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Frank Walsh

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# RETHINKING THE LEGALITY OF COLOMBIA'S ATTACK ON THE FARC IN ECUADOR: A NEW PARADIGM FOR BALANCING TERRITORIAL INTEGRITY, SELF-DEFENSE AND THE DUTIES OF SOVEREIGNTY

Frank M. Walsh\*

## INTRODUCTION

On March 1, 2008, the Amazon jungle's predawn quiet was shattered as the Colombian military executed Operation Phoenix, a combined arms attack on a Fuerzas Armadas Revolucionarias de Colombia ("FARC") terrorist<sup>1</sup> base located in Ecuadorian territory.<sup>2</sup> Colombian Super Tucano aircraft targeted the FARC base from a distance and fired upon the camp while remaining in Colombian air space.<sup>3</sup> Following the air strike, Colombian troops crossed the border and entered the FARC base to verify that the targets had been eliminated. Operation Phoenix accomplished its goals: the Colombian Air

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\* Georgetown University Law Center, J.D. 2007; Yale University, B.A. 2004. This article is dedicated to Katia M. Walsh for her strength and support.

<sup>1</sup> The FARC, a narcoterrorist organization with over 6,000 members, is listed on the Department of State's list of Foreign Terrorist Organizations. See U.S. State Department, Designated Foreign Terrorist Organizations (Apr. 30, 2001), <http://www.state.gov/s/ct/rls/fs/37191.htm> (last visited Feb. 24, 2009). Designation as a FTO triggers a number of sanctions, including visa restrictions and the freezing of funds of these groups in American financial institutions. Additionally, the designation is intended to raise public awareness of the concerns that the United States has about the FTO's. See MARK P. SULLIVAN, LATIN AMERICA: TERRORISM ISSUES, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS (2005), at CRS - 4, <http://www.fas.org/irp/crs/RS21049.pdf>.

<sup>2</sup> See Joshua Goodman, *Colombian Rebel Leader Raul Reyes Killed by Army, Minister Says*, BLOOMBERG ONLINE, Mar. 1, 2008, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a5HnABwKGrZc> [hereinafter Goodman]; Simon Romero, *Colombian Forces Kill Senior Guerilla Commander, Official Says*, N.Y. TIMES, Mar. 2, 2008, at 18.

<sup>3</sup> See *On the Warpath*, THE ECONOMIST, Mar. 6, 2008, at 43; Goodman, *supra* note 2.

Force killed Raul Reyes, the FARC's second-highest ranking leader, and 20 other members of the FARC.<sup>4</sup> The strike also yielded voluminous electronic documents from Reyes' personal computer and electronic media storage.<sup>5</sup>

Operation Phoenix immediately drew criticism from the international community, with detractors condemning Colombia's military strike as an illegal violation of Ecuador's territorial sovereignty, suggesting that Colombia should have consulted with Ecuador before launching an attack to avoid encroaching upon Ecuador's sovereignty.<sup>6</sup> Venezuelan President Hugo Chavez, widely viewed as sympathetic to the FARC cause,<sup>7</sup> condemned the attack, broke off diplomatic relations with Colombia, and ordered Venezuelan troops to the Colombian border. Ecuadorian President Rafael Correa followed suit, breaking off relations and ordering troops to the border.<sup>8</sup> Within a week, a majority of the member states of the Organization of American States ("OAS") had denounced the action.<sup>9</sup>

Despite the international condemnation, however, the issue of whether Operation Phoenix actually violated international law is not as clear-cut as some critics would believe. Rather, Operation Phoenix's widespread condemnation is the result of an oversimplified and incomplete understanding of the northern Andean reality. The condemnation was incomplete because it failed to account for newly publicized connections between Ecuador and the FARC. The condemnation was oversimplified because critics failed to account for several principles of international law, including the right to self-defense and a

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<sup>4</sup> See *The War Behind the Insults*, THE ECONOMIST, Mar. 8, 2008, at 12, available at [http://www.economist.com/opinion/displaystory.cfm?story\\_id=10808543](http://www.economist.com/opinion/displaystory.cfm?story_id=10808543) [hereinafter *The War Behind the Insults*].

<sup>5</sup> Patricia Markey, *Colombia Says FARC Documents Show Correa Ties*, REUTERS, Mar. 3, 2003, <http://www.reuters.com/article/newsMaps/idUSN0229738220080303> [hereinafter Markey].

<sup>6</sup> See *The War Behind the Insults*, *supra* note 4, at 12.

<sup>7</sup> See generally Chavez: *Take FARC Off Terror List*, CNN ONLINE, Jan. 11, 2008, <http://www.cnn.com/2008/WORLD/americas/01/11/chavez.farc/index.html>.

<sup>8</sup> Stephan Kuffner & Puerto Nuevo, *South America's Most Troubled Border*, TIME ONLINE, Apr. 18, 2008, <http://www.time.com/time/world/article/0,8599,1732271,00.html>.

<sup>9</sup> Chris Kraul, *Neighbors take aim at Colombia over incursion*, L.A. TIMES, Mar. 5, 2008, at A-3, available at <http://articles.latimes.com/2008/mar/05/world/fg-oas5>.

state's duty to prevent its territory from being used for terrorist activity.

The fundamental problem with this area of international law is that jurists fail to accord several principles that are in tension. Some parties argue for territorial integrity, others argue self-defense, and still others argue that all states of the world have fundamental responsibilities to the world order. Instead of dealing with how these principles interact, jurists have often argued their points in isolation. This article rejects the status quo and synthesizes existing international law into a new paradigm for the use of force against terrorists in a third party state. In this new paradigm, described *infra*, the theories of territorial integrity, self-defense, and the responsibilities of sovereignty are all integrated into a single algorithm. The algorithm works by mapping out the potential policy space onto a two-dimensional model with the axes defined by international law.

This article analyzes Operation Phoenix's legality in three parts. First, the article discusses the historical background to the Colombian civil war, the aftermath of Operation Phoenix, and newly publicized information suggesting a relationship between the FARC and the Ecuadorian government. Second, the article describes several fundamental principles of international law that the critics of Operation Phoenix overlooked. Finally, the article sets forth a new paradigm for analyzing the use of force against terrorists in third party states and applies that paradigm to Operation Phoenix.

## I. OPERATION PHOENIX AND ITS AFTERMATH

### a. *The FARC's Journey from Colombia to Ecuador*

The story of the FARC's involvement in Ecuador begins decades earlier in Colombia.<sup>10</sup> The Colombian government has been battling the FARC for over fifty years.<sup>11</sup> The conflict has

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<sup>10</sup> See Jorge L. Esquirol, *Can International Law Help? An Analysis of the Colombian Peace Process*, 16 CONN. J. INT'L L. 23, 26-29 (2000) [hereinafter Esquirol].

<sup>11</sup> Luz E. Nagle, *Colombian Asylum Seekers: What Practitioners Should Know About the Colombian Crisis*, 18 GEO. IMMIGR. L.J. 441, 454 (2004) [hereinafter *Colombian Asylum Seekers*].

left as much as 40% of the country<sup>12</sup> under the de facto control of major narcoterrorist groups.<sup>13</sup> Only in the past six years has Colombia, under the leadership of President Alvaro Uribe and with the assistance of American military aid, been able to turn the tide in the war on the FARC. As the Colombian military increased the territory under its control, the FARC was pushed farther and farther into Colombia's southwestern jungles. Over time, the FARC began crossing the border with Ecuador and began using the area for supplies and recuperation.<sup>14</sup>

The FARC began as a Marxist revolutionary group in the 1950's but has since lost its ideological support<sup>15</sup> and has since become a simple violent criminal organization.<sup>16</sup> For a large portion of Colombia's history, the FARC was able to operate with near impunity in the country's southern jungles. The war with the FARC has claimed the lives of more than 250,000 Colombians and has forcibly displaced more than 1,350,000.<sup>17</sup> The low point in the war came in 1998 when Colombian President Andrés Pastrana ceded land equivalent to the size of Swit-

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<sup>12</sup> See *id.* (noting that a proposal was submitted by President Pastrana, which would have awarded autonomy to an area comprising approximately 40% of Colombian territory).

<sup>13</sup> Jeremy McDermott, *FARC: Rebels Without a Cause?*, BBC ONLINE, May 21, 2002, <http://news.bbc.co.uk/2/hi/americas/1998304.stm>.

<sup>14</sup> Arie Farnam, *Colombia's Civil War Drifts into Ecuador*, THE CHRISTIAN SCIENCE MONITOR, July 11, 2002, available at <http://www.csmonitor.com/2002/0711/p07s01-woam.html>.

<sup>15</sup> See Luz E. Nagle, *Placing Blame Where Blame is Due: The Culpability of Illegal Armed Groups and Narcotraffickers in Colombia's Environmental and Human Rights Catastrophes*, 29 WM. & MARY ENVTL. L. & POL'Y REV. 1, 22-23 (2004) [hereinafter *Placing Blame Where Blame is Due*]. The Fuerzas Armadas Revolucionaria de Colombia-Ejército del Pueblo ("FARC") began in 1947, when the central committee of the Colombian Communist party fortified the central cordillera in the Andes to fight against the conservative regime of Ospina Perez. In 1964, FARC dissidents created the Ejército de Liberación Nacional ("ELN") as what one commentator called the "result of the combination of a Marxist ideology and the fanatic and messianic elements of religious origin." *Id.*

<sup>16</sup> See ANDREW FEICKERT, U.S. MILITARY OPERATIONS IN THE GLOBAL WAR ON TERRORISM: AFGHANISTAN, AFRICA, THE PHILIPPINES, AND COLUMBIA, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS (2005), [http://www.ndu.edu/library/docs/crs/crs\\_r132758\\_04feb05.pdf](http://www.ndu.edu/library/docs/crs/crs_r132758_04feb05.pdf).

<sup>17</sup> See *Placing Blame Where Blame is Due*, *supra* note 15, at 12; see also NORWEGIAN REFUGEE COUNCIL, INTERNAL DISPLACEMENT: A GLOBAL OVERVIEW OF TRENDS AND DEVELOPMENTS IN 2004 11 (2004), [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/5136B3B276CF8B9580257090004E66A8/\\$file/Global\\_overview\\_2004\\_final\\_low.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/5136B3B276CF8B9580257090004E66A8/$file/Global_overview_2004_final_low.pdf) (explaining that Colombia has the world's second largest internally displaced person population).

zerland to the FARC rebels.<sup>18</sup> The FARC then proceeded to use the territory as a safe haven to train insurgents and even began producing fraudulent documents for European and Middle Eastern terrorist groups.<sup>19</sup>

Since 2002, Colombia has been able to turn the tide against the FARC for two primary reasons: increased American aid and the determined leadership of President Alvaro Uribe. First, American aid has become more robust. American efforts to deal with Colombian narcoterrorism had traditionally focused almost exclusively on the drug interdiction/eradication effort.<sup>20</sup> The Andean Counterdrug Initiative, commonly called Plan Colombia, limited American Coercive action to counternarcotics operations.<sup>21</sup> After September 11, 2001, however, Congress expanded Plan Colombia to include other countries in the Andean region.<sup>22</sup> With the amendments, the United States began to equip Colombia with the tools it would need to beat an entrenched militarized enemy.

The second factor in Colombia's recent successes has been the determined leadership of President Uribe.<sup>23</sup> Winning a landslide victory in 2002, this Oxford and Harvard educated conservative reinvigorated the Plan Colombia, specifically by

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<sup>18</sup> Christopher Marquis, *Colombian Deal with Rebels is Vexing U.S.*, N.Y. TIMES, Aug. 23, 2001, at 1.

<sup>19</sup> See Brian Lavery, *World Briefing Europe: 3 Sought In COLOMBIA Return To Ireland*, N.Y. TIMES, Aug. 6, 2005, at A6 (describing how three Irish Republican Army suspects fled COLOMBIA last year after they were sentenced to 17-year prison sentences for teaching Marxist rebels how to make bombs secretly); see also Nagle, *Colombian Asylum Seekers*, *supra* note 11, at 454 (discussing how the Hizbollah operatives suspiciously opened a meat packing plant in an area not known for its cattle ranching).

<sup>20</sup> See Esquirol, *supra* note 10, at 85-86.

<sup>21</sup> See generally President George W. Bush, *Supporting Democracy in Colombia*, NATIONAL SECURITY PRESIDENTIAL DIRECTIVE 18, Nov. 2002 (recognizing the link between narcotraffickers and terrorists).

<sup>22</sup> See Hale Sheppard, *The Andean Trade Preference Act: Past Accomplishments and Present Circumstances Warrants its Immediate Renewal and Expansion*, 34 GEO. WASH. INT'L L. REV. 743, 767-78 (2003).

<sup>23</sup> *The War Against Drugs and Thugs: A Status Report on Plan Colombia Successes and Remaining Challenges Before the H. Comm. on Government Reform*, 108th Cong., 81-91 (2004) (statement of Luis Alberto Moreno, Colombian ambassador to the United States), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108\\_house\\_hearings&docid=f:96408.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_house_hearings&docid=f:96408.pdf). ("The United States has provided more than \$3.2 billion in assistance to date, while Colombian resources have totaled \$6 billion."). *Id.* at 81.

reducing violence.<sup>24</sup> The American in charge of Southern Command, General James T. Hill, said, "Uribe is a unique leader who has galvanized the will of the people and motivated his armed forces. He has personally demonstrated that one individual can change the course of events."<sup>25</sup> Uribe's early successes have been comprehensive:

In the three years since his election, Uribe's incarnation of Plan Colombia has lowered homicides and "acts of terrorism" more than 40%, lowered coca and heroin poppy cultivation by more than 30%, increased the number of "alternative" or legal crops from 1,500 hectares to 43,951 hectares, and helped more than 2.3 million have gain access to public health care. Uribe's successes against drug trafficking have been matched by some successes against the insurgency: during Uribe's term of office the number of active narcoterrorists has fallen from 35,000 to 12,000.<sup>26</sup>

More recent reports state that the FARC's numbers have fallen even lower.<sup>27</sup>

But Colombia's successes have led to new problems: namely, an exodus of the FARC into neighboring Ecuador. Ecuador shares its 400-mile northeastern border with Colombia. The region along the border is not as developed as the rest of the country; consequently, the majority of people living near the Ecuadorian-Colombian border live in small villages and towns. The dense jungle and the lack of development make the area difficult, if not impossible, to control and at least one foreign security official claimed that the Ecuadorian military rarely comes within twenty miles of the border.<sup>28</sup> While the Ecuado-

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<sup>24</sup> Jeremy McDermott, *Profile: Alvaro Uribe*, BBC ONLINE, Aug. 7, 2002, <http://news.bbc.co.uk/1/hi/world/americas/1996976.stm>.

<sup>25</sup> *Defense Department Counternarcotic Efforts: Hearing before the House Armed Services Committee*, 108th Cong. (Mar. 24, 2004) (statement by General James T. Hill, Commander United States Southern Command).

<sup>26</sup> See Frank Walsh, *Synchronizing Colombian Narcoterrorism Policy with the War on Terror: The Legality of Military Deployment by the United States and the Organization of American States*, 4 GEO. J.L. & PUB. POL'Y 453, 462 (2006).

<sup>27</sup> Jeremy McDermott, *Colombia's Rebels: A Fading Force?* BBC ONLINE, Feb. 1, 2008, <http://news.bbc.co.uk/2/hi/americas/7217817.stm> (noting that government figures place the current number of rebel fighters from 6,000 – 8,000, down from 16,000 in 2001).

<sup>28</sup> See Robert Taylor, *Caught in the Crossfire*, WORLD PRESS REVIEW, Vol. 49 (Sept. 2002), available at <http://worldpress.org/Americas/670.cfm#down> (stating "The concern over the increasing FARC presence in Ecuador resulted in numerous opinion pieces in the Ecuadorian media."). *Id.*

rian military has made efforts to stop the FARC, claiming to have destroyed 47 FARC camps in 2007, Colombian officials remained unimpressed with Ecuadorian action.<sup>29</sup>

Thus, in late February 2008, the FARC was firmly established in Ecuador as Colombian forces pursued the narcoterrorists on Colombian soil. When Colombian authorities received actionable intelligence that Raul Reyes was at a FARC camp less than two miles into Ecuadorian territory, Colombian officials decided to act and neutralize one of the narcoterrorist organization's top leaders.

b. *The International Community Condemns Colombia*

The international response to Colombia's attack was quick and negative. The Organization of American States ("OAS"), under Secretary General José Miguel Insulza, convened its permanent council on March 4th.<sup>30</sup> Ecuador's Foreign Minister argued her nation's case, based largely on Article 21 of the Organization of American States' Charter:

The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatsoever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized.<sup>31</sup>

Secretary General Insulza expounded on the importance of territorial integrity:

[t]his principle is one of the cornerstones of the international legal order and, in particular, the inter-American legal system, and a principle that has always been indisputably linked to the princi-

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<sup>29</sup> Sibylla Brodzinsky, *On Ecuador's Border, FARC Rebels Visit Often*, THE CHRISTIAN SCIENCE MONITOR, Mar. 10, 2008, at 2, available at <http://www.csmonitor.com/2008/0310/p07s02-wogn.html>.

<sup>30</sup> Ray Walser, *The Crisis in the Andes: Ecuador, Venezuela, and Colombia*, HERITAGE FOUNDATION ONLINE, May 2, 2008, available at <http://www.heritage.org/research/LatinAmerica/hl1080.cfm> (originally delivered before the House Committee on Foreign Affairs' Subcommittee on the Western Hemisphere, Apr. 10, 2008) [hereinafter Walser].

<sup>31</sup> Charter of the Organization of American States, art. 21, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3.



ple of peaceful settlement of controversies between States and cooperation to safeguard peace, security, and development.<sup>32</sup>

After heated debate, the OAS issued a resolution on March 5th reaffirming “the principle that the territory of a state is inviolable and may not be the object, even temporarily of military occupation or other measures of force taken by another State, directly or indirectly, on any ground whatsoever.” On March 17th, the OAS ministers reconvened and issued another resolution condemning Colombian action but reemphasizing a nation’s responsibility to control terrorist activity on its own soil:

[The Parties Agree] to reject the incursion by Colombian military forces and police personnel into the territory of Ecuador, in the Province of Sucumbíos, on March 1, 2008, carried out without the knowledge or prior consent of the Government of Ecuador, since it was a clear violation of Articles 19 and 21 of the OAS Charter.

[. . .]

To reiterate the firm commitment of all member states to combat threats to security caused by the actions of irregular groups or criminal organizations, especially those associated with drug trafficking.<sup>33</sup>

At the end of the day, Colombia was left with mixed results. It had killed an internationally known narcoterrorist leader and dealt the FARC a devastating blow. On the other hand, Colombia was condemned for its actions and lost immeasurable international political capital. It is doubtful whether Bogota would be able to conduct a similar raid if it received similar intelligence in the future.

c. *New Evidence of Clandestine Connections: Ecuador’s Contact with the FARC’s Operations Against Colombia*

The OAS’s condemnation of Colombia, however, was premature and new information made public after Operation Phoenix substantially altered any analysis of the Operation’s legality. During the Operation, Colombian soldiers salvaged three laptop computers, two external hard drives, and three USB memory sticks from the FARC camp. The laptops and media storage devices contained startling information: according

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<sup>32</sup> Walser, *supra* note 30.

<sup>33</sup> *See id.*

to the confiscated files, the Ecuadorian government and Raul Reyes had been in contact discussing political proposals and projects on the frontier.<sup>34</sup> The files explained that Gustavo Larrea, an Ecuadorian defense minister close to President Rafael Correa, had repeatedly communicated with FARC commanders.<sup>35</sup> "One document revealed an offer by the Ecuadorian government to transfer police and army commanders in the area who proved hostile to the FARC."<sup>36</sup> Another document stated that Venezuelan President Hugo Chavez, a personal friend of Correa's, funneled at least \$300 million to the FARC.<sup>37</sup>

President Correa immediately denied the allegation as "completely false" and the work of "an extremely cynical [Colombian] government."<sup>38</sup> President Chavez followed suit, calling the allegation "ridiculous."<sup>39</sup> Ecuadorian Interior Minister Fernando Bustamante attacked the authenticity of the documents, saying that "it is very easy to say something based on evidence that has not been scrutinized publicly or internationally."<sup>40</sup> Colombia responded to the denials by submitting the laptops and media storage devices to the International Criminal Police Organization, commonly known as "Interpol," for its verification.

At Interpol, 64 different agents spent over 4,000 hours analyzing the computers.<sup>41</sup> In total, Interpol reviewed "over 600 gigabytes of data including: 37,872 written documents, 452 spreadsheets, 210,888 images, 22,481 web pages, 7,989 email addresses, 10,537 multimedia files (sound and video), and 983

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<sup>34</sup> Markey, *supra* note 5.

<sup>35</sup> *See id.*

<sup>36</sup> *Id.*

<sup>37</sup> Helen Murphy and Joshua Goodman, *Uribe Seeks Trial for Chavez in International Court*, BLOOMBERG ONLINE, Mar. 4, 2008, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=av8Hk0ffaBAE>.

<sup>38</sup> Jose Llangari, *Ecuador's Correa Denies Ties with Colombian Rebels*, REUTERS, Mar. 3, 2008, <http://www.reuters.com/article/latestCrisis/idUSN03354607>.

<sup>39</sup> *Chavez Denies Charges of Ties to Colombia Rebels*, REUTERS, May 11, 2008, [http://www.reuters.com/article/homepageCrisis/idUSN11559327.\\_CH\\_.2400](http://www.reuters.com/article/homepageCrisis/idUSN11559327._CH_.2400).

<sup>40</sup> Markey, *supra* note 5.

<sup>41</sup> Ronald K. Noble, Press Statement, The International Criminal Police Organization [INTERPOL], Forensic Report on FARC Computers and Hardware Seized by Colombia (May 15, 2008), *available at* <http://www.interpol.int/public/icpo/speeches/2008/sgbogota20080516.asp#> [hereinafter Noble].

encrypted files.”<sup>42</sup> Interpol’s findings were as conclusive as its investigation was extensive: Interpol found that “no user files have been created, modified or deleted on any of the eight FARC computer exhibits following their seizure on 1 March 2008.”<sup>43</sup> In its final forensic report, Interpol also explained that Colombia’s specialized *Grupo Investigativo de Delitos Informaticos* had “followed internationally recognized principles in the handling of electronic evidence.”<sup>44</sup>

Interpol’s response was even stronger after Ecuador continued to question the files’ authenticity despite Interpol’s report. In a media release published after Ecuador publicly questioned whether Interpol’s report was conclusive in establishing a connection between Ecuador and the FARC, Interpol was unapologetic in its adamant reaffirmation that the documents reflected such a connection:

If Ecuador has objections with the content of the user files, then Ecuador should criticize the FARC because the seized computers belonged to the FARC. Yet, to date, INTERPOL has not read any account of Ecuador denouncing or criticizing the FARC in relation to any user files content in the seized computer exhibits allegedly implicating Ecuador or any of its government officials.

[ . . . ]

In the interests of international police co-operation, INTERPOL hopes that Ecuador will control its repeated tendency to attack INTERPOL for simply having reported the truth in an impartial manner. If there is indeed content in the seized FARC computer user files with which Ecuador disagrees, then it should complain to and criticize the FARC, not INTERPOL.<sup>45</sup>

Despite the picture it attempted to paint as a helpless victim, Ecuador’s political elite had been cultivating a relationship with the FARC.

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<sup>42</sup> *Id.*

<sup>43</sup> Media Release, INTERPOL, INTERPOL Reaffirms Key Findings of its Examination of Seized FARC Computers in Response to Efforts to Distort Conclusions, (June 13, 2008), available at <http://www.interpol.int/Public/ICPO/PressReleases/PR2008/PR200826.asp>.

<sup>44</sup> INTERPOL, *Forensics Report on FARC Computers and Hardware Seized by Colombia*, (May 15, 2008), available at, <http://www.interpol.int/public/icpo/speeches/2008/sgbogota20080516.asp#>.

<sup>45</sup> Media Release, INTERPOL, *supra* note 43.

The fundamental problem with Operation Phoenix's international critics, in early March 2008, was that their opinion was based on imperfect information. If one were to assume that Colombia decided to suddenly launch a strike into the territory of its innocent neighbor, then the Operation's illegality would understandably be clear. But that was not the reality in March 2008. Rather, Colombia was the victim of systematic attacks from a narcoterrorist enemy intent on the collapse of the government in Bogota.<sup>46</sup> Not only had Ecuador sat by as the FARC used its territory to launch attacks on Colombia, but at least some Ecuadorian authorities had begun to actively communicate with FARC officials. Colombia's attack was not unprovoked, Ecuador was not innocent, and Operation Phoenix was not a black and white situation.

## II. FORGOTTEN INTERNATIONAL LAW: SELF DEFENSE AND THE RESPONSIBILITIES OF SOVEREIGNTY

The new information about Ecuador's involvement with the FARC precipitates a renewed analysis of the applicable principles of international law. While the international response to Operation Phoenix was almost universal in its rejection of the use of force to attack a terrorist threat on foreign soil, this condemnation was not a foregone conclusion from a legal perspective. The issue of attacking a terrorist enemy on foreign soil is a much more complex issue than many of Operation Phoenix's critics acknowledged.

Notably, the international community undervalued two principles of international law: the right of self-defense and the duties of sovereignty. First, each nation has the right to defend itself. To borrow from a phrase used in American constitutional jurisprudence, international law is not a suicide pact.<sup>47</sup> International law has long recognized the right to use force to repel aggressive attacks. Second, critics of Operation Phoenix also failed to consider Ecuador's culpability. If Ecuador had pre-

<sup>46</sup> See Sibylla Brodzinsky, *Interpol: Colombia Did Not Doctor FARC Files*, THE CHRISTIAN SCIENCE MONITOR, May 16, 2008, available at <http://www.csmonitor.com/2008/0516/p25s06-woam.html> (describing how the FARC was planning on taking loans that would be repaid when they "take power").

<sup>47</sup> *Terminiello v. City of Chicago*, 337 U.S. 1, 36 (1949) ("There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."). *Id.*

vented the FARC from operating in Ecuadorian territory, then Colombia would have had no need to cross the border. Thus, it was Ecuador's failure to exercise sovereignty over its territory that was a predicate to the FARC's attacks on Colombia. From this perspective, Ecuador at least shares the fault for the violation of territorial limits because it was Ecuador's failure to exercise sovereignty that lay at the root of Colombia's decision to launch Operation Phoenix.

In sum, Colombia has a bona fide argument that its actions were completely legal under international law. This article will examine this argument by (1) reviewing the absolute right of self-defense and (2) showing how the right to territorial integrity is not an absolute right but rather is coupled with the duty of properly safeguarding that territory.

a. *Self-Defense Under International Law*

The international community has ignored, or at best undervalued, the principle of self-defense in its treatment of Operation Phoenix. Established international law has historically emphasized the importance of a nation's right to defend itself against attacks. The right of self-defense is a *jus cogens*<sup>48</sup> principle of customary international law.<sup>49</sup> Even the Kellogg-Briand Pact, the controversial accord commonly known as the Treaty for the Renunciation of War, acknowledged the importance of the right of armed self-defense.<sup>50</sup> Indeed, international

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<sup>48</sup> DIMITRIOS DELIBASIS, THE RIGHT TO NATIONAL SELF-DEFENCE IN INFORMATION WARFARE OPERATIONS 127 (2007) (*Jus cogens* is an international term of art meaning an international principle so established that the principle cannot be adjusted by treaty).

<sup>49</sup> See MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 236 (1961) (arguing that notions of self defense has roots grounded in national sovereignty principles); see also Draft Declaration on Rights and Duties of States, *Report of the International Law Commission Covering its First Session*, U.N. GAOR, 4th Sess., Supp. No. 10, U.N. Doc. A/925 (Apr. 12-Jun. 9, 1949) (stating that "[e]very State has the right of individual or collective self-defense against an armed attack"). *Id.*

<sup>50</sup> See Quincy Wright, *The Meaning of the Pact of Paris*, 27 AM. J. INT'L L. 39, 42-43 (1933). Correspondence exchanged between the delegates made it clear self-defense was still allowed even in a world order where aggressive war was outlawed. *Id.* The French delegate said the treaty "would not deprive the signatories of the right of legitimate defense," the British delegate said that "the right of self-defense was inalienable," and the American delegate maintained that "[t]here is

law would be a futile effort if it worked as a suicide pact that forced states to stand idly by while its citizens were attacked. Protecting legitimate self-defense stems from the central assumption of the entire Westphalian state system: nations have the right to protect their own interests and citizens.<sup>51</sup>

The United Nations Charter ("UN Charter") is often cited as the paradigmatic example of international law's ban on warfare. Article 2(4) imposes a general ban on the use of force:

[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.<sup>52</sup>

However, this general prohibition is subject to an exception in Article 51 designed to safeguard the right to self-defense:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense 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.<sup>53</sup>

Thus, a state has the power to defend itself until such time as the Security Council takes the necessary steps to neutralize the threat.

Additionally, the framers of the Charter intended Article 51 to have a wide standard when it came to classifying threats to peace.<sup>54</sup> This construction is apparent when comparing the English text to the equally official French text of the Charter; the French version uses the term "aggression" instead of "armed attack" in Article 51, suggesting the legitimacy of armed self-de-

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nothing in the American draft of an anti-war treaty to restrict or impair in any way the right of self-defense." *Id.*

<sup>51</sup> See Major Joshua E. Kastenberg, *The Use of Conventional International Law in Combating Terrorism: A Maginot Line for Modern Civilization Employing the Principles of Anticipatory Self-Defense & Preemption*, 55 A.F.L. REV. 87, 106 (2004) [hereinafter Kastenberg].

<sup>52</sup> U.N. Charter art. 2, para. 4.

<sup>53</sup> *Id.* at art. 51.

<sup>54</sup> See *id.* art. 2, para. 4; see also Christopher C. Joyner & Michael A. Grimaldi, *The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention*, 25 VA. J. INT'L L. 621, 652 (1985) [hereinafter Joyner & Grimaldi].

fense against even non-military coercive actions.<sup>55</sup> The International Court of Justice (“ICJ”) recognized this wide standard of “aggression” in *Nicaragua v. United States*.<sup>56</sup> In that case, the ICJ acknowledged that “armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to . . . an actual armed attack conducted by regular forces” constitute aggression.<sup>57</sup>

Thus, for situations like Operation Phoenix, two conflicting principles of international law are in tension: the right to territorial integrity and the right to self-defense. The international community focused on the former, the Colombian government argued the latter. Blanket rules are not appropriate for solving situations like this. Instead, each situation should be analyzed on a case-by-case basis to determine where on the spectrum between territorial integrity and self-defense a situation exists.

Just because the FARC’s actions could trigger self-defense, however, does not *ipso facto* give Colombia the right to conduct operations on Ecuadorian soil. Borders, and the importance of the nation-state in the Westphalian system, preclude victims of terrorism from completely ignoring national borders in the hunt for terrorists. Since the earliest articulations of self-defense in the 17th century, international jurists have recognized that the right to self-defense must be limited so as not to allow any country to conduct any operation in the guise of protecting against a phantom future menace.<sup>58</sup> Instead, the difficult task is deciding when a nation who is the victim of an armed attack under Arti-

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<sup>55</sup> See John Norton Moore, *The Secret War in Central America and the Future of World Order*, 80 AM. J. INT’L L. 43, 83 (1986). But see Joyner & Grimaldi, *supra* note 54, at 652. See generally Jonathan A. Bush, “The Supreme . . . Crime” and its Origins: *The Lost Legislative History of the Crime of Aggressive War*, 102 COLUM. L. REV. 2324 (2004) (presenting a detailed history of what constitutes “aggression” and the various international standards regarding aggressive war).

<sup>56</sup> *Military and Paramilitary Activities, (Nicar. v. U.S.)*, 1986 I.C.J. 14, 215 (June 27, 1986) [hereinafter *Nicar. v. U.S.*].

<sup>57</sup> *Id.* at 103.

<sup>58</sup> See, e.g., HUGO GROTIUS, ON THE LAW OF WAR AND PEACE, Book II, Chapter I (Kessinger Publishing, 2004) (1625) [hereinafter GROTIUS]; EMMERICH DE VATTTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW, Book II, Chapter IV (1758), available at, <http://www.lonang.com/exlibris/vattel/vatt-204.htm> [hereinafter De Vattel].

cle 51 can violate a host nation's borders to neutralize the threat. This task is discussed in Section III.

b. *A Nation's Right to Territorial Integrity is Coupled with the Right to Prevent Aggressors From Operating on that Nation's Territory*

The critics of Operation Phoenix also undervalued the fact that territorial sovereignty comes with responsibility. Critics centered their arguments on Ecuador's absolute right over its territory, but this traditional Westphalian ideal has been limited in modern times. The traditional Westphalian state system was predicated on the idea that each state could operate its territory in any way it wanted; sovereignty was absolute. However, the 20th century has seen this absolute right qualified in a myriad of ways.<sup>59</sup> A nation can no longer violate fundamental humanitarian law,<sup>60</sup> commit war crimes,<sup>61</sup> commit crimes against humanity,<sup>62</sup> or conduct genocide<sup>63</sup> on its own territory.

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<sup>59</sup> See Bruce Broomhall, *Universal Jurisdiction: Myths, Realities, and Prospects: Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 NEW ENG. L. REV. 399, 400 (2001).

<sup>60</sup> See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

<sup>61</sup> See Beverly Izes, *Drawing Lines in the Sand: When State-Sanctioned Abductions of War Criminals Should be Permitted*, 31 COLUM. J.L. & SOC. PROBS. 1, 18 (1997) (the option is to "[e]xtradite or prosecute." "[N]o state should offer a safe haven to individuals who are accused of serious crimes under international law").

<sup>62</sup> Gwynne Skinner, *Nuremberg's Legacy Continues: The Nuremberg Trials' Influence on Human Rights Litigation in the U.S. Courts Under the Alien Torts Statute*, 71 ALB. L. REV. 321, 327-28 (2008). Skinner describes the growing international consensus that crimes against humanity are the concern of all nations:

Prior to the Nuremberg trials, there existed no specific legal precedent for subjecting offenses such as war crimes and crimes against humanity, such as genocide, to the principle of universal jurisdiction. Because of Nuremberg, the idea that there is universal jurisdiction over those who commit such offenses gained legitimacy. In addition, in the aftermath of World War II, members of the United Nations recognized that offenses such as crimes against humanity and genocide were the concern of all States, and that each State's domestic institutions, such as courts, should be responsible for remedying these wrongs.

*Id.*

<sup>63</sup> See Carsten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor*, 95 AM. J. INT'L L. 952, 954-55 (2001) (describing how a state cannot grant immunity to perpetrators of genocide); see also *Prosecutor v. Niyonteze*, Tribunal militaire de division 2, Lausanne, Apr. 30, 1999 (a Swiss military court agreed it possessed



Similarly, the international community has chipped away at a state's right to foster international terrorism on its own soil.

Thus, territorial integrity has been coupled with the duty to prevent terrorists from operating within one's territory. Almost without exception, declarations that a state's territory is inviolate are coupled with qualifications that the state must deny safe harbor to terrorists and aggressive irregular forces.<sup>64</sup> The traditional articulation of this duty was included in both the Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations<sup>65</sup> and the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty<sup>66</sup>: "no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in another State."<sup>67</sup> The inclusion of provisions like the one quoted immediately *supra* illustrates the types of responsibilities with respect to combating terrorism that come with territorial sovereignty.

Some international jurists have gone so far as to say that tolerating terrorist organizations could constitute an act of aggression sufficient to allow the target of the terrorist attacks to attack the host nation itself.<sup>68</sup> Justice Jackson, Chief Counsel

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jurisdiction over a Rwandan mayor accused of war crimes originating in the Rwanda genocide).

<sup>64</sup> See, e.g., G.A. Res. 2625 (XXV), paras. 33-34, U.N. GAOR, 25th Sess., Supp. No. 18, U.N. Doc. A/8018 (Oct. 24, 1970) [hereinafter G.A. Res. 2625 (XXV)]; G.A. Res. 2131(XX), para. 2, U.N. Doc. A/RES/36/103 (Dec. 21, 1965) [hereinafter G.A. Res. 2131 (XX)].

<sup>65</sup> G.A. Res. 2625 (XXV), *supra* note 64, para. 56.

<sup>66</sup> G.A. Res. 2131 (XX), *supra* note 64, para. 2.

<sup>67</sup> G.A. Res. 2625 (XXV), *supra* note 64; G.A. Res. 2131 (XX), *supra* note 64.

<sup>68</sup> See, e.g., Yehuda Z. Blum, *The Beirut Raid and the International Double Standard: A Reply to Professor Richard A. Falk*, 64 AM. J. INT'L L. 73, 80 (1970) [hereinafter Yehuda]. Justice Jackson built upon earlier legal instruments that had suggested tolerating terrorist activity constituted aggression. For example, the 1933 "Act Related to the Definition of the Aggressor," adopted by the Committee on Security Questions of the General Commission of the League of Nations Disarmament Conference, defined aggression as including "support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take in its own territory all the measures in its power to deprive those bands of all assistance and protection." *Id.*

for the United States at the Nuremberg tribunal, argued in his opening statement that aggression included the:

provision of support to armed bands formed in the territory of another State, or refusal, notwithstanding the request of the invaded State, to take in its own territory, all the measures in its power to deprive those bands of all assistance or protection.<sup>69</sup>

In 1954, the United Nations International Law Commission prepared a Draft Code of Offenses against the Peace and Security of Mankind and categorized the toleration of terrorist activities as an international crime:

The following acts are offences against the peace and security of mankind:

[t]he organization, or the encouragement of the organization, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or toleration of the organization of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions.<sup>70</sup>

In sum, there is a myriad of international sources supporting the idea that states should not and cannot harbor terrorists within their border. Failing to take action against terrorists is at best a failure in a state's sovereign duties and at worst an act of aggression. As the Security Council succinctly stated in its resolution condemning Libya for fostering terrorism: "[T]he suppression of acts of international terrorism, including those in which States are directly or indirectly involved, is essential for the maintenance of international peace and security."<sup>71</sup>

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<sup>69</sup> See NOAM CHOMSKY, *FAILED STATES* 65 (2006) (relying on Justice Jackson's definition of aggression); see generally Henry T. King, Jr., *Robert Jackson's Transcendent Influence Over Today's World*, 68 ALB. L. REV. 23 (2004) (describing how international scholars have echoed Justice Jackson's articulations of international law).

<sup>70</sup> Draft Code of Offenses against the Peace and Security of Mankind, art. 2(4) (1954), U.N. GAOR, 9th Sess., 504th plen. mtg., Supp. No. 7, UN Doc. 897(IX) (1954). In Article 2(6), the Draft Code echoed Justice Jackson's opening statement: "[t]he undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State." *Id.* at art. 2(6).

<sup>71</sup> S.C. Res. 748, para. 3, U.N. Doc. S/RES/748 (March 31, 1992).

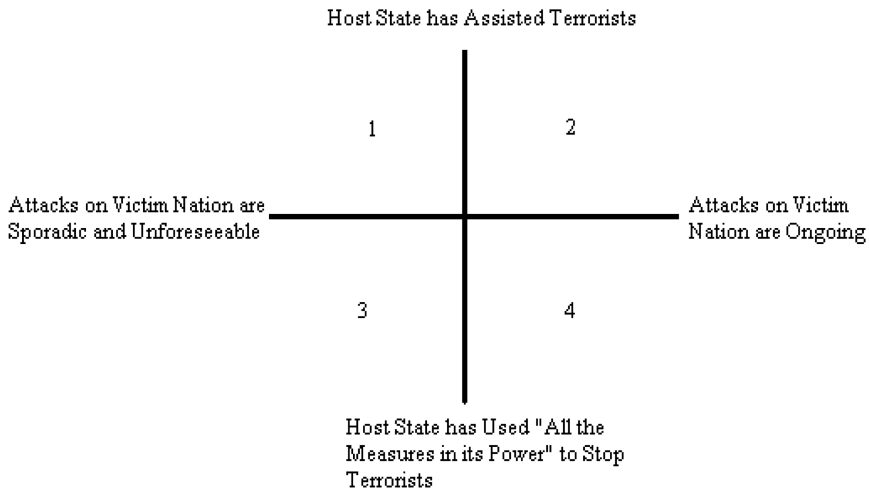
### III. SYNTHESIZING AN INTERNATIONAL POLICY THAT BALANCES TERRITORIAL INTEGRITY, SELF-DEFENSE, AND THE RESPONSIBILITIES OF SOVEREIGNTY

The challenge for international jurists and foreign policy experts alike is deciding how to balance territorial integrity, self-defense, and the responsibilities of sovereignty that remain in constant tension. In the past, the problem has been that international jurists have focused on one of these theories and ignored the others. The theories operated largely in isolation, with theorists' arguments passing each other like trains in the night. The solution to the status quo is a paradigm that integrates the theories of territorial integrity, self-defense, and the responsibilities of sovereignty into a single inquiry.

#### a. *The New Paradigm*

This article reconciles these three principles by creating a model that maps out the potential policy space along two axes: the nature of the terrorist aggression on the x-axis and a host nation's culpability on the y-axis. Figure 1 illustrates the concept, hereinafter referred to as the "New Paradigm."

*Figure 1. A New Paradigm for the Exercise of Self-Defense*



The policy space is thus divided into four quadrants: a host state assisting terrorists engaged in sporadic attacks (Quadrant

1), a host state assisting terrorists engaged in ongoing attacks (Quadrant 2), a host state that has attempted to stop terrorists engaged in sporadic attacks (Quadrant 3), and a host state that has attempted to stop terrorists engaged in ongoing attacks (Quadrant 4).

Deciding where a given scenario lies on this two-dimensional mapping of the potential policy space is a two-step process. First, the more egregious the terrorist threat, the farther to the right the activity would be plotted. Second, the more a host nation assisted the terrorist, the higher the activity would be plotted. The two extremes would range from the lower left, where a benign terrorist threat is being earnestly pursued by the host country, to the upper right, where a serious terrorist threat is being assisted by the host country. A victim nation threatened by activity in the upper right could lawfully attack the terrorist threat in the host nation, while a victim nation threatened by activity in the lower left could not.

This paradigm of thought properly balances territorial integrity, self-defense, and the responsibilities of sovereignty. If a terrorist threat was more egregious or if the host nation was actively involved in supporting the terrorists, then military operations would be more appropriate. In short, states that are victims of terrorist attacks could not attack the terrorists in a third party host state for activity in Quadrants 1, 3, or 4. Only in Quadrant 2, where a terrorist threat presents a grave danger and a host country is culpable in its behavior, would a victim of terrorist violence be justified in using force in a host country.

The use of force is not justified for activity in Quadrant 1, where a host nation is assisting terrorists engaging in sporadic or isolated attacks, because those kinds of attacks do not rise to the level sufficient to trigger self-defense. While there is widespread debate over the issue of what circumstances are sufficient to trigger an exercise of self-defense, there is a general consensus that an overly expansive view of the doctrine would destabilize the world order by giving every state a pretext to engage in aggressive warfare. Hugo Grotius, in his seminal work, *On the Laws of War and Peace*, cautioned against the overly broad use of self-defense:

The danger, again, must be immediate and imminent in point of time. I admit, to be sure, that if the assailant seizes weapons in

such a way that his intent to kill is manifest the crime can be forestalled; for in morals as in material things a point is not to be found which does not have certain breadth. [M]ost wrongs have their origin in fear, since he who plans to do wrong to another fears that, if he does not accomplish his purpose, he may himself suffer harm.<sup>72</sup>

Emmerich de Vattel echoed this sentiment nearly a century later, wary of “vague and uncertain suspicions”:

It is safest to prevent the evil when it can be prevented. A nation has a right to resist an injurious attempt, and to make use of force and every honorable expedient against whosoever is actually engaged in opposition to her, and even to anticipate his machinations, observing, however, not to attack him upon vague and uncertain suspicions, lest she should incur the imputation of becoming herself an unjust aggressor.<sup>73</sup>

Put another way, when a particular terrorist activity is minor in scope, then the right of territorial integrity trumps the right of self-defense. The 1837 *Caroline Case*, the seminal case on international self-defense, established the standard for lawful self-defense as a showing of a “necessity of self-defense, instant, overwhelming, leaving no moment for deliberation.”<sup>74</sup> While defining the contours of this standard (and analyzing where exactly to place the y-axis in the New Paradigm) is a fact-specific inquiry that is open to widespread debate, the conceptual point is clear: minor acts of terrorism cannot serve as grounds for an exercise of self-defense within a host country’s territory.

The use of force is likewise not warranted in Quadrant 3, which presents the weakest case for the use of force. In addition to the fact that the terrorists attacks in this quadrant are not grave enough to warrant the violation of international borders for the same reasons the use of force was not justified under Quadrant 1, the terrorist activity in Quadrant 3 is also being actively combated by the host nation. That is to say, the host nation is not culpable for the terrorist’s actions. Thus, the Article 51 right to self-defense is not triggered *and* the host country has not violated its duties as a sovereign nation.

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<sup>72</sup> GROTIUS, *supra* note 58, § V(1).

<sup>73</sup> DE VATTELL, *supra* note 58, § 50.

<sup>74</sup> See Kastenber, *supra* note 51, at 107.

The use of force is probably not warranted in Quadrant 4, but this presents the hardest analytical problem in the New Paradigm. The Article 51 right of self-defense is triggered in this scenario, with terrorist engaging in systematic and ongoing armed attacks on the victim nation. Thus, as an initial inquiry, a country would generally be able to take actions in the name of self-defense against the terrorists. However, the act of self-defense against the terrorists would violate the territorial sovereignty of a host nation who is using "all of its measures" to stop the terrorists. Thus, the right of self-defense here directly conflicts with the right of territorial integrity.

The "tiebreaker," for lack of a better term, in this situation should be the culpability of the host nation. If a host nation is earnestly pursuing a campaign against the terrorists, then a victim nation should not be able to violate the host nation's territorial integrity simply because the victim nation is not satisfied with the host's progress. Protecting the integrity of a nation's borders is critical if the small nations of the world, like Georgia and or Kuwait, are to survive alongside more powerful neighbors. As scholar Robert Kagan writes, "the nation-state remains as strong as ever, and so, too, the nationalist ambitions, the passions, and the competition among nations that have shaped history."<sup>75</sup> Thus, even though a victim state might otherwise be entitled to an exercise of self-defense in other circumstances, an innocent host nation should be able to rely on its borders to protect it from the hostile actions of a victim nation.

One note on scenarios in Quadrant 4: there is a strong case that a host nation is not using "all of its measures" to combat the terrorism if the host nation does not request the assistance of the victim nation to neutralize the terrorists. Article 52 of the United Nations Charter codifies the right of collective defense:

Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or

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<sup>75</sup> ROBERT KAGAN, *THE RETURN OF HISTORY AND THE END OF DREAMS* 2 (2008).

agencies and their activities are consistent with the Purposes and Principles of the United Nations.<sup>76</sup>

Thus, if a host nation is part of a regional security arrangement like NATO, then the host nation should rely on such an arrangement to fulfill the host nation's sovereign responsibility to eradicate terrorism.

A victim nation should only be entitled to the use of force for scenarios in Quadrant 2, against a serious terrorist threat in a host country that is assisting or tolerating the terrorists' operations. Victim nations in this situation have the right to exercise self-defense under Article 51 because the terrorist threat is sufficiently serious. Additionally, the fact that the host nation has "assisted or tolerated"<sup>77</sup> the presence of foreign terrorists undermines the host nation's claim to territorial integrity. The host nation cannot renege on its responsibilities as a sovereign nation and then rely on its sovereignty as a shield against actions meant to rectify the host nation's irresponsible behavior. To hold otherwise would be to grant terrorists an expansive loophole in the fabric of international law.

This article has thus far outlined the use of the New Paradigm for the Exercise of Self-Defense. The discussion of the New Paradigm is admittedly broad and theoretical; a detailed exegesis of the paradigm's parameters falls outside the scope of this article. Rather, this article attempts to set forth a manner of thinking that reconciles previously disjointed theories of international law. The paradigm's value is not in establishing clear distinctions between lawful and unlawful activity, but rather to present a particular conceptualization of international law that accords various principles that are often in tension. The New Paradigm intends to force international jurists to consider all perspectives when deciding whether a situation is law-

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<sup>76</sup> U.N. Charter art. 52, para. 1.

<sup>77</sup> See generally Draft Code of Offenses against the Peace and Security of Mankind, *supra* note 70. The organization, or the encouragement of the organization, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or the toleration of the organization of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions. *Id.* (discussing the lists of offenses against the peace and security of mankind).

ful. Put another way, under the New Paradigm, the trains of territorial integrity, self-defense, and the responsibilities of sovereignty would no longer be passing in the night.

b. *Applying the New Paradigm to Operation Phoenix*

As described *supra*, determining where a particular situation falls on the New Paradigm is a two-step process. In the case of Operation Phoenix, the first step would be to analyze the severity of the FARC's attacks on Colombia. Second, the analysis would center on Ecuador's culpability in the FARC's operations. These two factors, plotted on the two axes in the New Paradigm, would then place Operation Phoenix in a quadrant.

The first step of the analysis is straightforward: the FARC represents a grave threat to the Colombian democracy. In the last decade alone, the FARC has committed 16,500 terrorist attacks, murdered 7,500 people, injured another 9,500, and kidnapped more than 12,000.<sup>78</sup> This kind of systematic assault rises to the level of aggression required to trigger Colombia's right to self-defense.<sup>79</sup> There can be little question that the FARC represents a clear and present danger to the continued existence of the Colombian government. Therefore, the FARC's threat would be placed on the right side of the New Paradigm as a serious threat sufficient to trigger the right to self-defense.

The second step of the analysis centers on Ecuador's complicity in the FARC's operations. As described *supra*, states are forbidden for even tolerating terrorist groups: "no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in another State."<sup>80</sup> Ecuador has not only tolerated the FARC's presence on Ecuadorian soil, but captured FARC documents indicate that Ecuador actively assisted the terrorists: Ecuadorian defense minister Gustavo Larrea, repeatedly communicated with FARC commanders<sup>81</sup> and the Ecuadorian government offered to transfer police and army commanders in the area who proved hostile

<sup>78</sup> See Noble, *supra* note 41.

<sup>79</sup> See *Nicar. v. U.S.*, *supra* note 56.

<sup>80</sup> G.A. Res. 2625 (XXV), *supra* note 64, para. 56; see also G.A. Res. 2131 (XX), *supra* note 64, para. 2.

<sup>81</sup> See Markey, *supra* note 5.



to the FARC.<sup>82</sup> Similar to the cases made for host nation culpability in Lebanon's support of the Popular Front for the Liberation of Palestine<sup>83</sup> and Cambodia's tolerance of Vietnamese irregulars,<sup>84</sup> Ecuador's decision to allow the FARC to operate on Ecuadorian territory undermined Ecuador's right to demand territorial integrity. Therefore, the FARC's affirmative steps to help the FARC place Operation Phoenix in the upper half of the New Paradigm as an act of self-defense in a host nation that is complicit in the terrorist activity.

Operation Phoenix is the paradigmatic Quadrant 2 scenario. Not only is the FARC an established terrorist organization with a clear power structure but the Colombian authorities found a proverbial smoking gun implicating Ecuadorian authorities. Interpol objectively analyzed the confiscated media and verified its authenticity. Consequently, Colombia is entitled to exercise its Article 51 right to self-defense in territory controlled by a government that has seen fit to assist recognized terrorists.

The threat terrorism presents to the rule of law is clear, and it is incumbent upon the nations of the world to stop terrorism when it appears. At the very least, states must be able to protect their citizens from ongoing terrorist attacks. If self-defense is to mean anything, then a country must have the right to neutralize serious terrorist threats in a host country that is sympathetic to the terrorists. Operation Phoenix was the paradigmatic example of lawful self-defense: the Colombia government took action when it became apparent that no one else would.

#### IV. CONCLUSION

One of the greatest fallacies in international relations thought is the idea that, if a state does nothing, then nothing bad will happen to that state. History has proven that the exact opposite is the case. If Colombia had chosen not to launch Operation Phoenix, then Raul Reyes would still be coordinating FARC terrorist operations and Ecuadorian officials would still

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<sup>82</sup> *Id.*

<sup>83</sup> See, e.g., Yehuda, *supra* note 68, at 82-84.

<sup>84</sup> See, e.g., Captain Timothy Guiden, *Defending America's Cambodian Incur-sion*, 11 ARIZ. J. INT'L COMP. L. 215, 231 (1994).

be collaborating with the FARC. Colombia, Ecuador, and the entire Andean ridge would be less safe.

From a purely legal perspective, Operation Phoenix offers international jurists an opportunity to accord several international principles that are often in tension. The ideas of territorial integrity, self-defense, and the responsibilities of sovereignty have operated in isolation for far too long. This article's New Paradigm integrates these three disparate principles into a single algorithm that balances the principles in a way that protects and stabilizes the international world order. Borders matter, but so does eliminating the threat of terrorism. Hopefully, history will record that the initial criticism of Operation Phoenix proved to be an imperfect judgment based on incomplete facts. In this way, an air strike deep in the Amazon might prove to be the catalyst for the recognition of a more nuanced right of self-defense that equips the nations of the world with the legal tools need to fight terrorism wherever it might hide.