International Law on the Use of Force against Terrorists Since 9/11

The Contrasting Cases of Israel and India

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The international law on the use of force against terrorists has experienced a radical revision since the rise of transnational jihad of Al-Qaeda. It has sufficiently expanded to accommodate actions against terrorists in foreign territory in the wake of terrorist attacks, particularly when the foreign State is hosting terrorists and not cooperating with the victim State. However, the new legal framework does not give carte blanche to States to use force against terrorists. While using force States must strictly follow the law. Attempts to bypass the law discredit a state's self-defence claim, even if that state has been the victim of terrorism. Two evident but contrasting examples of this assertion are Israel's actions in Lebanon (2006) and Gaza (2014) and India's surgical strikes in Pakistan-occupied Kashmir (PoK) in 2016. While the former circumvented the law and faced international criticism, the latter's actions were within international law and therefore, found international support.

The rise of Al-Qaeda's transnational jihad since the mid-1990s and the 9/11 attacks have resulted in a radical revision of the law on terrorism, both at international and national levels. Almost every single state has either adopted a new counter-terrorism law or drastically revised the

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existing ones. At the international level, the United Nations Security Council (UNSC) adopted several resolutions for countering terrorism and established a new Counter-Terrorism Implementation Task Force. One-and-a-half decades after 9/11, while Al-Qaeda Central (AQC) has declined, threats from other terrorist organisations, like Al-Qaeda in Arab Peninsula (AQAP), Jabhat Al-Nusra and most importantly, the Islamic State, continue to rise. With these threats in mind, states are constantly pushing for change in international law to achieve relative advantage.

International law on the use of force suffered perhaps the biggest challenge due to 9/11 attacks and as a result, expanded to accommodate terrorism within its fold, partly because of a broader interpretation of law and partly because of the unanimous acceptance by states of such broader interpretation. The international community, in a unanimous move to counter terrorism, is now more complacent towards unilateral use of force against terrorists.

The recent case of surgical strikes by the Indian Army is a case in point. It is well known that the Indian Army executed surgical strikes on 29 September 2016 to destroy some terrorist camps in Pakistan-occupied Kashmir (PoK) in anticipatory self-defence against terrorist attacks.[1] The majority of states responded favourably towards India. However, had the surgical strikes been conducted 20 years ago, the same states would have responded differently. Before 9/11, states had strongly defended the prohibition on the use of force, which was considered the cornerstone principle of state sovereignty. Similarly, in 2006, when Israel used force in Lebanon against Hezbollah, a majority of the states accepted Israel's right to self-defence against terrorism, although the same states also agreed that the scale of response was disproportionate.

The core argument of this article is that the international law on the use of force against terrorism has sufficiently expanded since 9/11 to allow states to use force against terrorists, albeit with certain restrictions. The article examines these restrictions and explains that states can judicially use this new legal framework to counter terrorism effectively, particularly in cases where foreign states support terrorist groups. However, the new legal framework does not give *carte blanche* to states on the use of force against terrorism. Actions undertaken by States in foreign territories against terrorists should be within the boundaries of the international law. Attempts to bypass the law result in the loss of international support , even if that state has been a victim of terrorism. To support this assertion, this article provides an in-depth analysis of two case studies, that is, the

recent Indian surgical strikes on terrorist camps situated in the PoK and Israel's use of force in Lebanon in 2006 and Gaza in 2014, along with a brief discussion on some other cases of use of force against terrorists.

The article is divided as follows. The next section explains the international law on the use of force and the circumstances under which states are allowed to use force. The following section analyses the evolution of international law on the use of force against terrorists from pre-9/11 to the present day. It is suggested that since 9/11, rules regarding the use of force against terrorists have expanded and the threshold line permitting the use of force has been lowered. While the law *per se* has not changed, the rules have evolved largely as a result of a broader interpretation of existing laws and the general acceptance by states to permit the use of force against terrorists. The final section investigates the case of Indian surgical strikes and compares it with the Israeli actions in Lebanon in 2006 and in Gaza in 2014. It asserts that while states benefit from the new legal framework, they should use the law in order to demonstrate strong credibility in international relations. Attempts to bypass the law would invite criticism and isolation from the international community.

Understanding International Law on the Use of Force

International law prohibits all uses of force on the territory of sovereign states. The starting point to understand this principle is Article 2(4) of the United Nations (UN) Charter. Since the incorporation of this article in the UN Charter, states have strongly resisted attempts to breach Article 2(4). Maintaining a very narrow reading of Article 2(4), states have asserted that no exception, other than those prescribed in the UN Charter, to Article 2(4) is available under international law.

The reason for such a discourse is somewhat reasonable. The UN Charter was adopted in the historic context of World War II.[2] States, in 1945, unanimously agreed that to avoid another world war, international law on the use of force should be sufficiently strong. During the *travaux préparatoires* of the UN Charter, Article 2(4) was one of the most debated articles. States preferred 'use of force' to 'war' or 'aggression' to ensure that any degree of justification to use force against the territorial integrity of states is considered illegal. Thus, Article 2(4) stipulates that

> 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.[3]

Article 2(4) is not a standalone protection wall in international law on the use of force. A number of international multilateral treaties and United Nations General Assembly (UNGA) resolutions strictly prohibit the use of force by states. The key legal documents are: Resolution on the Essential of Peace, 1949;[4] Declaration on Friendly Relations, 1970;[5] Definition of Aggression, 1974;[6] and Declaration on the Non-use of Force, 1987[7]. The jurisprudence of International Court of Justice (ICJ) has further strengthened the prohibition of the use of force. Through numerous cases,[8] including the most famous Nicaragua case, ICJ has maintained that no exception to Article 2(4) is available apart from those endorsed by the UN Charter.[9]

However, the UN Charter provides for two exceptions to Article 2(4). The first exception is self-defence under Article 51 and the second exception is the authorisation of the UNSC to use force to maintain international peace and security under Article 44 of Chapter VII. These two exceptions mean that states are allowed to use force against the territorial independence of any state either (i) in an act of self-defence (Article 51) or (ii) the UNSC has authorised one or more states to use force (Chapter VII).[10]

As the use of force under Chapter VII lies outside the scope of this research, I will focus only on Article 51, which states that:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. 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.[11]

Self-defence under Article 51 of the UN Charter can be triggered by a state when an armed attack has occurred on its territory. However, Article 51 does not clearly state what kind of attacks would be sufficient to activate it. To this end, ICJ has played a major role in defining 'armed attack' under Article 51. In the Nicaragua case, ICJ stated that not all kind of attacks can be considered as armed attack under Article 51. Attacks that allow victim states to use force should be of sufficient gravity.[12] The ICJ also explained that armed attacks can be of two types:

most grave form of attacks and less grave forms of attacks.[13] The ICJ followed this approach in the Oil Platform case in 2003,[14] stating again that only 'gravest form of attacks' can be considered as an armed attack able to trigger Article 51. The ICJ also found that attacks must also have the 'specific intention of harming'.[15] Consequently, only grave armed attacks have the power to trigger Article 51.

Furthermore, although a grave armed attack would be necessary for a victim state to trigger Article 51, it is not a sufficient condition to use force in another state's territory. The sufficient condition is attribution. Thus, the victim state should be able to acceptably attribute the responsibility of armed attack to a state before using force on its territory. In fact, in international law on the use of force, attribution is key. Attribution is easy when there is a conventional style of armed attack. However, it becomes complicated when the attacks are carried out by non-state actors like terrorist groups, armed bands and irregular armed forces. We shall deal with the subject of attribution in the case of terrorist attacks in detail in the next section.

Beyond attribution, there are four limitations to self-defence, namely, immediacy, necessity, proportionality, and temporality,[16] which are the core principles of self-defence. Therefore, self-defence is not an absolute right. Under immediacy, the victim state should take armed action immediately after the armed attacks have occurred or attacks are underway in case of anticipatory self-defence. A state cannot use force several months after actual attacks. However, before taking any action, the victim state should assess the necessity of using force. The victim state should use force only if all options for peaceful resolution of the conflict have been exhausted and force is the last available option.[17] In doing so, the victim state should maintain the link with the limitation of immediacy. Thus, while evaluation of necessity is essential, it should be well balanced with the limitation of immediacy. Once force is used, the victim state must ensure that the action taken is proportionate to the armed attack it has suffered on its territory. States may use force legitimately but their actions should always be 'proportionate, in nature and degree', to the armed attack.[18]

Proportionality, however, is a very contested limitation, particularly in cases of terrorist attacks. States like Israel and the United States (US) argue that proportionality depends on the nature of the threat that terrorist groups pose. For instance, during the Lebanon War in 2006, while the US and Israel disagreed, a majority of states agreed that Israel's

action in Lebanon against Hezbollah was disproportionate to the armed attack Israel had suffered. We shall revisit the Lebanon War in detail at a later stage.

Finally, the use of force against terrorists should be time-limited. Once operation against the terrorist groups or a state has started, there should be an exit strategy and use of force should be time bound.

International Law on the Use of Force against Terrorists since 9/11

The attack on the US homeland on 11 September 2001 and the rise of Al-Qaeda's transnational jihad changed the way international law looked at the problem of terrorism. Terrorism, which was considered as a national criminal law issue, suddenly found an international character. While a separate legal framework was created to deal with international terrorism,[19] law on the use of force, as highlighted earlier, went through a sea change.

The use of force against terrorists was in fact, and still is, a very complicated subject in international law. As a general practice, apart from Israel and the US who have defended their right to use force against terrorists on foreign territories under Article 51 since the UN Charter came into force, all the other states remained nearly unanimous in their approach of not including acts of terrorism in the legal framework of the use of force till 9/11.

The post-UN Charter period until the late 1990s witnessed only a few cases of states using force in a foreign territory against terrorists, and all of them were unanimously and ardently criticised. The first such incident was Israel's attack in Beirut in 1968. The Israeli action was heavily condemned by the UNSC.[20] Israel did it again in 1985, in Tunisia, by attacking Palestine Liberation Organization's (PLO) headquarters and the UNSC responded by describing it as an 'act of armed aggression against Tunisian territory'.[21] A year later, the US attacked Libya in response to terrorist attacks on US citizens. While the UN resolution could not get through the UNSC on this occasion because of obvious reasons,[22] a majority of states did not accept the US' right to self-defence against international terrorism.[23]

Likewise, anticipatory and pre-emptive self-defence,[24] discussed in detail in the next section, were also strongly opposed during this period. In fact, while states were still a bit complacent on the use of force against terrorists after an armed attack has occurred, pre-emptive or anticipatory

self-defence was never accepted. During the *travaux préparatoires* of the UN Charter, when delegates from some Western countries like the US and the United Kingdom (UK) conveyed their intention to include pre-emptive self-defence under Article 51,[25] a majority of states, particularly the representatives of Third World countries, strongly opposed this move, which they saw as imperialism in disguise.

The incidents of anticipatory self-defence and pre-emptive self-defence in the period before 9/11 were also rare. Among them, the most noteworthy was Israel's missile attack on Iraq's Osirak nuclear reactor in 1981. And, as expected, both the UNSC and the UNGA strongly condemned the action, stating that it was in 'violation of the Charter and the norms of international conduct'.[26] In addition, legal experts and scholars have supported the ban on pre-emptive self-defence, asserting that no right of self-defence exists absent an armed attack. In the event of a possible attack, a state should only be prepared to resist rather than pre-empting the attacks.[27]

It is not that states were not allowed at all to use force against terrorists in foreign territories, but the permission to do so was very much centred on the case of attribution. Thus, if a state could prove that the act of a terrorist group was attributed to a state, there was then no restriction. However, one can imagine the difficulty to attribute the responsibility of a terrorist attack to a state, particularly in proxy wars. No state would accept openly that it supports terrorism. Nevertheless, this restrictive approach had a few rationales.

First, as explained earlier, the UN Charter was drafted in the backdrop of the end of World War II. No state, particularly the West and its allies, wanted to go through the horror that had been just witnessed. The message was clear: the use of force, which was the reason to start the two world wars, should not only be legally prohibited but also closely monitored and resisted. Second, the post-UN Charter period saw numerous countries gaining independence from their colonial masters. These colonies wanted to resist any opportunity of Western countries and their allies to repeat the imperial history.

Third and most importantly, terrorism prior to 9/11 was seen as a national criminal law problem not because countries never suffered from terrorism but because terrorist activities in those times were mostly home grown. For instance, the UK went through a long struggle with Irish Republican Army (IRA). Similarly, secular rulers in Egypt, Libya and Jordan suffered from home-grown jihadists movements in the 1970s and

1980s and Israel had to face the PLO since 1969. Before the rise of Al-Qaeda's transnational jihad, terrorism was limited to national boundaries and states were able to handle terrorist acts within their national criminal law framework. Israel was an exception as the PLO had footholds in multiple Arab countries, and so was India after the rise of Lashkar-e-Taiba (LeT) and Pakistan-led armed insurgency in Kashmir from 1987 onwards. Finally, the terrorist activities of the 1970s and 1980s were not as sophisticated as Al-Qaeda's transnational jihad. With the massive rise of technology, the boundaries of terrorism have blurred. The sophisticated weapons terrorists now possess and the technological advancement they have achieved have enhanced their attacking capacity around the world. Such high level of terrorist acts needs contemporary rules to tackle them.

As the character of terrorism changed in the middle of the 1990s, the response from the states also experienced significant refurbishing. In August 1998 when the US responded to the twin terrorist attacks on its embassies in Kenya and Tanzania by attacking training camps in Afghanistan and a pharmaceutical plant in Sudan, the response from the states was not as rigid as it used to be a decade before in a similar context.[28]

This lenient attitude of states against the US on this occasion became permanent in just a few years. Immediately after 9/11, the UNSC passed Resolution 1373, which is perhaps the first legal document allowing a collective action against terrorism.[29] Other resolutions like 1368[30] and 1189[31] also supported the concept of self-defence against terrorism. Since then, as international terrorism has grown by leaps and bounds, the measures to combat it have also expanded drastically.

While the law expanded after 9/11, it did not change overnight. As discussed earlier, states started displaying some flexibility on the use of force before 9/11 after the twin US Embassy attacks. Yet, 9/11 was the triggering factor. The biggest change 9/11 brought in law was the universal recognition that if terrorist groups or non-state actors mount attacks on states, the victim states can now freely exercise their right to self-defence under Article 51, even if, as we shall see later, no state has supported or assisted the terrorist groups to mount attacks on the victim states.[32]

However, this recognition did not give states a free hand regarding terrorism. Resolution 1373, the first legal document permitting use of force against terrorists, was passed under Chapter VII of the Charter. And, one should note that Chapter VII authorisation to use force is a

legal right derived from the UNSC endorsement to use force to maintain international peace and security. It does not, however, give right to use force unilaterally.

So, what did 9/11 bring? In my opinion, the 9/11 attacks had an effect on the attitude of states in dealing with terrorism. One should note that, although international law *per se* did not change, the status quo of law on use of force was broken. This was largely because of a broader interpretation of Article 51 to accommodate self-defence against terrorist strikes; particularly in the case attribution is not straightforward. In addition to this, international law on the use of force also accommodated anticipatory self-defence against imminent attacks.[33]

The language of Article 51 is silent on who could mount an armed attack. At no point does it suggest that self-defence is available only against states. In fact, self-defence against non-state actors was a legally available option much before 9/11. To this end, UNGA has stated that 'sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein' shall qualify as an act of aggression.[34] The ICJ adopted the same definition in its landmark Nicaragua case[35] in 1986, followed by a similar assertion in DRC v. Uganda. Further, Judge Higgins, the then sitting judge of ICJ, in her separate opinion in the Israel wall case also affirmed that states could use force against non-state actors under Article 51.[36]

However, as mentioned earlier, the acceptance to use force against terrorists was strongly linked to attribution. Thus, states were legally permitted to use force against terrorists only if terrorist attacks could be attributed to the state on which the force was used. If one removes attribution, the defence to use force against terrorists collapses. It was in this light that states always opposed the use of force on terrorists.

Since the rise of Al-Qaeda and its transnational jihad in the mid-1990s, the dynamics of terrorism changed significantly. The boundaries of terrorism are not limited anymore to one country, and thus cannot be dealt through the criminal law prism alone. Under these evolving circumstances, academicians, legal experts and policymakers have raised serious questions on the approach to restrict terrorism to attribution. One cannot expect a state to remain a mute spectator if a massive terrorist attack has occurred on its territory and that attack cannot be attributed to any state. The most striking example is the November 2015

Paris attacks. Although Islamic State of Iraq and al-Sham (ISIS) claimed the responsibility of the attacks, its action can neither be attributed to Iraq nor to Syria. Similarly, the ISIS attacks at Brussels airport in 2016 cannot be attributed to Syria or Iraq. Scholars assert that states have a responsibility to protect their citizens from terrorist attacks. If the host state from which terrorists are launching attacks on the victim state is neither willing to cooperate nor taking any measures to stop the attacks, then the victim 'State must have the right to use force in self-defence'.[37] Professor Christian Tams, an expert on this subject, also suggests that since 9/11 state practice in international law has been accommodating the use of force against terrorists.[38] The International Law Commission has also established that the conduct of terrorist groups could be attributed to a state under certain circumstances as described by it in the Responsibility of States for Internationally Wrongful Acts, 2001.[39] These circumstances are elaborated later while establishing the conditions for self-defence against terrorists in the absence of a proper attribution.

As a matter of fact, this position was established by ICJ long back in 1949 in the Corfu Island case. In this case, ICJ, accepting the concept of duty of vigilance, opined that every state has an obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states.[40] Unfortunately, between Corfu Island and 9/11, states largely ignored ICJ's verdict, partly because the threat from terrorism was not as severe as now and partly because national criminal law was very much capable of dealing with terrorism.

It was in these changing circumstances that Israel's action against Hezbollah in Lebanon in 2006, and against Hamas in Gaza in 2009 and 2014,[41] did not face strong resistance. While states did criticise Israel for its disproportionate action, they were reluctant in condemning Israel's aggression. We shall come back to this topic in the next section.

International legal experts now argue that in case of terrorist attacks, victim states can use force on states hosting terrorists, without claiming attribution, under the following four conditions [42] and that satisfaction of any condition alone would be sufficient to trigger self-defence under Article 51.

The first condition is that the state actively and openly supports terrorist groups. The case of the use of force is fairly straightforward here. Second, academicians and legal experts have proposed lately that in case the host state is either unable or unwilling or both to tackle the terrorist organisations operating on its territory and neither willing to

help the victim state, the attribution criterion is not required. The victim state can launch counter-attacks on terrorist camps located inside the territory of the host state. The classic example of this argument is the Syrian case vis-à-vis the Islamic State. Although the Paris attacks in November 2015 cannot be attributed to Syria, scholars admitted that unable–unwilling formulae could be applied in this case, as the Assad government was unable to defeat ISIS. Also, Iraq, citing its inability to counter ISIS, officially asked help from the US.[43] To this end, Professor Trapp has rightly suggested that if the use of defensive force is targeted only at the non-state actors responsible for armed attacks and not on the host country's forces, government properties and installations, then the use of force would be considered as legitimate, provided that other criteria for self-defence, that is, necessity, proportionality, immediacy and temporality, are adequately met.[44]

The third condition is that the host state 'effectively controls' the operations of the terrorist group. In such a situation, acts of terrorist groups shall be attributed to the host state.[45] The International Criminal Tribunal for Yugoslavia (ICTY) clarifies that when a state exercises 'overall control of a group as a whole', then the actions of that group can be attributed to that state.[46] It 'concluded that the dynamics and hierarchy within (sufficiently) organized groups would make their activities attributable to the state if they stood under its overall control.'[47] This also mirrors International Law Commission's Articles on State Responsibilities that:

> the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.[48]

Fourth, a state does not control the operations of terrorist groups but effectively controls the territory on which terrorist groups operate and takes no action against them. In this regard, the European Court of Human Rights (ECHR) established clarity while stating that if a state effectively controls a territory, all acts of commission and omission should be accredited to that state.[49] International law also requires states to apprehend, prosecute and punish terrorist groups operating in their territories and attacking other states. The International Law Commission, in its report published in 2014, stated that states have an obligation to take necessary actions against terrorist groups operating in their territory and harming other states.[50] The Convention for the Suppression of

Unlawful Seizure of Aircraft[51] and UNSC Resolution 2178 (2014)[52] have taken the same stand.

As stressed earlier, one can safely assume that in the case any of the four possibilities is satisfied, the victim state has the right to use force inside the territory of the host state. However, if self-defence is activated by the victim state as the result of any of the four possibilities, the victim state will also have to satisfy the restrictions of self-defence in order to legally justify its action. These limitations, sufficiently explained earlier, are immediacy, necessity, proportionality and temporality.

If states can use force against terrorists after an armed attack has occurred, for instance, the Paris attacks or 9/11, then should states be allowed to use force in anticipatory self-defence, particularly when there is a clear sign that a terrorist attack from foreign territory is underway?

As the law on the use of force against terrorists in wake of armed attacks evolved, the legal approach on anticipatory self-defence too went through similar changes. As explained earlier, both anticipatory self-defence and pre-emptive self-defence were prohibited in international law before 9/11. However, the status quo changed with the emergence of transnational jihad, introduction of modern warfare and fast-changing geopolitical conditions in the Middle East. 'With the development of new weapons of mass destruction it would (be) perverse to maintain that a state facing an imminent attack by an enemy armed with such weapons would have to sit by idly and wait for the attack to start before it could defend itself.'[53] It would thus be unreasonable to expect a state to not take any action and wait for the approval from the Security Council in wake of attacks that are imminent.

The first step understandably came from the US when its National Security Strategy (NSS), published in September 2002, claimed its right to anticipatory self-defence as well as pre-emptive self-defence, stating that 'force may be used even where there has been no actual attack, purely in order to pre-empt future, even non-imminent, attacks'.[54] Nevertheless, while states like the UK[55] and the Netherlands[56] accepted the right to anticipatory self-defence against imminent attacks, pre-empt non-imminent right was out rightly rejected.[57] The UN Secretary-General, in 2004, in a high-level panel report also observed that 'a threatened State, according to long established international law, can take military action as long as the threatened attack is imminent'.[58] A year later, he adopted the same position reiterating that states under the threat of imminent attack have the right to use force in self-defence.[59] These developments in

the first decade of the twenty-first century helped establishing that states would accept the legality of anticipatory self-defence when there is an imminent threat of an armed attack and that the broader interpretation of Article 51 is now imperative. However, at the same time, states have unanimously rejected the pre-emptive rights to use force.

This section concludes with the assertion that though the legal framework on use of force remains unchanged, the legal approach since 9/11 to interpret the definition of self-defence under Article 51 has conveniently accommodated the use of force against terrorists even when the attacks cannot be straightaway attributed to a state. Thus, the use of force on foreign territory against terrorists is legally justified if:

1. there is an armed attack or imminent threat of armed attack;
2. that armed attack is attributed to a state directly or any of the four conditions discussed earlier can be satisfied; and
3. the limitations of self-defence, that is, immediacy, necessity, proportionality and temporality, are respected.

The Application of the Expanded International Law: Israel and India, Two Contrasting Cases

The availability of legal right to use force against terrorists means that states can combat the issue of terrorism more effectively, particularly in cases where a state hosting terrorist activities is not cooperating with the victim state. But, do states really need a legal framework to justify their actions against terrorists? States would anyway use force if they wish to. Therefore, what is the need for a legal framework and how is the international law applied in practice?

In my opinion, while military strategies do not need international law justification, political echelons do. To maintain strong international relations, states need legal tools to justify their actions at the international level. Unilateral actions against the wishes of the majority of states could lead to isolation and international criticism.

A close analysis of all major cases in the decade that followed 9/11 suggests that states have always looked for a legal justification before resorting to force against terrorists. For instance, the 2001 North Atlantic Treaty Organization (NATO) military action in Afghanistan was backed by UNSC Resolutions 1368 and 1373;[60] the 2003 invasion of Iraq by the US and its allies, though widely criticised, was legally justified by the 'material breach' of the UNSC Resolution 678[61] and

supported by UNSC Resolution 1441;[62] and the counter-terrorism action by the US against ISIS in Iraq in 2014 was officially requested by the Iraqi government.[63]

These cases are not discussed in detail here as none of them neatly fall within the scope of the main argument of this article. One of the focal points of this article is that states look for legal justification to strengthen their case on the international platform. Israel's actions during the 2006 Lebanon War and the 2014 Gaza War are perfect examples highlighting that while the expanded law on the use of force against terrorists gives states additional leverage to fight terrorism, they are not given carte blanche to fight terrorism; and attempts to bypass the law invite criticism and isolation from the international community. On the other hand, the recent case of Indian surgical strikes contrasts with the Israeli cases vis-à-vis its strict adherence to international law. A comparative analysis of the two cases is given next.

The 34-day war between Israel and Hezbollah in the summer of 2006 was the result of Hezbollah's non-stop firing of rockets and mortars along the Israeli border, the killing of three Israeli soldiers and the abduction of two. It is well known that the Israeli response was massive.

Under Article 51 of the Charter, Israel was justified to defend itself against the armed attacks. In fact, at the time Israel launched its offensive in Lebanon, no state rejected Israel's self-defence claim, even though the actions of Hezbollah could not be attributed to Lebanon. It was clear that there was an armed attack on the Israeli territory, Israel satisfied three of the four possibilities set out in the previous section and the action was immediate, temporal and necessary. Yet, the Israeli action was widely criticised. The criticism was not about whether Israel's self-defence rights were legitimate but on the disproportionate nature of the action of Israel on the civilian population of Lebanon.

Israel's indiscriminate response targeted government properties, hospital, public buildings and airport in its attempt to flush out Hezbollah. 'The response (also) involved the destruction of military and civilian infrastructures located hundreds of miles away from the area of (confrontation).'[64] By the end of the 34 days, the total casualty on the Lebanon side surpassed 1,400, the majority being civilians. Despite the law being on the Israeli side, the criticism was strong. The then UN Secretary-General Kofi Annan stated that 'Israel's disproportionate use of force and collective punishment of the Lebanese people must stop.'[65] The Security Council, after witnessing the disproportionality of Israel's

response, immediately moved a ceasefire resolution, which was only blocked by the US veto. A resolution was eventually passed in August 2006 setting out the ceasefire terms.[66]

Israel repeated this offensive in 2014 against Hamas, which mirrored the Lebanon War with regard to both armed attack and proportionality.

Israel's Operation Protective Edge was an immediate response to the murder of three Israeli teenagers and regular rocket attacks by Hamas. This time too Israel's action as self-defence was legally justified. International community too agreed that Israel's self-defence claims were legitimate. Yet, Israel failed again the proportionality test. The 2014 Gaza War is, in fact, considered to be the worst use of force till date with regard to humanitarian crisis. Israeli forces, in 2014, not only knowingly attacked hospitals and schools but also UN-neutral areas, despite being clearly given the coordinates of these places by the UN. The UN reported a total casualty of over 2,500 Palestinians; over 70 per cent being civilians. Israel's collective punishment on the Palestinian population was widely criticised and its argument that Hamas terrorists were hiding behind civilians found no takers. Apart from criticism and isolation from the international community, the International Criminal Court (ICC) opened an enquiry against Israel on war crimes during the Gaza War[67] and a local court in Spain, applying universal jurisdiction,[68] convicted Benjamin Netanyahu for war crimes and ordered his arrest.[69]

In both Lebanon and Gaza wars, the law was very much on the side of Israel as it had been constantly attacked by Hezbollah and Hamas respectively. Had Israel's action been proportionate to the attacks it faced, it would have certainly escaped international criticism.

In comparison to Israel's actions, the Indian case of surgical strikes in September 2016 is very small, both in terms of scale and temporality. In fact, the Indian action quickly disappeared from the debates in international forums. However, it is still a very good case to showcase that when international law is strictly followed, the output results in strong support from the international community. Thus, it can be considered as a stronger case than the Lebanon or Gaza wars because of its strict adherent to international law and support from international community. In both Lebanon and Gaza wars, Israel, despite being the victim of armed attacks, faced scathing criticism, which involved countries like Germany, France, Belgium and the UK. The criticism was so high that a UK petition signed by more than 100,000 people and presented to the Parliament suggested the arrest of Israeli Prime Minister

Benjamin Netanyahu upon his arrival in the UK.[70] On the contrary, the response from the international community to the Indian action in PoK was much more favourable. India received vocal support from the US, the European Parliament, Russia and South Asian countries.[71] It also succeeded in sidelining Pakistan in all major multinational forums and gathering support against Pakistan's state-sponsored terrorism.

The main reason behind such a widespread support was the legality of Indian armed forces action. In fact, the surgical strikes took place very much within the boundaries of international law on the use of force against terrorists. In addition to this, as Indian national law perspective considers PoK an Indian territory occupied by Pakistan, the surgical strikes were carried inside the national boundaries. However, as the national legal framework is outside the scope of this paper, the discussion will be limited only to the international law.

India satisfied all the three conditions discussed in the previous section. The trigger to activate Article 51 was the attack in Uri in India on 18 September 2016, killing 19 people and injuring more than 30 people. This attack easily falls under the armed attack definition of high gravity set out by ICJ in Nicaragua case and elsewhere. Further to this, ICJ, in the Oil Platform case, has also asserted that a series of attacks cumulatively can be considered as an armed attack under Article 51—a point that was revisited in DRC v. Uganda in 2005.[72] A series of attacks is the point to highlight. In a span of one year, India faced at least three terrorist attacks originating from Pakistan-based terrorist organisations. In July 2015, in Gurdaspur, a terrorist attack killed more than 10 people;[73] in January 2016, an attack in Pathankot killed seven people;[74] and a June 2016 attack in Pampore killed eight and injured another 22.[75]

With regard to attribution, while attribution to a country in case of terrorism is a complex phenomenon, it is widely recognised that Pakistan's Inter-Services Intelligence (ISI) has been strongly involved in supporting terrorist groups in Kashmir as well as in PoK. The major terrorist groups, LeT and Jaish-e-Mohammed (JeM), banned by the US, freely operate in Pakistan and PoK. The US Department of State's country report, published in 2014, states that terrorist groups such as LeT 'continue to operate, train, propagandize, and fundraise in Pakistan'.[76] *BBC* reports that LeT is able to 'operate openly inside Pakistan, raising funds and recruiting members. Almost every shop in the major market of Pakistani cities, both large and small, has a Lashkar collection box to raise funds for the struggle in Kashmir.'[77] Further, the founder of LeT, Hafiz

Mohammad Saeed, moves freely in Pakistan, giving public speeches and interviews against India, as his organisation continues to flourish.[78] The LeT's logistical, operational and financial support from Pakistan's army and ISI have increased significantly,[79] as these terrorist groups continue to be used 'as instruments of foreign policy'.[80] Additionally, Pakistan's effective control of PoK, where these terrorist groups operate and launch attacks, safely attributes the responsibility of the terrorist attacks to Pakistan. Furthermore, although Pakistan has shown enthusiasm to fight with Tehrik-e-Taliban Pakistan (TTP), there is no willingness to tackle terrorist activities emerging from the LeT, JeM and other terrorist groups targeting India, satisfying the unwilling/unable formula set out earlier.[81]

Finally, it is quite evident that the Indian forces strictly followed the limitations of self-defence: the surgical strikes were executed immediately after the Uri attacks; were necessary as Pakistan continued to harbour terrorists and a series of diplomatic efforts to bring peace in the region failed; were proportionate as the actions were taken precisely against the terrorist groups, with special care to target only terrorist camps avoiding any civilian casualty; and had temporal limits as the entire operation finished in the span of a few hours.

Thus, we see how Indian action neatly followed the conditions of international law. It is this strict adherent to international law on use of force that distinguishes the Indian case from the Israeli ones in getting favourable international response. Had the Indian forces responded the Israeli way, the loss of credibility and international support would have been assured.

The two cases discussed here sufficiently display that while the international law on the use of force against terrorists has expanded to give states a margin to counter terrorism, the states in return must also respect the law. In both Israeli and Indian cases, the law supported their respective self-defence claims. However, while former disproportionately breached the international law, the latter stayed within the legal mandate given to it. The outputs, as we have witnessed, were contrasting.

Conclusion

International terrorism has become a global problem. It has engulfed almost the entire world. Al-Qaeda's legacy has been taken up by ISIS, forcing states to continue combatting terrorism. As the foothold of terrorism is not restricted to one country, the use of force in foreign countries is now imperative; and as the use of force against terrorists

in foreign states becomes inevitable, the law governing the use of force has also expanded. As this article argues, the international law has accommodated the use of force against terrorists, particularly in circumstances where actions of terrorist attacks can be attributed to no state. These changes have been largely driven by a broader interpretation of the law and not because of any amendments to it. Yet, the new rules come with a warning. Attempts to bend the new rules would invite severe criticism.

While one of the sections in the article sets out the conditions under which the use of force against terrorists would be considered legal, another section provides the functional link between the expanded law on use of force and its applicability in the current set-up of international relations. The Indian case represents the application of international law on use of force without inviting international criticism. The Israeli case, on the other hand, presents a contrasting output.

During the Lebanon War, Israel and the US disagreed that the Israeli action was disproportionate arguing that the terrorist group should be completely annihilated to break its capacity for future attacks. Unfortunately, a close analysis states otherwise. Hezbollah is not only active but its members are now part of Lebanese government cabinet. The representatives of Hezbollah also sat at the UNSC as non-permanent member when Lebanon was the UNSC member between 2010 and 2012.[82] Similarly, while Hamas continues to operate in Gaza, it has also secured massive international support for Palestine as a state, particularly after the 2014 war. Many Western countries, including the European Union, now recognise Palestine 'in principle'.[83] In 2015, the UK Parliament also passed a resolution recognising Palestine and condemning Israel's aggression in Gaza and settlements in West Bank.[84] Certainly, Israel's support in this moral war, thanks to its non-commitment to international law, has shrunk to just the US. It is thus for these reasons that states are reminded to remain strictly within the legal boundaries, ensuring that the international law is respected and that this expansion is not misused.

The fight against international terrorism in foreign territories is now adequately supported by the international law on the use of force. States like India, Israel, Turkey and others find the international law on their side, which they should use to thwart terrorist attacks. However, in doing so, the armed forces must ensure that they strictly stay within the boundaries of the law so that diplomatic echelons can successfully advocate their actions in international relations. Demonstrable credible

commitment to international law is essential to maintaining strong international relations.

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Notes

1. The Indian Army Director-General of Military Operations (DGMO), Lieutenant General Ranbir Singh, announced in a press conference on 30 September 2016 that the Indian Army had executed surgical strikes in PoK. The full statement is available on https://www.youtube.com/watch?v=0I7RBh8es3I, accessed on 14 December 2016.
2. The Preamble of the UN Charter states that the UN is determined 'to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind', available at http://www.un.org/en/sections/un-charter/preamble/index.html, accessed on 14 December 2016.
3. Article 2(4), the UN Charter.
4. Article 2, Resolution on the Essential of Peace, 1949.
5. Principle 1, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Resolution XXV.
6. Article 1, Definition of Aggression, 1974, UNGA Resolution XXIX.
7. Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, 1987.
8. Other important cases where ICJ maintained the restrictive approach to interpret Article 2(4) are the Corfu Island case (1949), the DRC v. Congo case (2003), and the Iranian Oil Platform case (2003).
9. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), 1986.
10. The most recent example of UNSC authorisation is UNSC Resolution 1973, passed in 2011 under Chapter VII. The resolution authorised states 'to take all necessary measures to protect civilians and civilian populated areas under threat of attack in the (Libya)'.
11. The UN Charter, Article 51.

12. Military and Paramilitary Activities in and against Nicaragua (Nicaragua vs United States), 'Merits', n. 9, para 191.
13. Ibid., para 249.
14. Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America), November 2003.
15. Ibid., para 64.
16. For discussions on the limitations to self-defence, namely, immediacy, necessity, proportionality and temporality, see Judith Gardam, *Necessity, Proportionality and the Use of Force by States*, New York: Cambridge University Press, 2006, pp. 138-143; Christian Tams, 'The Use of Force against Terorrists', *The European Journal of International Law,* Vol. 20, No. 2, 2009.
17. Gardam, *Necessity, Proportionality and the Use of Force by States*, n. 16, p. 141.
18. R. Higgins, *The Development of International Law through the Political Organs of the United Nations*, Oxford: Oxford University Press, 1963, p. 201. Also, see Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America), n. 14, p. 12.
19. After 9/11, 'the Security Council toughened up its position as the enforcer of 1373, accepting a report by its committee' (known as Counter-Terrorism Committee) and later creating a Counter-Terrorism Committee Executive Directorate (CTED) in 2004. See Conor Gearty, *Liberty and Security*, Cambridge: Polity Press, 2013, p. 31.
20. UNSC Resolution 262, 31 December 1968.
21. Christine Gray, *International Law and Use of Force*, New York: Oxford University Press, 2008, p. 196. The UNSC resolution was passed by 14 in favour and one abstention.
22. Organisation of African Unity unsuccessfully attempted to move a resolution in the Security Council. The resolution would have been anyway vetoed by the US.
23. Gray, *International Law and Use of Force*, n. 21, p. 196.
24. While the dictionary meaning of pre-emptive self-defence and anticipatory defence would infer largely the same meaning, legal experts have maintained a clear line between the two terms. On the one hand, anticipatory self-defence is considered as self-defence to deter attacks that are imminent in nature. On the other hand, pre-emptive self-defence is an action taken to deter attacks that are non-imminent. Pre-emptive attacks may or may not occur in the near future and are considered illegal in international law.
25. Leo Van den hole, 'Anticipatory Self-defence under International Law', *American University International Law Review*, Vol. 19, No. 1, 2003, p. 78.

26. UNSC Resolution 487, 13 November 1981.
27. Richard Erickson, *Legitimate Use of Military Force against State Sponsored International Terrorism*, Alabama: Air University Press, 1989, p. 136.
28. Gray, *International Law and Use of Force*, n. 21, p. 197.
29. While Resolution 1373 was the first legal document which allowed a collective action against terrorism, the first legal document to deal with the subject of terrorism was UNSC Resolution 1189, which was passed in 1998 after the twin US Embassy bombings in Dar es Salaam and Nairobi. Resolution 1189 was, nevertheless, limited in its scope as it only criticised the twin US Embassy bombings.
30. UNSC Resolution 1368, 12 September 2001.
31. UNSC Resolution 1189, 13 August 1998.
32. UNSC Resolution 1368 and UNSC Resolution 1373.
33. For the evolution of anticipatory self-defence, see David Kretzmer, 'The Inherent Right to Self-defence and Proportionality in Jus Ad Bellum', *The European Journal of international Law*, Vol. 24, No. 1, 2013, pp. 235–82; Van den hole, 'Anticipatory Self-defence under International Law', n. 25; United Nations, *In Larger Freedom: Towards Development, Security and Human Rights for All*, New York, 2005, para 124.
34. Article 3(g), Definition of Aggression, UNGA.
35. Nicaragua case, para 195.
36. Judge Higgins, Separate Opinion, Israeli wall case, 2004, para 33.
37. Kretzmer, 'The Inherent Right to Self-defence and Proportionality in Jus Ad Bellum', n. 33, p. 246.
38. Tams, 'The Use of Force against Terrorists', n. 16, p. 378.
39. Articles 8–11, International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, 2001.
40. Corfu Island case, 1949, para 38.
41. Kimberley Trapp, 'Can Non-state Actors Mount an Armed Attack?', in Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law*, Oxford: Oxford University Press, 2015, p. 690.
42. Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law*, Manchester: Manchester University Press, 2005, p. 186.
43. 'Iraq Formally Asks US to Launch Air Strikes against Rebels', *BBC*, 18 June 2014, available at http://www.bbc.co.uk/news/world-middle-east-27905849, accessed on 16 December 2016.
44. Kimberley Trapp, 'The Use of Force against Terrorists: A Reply to Christian Tams', *The European Journal of International Law*, Vol. 20, No. 4, 2010, p. 1052.

45. Lindsay Moir, 'Action against Host States of Terrorist Groups', in Weller (ed.), *The Oxford Handbook of the Use of Force in International Law*, n. 40, pp. 722–23.
46. ICTY, Prosecutor v. Tadić, ILM 38, 1999, para 90.
47. Ibid.
48. Article 8, International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, 2001.
49. Al-Skeini and Others v. United Kingdom, ECHR, 2011.
50. International Law Commission, *The Obligation to Extradite or Prosecute*, Final Report, United Nations, 2014, pp. 7–8.
51. Article 7, Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970.
52. UNSC Resolution 2178, 24 September 2014, available at http://www.un.org/en/sc/ctc/docs/2015/SCR%202178_2014_EN.pdf., accessed on 31 March 2017.
53. Kretzmer, 'The Inherent Right to Self-defence and Proportionality in Jus Ad Bellum', n. 33, p. 248.
54. Gray, *International Law and Use of Force*, n. 21, p. 209.
55. UK Attorney General's Advice on the Iraq War Iraq: Resolution 1441, para 3, available at https://www.theguardian.com/politics/2005/apr/28/election2005.uk, accessed on 31 March 2017.
56. 'Dutch Inquiry on the Legality of the War', January 2010, available at http://www.iraqinquirydigest.org/?page_id=7576, accessed on 16 December 2016.
57. Gray, *International Law and Use of Force*, n. 21, p. 212.
58. UN, *A More Secure World: Our Shared Responsibility*, Report of the High-level Panel on Threats, Challenges and Change, 2004, para 188.
59. United Nations, *In Larger Freedom: Towards Development, Security and Human Rights for All*, n. 33, para 124.
60. B. Smith, 'The Legal Basis for the Invasion of Afghanistan', 26 February 2010, available at researchbriefings.files.parliament.uk/documents/SN05340/SN05340.pdf, accessed on 31 march 2017.
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62. UNSC Resolution 1441, 8 November 2002, available at https://www.un.org/Depts/unmovic/documents/1441.pdf, accessed on 31 march 2017.
63. 'Iraq Formally Asks US to Launch Airstrikes against Rebels', n. 43.
64. Enzo Cannizzaro, 'Contextualizing Proportinality: Jus ad Bellum and Jus

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66. UNSC Resolution 1701, 11 August 2006, available at https://www.un.org/press/en/2006/sc8808.doc.htm. accessed on 31 march 2017.
67. 'ICC Opens Initial Probe into Possible War Crimes in Palestinian Territories', *Haaretz*, 16 January 2015, available at http://www.haaretz.com/israel-news/1.637518, accessed on 31 March 2017.
68. Universal jurisdiction in internationa law means that a person accused of committing crimes in another country can be brought to justice in the courts of another country. Offences covered by universal jurisdiction include certain war crimes, torture and hostage taking, and anyone can apply to the courts for an arrest warrant to ensure those guilty of these crimes abroad face justice here.
69. 'Arresting Netanyahu', *Al Jazeera*, 19 November 2015, available at http://www.aljazeera.com/indepth/opinion/2015/11/arresting-netanyahu-spain-warrant-israel-151119100033778.html, accessed on 31 March 2017.
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71. 'How World Powers Reacted to Indian Army's Strike across LoC', *Hindustan Times*, 29 September 2016, available at http://www.hindustantimes.com/india-news/how-world-powers-reacted-to-indian-army-s-strikes-against-militants-across-loc/story-ZYYJL2KO0t2Rokz3u6qWqO.html, accessed on 31 March 2017.
72. DRC v. Uganda, ICJ, 2005.
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82. UNSC, 'Countries Elected Members', available at http://www.un.org/en/sc/members/elected.asp, accessed on 31 March 2017.
83. EU recognised Palestine in principle on 16 December 2014; see 'EU Parliament Backs Palestine State "in Principle"', *The Guardian*, 17 December 2014, available at https://www.theguardian.com/world/2014/dec/17/eu-parliament-backs-palestine-state, accessed 25 March 2017. Iceland had already recognised Palestine in 2011; see 'Iceland Recognises Palestine State', *The Guardian*, November 2011, available at https://www.theguardian.com/world/2011/nov/30/iceland-recognises-palestinian-state, accessed on 25 March 2017.
84. UK recognised Palestine in principle on 12 October 2014; see 'Palestine Vote: MPs take Historic Decision to Recognise Palestinian State', *The Independent*, 13 October 2014, available at http://www.independent.co.uk/news/uk/politics/palestine-vote-mps-take-historic-decision-to-recognise-palestinian-state-9792485.html, accessed on 27 March 2017.