departed from the view that self-defence is possible only against states; it can now also include NSAs. The resolutions have been interpreted as authorising the US to employ self-defence against the terrorists that had attacked its territory, without attributing the activities of these NSAs to another state.[69] Commentators who argue in support of the transformation of the law of self-defence are, thus, of the view that these SC resolutions bear the legal purport of transforming the law of self-defence, as the terrorist

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[66] M Wood 'The Law on the Use of Force: Current Challenges' (2007) 11 *Singapore Yearbook of International Law* 1 4.

[67] JC Preece 'The Elephant in the Room: Anticipatory Force and the North Atlantic Treaty Organization' available at http://www.community.org/app/webroot/files/articlepdf/Preece.pdf (accessed 26 October 2014) 1.

[68] See note 4 above.

[69] JM Beard 'America's New War on Terror: The Case for Self-defense under International Law' (2001) 25 *Harvard Journal of Law and Public Policy* 559 568.

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attacks, being armed attacks, are implicit in the resolutions.[70] This view is shared by other legal scholars.[71]

This author views the resolutions as merely confirming and re-emphasising that the general right to self-defence is available to all states by virtue of article 51 of the Charter in the event that the relevant criteria are met.[72] Tladi appears to hold a similar opinion.[73] When Resolution 1368 was passed, only one day after the 9/11 attacks, the SC was not clear on which entity had been responsible for the attacks, and whether it was an act of a state or that of an NSA. The SC mentioned no names, but merely called on states in general to work together to bring justice to the perpetrators, organisers and sponsors of the terrorist attacks and to those who had ordered, supported or harboured the perpetrators.[74] The fact that President Bush could also not identify any entity responsible for the attacks when he addressed the people of the US on the evening of 11 September 2001 corroborates this view.[75]

It is further contended by certain commentators that express authorisation cannot be inferred from the resolutions, because of lack of clarity of the wording of these resolutions, as they are ambiguously drafted.[76] While both resolutions recognised the right of collective and individual self-defence, they identified the terrorist acts not as armed attacks, although these amounted to a threat to international peace and security.[77] In spite of the undoubtedly sufficient gravity of the attacks in terms of their scale and effect, the SC was silent as to the possibility of the invocation of self-defence.[78] If they had qualified it as armed attacks, it would have warranted a response in self-defence contemplated

70 Ibid.

71 D Tladi 'The Use of Force in Self-defence Against Non-state Actors in International Law: Recalling the Foundational Principles of International Law' (2012) 2 *Zanzibar Yearbook of Law* 71 85 and the literature cited there.

72 M Byers 'International Law and the Angry Superpower' (2003) 3 *Anuario Mexicano de Derecho Internacional* available at http://biblio.juridicas.unam.mx/revista/DerechoInternational/numero /3/art/art3.htm (accessed 30 October 2015).

73 Tladi (note 71 above) 85.

74 S/RES/1368 (12 September 2001) para 3.

75 George W Bush '9/11 Address to the Nation' (11 September 2011) *American Rhetoric.com* available at http://www.americanrhetoric.com/speeches/PDFFiles/George%20W.%20Bush%20-%20911%20Address%20to%20the%20Nation.pdf (accessed 7 October 2015).

76 Ruys & Verhoeven (note 62 above) 311–312.

77 S/Res/1368 (12 September 2001) para 2 of the preamble and para 1 of the operative part of the resolution; see, also, Ruys & Verhoeven (note 62 above) 312; A Goppel *Killing Terrorists: A Moral and Legal Analysis* (2013) 95–96; ME O'Connell 'Lawful Self-defense to Terrorism' (2002) 63 *University of Pittsburgh Law Review* 889 892.

78 Ruys & Verhoeven (note 62 above) 312.

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under the Charter.[79] Although reference to the right of self-defence is contained only in the preamble to, and not in the operative part of the resolutions, arguments pertaining to the weight of such reference is of little significance.[80] Even if it is conceded that Resolutions 1368 and 1373 did not expressly authorise the use of force, it may, nevertheless, be argued that the resolutions created the understanding that the right to use force against NSAs exists, thereby changing the position of the law. As such, the strict requirement of attribution of the conduct of NSAs sponsored by states is no longer necessary.

It is to be noted however, that before the ongoing debate, the jurisprudence of the ICJ,[81] ICTY,[82] the ILC Draft Articles on State Responsibility[83] and the UN's definition of aggression had set the standard for attribution of the conduct of NSAs to states.[84] The standard for attributing or imputing the activities of an NSA to a state is conditional upon the following requirements being met: (a) the NSA is sent by or on behalf of a state; or (b) the NSA is acting on the instructions of a state, or is under its effective control; and (c) the state acknowledges and adopts the conduct of the NSA as its own.[85] Under the traditional view, passive support given to terrorists does not give rise to forcible measures in the territory of another state, but permits only proportional non-forcible countermeasures;[86] this view maintains, to a limited extent, the determination of lawful self-defence.[87]

Nevertheless, it is the view of this author that the threshold for attribution, which previously entailed a state's active support by way of the effective control or adoption of the conduct of an NSA, has been lowered. This view is based on post 9/11 state practice made popular by the so-called Bush Doctrine. Undoubtedly, the events of 9/11 had a huge impact on the law of self-defence, because it caused states and commentators to seek an expanded interpretation of the concept. The 'Bush Doctrine' is a phrase used to describe various related foreign-policy principles of

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79 Art 51 of the UN Charter.

80 Ruys & Verhoeven (note 62 above) 311–312; Gray (note 21 above) 199.

81 *Nicaragua* case (note 3 above) para 115; *Wall* case (note 11 above) para 139; *DRC v Uganda* (note 11 above) paras 143, 146 and 147.

82 *Prosecutor v Dusko Tadić* Appeals Chamber (2 October 1995) IT-94-IAR72 (Decision on the defence motion for interlocutory appeal on jurisdiction) paras 131–132 and 137.

83 Art 8 of the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts.

84 A/RES/3314 (XXIX) (14 December 1974) Annex 3(g).

85 C Henderson *The Persistent Advocate and the Use of Force: The Impact of the United States upon the* Jus ad Bellum *in the Post-cold War Era* (2013) 141.

86 Id 150.

87 A/RES/3314 (XXIX) (14 December 1974) Annex 3(g).

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President Bush. These principles are contained in his addresses to the people of the US and in the joint session of the US Congress after the 9/11 attacks, as well as in the National Security strategies of the US of 2002 and 2006. The doctrine is a policy framework that attributes the activities of NSAs to certain states for merely harbouring terrorists — there is accordingly no distinction between terrorists and their host states.[88] Arguably, it was in furtherance of the Bush Doctrine that the US and its allies prosecuted the war against one such terrorist host state, Afghanistan, from 2001 to 2014.

Although the Bush Doctrine became in vogue post 9/11, its application predates 2001. For instance, prior to the 9/11 attacks, the US attacked Afghanistan and Sudan for failing to shut down terrorist facilities and for allegedly acquiescing in Bin Laden's terrorist conduct[89] despite not claiming that either Afghanistan or Sudan was in effective control of Al-Qaeda, that they had given active support to or that they had adopted Al-Qaeda's activities in respect of the US embassy bombings in Kenya and Tanzania.[90] The purport of the doctrine is that states that harbour terrorists will not be spared when the US responds in self-defence, because such states are equally blameworthy and can, therefore, not be distinguished from the terrorists.[91]

Accordingly, in its response to the 9/11 attacks, the US did not claim that the Taliban or the government of Afghanistan had sent Al-Qaeda, had directly controlled them, had acknowledged or adopted their conduct or actively participated in any other form. Instead, it merely contended that the attacks were made possible by the decision of the Taliban regime to allow the parts of Afghanistan under its control to be used by a terrorist organisation (Al-Qaeda) as its base of operation.[92] The subsequent

88 B Langille 'It's "Instant Custom": How the Bush Doctrine became Law after the Terrorist Attacks of September 11, 2001' (2003) 26 *Boston College International and Comparative Law Review* 145.

89 KN Trapp 'Back to Basics: Necessity, Proportionality, and the Right of Self-defence against Non-state Terrorist Actors' (2007) 56 *International and Comparative Law Quarterly* 141.

90 'Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council' (20 August 1998) UN Doc S/1998/780.

91 Langille (note 88 above) 145; E Bumiller 'A Nation Challenged: The President; Bush Chides Some Members of Coalition for Inaction in War against Terrorism' *New York Times* 10 November 2001 B4; Bush '9/11 Address to the Nation' (note 75 above); George W Bush 'Address to a Joint Session of Congress on the 9/11 attacks' available at http://www.americanrhetoric.com/speeches/PDFFiles/George% 20W.%20Bush%20%20Joint%20Session%20Address%20on%20 Terrorist%20Attacks.pdf 4 (accessed 22 September 2015).

92 'Letter 7 October 2001' (note 8 above).

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US attack on the Taliban (which had played no active role in the 9/11 attacks as required by the traditional criteria for attribution) therefore illustrates the resolve of the US to reinterpret the law on attribution and, by extension, the law of self-defence. Even if the attacks on the Taliban were inconsistent with the settled law on self-defence, they were, nevertheless, consistent with the US's reinterpretation of attribution.[93] This is a manifest departure from the traditional requirement of active support to NSAs as a ground for self-defence against host states.[94] Interestingly, the disciples of the Bush Doctrine argue that the doctrine has crystallised into a new customary law.[95]

It is contended that a sovereign host state has the corresponding obligation to protect the rights of other states to integrity, inviolability and peace.[96] This duty, relating to the concept of sovereignty, is the basis of state responsibility under contemporary international law, although these responsibilities appear to be reduced as states may disregard them.[97] Ikenberry has taken one step further by arguing that 'countries that harbour terrorists, either by consent or because they are unable to enforce their laws within their territory, effectively forfeit their rights of sovereignty' to be left in peace inside their own territory. This may permit other states, including the US, to intervene, even if pre-emptively.[98]

However, it has been argued to the contrary that it would be unlawful to attack an innocent state on the basis of self-defence if such state had not given any financial or logistical support to NSAs and had neither knowledge of the hostile acts nor endorsed such acts. This is particularly true if such innocent state had met the due-diligence obligation to prevent international harm to other states.[99]

This article's view is not that attribution has been discarded completely, but that the threshold requirement of attribution has been lowered. In

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93 S 2 of the Authorization for Use of Military Force; 2002 National Security Strategy; President Bush 'Address to the Nation on Terrorist Attacks' 11 September 2001; SR Ratner '*Jus ad Bellum* and *Jus in Bello* after September 11' (2002) 96 *American Journal of International Law* 905 906.

94 Henderson (note 85 above) 153–154.

95 See, for example, Langille (note 88 above) 145–146.

96 Benvenisti (note 10 above) 692; NJ Wheeler 'The Bush Doctrine: The Dangers of American Exceptionalism in a Revolutionary Age' (2003) 27 *Asian Perspective* 183; WM Reisman 'International Legal Responses to Terrorism' (1999) 22 *Houston Journal of International Law* 3 51.

97 Benvenisti (note 10 above) 692.

98 GJ Ikenberry 'America's Imperial Ambition' 2002 *Foreign Affairs* 52.

99 AB Lorca 'Rules for the "Global War on Terror": Implying Consent and Presuming Conditions for Intervention' (2012) 45 *International Law and Politics* 1 34. See, also, JJ Paust 'Use of Armed Force against Terrorists in Afghanistan, Iraq, and Beyond' (2002) 35 *Cornell International Law Journal* 533 540.

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other words, the international community now tolerates attacks in self-defence against a state that merely harbours terrorist NSAs. As Duffy points out, 'while there is still controversy, and room for alternative interpretations of practice, the weight of commentary supports the view that clear cut attribution is no longer a pre-requisite to trigger resort to self-defence'.[100] This article considers this latter view to be the preferable one because it has been given credence by some UN resolutions, state practice post 9/11, the African Union and various commentators. Indeed, the African Union, in its 2005 African Union Non-aggression and Common Defence Pact, provided that an act of aggression includes the harbouring of terrorists.[101] In other words, there need not be any causal nexus between the terrorist wrongdoer and a host state, because that state can be held accountable also for omissions, whether these be deliberate or innocent.[102] Thus, it appears sufficient to attribute the conduct of NSAs to a state if that state merely harbours or tolerates such NSAs, thereby giving rise to a lawful action in self-defence.[103] Also, the SC has requested states to refrain from both active and passive support to NSAs. Innocently or merely providing a safe haven for terrorists therefore engages the international responsibility of such host states who may be held accountable.[104] The resolve of the SC to hold states accountable for merely harbouring terrorist NSAs resonated in both Resolutions 1368 and 1373.

5.2 State Practice

State practice is an important factor in the determination of changes in treaties or norms, because the meaning of a particular treaty at the time of its establishment could subsequently change through the practice of states. Consistent practice may allow for the interpretation and reinterpretation with a view to altering the meaning.[105]

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[100] Duffy (note 9 above) 298.

[101] Art 1(c)(xi) of the 2005 African Union Non-aggression and Common Defence Pact defines aggression to include 'the encouragement, support, harbouring or provision of any assistance for the commission of terrorist acts and other violent trans-national organized crimes against a Member State'.

[102] V Proulx 'Babysitting Terrorists: Should States be Strictly Held Liable for Failing to Prevent Transborder Attacks' (2005) 23 *Berkeley Journal of International Law* 616 624.

[103] Garwood-Gowers (note 18 above) 2.

[104] S/RES/1368 (12 September 2001) para 3; S/RES/1373 (28 September 2001) para 2(a); S/RES/2129 (17 December 2013) para 13; S/RES/2133 (27 January 2014); and S/RES/2170 (15 August 2014) para 11.

[105] Art 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties provides: 'There shall be taken into account, together with the context: Any subsequent

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5.2.1 *The Law of Self-defence and State Practice Prior to the Terrorist Attacks of 9/11*

In justifying the military response to terrorist attacks by NSAs, state practice has shown the need to always establish a link between the attackers and another state. This was done by invoking either a state's active or passive support or its incapacity to prevent attacks from within its territory.[106] For example, the US invoked the passive support provided by the Taliban to Al-Qaeda in relation to OEF.[107] Before the 9/11 attacks, not many states relied on article 51 of the Charter to justify responses to armed attacks by terrorist NSAs,[108] because states that claimed to have suffered armed attacks had the responsibility to demonstrate that another state was responsible.[109] A state to which the conduct of terrorist NSAs might be attributed should have been an active participant in such conduct or might have been in effective control of the NSA.[110] Thus, states that engaged in self-defence against NSAs without establishing an active nexus between the NSA and a state were condemned.[111] In addition, attempts by some states were sharply condemned if they profferd a robust interpretation of existing norms regulating the use of force and the exceptions thereto with a view to permitting their use of force directly against NSAs without imputing such conduct to another state. In this regard, the US, Israel and apartheid South Africa were in certain instances condemned for the use of unilateral force against NSAs without attribution to other states, although the US had also relied on its veto in the SC to block such condemnations.[112]

For example, the SC condemned Israel's raid on the Palestinian Liberation Organisation's (PLO) headquarters in Tunis in 1985, although Israel justified the action as self-defence and in response to Tunisia's toleration of the PLO on its territory from where terrorist attacks had

practice in the application of the treaty which establishes the agreement of the parties regarding the interpretation'; Murphy (note 27 above) 24.

106 Ruys & Verhoeven (note 62 above) 312.

107 Tladi (note 71 above) 84.

108 S Cenic '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?' (2007) 14 *Australian International Law Journal* 201 201–202; WV O'Brien 'Reprisals, Deterrence and Self-defense in Counterterror Operations' (1989–1990) 30 *Virginia Journal of International Law* 421.

109 G Travalio & J Altenburg 'Terrorism, State Responsibility, and the Use of Military Force' (2003) 4 *Chicago Journal of International Law* 97 102.

110 *Nicaragua* case (note 3 above) para 115.

111 Cenic (note 108 above) 202; Gray (note 21 above) 199.

112 Garwood-Gowers (note 18 above) 8.

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been carried out against Israel. Israel's conception of self-defence was described as being at variance with international law and, at best, amounted to an act of armed aggression and a violation of the Charter.[113] Israel had offered two major arguments since the 1970s for its attacks on other states for reasons of terrorism without establishing an active nexus between such state and an NSA. First, it argued that merely consenting to the presence of terrorists in a state's territory was enough reason to construe the state as an accomplice to attacks from the NSA. Secondly, the inability of a state to prevent attacks from its territory also effectively held the host state to be an accomplice.[114] In 1968, Israel relied on these interpretations to raid bases in Lebanon[115] on the ground that it had allowed terrorists to build bases in its territory, thus encouraging warfare by terror against Israel; however, the Israeli action was unanimously condemned by the SC.[116] Nevertheless, though Israel had given similar reasons when attacking Entebbe airport in Uganda for the rescue of its nationals in 1976,[117] it had the tacit approval from most states.[118]

In 1998 the US bombed a Sudanese pharmaceutical complex and terrorist training bases in Afghanistan following the terrorist attacks on US embassies in Kenya and Tanzania. While the US pleaded self-defence and relied on the need to pre-emptively deter future attacks, the international community was collectively mute.[119] Although there was no formal condemnation from the SC or the General Assembly (GA), the Arab States, the Non-aligned Movement (NAM), Russia and Pakistan condemned the US.[120]

Similarly, South Africa's hot pursuit of terrorist NSAs into the territories of neighbouring states was condemned. South Africa was condemned by the SC for its acts of aggression against Angola and Botswana, because those acts were said to amount to a violation of the territorial integrity and sovereignty of those states.[121]

According to Tams, twenty years ago the majority of states considered the views of the US, Israel and South Africa on the unilateral use of force against NSAs as a way of inviting abuse and they were accordingly

113 S/RES/573 (4 October 1985); S/RES/508 (5 June 1982); S/RES/509 (6 June 1982); see, also, Gray (note 21 above) 196.
114 Ruys & Verhoeven (note 62 above) 292–293.
115 Gray (note 21 above) 195.
116 S/RES/262 (31 December 1968); Gray (note 21 above) 195.
117 Ruys & Verhoeven (note 62 above) 292–293.
118 Byers (note 72 above).
119 Gray (note 21 above) 198.
120 Garwood-Gowers (note 18 above) 9.
121 S/RES/546 (4 January 1984) paras 1–2; S/RES/568 (21 June 1985) paras 1–2.

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rejected.[122] Therefore, the settled position prior to 9/11 was that grave breaches of peace or invasion by armed NSAs may trigger an article 51 right only if they were in furtherance of the orders of a state.[123]

The view expressed above has support in case law. The *Nicaragua* case identified two scenarios in which the right to invoke article 51 may arise. For such activities to trigger a right of self-defence, an attack must, first, be sufficiently grave, and, secondly, be attributable to a state if it is carried out by an NSA.[124] The ICJ raised the threshold of gravity so that states may not rely on mere frontier incidents to attack opponents in purported self-defence.[125] Furthermore, Garwood-Gowers argues that, if this threshold is lowered, thereby allowing less grave attacks to qualify as armed attacks capable of triggering self-defence, it may amount to the broadening of the scope of self-defence and a concomitant weakening of the general prohibition of the use of force contained in article 2(4) of the Charter.[126]

The above evaluation has undoubtedly shown that before 9/11 the positive involvement of a state in the activities of NSAs was a prerequisite for self-defence to be triggered. State practice after the terrorist attacks of 9/11 is believed to have radically changed this view.

5.2.2 *State Practice after the Terrorist Attacks of 9/11*

First, it has been argued that following OEF launched by the US and the toleration of the international community of that operation for several years, it could safely be construed that self-defence has been transformed to allow states to respond to attacks by terrorists with decreased condemnation.[127]

Secondly, Israel had, in 2003 and 2006, bombarded perceived terrorist bases in Syria (without imputing the terrorist activities to Syria) and Lebanon, even though the Israeli representative to the UN made reference to the toleration of the terrorist activities of Hezbollah by Lebanon during the debates in the SC. Duffy remarked that Israel made certain assertions that could be interpreted as imputing the conduct of Hezbollah to Lebanon.[128] The reaction of the international community

[122] Tams (note 6 above) 373.
[123] I Brownlie 'International Law and the Activities of Armed Bands' (1958) 7 *International and Comparative Law Quarterly* 712 731.
[124] *Nicaragua* case (note 3 above) para 195; Cenic (note 108 above) 204.
[125] *Nicaragua* case (note 3 above) para 191.
[126] A Garwood-Gowers '*Case Concerning Oil Platforms* (*Islamic Republic of Iran v 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* 241 249.
[127] Tams (note 6 above) 378.
[128] Duffy (note 9 above) 298.

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to these attacks by Israel was mixed, because, while some states considered the response as legitimate self-defence others described the attacks as acts of aggression and as disproportionate.[129] While the SC expressed its concern about the escalation of violence in the region, it did not blame Israel specifically, but rather welcomed Lebanese efforts to extend control of its territory to the southern borders.[130] The Arab League expressed dissatisfaction with the terms of the ceasefire, which were viewed as skewed in favour of Israel without regard to the genuine concerns of the Lebanese people.[131]

Thirdly, in 2000, 2004 and 2007, Russia had conducted extraterritorial strikes against Chechen terrorist bases in Georgia. Russia's claim of self-defence against the Chechen terrorist attacks, without attributing these activities to the state of Georgia, was met with mixed reactions from the international community.[132]

Fourthly, Turkey's raid against PKK bases in northern Iraq in 2007 equally met with mixed reactions. While the US openly justified Turkey's right of self-defence in the manner it was executed, other states condemned the invasion for being a disproportionate use of force.[133] In fact, more states condemned Turkey's incursion into Iraq, than the few states that justified it.[134] Arguably, the condemnation was not in respect of the illegality of the action, but of Turkey's failure to keep within the confines of proportionality. Significantly, no resolution was formally adopted by either the SC or the GA condemning Turkey.[135]

Fifthly, the 2008 invasion by Colombia of terrorist bases in Ecuador in pursuit of members of the Revolutionary Armed Forces of Colombia (FARC), was condemned by the Organization of American States OAS as amounting to a violation of Ecuador's sovereignty.[136] Colombia considers the FARC to be terrorists, while other governments see them as revolutionaries. In spite of the condemnation of the Colombian action by

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[129] Tams (note 6 above) 379; A Zimmermann 'The Second Lebanon War: *Jus ad Bellum*, *Jus in Bello* and the Issue of Proportionality' (2007) 11 *Max Planck Yearbook of United Nations Law* 99.
[130] S/RES/1701 (11 August 2006).
[131] Id para 4 of the preamble.
[132] UN Doc S/2002/1012 (11 September 2002); Gray (note 21 above) 230; Tams (note 6 above) 380.
[133] T Ruys '*Quo Vadit Jus ad Bellum*?: A Legal Analysis of Turkey's Military Operations Against the PKK in Northern Iraq' (2008) 9 *Melbourne Journal of International Law* 334; Tams (note 6 above) 379.
[134] R Van Steenberghe 'Self-defence in Response to Attacks by Non-state Actors in the Light of Recent Practice: A Step Forward?' (2010) 23 *Leiden Journal of International Law* 183 193.
[135] Murphy (note 27 above) 39–40.
[136] OAS CP/RES 930 (1632/80) (5 March 2008).

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other countries in the region and the severing of diplomatic relations with Colombia by Nicaragua, neither the SC nor the GA condemned Colombia for the show of aggression.[137]

Sixthly, on 22 September 2014 the US led coalition commenced military operations by way of airstrikes against positions of ISIL and the Khorasan Group in Syria, similar to earlier strikes that had been carried out against ISIL in August 2013. The attacks against these NSAs appear not to be in retaliation for activities in any way attributed to any state.[138] The international reaction against ISIL in Iraq and Syria, with a coalition of the US, Australia, Belgium, the UK, Canada, France, the Netherlands, Denmark, Bahrain, Jordan, Saudi Arabia, Qatar and the United Arab Emirates, has caused Hakimi to argue that, 'the claim that international law absolutely prohibits such use of force is losing ground'.[139] Although there is no doubt that the coalition is fighting against an NSA in the territories of Iraq and Syria, it is important to note that there is no consensus among states in respect of the legal mandate or standard of the operation.[140] No state has specifically declared that the operations amount to a self-defence. While it may arguably be inferred from the US statements that the coalition is exercising collective self-defence to rescue Iraq, the coalition rely, on the other hand, on flushing out terrorists from the ungoverned spaces within Syria.[141]

Based on these examples, Tams concludes that the international community can no longer deny states the right to use force in self-defence against NSAs. However, it remains debatable whether such use of force complies with the principles of necessity and proportionality.[142] Some commentators even suggest that the need for attribution contained in the *Nicaragua* decision in response to attacks by NSAs has been dispensed with since the 9/11 attacks.[143] The better view, according to Tams, is that the traditional rules regulating self-defence have been modified. To him 'contemporary practice suggests that a territorial state has to accept anti-terrorist measures of self-defence directed against its territory where it is responsible for complicity in the activities of terrorists based on its territory, either because of its support below the level of direction and

[137] Murphy (note 27 above) 41.
[138] Hakimi (note 7 above) 20–25.
[139] Ibid.
[140] Id 25–26.
[141] Ibid.
[142] Tams (note 6 above) 381.
[143] C Greenwood 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq' (2003) 4 *San Diego International Law Journal* 7 17; SD Murphy 'Self-defense and the Israeli Wall Advisory Opinion: An *Ipse Dixit* from the ICJ?' (2005) 99 *American Journal of International Law* 62.

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control or because it has provided a safe haven for terrorists'.[144] This view, which he described as the lenient standard of attribution, appears to suggest that 'aiding and abetting' are sufficient for the purpose of attribution.[145] This author agrees with the conclusion that state practice has shown the emergence of a new customary law that allows the use of force against NSAs.

Tladi, however, argues the contrary. He is of the view that although state practice in the determination of a shift in the law is important as an aid to interpretation, it cannot be seen as determinative of article 51.[146] He argues that self-defence is merely an exception to the general rule on the prohibition of the use of force and should not be interpreted in such a manner that it overpowers the substantive rule. It should be construed strictly within the context of other principles, such as territorial integrity, sovereign equality and the use of force.[147] Self-defence may offend these foundational principles if it is without the consent of the territorial state. Tladi considers the attack on Iraq by Turkey and the world's reactions thereto as an illustration of the established position — the unlawfulness of the use of force by states against NSAs in self-defence. According to him, the criticism of the violation of Iraq's sovereignty by Javier Solana, Ban Kin Moon and Stephen Smith resonates the position that the use of force against NSAs remains unlawful.[148] Similarly, and based on reactions from Russia, Ghana, Qatar and China, Tladi does not even consider Israel's attack on Lebanon to be a yardstick to justify the toleration of the use of force against NSAs.[149] Furthermore, on the question whether the US invasion of Afghanistan can serve as a basis for the acceptance of a new norm to the effect that states can embark on self-defence against NSAs, Tladi argues that the invasion was not against Al-Qaeda, but against the Taliban, because there was an attribution of blame to the Taliban government by the US.[150] He concludes that state practice is insufficient to provide evidence of any acceptance of the use of force without attribution to a state.

While Tladi's weighty contentions have gone a long way to illuminating this contemporary debate and resonates with the ICJ jurisprudence on the law of attribution, this author is not persuaded by decisions

144 Tams (note 6 above) 385.
145 Id 386.
146 Tladi (note 71 above) 80.
147 Ibid.
148 At the time, Javier Solana was EU High Representative for Foreign Affairs and Security Policy, Ban Kin Moon was the UN Secretary-General and Stephen Smith was Australia's Foreign Minister; see Tladi (note 71 above) 82.
149 Id 83.
150 Id 84.

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of international tribunals or the ICJ. Such decisions are only binding between the parties,[151] particularly when juxtaposed against established customary international law. Subsequent practice of states is likely to elucidate the provisions of the Charter better than decisions of the ICJ.[152] Oliver posits that state practice is the 'real world test' and the 'leading edge' of international law.[153] Oliver accordingly supports the view that the law on self-defence has been transformed to permit the use of force against NSAs.

5.3 *Multilateral Endorsement of the Use of Force by States against Non-state Actors*

The attitude of the international community to unilateral responses to terrorist violence may be discerned from the condemnation of such action by the SC, GA and other regional organisations. A unilateral forcible action which does not attract any UN condemnation is, thus, generally deemed not to be illegal.[154] The absence of serious condemnation by the international community of OEF embarked upon by the US and its allies since 7 October 2001 could be interpreted as justification for the US's departure from the existing international norms that regulate the use of force by states against NSAs in favour of a new set of international laws. The following have all been advanced as part of a fundamental show of support for OEF: The SC's unanimous recognition of the US's right of self-defence through the adoption of Resolutions 1368 and 1373; Australia's invocation of the Security Treaty between Australia, New Zealand and the United States of America (ANZUS);[155] and the decisions by NATO, OAS and other states to support the self-defence efforts through the provision of troops, funds and logistics.[156] In particular, this support

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[151] Art 38 of the 1945 Statute of the ICJ.

[152] Art 3(3)(b) of the 1969 Vienna Convention on the Law of Treaties. It provides: 'There shall be taken into account, together with the context: "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding the interpretation"'.

[153] JT Oliver *Freedom of Navigation, Rights of Passage, International Security and the Law of the Sea* (Unpublished thesis, University of Virginia School of Law, 23 April 1993) 85, cited in Fitzgerald (note 57 above) 489.

[154] L Henkin 'NATO's Kosovo Intervention: Kosovo and the Law of "Humanitarian Intervention"' (1999) 93 *American Journal of International Law* 824 827; Benvenisti (note 10 above) 689.

[155] Arts IV and V of the 1951 Security Treaty between Australia, New Zealand and the United States of America (ANZUS). Arts IV and V are to the effect that parties recognise that an armed attack in the Pacific area on any of the parties would be dangerous to the peace of the others and resolve to treat the attack on any of them as an attack on all of them.

[156] Arnold (note 10 above) 64–65.

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entailed 36 states offering troops or equipment, 44 states offering air bases, 33 states allowing landing rights and 13 states allowing storage of equipment.[157] In fact, as a result of the international support for OEF, the US could argue that the operation is not a unilateral one, but a coalition against terror.[158] The search for the legitimacy of OEF has pushed the SC, perhaps upon the US's instrumentality, to refer specifically to the need for an International Security Assistance Force (ISAF) to work with OEF by way of a coalition in the realisation of its mandate.[159] In the face of the massive international support for the US led OEF, it would be difficult to consider the action of the US as being illegal, even though the Taliban support of Al-Qaeda fell short of the required threshold of attribution enunciated in the *Nicaragua* case.[160]

However, that reasoning is not generally accepted, because of the contrary view that the seeming multilateral endorsement of the US invasion of Afghanistan post 9/11 is not as a result of the legality of the action or the acceptance of US military policies,[161] but is based on several other reasons. According to Gray, it remains unclear whether the events of 9/11 and the universal acceptance of the response of the US brought about a lasting transformation of the law on self-defence or whether it was a temporary, once-off response.[162]

5.4 Scholarly Opinions

Apart from the above indicators of a shift in the law of self-defence, scholarly opinion also holds that the violation of the sovereignty of a host state is legally justified when that state aids and abets terrorism or breaches an international duty, even when an NSA may be the author of an act of aggression.[163] According to Cassese, aiding and abetting international terrorism is equated with an armed attack in the

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[157] 'Inside Afghanistan' *Washington Post* 14 October 2001 A20; Beard (note 10 above) 572.
[158] Gray (note 21 above) 206.
[159] S/RES/1510 (13 October 2003); S/RES/1563 (17 September 2004); S/RES/1623 (13 September 2005); S/RES/1659 (15 February 2006); S/RES/1662 (23 March 2006); and S/RES/1707 (12 September 2006).
[160] Arnold (note 10 above) 76.
[161] Gray (note 21 above) 198.
[162] Id 194.
[163] A Cassese 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 *European Journal of International Law* 993 997; A/RES/2625/XXV (24 October 1970); S/RES/1189 (13 August 1998); and S/RES/1373 (28 September 2001).

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consideration of the propriety of self-defence.[164] Wolfrum,[165] Byers,[166] Wilmshurst,[167] Beard,[168] Ruys and Verhoeven,[169] and Travalio and Altenburg,[170] have argued in favour of the fact that the threshold for attribution for the conduct of terrorist NSAs to states has been lowered. The attribution requirement remains part of the concept of 'armed attack', but the threshold for attribution has been lowered to mere hosting or toleration of NSAs.[171]

Furthermore, under paragraph 38 of the Leiden Policy Recommendations, the international law experts point out that 'it is now well accepted that attacks by non-state actors, even when not on behalf of a state, can trigger a state's right of individual and collective (upon request of the victim state) self-defence'.[172] The Leiden Policy Recommendation states that

> in the case of an attack by terrorists that is not attributable to a state, article 51 should be read to require that the attack be large-scale in order to trigger the right of self-defence; in assessing the scale, account may be taken of a series of attacks emanating from the same territory and the same terrorist group.[173]

To these experts, the inherent nature of self-defence to repel or avert an armed attack does not require attributability to a territorial state under the rules of state responsibility.[174] Legal scholarship and SC resolutions have generally shown that merely harbouring or tolerating the activities of NSAs could engage the responsibilities of states, because they have been requested to refrain from both active and passive support. The SC resolved that states have the duty to refrain from organising, instigating

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164 Cassese (note 163 above) 997.

165 R Wolfrum 'The Attack of September 11, 2001, the Wars Against the Taliban and Iraq: Is There a Need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict?' (2003) 7 *Max Planck Yearbook of United Nations Law* 1 38.

166 Byers (note 5 above) 409–410.

167 Wilmshurst (note 9 above) 358.

168 Beard (note 10 above) 578–579.

169 Ruys & Verhoeven (note 62 above) 311.

170 Travalio & Altenburg (note 109 above) 105.

171 Garwood-Gowers (note 18 above) 11–12.

172 N Schrijver & L Van den Herik 'Leiden Policy Recommendations on Counter-terrorism and International Law' (1 April 2010) available at http://www.grotiuscentre.org/resources/1/Leiden%20Policy%20Recommendations %201%20April%202010.pdf (accessed 5 December 2014) para 38.

173 Id para 39; see, also, C Heyns 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (13 September 2013) UN Doc A/68/382 para 89; see, also, Hakimi (note 7 above) 17.

174 Schrijver & Van den Herik (note 172 above) para 42.

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or generally acquiescing in acts of terrorism or from knowingly allowing their territories to be used in carry-out activities that are injurious to other states.[175]

6 Has the Law on Self-Defence been Transformed?

This author appreciates the complex nature of this debate and the difficulty of focusing on any side of the divide; similarly, it has been remarked by some eminent commentators that it appears premature to say conclusively whether or not the law of self-defence has been transformed. Specifically, commentators such as Cassese and Van Steenberghe opt for some future state practice to determine where the pendulum swings to.[176] Nevertheless, between the time when Cassese and Steenberghe wrote their views (in 2001 and 2010 respectively) and now, some significant developments, particularly the events in Iraq and Syria, may have stretched the law beyond what it used to be. This author will thus brave the odds to conclude that the law of self-defence has indeed been transformed.

Given that the Charter constitutes the cornerstone of the international security infrastructure, the strict interpretation of article 51 by the ICJ in the *Nicaragua* case, the *Palestinian Wall* case and the *DRC* case, as well as some GA resolutions that firmly constrain the use of force,[177] have resulted in powerful states arguing that the drafters of the Charter placed too many limitations on the use of force.[178] These limitations have, therefore, made it extremely difficult for victim states of terrorist attacks to respond unilaterally without inhibition. As Scharf points out, the crystallisation of the Bush Doctrine could not rapidly blossom into customary international law due to the post 9/11 ICJ decisions in the *Palestinian Wall* and *DRC* cases in which the Court reiterated and affirmed the attribution requirement.[179] Although no consensus has thus far been

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175 *Corfu Channel* (Merits) 1949 ICJ Reports 4 para 22; A/RES/2625(XXV) (24 October 1970) Annex s 1.

176 Cassese (note 163 above) 993, where he states: 'I shall leave here in abeyance the question whether one can speak of "instant custom" that is of the instantaneous formation of a customary rule widening the scope of self-defence as laid down in Article 51 of the UN Charter and in the corresponding rule of customary law. It is too early to take a stand on this difficult matter'; see, also, Van Steenberghe (note 134 above) 183–184, where he states: 'It is no doubt too early to draw any firm conclusion from this practice, future practice will be decisive'; Hakimi (note 7 above) 3.

177 A/RES/2625(XXV) (24 October 1970); A/RES/3314(XXIX) (14 December 1974).

178 Tams (note 6 above) 363.

179 MP Scharf 'Accelerated Formation of Customary International Law' (2014) 20 *ILSA Journal of International and Comparative Law* 305 338–339.

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reached by states with regard to evading the comprehensive ban on the use of force, some of them have unilaterally resorted to reinterpreting the Charter provisions with a view to escaping or circumventing the trappings of the Charter.[180] It is on the basis of these reinterpretations that some form of rationale was drummed up by Russia to invade Georgia, by Australia to pre-emptively attack terrorist bases in third states and by Rwanda for its deployment of troops against Hutu militias in the DRC.[181] Having said that, circumventing or reinterpreting the Charter has not been easy. For instance, even the interpretation of article 2(4) by certain commentators that the use of force not directed against the territorial integrity or political independence of another state is not contrary to the Charter prohibition, was rejected.[182] The law of the Charter, therefore, remains that all uses of force and threats, including those directed at NSAs in the territories of other states, are prohibited. This is because the intention of the drafters of the Charter was a comprehensive ban on the use of force; it appears that no interpretation will be allowed to alter the scope of the ban.[183]

Nevertheless, the combined effect of SC Resolutions 1368 and 1373, the lowered attribution threshold, the post 9/11 state practice, scholarly opinions and the broad support for forcible actions against NSAs can be construed as recognition, legitimisation or legalisation of an action in self-defence against a state for merely harbouring or acquiescing in the conduct of NSAs. Thus, an action in self-defence could lie against an NSA, independent of any attribution to a state;[184] the Bush Doctrine has instantly crystallised into a new customary law.[185] The manifestation of the emergence of a new customary law of self-defence is also rooted in the absence of any serious opposition or objection to the US's sustained reliance on harbouring of terrorists as a ground necessitating an action

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[180] A Cassese 'Return to Westphalia?' in A Cassese (ed) *The Current Legal Regulation of the Use of Force* (1986) 513.

[181] Ruys & Verhoeven (note 62 above) 290.

[182] Tams (note 6 above) 364.

[183] TM Franck *Recourse to Force: State Action Against Threats and Armed Attacks* (2002) 12; 'A More Secure World' (note 1 above) paras 188–192.

[184] Cassese (note 163 above) 996–997 states: 'It would thus seem that in a matter of a few days, practically all states (all members of the Security Council plus members of NATO other than those sitting on the Security Council, plus all states that have not objected to resort to art 51) have come to assimilate a terrorist attack by a terrorist organisation to an armed aggression by a state, entitling the victim state to resort to individual self-defence and third states to act in collective self-defence (at the request of the former state).'

[185] Langille (note 88 above) 145; Y Arai-Takahashi 'Shifting Boundaries of the Right of Self-defence: Appraising the Impact of the September 11 Attacks on *Jus ad Bellum*' (2002) 36 *International Lawyer* 1081 1095.

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in self-defence.[186] Even Iraq, the most vocal opposition to the action, was more inclined to question the absence of evidence linking the Taliban or Al-Qaeda to the 9/11 attacks, rather than the legality of such an action against a state for merely harbouring terrorist NSAs.[187]

Given that the emerging principle of a lowered threshold for attribution is gaining ground, it is, however, suggested that an action in self-defence be limited to attacks against only NSAs and their objects if effective control by the state over the NSA is not established. The right of self-defence available to the victim state should be strictly directed at the NSAs and their objects, but both the military and civilian objects of the territorial state should be spared from attack[188] if the grounds for self-defence are merely the hosting of or tolerating NSAs. This view is without prejudice to the right of the victim of attacks to use force against terrorist infrastructure in the territorial state.

7 Conclusion

This article can safely conclude that international law has permitted the use of force by states in self-defence against NSAs, thereby transforming the law of self-defence. The requirement of attributing the conduct of an NSA to a state for the purpose of triggering self-defence in consonance with the jurisprudence of the ICJ and the ILC Draft Articles on Responsibility of States remains, but the threshold for attribution has been lowered. Prior to the 9/11 attacks, the law required that for the conduct of an NSA to trigger a response in self-defence, such an NSA must have been under the effective control of a state necessitating the imputation of the NSA's conduct to the state. Contemporary international law, particularly since 2001 to date, has shown that merely harbouring terrorist NSAs could engage the responsibilities of a state, thereby exposing it to attacks in self-defence from the victim states of armed attacks by NSAs. Inevitably, the Bush Doctrine appears to have crystallised into a new customary international law. The SC Resolutions 1368 and 1373, the lowered threshold for attribution, legal scholarship, contemporary state practice and the massive international support enjoyed by states that use force against non-state actors without attribution, unequivocally point towards the acceptance of the transformation of the law of self-defence.

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186 Travalio & Altenburg (note 109 above) 108–109; Ratner (note 93 above) 905–910.

187 Ratner ibid.

188 DW Bowett *Self-defence in International Law* (1958) 55–56; see, also, Schrijver & Van den Herik (note 172 above) para 43.

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