Use of Armed Force against Terrorists in Afghanistan, Iraq, and beyond

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Introduction

The September 11th attacks on the United States by non-state actors, the prospect of an upgraded war with Iraq, and the Bush doctrine claiming the propriety of “preemptive” attacks on terrorists and states that harbor or support them, as well as on states that might someday use weapons of mass destruction against the United States and its nationals or against U.S. allies each raise questions concerning the permissibility of the use of armed force against terrorists and others in Afghanistan, Iraq and beyond. Are any such uses of armed force permissible under international law? Does the President have authority under the United States Constitution to engage in any uses of armed force against non-state terrorists and states that are permissible under international law? Must the President have the support of Congress to upgrade the war with Iraq or to engage in preemptive strikes against other states? These and related issues form the primary focus of this Article.

I. Self-Defense against Non-State Terrorist Attacks

The use of military force by the United States in Afghanistan on October 7, 2001 against Mr. bin Laden and members of his al Qaeda network was permissible under both international and U.S. constitutional law. Bin Laden and several of his followers were non-state actors who ordered, perpetrated, or were complicit in continuous terrorist attacks on the United States, including the September 11th attacks on U.S. soil and previous armed attacks against the U.S.S. Cole, U.S. embassies in Kenya and Tanzania, and other U.S. military and nationals abroad. Such ongoing

Article 51 of the Charter recognizes "the inherent right of individual or collective self-defense if an armed attack occurs." Although there is widespread agreement that an "armed attack" must occur, nothing in the language of Article 51 requires that such an armed attack be carried out by another state, nation, or belligerent, as opposed to armed attacks by various other non-state actors; and several textwriters recognize that attacks by non-state actors can trigger the right of self-defense under the Charter.

2. See, e.g., Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, para. 195 (June 27); THOMAS BUERGENTHAL & SEAN D. MURPHY, PUBLIC INTERNATIONAL LAW 325 (3d ed. 2002); OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 150 (1991); Michael Byers, Terrorism, The Use of Force and International Law After 11 September, 51 INT’L & COMP. L.Q. 401, 410-11 (2002); Mark A. Drumbl, Judging the 11 September Terrorist Attack, 24 Hum. RTS. Q. 323, 329-30 (2002); Jules Lobel, The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan, 24 Yale J. INT’L L. 537, 540-43 (1999); Sean D. Murphy, Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter, 43 Harv. INT’L L.J. 41, 42, 44 (2002); Sreenivasa Rao Pennaraju, International Organizations and Use of Force, in 2 LIBER AMICORUM JUDGE SHIGERU ODA 1575, 1578-79 (Nisuke Ando et al. eds., 2002). All that is required is that a process of armed attack has begun, not, for example, that the bullets have been fired or have even hit their mark. Responsive force will be in self-defense, not anticipatory or preemptive self-defense. See infra note 15. A series of armed attacks can constitute an ongoing process of armed attack. See infra note 9.

An interesting issue is whether an attack using merely the release of bacteriological or biological materials, as opposed to delivery of such materials on a missile or bomb in a city, leading to deaths, injury and suffering on a large scale, is covered by the phrase "armed attack." Technically, the answer would appear to be "no," and there seems to be a need to amend Article 51 of the U.N. Charter to allow proportionate military action to defend against such processes of attack. Use of the word "armed" in Article 51 is quite different than use of the broader phrase "force" in Article 2 (4) of the Charter, yet states and textwriters still debate whether economic coercion of a similar intensity, with similar consequences, to armed force is proscribed under Article 2 (4). See, e.g., JORDAN J. PAUST, JOAN M. FITZPATRICK & JON M. VAN DYKE, INTERNATIONAL LAW AND LITIGATION IN THE U.S. 60, 891, 906-07 (2000). This demonstrates that use of the more limiting word "armed" in Article 51 was intentional at the time of formation of the Charter and would not cover all sorts of force or weapons, and that such a limiting interpretation of the word "armed" would find support today in general patterns of expectation about what is legally appropriate or required, e.g., in opinio juris relevant to the meaning of Article 51 as well as relevant customary international law. Yet, one can also envision the development where patterns of legal expectation change soon after significant use of bacteriological or biologic weapons to attack a country and there is a responsive use of military force by the country experiencing such an attack. Even if the meaning of the word "armed" can thus be amended, it may be more rational and policy-serving for states to agree on a formal amendment to the Charter.

Recent U.N. Security Council and NATO recognitions that the bin Laden-al Qaeda September 11th attacks implicated rights of individual and collective self-defense provide even more authoritative support for this point. Additionally, a famous historic case often mentioned concerning interpretation of Article 51, the 1837 Caroline incident, involved armed attacks against Canada by insurgent groups based partly in the United States and recognition of the right to use necessary, selective and proportionate military force in self-defense in response to non-state actor attacks.

In 1998, the United States claimed the right to use selective military force in Afghanistan and the Sudan in self-defense with respect to various continuing attacks by bin Laden and his non-state entourage, and the United States made a similar claim with respect to its use of armed force in

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6. See 2 MOORE, DIGEST OF INTERNATIONAL LAW 412 (1906) (incident in 1837); PAUST, FITZPATRICK & VAN DYKE, supra note 2, at 898–99; W. Michael Reisman, International Legal Responses to Terrorism, 22 Hous. J. INT’L L. 3, 42–47 (1999). Some have argued that the exchange of views concerning the Caroline incident addressed and justified preemptive self-defense (before an armed attack occurs) but the incident involved a process of continual attacks on the government of Canada by insurgents operating in Canada and the United States. Lord Palmerston claimed that the particular act of destroying the Caroline was an act of self-defense. Lord Ashburton, the British Special Minister during an exchange of views with U.S. Secretary of State Daniel Webster, also based the justification of Canada’s use of force on “the necessity of self-defense” in response to ongoing attacks, and the United States admitted that self-defense might justify the use of force, but only in “cases in which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.” 2 MOORE, DIGEST, supra; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 905, RN 3 (3d ed. 1987) [hereinafter Restatement]. Preemptive self-defense was not addressed and would have been unacceptable to the United States. Moreover, today Article 51 of the U.N. Charter is expressly limited to the circumstance of an armed attack. U.N. CHARTER art. 51.

7. See Sean D. Murphy, Contemporary Practice of the United States Relating to International Law, 93 AM. J. INT’L L. 161, 162–63 (1999) (United States claimed self-defense regarding armed attacks by bin Laden and his followers); Reisman, supra note 6, at 48-49.
Afghanistan beginning on October 7th, after the September 11th attacks. Such defensive uses of armed force abroad in response to ongoing processes of attack are neither mere “preemptive” nor “reprisal” actions as such because, despite complex or mixed sanction strategies that are often part of a decision to use military force, the uses of force in 1998 and 2001 were not designed merely to preempt some independent future attack or to retaliate against an attack that had already occurred and was entirely complete.

With respect to merely preemptive and retaliatory attacks, it is worth noting that only three forms of force are proscribed in Article 2 (4) of the U.N. Charter: (1) the threat or use of force “against the territorial integrity” of another state, (2) the threat or use of force “against . . . the political independence of” another state, and (3) the threat or use of force “in any other manner inconsistent with the Purposes of the United Nations.”

Thus, one might argue that a selective use of military force simply to preempt or retaliate against non-state terrorist attacks might not constitute a use of armed force in violation of the first two forms of force that are proscribed since selective use of armed force in such a circumstance might not actually be force used “against the territorial integrity or political independence of” another state if, for example, territorial boundaries or regimes are not changed or directly disrupted. However, some states will claim that the mere crossing of borders by armed military personnel or cruise missiles of another state for such a purpose is the use of force “against the territorial “integrity” of a state or “against” its political “independence.”

More importantly, Article 2 (4) also prohibits the use of armed force “in any other manner inconsistent with the Purposes of the United Nations,” including the need to serve peace, security, equal rights and self-determination of peoples, human rights and fundamental freedoms, to achieve justice, and to ensure that “armed force shall not be used, save in


9. See, e.g., Paust, supra note 3, at 729-31 (regarding U.S. claims related to use of force against Libya in 1986); Reisman, supra note 6, at 7-8, 48. When there have been a series of attacks over time, a state may have both a responsive and a preventative objective and still be acting in legitimate self-defense as long as it is responding to a process or series of armed attacks within a reasonable time.

10. U.N. CHARTER art. 2, para. 4; see, e.g., Jordan J. Paust, Comment, 78 Am. Soc’y Int’l L. Proc. 92, 92-93 (1984); Michael Reisman & Myres S. McDougal, Humanitarian Intervention to Protect the Ibos, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167, 177 (Richard B. Lillich ed., 1973); but see Murphy, supra note 2, at 42.

11. See also S.C. Res. 573, U.N. SCOR, 40th Sess., 2615th mtg., U.N. Doc. S/RES/573 (1985), addressed infra note 14; Schachter, supra note 2, at 118; Byers, supra note 2, at 406-07 (noting “most such responses will violate the territorial integrity of a State,” but some such “uses of force have been accepted”); Pemmaraju, supra note 2, at 1591.


13. Id. preamble.
the common interest". 14 Theoretically, it is possible that, on balance, a given use of armed force to preempt or retaliate against non-state terrorist attacks will not thwart most of these purposes and, in fact, will serve the majority of such purposes. Thus, it might be argued that such a use of force, tested contextually and in view of various purposes recognized in the Charter, should be permissible under Article 2 (4) of the Charter whether or not a state has a legitimate claim of self-defense under Article 51. However, predominant trends demonstrate widespread expectation and intense demand that the use of armed force for merely preemptive or retaliatory purposes is inconsistent with the purposes of the Charter, is proscribed under Article 2 (4), and is not authorized under Article 51 of the Charter. 15 Moreover, from a policy-oriented viewpoint, the strict limitation in

14. Id.

Article 51, set forth in the phrase "if an armed attack occurs" will, in many contexts, also serve various policies at stake including peace, security, equal rights and self-determination of peoples, the need for peaceful resolution of disputes, and the need to assure that force will not be used save in the common interest, and will at least prohibit unilateral preemptive attacks that might be made under various sorts of pretext when military force is not strictly necessary even to serve legitimate self-defense interests. Further, the most ludicrous of preemptive self-defense claims would abandon strict necessity in favor of a supposed need to attack imminent threats, which, logically speaking, are not even actual threats. Moreover, Article 39 of the Charter appears to preclude use of preemptive armed force against perceived threats that do not amount to an armed attack under Article 51 by requiring the Security Council to determine whether a threat exists and what measures, if any, it chooses to authorize.\textsuperscript{16}

Measures of legitimate self-defense can include the targeting of lawful military targets, such as the head of a non-state entity—Mr. bin Laden—or the head of a state directly involved in ongoing processes of attack on the United States, U.S. military, or U.S. nationals abroad and such lawful targetings in self-defense would not be assassinations which, in times of armed conflict, would be war crimes.\textsuperscript{17} The right of self-defense also justi-
fies the capture of bin Laden or other members of al Qaeda during a permissible defensive military incursion into Afghanistan, or some other country, in order to capture and arrest those responsible for, or who directly participate in, the ongoing attacks. 18 Such a military mission is especially appropriate in a territory where there is no recognized government and an insurgent or belligerent group, like the Taliban government in Afghanistan prior to October 7th, 19 controls substantial territory and either harbors bin Laden and members of al Qaeda, or is unable to stop the attacks on the United States and its nationals by those operating in territory that it controls. This is not to say that U.S. attacks on the Taliban as such, or attacks in the future on some other group or state, would be permissible if they merely harbor bin Laden or members of al Qaeda or are aware of terrorist actions and are merely unable to control them from misusing their territory. In fact, occupation of the territory of a state whose government is merely unable to control misuse of its territory has been met with widespread international condemnation. 20 Additionally, the gathering of evidence in a foreign state concerning impermissible terrorist attacks from such a state’s territory is unacceptable absent consent for such law enforcement activities by the territorial state, 21 permissible occupation of foreign state territory during an armed conflict, or appropriate

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19. The Taliban government was the functioning de facto government of Afghanistan prior to October 7th, 2001 and a few states recognized it as the de jure government, including Pakistan and Saudi Arabia. The Taliban also had the status of a “belligerent” within the meaning of the customary laws of war prior to October 7th, 2001 since it had control of significant portions of the territory of Afghanistan, a government, a population, and an armed force; had engaged in armed conflict with the Northern Alliance; and had outside recognition by some states as the de jure government of Afghanistan. Thus, it was not merely an insurgent. Concerning criteria for belligerent status see PAUST, BASSIOUNI ET AL., supra note 17, at 809, 812-13, 815-16, 831-32, and references cited therein. U.S. cases and international law concerning de facto or unrecognized state status use many of the same general criteria. See, e.g., Kadic v. Karadzic, 70 F.3d 232, 244-45 (2d Cir. 1995).


II. Self-Defense against State Participants in Armed Attacks

Absent U.N. Security Council or regional organization authorization to use military force against a state that merely harbors terrorists or is unable to control misuse of its territory, and absent direct involvement by such a state in a process of armed attack that triggers the right of self-defense against the state, the use of military force against such a state would be impermissible under the Charter.\(^2\)

Harboring terrorists, providing formal or effective amnesty for terrorists in violation of the customary and treaty-based duty to initiate prosecution of or to extradite terrorists,\(^2\) otherwise tolerating, acquiescing, encouraging, or inciting terrorists within one's borders, or providing certain other forms of assistance to terrorists can implicate state responsibility and justify various political, diplomatic, economic, and juridic sanctions in response,\(^2\) including international claims for reparations and domestic lawsuits. Yet, unless the state is organizing, fomenting, directing, or otherwise directly participating in armed attacks by non-state terrorists, the use of military force against the state, as opposed to only the non-state terrorists, would be impermissible.\(^2\)

For example, when a harboring state is not a direct participant in the armed attack, but state responsibility otherwise exists, the state attacked by non-state terrorists has a legitimate claim against the harboring state under international law and an international dispute can arise. Articles 2 (2) and

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\(^{22}\) See infra sections III, IV.

\(^{23}\) See, e.g., Schacht, supra note 2, at 144-46; Byers, supra note 2, at 408 ("[Noting the] widely held view that terrorist attacks, in and of themselves, do not constitute 'armed attacks' justifying military responses against sovereign States. Even today, most States would not support a rule that opened them up to attack whenever terrorists were thought to operate within their territory."); Drumbl, supra note 2, at 330 ("the basic legal test. . . is whether the state had 'effective control' over the wrongdoers"); Travailo, supra note 20, at 152-54, 158-59, and references cited; but see Byers, supra note 2, at 409-10, 410 n.46 (assuming that a radically new customary rule has developed after September 11th allowing self-defense "against States which actively support or willingly harbour terrorist groups who have already attacked the responding State") (emphasis added).

\(^{24}\) Concerning such a general obligation aut dedere aut judicare see, for example, Paust, Bassiouini et al., supra note 17, at 9, 132-47, 170-71. Concerning the customary and treaty-based proscription of most forms of terrorism, see Paust, Bassiouini et al., supra note 17, at 995, 1005, 1007-17.

\(^{25}\) See, e.g., Reisman, supra note 6, at 35-36, 54. The important point here is that states can be responsible for a vast array of acts or omissions—denial of justice, human rights violations, transnational pollution—and not be legally subject to military attack as a sanctioned response; state responsibility does not simplistically justify armed force in self-defense. See Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4 (finding Albania was responsible for certain events, but British use of force was illegal).

\(^{26}\) See, Lobel, supra note 2, at 541 (mere "aid" is insufficient); Paust, supra note 3, at 720-21; see also Stephen R. Ratner, Jus ad Bellum and Jus in Bello After September 11, 96 Am. J. Int'l L. 905, 908 (2002) ("it seems clear, on the issue of state responsibility, that none of the tests . . . supports the harboring theory of the United States"); Anne-Marie Slaughter & William Burke-White, An International Constitutional Moment, 43 Harv. Int'l L.J. 1, 20 (2002) (stating that "counter measures allowed could fall short of the use of force"); text and sources noted, infra notes 30-31; but see Byers, supra note 2, at 409-10.
33 of the Charter recognize the need to settle international disputes "by peaceful means in such a manner that international peace and security, and justice, are not endangered." An armed attack on a merely harboring state would not maximize the serving of such purposes and thus would be impermissible.

Although questioned by some, the majority opinion of the International Court of Justice in Nicaragua v. United States recognized that a state that sends "armed bands, groups, irregulars...[or others to] carry out acts of armed force against another State of such gravity as to amount to (inter alia) an actual armed attack," can be engaged in an armed attack that triggers the right of self-defense against such state. The Court added, however, that mere knowing "assistance to rebels in the form of the provision of weapons or logistical or other support" might involve an impermissible use of force or intervention that can create state responsibility under international law and is thus subject to certain forms of sanction, but would not constitute an "armed attack" for purposes of self-defense. The Court's opinion demonstrates that even knowing assistance to private terrorist groups, much less harboring, tolerating, or acquiescing, each of which can lead to state responsibility, may not rise to the level of an armed attack. Thus, more direct participation, such as the sending or controlling and directing of terrorists during an attack is required. To analogize to

27. U.N. CHARTER arts. 2(2), 33; see also Lori Fisler Damrosch, Sanctions Against Perpetrators of Terrorism, 22 HOUS. J. INT'L L. 63, 68 (1999) (noting the need to exhaust nonforcible means); Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, arts. 1-11, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57 (Kellogg-Briand Pact) (condemning "recourse to war for the solution of international controversies" and recognizing "that the settlement or solution of all disputes or conflicts...shall never be sought except by pacific means"). The Kellogg-Briand Pact was used at the International Military Tribunal at Nuremberg, among others, concerning individual responsibility for crimes against peace or aggression. See Judgment and Opinion, International Military Tribunal at Nuremberg (Oct. 1, 1946).

28. See Reisman, supra note 6, at 37-39.


30. Id.; see also id. para. 228 ("mere supply of funds" is not a use of force); id. para. 230 ("provision of arms" is not an armed attack). The court also recognized that even if the U.S. participation in activities of the Contras involved "financing, organizing, training, supplying and equipping of the Contras, the selection of its military and paramilitary targets, and the planning of the whole of its operation," the United States did not exercise "effective control" over the military and paramilitary operations and there was insufficient evidence that the United States "directed or enforced the perpetration of the acts" and, thus, attacks by the Contras were not acts attributable to the United States. Id. para. 115. In view of the Court's holding, mere financing of non-state terrorists may not involve the hiring or directing of such individuals or groups or other conduct sufficient to support a conclusion that the state is directly participating in an armed attack. Id. para. 195. However, some forms of financing might be sufficient to qualify as direct participation such as the hiring of non-state actors to engage in an attack. See id. Furthermore, the International Criminal Tribunal for Former Yugoslavia has declared that "in addition to financing, training and equipping or providing operational support," the state should have a "role in organizing, coordinating or planning the military actions of the [non-state group]." See Prosecutor v. Tadic, Opinion and Judgment, IT-94-1-T, para. 137 (May 7, 1997).

31. See Nicar. v. U.S.
individual criminal responsibility, a state would have to be a joint perpetrator or co-conspirator directly involved in the attacks to justify the use of lethal force in self-defense even though some forms of criminal complicity might permit various other sanctioned responses not involving the use of lethal or armed force.

These recognitions make the U.S. attacks on the Taliban in 2001 and the arrest or detention of members of the Taliban armed forces, as opposed to bin Laden and al Qaeda, highly problematic. From what is publicly known, the Taliban did not send bin Laden's operatives abroad to attack the United States, control and direct bin Laden's attacks on the United States and its nationals, knowingly finance the attacks, or otherwise directly participate in the attacks. Prior to October 7th, the United States publicly criticized the Taliban regime for merely harboring or otherwise cooperating with bin Laden and had not even listed the Taliban regime as a "sponsor" of terrorism and a "safe haven" regime tolerating bin Laden's training camps and base of operations until 1999. In fact, words such as "known links," "sponsor," and "support" can cover a number of situations and many forms of actual sponsoring or supporting will not rise to the level of an armed attack or direct participation in an armed attack. The Taliban's provision of safe haven to bin Laden and toleration of his terrorist training camps in areas generally controlled by the Taliban, the receipt of

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32. See, e.g., Murphy, supra note 7; Reisman, supra note 6, at 47-49, 55.
33. See, Damrosch, supra note 27, at 67-68, 68 n.21 (addressing Executive Order No. 13,129, 64 FED. REG. 36,759 (1999) by which then President Clinton blocked property and prohibited certain transactions with Afghanistan on the basis of it being a "safe haven" for bin Laden); see also Byers, supra note 2, at 408 (quoting a claim by the United States in a letter to the U.N. Security Council on October 7, 2001, that "the Taliban regime... [allows] the parts of Afghanistan that it controls to be used by [the al Qaeda] organization as a base of operation."). At that time, the U.N. Security Council also recognized Taliban responsibility for provision of safe haven and support to bin Laden, including the recognition that the Taliban continues "to allow him and others associated with him to operate a network of terrorist training camps from Taliban controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations" and its refusal to extradite him; declared that Taliban refusals to follow prior Security Council resolutions constituted a threat to international peace and security; set up a committee to address sanctions against the Taliban; and required all states to deny landing rights to aircraft owned, leased, or operated by the Taliban and to freeze certain Taliban assets, but did not authorize use of military force against the Taliban. U.N. S.C. Res. 1267, U.N. Doc. S/RES/1267 (1999).
34. See M. Cherif Bassiouni, Legal Control of International Terrorism: A Policy-Oriented Assessment, 43 HARV. INT'L L.J. 83, 87 (2002) (noting that unconfirmed evidence of Taliban support and shielding of bin Laden existed, but the United States neither sought extradition nor provided the Taliban with proof of bin Laden's criminal involvement with September 11th attacks); Charney, supra note 15, at 835-36 (noting U.S. claim to attack "states that are associated" with terrorism was too broad and that the United States should have gone to the Security Council with more information linking Afghanistan as "the source of the attack"); Murphy, supra note 2, at 46 (connections between al Qaeda and the Taliban remain unclear and "these incidents clearly were not taken directly by the government of one state against the United States"); Lobel, supra note 2, at 541; Paust, supra note 3, at 722 (regarding the potentially overly broad meaning of "support" or links). However, Professor Franck seems to assume that mere sponsoring, supporting, or harboring by the Taliban would justify military force in self-defense against the Taliban. See Franck, supra note 3, at 841.
monies and military support from bin Laden for the Taliban's war against the Northern Alliance, and even knowledge of past and continuing al Qaeda terrorist attacks would not constitute Taliban control of, or direct participation in, future al Qaeda attacks like the September 11th attack on the United States so as to justify the use of military force against the Taliban, especially in view of the International Court of Justice's Nicaragua decision. 35 Similarly, alleged Pakistani military and other support of the Taliban and al Qaeda in the conflict against the Northern Alliance 36 would not have constituted direct participation by Pakistani military in al Qaeda attacks on the United States so as to justify the use of military force against Pakistan. Iraq's alleged intelligence contacts with, or training of, some members of al Qaeda and post hoc haven for some members of al Qaeda is even less support of al Qaeda attacks, and there is no known Iraqi participation in the September 11th attacks.

While in Afghanistan during a lawful effort to use selective military force in self-defense against al Qaeda, the United States could respond selectively and defensively to Taliban attacks on U.S. military personnel or aircraft, but U.S. use of military force, especially through massive aerial bombardments, was much broader in focus and effect and, at least in later stages, designed in part to contribute to the destruction of the Taliban regime. 37 Perhaps the Northern Alliance could have requested support from the United States in an armed struggle for self-determination of the Afghan people, 38 but no such request or claim is known. Perhaps also the Taliban attacks on U.S. military in Afghanistan had become so widespread that use of force against the Taliban as such had become reasonably necessary and proportionate, but the Bush administration informed the U.N. Security Council at the start of the U.S. use of force on October 7th that it intended to attack "military installations of the Taliban regime in Afghanistan." 39 U.S. and British military forces proceeded to attack both al Qaeda

36. See, e.g., Dexter Filkins, Taliban Foes Say Kunduz is Theirs: Northern Alliance Forces Take Final Stronghold in North, N.Y. TIMES, Nov. 26, 2001, at A1; Seymour M. Hersh, The Getaway: Questions Surround a Secret Pakistani Airlift, NEW YORKER, Jan. 28, 2002, at 36 (noting that thousands of Pakistani military and intelligence advisers allegedly supported the Taliban's war against the Northern Alliance, if not al Qaeda); Al-Qaida may have Sneaked out with Pak Fighters, Jan. 22, 2002, at http://news.indiainfo.com/spotlight/usstrikes/22pakis.html; see also Drumbl, supra note 2, at 350 (quoting news sources: "the Pakistani intelligence service has had... [a] 'longstanding relationship with Al Qaeda... even us[ing] Al Qaeda camps in Afghanistan to train covert operatives. . .").
37. See infra notes 39-40.
38. Concerning the permisibility of some forms of self-determination assistance see PAUST, FITZPATRICK & VAN DYKE, supra note 2, at 41-42, 460, 893-95, 918, 924-25; Jordan J. Paust & Albert P. Blaustein, War Crimes Jurisdiction and Due Process: The Bangladesh Experience, 11 VAND. J. TRANS. L. 1, 11-12 n.39, 18-20, n.69, 30-31 (1978); text infra notes 67-72. The closest evidence that such a claim was made appears indirectly by way of U.N. Security Council support of the "efforts of the Afghan people to replace the Taliban regime." See text infra note 51.
III. Security Council Authorizations

Another possibility is that the U.N. Security Council authorized states like the United States to use military force in broader circumstances. U.N. Security Council Resolution 1373 reaffirmed the Security Council’s "unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001," reaf-

firmed "that such acts . . . constitute a threat to international peace and security," reaffirmed "the inherent right of individual or collective self-
defense," reaffirmed "the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts," and called upon all states to "[c]ooperate . . . to prevent and suppress terrorist attacks and take action against perpetrators of such acts." However, the resolution did not declare that all states should "combat by all means" and "take action against" states that harbor, support, tolerate, or fail to prevent misuse of their territory by terrorists engaged in such terrorist attacks and the resolution is expressly limited to "action against perpetrators."

Furthermore, commentators disagree regarding whether Resolution 1373 authorizes the use of armed force even against perpetrators of the terrorist attacks of September 11th. I suggest that phrases such as "combat by all means" and "suppress terrorist attacks and take action against perpetrators of such acts" are broad enough to provide an authorization to use military force against the perpetrators and the fact that the resolution does not contain phrases used previously in Security Council authorizations to use military force in Korea, during the Gulf War, or in Bosnia-Herzegovina, such as "by all necessary means" as opposed to "combat by

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42. Id.
43. Id.
44. Id. (emphasis added).
45. Id. at 3(c) (emphasis added). In the past, when a Security Council resolution has called upon states to take action, the International Court of Justice has considered the command to be legally binding. See, e.g., Advisory Opinion No. 53, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (June 21).
47. See, e.g., ASIL Insights, Terrorist Attacks on the World Trade Center and the Penta-
gon, Comments and Addenda, at http://www.asil.org/insights/insigh77.htm; Drumbl, supra note 2, at 328-29 (noting "state action, practice, declarations, and commentary . . . suggest that the Security Council Resolutions are being interpreted as a 'green light' . . ."); Murphy, supra note 2, at 44; cf. Byers, supra note 2, at 401-02, 402 n.8, 412 (opining that the resolution does not provide authorization, but "could provide the US with an at-least-tenable argument" that it does).
all means” and “take action against,” is not determinative. In any event, although the Security Council’s call upon states is relevant, but not necessary, to the permissibility of self-defense actions against bin Laden and al Qaeda as perpetrators of the September 11th attacks, it is not a call upon states to “combat by all means” and “take action against” a regime like the Taliban and it is also noticeably silent concerning any sort of Taliban responsibility, especially whether the Taliban regime had been a direct participant in al Qaeda attacks. More generally, it is not a call upon states to combat and take action against states that merely harbor non-state terrorists, as the Bush administration claims that Iraq has done by harboring some members of al Qaeda after the September 11th attacks.

If the Security Council authorizes the use of force against a state that is not directly participating in non-state terrorist attacks because that state’s acts or omissions nonetheless pose a threat to international peace and security, such an authorization would allow U.S. use of military force under the Charter, but it is apparent that no such authorization exists concerning the Taliban regime, and no specific authorization exists for an upgraded “war” against Iraq because of possible contacts with, harboring or tolerating non-state terrorists. A later resolution condemned the Taliban regime “for allowing Afghanistan to be used as a base for the export of terrorism by the Al-Qaeda network and other terrorist groups and for providing safe haven to Usama bin Laden, Al-Qaeda and others associated with them,” and even supported “efforts of the Afghan people to replace the Taliban regime,” but did not expressly authorize U.S. military force against the Taliban as such.

IV. Future NATO Regional Peace and Security Action

The attacks of September 11th on the United States led to unprecedented NATO invocation of a mutual defense clause in the regional North Atlantic Treaty proclaiming:


49. It is not necessary because Article 51 of the U.N. Charter provides an independent basis for legitimate self-defense. See Franck, supra note 3, at 840.

50. See U.N. CHARTER arts. 25, 39, 42, 48.


52. See sources cited supra note 5.

[A]n armed attack against one or more [NATO members] in Europe or North America shall be considered an attack against them all; and consequently they agree . . . each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking . . . such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.54

However, lawful use of military force in such circumstances hinges on permissible individual or collective self-defense under the Charter as supplemented by relevant customary international law.

A broader regional power concerning peace and security also exists in NATO per terms of the U.N. Charter. For example, Article 52 of the Charter recognizes the permissibility of actions by regional arrangements for “the maintenance of international peace and security as are appropriate for regional action, provided that such . . . activities are consistent with the Purposes and Principles of the United Nations.”55 NATO is an example of such a regional arrangement and its actions in Kosovovo exemplify regional peace and security actions that were permissible under Article 52 of the Charter as they were consistent with the serving of peace, security, self-determination, and human rights.56 Moreover, such a regional competence is partly enhanced by Charter-based duties of every state to take joint and separate action57 for the universal respect for and observance of human rights.58 The Genocide Convention59 also recognizes that “to liberate mankind from genocide . . . international cooperation is required”60 and sets forth the duty of State Parties “to prevent and punish” genocide.61

Although Article 53 of the Charter does not limit “regional action” permitted in Article 52, it prohibits regional organizations from engaging in “enforcement action under [the Security Council’s] authority” without its authorization.62 Permissible regional organization actions are not always enforcement actions under the authority of the Security Council. For example, when the Security Council is veto-deadlocked with respect to its ability to make decisions on enforcement actions, permissible regional military actions under Article 52 are neither “enforcement actions” nor “under

Documents Supplement to International Law and Litigation in the U.S. 29 (2000) [hereinafter Supplement].
54. North Atlantic Treaty, supra note 53, art. 5. The phrase “as it deems necessary” leaves discretion with each member whether to use military force. See id.
55. U.N. Charter art. 52 (adding “nothing in the present Charter precludes the existence of regional arrangement for dealing with regional action”).
56. For a contrary opinion see Shinya Murase, The Relationship Between the UN Charter and General International Law Regarding Non-Use of Force: The Case of NATO’s Air Campaign in the Kosovo Crisis of 1999, in 2 Liber Amicorum Judge Shigeru Oda 1543, 1544–45, 1551–52 (Nisuke Ando et al. eds., 2002).
57. U.N. Charter art. 56.
58. Id. art. 55(c).
60. Id. preamble.
61. Id. arts. I, IV–V.
62. See U.N. Charter art. 53.
the authority" of the Security Council, at least until the Security Council can act and actually decide on measures under Chapter VII of the Charter because when veto-deadlocked, the Security Council is unable to decide on measures “to give effect to its decisions”\(^6\) or to decide on “action required to carry out” its decisions\(^6\) and it is unable to decide to “utilize” a regional arrangement “for enforcement action under its authority” within the meaning of Article 53.\(^6\) In view of the above, it is evident that NATO’s actions in Kosovo were permissible under Article 52 and were not impermissible under Article 53 of the Charter.

By majority vote, the Security Council should also be able to provide “authorization” for regional action even though, or especially because, such action is not “enforcement action.” This impliedly occurred when the Security Council voted to defeat a draft resolution attempting to restrain NATO authority in Kosovo.\(^6\) It may also be the case that such authorizations are based in new patterns of normative expectation and “subsequent practice,” and thus provide a new or clarified meaning concerning the Charter.

V. Self-Determination Assistance

As the 1970 Declaration on Principles of International Law\(^6\) affirms, self-determination assistance is also permissible under the Charter. The Declaration notes: “[e]very State has the duty to refrain from any forcible action which deprives peoples . . . of their right to self-determination”\(^6\) and “[i]n their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.”\(^6\) The 1984 resolution of the General Assembly concerning the illegal regime in South Africa also affirmed the permissibility of self-determination assistance while “recognizing the legitimacy of [the struggle of the people of South Africa] to eliminate apartheid and establish a society based on majority rule with equal participation by all the people of South Africa . . .” and urged “all Governments and organizations . . . to assist the oppressed people of South Africa in their legitimate struggle for national liberation,” while also condemning “the South African racist regime for . . . persisting with the further entrenchment of apartheid, a system declared a crime against humanity and a threat to international

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\(^{63}\) See id. arts. 41-42.
\(^{64}\) See id. art. 48.
\(^{65}\) See id. art. 53.
\(^{68}\) Id., reprinted in Supplement at 22.
\(^{69}\) Id., reprinted in Supplement at 24.
peace and security.” As the 1970 Declaration implicitly affirms, the territorial integrity of states can be disrupted and changed if they are not “conducting themselves in compliance with the principle of equal rights and self-determination of peoples.” Various other Security Council resolutions and international instruments and decisions indicate that use of force to overthrow a foreign government and to provide self-determination assistance to a people is not absolutely impermissible under the Charter. However, permissibility must rest on a relatively free will of a given people and their request for assistance, unless there is an independent basis for support in an authoritative Security Council or regional authorization.

VI. Constitutional Issues and War with Iraq

The United States does not use military force abroad merely to go to “war,” although several uses of armed force, even without a declaration of war or formal recognition of such a status can trigger a status of war, armed conflict or “hostilities” as well as application of the laws of war to restrain relevant methods or means of warfare, e.g., selection of targets, selection of weapon systems, and protection of persons. Sometimes the United States

71. Id.; see Paust & Blaustein, supra note 38, at 18-19, 20 n. 69.
uses armed force as a measure of self-defense, despite the error of some who speak loosely of reprisals, which are the prerogative of Congress. 73

The United States also uses armed force in accordance with decisions of the Security Council to authorize enforcement actions. 74 We are over Iraqi territory today because of a 1990 Security Council authorization to use force 75 and, at least initially in 1991, under a 1991 congressional authorization to use force “pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve implementation” of certain previous Security Council resolutions. 76 The 1990 resolution of the Security Council authorizes member states “to use all necessary means,” including force, (1) “to uphold and implement” a resolution recognizing Iraqi aggression in Kuwait; and demanding that Iraq withdraw from Kuwait; (2) “to uphold and implement “all subsequent relevant resolutions;” and (3) “to

73. See, e.g., Paust, Responding Lawfully, supra note 3, at 718-19 n.21.
74. Specifically, the United States has used force in accordance with Articles 25, 39, 42, and 48 of the U.N. Charter.
77. The word “relevant” is a malleable term. One interpretation is that it means relevant to the need for Iraq to withdraw from Kuwait, which has already occurred. See, e.g., Burrus M. Carnahan, Protecting Nuclear Facilities from Military Attack: Prospects After the Gulf War, 86 Am. J. Int'l L. 524, 526 (1992); Paul Szasz, Remarks, 92 Am. Soc'Y Int'l L. Proc. 136, 139-41 (1998). Does it mean relevant with respect to other Iraqi acts of aggression and/or Iraqi threats to peace and security in the region? See Michael Matheson, Remarks, 92 Am. Soc'Y Int'l L. Proc. 139, 141 (1998). In particular, is U.N. Security Council Resolution 688 relevant as it addresses threats to regional peace and security posed by Iraqi aggression against certain groups within Iraq and widespread oppression? Apparently so. See text infra notes 116, 121-23. Moreover, U.N. Security Council Resolution 1441 listed Resolution 688 among “relevant resolutions,” deplored Iraq’s failure “to end repression of its civilian population,” and recalled that Resolution 678 authorized the use of force for three identifiable purposes. U.N. S.C. Res. 1441, U.N. Doc. S/RES/1441 (2002). Is U.N. Security Council Resolution 687 relevant as the Security Council stated that it was acting under Chapter VII of the U.N. Charter, recognized the “threat that all weapons of mass destruction pose to peace and security in the area,” decided “that Iraq shall unconditionally accept the destruction, removal, or rendering harmless, under international supervision,” various chemical and biological weapons and ballistic missiles, and decided “that Iraq shall unconditionally agree not to acquire or develop nuclear weapons or nuclear-weapons-usable material,” among others? Apparently so. See U.N. S.C. Res. 687, preambular paras. Q, Y, Z, paras. 8-10, 12, 34, U.N. Doc. S/RES/687 (1991); see also text infra notes 115, 121-23. U.N. Security Council Resolution 1441 listed Resolution 687 among “relevant resolutions,” recognized “the threat Iraq's noncompliance with Council resolutions and proliferation of weapons of mass destruction and long-range missiles pose to international peace and security,” recalled that Resolution 687 “imposed obligations on Iraq as a necessary step for ... restoring international peace and security in the area,” and decided that Iraq “remains in material breach of its obligations under relevant resolutions, including resolution 687. ...” U.N. S.C. Res. 1441, preamble, para. 1, U.N. Doc. S/RES/1441 (2002). Is U.N. Security Council Resolution 949 a relevant resolution? Apparently so, since the resolution noted “past Iraqi threats and instances of actual use of force against its neighbours” including Kuwait; recognized “that any hostile or provocative action directed against its neighbours by the Government of Iraq constitutes a threat to peace and security in the region”; recognized the Council's determination “to prevent Iraq from resorting to
restore peace and security in the area” in and around Iraq. It is important to note, however, that the 1991 congressional authorization to use military force against Iraq is far more limited than the Security Council authorization. The congressional authorization does not contain language authorizing use of armed force to implement “subsequent relevant resolutions” or “in order to restore peace and security in the area” and is limited by the phrase “in order to,” which is tied to implementation of a limited set of resolutions. Thus, the congressional authorization does not support threats and intimidation of its neighbours and the United Nations; stated that the Council was acting under Chapter VII of the Charter; condemned “military deployments by Iraq in the direction of the border with Kuwait”; demanded “that Iraq immediately complete the withdrawal of all military units . . . deployed to southern Iraq”; demanded “that Iraq not again utilize its military or any other forces in a hostile or provocative manner to threaten either its neighbours or United Nations operations in Iraq”; and demanded “that Iraq not redeploy to the south the units referred to . . . or take any other actions to embrace its military capacity in southern Iraq.” U.N. S.C. Res. 949, preamble, paras. 1-4, U.N. Doc. S/RES/949 (1994); see also text infra note 117. This would justify U.S. participation in enforcement of no-fly zones, at least over southern Iraq. See U.N. S.C. Res. 1441, supra, para. 8 (“Decides that Iraq shall not take or threaten hostile acts directed against . . . any Member State taking action to uphold any Council resolution”) (emphasis added). Paragraph 8 implicitly recognizes the continued propriety of Member State “action to uphold” relevant resolutions and the preamble expressly recalled the authorization in Resolution 678 to use force for three identifiable purposes, one of which is “to uphold and implement . . . all relevant resolutions . . . .” U.N. S.C. Res. 678.

87. See supra note 70. Was peace and security in the area restored when Iraq withdrew from Kuwait? This was not the view of the Security Council, since it decided later that Iraqi repression of its own people constitutes a continuing threat to international peace and security in the area. See U.N. S.C. Res. 688, U.N. Doc. S/RES/688 (1991); see also infra notes 121-23; U.N. S.C. Res. 1441, U.N. Doc. S/RES/1441 (2002). This would seem to justify U.S. participation in enforcement of the no-fly zones over Iraqi territory, at least under Security Council resolutions. See text infra notes 110, 116-18. Such uses of armed force and Iraqi armed force over the years have resulted in the existence of a limited de facto war to which the laws of war applied. Additionally, did Iraqi breaches of Security Council Resolutions 687 and 949 pose continued threats to peace and security in the region? Apparently so. See U.N. S.C. Res. 1441, supra; text infra notes 115-17, 119. Although Security Council Resolution 687 adopted a cease-fire in 1991, a cease-fire does not end war; it suspends hostilities. Additionally, the cease-fire was broken several times over the years and hostilities intensified several times, including in 1993 and 1998. See Christine Gray, After the Ceasefire: Iraq, the Security Council and the Use of Force, 65 BRIT. Y. B. INT’L L. 135 (1994); but see Frederic L. Kirgis, Security Council Resolution 1441 on Iraq’s Final Opportunity to Comply with Disarmament Obligations, Nov. 12, 2002, in ASIL Insights (Nov. 12, 2002), at http://www.asil.org/insights/insigh92.htm (assuming that the ceasefire based on Resolution 687 has not been broken and is still alive despite the recognition in Resolution 1441 that “the Council declared that a ceasefire would be based on acceptance by Iraq of the provisions of that resolution” and that “Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687.” U.N. S.C. Res. 1441, preamble, para. 1, U.N. Doc. S/RES/1441 (2002)).

88. See Authorization for Use of Military Force Against Iraq, Section 2(a), 2(b)(1), 2(c) H.R.J. Res. 77, 102d Cong., 1st Sess., 105 Stat. 3 (Jan. 14, 1991), reproduced in PAUST, FITZPATRICK & VAN DYKE, supra note 2, at 1003-05. For authority that Congress has the power to limit presidential use of military force or to provide limits to the conduct of war, see United States v. Verdugo-Urquidez, 494 U.S. 259, 275 (1990); Brown v. United States, 12 U.S. (8 Cranch) 110 (1814); id. at 145, 147, 149, 153-54 (Story, J., dissenting); Little v. Barreme (The Flying Fish), 6 U.S. (2 Cranch) 170, 177-78 (1804); Talbot v. Seaman, 5 U.S. (1 Cranch) 1, 28 (1801); Bas v. Tingy, 4 U.S. (4 Dall.) 37,
ongoing presidential use of armed force against Iraq or some future upgrade of the de facto war in order to remove the Iraqi regime from power or to destroy Iraqi weapons of mass destruction. Moreover, the congressional authorization is subsequent in time to the Security Council resolution and, under the last in time rule, any limitations in the 1991 congressional authorization would override the domestic legal effect of broader authorizations in the 1990 Security Council resolution even though the Security Council resolution remains valid under international law. Since the President is bound faithfully to execute the law and the more limiting 1991 congressional authorization would be the relevant prevailing law, the President is bound to comply with such congressional limitations concerning use of force against Iraq unless they are obviated by an unavoidably inconsistent subsequent congressional or Security Council authorization.

Regardless of whether Security Council authorizations existed, the United States used armed force in Europe in accordance with NATO authorizations of regional peace and security action, e.g., in Bosnia-Herzegovina, with additional Security Council authorization, and more recently in


80. Concerning the nature and application of this rule see PAUST, FITZPATRICK & VAN DYKE, supra note 2, at 182, 345-60, 368-69, 372-73, 392, 395, 845, 1007, 1022.

81. See, e.g., U.S. CONST. art. I, § 3; cases cited supra note 79.

82. The Iraq Liberation Act of 1998 recommended that "it should be the policy of the United States to support efforts to remove the regime headed by Saddam Hussein from power in Iraq and to promote the emergence of a democratic government to replace that regime," and granted authority to the President to provide certain types of assistance to Iraqi democratic opposition groups, but expressly noted that nothing in the Act "shall be construed to authorize or otherwise speak to the use of United States Armed Forces . . . in carrying out this Act" except for provision of certain defense articles, services, education and training. Iraq Liberation Act of 1998, §§ 3, 4, 8, Pub. L. No. 105-338, 105th Cong., 112 Stat. 3178 (1998). Previously, in 1998, Congress stated that "the Government of Iraq is in material and unacceptable breach of its international obligations" with respect to its weapons of mass destruction programs and "urged" the President "to take appropriate action, in accordance with the Constitution and relevant laws of the United States to bring Iraq into compliance with its international obligations." Joint Resolution, Iraq Breach of International Obligations, Pub. L. 105-235, 105th Cong., 112 Stat. 1538 (1998). However, the Joint Resolution did not expressly authorize the use of armed force and it is not unavoidably inconsistent with limitations on the use of armed force set forth in the 1991 congressional authorization. Further, it did not refer to the 1973 War Powers Resolution, which Congress often does when authorizing use of armed force, and section 1547(a) of the War Powers Resolution states that authority to use armed force "shall not be inferred . . . from any provision of law . . . unless such provision specifically authorizes" armed force "and states that it is intended to constitute specific statutory authorization within the meaning of" the War Powers Resolution. 50 U.S.C. §§ 1541-1548. Thus, it does not appear to have obviated the 1991 legislative limitations and to have revitalized any continuing authority for the President to use armed force under the 1990 U.N. Security Council Resolution 678. Additionally, the subsequent Iraq Liberation Act expressly quoted the "appropriate action" portion of the Iraqi Breach of International Obligations resolution, but denied authorization to use armed force against Iraq. See Iraq Liberation Act of 1998, supra §§ 2(11), 8.

Kosovo, without formal or direct Security Council authorization. The ongoing Gulf War and use of force in Bosnia-Herzegovina and Kosovo are examples of use of armed force that the United States has engaged in without congressional declarations of war, and the latter two are examples of uses of force without even congressional authorization.

From a constitutional perspective, a declaration of war is the prerogative of Congress. We have not formally declared war against a state or set of states as such since World War II. And, to my knowledge, there has been no U.S. declaration of war against any entity other than a state, although the United States has been at war with certain Indian nations and a non-state belligerent—the Confederate States of America—during the Civil War. All of our prior declarations of war, which are few, were conjoined with a joint resolution or legislation. Yet, it seems possible for a mere declaration to occur without the declaration being conjoined with a joint resolution or act of Congress, which would have to be presented to the President. The 1973 War Powers Resolution functions to grant powers to the President—whether or not such powers otherwise exist in the President under the Constitution—to engage in certain short, meaning 60 or 90 day, uses of armed force and involvement in armed hostilities, but it does not operate as a sweeping declaration of war or unlimited authorization. Indeed, Section 2(c) proclaims a limited purpose and policy that recognizes the propriety of presidential use of force only in cases of a declaration of war, specific congressional authorization, or an attack upon the United States, its territories or possessions, or its armed forces and, thus, clearly does not recognize the propriety of presidential preemptive strikes. Additionally, with respect to the more specific issues concerning use of military force against Iraq, subsequent limitations on the use of armed force contained in the 1991 congressional authorization would prevail over the 1973 resolution. The Joint Resolution of Congress on Sep-

84. See PAUST, FITZPATRICK & VAN DYKE, supra note 2, at 921-25
85. See, e.g., PAUST, supra note 79, at 439, 441, 450 n.5.
87. See PAUST, supra note 79, at 442-43.
89. See id. § 1544(b) (known as Section 5(b) of the War Powers Resolution).
90. Whatever functional authority or grant of power to the President exists in the War Powers Resolution, it is limited by the resolution’s stated purpose and policy as well as any other limit contained in the resolution. This is necessarily so even if the stated purpose and policy does not adequately reflect the limits of independent presidential powers under the Constitution.
91. See 50 U.S.C. § 1541(c).
92. The 1991 authorization states that it “is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.” Authorization for Use of Military Force Against Iraq, Section 2(e)(1), H.R.J. Res. 77, 102d Cong, 1st Sess., 105 Stat. 3 (1991), reproduced in PAUST, FITZPATRICK & VAN DYKE, supra note 2, at 1003-05. Section 5(b) of the War Powers Resolution requires termination of the use of armed force after 60 days unless Congress has enacted a specific
September 18, 2001 concerning military force after the September 11th attacks also provides sweeping but partly limited authorization to the President, as noted below. However, none of these resolutions authorize preemptive strikes.

Under Article II of our Constitution, the President also has a share of the war powers as the Executive, the Commander in Chief, and one under the express duty to faithfully execute the law, which includes the duty to faithfully execute treaties and customary international law since they are part of federal law and supreme law of the land under the Constitution. It is this constitutionally-based duty to enforce international law that actually enhances presidential competence to use armed force without congressional authorization. For example, prior to the January 14, 1991 congressional authorization for former President Bush to use armed force against Iraq, which was not retroactive, the President had a duty to faithfully execute Security Council authorizations to use force, a duty that in such a circumstance actually enhanced presidential power to make the choice on behalf of the United States of whether and the manner in which to execute such authorizations. Yet, because the 1991 congressional authorization was dated after the Security Council authorization and was far more limited, congressional limitations were binding on the President under the last in time rule. With respect to U.S. use of force in and around Bosnia-Herzegovina, President Clinton rightly claimed that a presidential competence to execute Security Council and NATO authorizations of armed force existed precisely because the President has the constitutional duty to faithfully execute treaty law. The same claim was made with respect to U.S. use of force in and around Kosovo in view of NATO authorization. 50 U.S.C. § 1544(b). Limits in the 1991 specific authorization would thus be part of any authorized extension of force beyond 60 days. Moreover, the 1991 authorization is later in time and should prevail in case of any inconsistency with the 1973 joint resolution.

94. Id.
95. See U.S. Const. art. II, § 1.
96. Id. § 2.
97. Id. § 3.
98. See, e.g., PAUST, supra note 79, at 143-66.
99. See id. at 1-79.
102. See, text and citation, supra note 80.
103. See, e.g., PAUST, FITZPATRICK & VAN DYKE, supra note 2, at 1006-08; Paust, supra note 79, at 23-24; Sean D. Murphy, Contemporary Practice of the United States Relating to International Law, NATO Action in Bosnia, 88 Am. J. INT'L L. 522-25 (1994).
treaty-based authorization of regional action.\footnote{104}

Today, President Bush can use military force in self-defense against ongoing processes of armed attack while executing the U.S. right to do so in accordance with the U.N. Charter, with or without congressional authorization, and whether or not there is any special Security Council authorization of enforcement action or NATO authorization of regional action. In addition, he has the functional delegation of power under the 1973 War Powers Resolution to engage in certain short wars when there has been an attack upon the United States, its territories or possessions, or its armed forces, assuming that international law is complied with and that no subsequent congressional limitations apply.\footnote{105} The 2001 congressional authorization to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons,"\footnote{106} is very broad, and it is unlimited in at least two respects: (1) it contains no time limit with respect to those nations, organizations, or persons actually covered,\footnote{107} and (2) it is not limited to use of force against those who planned, authorized, or committed the September 11th attacks, but also extends to those who aided the September 11th attacks or harbored the perpetrators of the September 11th attacks on or before September 11th.\footnote{108} However, international law will still set limits on, and might also enhance presidential power in view of the President’s constitutionally-based duty to faithfully execute international law and the President’s duty under the 2001 legislation to use merely “appropriate” measures.\footnote{109} Importantly, by using the terms “aided” and

\footnote{104. See, e.g., Sean D. Murphy, Contemporary Practice of the United States Relating to International Law, Legal Regulation of the Use of Force, Kosovo: Air Strikes Against Serbia, 93 Am. J. Int’l. L. 628, 629-35 (1999); Sean D. Murphy, Legal Regulation of the Use of Force, Humanitarian Intervention in Kosovo, 93 Am. J. Int’l. L. 161, 169 (1999).}

\footnote{105. See supra notes 88-91.}

\footnote{106. See Joint Resolution to Authorize the Use of United States Armed Forces Against those Responsible for the Recent Attacks Launched Against the United States, Section 2(a), Pub. L. No. 107-40, 115 Stat. 224 (2001).}

\footnote{107. Thus, under Section 5 (b) of the War Powers Resolution, 50 U.S.C. § 1544(b), the 60-90 day limit with respect to circumstances covered in Section 4(a)(1), 50 U.S.C. § 1543(a)(1), has been extended and Congress was explicit in the 2001 Antiterrorism authorization that it constituted “specific statutory authorization within the meaning of 5(b) of the War Powers Resolution.” Id. § 2(b)(1).}

\footnote{108. Joint Resolution to Authorize the Use of United States Armed Forces Against those Responsible for the Recent Attacks Launched Against the United States, Section 2(a), Pub. L. No. 107-40, 115 Stat. 224 (2001).}

\footnote{109. Relevant international law is a necessary background for interpretation of congressional laws. See, e.g., PAUST, FITZPATRICK & VAN DYKE, supra note 2, at 141-42; PAUST, supra note 79, at 6-9, 62-63, 82-83, 99-100, 103-05 n.2, 107-08 n.9. Thus, international law conditions the meaning of the express limitation to use merely “appropriate” armed force. Since it would not be appropriate under international law to use military force against a state that merely aids or harbors non-state terrorists when the state is not a direct participant in an armed attack, absent Security Council or regional authorization, the 2001 congressional authorization must be construed to deny such a use of military force. Further, there must be a clear and unequivocal intent of Congress to override relevant international law. See, e.g., PAUST, FITZPATRICK & VAN DYKE, supra
"harbored" the 2001 congressional authorization is limited to circumstances on or before September 11th it is not preemptive in focus, and it does not authorize use of force against states that merely aid or harbor members of al Qaeda after September 11th, as the President claims Iraq has done. Further, it is unknown whether Iraq participated in the September 11th attacks at all. Thus, the 2001 congressional authorization would not provide support for the use of force to topple the Iraqi regime or to destroy Iraqi weapons of mass destruction in a "preemptive" raid upgrading the de facto war with Iraq. As noted, limitations in the 1991 congressional authorization of armed force against Iraq would also preclude such an operation under the 1991 authorization despite any continuing authority that exists in Security Council Resolution 678.

Despite such limitations, as far as the U.S. Congress is concerned, all such limitations were swept away with the new joint resolution authorizing use of military force against Iraq that the President determines to be appropriate to defend the national security of the United States against the continuing threat posed by the Iraqi regime and to enforce various Security Council resolutions concerning Iraq. In the joint resolution, Congress expressly reaffirmed the continuing vitality of Security Council Resolution 678 and recognized that "all relevant United Nations Security Council resolutions" should be enforced. Thus, the Joint Resolution revitalizes Security Council Resolution 678's full effect as U.S. domestic law in contrast to limitations contained in the 1991 congressional authorization. Additionally, while addressing Security Council Resolution 678, Congress declared that Iraq continues to threaten international peace and security in the region by (1) developing weapons of mass destruction in violation of U.N. Security Council Resolution 687; (2) repressing its civilian population in violation of U.N. Security Council Resolution 688; and (3) threatening its neighbors or United Nations operations in Iraq in violation of Security Council Resolution 949. Thus, Congress considers Resolutions 687, 688, and 949 to be relevant resolutions within the meaning of

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note 2, at 142, 345-52, 359; PAUST, supra note 79, at 99, 108 n.9. There is no clear and unequivocal intent of Congress to do so in the 2001 authorization.

110. As noted, the 1973 War Powers Resolution and the 1991 authorization are also not preemptive in focus.

111. See text supra notes 79-81.

112. See Joint Resolution to Authorize the Use of Military Force Against Iraq, Section 3(a)(1)-(2), Public Law 107-243 (Oct. 2002). The 2002 authorization contains no time limit and thus also swept away the 60-90 day time limits contained in the 1973 War Powers Resolution (1) as subsequent federal law, and (2) as an express specific statutory authorization within the meaning of Section 5(b) of the War Powers Resolution. See id. § 3(c)(1).

113. See id. preamble.

114. See id. § 3(a)(2).

115. See sources cited supra notes 82-83.

116. See sources cited supra notes 76, 82-83. The preamble to the Joint Resolution noted that the 1998 Iraqi Liberation Act had stated that U.S. policy should support efforts to remove the Iraqi regime and to promote a democratic government in Iraq.

117. See supra notes 82-83.
Resolution 678118 and also considers Iraqi breaches of these resolutions to pose threats to peace and security in the region within the meaning of Resolution 678.119 Thus, Security Council Resolution 678, coupled with the 2002 congressional authorization, provides legal justification for the use of armed force against Iraq, assuming that no limits are created by a new Security Council resolution.

Soon after the 2002 congressional resolution, the Security Council adopted Resolution 1441.120 Although the new Security Council resolution did not expressly authorize the use of armed force against Iraq, it decided “that Iraq has been and remains in material breach of its obligations under relevant resolutions,”121 and recalled “that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations,”122 and, more importantly, it referred twice to Resolution 678 and expressly reminded “that its resolution 678 (1990) authorized Member States to use all necessary means to uphold and implement its resolution 660 (1990) . . . and all relevant resolutions subsequent to resolution 660 (1990) and to restore peace and security in the area.”123 Thus, the Security Council has expressly recognized the continuing vitality of Resolution 678 as an authorization to use military force for any of the three purposes expressed and it has incorporated Resolution 678 by reference.

Conclusion

From both an international law and constitutional perspective, the U.S. use of military force against al Qaeda in response to ongoing processes of armed attack against the United States, its military vessels, its embassies abroad, and its nationals here and abroad was permissible. However, the

118. See supra note 77.
119. See supra note 78. The preamble to the Joint Resolution addresses the need “to restore international peace and security in the Persian Gulf region.” There is no clear, unequivocal intent of Congress to override international law. On the contrary, Congress assumes that U.N. Security Council Resolution 678, coupled with Resolutions 687, 688 and 949, authorize use of armed force against Iraq, and the President is authorized in the Joint Resolution to use “appropriate” force “in order to” “enforce” Security Council resolutions.
121. Id. para. 1. Expressly mentioned as “relevant resolutions” (a phrase relevant to the authorization of armed force under Resolution 678) were Resolutions 687 and 688, and in connection with the latter, the Security Council addressed the need of the Iraqi regime “to end repression of its civilian population.” See id. preamble; supra note 77.
122. Id. para. 13.
123. Id. preamble. Resolution 1441 also impliedly recognized the continued permissibility of armed “action to uphold any Council resolution” when it decided “that Iraq shall not take or threaten hostile acts directed against . . . any Member State taking action to uphold any Council resolution.” Id. para. 8. Nonetheless, Resolution 1441 decided to “afford Iraq . . . a final opportunity to comply with its disarmament obligations under relevant resolutions of the Council, but did not obviate continuing authorizations to use military force. Id. para. 2. States must act in good faith to provide Iraq a reasonable opportunity to comply. Thus, there exist both authorizations for an upgraded war and an opportunity for peace.
U.S. use of military force against the Taliban in Afghanistan was highly problematic under international law and raises serious concerns about future use of military force against states that merely harbor or support or have known links with non-state terrorists or other international criminals. State responsibility for support of non-state terrorists can lead to use of political, diplomatic, economic, and juridical sanction strategies, but does not simplistically justify the use of military force in the absence of direct involvement by the supporting state in a process of armed attack or permissible Security Council or regional authorizations to use military force. Permissible use of military force against Iraq rests ultimately on authorization from the Security Council.

Despite claims associated with the Bush doctrine that assumes the permissibility of preemptive strikes against states or groups whose weaponry or weapons programs could pose a threat to the United States or its allies, preemptive self-defense is not permissible under the United Nations Charter absent Security Council or appropriate regional authorization to use armed force.

