THE LEGALITY OF THE UNITED STATES WAR ON TERROR: IS ARTICLE 51 A LEGITIMATE VEHICLE FOR THE WAR IN AFGHANISTAN OR JUST A BLANKET TO COVER-UP INTERNATIONAL WAR CRIMES?

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I. INTRODUCTION

On September 11, 2001, a network of terrorists hijacked four commercial airliners and crashed them into the World Trade Center and Pentagon, killing and injuring thousands of Americans, as the world watched in shock and disbelief.¹ In a perfect biblical setting, the government of the United States would invoke the "eye for an eye" doctrine and retaliate with lethal force, seeking justice for the thousands of men, women, and children that our country lost in the blink of an eye. However, when the United States signed the United Nations Charter on June 26, 1945, it became bound by international law and the limits of warfare that accompany it.²

1. Frank Hyland, Terrorism Hits Home: Hundreds Feared Dead as Planes Hit World Trade Center; Pentagon also Hit by Suicide Attack from the Air; All Airline Flights Nationwide are Canceled, ATLANTA J. & CONST., Sept. 11, 2001, at 1A; Michael Grunwald, Terrorists Hijack 4 Airliners, Destroy World Trade Center, Hit Pentagon; Hundreds Dead, WASH. POST, Sept. 12, 2001, at A1.

2. U.N. CHARTER, pmbl., http://www.un.org/Overview/Charter/preamble.html. Provides that "[a]ccordingly, our respective Governments, through representatives assembled in the city of San Francisco, ... have agreed to the present charter of the United Nations and do hereby establish an international organization to be known as the United Nations."
At the time the charter was ratified, the purpose of the United Nations was to promote harmony and peace around the world and to save future generations from the horrors of war. Although the United Nations and its charter have signified a noble and important idealism, much debate has occurred over recent years concerning the limitations of a state's right to defend itself. In the wake of September 11, the argument more specifically involves whether a State can invoke Article 51 of the United Nations Charter in the event of a terrorist attack and subsequently attack the state that harbors those terrorists. The United States emphatically, and without hesitation, has responded to this issue.

On October 7, 2001, the permanent representative of the United States sent a letter to the United Nations, addressed to the President of the Security Council, claiming the United States has an inherent right of individual and collective self-defense, and reporting it had initiated actions designed to prevent and deter further attacks on the United States. Since then, the United States has taken direct military action in Afghanistan, leading and partnering with governments from around the world to form a coalition whose purpose is to do everything possible to eliminate the threat posed by international terrorism, and to deter states form supporting, harboring, or acting complicity with international terrorist groups.

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3. Id. Provides that “[w]e the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and for these needs to unite our strength to maintain international peace and security.”


This article will consist of two main parts. First, this paper will provide an overview and breakdown of Article 51 of the United Nations Charter, including the settings and circumstances in which a state can invoke the article and retaliate against another state in self-defense. Then, this paper will provide an analysis of the United States war in Afghanistan, focusing on the war's legality under the United Nations Charter and Article 51, in an objective format that will provide both narrow and broad interpretations of the controversial legal concepts embedded within Article 51.

II. THE UNITED NATIONS CHARTER AND ARTICLE 51

When the United Nations Charter was signed following World War II, the basic premise of the treaty was to outlaw war. This principal is inferred from the general provisions of the Charter. Article 2(3) requires that all members are to settle their disputes in a peaceful manner, while Article 2(4) goes on to say that all members, in their international relations, shall refrain from using force against any state, or in any manner inconsistent with the purposes of the United Nations. According to the International Court of Justice, these provisions regarding the restraint of force are not just United Nations Charter provisions, but are now regarded as a rule of customary international law. Accordingly, peace and tranquility have become the customary rule of international law with few exceptions.

Although peace and security was the ultimate objective of the United Nations Charter, the framers still understood the long-established right of a state to defend itself. Therefore, as an exception to the general rules regarding the


9. U.N. CHARTER art. 2, http://www.un.org/Overview/Charter/chapter1.html Provides that “[a]ll members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”

10. Id. Provides that “[a]ll 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.”


12. Nicar. v. U.S., supra note 11; YORAM Dinstein, WAR, AGGRESSION, AND SELF-DEFENSE, 72 (2nd ed.) (1994). -Distinguishing from the modern limits on warfare that accompany treaties and agreements, Dinstein points out that the predominant conviction of the 19th and early 20th centuries was that every state had a right to embark upon war whenever the state pleased. With all the discretion they need, states could "resort to war for a good reason, a bad reason, or no reason at all".; See also H.W. BRIGGS, THE LAW OF NATIONS 976 (2nd ed, 1952).

13. Nicar. V. U.S., supra note 11, at 94 (“On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article
use of force, the framers drew up Article 51. According to Article 51, “Nothing in the present charter shall impair the inherent right of individual or collective self defense if an armed attack against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security…”

As international conflicts have grown prevalent in today’s society, the text of Article 51 has drawn much debate over how the Article should be interpreted and, in particular, what circumstances must be present for a state to legally defend itself. The inconsistency and incoherence surrounding Article 51 is due primarily to the lack of definitions and references given to certain terms in the text of the Article. For instance, before Article 51 can be invoked, there must have been an “armed attack” on a nation. However, nowhere in the provision does it say what constitutes an “armed attack”. Can an armed attack be a terrorist attack? What about the assassination of a government leader? Then there is the controversial issue as to what the framers of the article meant by the expression “self-defense.” What degree of self-defense is allowed? Should the term “self-defense” be interpreted the same way that “self-defense” is interpreted under certain state statutes? Under Florida law, the use of deadly force would be justifiable if a person reasonable believes that such force is necessary to prevent imminent death or great bodily harm. Should the same standards be used in the case of an attack on a country? Here lies the confusion that surrounds Article 51 and scratches the head of legal scholars around the globe.

15. U.N. CHARTER, supra note 4. The article goes on to say that “[m]easures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”
17. U.N. CHARTER, supra note 4. There are no definitions in Article 51 to any of the broad terms used in the charter.
18. Id.
19. Id.
20. Id.
III. ARMED ATTACK

A. Framers Intent

The lack of authority as to what constitutes an "armed attack" has promulgated a heated debate among legal scholars. There are many who believe that it was the United Nations intent to apply a narrow definition to the term "armed attack" under Article 51. Under such a view, the term "armed attack" would not include attacks from terrorist organizations. This rationale could be reasoned to be accurate and consistent with traditional views considering, at the time the charter was signed, military attacks, not terrorist attacks, occupied the minds of world leaders. Furthermore, these same scholars have argued that if it were the framers intent to apply a broad interpretation rather than a narrow interpretation, then there would be no limitation as to whether an armed attack has occurred. An e-mail threat from abroad could be argued to constitute an "armed attack" under such a broad view. However, a narrow interpretation would allow many acts of war to easily take place without any legal resistance. "Interpreting the concept of ‘armed attack’ restrictively, where the underlying attack is terrorist in nature would merely serve to transform a necessary state response into an ‘unlawful’ response under the United Nations Charter." States that utilize terrorists to carry out acts of war on other nations would essentially be protected under the United Nations Charter. The expression "armed attack" should therefore be construed using a broad view, ensuring that the September 11 attacks constituted an "armed attack" under Article 51.

B. Nicaragua v. United States of America

It also has been argued that a situation in which a country harbors a terrorist organization does not come within the meaning of the term "armed attack" as interpreted by the International Court of Justice in Nicaragua v. United States of America. In this infamous case, Nicaragua had claimed that

23. Id. Ian Brownlie, writing as early as 1963, opined that "sporadic operations by armed bands also would seem to fall outside the concept of armed attack."
24. Id. at 546 ("The intent of the Charter’s framers was to make acceptable uses of force readily distinguishable form unacceptable uses of force.").
26. Id.
27. Id. ("Under a restrictive interpretation, states which sponsor terrorists are essentially permitted to utilize surrogates to carry out acts which might otherwise lead to war had those acts been carried out overtly.").
the United States had violated Article 2(4) of the United Nations Charter, "to refrain from the threat or the use of force," by conducting military actions against them.\(^{29}\) The United States argued that Nicaragua had been providing weapons and other support to rebels in order to help them overthrow the government of El Salvador, and the fact that Nicaragua had provided these weapons and support to the rebels was evidence of an "armed attack" against El Salvador.\(^{30}\) It was the court's opinion that the conduct of the United States towards Nicaragua could not be justified by the right of collective self-defense in response to an alleged armed attack on one of Nicaragua's neighbors.\(^{31}\) The court went on to say "while the concept of an armed attack includes the dispatch by one State of armed bands into the territory of another State, the supply of arms and other support to such bands cannot be equated with armed attack."\(^{32}\) Although this type of activity may constitute a breach of Article 2(4) and the principles of peace and international harmony, it is "of lesser gravity than an armed attack."\(^{33}\) While this decision has been noted for setting a standard in which the term "armed attack" is analyzed under Article 51, other interpretations have recently emerged and been used to determine what constitutes an "armed attack."\(^{34}\)

C. Terrorist Attacks

When analyzing the expression "armed attack" from a literal standpoint, terrorist acts taken out by armed bands with the support and encouragement of a foreign state should be considered an "armed attack."\(^{35}\) There is no language in Article 51 that states an "armed attack" is limited to an attack by another state.\(^{36}\) This leads open the possibility that the article can be read broadly enough to include the terrorist attacks that occurred on September 11, 2001. "Armed attacks by non-State armed bands are still armed attacks, even if commenced only from- and not by- another State."\(^{37}\) However, because a state

\(^{29}\) Id. at 18.

\(^{30}\) Id. at 126-27.

\(^{31}\) Id.

\(^{32}\) Id.

\(^{33}\) Nicar. v. U.S., supra note 11, at 127.


\(^{35}\) Baker, supra note 34, at 38-39; See also Ruth Wedgwood, Responding to Terrorism: The Strikes Against Bin Laden, 24 YALE J. INT'L. L. 559, 563-564 (1999) ("There is nothing in the U.N. Charter or international practice that restricts the identity of aggressors against whom states may respond - private actors as well as governments may be the sources of catastrophic conduct.").

\(^{36}\) Baker, supra note 34, at 41-42.

\(^{37}\) See DINSTEIN, supra note 12 at 238. ("The crucial question is whether an armed attack actually occurred. Thus, a hypothetical military action by the United States against drug traffickers in Columbia would
responding in force to an isolated act of terror would undoubtedly be condemned for its actions, other factors should also be considered before responding to terrorism. Yehuda Blum believes that factors such as the level of state support given to the terrorists, and whether the attack was an isolated terrorist act, are but one link in a long chain of acts that are relevant when considering if a terrorist act rises to the level of an "armed attack." Furthermore, subjective factors such as the terrorist threat to a state's safety and the motives of the state's government where the terrorists operate have been noted as being issues that may be considered when trying to determine whether an attack constitutes an "armed attack."

When considering recent terrorist activity, it seems at first glance that the September 11 attacks were isolated from other terrorist attacks by Al Qaeda and should therefore not rise to the level of an "armed attack." However, this is simply not the case. The sheer magnitude of crashing a commercial airliner into the world trade center, killing thousands of people, and causing massive destruction to a nation's most symbolic city cannot be compared to sporadic and minor isolated attacks. The September 11 attacks were not the first attacks on American targets and, according to Al Qaeda leaders, they will probably not be the last. Consequently, this makes many confident that the September 11 attacks represent an on-going pattern of behavior involving terrorist activity, raising them to the level of an "armed attack" under Article 51. In addition, the situation here is not one in which a terrorist organization overpowered a weak non-supportive state government. The United Nations Security Council

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38. Baker, supra note 34, at 42.
40. Baker, supra note 34, at 43.
41. Walter Gary Sharp, Sr., The Use of Armed Force Against Terrorism: American Hegemony or Impotence?, 1 CHI. J. INT'L L. 37, 44 (2000). Osama Bin Laden has been either indicted or been linked to a number of terrorist attacks against the United States, including the bombing of the United States embassies in Kenya and Tanzania in 1998, the bombings of United States military facilities in Saudi Arabia in 1995 and 1996.
42. Beard, supra note 11, at 574; Antonio Cassese, The International Community's Legal Response to Terrorism, 38 INT'L & COMP. L.Q. 589, 596 (1989).
43. Beard, supra note 11, at 587-588; Nora Boustany, Arab Newspapers Focus on Taliban's Fall, WASH. POST., Nov. 16, 2001 at A38 ("The Taliban's leader, Mullah Mohammed Omar, is quoted as saying he had 'a grand plan to destroy America', which will begin shortly."); Responsibility for the Terrorist Atrocities in the United States, 11 September 2001: Executive Summary, 10 DOWNING STREET NEWSROOM, Nov. 14, 2001, at http://www.number-10.gov.uk/output/page384.asp (Omar is also quoted in a videotaped interview on al-Jazeera TV news broadcast saying "Here is America struck by God Almighty...I swear to God that America will not live in peace before peace reigns in Palestine.").
44. Beard, supra note 11, at 575.
has on many occasions expressed its concern and condemnation in regards to the Taliban's support of Al Qaeda.\textsuperscript{45} For example, in resolution 1333, the Security Council "condemned the Taliban Regime for its support of international terrorism, deplored its continuing provision of a safe haven to Osama Bin Laden and his associates, and demanded that the Taliban swiftly close all terrorist training camps on its territories."\textsuperscript{46} Thus, the motives of the Taliban government, and their strong ties with the Al Qaeda terrorist organization, help support the belief that an "armed attack" occurred on September 11, 2001.

D. International Support

Responses from international world organizations also support the notion that the September 11 attacks signaled an "armed attack" against the United States.\textsuperscript{47} According to a statement made by NATO Secretary General Lord Robertson, the NATO parties had "determined that the attack against the U.S. on September 11th was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty."\textsuperscript{48} Article 5 makes direct reference to the term "armed attack" stating that an "armed attack against one or more of them"... "shall be considered an attack against them all," and that "if such an armed attack occurs, each of them, in exercise of the rights of individual and collective self defence recognized by Article 51 of the charter of the United Nations will assist the Party or Parties so attacked by taking forthwith"... "such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area."\textsuperscript{49}

Although nations from around the world have given their condolences and support to the United States, the United Nations Security Council has yet to declare that the September 11 attacks were an "armed attack" under Article 51.\textsuperscript{50} This could take to mean by many that the United Nations Security Council believes that the September 11 attacks did not constitute an "armed attack" on the United States and is allowing an illegal war to continue indefinitely. However, this interpretation is not correct. The United Nations Security

\begin{itemize}
\item \textsuperscript{45} Id. at 583.
\item \textsuperscript{47} Beard, supra note 11, at 568.
\item \textsuperscript{48} NATO: Statement by NATO Secretary General, Lord Robertson (October 2, 2001), http://www.nato.int/docu/speech/2001/s011002a.htm.
\item \textsuperscript{50} Beard, supra note 11, at 569; See also Actions Taken Around the World as Coalition Begins Air Strikes in Afghanistan, ASSOCIATED PRESS NEWSWIRES, Oct. 14, 2001, WL APWIIRES File (The European Union, Pacific Allies, and numerous states throughout Eastern Europe, Africa, and Asia express their support for the United States military response to the September 11th terrorist attacks).
\end{itemize}
Council has issued two resolutions that reaffirm the United State’s right to self-defense. By reaffirming this right, the United Nations Security Council is implying that there was an armed attack on the United States and therefore is recognizing the United States’s inherent right of self-defense.

IV. SELF-DEFENSE

A. The Caroline Case

Like other expressions and terms stated throughout article 51, the United Nations Security Council makes no reference as to what constitutes reasonable and proper self-defense under the charter. Due to this lack of authority, deference has customarily been given to traditional international law when determining what constitutes reasonable and proper self-defense.

International law and the concept of self-defense have been primarily shaped by the infamous Caroline case, which occurred during the Canadian rebellion of 1837. In that case, a British officer, believing that an American ship named the Caroline was operating as an ammunition supply vessel for Canadian vessels, gave orders to destroy the ship when it was docked at Fort Schlosser in New York. Consequently, British soldiers boarded the ship, assaulted the men on board, and set the ship on fire, killing two American that were on board. While the United States condemned the attack as an illegal use of force against the United States, British officials argued that the destruction of the Caroline was legal and justified by the necessity of self-defense. In response to the British contention that the incident was a justifiable act of self-defense, United States Secretary of State Daniel Webster sent a letter addressed to Henry Fox, the British Minister at Washington D.C. in which he defined the


52. Martin A. Rogoff & Edward Collins Jr., The Caroline Incident and the Development of International Law, 16 BROOK. J. INT’L. L. 493, 504 (1990) [hereinafter Rogoff & Collins Jr.] ("The great significance of the Caroline doctrine in modern international law results from a radical transformation of norms relating to resort to force, and from an acceptance of Webster’s formulation on resort to force in self-defense as authoritative customary law.").


54. Campbell, supra note 52, at 1077.

55. Id.

56. Rogoff & Collins Jr., supra note 51 at 496.
circumstances and conditions upon which a state can properly use force in self-defense. In his letter, Webster stated that in order for the British to exercise self-defense, the British government would have to show a necessity of self-defense which is "instant, overwhelming, leaving no choice of means, and no moment for deliberation." In addition, Webster also defined proportionality as actions that are not unreasonable or excessive. British official Lord Ashburton later agreed with the limitations on self-defense that Webster outlined in his letter. As a result, this case essentially gave rise to the law of self-defense.

It is now accepted that self-defense is permissible only if the use of force meets the elements of necessity and proportionality. The use of force by one state against another satisfies the element of necessity only if it can be shown that there was no other alternative means by which to remedy the situation. The condition of proportionality is met if the use of force in self-defense does not exceed the severity of the attack that triggered the use of force in the first place.

B. Necessity

There are some scholars who believe that the United States has not met its burden of proof with regards to the element of necessity, as recognized under the Caroline doctrine, customary international law, and ultimately under Article 51 of the United Nations Charter. First, these commentators have argued that the doctrine of necessity requires "immediacy" or a close-in-time response to the original attack that precipitated the use of force. This could be inferred

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57.  Id. at 497.
58.  Id. at 497-98.
60.  Rogoff & Collins Jr., supra note 51, at 498.
61.  Nicar. v. U.S., supra note 11, at 103. The international court of justice specifically recognized necessity and proportionality as elements of self-defense under customary international law. According to the courts opinion, "[s]ince the existence of the right of collective self-defense is established in customary international law, the Court must define the specific conditions which may have to be met for its exercise, in addition to the conditions of necessity and proportionality to which the Parties have referred."
63.  Id.
64.  Id.
65.  Beard, supra note 11 at 585; Francis A Boyle, Military Responses to Terrorism, 81 AM. SOC’Y INT’L L. PROC. 288, 294 (1987) ("This provision of the Charter [Article 51] made it quite clear that self-defense could only be exercised in the event of an actual or perhaps at least imminent ‘armed attack’ against the state itself."); Baker, supra note 34, at 34 (arguing that the “temporal element” of the requirement of
from the expression used in Webster's letter where he states that necessity occurs when there is "no moment of deliberation."66 Without such a need for immediacy, it would be very easy for States to use the doctrine of self-defense as a vehicle to retaliate for prior acts of violence and conquest.67 However, this restrictive view, which requires an immediate threat, presents a problem in modern warfare. When the Caroline doctrine was formulated in 1837, acts of aggression took place on a larger scale with customary procedures that allowed enemies to have the knowledge and time to prepare for battles.68 Today's landscape regarding warfare is quite different. Present day weapons such as nuclear bombs and computer missile systems may not give a state time to determine whether an attack is imminent.69 Therefore, such a restrictive view might eliminate any chance for justifiable self-defensive measures.70

As the problem of "immediacy" persists, there are many scholars who argue that the right of anticipatory self-defense exists in Article 51 on the premise that pre-charter rights inherently survive the adoption of the charter if they are not prohibited by or inconsistent with it.71 According to this liberal view, "because anticipatory action taken in defense of a state's territory" ... "does not by definition involve a threat or use of force against" ... "another state, and it is not inconsistent with the overarching purpose of the United Nations to maintain international peace and security, it is permissible under Article 51."72

It appears to be more reasonable that the right to self-defense is not limited to instances of actual attacks against the victim state, but rather extended to
anticipatory responses to such attacks as well. Such a view would seem to be more appropriate when considering the present day weapons of mass destruction, which essentially phase out the distinction between actual and imminent attacks. The United States certainly agrees with this position. In a statement to the nation, President Bush announced that new threats to the United States have required the Untied States to adopt a new policy of pre-emptive actions, breaking from doctrines that have governed US foreign and military policy for more than 50 years. Keeping with this new policy, the United States response to the September 11 attacks was made nearly a month after the September 11 attacks took place.

Under the restrictionist view, this response clearly did not meet the element of necessity, as the counterattack did not occur until weeks after four planes were hijacked and propelled into the World Trade Center and Pentagon. However, there are many in the international community who are rethinking the need of “immediacy” as an element of necessity. When the United States invoked anticipatory self-defense to justify missile attacks against Sudan and Afghanistan in 1998, the majority of the international community gave little opposition to the preemptive use of force. This emerging thought seems to allow for more responsible military actions. By not “jumping to the gun” and waiting, a state would have time to gather all the information and intelligence needed to prepare a well-thought-out military campaign against the “true” opposition that is responsible for the attacks.

Although there has been a shift from a restrictionist view to a more liberal view by many in the international community, significant challenges have still been made concerning the legality of the United States military strikes in Afghanistan and ultimately on the doctrine of anticipatory self-defense. In response to these challenges, the United States has argued that the September 11 attacks were not isolated attacks but rather part of an on-going terrorist attack by Al Qaeda and Taliban leaders. This could be easily proved by the intelligence organizations in numerous states having produced significant evidence that Al Qaeda cells around the world have continued and will continue.

73. Id. at 1034.
74. Id. at 1036.
76. A Nation Challenged; Bush’s Remarks on U.S Military Strikes in Afghanistan supra note 5 (military operations began on October 7, 2001, nearly a month away from the terrorist attacks on September 11, 2001).
77. Id.
79. Beard, supra note 11, at 587-88.
to plan future attacks against the United States. Consequently, these realistic and serious threats made against the United States must allow for the use of preemptive force to defend against future tragedies.

C. Proportionality

Assuming the element of necessity is met, the use of force in response to an "armed attack" still must be proportionate to the original attack. If taken literally, this would mean that it would be perfectly legal to bomb the most populous city in Afghanistan with the purpose of killing thousands of innocent civilians. This, of course, is not the way in which proportionality should be interpreted. Today, proportionality refers more to the balance between a military objective and its cost in terms of lives lost or the military actions needed to control the enemy. The international community will only usually condemn defensive military actions if the actions were overly excessive as compared to the original attack in terms of civilian casualties or scale of weaponry.

There are many opponents of the war who believe that the United States military strikes in Afghanistan have not met the element of proportionality as required by customary international law. Strong speculation has been circulating among many scholars that the strikes against Afghanistan are not military in nature, but rather political, with the intent to remove the Taliban from power and establish a new government in Afghanistan. Assuming this proclamation has merit, the Taliban is not simply an army but a political entity, and its members are largely civilians, not military combatants. Therefore, many of the targets hit, such as the Taliban headquarters and other buildings in Kabul and Kandahar, would probably qualify as civilian targets. Reports from the media that targets in Afghanistan have included airports,

80. Id. at 588.
81. Rogoff & Collins Jr., supra note 52, at 498.
82. Judith Gail Gardam, Proportionality and Force in International Law, 87 AM. J. Int’L L. 391 (1993); See also Myers M. McDougle & Florentino P. Feliciano, Law and Minimum World Public Order 241-44 (1961) (for their definition of proportionality in the jus ad bellum); William V. O’Brien, The Conduct of Just and Limited War 27-31 (1981); See also James Turner Johnson, Just War Tradition and the Restraint of War 203 (1981), (defines proportionality in the jus ad bellum sense as “where the total evil of war is compared to its total good”; or “in contemporary language, the costs of the war must not outweigh the benefits. In the jus in bello sense, proportionality has “to do with calculations of force necessary to subdue the enemy.”).
83. Schachter, supra note 8, at 1637.
85. Id.
86. Id.
communication facilities, electrical plants, and government buildings, has added to the speculation of excessive civilian casualties.\textsuperscript{87} Additionally, many Afghan civilians have reported that the United States military has not been bombing just military targets, but rather, residential neighborhoods.\textsuperscript{88} If these proclamations have merit, then the United States bombings in Afghanistan could essentially be considered to be overly excessive in terms of civilian casualties.

On the other hand, the United States government strongly denies that its military targets Afghan civilians.\textsuperscript{89} Rather, it has been argued by United States officials that all military strikes taken in Afghanistan have been strategic.\textsuperscript{90} According to Col. Ray Shepard, "we painstakingly assess the potential for injuring civilians or damaging injuring civilians, and positively identify targets before striking."\textsuperscript{91} However, the United States has undoubtedly made mistakes. An on-site review conducted by the New York Times has revealed that over four hundred civilians have been killed in eleven locations where there have be United States led air strikes.\textsuperscript{92} These mistakes evidently have come from mistaken information given by local Afghans and reluctance by the United States to commit itself to a much riskier ground attack.\textsuperscript{93}

Whether the United States has been using excessive force in its war on terror is clearly subjective in its analysis. Although it can be argued that the loss of hundreds of Afghan civilians outweigh any legitimate military objective of the United States, it can be just as effectively argued that civilian casualties are casualties of war and, although tragic, cannot possibly measure up to the lives that will be saved by the United States military strikes. Either way, the United States has recognized the need to reduce civilian casualties caused by bombing mistakes. The United States military strategy has evolved away from the use of air strikes as the primary weapon and more to the use of ground forces.\textsuperscript{94} This trend will likely result in fewer innocent civilians being killed; thus, reiterating

\textsuperscript{87} Id.
\textsuperscript{88} Id. The following art testimonials reported by the Boston Globe and New York Times: According to Neseebullah Khan, "[i]t is not true that the Americans have only been bombing military targets. Many bombs are dropping on residential neighborhoods." According to Mohammad Zahir, "Everyone wants to eliminate terrorism from the face of the earth, but the way adopted by the U.S. is not fair because masses of ordinary people also live in Afghanistan. The attack was not just on terrorist camps...I know these are residential areas."

\textsuperscript{89} PAUL W. LOVINGER & HARRY SCOTT, Why Bush's War is Illegal, at http://www.warandlaw.homestead.com/files/bushwar.htm (In his briefing on 10-11-01, Secretary of Defense Brumsfield said the military "does not target civilians").

\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Dexter Filkins, Flaws in U.S. Air War Left Hundreds of Civilians Dead, N.Y. TIMES, July 21, 2001 at 1A.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
the use of military force that is proportionate to the United States objective of eliminating international terrorism.

IV. CONCLUSION

Today, the increasing emergence of transnational terrorism has changed the way in which international law is used and interpreted. The threat of unimaginable attacks, such as the one witnessed by the world on September 11, 2001, has promulgated the need for a broad view of Article 51 and the circumstances in which a state may use force to defend itself from future attacks. The framers' intent when drafting the United Nations Charter, although primarily to promote peace and restrain rampant exercises of power, also included the longstanding notion that a state inherently has the right to defend itself when under attack by another state. That being said, the United States has been the target of ongoing and consistent attacks by a state-sponsored terrorist organization, determined to continue in its efforts to destroy the United States. Therefore, the United States must be able to legally defend itself as an independent sovereign state.

There are many who say that Article 51 does not apply to terrorist attacks. However, this view has become outdated and obsolete due to the modern threats of warfare that face the international community. Terrorism has become a vehicle for states to wage war against their enemies and, as such, states must be given the authority to use state-sponsored force to deter such attacks. Otherwise, states that allow or use terrorism as a mechanism to accomplish military goals will become easily shielded under the United Nations Charter although essentially violating international law in the first place.

This view does not mean to say that all international terrorist attacks are severe enough to invoke Article 51. Factors such as the severity of the attack, the amount of state involvement with the terrorist attack or terrorist organization, and the capability of repetition all should be seriously considered when assessing whether a terrorist attack rises to the level of an "armed attack" under Article 51. Taking these factors into consideration, the evidence is clear that the terrorist attacks on September 11 were armed attacks under Article 51.

The evolution of modern weapons and nature of terrorism warfare also stresses the need for anticipatory self-defense under Article 51. However, before a state can attack another state, there should be undeniable evidence that leads to the conclusion that an attack is needed to protect that state. Otherwise, states would be able to invoke Article 51 and claim anticipatory self-defense even though the attack was clearly retaliatory. The United States certainly had evidence that Al Qaeda carried out the attacks on September 11 and had plans of continual attacks on the United States. Therefore, the United States military
actions following September 11 were warranted to prevent future attacks on the United States.

Lastly, the United States has been strategic in its application of military operations, making it a point to assess civilian casualty. Even though mistakes have been made, as in any war, the United States has made it a mission to reduce civilian casualties by changing strategies. As such, the United States attacks have not been overly excessive and disproportionate when compared to its ultimate objectives.

The United Nations needs to understand that a new type of war has developed and, consequently, must provide new flexible guidelines for the legal invocation of Article 51 in the aftermath of a terrorist attack. Until that time comes, forcible state responses, such as those actions taken by the United States, need to be considered legitimate under a broad interpretation of Article 51.