Article

Weak States and Terrorist Organizations: A Proposed Model of Intervention

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I. INTRODUCTION

The war on terror in the post 9/11 reality brings constant challenges to jurists. One such challenge is fighting terrorism in nations with weak or absent central governments. Terrorist organizations like Al-Qaeda have built a strong terrorist infrastructure throughout the Third World, in part due to a combination of weak central governments and vast areas of land conducive to hiding. Nations with these conditions are fertile ground for terrorists. This article addresses the tools governments can utilize to combat terrorist organizations in nations that might be sympathetic to the War on Terror but for geo-political reasons lack the will and means to effectively fight terrorism within their borders.

This article begins with the definition of sovereignty and the duties and privileges that it entails. The discussion continues with an outline of the basic approaches that justify the use of force in international law against entities within another sovereign nation. Next, this article introduces the conceptual basis and difficulties of self-defense in relation to a non-state actor, specifically, an actor that takes advantage of a weak government. The article further highlights that acting against a terrorist organization often entails infringing on the sovereignty of the weak state in a manner that seems to go beyond the scope of traditional self-defense. We also provide several historical examples of events that occurred in weak

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states. We suggest that in light of approaches taken by military historians and strategic experts, the definitions of terrorism and guerilla warfare should be re-examined and viewed through the lens of conventional warfare rather than through different paradigm. We claim that when viewed in this way the right of self-defense includes the right to infringe a weak state's sovereignty. In the final section of the article, we claim that if the weak state does not wish to assist the terrorists residing within their border the right of self defense should be exercised gradually. We offer a gradual model that proposes a limited arsenal of tactical measures—non-kinetic warfare, blockade, targeted killing, and precision guided munitions—that will have a lesser effect on the weak state's sovereignty. The rationale is that using such tactics will give the weak state the motivation to fulfill the duties of a sovereign nation, or if it lacks the power, to allow another force to act on its behalf.

II. ANALYSIS

A. DEFINITION OF A STATE

The Montevideo Convention of 1933 ("Convention") defines a "state" as an international legal person possessing four main attributes: (1) a defined territory; (2) with a permanent population; (3) which is under the control of a government; and (4) which has the capacity to engage in formal relations with other states.[1] These criteria represent the foundation upon which a state can legally exist, an understanding supported in the Badinter Arbitration Committee's Opinion No. 1.[2] Interestingly, the latter opinion only mentions the first three prongs identified in Article 1 of the Convention, omitting the last criterion requiring the ability of a state to engage in formal international relations.

Such an omission could be an indication that positive law now recognizes organized entities as states, even if they are not necessarily recognized internationally. Nonetheless, Article 3 of the Convention explains that the existence of a state is a

1. *See* Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19.

2. *See* Alain Pellet, *The Opinions of the Badinter Arbitration Committee A Second Breath for the Self-Determination of Peoples*, Appendix, 3 EUR. J. INT'L L. 178, 182 (1992) (quoting Opinion No. 1 of the Badinter Arbitration Committee) ("The Committee considers: . . . that the state is commonly defined as a community which consists of a territory and a population subject to an organized political authority; [and] that such a state is characterized by sovereignty. . . .").

matter that is independent from its international recognition as such.[3] This statement characterizes what is widely known as the "declarative theory of statehood,"[4] where international recognition does not constitute a critical aspect of statehood. This concept is reiterated and supported by the Badinter Commission's Opinion No. 1, which explains that the "effects of recognition by other states are purely declaratory."[5]

The other three criteria prove to be critical to the existence of a state. The first two criteria, referring to territory and population, are fairly straightforward. The third criterion, regarding the necessity of maintaining government control, is more complicated.

The territory of a state must be defined, and comprised of, land, territorial waters, and superjacent airspace. Otherwise, there are no minimum territorial requirements. Some states, like the Russian Federation, possess an area of 17 million square kilometers, while others, such as the Vatican, have an area of 0.44 square kilometers. The same is true with regard to population. Some states, like India or China, count more than a billion citizens, while others barely have a few hundred

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3. *See* Montevideo Convention on the Rights and Duties of States art. 3, Dec. 26, 1933, 165 L.N.T.S 19 ("The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts. The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.").

4. It ought to be noted that two main contending theories on statehood exist; the "Declarative Theory of Statehood" and the "Constitutive Theory of Statehood." The former theory emphasizes the idea that for a state to be created, the criteria set forth in the Montevideo Convention have to be met; the whole process of becoming a state being mainly internal. The "Constitutive Theory of Statehood," on the other hand, focuses on the idea that a new state will become a person of international law only when it has been recognized by other states. *See* LASSA OPPENHEIM & RONALD FRANCIS ROXBURGH, INTERNATIONAL LAW: A TREATISE 135 (3d ed. 1920) ("There is no doubt that statehood itself is independent of recognition. International Law does not say that a state is not in existence as long as it is not recognized, but it takes no notice of it before its recognition. Through recognition only and exclusively a State becomes an International Person and a subject of International Law.").

5. *See* Pellet, *supra* note 2, at 182 ("The Committee considers: . . . that the answer to the question should be based on the principles of public international law which serve to define the conditions on which an entity constitutes a state; that in this respect, the existence or disappearance of the state is a question of fact; *that the effects of recognition by other states are purely declaratory*. . . .") (emphasis added).

citizens.[6]

The remaining criterion is the exercise of effective government control over both territory and population.[7] This effective control can be translated both vertically—the government can raise taxes, institute courts of law, set up a police force, etc.; and horizontally—by not being the "vassal" (a puppet state) of another larger nation.[8] Effective control requires consideration of numerous factors and is subjective, making this a more complicated critical prong.

B. DEFINITION OF A WEAK STATE

Now that the definition of a state has been established, the next question is what constitutes a weak state. A weak state is a state that originally possessed the attributes of statehood when it was formed but now does not maintain effective control over the populated territorial entity.[9] "Weakness" for the purposes of this current research does not necessarily refer to economic weakness but to the notion of institutional weakness. Institutional weakness occurs when a state is unable to assert effective control over its territory through government mechanisms.[10] Such a state could have been weakened after its creation by either internal or external factors that have undermined its structure—civil war, military occupation, economic crisis, corruption, absence of rule of law, and so forth.

There also have been empirical studies that have found a correlation between a weak state and failed states, and

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6. *See Population*, VATICAN CITY STATE, http://www.vaticanstate.va/EN/State_and_Government/General_informations/Population.htm ("The population of Vatican City is about 800 people.") (last visited Mar. 4, 2012).

7. Although effective governmental control is an important criterion without which one cannot become a state, this criterion has been dispensed with at times for "self-determination" purposes, such as was the case for Algeria and other states. *See* BOLESLAW A. BOCZEK, INTERNATIONAL LAW: A DICTIONARY 119–20 (2005) ("However, exceptionally, the required standard of effective government has not been observed, as was the case of some newly independent former colonial territories such as Algeria, Burundi, Guinea-Bissau and Rwanda where in the name of the right of self-determination statehood was recognized despite absence of an effective government and virtual anarchy.").

8. *See* KIMBERLEY TRAPP, STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM 8–13 (2011).

9. A noteworthy exception to this general principal is found in some states that acceded to independence, mainly during the 20th Century, after the break-up of empires or republics, or during decolonization.

10. *See* TRAPP, *supra* note 8, at 8–13.

terrorism. The Political Instability Task Force defines "failed states" as states where there are "civil conflicts, political crises, and massive human rights violations that are typically associated with state breakdown."[11] This definition was used to probe the connection between terrorist attacks and their fatality rates to states that had failed. The analysis included a list of 162 countries with populations over 500,000 focusing on a time frame between 1970 and 1997. This comparative analysis found that terrorism was strongly concentrated in failed or weak states.[12] This raises the question, what is the mechanism that allows terrorism to flourish in weak states?

Weak or absent government control over its territory leads to a power vacuum that invites internal and external predators. These unwelcomed forces take advantage of the power vacuum by invading the country, setting up bases to train, plan attacks, develop arsenals, and carry out operations with total impunity. Such a state of affairs could lead to a further undermining of the existing governmental authority. The continual weakening of the state will cause, at best, the emergence of a new "warlord feudality."[13]

The matter takes another turn for the worse when the weak state has in its possession arsenals that could threaten the national security of other nations.[14] In such a context, it is

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11. Gary LaFree & Gary Ackerman, *The Empirical Study of Terrorism: Social and Legal Research*, 5 ANN. REV. L. SOC. SCI. 347, 362 (2009). The Political Instability Task Force is a multidisciplinary group that examines international security issues. *Id.*

12. Gary LaFree et al., *Global Terrorism and Failed States*, *in* PEACE AND CONFLICT 39, 41 (J. Joseph Hewitt et al. eds., 2008).

13. The U.S. Army and Marine Corps Counterinsurgency Manual provides us insight into the consequences a weak state could bear when groups such as militias fill the power-vacuum created by a weak state's inability to provide for basic security or other state functions. *See* DEPARTMENTS OF THE ARMY & NAVY, COUNTERINSURGENCY 3-112 (2006), *available at* http://www.fas.org/irp/doddir/army/fm3-24.pdf [hereinafter COUNTERINSURGENCY] ("As the H[ost] N[ation] government weakens and violence increases, people look for ways to protect themselves. If the government cannot provide protection, people may organize into armed militias to provide that essential service. Examples of this sort of militia include the following: Loyalist militias formed in Northern Ireland[,] Right-wing paramilitary organizations formed in Colombia to counter the FARC[,] Militias of various ethnic and political groups formed in Iraq during Operation Iraqi Freedom. If militias are outside the H[ost] N[ation] government's control, they can often be obstacles to ending an insurgency. Militias may become more powerful than the H[ost] N[ation] government, particularly at the local level. They may also fuel the insurgency and precipitate a downward spiral into full-scale civil war.").

14. A frightfully possible example of such a situation could be a terrorist

easy to understand why a "weak state," or in other words, a state which does not exercise effective control over its territory, not only imperils itself but also imperils regional and international stability. If the latter were the case, the weak states unwilling relationship with terrorism is directly linked to the one concerning the weak state's sovereignty. In order to fully grasp this idea, it is necessary to explore the concept of sovereignty in a weak state.

C. SOVEREIGNTY AND SELF-DEFENSE

State sovereignty is defined in Article 2(1) of the United Nations Charter ("UN Charter") as: "The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles. 1.) The Organization is based on the principle of sovereign equality of all its Members."[15] This means that states possess equal rights and obligations under international law.[16] This further denies the ability of states to judge each other since they are all equal.[17] Being a judge would imply that some states are superior to others—an idea that would seem shocking for some as well as contrary to the terms of the UN Charter.[18] However, this definition of "state equality" in rights and obligations flies in the face of current practice within the UN.[19] State

take-over of Pakistan's nuclear military facilities, creating world-wide national security concerns.

15. U.N. Charter art. 2, para. 1.

16. This understanding as to the equality of states is supported by legal theorists such as Emer de Vattel. *See* EMER DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, WITH THREE EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY 320 (Béla Kapossy & Richard Whatmore eds., Liberty Fund, Inc. 2008) (1797), *available at* http://oll.libertyfund.org/title/2246 ("Since nations are equal and independent, and cannot claim a right of judgment over each other, it follows, that, in every case susceptible of doubt, the arms of the two parties at war are to be accounted equally lawful . . . ."). This theory of equality of states would also presuppose that fascist, communist, or tyrannical states have as many rights and obligations as liberal democracies.

17. For a philosophical discussion of how state equality hinders the ability of state to judge one another, see Endre Begby, *Liberty, Statehood and Sovereignty: Walzer on Mill on Non-intervention*, 2 J. Military Ethics 46 (2003).

18. *Cf.* U.N. Charter art. 2 ("The Organization is based on the principle of sovereign equality of all its Members.").

19. Article 7, paragraph 1 of the U.N. Charter creates the Security Council among other bodies. *See* U.N. Charter art. 7, para. 1 ("There are established as principle organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an

sovereignty and equality are better understood nowadays as independence.

Independence usually refers to the ability of a state to be distinct from other states as an individual entity of international law. Independence entitles the state to be autonomous in its decision making process both domestically[20] and internationally.[21] Independence in military terms also means that states are not to be the victims of an attack or threat of an attack, as defined in Article 2(4) of the UN Charter: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations."[22]

Intervention in a state's affairs undermines their sovereignty by transferring traditional *de jure* or *de facto* government functions and competences to other actors—such as foreign states or non-governmental entities. Article 2(4) of the UN Charter clearly identifies armed intervention as a major factor threatening a state's sovereignty. Military force mainly refers to the use of force or the threat of force by one state against another for purposes other than defending itself.[23]

International Court of Justice and a Secretariat."). The Security Council makes resolutions that are considered binding by international law, whereas the General Assembly mainly issues "recommendations" that generally are not. *See Functions and Powers of the General Assembly*, GENERAL ASSEMBLY OF THE UNITED NATIONS, www.un.org/en/ga/about/background.shtml (last visited Mar. 4, 2012); *Background*, UN SECURITY COUNCIL, www.un.org/Docs/sc/unsc_background.html (last visited Mar. 4, 2012). Furthermore, some states (the United States, the United Kingdom, France, Russian Federation, and the People's Republic of China) within the Security Council have a permanent membership and can effectively veto any resolution aimed against any of their interests. *See Membership in 2012*, UN SECURITY COUNCIL, www.un.org/sc/members.asp (last visited Mar. 4, 2012). This hardly places every state on the same footing.

20. For instance, an independent state will create courts, a police force, and other state institutions without deferring to the authorities of another; so as to say an independent state holds exclusive jurisdiction over both its territory and population.

21. In other words, states will act freely of coercion or deference to other states when engaging in foreign relations as a person of international law.

22. U.N. Charter art. 2, para. 4.

23. The U.N. Charter recognizes the inherent right of every state to defend itself against an aggression. *See* U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the

A more malicious danger to state sovereignty rests within the state itself. As previously mentioned, a state that lacks the ability or renounces its exclusive control of its territory and population creates a power vacuum. This power vacuum is an invitation for predatory forces[24] that thrive under such conditions and further weaken the state.

A weak state's inability or unwillingness to affirm its sovereignty is first and foremost that state's own responsibility. On the other hand, should it remain exclusively within the province of such a state when its action or inaction against predatory actors[25] jeopardizes the national security of other nations?[26] At that point, the question is not anymore whether intervention should take place or not. The relevant question becomes whether the risk of conflict propagation,[27] be it in terms of magnitude or the potential regional character associated with it, is a risk that concerned states are willing to take.

If a concerned state is willing to bear such a risk, it would be faced with the following issues:

1.) What should be the purpose and nature of any counter-measure

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Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.").

24. When states fail to assert an effective control over their territories, other actors will exploit this weakness to their militarily advantage. *See* COUNTERINSURGENCY, *supra* note 13, at 3-20 (explaining how militias often fill the power vacuum in weak states). In other words, effective state sovereignty constitutes a deterrent against foreign aggression making the well know maxim of "*si vis pace, para bellum,*" commonly understood to mean "peace through strength," not only a motto to be worded on plaques but an actual military doctrine.

25. "Predatory actors" are not necessarily foreign and are often, as in the case of Hezbollah, domestic, and the relevant factor, while pondering on intervention by predatory actors, is whether this intervention will use the "hosted" state as a platform for projecting force against other targets. *See, e.g.*, THE TALIBAN AND THE CRISIS OF AFGHANISTAN 70 (Robert D. Crews & Amin Tarzi eds., Harvard University Press 2008) [hereinafter TALIBAN] (identifying the Taliban as a predatory actor, even though not necessarily foreign).

26. The cases of Afghanistan or even Lebanon offer interesting examples of either governmental inability to effectively control its territory in a case of insurgency for the former, or, in the latter case, an outright relinquishment of authority in southern parts of Lebanon to Hezbollah, a foreign controlled terrorist organization. *See generally* JEREMY M. SHARP, CONG. RESEARCH SERV., RL 33566, LEBANON: THE ISRAEL-HAMAS-HEZBOLLAH CONFLICT 1 (2006) (illustrating Hezbollah control in Lebanon); TALIBAN, *supra* note 25 (discussing Taliban control in Afghanistan).

27. Conflict propagation could encompass, for instance, acquiring military equipment that would dramatically bolster the qualitative or quantitative destructive or destabilizing capability of insurgent or terrorist groups.

taken by these concerned states?[28]

2.) How could such counter-measures be implemented in a way that would be both minimally intrusive on the "hosted state's" sovereignty[29] while reinforcing its sovereignty,[30] knowing that any foreign intervention constitutes infringement on the hosted state's sovereignty and territorial integrity?

In order to provide clear answers to these compelling questions, first, the nature of the threat that has infringed on the weak state's sovereignty must be identified. This presents a situation in which two international law principles conflict with one another.[31]

The first principle, territorial integrity, is protected by

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28. A question that is pointless to ask is: whose responsibility is it to take countermeasures? The answer is somewhat self-evident since states that feel that their national security is threatened will most likely act.

29. What is sought here is not the replacement of the "hosted state's" sovereignty by a military intervention, but its restoration after it has been taken away by, or relinquished to predatory actors. *See* COUNTERINSURGENCY, *supra* note 13, at D-12 ("Occupation is not a transfer of sovereignty. It does however grant the occupying power the authority and responsibility to restore and maintain public order and safety. The occupying power must respect, as much as possible, the laws in force in the host nation.").

30. Sovereignty needs to be both reinforced externally, for a state to appear as independent in its relations with other states, and internally, so as to affirm its legitimacy towards its own subjects. The latter case is critical while fighting insurgency since the indigenous population is placed somewhat in the role of an umpire between the insurgents and the government, where the latter two compete for the population's favor. Having a large foreign force controlling the state after a military intervention erodes and ultimately erases state sovereignty, benefiting insurgents. *See, e.g.*, COUNTERINSURGENCY, *supra* note 13, at 6-2 ("Just as insurgency and COIN ["counter insurgency"] are defined by a complex array of factors, training H[ost] N[ation] security forces is also affected by a variety of determinants. These include whether sovereignty in the host nation is being exercised by an indigenous government or by a U.S. or multinational element. The second gives counterinsurgents more freedom of maneuver, but the first is important for legitimate governance, a key goal of any COIN effort. If the host nation is sovereign, the quality of its governance also has an impact. The scale of the effort is another factor; what works in a small country might not work in a large one. . . .A large 'occupying' force or international COIN effort can facilitate success in training H[ost] N[ation] security forces; however, it also complicates the situation."); *see also id.* at 6-36 ("Leaders need decisions on what shortfalls to address first. . . . If the U.S. or another multinational partner or international entity exercises sovereignty, such as during an occupation or regime change, decisions about security force actions can be imposed on a host nation; however, it is always better to take efforts to legitimize the H[ost]N[ation] leaders by including them in decisions.").

31. This case scenario will not discuss the voluntary cooperation between the host state and the intervening state. Such an agreement would circumvent the issue arising from the clash between the two fundamental rights recognized by international law: territorial integrity and sovereignty on one hand, and self-defense on the other.

Article 2(4) of the UN Charter.[32] Territorial integrity forbids any use of force against a state unless that state has previously attacked or is about to do so.[33] The second fundamental principle is self-defense, which is recognized and reaffirmed by Article 51. The tenet that can be derived from these two fundamental principles is that nothing but aggression can justify the use of force in self-defense. However, we suggest a different approach to self-defense. This approach would be one where a state's unwillingness or inability to act [34] would lead to the possible use of force by the threatened state in self-defense.[35] Nations that refuse to comply with this international

32. U.N. Charter art. 2, para. 4.

33. *Id.* The right of self-defense has seen itself extended to cases of anticipatory self-defense in both customary international law and by the U.N. Security Council. The Caroline Affair provides us with the rule of customary international law which states that anticipatory self-defense would be considered legal provided that the use of force be "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation." Letter from Daniel Webster to Mr. Fox (Apr. 24, 1841), *in* 29 British & Foreign State Papers 1129, 1138 (1857). More recently, U.N. Security Council resolution 242 leads us to assume that anticipatory self-defense is legal when a state launches an attack before being itself under an imminent attack since Israel's actions in June 1967 were not condemned by the Security Council. *See* S.C. Res. 242, ¶ 1, U.N. Doc. S/RES/242 (Nov. 22, 1967). If such an action had been illegal, the Security Council would have condemned the attack.

34. Nations have a positive duty to prevent the commission of wrongs by parties located in their territory that would harm other nations. This legal principal is part of U.S. positive law and international law. It was recognized by the Supreme Court in United States v. Arjona, 120 U.S. 479, 484 (1887) ("The law of nations requires every national government to use 'due diligence' to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof."). This principle was further examined in *Corfu Channel*. *See* Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9). In this case, the International Court of Justice announced that a state has an obligation not to allow its territory to be used for acts contrary to the rights of other states. *Id.* at 22 ("Such obligations are based . . . on certain general and well-recognized principles, namely: elementary considerations of humanity . . . and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."). The Court reasoned that Albania breached its duty under international law by not notifying the British Fleet of the presence of mines in the Corfu Channel, and had to provide compensation for the harm done. *Id.* at 23. ("In fact, nothing was attempted by the Albanian authorities to prevent the disaster. These grave omissions involve the international responsibility of Albania."). The rule we can extract is summarized in the following sentence: a state has a legal obligation not to allow its territory to be used for acts contrary to the rights of other states and that any harm resulting from the breach of this duty would result in damages.

35. The U.N. Security Council more recently reaffirmed the self-defense principal in Security Council Resolutions 1214 and 1267, reminding the Taliban of their obligations under international law to suppress terrorism. For

law principle would be seen as committing a wrong against the nation that suffered from that weak nation's inaction. This use of force should not be oriented directly against the "host state" since this would further weaken the weak state but towards the entities that threaten the national security of both the host state and the intervening state. Such action would shift the weak state's duties to the intervening state.

The principle of sovereignty is also "*nuisance-proof*,"[36] meaning that a nuisance arising from a state that allows its territory to be used to harm another state does not provide sufficient grounds to violate the former state's sovereignty. If a state were to violate another's sovereignty acting in response to a nuisance, then it would have violated international law. The presence of a nuisance in this case would not be considered as an affirmative-defense—like self-defense—but only as an "extenuating circumstance."[37]

However, this might not be the case when the harm in question is not merely a consequence of a nuisance but involves a direct threat to the national security of another State. For example, state sovereignty yielded to self-defense after the United States was attacked on September 11, 2001. The United States demanded that the Taliban surrender the terrorists responsible for the attacks, close the terrorist bases which were in operation, and open these bases for inspection.[38] The United

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example, Resolution 1214 and 1267 both state "that the suppression of international terrorism is essential for the maintenance of international peace and security." S.C. Res. 1214, 2, U.N. Doc. S/RES/1214 (Dec. 8, 1998); S.C. Res. 1267, 1, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

36. In *Corfu Channel*, the Court established that acting out of self-protection or self-help does not provide sufficient grounds for a state to infringe on another's sovereignty. Although Albania had breached its duty to the sovereignty of the United Kingdom, the Court condemned actions by the United Kingdom which invaded Albania's territorial sovereignty in response. *Corfu Channel*, 1949 I.C.J. at 35 ("Between independent States, respect for territorial sovereignty is an essential foundation of international relations. The Court recognizes that the Albanian Government's complete failure to carry out its duties after the explosions . . . are extenuating circumstances for the action of the United Kingdom Government. But to ensure respect for international law . . . the action of the British Navy constituted a violation of Albanian sovereignty.").

37. *Corfu Channel*, 1949 I.C.J. at 34.

38. George W. Bush, President of the United States, Address before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11 (Sept. 20, 2001) ("[T]he United States of America makes the following demands on the Taliban . . . . Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist and every person in their support structure to appropriate authorities. Give the United States full access to terrorist training camps, so

States resorted to military action only after the Taliban did not comply with these demands, which were made in light of evidence that there was collusion between the Taliban and Al Qaeda. This use of force is warranted under Article 51 of the UN Charter (self-defense) against both Al Qaeda and the Taliban government,[39] the latter having harbored the former in violation of the Security Council Resolutions. The actions taken by the United States against the Taliban and Al Qaeda were deemed legally compliant with U.N. Security Council Resolutions 1368 and 1378.[40] Therefore, force is authorized against organized non-state actors as well as their state supporters in response to acts, such as terrorist attacks, which amount to a threat to international peace and security.

This raises the question of whether a threatened state is legally authorized to preempt the attacks from terrorist entities and their state supporters.[41] The answer is yes, but certain conditions, as defined by customary and positive international law, must also be taken into account. *Corfu Channel* established that states must police their territory in order to prevent it from being used in a manner contrary to the rights of other states.[42] It also determined that nation states harmed by

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we can make sure they are no longer operating.").

39. On October 7, 2001 the United States sent a letter to the U.N. Security Council stating they had taken actions to prevent and deter future attacks on the United States by Afghanistan. The United States defended its actions with U.N. Charter article 51, which provides every state the inherent right to self-defense. U.N. Security Council, Letter dated Oct. 7, 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001) ("[I]n accordance with the inherent right of individual and collective self-defense, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.").

40. U.N. Security Council Resolution 1368 provides a two-fold approach to the 9/11 terrorist attacks on the United States. First, it condemns the attacks, qualifying them as acts of international terrorism and a threat to international peace. Second, it calls on states to hold accountable those responsible for these acts and their abettors. S.C. Res. 1368, ¶ 3, U.N. Doc. S/RES/1368 (Sept. 12, 2001) ("*Calls* on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and *stresses* that those responsible for aiding, supporting or harboring the perpetrators, organizers and sponsors of these acts will be held accountable.") (emphasis in original); *see also* S.C. Res. 1378, U.N. Doc. S/RES/1378 (Nov. 14, 2001).

41. *See generally* NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS (2010) (discussing the effects of war and preemptive strikes on non-state actors).

42. *See Corfu Channel*, 1949 I.C.J. at 22.

a weak state's unwillingness to protect other states' rights, does not afford the harmed states the right to replace the sovereign state as a self-help measure.[43] Such an action would violate the weak state's sovereignty. We should recall that in *Corfu Channel* the laying of mines did not amount to a threat to international peace; it was merely a nuisance caused by Albania against the United Kingdom, as the latter's national security interests were apparently not at stake.[44]

On the other hand, the inherent right to self-defense can overcome state sovereignty when actions taken by a state or extraterritorial actor constitute a threat to international peace and security.[45] Security Council Resolution 1368, among other Resolutions, establishes that terrorist attacks can constitute a threat to international peace and security, which would authorize the use of force under the self-defense principle.

D. PREEMPTION AND NON-STATE ACTORS

A scenario that involves a terrorist organization in a third state raises the issue of preventive use of force. Specifically, the issue is whether a state is compelled by international law to wait to be stricken first in order to defend itself, or whether it could act *before* and strike *first* in an act of self-defense. International law allows preemptive use of force. There are numerous examples of when preemption was deemed acceptable under certain circumstances, such as the 1967 Six Day War and the Caroline Affair.

This use of force must be in response to a planned attack by the other party, that would be, in the words of Daniel Webster: "overwhelming, leaving no choice of means and no moment for deliberation."[46] The UN Security Council indirectly legitimized Israel's preemptive use of force during the 1967 Six Day War as it was about to be attacked by not condemning its actions as a violation of Article 2(4) of the UN Charter.[47] The right to preempt aggression represents one possible expression of a state's self-defense. This right to preempt aggression is not restricted solely to state-led aggression[48] but has expanded to

43. *See id.* at 35.

44. *See generally id.*

45. *See* S.C. Res. 1368, ¶ 1, U.N. Doc. S/RES/1368 (Sept. 12, 2001) ("*Determined* to combat by all means threats to international peace and security caused by terrorist act.") (emphasis in original).

46. Webster, *supra* note 33, at 1138.

47. U.N. Charter art. 2, para. 4.

48. The U.N. Charter views a prohibition against the use of force

include other actors who would jeopardize the national security of a state or region, rendering the question of who creates such a threat secondary.[49]

E. PREEMPTING TERRORISM PREVENTS A FULL-BLOWN WAR

In the past century, there has been a misperception of terrorism. This stems from entities justifying horrendous acts of violence against civilians by making it seem morally acceptable to those unfamiliar with terrorism; this is done by characterizing the acts as expressions of revolt and remedy against an "unbearable injustice." However, this characterization fails to assess the genuine "root causes" of terrorism.[50]

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undermined if its interpretation of this prohibition solely regarded Member States. *See e.g.*, U.N. Charter art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations."). Does this Article mean that a non-member can resort to force or threaten to use force against the territorial integrity or political independence or any member state? If this prohibition was to be applied only to Member States, terrorist organizations would feel both justified under and unbound by the U.N. Charter since they would not qualify as a Member State.

49. The same reasoning is valid with regard to the U.N. Charter. *Id.* at art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations."). The inherent right of self-defense, as discussed in the above-mentioned Article, does not appear to restrict the right to attacks originating from nation states; it only mentions armed attacks in general.

50. The term "root cause" is widely used to excuse or mitigate a behavior that is, in and of itself, unbearable by removing a portion or all of the author's responsibility for his actions. Two international leaders have emphasized the threat posed by terrorism and the need for a clear line to be drawn that cuts it off from bearable or excusable behavior. Benjamin Netanyahu writes:

> We must fight terror wherever and whenever it appears. We must make all states play by the same rules. . . . If we begin to distinguish between acts of terror, justifying some and repudiating others based on sympathy with this of that cause, we will lose the moral clarity that is so essential for victory.
>
> This clarity is what enabled America and Britain to root out piracy in the nineteenth century. The same clarity enabled the Allies to root out Nazism in the twentieth century. They did not look for the 'root cause' of piracy or the 'root cause' of Nazism . . . because they knew that some acts are evil in and of themselves, and do not deserve any consideration or 'understanding'.

BENJAMIN NETANYAHU, FIGHTING TERRORISM, HOW DEMOCRACIES CAN DEFEAT THE INTERNATIONAL TERRORIST NETWORK xx- xxi (2001).

Similarly, the former Saudi ambassador to the United States wrote quite bluntly that Muslim youths who have been misled, "the terrorists", had to be dealt with in a drastic way. Stating that if this is not done dire consequences

Terrorism hardly occurs as a desperate act of last resort by angry individuals.[51] Such instances are extremely rare because even the smallest act of terrorism requires logistical and material support, which is usually available to organized groups rather than individuals.[52] "Thinking outside the box" is necessary to free ourselves from erroneous preconceptions of what terrorism is and why it is used. Looking at the larger picture, we see that terrorism is a tool of warfare. In other words, terrorism is a war tactic.[53] As utilized in the past, it is often successful for parties waging asymmetrical warfare.[54] The leading employer of this type of protracted warfare is Mao

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would be suffered by those who refuse to act. Prince Bandar bin Sultan bin Abdulaziz Al-Saud, *A Diplomat's Call for War*, SAUDI-US RELATIONS INFORMATION SERVICE, June 6, 2004, *available at* http://www.susris.com/2004/06/06/a-diplomats-call-for-war-prince-bandar-bin-sultan-bin-abdulaziz-al-saud/ ("[I]f we deal [with them] hesitantly, in hope that [the terrorists] are Muslim youths who have been misled, and that the solution [to the crisis] is that we call upon them to follow the path of righteousness, in hope that they will come to their senses – then we will lose this war.").

51. NETANYAHU, *supra* note 50, at 64 ("The idea that terrorism was not merely a random collection of violent acts by desperate individuals but a means of purposeful warfare pursued by states and international organizations was at that time simply too much for many to believe.").

52. COUNTERINSURGENCY, *supra* note 13, at 3-103 ("Terror attacks generally require fewer personnel than guerilla warfare or conventional warfare. . . . Terrorist tactics do not involve mindless destruction nor are they employed randomly. Insurgents choose targets that produce the maximum informational and political effects. Terrorist tactics can be effective for generating popular support and altering the behavior of governments.").

53. *See id.* Terrorism has played an important role in conflicts known as protracted wars. The term "protracted war" belongs mainly to Chinese and South-East Asian 20th century conflicts fought between ill-equipped armies and conventional forces. *See generally id.* at 1-30 ("Protracted conflicts favor insurgents, and no approach makes better use of that asymmetry than the protracted popular war. The Chinese Communists used this approach to conquer China after World War II. The North Vietnamese and Algerians adapted it to fit their respective situations. And some Al Qaeda leaders suggest it in their writing today. This approach is complex; few contemporary insurgent movements apply its full program, although many apply parts of it. It is, therefore, of more than just historical interest. Knowledge of it can be a powerful aid to understanding some insurgent movements.").

54. Insurgency tactics employ different variations of armed force, including terroristic acts, reaping various benefits that ultimately advance their political objectives. *See generally id.* at 1–-28 ("This Approach uses terrorist tactics in urban areas to accomplish the following: Sow disorder. Incite sectarian violence. Weaken the government. Intimidate the population. Kill government and opposition leaders. Fix and intimidate police and military forces, limiting their ability to respond to attacks. Create government repression.").

Zedong.[55] He developed a three step military approach to wage a protracted war.[56] It is interesting to note that terroristic tactics are used in the early stages of war where the main objectives are to psychologically wear down enemy forces and the civilian population.[57] This three step military strategy is not rigid and allows for modifications as insurgents meet new challenges as well as permits actors to shift between the different phases of protracted war. Insurgents may shift from the first step directly to the third one if government reaction and forces are extremely weak. They could also downshift from the third phase of protracted war to the "strategic counteroffensive" to the "strategic defensive," without retrograding to the "strategic stalemate" phase that is characterized by guerilla warfare.[58]

The first step of this military strategy is called the *strategic defensive*[59] phase. During the strategic defensive phase, insurgents understand that governmental forces could quickly and easily dispose of them were they to engage directly with the government in a conventional military manner.[60] Therefore, it is preferable for insurgents to engage governmental authority in non-militaristic forums by leading propaganda and disinformation campaigns or terrorist strikes targeted at delegitimizing the government's authority, while at the same time gaining legitimacy and popular support.[61]

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55. *Id.* at 1-31.

56. *Id.*

57. COUNTERINSURGENCY, *supra* note 13, at 1-32.

58. *Id.* at 1-35.

59. *Id.* at 1-32 ("Phase I, strategic defensive, is a period of latent insurgency that allows time to wear down superior enemy strength while the insurgency gains support and establishes bases. During this phase, insurgent leaders develop the movement into an effective clandestine organization. Insurgents use a variety of subversive techniques to psychologically prepare the populace to resist the government or occupying power. These techniques may include propaganda, demonstrations, boycotts, and sabotage. In addition, movement leaders organize or develop cooperative relationships with legitimate political action groups, youth groups, trade unions, and other front organizations. Doing this develops popular support for later political and military activities. Throughout this phase, the movement leadership—Recruits, organizes and trains cadre members. Infiltrates key government organizations and civilian groups. Establishes cellular intelligence, operations, and support networks. Solicits and obtains funds. Develops sources for external support. Subversive activities are frequently executed in an organized pattern, but major combat is avoided.").

60. *Id.*

61. *See generally id.* ("The primary military activity is terrorist strikes. These are executed to gain popular support, influence recalcitrant individuals, and sap enemy strength.").

The second phase of this strategy, the *strategic stalemate*, is when guerilla warfare becomes more prevalent in military actions.[62] After having substantially weakened the governmental morale and forces, the insurgents find themselves in a situation in which they do not bear the same costs as they did in the first phase. Exposing themselves will not cause a rise in casualties on the insurgent side and will inflict enhanced losses on the governmental side in "hit and run" operations.[63] Insurgents waging guerilla warfare weaken governmental forces while becoming stronger over time. Eventually, once the governmental forces have been weakened enough, the insurgents will be able to enter the third phase, known as the *strategic counteroffensive*.[64] The main characteristic of this type of warfare is that insurgents will now level and possibly surpass the governmental military forces while engaging in conventional warfare tactics.[65] At the same time, the insurgents will replace members in the current governmental authority.[66] It should be noted that insurgents

62. *Id.* at 1-33.

63. *See id.* at 1-33 ("Phase II, strategic stalemate, begins with overt guerilla warfare as the correlation of forces approaches equilibrium. In a rural based insurgency, guerillas normally operate from a relatively secure base area in insurgent-controlled territory. In an urban-based insurgency, guerillas operate clandestinely, using a cellular organization. In the political arena, the movement concentrates on undermining the people's support of the government and further expanding areas of control. Subversive activities can take the form of clandestine radio broadcasts, newspapers, and pamphlets that openly challenge the control and legitimacy of the established authority. As the populace loses faith in the established authority the people may decide to actively resist it. During this phase, a counterstate may begin to emerge to fill gaps in governance that the host-nation (HN) government is unwilling or unable to address. Two recent examples are Moqtada al Sadr's organization in Iraq and Hezbollah in Lebanon. Sadr's Madhi Army provides security and some services in parts of southern Iraq and Baghdad under Sadr's control. (In fact, the Madhi Army created gaps by undermining security and services; then it moved to solve the problem it created). Hezbollah provides essential services and reconstruction assistance for its constituents as well as security. Each is an expression of Shiite identity against governments that are pluralist and relatively weak."). *See generally id.* at 3-103 ("Guerrilla tactics, in contrast, feature hit-and-run attacks by lightly armed groups.").

64. *Id.* at 1-34.

65. *Id. See generally* Hew Strachan, *Strategy in the Twenty-First Century*, *in* THE CHANGING CHARACTER OF WAR 503–23 (Hew Strachan & Sibylle Scheipers eds., 2011).

66. *See* COUNTERINSURGENCY, *supra* note 13, at 1-34 ("Phase III, strategic counteroffensive, occurs as the insurgent organization becomes stronger than the established authority. Insurgent forces transition from guerilla warfare to conventional warfare. Military forces aim to destroy the enemy's military capability. Political actions aim to completely displace all government authorities. If successful, this phase causes the government's collapse or the

will still use terroristic and guerilla techniques during the third phase of the conflict in order to consolidate their gains and continue the weaning down of the governmental forces' physical integrity and morale. The following cases will try to familiarize the reader with different scenarios involving weak states in order to counter the aforementioned threats.

F. ACTUAL SCENARIOS AND THE WEAK STATE SPECTRUM

The Kolwezi case is an example of a weak state dealing with a terrorist organization within its country.[67] In May 1978, the French Foreign Legion conducted an airborne rescue operation in the city of Kolwezi, Zaire (in what is today known as the Democratic Republic of Congo). A paramilitary organization, the Front for the National Liberation of the Congo, captured thousands of European and African hostages. The Zairian despot Mobutu Sese-Seko requested foreign assistance from Belgium, France, and the United States. The French Foreign Legion, with the help of Belgian forces, mounted a rescue operation which involved a large military force that operated on Zairian territory alongside local military forces.[68] The operation succeeded with the liberation of the hostages and with only light military casualties.[69] The local government approached foreign powers for assistance because it lacked the power to enforce its decisions in dealing with such a complicated situation. How should the international community respond if the host nation not only lacks the forces to deal with the insurgents but also does not invite other nations to deal with the insurgents?

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occupying power's withdrawal. Without direct foreign intervention, a strategic offensive takes on the characteristics of a full-scale civil war. As it gains control of portions of the country, the insurgent movement becomes responsible for the population, resources, and territory under its control. To consolidate and preserve its gains, an effective insurgent movement continues the phase I activities listed in paragraph 1-32. In addition it, establishes an effective civil administration. Establishes an effective military organization. Provides balanced social and economic development. Mobilizes the populace to support the insurgent organization. Protects the populace from hostile actions.").

67. *See generally* Gregory Mthembu-Salter, Natural Resource Governance, Boom and Bust: The Case of Kolwezi in the DRC, SAIIA Occasional Paper No 35, 10 (June 2009), *available at* http://www.saiia.org.za/images/stories/pubs/occasional_papers/saia_sop_35_mtehmbu_salter_20090626_en.pdf.

68. *Id.*

69. General Gausseres, *Lessons Learned from Kolwezi – May 1978*, 12 CAHIERS DU RETEX, 37 SUPPLEMENT A OBJECTIF DOCTRINE 32, *available at* http://www.theatrum-belli.com/media/02/02/1252011299.pdf.

A similar case that involved hostages was the Zarka Affair. Several planes were hijacked by members of the Palestinian Liberation Organization ("PLO"), a terrorist group, and taken to Zarka, Jordan.[70] The PLO was demanding more autonomy and King Hussein was losing power. Jordan was on the brink of civil war and on the verge of becoming a failed state. However, the Zarka Affair led King Hussein to declare martial law, which brought on "Black September"—where Palestinian militias fought against the Royal Jordanian Land Force.[71] King Hussein regained control and political power over his entire kingdom, driving the PLO out of Jordan.

What can we learn from these examples? Our basic argument, in light of what has been discussed until now, is that there needs to be an accommodation between sovereignty and the scope of military response. The more a government's ability to control its territory declines, the more intervening forces will have to intrude upon that government's sovereignty. With sovereignty comes government responsibility.

Furthermore, a state can be weak in certain areas and strong in others. For example, Pakistan asserts full control in most of its territory but fails to assert its control in Waziristan. Military actions undertaken in Karachi would be held as unjustified actions, but other actions undertaken in tribal areas where Al-Qaeda operate freely would be a different matter. There are areas in Africa where a government's ability to enforce their authority is extremely limited. Due to the

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70. After the hijacking of three commercial flights above Europe by a Palestinian organization, King Hussein was forced to choose between civil war and becoming a puppet king while true power was in the hands of Yasser Arafat and the PLO. On September 16, 1970, the Jordanian army attacked the Palestinian militias and civil war rampaged through large parts of the country. *See* ADNAN ABU-ODEH, JORDANIANS, PALESTINIANS, & THE HASHEMITE KINGDOM IN THE MIDDLE EAST PEACE PROCESS 180 (1999). The war that involved several regional forces changed the balance of power in the region and allowed Jordan to regain its status as a sovereign nation. *See generally* CLINTON, JORDAN'S PALESTINIAN CHALLENGE 1948-1983: A POLITICAL HISTORY (1984). The Jordanian affair is a classic case of a weak state. King Hussein made his choice to rid Jordan of the Palestinian militias to protect its sovereignty even though it was clear to him that such an act might result in the collapse of his government. His move was not only challenged by the PLO but also by some Arab states and Syria even launched an attack to assist the Palestinians. Hussein might have lost his regime if not for U.S. and Israeli threats to interfere on behalf of the King. *See generally* URIEL DANN, KING HUSSEIN'S STRATEGY OF SURVIVAL (1992).

71. *See Jordanian Removal of the PLO*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/military/world/war/jordan-civil.htm, (last modified Nov. 7, 2011).

government's lack of control, the state's status could be understood as being a failed state, whereas in other areas the state might be seen as functional and sovereign.

We conclude that two main factors must be considered in assessing a state's ability and willingness to assert control. First, a state that is attempting to retake an area, even if it is conducting combat operations to achieve this goal, has more sovereignty than a state that reached a status quo of refraining from entering certain parts of its territory. An area where the government is not active could be an indicator of a state's weakness. Second, a state's assertion of power shows a sense of strength. Therefore, intervening nations should take minimal action in the weak state. This has fewer negative effects on the host state's sovereignty. However, the more inaction displayed by the weak state, the more justification there is to use more aggressive tools, thereby infringing on the weak state's sovereignty.

Another unanswered question is whether terrorism is a phenomenon that poses such a danger as to allow infringement on a state's sovereignty. Does the right of self-defense include acting in a state that does not support the terrorists but that lacks the power to stop them?

G. TERRORISM AND CONVENTIONAL WARFARE: ARE THEY DIFFERENT OR THE SAME?

After the Second World War, and particularly after the Cold War, it seemed that the era of conventional war ended and a new era of wars and low intensity conflicts began.[72] Rather than focusing on huge battlefields where armor, infantry, and artillery operated in conjunction with the air force, armies had to start focusing on guerilla warfare and battlefields located in the midst of civilian populations.[73]

Irregular forces often use terrorism alongside guerilla warfare or even semi-conventional warfare. Such tactics aim mainly at affecting public perception rather than the military victory. The logic behind this asymmetric approach is that the weaker side will be more determined than the stronger side

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72. There are many terms that try to deal with this new type of warfare. We use the term "low-intensity conflict" because of its popularity. However, other terms exist. *See generally* MARTIN VAN CREVELD, THE TRANSFORMATION OF WAR (1991) (discussing low-intensity conflicts from the perspective of military history).

73. *Id.*

because the latter is more prone to succumb to internal political pressures in the belief that big powers do not have the tools to successfully deal with this kind of warfare.[74] However, it is important to analyze the legal ramifications of the opinions by military experts who claim that nations can employ several methods to win an asymmetrical war.[75]

The core issue lies in a point that has not yet earned the attention of jurists. There is a natural inclination to categorize terrorism and guerilla warfare as either a unique phenomenon or purely an issue of criminal law.[76] This article introduces another approach that has been suggested by military historians, which understands these new wars as a position on a scale beginning with terrorism[77] and insurgency and ending with conventional war.

Yagil Henkin describes how the emergence of insurgency and terrorism led many scholars to assume that the basic terminology and paradigms of war were obsolete. The old war that was described by Carl Von Clausewitz, they said,[78] was a completely different phenomenon than the new war. However, Henkin convincingly argues that the two are in fact closely related.[79]

In the case of the first Chechen war, Henkin illustrates that the terms conventional war and terrorism were

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74. *See generally* Robert Cassidy, *Why Great Powers Fight Small Wars Badly*, 82 MILITARY REV. 42 (2002); GIL MEROM, HOW DEMOCRACIES LOSE SMALL WARS: STATE, SOCIETY, AND THE FAILURE OF FRANCE IN ALGERIA, ISRAEL IN LEBANON, AND THE UNITED STATES IN VIETNAM (2003).

75. Yaakov Amidror, *Wining Counterinsurgency War: The Israeli Experience*, 2 STRATEGIC PERSP. 1 (2010), *available at* www.jcpa.org/text/Amidror-perspectives-2.pdf.

76. *See generally* Amitai Etzioni, *Terrorists: Neither Soldiers Nor Criminals*, 89 MILITARY REV. 108 (2009).

77. We are avoiding the difficult task of a legal definition of terrorism and using a military definition. For a legal debate, see generally Ninian Stephen, *Toward a Definition of Terrorism, in* TERRORISM AND JUSTICE: MORAL ARGUMENT IN A THREATENED WORLD 1 (Tony Coady & Michael O'Keefe eds., 2002); Cyrille Begorre-Bret, *The Definition of Terrorism and the Challenge of Relativism*, 27 CARDOZO L. REV. 1987 (2006).

78. *See generally* CARL VON CLAUSEWITZ, ON WAR (Michael Howard & Peter Paret eds., 1976). On the influence of Clausewitz, *see generally* CHRISTOPHER BASSFORD, CLAUSEWITZ IN ENGLISH: THE RECEPTION OF CLAUSEWITZ IN BRITAIN AND AMERICA, 1815-1945 (1994); Marvin Van Creveld, *What is Wrong with Clausewitz?*, *in* THE CLAUSEWITZIAN DICTUM AND THE FUTURE OF WESTERN MILITARY STRATEGY 7–23 (Gert de Nooy ed., 1997). Martin Van Creveld, *The Clausewitzian Universe and the Law of War,* 26 J. OF CONTEMP. HIST. 403–29 (1991).

79. YAGIL HENKIN, EITHER WE WIN OR WE PERISH!: THE HISTORY OF THE FIRST CHECHEN WAR 1994–1996, 13–15, 515–43 (2007) (Hebrew).

interchangeable in that instance and that, in fact, the war began as a conventional one.[80] The Chechens' central claim was that using conventional warfare was a demonstration of their status as an independent sovereign nation.[81] At the same time, the Russians tried to portray them as terrorists and insurgents, while the Chechens made it a point to conduct themselves as an army.[82] This was not only for military strategic reasons but also for geo-political reasons.[83] However, the use of terrorism was introduced when Russian military pressure proved successful and terrorism was seen as an effective way to demoralize the Russian public opinion of the Russian government.[84] The Chechens, led by high-ranking members of the Chechen army, orchestrated massive terrorist operations that were carried out in other republics of the Russian Federation and involved taking hundreds, and sometimes thousands of hostages with clear threats of unparalleled blood baths.

Henkin shows that the so-called age of new wars is nothing new; the "olden-days" of conventional war paradigms are rather contemporary and significant.[85] A weak force may use terrorism and insurgency to reach a point where it will be in a position to apply conventional tactics, somewhat resembling Mao Zedong's three stages theory.[86] Or, a war may start as a conventional war, degrade into terrorism, and then spring back into conventional warfare.

Discussing a spectrum that begins with unconventional warfare and ends with conventional warfare seems appropriate. This leads to the next part of the article, which frames a new proposal for the identification of such actions as a form of war waged by the weak party, and calls for countermeasures of a similar (military) nature by the stronger one. Furthermore, this article argues that this military phenomenon raises the right of self-defense but that that right and specific actions should be exercised gradually and with caution.

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80. *See id.* at 198–215.
81. *Id.*
82. *Id.*
83. *See id.* at 253–350 (describing Chechen tactics and strategy).
84. *See id.* at 353–362, 397–415.
85. See generally, HENKIN supra note 79.
86. *See generally* MAO TSE-ZEDONG, ON GUERILLA WARFARE (Samuel B. Griffith II trans., 1961) (2000).

H. THE RIGHT TO SELF-DEFENSE

The basic rule that governs the use of force is stated in Article 2(4) of the UN charter: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[87] However the charter also allows for an exception in the case of self-defense in Article 51:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[88]

The problematic aspects of this rule in an era of international terrorism are clear[89] in our scenario which contemplates terrorist organizations acting from the territory of a weak state. There are several sources that can determine if the right of self-defense can be asserted here.

The common interpretation of Article 2(4) is that assistance to a rebel organization violates the prohibition on interfering in another country's affairs and is an action against the territorial integrity or political independence of that other country.[90] This prohibition was addressed in the Declaration on Principles of International Law and Friendly Relations, which banned not only direct assistance to rebel forces but also actions that would be carried out from its territory:

> Every State has the duty to refrain from organizing, instigating, assisting or participating in arts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such arts, when the acts referred to in the present paragraph involve a threat or use of force.[91]

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87. U.N. Charter art. 2, para. 4.

88. U.N. Charter art. 51.

89. *See* A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change, 59th Sess., ¶¶ 29–30, U.N. Doc. A/59/565 (Dec. 2, 2004), *available at* www.un.org/secureworld/report.pdf.

90. *See* MALCOLM N. SHAW, INTERNATIONAL LAW, 1042–44 (5th ed. 2003); Christopher Joyner, *The United States Action in Granada: Reflections on the Lawfulness of Invasion,* 78 AM. J. INT'L L. 131, 138 (1984).

91. *See* Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the

We find a similar notion in the United Nation General Assembly's resolution that defines "aggression."[92] The International Court of Justice ("ICJ") defined assistance to insurgents as "directing or authorizing" action, setting a very high standard for defining assistance.[93] The International Criminal Tribunal for the Former Yugoslavia ("ICTY") determined that this bar was too high and rejected this definition.[94] The 9/11 attacks strengthened the understanding that an attack carried out by an organization that is not a state can fall under the definition of an armed attack in Article 51.[95] This lent legitimacy to U.S. operations in Afghanistan[96] and is also relevant in our case.[97]

Another important element that suggests the right to self-defense is derived from Henkin's arguments which were mentioned earlier.[98] The fact that terrorism is a phase in a process that ends in conventional war leads to the question of

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Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028, at 121 (Oct. 24, 1970).

92. *See* Definition of Aggression, G.A. Res. 3314, U.N. GAOR, 29th Sess., Annex, U.N. Doc. A/Res/29/3314 (Dec. 14, 1974).

93. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27); *see also* Anthony D'Amato, *Modifying U.S. Acceptance of the Compulsory Jurisdiction of the World Court*, 79 AM. J. INT'L L. 385 (1985); Thomas Franck, *Some Observations on the ICJ's Procedural and Substantive Innovations* 81 AM. J. INT'L L. 116 (1987). This issue was reiterated in the ICJ case of Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶¶ 162–64 (Dec. 19); Louis Savadogo, Note, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda): The Court's Provisional Measures Order of 1 July 2000*, 72 BRIT. Y.B. OF INT'L L. 357–412 (2002).

94. *See* Prosecutor v. Tadic, Case No. IT-94-1-A, App. Ch., Judgment, ¶ 137 (Int'l Crim. Trib. for the Former Yugoslavia 15 July, 1999).

95. *See* S.C. Res. 1373, U.N. Doc S/RES/1373 (Sept. 28, 2001).

96. *See* Ian Johnstone, *The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-terrorism*, 43 COLUM. J. TRANSNAT'L L. 337, 366 (2005).

97. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9). The ICJ advisory opinion on the separation wall seemed to determine that Israel does not have the right of self-defense when the attacks originate in territory in their control and when they are carried out by organizations and not a state. Such a ruling seems to contradict the Nicaragua ruling and give immunity to terrorists and countries that assist them. It was suggested to interpret this ruling to refer to humanitarian legal aspects of an occupied population. *See, e.g.*, Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, 99 AM. J. INT'L L. 62 (2005); Mary Ellen O'Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror?*, 43 COLUM. J. TRANSNAT'L L. 435 (2005); Johnstone, *supra* note 96, at 374–75.

98. *See generally* Henkin, *supra* note 79.

anticipatory self-defense. In this case, the actual hostilities began when the terrorist organization started to attack. In light of Henkin's claims, we see this as a justification for reactions that are military in nature rather than mere law enforcement. The problems of anticipatory self-defense are clear,[99] the language of Article 51 does not seem to recognize such a right.[100] However, there are opinions that do recognize it as a customary issue.[101] Since terrorism is a stepping stone to conventional war, there is a justification for use of force in cases where actual terrorist attacks take place.

Another claim that supports the right of self-defense stems from opinions that support a state's use of force to protect its civilians that were attacked on foreign soil. Such actions—like the Israeli operation to free hostages that were taken to Entebbe—are justified under section 51,[102] or under customary right, which views life threatening danger to civilians as a humanitarian issue.[103] In cases like Entebbe, the use of proportional force is a last resort and there is a legitimate intention not to occupy.[104] In light of the global nature of terrorism, and the continuing attacks on civilian targets like in the Jihad attacks in London, New York, and Africa, this would support actions taken in a weak state scenario.

The final basis for the claim of self-defense in the weak state scenario is that international terrorism calls for re-conceptualizing traditional definitions. So much was suggested in the Dublin Convention prohibiting cluster ammunition: "*Resolved* also that armed groups distinct from the armed forces of a State shall not, under any circumstances, be

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99. *See* Myres McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597 (1963); *see also* THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 98 (2002); YORAM DINSTEIN, WAR, AGGRESSION AND SELF DEFENCE 172 (3d ed. 2001).

100. *Compare* U.N. Charter art. 51 *with* McDougal, *supra* note 99 *and* FRANCK, *supra* note 99, *and* DINSTEIN, *supra* note 99.

101. *See* McDougal, *supra* note 99, at 597–98; *see also* Leo Van den hole, *Anticipatory Self-Defence Under International Law,* 19 AM. U. INT'L L. REV. 69 (2003); Timothy Kearley, *Raising the Caroline,* 17 WIS. INT'L L.J. 325 (1999); Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law,* 16 BROOK. J. INT'L L. 493 (1990).

102. *See* Mitchell Knisbacher, *The Entebbe Operation: A Legal Analysis of Israel's Rescue Action*, 12 J. INT'L L. & ECON. 57, 57 (1977–78). This option is relevant in light of the cooperation between the government of Uganda and the terrorists.

103. *See* William V. O'Brien, *Reprisals, Deterrence and Self-Defense in Counterterror Operations*, 30 VA. J. INT'L L. 421, 443–44 (1990).

104. *Cf.* Richard Lillich, *Forcible Self-Help by States to Protect Human Rights,* 52 IOWA L. REV. 325, 342, 348–50 (1967).

permitted to engage in any activity prohibited to a State Party to this Convention."[105] The idea that conventions will refer to non-state actors proves beyond any shadow of a doubt that international jurists are acknowledging the changing reality.[106] We also see this in other areas of international law:

> [T]he close relationship between the law of occupation and the law of international armed conflict seems to preclude classifying hostilities between an occupant and guerrilla forces as a non-international armed conflict. Hence, applying the law of war to a conflict between an occupant and guerrilla forces requires the conceptualization of such conflict as an international armed conflict. This requires stretching the customary definition of an international armed conflict beyond an inter-state conflict, as well as widening the customary definition of combatants in international armed conflict.[107]

To summarize, sovereignty offers some protections, but also duties. A weak state often fails to live up to the obligations that come from its sovereign status. In light of the fact that terrorism represents a stepping stone on the road to conventional warfare, we claim that this danger is intrinsically a justification to infringe of the sovereignty of the host state. However, since the weak state does not support the terrorist organization but rather fails to act against it, the infringement on its sovereign status should be limited to tactics that have the least negative effects on sovereignty while at the same time remain militarily effective. The issue of proportionality that is at the core of the right to self-defense[108] is a major challenge in the weak state scenario.

The goals of tactics are to militarily inflict damage to the terrorist organization. If those measures are not sufficient to destroy the organization, as they very well may not be, then the goal is to force the weak state regime to a decision: either take back control from the terrorist group (like King Hussein in

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105. Convention on Cluster Munitions, Introduction, May 30, 2008, 48 I.L.M. 357.

106. An important field that discusses this change is the definitions of combatants. *See, e.g.*, EMILY CRAWFORD, THE TREATMENT OF COMBATANTS AND INSURGENTS UNDER THE LAW OF ARMED CONFLICT (2010); ANICÉE VAN ENGELAND, CIVILIAN OR COMBATANT?: A CHALLENGE FOR THE 21ST CENTURY (2011).

107. Ariel Zemach, *Taking War Seriously: Applying The Law Of War To Hostilities Within An Occupied Territory*, 38 GEO. WASH. INT'L L. REV. 645, 660 (2006).

108. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 94 (June 27); OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 152–55 (1991); Rogoff & Collins, *supra* note 101, at 509–10; Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 403 (1993); Kearley, *supra* note 101, at 368.

1970) or allow an intervening force to deal with the terrorist threat (like the Kolwezi affair). However, utilizing tactics that serve the proper equilibrium states seek, between the weak state sovereignty and the war on terror, is the ultimate goal.

I. TACTICAL MEASURES FOR A WEAK STATE SCENARIO

a. Non-Kinetic warfare

Non-kinetic warfare is a term that has been introduced recently due to the growing presence of electronics in modern life. By using electronic warfare, an enemy can attack intangible targets in cyberspace—like websites of banks, governments, and the media—and electronic infrastructure that will directly affect everyday life, like computer systems that control electric or water supplies.[109] Non-kinetic warfare has been used, presumably, by state players that were trying to prove their up and coming roles in future battlefields, as was claimed to be the case when Russia allegedly launched an organized campaign to cripple the Georgian internet system.[110] These attacks targeted government websites and banks causing them to shutdown which simultaneously cut major sources of information and demoralized the public.[111]

Non-kinetic warfare allows an entity to interfere enormously with enemy actions with minimal risk.[112] A major part of it is information warfare in cyberspace.[113] Russia and

109. For an analysis on the possibilities of this kind of warfare, see DOROTHY E. DENNING, INFORMATION WARFARE AND SECURITY (1999); *see also* U.S. DEP'T OF DEF. ANN. REP. TO CONG.: MILITARY POWER OF THE PEOPLE'S REPUBLIC OF CHINA 21–22 (2007) [hereinafter DEP'T OF DEF. CHINA REPORT] (discussing China's efforts in information warfare); Charles W. Williamson III, *Carpet Bombing in Cyberspace*, ARMED FORCES J. (last visited Mar. 26, 2012), http://www.armedforcesjournal.com/2008/05/3375884 (arguing that America needs to improve its military capabilities in cyberspace); Dorothy Denning, *Cyberwarriors: Activists and Terrorists Turn to Cyberspace*, 23 HARV. INT'L REV. 70, 70–75 (2001) (describing how terrorists conduct internet attacks).

110. John Markoff, *Before the Gunfire, Cyberattacks*, N.Y. TIMES (Aug. 13, 2008), www.nytimes.com/2008/08/13/technology/13cyber.html?em.

111. *Id.*

112. There are several methods that are implemented in this arena, the basic one is denial-of-service attack ("DoS attack") where a system is made unavailable by various actions that force a system to use all it resources such as bandwidth. Another form of attack is a distributed denial-of-service ("DdoS") attack, the attacker takes advantage of security vulnerabilities and takes over computers, using them to send huge amounts of data. Another method is using software that allows an external user to infiltrate a system and gather information to disrupt its usual use. *See* Denning *Cyberwarriors*, *supra* note 109, at 73–74.

113. For a discussion on the definition of cyber warfare, see Arie J. Schaap,

China provide us with several examples of this kind of warfare; according to reports they maintain an active concentrated effort to develop their abilities in this arena and perhaps have even used them on some occasions.[114]

While Article 51 of the UN Charter allows the use of force in self-defense, it does not clarify what constitutes force.[115] It is hard to say if non-kinetic warfare and cyber-warfare will be seen as acts of aggression but what makes them specifically relevant to the weak state scenario is their unique result.[116] Use of these instruments will not necessarily result in fatalities and will not have the same effects on sovereignty, chiefly because of their relatively low-intensity effects. The potential of limiting collateral damage makes it the primary tool in our scenario.

This issue raises several questions primarily because non-kinetic warfare is a new method and its ramifications are not clear.[117] There are also questions because of the unclear status of dual character targets—targets that serve both military and civilian goals—and the answers to these questions are relevant to the other military options suggested here. While this is an issue relevant to conventional warfare and to the other tactics discussed in this article, it has special significance in the realm of non-kinetic warfare where computer systems serve many different functions.[118] In addition to the potential danger of

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Cyber Warfare Operations: Development and Use Under International Law, 64 A.F. L. REV. 121, 126–28 (2009).

114. *See id.* at 132–33*; see also* DEP'T OF DEF. CHINA REPORT, *supra* note 109, at 21–22.

115. U.N. Charter art. 51.

116. Schaap, *supra* note 113, at 143 (suggesting that cyber warfare is not necessarily a use of force, drawing on the U-2 affair of 1960 where the UN did not view the reconnaissance plane mission over Soviet territory as an act of aggression). However, the logic in that case was that an act of information gathering does not reach the level required to be considered of use of force. In the scenario discussed in this article we are not dealing with mere espionage but a show of force. For a detailed discussion on defining armed attacks in cyber space, see Graham H. Todd, *Armed Attack in Cyberspace: Deterring Asymmetric Warfare with an Asymmetric Definition*, 64 A.F. L. REV. 65 (2009).

117. For example, measuring the collateral damage of non-kinetic attacks can be very difficult. *See* Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict and the Struggle for Moral High Ground*, 56 A.F. L. REV. 1, 96 (2005); Schaap, *supra* note 113, at 158–60.

118. For example, during the NATO operation in Kosovo a T.V. station was bombarded. This was justified as an action aimed to damage the morality of the Serbs. *See* Reynolds, *supra* note 117, at 83–84. Amnesty International called it a war crime—deeming it an action targeting a civilian target with a weak link to military operations. *Id.* at 83. On the other hand, some see media

collateral damage, there is a serious possibility of an "overspill" into the host country; where, although the host country is not a neutral party because of its failure to act against the predatory player, it is clear that the host country's ability to stop a cyber attack is limited.[119] When actions of the intervening force are targeting more than the personal computer of terrorists and could possibly cause damage to a larger information infrastructure of the host state, what is the justification for such an action? We suggest that the justification for taking action is the inability of the host country to stop the wider operations of the terrorist organization. Even though we will not demand such a level of responsibility from a "strong" state, the inability of the weak state to act against more serious aspects of the terrorist endeavor justify action using cyber warfare. In other words, cyber terrorism alone is not a reason to infringe on third party's sovereignty; it is only when the third party disregards the duties incumbent to a sovereign state to the level that justifies self-defense, then and only then, is causing inadvertent damage to its computer systems a justifiable action.

b. Blockade

A blockade is an action that prevents the free passing of goods to a specified area.[120] It has been used from the dawn of warfare and has been implemented repeatedly in the Twentieth Century.[121] It draws its effectiveness both from its effects on the enemy's supply routes and on the enemy's civilian population.

Although such action has its origin in the early days of international law, its legal ramifications are not clear. A blockade is an act of aggression—that much has been clearly stated by the UN general assembly.[122] However, there are

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as a legitimate target. *Id.* at 83–84. On the general issue of terrorist organizations and free expression, see Laura K. Donohue, *Terrorist Speech and the Future of Free Expression*, 27 CARDOZO L. REV. 233 (2005).

119. *See* Jeffrey T.G. Kelsey, *Hacking into International Humanitarian Law: The Principles of Distinction and Neutrality in the Age of Cyber Warfare*, 106 MICH. L. REV. 1427, 1444 (2008); Davis Brown, *A Proposal for an International Convention to Regulate the Use of Information Systems in Armed Conflict*, 47 HARV. INT'L L.J. 179, 210 (2006).

120. *See* AVI SHLAIM, THE UNITED STATES AND THE BERLIN BLOCKADE, 1948-1949: A STUDY IN CRISIS DECISION-MAKING 35 (1983).

121. *See id.* at 11; John Norman, *MacArthur's Blockade Proposals Against Red China*, 26 PAC. HIST. REV. 161, 161 (1957). In 1967, it was seen as one of the factors that resulted in the Six Day War. *See* MICHAEL B. OREN, SIX DAYS OF WAR: JUNE 1967 AND THE MAKING OF THE MODERN MIDDLE EAST 22 (2002).

122. G.A. Res. 3314, *supra* note 92, art. 3(c); s*ee also* McDougal, *supra* note

opinions that a blockade does not necessarily constitute an act of war, and other opinions hold that it does.[123]

In our scenario, we are dealing with a situation that involves the intervening force blockading an area in order to prevent the passing of material. This action is done by definition at the expense of the host state. The blockade in and of itself does not target directly the host state (i.e. bombing raids) but affects it indirectly by halting ships and planes—reducing or even effectively stopping the flow of material and technology that could have a legitimate civilian purpose.

It seems that such an action is justifiable when we analyze it from the point of view of stopping material that supports terrorist actions. After the 9/11 attacks, the Security Council adopted resolution 1373 that dealt with the duty to stop the movement of terrorists by "effective border controls."[124]

By comparing this situation to that of boarding ships in the high seas, we can learn several things. First, in the 1982 UN Convention on the Law of the Sea[125] and in other conventions, the importance of free travel was made clear:

> There can be no doubt that, in certain circumstances, States may lawfully intercept foreign civil aircraft over the high seas without the consent of its state of registry. The U.N. Security Council in its resolutions has effectively rendered international terrorists *hostes humanis generis*, thereby creating a virtual obligation for every State to cooperate in the war on terror. International law concerning piracy, hijacking of civil aircraft, as well as Stateless aircraft, provides additional grounds for the lawful interception of civil aircraft over the high seas. To make the interception lawful, the intercepting State must have reasonable grounds for suspecting that the particular aircraft is engaged in a prohibited activity.
>
> International law also provides reasonably clear standards on how these interceptions may be carried out. The intercepting aircraft must exercise "due regard" for the safety of the intercepted civil aircraft and employ force only as a last resort. Although military aircraft are not bound by the Rules of the Air and other safety-related standards adopted by the ICAO, including standards governing the interception of civil aircraft, they should to the maximum extent possible act in accordance with them. If the ICAO standards are followed, they will shield a State from allegations that the interception itself was incompatible with the principle of "due regard.[126]

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99 (discussing blockades further in the context of the Cuban Missile Crisis); Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546, 553–63 (1963).

123. *See* Pitman B. Potter, *Pacific Blockade or War?*, 47 AM. J. INT'L L. 273, 273–74 (1953).

124. S.C. Res. 1373, ¶ 2(g), U.N. Doc. S/RES/1373 (Sept. 28, 2001).

125. United Nations Convention on the Law of the Sea arts. 17, 21, 23, Dec. 10, 1982, 1833 U.N.T.S. 397.

126. *See* Andrew S. Williams, *The Interception of Civil Aircraft over the*

A blockade will not necessarily take place on the high seas; it may be undertaken in the territorial waters of the host state if it is tactically the most effective method.[127] But, as with the high seas debate where there is a long tradition in international law of protecting the right of transit, that has not prevented mechanisms from being created that allow boarding vessels in light of the post 9/11 reality. Therefore, a weak state scenario constitutes ample justification for boarding ships that are suspected to have terrorist connections notwithstanding the infringement of the host state sovereignty.

However, what are the limits on the use of this tactic? What limits should the intervening force operate within? There is no doubt that this is a tool that has significant potential to affect the civilian population; it is difficult to create a blockade that will not impose civilian difficulties with regard to access to food and water. However, such a direct action is prohibited under Article 54 in Protocol I.[128] Nevertheless, there are limits to this duty, as demonstrated by Article 23 of the Fourth Geneva Convention or by Article 70 of the First Protocol Additional to the Geneva Conventions of 1977. The conventions demand transfer of food, medication, clothing, bedding, means of shelter, and "other supplies essential to the survival of the civilian population."[129]

What types of restrictions would counter the threat and reinforce sovereignty? This issue was dealt with in a case brought before the Israeli Supreme Court, which held that there is a duty to supply the civilians in Gaza a minimum of humanitarian goods.[130] In the opinion of Chief Justice Beinicsh,

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High Seas in the Global War on Terror, 59 A.F. L. REV. 73, 151 (2007).

127. There may be tactical and political implications in conducting a blockade within territorial waters. From a tactical point of view, the closer the ship to the shore/port, the less reaction time the blockading force has to stop it, and the less vulnerable are the blockading ships to fire from the shore. From the legal point of view, boarding or stopping a ship inside the territorial waters of another nation not only infringes its sovereignty, but may either invite retaliation on the part of that nation, or cause an international incident. In one such example, during Britain's 1966–1975 blockade of Mozambique's Beira port to prevent oil shipments to the rebel colony of Rhodesia, such legal considerations caused Britain to enforce the blockade only outside of Mozambique's territorial waters. *See* Richard Mobley, *The Beira Patrol: Britain's Broken Blockade Against Rhodesia*, 55 NAVAL WAR C. REV. 63, 63–84 (2002).

128. Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 54, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

129. Protocol I, *supra* note 128, at art. 69.

130. HCJ 9132/07 Gaber Al-Bassiouni v. Prime Minister [Jan. 30, 2008] (unpublished) (Isr.),

the Israeli government fulfilled its humanitarian duties toward the civilian populations by supplying diesel fuel that was used in the Gaza power plant to maintain basic humanitarian needs.[131] Avi Bell argues that this duty is limited to a basic list of commodities that are needed and that there is no source in conventions or customary law that requires more than the basic commodities.[132] However, there were claims that the Gaza situation was in effect an act of occupation and should be classified as such; as a result, the Gaza situation would generate all the duties that an occupying force has towards civilians in occupied territory.[133]

Another justification for actions taken against terrorist groups which have an effect on the civilian population is that in the larger scheme, moderate actions will lead to less violence among all parties involved. This justification was suggested regarding the security fence that was built by Israel.[134]

In a weak state scenario, the Israeli Supreme Court's approach should be adopted.[135] While a blockade has less of an effect on the sovereignty of the host nation, it still demands caution as there are ramifications of a blockade and other kinds of embargos on the civilian population. On this point, we introduce a different military option that has a more direct impact on sovereignty, targeted killing. While the aim of a direct attack is to kill terrorists on the host state's soil, we

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www.elyon1.court.gov.il/files_eng/07/320/091/n25/07091320.n25.pdf; *see also* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 197–99 (Int'l Comm. of the Red Cross ed., vol. 1 2005).

131. HCJ 9132/07 Gaber Al-Bassiouni v. Prime Minister, ¶¶15, 17.

132. *See* Reid Weiner & Avi Bell, *The Gaza War of 2009: Applying International Humanitarian Law to Israel and Hamas*, 11 SAN DIEGO INT'L L.J. 5, 22–26 (2009).

133. *See* Mustafa Mari, *The Israeli Disengagement from the Gaza Strip: An End of the Occupation?*, 8 Y.B. OF INT'L HUM. L. 356, 366–68 (2005) (stating that Israel has duties it is required to fulfill towards the civilians of Gaza). *See generally* Yuval Shany, *Faraway, So Close: The Legal Status of Gaza After Israel's Disengagement*, 8 Y.B. OF INT'L HUM. L. 369 (2005); Nicholas Stephanopoulos, *Israel's Legal Obligations to Gaza after the Pullout*, 31 YALE INT'L L.J. 524 (2006).

134. Barry A. Feinstein & Justus Reid Weiner, *Israel's Security Barrier: An International Comparative Analysis and Legal Evaluation*, 37 GEO. WASH. INT'L L. REV. 309, 357 (2005) (noting the negative consequences the barrier has on the Palestinians, death however is not a negative consequence mentioned); *see also* Adam Winkler, *Just Sanctions*, 21 HUM. RTS. Q. 133, 153–55 (1999) (noting the justifications for economic sanctions).

135. HCJ 9132/07 Gaber Al-Bassiouni v. Prime Minister [Jan. 30, 2008] (unpublished) (Isr.), www.elyon1.court.gov.il/files_eng/07/320/091/n25/07091320.n25.pdf.

suggest that a direct attack's localized effect makes it a justified part of the military arsenal in a weak state scenario.

c. Targeted Killing

Information is gathered concerning possible future attacks as part of the war on terror. One military option available in such a case is targeted killing.[136] "Targeted killing" is loosely defined as "[when] lethal force is intentionally and deliberately used, with a degree of pre-meditation, against an individual or individuals specifically identified in advance by the perpetrator. [With] the specific goal of the operation [being to use] lethal force."[137] This tactic has several useful outcomes, such as the intercepting terrorists, rendering the finding of replacement terrorists more difficult, and diverting the terrorists' resources and energy towards spending more time and effort on survival.[138] Also, placing terrorist organizations in a defensive posture disrupts their recruitment of future terrorists.[139]

The legality of extrajudicial killing by a state has been discussed extensively in the recent past. The fact that assassination is not a legal option to provide for the public safety gave way to a vibrant discussion on the legality of targeted killings.[140] Several scholars have suggested that there

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136. *See* Emanuel Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-defense: Human Rights versus the State's Duty to Protect its Citizens*, 15 TEMP. INT'L & COMP. L.J. 195, 224–26 (2001); *see also* Gal Luft, *The Logic of Israel's Targeted Killing*, MIDDLE EAST Q., 3, 13 (2003) (noting a strategic perspective on targeted killings).

137. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, Hum. Rts. Council, ¶ 9, U.N Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf (attempting to define targeted killings).

138. *See* Steven R. David, *Israel's Policy of Targeted Killing*, 17 ETHICS & INT'L AFF. 111, 120–21 (2003).

139. *See id.*

140. *See generally* William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 748–49 (2003) (analyzing the U.S. legal framework as it pertains to targeted killings); J. Nicholas Kendall, *Israeli Counter-Terrorism: "Targeted Killings" Under International Law*, 80 N.C. L. REV. 1069, 1073–74 (2002) (analyzing the developments of Israeli counter-terrorist actions in the international law context); David Kretzmer, *Targeted Killing of Suspected Executions or Legitimate Means of Defense?*, 16 EUR. J. INT'L L. 171 (2005) (examining the legality of targeted killings in the context of international human rights law and international humanitarian law); Daniel Statman, *Targeted Killing*, 5 THEORETICAL INQUIRES IN L. 179 (2004) (noting a moral

should be greater accountability, such as some form of due process, because of the increased use of targeted killings.[141] The main problem surrounding the legality of targeted killings resides in an undefined universal definition of what constitutes a terrorist.[142] It is difficult to identify the point where a civilian becomes an unlawful combatant and loses the protection afforded to civilians under international humanitarian law. The Israeli Supreme Court tried to solve this problem by implementing an approach that classifies terrorists and their organizations as unlawful combatants for the purpose of international law.[143] This approach and other similar ones[144] are at the heart of our discussion. Furthermore, the discussions on the legality of targeted killing introduces another important question: Does any normative framework exist, and if so, which framework would be the most appropriate to oversee such action?

While there is consensus that targeted killing is a legitimate recourse in the war on terror,[145] there are differing views concerning the need for a legal procedure. Here we claim that a due process like procedure pertaining to targeted killings is important in a weak state scenario.[146]

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defense to targeted killings); Patricia Zengel, *Assassination and the Law of Armed Conflict*, 43 MERCER L. REV. 615, 631–32 (1992) (noting the large political controversy incurred when the United States decides to use force against a foreign nation).

141. *See* Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT'L L. 319, 334 (2004); Kretzmer, *supra* note 140, at 171; Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 405 (2009). *See generally* Orna Ben-Naftali & Keren Michaeli, *'We Must not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killing*, 36 CORNELL INT'L L.J. 233, 335–38 (2006) (detailing a stricter model).

142. *See* Ryan Goodman, *The Detention Of Civilians In Armed Conflict*, 103 AM. J. INT'L L. 48, 48–49 (2009); Louis Rene Beres, *The Legal Meaning Of Terrorism For The Military Commander*, 11 CONN. J. INT'L L. 1, 2–6 (1995).

143. *See* HCJ 769/02 The Public Committee Against Torture in Israel v. Government of Israel (2) IsrLR 459 [2006] ¶¶24–27 (Isr.), *available at* http://www.scribd.com/doc/68675324/Targeted-Killing-Case-Israel-High-Court-of-Justice-JUDGMENT-HCJ-769-02-The-Public-Committee-Against-Torture-in-Israel-v-Israel-13-Dec-2006.

144. NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW (2009).

145. *See generally* THOMAS B. HUNTER, TARGETED KILLING: SELF-DEFENSE, PREEMPTION, AND THE WAR ON TERRORISM (2007), *available at* http://www.operationalstudies.com/mootw/Targeted%20Killing%20Research%20PaperOS.pdf (noting the norms states use to justify targeted killing to combat terrorism).

146. *See* Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1029–30 (2004) (noting the issue from an American legal point of view); Murphy & Radsan, *supra* note 141 (noting due process as an important need).

Terrorism is a direct attack on the sovereignty of the host state. Because of this direct attack, it also demands an understanding of how to properly adjudicate counter-terrorism activities. Due process serves not only the internal needs of rule of law but also offers protection to the host state's sovereignty. While there are opinions that minimize the level of judicial intervention needed in counter terrorism operations and suggest this function be delegated largely to the administrative branch, this view is criticized for several reasons.[147] Emanuel Gross has suggested that a constitutional model is well equipped to deal with the war on terror.[148] The Israeli Supreme Court adopted this approach:

> First, the Court envisions the terrorist threat as an international - rather than a solely domestic - problem. Accordingly, the standards for adjudicating counter-terrorism cases, as well those involving human rights and national security, are international standards. Second, the war against terrorism is an exceptional circumstance but has not been treated with exceptional law. The Court usually refers to existing international law of war and human rights conventions. It has not ruled that terror presents a unique situation outside the force of international law. Third, this three-tiered analysis actually reinforces human rights. In order to justify certain counter-terrorism measures, the state must prove that the operation or action taken is in accordance not only with the relevant direct law (be it detention law, military order or other regulation) but also with the Israeli common law and international law. Legality under one set of laws does not imply per se legality under another set of laws.[149]

Critics of this view will state that this is a very optimistic picture of the war against terrorism and that this view forces all countries to use executive models of the war in some form or another.[150] But, in a weak state situation, this is pertinent since oversight will ensure that actions will be taken based on relevant evidence of an imminent danger. Moreover, this approach has a low chance of collateral damage. The lower the

147. *See* Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011,1035–37 (2003) (suggesting that public officials will not be bound by constitutional regulations but their actions will be regulated by the public).

148. Emanuel Gross, *The Struggle of a Democracy Against the Terror of Suicide Bombers: Ideological and Legal Aspects*, 22 WIS. INT'L L.J. 597, 651–55 (2004).

149. Yigal Mersel, *Judicial Review of Counter-Terrorism Measures: The Israeli Model for the Role of the Judiciary During the Terror Era*, 38 N.Y.U. J. INT'L L. & POL. 67, 101 (2006).

150. *See generally* Daphne Barak-Erez, *Terrorism Law Between the Executive and Legislative Models*, 57 AM. J. COMP. L. 877, 881–82 (2009) (explaining the United States' executive model and its application to terrorism law).

collateral damage, the lower the impact will be on the host state's sovereignty.

It has been suggested that targeted killings are justified when they save the lives of soldiers,[151] even if there is a small risk of endangering civilians. Since targeted killings reduce the impact on sovereignty, they are justifiable in a weak state scenario where a terrorist is not only attacking the intervening power but also infringing on the sovereignty of the host country.

d. Precision Guided Munitions

Precision-guided munitions ("PGMs") are weapons that possess the ability to strike targets with a high degree of accuracy.[152] PGMs are usually referred to as "smart bombs" since they possess technological elements (guidance systems) that enable them to be guided or to independently direct themselves towards their target. The need for PGMs became clear during World War II because conventional bombs—unguided bombs dropped from aircraft that follow their own ballistic trajectory—were imprecise. Multiple bombing raids were required to completely destroy a single target. This method was costly and placed crews and material in harm's way. Brigadier General Anderson recounted in a letter to a fellow colleague:

> I participated in the Bremen operation where I saw sixteen B-17s knocked out of the air. However, if we had destroyed the factory completely it would have been worth fifty B-17s. We did accomplish about 40% to 50% destruction . . . our computations indicated that it would take three hundred bombers to destroy the target and we dispatched one hundred.[153]

Some estimates show that in 1941, out of one hundred bombs dropped over a designated target during the daytime, 10% fell precisely on target, 25% fell within 250 yards, 40%

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151. Solon Solomon, *Targeted Killings and The Soldiers' Right to Life*, 14 ILSA J. INT'L & COMP. L. 99, 110–11 (2007).

152. *See generally* ROWLAND F. POCOCK, GERMAN GUIDED MISSILES OF THE SECOND WORLD WAR (1967) (noting the history of the development of such weapons); KENNETH P. WERRELL, THE EVOLUTION OF THE CRUISE MISSILE (1985) (discussing the history of the cruise missile); WILLIAM F. TRIMBLE, WINGS FOR THE NAVY (1990) (discussing naval history and their interaction with ever increasing military technology, specifically bombs).

153. PAUL GILLESPIE, WEAPONS OF CHOICE: THE DEVELOPMENT OF PRECISION GUIDED MUNITIONS 26 (2006) (citing Letter from Brigadier General F.L. Anderson, 4th Bombardment Wing Commander, to Brigadier General Eugene L. Eubank (May 4, 1943), *in* BOX 76 PAPERS OF CARL A. SPAATZ, LOC).

within a 500 yard radius and 90 percent within 1 mile of the target.[154]

Bombs with heightened precision were developed with two goals in mind: (1) destroying enemy industries[155] and (2) destroying the enemy's defensive capabilities.[156] Achieving these goals would reduce losses and bombing raids would be carried out from lower altitudes while simultaneously enhancing precision and implementing a strategy of attrition.[157] Furthermore, some had a third goal of using guided bombs to terrify, as shown by the motivations behind the bombs developed under the Aphrodite Project ("Project"). General Spaatz from the Project wished to use heightened precision bombs as an "irritant and morale-breaking weapon" against the German population and "to leave in the minds of the Germans the threat of robot attacks against cities [by attacking] an industrial objective in a large German city as far inland as practicable."[158] General Spaatz stated: "My idea would be to turn them loose to land all over Germany so that the Germans would be just as much afraid of our war weary planes on account of not knowing just where they were going to hit as are the people in England from the buzz bombs and rockets."[159]

PGMs can and have been used to meet the first two goals and even the optional third goal. For the third goal, weapons that were not deemed to be precise enough or serviceable, such as the ones developed under the Project, were used as instruments of psychological warfare. Current PGMs have unprecedented precision, be it in bombs, such as the Pave Way II and Pave Way III bombs but also in other types of weapons.[160] This level of precision was spurred by the

154. *Id.*

155. It appears that during WWII one of the Allies' priorities in the Western Front was to bomb V-2 and V-3 sites that terrorized British citizens. This is why the Allied Air Forces developed projects pertaining to the destruction of these sites with PGMs creating the *Aphrodite Project*. The *Aphrodite Project* proved to be promising with regards to possible future developments of guided weapons, however the results on the ground fell short of destroying enemy V-2 and V-3 launching sites. *See id.* at 28.

156. *See generally id.* at 25–26.

157. *See generally id.* at 25–28.

158. *See* GILLESPIE, *supra* note 153, at 29.

159. *Id.* (citing Letter from H.H. Arnold to Carl Spaatz (Nov. 23, 1944) *in* BOX 16 AND BOX 193 PAPERS OF CARL A. SPAATZ, LOC).

160. For instance, the XM-25 rifle is a prime example of how small arms can also be developed to deliver utmost precision by using lasers in order to determine when a launched grenade should explode. *See XM25 Individual Semi-Automatic Airburst System (ISAAS) Counter Defilade Target*

technological revolution that introduced the laser and the semiconductor integrated circuit.[161] Now, air strikes can eliminate with precision enemy threats without having to destroy large areas surrounding the designated target. Thus, the risk of collateral damage during a "surgical strike" is much less than the collateral damage in bombing raids during WWII.

PGMs have numerous advantages besides reduced collateral damage, which is part of the reason why the United States uses such weapons against host nations. PGMs can accurately strike a defined target, pilots can deliver weapons with minimal safety risk, and collateral damage is minimized. PGMs offer the opportunity to neutralize a threat, like terrorists in a weak host nation, without resorting to a full blown war and infringing upon a host nation's sovereignty.

The inability of a weak state to act against domestic terrorists justifies the usage of PGMs. There are numerous benefits to PGMs, but unfortunately, the use of PGMs is not always purely beneficial. Critics state that many civilian lives are lost in the midst of military operations, mainly while carrying out targeted killings.[162] It is clear that some collateral damage is unavoidable due to a long list of factors such as mistakes in assessing the situation at hand on the part of the striking force, or because some targeted individual(s) purposefully live amongst civilians. However, the potential offered by PGMs to reduce civilian collateral damage and intrusion on the host state's sovereignty make such munitions a weapon of choice while undertaking preventive and preemptive strikes against terrorist entities.

III. SUMMARY

This article introduces the weak state doctrine. We argue that when a state does not have the ability to control parts of its territory which are under the control of terrorists—who are using it as a base of operation to launch attacks on a third state—the attacked state has a right of self-defense against the terrorist organization residing within the weak host state.

Engagement (CDTE) System Objective Individual Combat Weapon (OICW) Increment 2, GLOBALSECURITY.ORG, www.globalsecurity.org/military/systems/ground/m25.htm (last modified July 7, 2011).

161. *See* GILLESPIE, *supra* note 153, at 70.

162. *See* David E. Anderson, *Drones and the Ethics of War*, PBS.ORG (May 14, 2010), http://www.pbs.org/wnet/religionandethics/episodes/by-topic/international/drones-and-the-ethics-of-war/6290/.

When a state loses its sovereignty to a terrorist organization and it cannot fulfill its stately duties, it forfeits some of the privileges that sovereignty entails. However, since inaction by the weak host state is not voluntary, actions by intervening nations against the terrorist organization that would infringe on the sovereignty of the weak state should be gradual and allow the weak state the opportunity to resume its capacity as a sovereign state. We suggest a list of tactical measures—non-kinetic warfare, blockade, targeted killing, and precision guided munitions—that have a lesser effect on sovereignty and allow the weak host state to choose between acting against the terrorist entity or allow the intervening force to do so on its behalf.

We do not give a clear answer to the allotted time for the first stage of intervention. The question of when to move to more drastic measures is not one that can be answered with a specific timetable. There are situations that suggest more fierce military action is necessary over a short time span—such as when there are hostages involved and any delay can put their lives in danger—and other situations that require a gradual escalation of military operations. Ultimately, the goal is that the weak state will be able to enforce the rule of law on its territory and against terrorists within its borders.