



DIIS · DANISH INSTITUTE FOR INTERNATIONAL STUDIES

NEW THREATS AND THE USE OF FORCE

Chapter 3

Use of Force in Self-Defence

Under international law, only the right of self-defence provides a legal basis for states acting individually or collectively to use force against another state without prior authorisation from the Security Council. Consequently, self-defence is the natural starting point in assessing the options available to states confronted with military threats, including threats from international terrorism and the proliferation of WMD. The scope of the right of self-defence also defines the basis on which states assembled in the Security Council or the General Assembly should react to unauthorised use of force, whether to condemn it as an unlawful act of aggression or condone it as a lawful exercise of the right of self-defence.

The right of states to use force in self-defence has long been recognised in state practice and is also affirmed as an “inherent right” in Article 51 of the UN Charter. Today, self-defence provides one of only two exceptions to the general prohibition on the use of force embodied in Article 2(4) of the UN Charter, the other exception being the use of force authorised by the Security Council (see Chapter 1).

The exact scope of the right of self-defence remains controversial, although the concept of self-defence does have a generally accepted core as well as some outer limits. States and scholars disagree, with powerful states generally inclined towards a broader scope for self-defence than weaker states, and many American scholars, joined by some British ones, have traditionally been in favour of a broader definition of self-defence than other scholars.

This controversy can partly be explained by the fact that the law on self-defence may evolve through the practice of UN organs and states in meeting new challenges to national and international security. On most contentious issues, controversy seems to concern not so much whether specific actions involving the use of force may be politically

justifiable, but whether such actions and the international reaction to them have expanded the right of self-defence by way of customary international law.

This chapter is structured as follows. First, the legal basis and general content of the right of self-defence is set out (Section 1). Second, the conditions of self-defence that are of special relevance to the present report are discussed in more detail: the character and object of the threat (Section 2), its source (Section 3) and its actuality (Section 4). Third, the conclusion assesses the adequacy and limits of the current right of self-defence as a framework for confronting new threats to international peace and security emanating from international terrorism and the proliferation of WMD (Section 5).

I. The right of self-defence: its legal basis and general content

I.1. Self-defence in customary international law prior to 1945

Until the twentieth century, war was not generally prohibited as a means of international politics. However, there was a compulsion among states and writers to justify any use of force against another state on moral and political grounds. In the seventeenth and eighteenth centuries, the classical writers in international law, relying on natural law philosophy, considered the right of self-defence to be a natural right of self-preservation and self-protection, inherent in state sovereignty. It was described as the right to protect the lives and property of the state and its subjects against actual or imminent injury inflicted by another state in violation of its legal or moral obligations. The right of self-defence was but one element in defining the causes of “just war”. Other forms of forcible self-help were also considered justified, such as the use of force to secure redress or enforcement of rights or to inflict punishment against a state violating its legal or moral obligations.⁹⁹

In state practice, the *Caroline Case* has come to be regarded as the classic expression of the doctrine of self-defence, and indeed the very source of self-defence as a legal doctrine.¹⁰⁰ The issues involved in this old case have many parallels in current international debates. It concerned an incident in 1837 in which British forces entered US territory

and destroyed the American steamboat *Caroline*, which was being used to transport supplies by American armed bands assisting in the Canadian rebellion against the British Crown.¹⁰¹

The Caroline Incident

The Canadian rebellion of 1837 against the British Crown aroused active support among American citizens along the Canadian border. The US Government took steps to prevent American partisans from taking part in the Canadian rebellion, but was unable to do so. Urged on by refugee Canadian insurgents, American citizens in Buffalo, armed and equipped for battle, volunteered by the hundreds to assist the Canadian rebellion. This armed band invaded Navy Island, an island in British possession situated in the Niagara River between the American and Canadian mainland, and subsequently used the island as a base for military operations against the Canadian shore and British boats. The American rebels were constantly reinforced with men and military equipment supplied from the American shore. The American steamboat *Caroline* played a crucial role in this supply. The British forces in Canada considered that the destruction of the *Caroline* would both prevent further reinforcements and supplies from reaching the rebels on Navy Island and deprive the rebels of their means of access to the Canadian mainland. Consequently, on the night of 29 December 1837, a British expedition boarded the *Caroline*, docked at Fort Schlosser, and, after forcing the crew to escape, set her on fire and sent her adrift down the Niagara River. Two American citizens were killed by British forces in the incident.

What made the *Caroline* a historic case was the diplomatic notes subsequently exchanged between the US and British authorities. The US Secretary of State, Daniel Webster, in a famous letter, called upon the British Government to show a:

necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation.... [and also] that the local authorities of Canada,

*even supposing the necessity of the moment authorized them to enter the territories of The United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.*¹⁰²

Lord Ashburton, in his reply, proposed to justify the Caroline incident in accordance with the criteria formulated by Webster, adding regret that the action taken had necessitated a violation of American territory and an apology that such regret had not been expressed earlier.¹⁰³ Webster accepted the apology¹⁰⁴ and there the case ended.

When in the early twentieth century initiatives were taken to limit the right to resort to war, self-defence was not an issue. Neither the Covenant of the League of Nations of 1919, limiting the right to resort to war, nor the Pact of Paris of 1928 (the Kellogg-Briand Pact), renouncing war as an instrument of national policy, even mention the right of self-defence. However, this was only because the right of states to defend themselves against attack was universally recognised as a natural right, inherent in state sovereignty.¹⁰⁵

The Nuremberg Military Tribunal, in its judgment of 1946 on war crimes committed by members of the German Nazi regime during the Second World War, confirmed not only the customary right of self-defence, but also the Caroline formula as reflective of its content.¹⁰⁶

In conclusion, it is beyond contention that a right of self-defence had been firmly established in customary international law prior to 1945, and most agree that this right was defined and limited in accordance with the principles defined in the *Caroline Case*.¹⁰⁷ The controversial issue is the impact of the UN Charter on this customary right of self-defence.

1.2. Article 51 of the UN Charter

A major achievement of the UN Charter was the general prohibition on the use of force between states in Article 2(4). During the preparations of the UN Charter, some took the view that the Security Council should have exclusive competence to use force against a state, and that consequently, Security Council enforcement action should be the only exception to the prohibition on the use of force. However, since the Security Council might not always be able to act, most states considered it necessary to preserve the right of self-defence.¹⁰⁸ So Article 51 was inserted.

Apart from self-defence, the UN Charter abolished any right of forcible self-help arguably recognised under customary international law prior to 1945.¹⁰⁹

Obviously, this makes crucial the scope of the right of self-defence. Article 51 provides 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.

A primary purpose of Article 51 was to recognise explicitly a right of collective self-defence and to make self-defence subject to the primary competence of the Security Council.

The right of self-defence includes individual as well as collective self-defence (Article 51). Individual self-defence may be conducted by a state that is a victim of an armed attack. Collective self-defence may be conducted by other states on behalf of the victim state, provided that the latter has declared itself to be the victim of an attack and, in the absence of a prior agreement,¹¹⁰ has specifically requested the assistance of those states.¹¹¹

The right of self-defence is temporary, existing only “until the Security Council has taken the measures necessary to maintain international peace and security” (Article 51). In principle, it is for the Security Council to decide whether the measures it has taken have the consequence of terminating the right of self-defence. In the absence of such a decision, the victim state may initially rely on its own assessment.¹¹² Furthermore, any exercise of the right of self-defence “shall be immediately reported to the Security Council” (Article 51). While a failure to report to the Security Council does not exclude the lawfulness of action taken in self-defence, it does create a certain presumption against the state subsequently relying on the right of self-defence as a justification for military action.¹¹³

As regards the basic conditions of self-defence, it is controversial

whether Article 51 simply confirmed customary law prior to 1945 allowing self-defence against an imminent attack, or intended to limit the right of self-defence to situations where an armed attack has already occurred. This issue of anticipatory self-defence is dealt with below (Section 4.2).

In any case, it is clear that Article 51 has not altogether superseded customary international law on self-defence as it existed prior to 1945, if only because Article 51 does not regulate all aspects of the right of self-defence, including the requirements of necessity and proportionality.¹¹⁴

Action in self-defence must not exceed what is necessary and proportionate to respond to the attack.¹¹⁵ These requirements are hugely important in state practice, since most cases turn on their observance or non-observance. At the same time, however, their exact content is subject to debate. According to the Caroline formula, action taken in self-defence must involve “nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it”.¹¹⁶ The International Court of Justice has described the requirements as follows: “self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it”.¹¹⁷

In any event, the right of self-defence, like any use of force, is subject to the rules of international humanitarian law applicable in armed conflict, including those governing the means of weaponry and methods of warfare (“the Hague Rules”) and those governing the protection of victims of armed conflict (“the Geneva Rules”).¹¹⁸

In conclusion, although controversy exists as to whether Article 51 was intended to limit the right of self-defence to cases where an armed attack has already occurred, it is settled that the pre-Charter customary principles on self-defence continued to apply after 1945 to the extent that they are compatible with Article 51 of the UN Charter.

1.3. The relevance of state practice after 1945

Whatever may be the better view in the controversy over the interpretation of Article 51, this provision is itself an expression of state practice reflecting the state of the law in 1945. The law on self-defence, like international law in general, is not necessarily static. Subsequent state practice may expand the right of self-defence beyond the scope of

Article 51, provided that state practice invoking a broader concept of self-defence has been supported by a vast majority of states as a legal right. Sources of state practice on the right of self-defence include notably: International declarations on the use of force, cases where states have used force while invoking the right of self-defence, and the international reaction to such claims. In other words, even a narrow interpretation of Article 51 allowing a right of self-defence in the case of an actual armed attack only would not preclude that, today, the right of self-defence might include, for example, the use of force against imminent attacks, or even the use of force against the threat of possible future attacks, if such a right had been recognised in state practice as an expression of customary international law on self-defence.

2. Character and object of the threat: armed attack against a state

An “armed attack” is what triggers the right of self-defence (Article 51).¹¹⁹ Article 51 does not define an “armed attack”, nor does a universal definition exist, although the core of the concept is not disputed. The attack must be directed against a state.

The right of self-defence concerns only international armed attacks. Acts of violence and terrorism conducted within the territory of a state without external support and the response of the authorities to such acts does not fall under this meaning of self-defence.

An “armed attack” within the meaning of Article 51 does not include lawful resort to force, i.e. either in self-defence against an armed attack (there is no right of self-defence against self-defence), or in accordance with a prior authorisation from the Security Council.

2.1. “Armed attack”: a qualified use of armed force

An armed attack signifies a qualified form of the use of force. As stated by the International Court of Justice, it is “necessary to distinguish the most grave forms of the use of force [constituting an armed attack] from other less grave forms”.¹²⁰ Whether specific military action is sufficiently grave to amount to an armed attack depends on its “scale and effects”.¹²¹ According to the Court, this would normally exclude “a mere frontier incident”,¹²² presumably, however, that depends on the scale of the frontier incident.¹²³ Furthermore, a series of minor incidents might

arguably cumulate to constitute an armed attack.¹²⁴ On the contrary, the Court does not exclude that “the mining of a single military vessel might be sufficient to bring into play the “inherent” right of self-defence”.¹²⁵ The term “armed attack” implies, at a minimum, resulting human casualties and/or serious destruction of property.¹²⁶

There is thus no symmetry between Article 2(4) and Article 51.¹²⁷ Whereas Article 2(4) prohibits any threat or use of force between states, Article 51 confers on a victim state a right of self-defence only if the use of force amounts to an “armed attack”. Nevertheless the 1970 *Declaration on Friendly Relations*,¹²⁸ which elaborates on the prohibition on the use of force, may provide some guidelines as to the kind of action which may, given a sufficient scale or with sufficiently grave effects, constitute an armed attack.

As it denotes a qualified form of the use of force, an “armed attack” is more similar to the concept of an “act of aggression”, only for it to be an armed attack, the aggression must be armed.¹²⁹ Consequently, the 1974 *Definition of Aggression*¹³⁰ has proved a source of inspiration in defining what constitutes an “armed attack”. It contains in Article 3 a non-exhaustive list of acts of aggression, including notably: invasion; attack; bombardment; blockade of the ports or coasts of another state; an attack on the land, sea or air forces of another state; allowing another state to use territory placed at its disposal for acts of aggression; and the sending of armed bands, groups, irregulars or mercenaries to carry out acts of armed force against another state of such gravity as to amount to an act of aggression. Article 2 even states that any first use of force in contravention of the UN Charter should be considered *prima facie* evidence of an act of aggression. However, all the examples just mentioned are subject to the general condition that (the Security Council may decide that) an act of aggression has not been committed if “the acts concerned or their consequences are not of sufficient gravity” (Articles 2 and 3).

2.2. Against a state: state territory, armed forces or nationals and assets abroad

Although Article 51 does not define what should be the object of an armed attack, self-defence undoubtedly involves armed attack against a state.

The right of self-defence undoubtedly applies to armed attacks

directed against state territory or the armed forces of a state (cf. the 1974 *Definition of Aggression*).

One controversial issue is whether self-defence may also be invoked to protect nationals and property abroad from an armed attack or to rescue nationals abroad from imminent danger. This is particularly relevant to acts of international terrorism, which have most often been aimed at nationals or assets abroad rather than at the territory of the state being targeted. A right to use force to protect nationals abroad had become recognised in state practice prior to 1945.¹³¹ After 1945, several states, including the USA, UK, France, Belgium and Israel, have continued to invoke such a right as a matter of self-defence.

First, this right has been relied on to justify the forcible rescue of nationals imperilled in failed states (e.g. Belgium in the Congo, 1960; the USA in the Dominican Republic, 1965) or taken hostage by terrorists (e.g. Israel in Uganda, 1976; the USA in Iran, 1980) in situations where the state responsible was unwilling or unable to protect them. In such cases, the necessity of rescue is evident. Provided the operation is strictly limited to rescuing the state's own nationals, it is therefore regarded by many as a lawful exercise of the right of self-defence; if not formally legal, most states have at least refrained from condemning such limited actions.

Second, the right has been relied on to justify a forcible response to armed attacks against nationals or assets abroad for the purpose of deterring/preventing further such attacks, whether in case of a state attack (e.g. the USA against Iran, 1987-88) or a terrorist attack, directing the response against the terrorists as well as the state allegedly harbouring them (e.g. the USA against Libya, 1986; the USA against Iraq, 1993; the USA against Afghanistan and Sudan, 1998). Such forcible responses have provoked controversy due to the delicate issue of distinguishing lawful self-defence from unlawful reprisals (see Section 4.2).

The International Court of Justice in the *Tehran Hostages Case* referred to the taking of hostages on the US Embassy in Tehran as an "armed attack".¹³² In the *Oil Platforms Case* concerning attacks on a US warship and a US tanker in the Persian Gulf allegedly conducted by Iran, the Court seems implicitly to recognise that, in principle, an armed attack against a merchant ship may in itself trigger the right of self-defence.¹³³

The Security Council in 1992, in condemning the terrorist act of 1988 at Lockerbie, which destroyed a civilian aircraft, and the conspiracy of Libya, while not explicitly referring to self-defence, affirmed “the right of all States, in accordance with the Charter of the United Nations and relevant principles of international law, to protect their nationals from acts of international terrorism that constitute threats to international peace and security”.¹³⁴

In conclusion, the right of self-defence applies not only in the case of an armed attack against a state’s territory or armed forces, but presumably also in the case of armed attacks on its nationals and assets abroad. In any event, necessary and proportional action to protect nationals and assets abroad is likely to be considered justified by most states.¹³⁵

3. Source of the threat: attack by or from a state

Responding to attacks by regular state forces is at the core of the right of self-defence. A controversial issue, and crucial in the context of international terrorism, is the extent to which the right of self-defence also extends to attacks conducted by non-state actors.

3.1. Direct state attack: a state attack with regular armed forces

The traditional armed attack involves the use of a state’s regular armed forces against another state, whether in the form of an invasion and subsequent occupation or annexation, bombardment or other substantial use of force against its territory, a blockade of its ports and coasts, or an attack on its land, sea or air forces. The Iraqi invasion of Kuwait in 1990 is an example of such a classic armed attack in the form of an invasion.

3.2. Indirect state attack: a state supporting attacks by non-state actors

Although direct armed attacks with regular forces still occur, indirect forms of state attack have become more common, bringing into focus the question of the level of state involvement required to make the attack imputable to the state.

Infiltration of armed bands, irregulars etc.

State infiltration of irregulars etc. into the territory of another state was a common phenomenon during the Cold War, and continues to be used today in many parts of the world.

The 1974 *Definition of Aggression* recognises that military action carried out by irregulars etc. on the territory of another state may amount to aggression on the part of the state who sent them. Article 3(g) includes under the definition of aggression:

The 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 [an act of aggression], or its substantial involvement therein.

The International Court of Justice in the Nicaragua Case, recognising the 1974 *Definition of Aggression* as reflecting customary international law, made the natural inference from its Article 3(g) that an armed attack conducted by irregulars etc. triggers the right of self-defence of the victim state, if “substantial involvement” by another state can be shown.¹³⁶ In the Court’s view, this formula did not include in the concept of an armed attack the mere assistance to rebels in the form of provision of weapons, logistical or other support.¹³⁷

The Court’s definition of armed attack in the form of infiltration¹³⁸ has been criticised by some as being too narrow, including Judge Jennings dissenting in the Nicaragua Case, questioning whether, by applying the Court’s standard, any state involvement short of direct attack by regular forces may trigger the right of self-defence.¹³⁹

Support of or acquiescence in territory being used as a base for attacks by non-state actors

As regards self-defence against international terrorism, a crucial issue involves states sponsoring or tolerating international terrorist organisations operating from their territory.

The 1974 *Definition of Aggression* recognises that a state allowing its territory to be used by another state to carry out acts of aggression against a third state will be complicit in that act of aggression. Article 3(f) includes under the definition of aggression:

The action of a State in allowing its territory, which it has placed at the disposal of

another State, to be used by that other State for perpetrating an act of aggression against a third State.

As regards the harbouring of non-state actors, including terrorist organisations, whereas the 1974 *Definition of Aggression* is silent, the 1970 *Declaration on Friendly Relations*¹⁴⁰ on the prohibition on the use of force states that:

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

Here states have a duty to protect other states from acts of terrorism emanating from its territory. Furthermore, the natural inference of this statement is that the right of self-defence applies against the acquiescing state, provided that the terrorist acts resulting from the activities it is harbouring amount to an armed attack on another state. This, however, would lower the threshold of the acquiescing state's complicity as defined by the 1974 *Definition of Aggression* and the International Court of Justice, since, clearly, a state's harbouring of or acquiescence in terrorist activities does not equal "substantial involvement".

State practice prior to 11 September 2001

In state practice, the right of self-defence has been invoked in numerous cases in the fight against international terrorism. No one has done this as consistently as Israel in its fight against Palestinian terrorism allegedly sponsored by its Arab neighbours, though on many occasions Israel's conduct has been condemned in the Security Council. However, the political context of Israel's actions is quite unique, and in many cases the lawfulness of Israel's response could be questioned because many of these terrorist acts originated in territory occupied by Israel.¹⁴¹ Furthermore, it has often been unclear whether Israel was condemned because of insufficient evidence of state involvement or because the counter-force used was considered an unlawful reprisal (see also Section 4.1.2) or simply disproportionate in scale.¹⁴²

The USA has invoked a right of self-defence against state-sponsored

terrorism prior to 11 September 2001, in circumstances warranting closer attention:

USA – Libya 1986. On 5 April 1986 a bomb exploded in a discotheque in Berlin, killing one US soldier and wounding many others. This terrorist act was believed to be part of a campaign of Libyan state-sponsored terrorism headed by the Libyan leader Colonel Gadhafi. As a response, on 14 April 1986 the US launched air strikes against several targets in Libya, including Tripoli, killing 37 people, mostly civilians. In a letter to the Security Council, the US invoked the right of self-defence by referring to “an ongoing pattern of attacks by the Government of Libya” and the need to deter future terrorist attacks.¹⁴³ In the Security Council, most states rejected the US response as disproportionate, but the US, UK and France joined to veto a motion of condemnation.¹⁴⁴ The US action was condemned in the General Assembly by 79 votes to 28, with 51 abstaining.¹⁴⁵

USA – Iraq 1993. The Iraqi leadership had allegedly given orders to the Iraqi intelligence service for the assassination of US President Bush Senior by way of a terrorist act to take place on 14 April 1993, an attempt which, however, failed. As a response, on 26 June 1993 the US carried out a missile attack against the headquarters of the Iraqi intelligence service in Baghdad. In a letter to the Security Council, the US invoked Article 51 in stating among others that: “as a last resort, the United States has decided that it is necessary to respond to the attempted attack and the threat of further attacks by striking at an Iraqi military and intelligence target that is involved in such attacks”.¹⁴⁶ In the Security Council, the US action met with widespread support and understanding; the UK and Russia explicitly supported the legality of the action, and only China explicitly condemned it.¹⁴⁷

USA – Afghanistan and Sudan 1998. On 7 August 1998 the US embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, were the targets of terrorist attacks, killing almost 300 people, including 12 US citizens, and injuring thousands. The terrorist attacks were strongly condemned by the Security Council, which called for the perpetrators to be brought swiftly to justice.¹⁴⁸ In response, on 20 August 1998 the US fired cruise missiles against “terror facilities” believed to be connected with the

attacks, namely a paramilitary training camp in Afghanistan belonging to the terrorist organisation Al Qaeda, which was allegedly responsible for the attacks, and a chemical plant in Sudan, which was allegedly being used to produce chemical weapons to be used in terrorist attacks.¹⁴⁹ The US invoked Article 51, referring to the need to prevent and deter further attacks: “These attacks were carried out only after repeated efforts to convince the Government of Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the Bin Laden organisation. That organisation has issued a series of blatant warnings that “strikes will continue everywhere” against American targets, and we have convincing evidence that further such attacks were in preparation from these same terrorist facilities. The United States, therefore, had no choice but to use armed force to prevent these attacks from continuing”.¹⁵⁰ The US action was condemned by the Non-Aligned Movement, some Arab states and Russia. The UK and France recognised the right of self-defence, whereas others who expressed support of the US did not explicitly adopt the US justification of self-defence.¹⁵¹

USA and Others in Afghanistan 2001

On 11 September 2001 an unprecedented terrorist attack was directed against the USA. Foreign terrorists hi-jacked civilian aircraft and used them as fuelled bombs against the World Trade Center in New York City, and the Pentagon in Washington D.C., killing more than 3,000 people, mostly civilians, including the nationals of 81 countries, and destroying property worth billions of dollars. The world was shocked and appalled by the tragedy.

Evidence pointed in the direction of Al Qaeda as being responsible for the attacks, a terrorist organisation headed by Usama Bin Laden and operating from Afghanistan with the agreement and support of the Taliban regime (the de facto government of Afghanistan). President Bush vowed to attack Afghanistan if its authorities failed to close down Al Qaeda’s terrorist camps and extradite its leaders. These US demands were rejected by the Taliban.

The US Congress, referring to the right of self-defence, authorised President Bush to use all necessary force against the perpetrators of the attacks and those who harboured them in order to prevent any further acts of international terrorism against the United States.¹⁵²

The Security Council, in Resolution 1368 of 12 September 2001, unanimously and for the first time recognised the right of self-defence in response to terrorist attacks,¹⁵³ while also indicating that state complicity in the form of support and harbouring was involved:

*The Security Council,
Reaffirming the principles and purposes of the Charter of the United Nations,
Determined to combat by all means threats to international peace and security
caused by terrorist acts,
Recognizing the inherent right of individual or collective self-defence in accordance with the Charter,*

1. *Unequivocally condemns in the strongest terms the horrifying terrorist attacks on 11 September 2001 in New York, Washington D.C. and Pennsylvania and regards such acts, like any act of international terrorism, as a threat to international peace and security*
2. (...)
3. *Calls on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable.*

NATO, on 12 September 2001, for the first time in its existence, invoked Article 5 of the Washington Treaty, the “Musketeer Oath” of collective self-defence, on one condition only: that it be determined that the 11 September terrorist attack against the USA had been directed from abroad:

*The Council agreed that if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all.*¹⁵⁴

Against this background, on 7 October 2001 the US initiated Operation Enduring Freedom in Afghanistan, with support from the UK as well as other NATO allies, including Denmark. On the same day, the US and UK reported the operation to the Security Council, invoking Article 51 and stating the purpose of the operation. The US stated among others:

The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organisation have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organisation as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organisation continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad.

In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan. In carrying out these actions, the United States is committed to minimizing civilian casualties and damage to civilian property.¹⁵⁵

The UK, along the same line, stated among other things that:

forces have now been employed in exercise of the inherent right of individual and collective self-defence following the terrorist outrage of 11 September 2001, to avert the continuing threat of attacks from the same source.... Usama Bin Laden and his Al-Qaeda terrorist organisation have the capability to execute major terrorist attacks, claimed credit for past attacks on United States targets, and have been engaged in a concerted campaign against United States and its allies. One of their stated aims is the murder of United States citizens and attacks on the allies of the United States.

This military action...is directed against Usama Bin Laden's Al-Qaeda terrorist organisation and the Taliban regime that is supporting it. Targets have been selected with extreme care to minimize the risk to civilians.¹⁵⁶

Operation Enduring Freedom was an extensive military operation involving months of air bombings and a massive presence of troops on the ground. The operation led to the fall of the Taliban regime and the installation of a new provisional government in Afghanistan. Throughout, there has generally been broad international support for the operation.

The fact that the Taliban regime was forcibly removed from power

is noticeable. In previous cases, states supporting terrorism were merely deterred by force. The drastic step of violently overthrowing a government would traditionally be regarded as exceeding proportionate self-defence to deter a state from continuing to harbour terrorists.¹⁵⁷ The question is thus whether, in these particular circumstances, the right of self-defence also extended to the forcible removal of the Taliban regime. Security Council Resolution 1368 (2001) stressed in ambiguous terms that “those responsible for aiding, supporting or harbouring the perpetrators, organisers and sponsors of these acts will be held accountable”. However, the letters from the USA and UK to the Security Council clearly indicated that the military operation would also be directed against the Taliban regime. While not explicitly setting out the aim of forcibly removing the Taliban from power, there is no doubt that this was an explicit objective of the USA, whereas the UK officially recognised regime change only as a possible and legitimate consequence of military action.¹⁵⁸ In any event, the Taliban was overthrown as a result of the military operation in Afghanistan, and there was (almost) no international objection to this outcome. This would suggest that, in these particular circumstances, the forcible removal of a foreign regime was regarded as a necessary and proportionate measure of self-defence. There had been close and long-standing ties between the Taliban and Al Qaeda, and the Taliban had for years ignored international condemnation of its policy¹⁵⁹ and had apparently been unaffected by efforts of deterrence.¹⁶⁰ Furthermore, the status of the Taliban as a *de facto* government, not internationally recognised as the legitimate government of Afghanistan and isolated in the international community, might well have promoted international acceptance of its forcible removal.

Assessment

Prior to 11 September 2001, the right of self-defence against attacks by non-state actors, including terrorist attacks, was only clearly established in the case of “substantial” state involvement in the attack.¹⁶¹ However, some saw in state practice a tendency to allow self-defence against states that were merely harbouring or tolerating terrorist activities on their territory.¹⁶²

The question is whether events following 11 September 2001 have lowered the threshold of self-defence against complicit states from “substantial” state involvement to a mere requirement of “harbouring”

of or even just “acquiescence” in terrorist activities. Security Council Resolution 1368 (2001) is subject to various interpretations in this respect. Interpreted narrowly, the established threshold of substantial state involvement has not been lowered, since the Taliban in fact met this threshold.¹⁶³ Interpreted more broadly, the threshold has been lowered to harbouring terrorist activities.¹⁶⁴ Both the wording and background to the adoption of Resolution 1368,¹⁶⁵ the formal US and UK justifications of Operation Enduring Freedom in letters to the Security Council and the broad international support for that operation suggest the broad interpretation.

In conclusion, events after 11 September 2001 have presumably affirmed that the right of self-defence applies against states harbouring terrorists who are responsible for attacks against another state. Furthermore, it can be argued that measures of self-defence in such cases may exceptionally also include the forcible removal of the complicit regime, if, as in the case of the Taliban, in the particular circumstances, this is the only means of preventing further terrorist attacks.

3.3. Private attack: attack by non-state actors without state involvement

A controversial issue is whether the right of self-defence may also extend to purely private armed attacks conducted or directed from the territory of another state, but without any support or acquiescence from the host state.¹⁶⁶

Although Article 51 does not limit the right of self-defence to armed attacks by another state, state attack was undoubtedly what was being considered when Article 51 was written,¹⁶⁷ and it has also been the focus of subsequent declarations, including the 1974 *Definition of Aggression*, which only refers to various forms of direct and indirect aggression by states. Therefore, the position that the right of self-defence also extends to purely private armed attacks, including terrorist attacks,¹⁶⁸ has been and remains controversial.¹⁶⁹

State practice prior to 11 September 2001

State practice includes only a few cases where the right of self-defence was invoked in response to armed incursion or terrorist acts emanating from a state which did not support the activities being conducted from its territory, but was unable to prevent the attacks:

Caroline. The classic Caroline incident, mentioned earlier, concerned purely private attacks. The British Government relied on a right of self-defence to respond to cross-border attacks by private US citizens joining in the armed Canadian rebellion against British rule, without the US government being able to prevent them from doing so.¹⁷⁰

Turkey and Iran in Iraq 1995-96. In response to continuing cross-border attacks by Kurdish terrorist groups (the PKK) based in northern Iraq, Turkey and Iran both conducted military operations against Kurdish positions, Iran expressly invoking the right of self-defence. Neither Turkey nor Iran blamed the government of Iraq, which in no way supported the Kurdish attacks, but was unable to exercise authority in the north of the country because of the no-fly zone imposed on Iraq by the USA and others in order to create a safe Kurdish haven from Iraqi oppression. The Iraqi complaint of Turkish aggression was not addressed in the United Nations. The Arab League condemned Turkey, whereas the USA expressed support.¹⁷¹

USA in Afghanistan 2001

As indicated above, the terrorist attacks against the USA on 11 September 2001 was a case of armed attack supported by a state, the Taliban regime in Afghanistan. However, it may be argued that the international reaction to 11 September supports the view that even purely private terrorist attacks without any state involvement may trigger the right of self-defence:

Security Council Resolution 1368 (2001), in recognising the right of self-defence in response to the terrorist attacks (preamble and para. 1), does not make that recognition conditional on Taliban complicity, although it subsequently indicates that this existed (para. 3). NATO's response subjects the invocation of collective self-defence to the condition only that the armed attack "was directed from abroad".

Assessment

It is not clear why self-defence must be restricted to armed attacks in which a state is involved. Thus, even in 1992, the Security Council,¹⁷² in condemning the terrorist act at Lockerbie in 1988 and the conspiracy of Libya in that attack, although not explicitly endorsing a right of self-defence against private terrorism, stated its deep concern with

the world-wide persistence of acts of international terrorism in all its forms, including those in which States are directly or indirectly involved, which endanger or take innocent lives, have a deleterious effect on international relations and jeopardize the security of States... [and affirmed] the right of all States, in accordance with the Charter of the United Nations and relevant principles of international law, to protect their nationals from acts of international terrorism that constitute threats to international peace and security.

After 11 September 2001, some still reject the notion that purely private terrorist attacks may trigger the right of self-defence, including the International Court of Justice, which, in its advisory opinion on the West Bank Wall, stated that Article 51 only applies “in the case of an armed attack by one State against another State”.¹⁷³ Others express uncertainty in the light of post-September 11 events,¹⁷⁴ whereas others find that Security Council Resolution 1368 and NATO’s response have affirmed that the right of self-defence applies to any armed attack against a state, including terrorist attacks, even in the absence of any state involvement.¹⁷⁵ It may thus be argued that the right of self-defence also applies to purely private attacks.

However, in the absence of any state involvement, defensive use of force by the victim state will in most cases be unnecessary, since, presumably, the state that is unwillingly hosting the terrorists responsible for the attack will itself act promptly against them. Self-defence against purely private attacks will only be relevant if the host state is unwilling or unable to eliminate the threat of further attacks effectively.¹⁷⁶ Furthermore, if the host state was not involved in the attack, the principles of necessity and proportionality require that the defensive use of force be directed exclusively against the terrorists responsible for the attack, not against the state unwillingly hosting them; the host state, for its part, must accept the limited violation of its territorial integrity that this requires.¹⁷⁷

4. Actuality of the threat: actual, imminent or potential future attack?

When an attack occurs, one important issue is whether the right of self-defence may also apply after the attack has been completed. A further crucial issue is whether and to what extent the right of self-defence may

also apply even prior to the actual initiation of an attack; there may be several stages at which the threat of a future attack appears more or less imminent and the eventual attack more or less certain, from situations where an attack is manifestly underway and will take place within hours, through situations where an attack seems highly likely within days, to situations where an attack seems probable sometime in the future.

4.1. Ongoing or completed attack: “reactive self-defence”

The core of self-defence is the right to respond to an armed attack which has already been launched (Article 51). However, in terms of the need to resort to force, it makes a big difference whether the attack is still ongoing or has already been completed.

4.1.1. Ongoing attack: obvious necessity of a forcible response

No one questions the right of a state to use force in self-defence against an actual and ongoing armed attack against it (Article 51). This classic right of self-defence against an ongoing attack continues to apply where the armed attack takes the form of an invasion leading to the occupation or annexation of another state.

In the case of an ongoing armed attack, there is normally no question of whether the use of force is necessary to respond to it. The right of self-defence includes the use of military force necessary and proportionate to halt and repel the attack. In this case, the requirement of necessity would seem to override the requirement of proportionality, since, presumably, what is necessary to halt and repel the armed attack will also be deemed proportionate. Self-defence against a massive ongoing attack may thus necessitate the waging of an all-out-war, ultimately resulting in the forcible removal of the aggressive regime.¹⁷⁸

Iraq’s invasion of Kuwait in 1990 illustrates the classic invocation of the right of self-defence. After Iraq had successfully invaded and annexed Kuwait, the Security Council, having already condemned the invasion, affirmed in Resolution 661 “the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter”.¹⁷⁹ In early 1991 an international coalition assisted Kuwait in forcing Iraq out of Kuwait, thus reestablishing the *status quo ex ante*.¹⁸⁰

4.1.2. Completed attack: punishment or necessary prevention/deterrence?

On the one hand, it would arguably defy common sense for a state which is the victim of (continuous) pin-prick attacks not to be allowed to respond by military force against the aggressor to prevent further attacks. Notably, this would often leave a state that was the victim of terrorist attacks defenceless in terms of military force. On the other hand, when an armed attack has been completed, the necessity of self-defence is less obvious,¹⁸¹ and in any event involves different standards than in the acute circumstances of an ongoing attack. Thus, the use of force in response to a completed armed attack brings into focus the crucial but difficult distinction between lawful self-defence and unlawful reprisals.

Article 51 does not provide much guidance, stating only that the right of self-defence applies “if an armed attack occurs”. Indeed, this could be interpreted as prohibiting as well as permitting the use of force against an armed attack which has already occurred.

The International Court of Justice seems to recognise that, in principle, the right of self-defence may also apply *after* an armed attack has occurred. In the *Nicaragua Case*, the Court stated that “the right of collective self-defence presupposes that an armed attack has occurred”.¹⁸² In the *Oil Platforms Case*, the USA had destroyed Iranian oil platforms in response to previous attacks on US ships. The Court did not reject the US invocation of self-defence on the basis that the attacks against the United States had already occurred. On the contrary, it stated that, “in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that attacks had been made upon it for which Iran was responsible”.¹⁸³

The crucial question is one of necessity. When there is no longer an actual attack to repel, how can it be argued that the use of force in self-defence is, nevertheless, necessary? Certainly, it would not suffice to invoke the necessity of equalising the harm done to the victim state by a proportional response against the aggressor, although such an argument involving revenge may correspond to a basic human instinct. In the past, the use of force often took the form of reprisals in response to a breach of international law. However, the overriding concern of the UN Charter is to maintain peace, not to enforce justice.¹⁸⁴

Consequently, current international law prohibits, without exception, reprisals involving the use of force. This is emphatically spelled out in the 1970 *Declaration on Friendly Relations* interpreting the prohibition on the use of force: “States have a duty to refrain from reprisals involving the use of force”.¹⁸⁵ This view is supported by the International Court of Justice,¹⁸⁶ the International Law Commission,¹⁸⁷ the great majority of legal scholars,¹⁸⁸ and also by the practice of the Security Council (notably, but not exclusively, relating to Israel).¹⁸⁹ The delicate question is where to draw the line between self-defence and reprisals.¹⁹⁰

If there is to be room for the use of force in self-defence as a response to an armed attack that has already occurred, it must be justified by the necessity of preventing or deterring likely further attacks in the (near) future, the previous armed attack being only relevant as (insufficient) evidence of the existence of a continuing threat of future attacks. The crucial point to arguably distinguish lawful post-attack self-defence from unlawful reprisals has nowhere been more aptly stated than by the British Foreign Office in a report from 1839 justifying the already mentioned Caroline incident:

*the grounds on which we consider the conduct of the British Authorities to be justified is that it was absolutely necessary as a measure of precaution for the future and not as a measure of retaliation for the past. What had been done previously is only important as affording irresistible evidence of what would occur afterwards.*¹⁹¹

Thus, the minimum requirement of post-attack self-defence is that it must be future-oriented, its necessity depending on convincing evidence of a continuing threat of further attacks.¹⁹² To show urgency, the response must come within a reasonable time after the original attack.¹⁹³ As regards the purpose of post-attack self-defence, there may be some difference between responding to a state attack and to attacks by non-state actors, including terrorist groups.

Deterrence of further state attacks

In case of a completed attack by another state, the necessity of self-defence is clearly absent should the aggressor state excuse the attack and offer reparation.¹⁹⁴ On the other hand, if evidence suggests a continuing threat of further attacks, a necessity of self-defence arguably exists.

However, self-defence against an aggressor state actually to prevent

the threat of future attacks by eliminating its capacity to strike again requires the use of force on a scale which would be considered by many as disproportionate to the original attack,¹⁹⁵ although arguably not to the threat. Therefore, although actual prevention is more easily compatible with a necessity of self-defence than deterrence, which has the colour of a reprisal, a limited response to deter further attacks may be deemed an acceptable alternative.¹⁹⁶ In the case of such deterrence, proportionality becomes essential. The deterrent response must be carefully calibrated to be proportionate to the original attack.¹⁹⁷

Statements by the International Court of Justice in the *Nicaragua* and *Oil Platforms* cases seem to support the view that post-attack self-defence in response to state attacks may in principle be lawful¹⁹⁸ even for the purpose of deterring further attacks, provided that 1) the need to use force in self-defence is based on a risk of further attacks;¹⁹⁹ 2) options for eliminating that risk by peaceful means have been exhausted;²⁰⁰ 3) the use of force is proportionate in scale and effects to the previous attacks;²⁰¹ and 4) there is a causal link between the target of self-defence and the (risk of further) attacks.²⁰²

Prevention of further terrorist attacks

As mentioned earlier, it has been recognised that the right of self-defence also applies to terrorist attacks, arguably even in the absence of state involvement in them (see above Section 3.2-3.3). Terrorist attacks most often take the form of pin-prick assaults leaving the victim state unable to repel the actual attack. In addition, experience shows that terrorists are likely to strike again. Therefore, if a terrorist attack has already occurred, the right of self-defence to prevent likely further attacks becomes crucial. In the case of terrorist attacks as opposed to state attacks, the obvious purpose of post-attack self-defence is actually to prevent future attacks, rather than merely deter them, by eliminating the threat through targeted action against the terrorists responsible.²⁰³ In case of state complicity in the terrorist attacks, a deterrent use of force against that state may also be relevant.

In state practice, the classic Caroline incident, mentioned earlier, concerning the use of force in response to private attacks from abroad was justified as self-defence to prevent further attacks. Israel has consistently relied on the right of self-defence to respond to terrorist attacks. These actions have often been condemned in the Security Council, on

occasion with explicit reference to the unlawfulness of forcible reprisals.²⁰⁴ As stated earlier, the political context in Israel is unique and the legal issues complex. However, there are other cases, mentioned earlier (see Section 3.2-3.3), where the right of self-defence has been invoked to justify a post-attack military response to terrorist acts, including the USA in Libya (1986), the USA in Iraq (1993), Turkey and Iran in Iraq (1995-96), and the USA in Afghanistan and Sudan (1998). These instances were not met with international condemnation, but rather with sympathy, when the response was deemed necessary and proportionate. Prior to 11 September 2001 the legal implications of this state practice were controversial. Some writers saw it as merely confirming settled law conferring on victim states a right of post-attack self-defence provided the primary purpose is deterrence or prevention of further attacks.²⁰⁵ Others regarded it as basically incompatible with the principle of necessity and the prohibition of forcible reprisals, while recognising that in some instances such actions had received widespread international understanding.²⁰⁶ In between was the view that state practice showed increasing international tolerance for forcible countermeasures against international terrorism, possibly reflecting an emerging recognition of its lawfulness as self-defence.²⁰⁷

Security Council Resolution 1368 (see above Section 3.2), which unanimously condemned the terrorist attacks of 11 September 2001 and recognised the right of self-defence, has unequivocally affirmed that the right of self-defence includes the use of the force required to respond to previous terrorist attacks. Resolution 1368, when referring to “threats to international peace and security caused by terrorist acts”, clearly indicates that the right of self-defence is conditioned upon the existence of an ongoing threat of further attacks. The letters from the USA and UK to the Security Council invoking Article 51 justify the use of military force in Afghanistan accordingly. The US letter referred to an “ongoing threat to the United States and its nationals” and stated the purpose of the action as being to “prevent and deter further attacks on the United States”,²⁰⁸ while the UK letter stated that the purpose of self-defence is “to avert the continuing threat of attacks from the same source”.²⁰⁹

Assessment

The unanimous Security Council Resolution 1368 (2001) and subsequent events, notably the US and UK justifications of Operation

Enduring Freedom in Afghanistan, the course of this operation and the general international support for it, have clearly affirmed that the right of self-defence includes the use of force in response to previous terrorist attacks if this is necessary to prevent or deter likely further attacks from the same source. The right of self-defence thus depends on a continuing threat of further attacks from the terrorists responsible and on the host state being unwilling or unable to eliminate that threat. In such circumstances the right of self-defence includes measures necessary to eliminate, if possible, the terrorist threat, including preventing or deterring any state supporting or harbouring the terrorists from continuing to do so.

4.2. Imminent (threat of) attack: “anticipatory self-defence”

In legal doctrine on self-defence, no issue has attracted more controversy than the question of whether the use of force to counter an imminent threat of armed attack continues to be lawful – so called anticipatory self-defence. Presumably, anticipatory self-defence will be relevant, notably where a state is preparing a regular attack against another state, as indicated by extraordinary troop movements, the fuelling of missiles etc., and possibly combined with official threats, whereas terrorists tend to strike without warning of time and place, their preparations for attack presumably most often being “invisible” until it is too late.

As mentioned earlier (Section 1.1), customary international law prior to 1945 recognised a right of anticipatory self-defence against an imminent threat of attack,²¹⁰ based on the formula of the leading *Caroline Case*²¹¹ that there be “a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation”.

The controversial issue is whether this customary right of anticipatory self-defence survived the adoption of the UN Charter, which stipulates a general prohibition on the use of force between states in Article 2(4). Article 51, however, preserves the right of self-defence, while stating its scope in somewhat ambiguous terms: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs...”. The opening phrase, “nothing in the present Charter shall impair the inherent right of self-defence”, when read in isolation, suggests that Article 51 did not remove the customary right of self-defence, but it provides further that the right of self-defence applies “if an armed attack occurs”.²¹²

Some scholars find that Article 51 did not terminate the customary right of anticipatory self-defence, holding that the reference to an actual armed attack is not decisive in this context, the primary purpose of the Article being to establish a right of collective self-defence and determine the relationship between self-defence and collective security, not to narrow the scope of self-defence in other respects.²¹³ A statement in the *travaux préparatoires*, by the committee in San Francisco dealing with the provision on the prohibition on the use of force (Article 2(4)), according to which “the use of arms in legitimate self-defence remains admitted and unimpaired”,²¹⁴ is said to support this view.²¹⁵

Other scholars argue that Article 51 has narrowed the customary right of self-defence, since according to its wording – and in accordance with the overall purpose of the UN Charter to restrict any unilateral use of force – it allows a resort to self-defence only in cases of actual armed attack.²¹⁶

It would seem unlikely that the words “if an armed attack occurs” were added by the committee dealing with the right of self-defence (Article 51) out of mere accident or lack of thought for the consequences.²¹⁷ Indeed, evidence shows that the wording of Article 51 was deliberately chosen to exclude anticipatory self-defence, on the initiative of the USA.²¹⁸

Even if the wording and history of Article 51 would seem to exclude anticipatory self-defence, it cannot be denied that powerful arguments from necessity and common sense speak in its favour, not least in light of the destructive power of modern weaponry, including weapons of mass destruction (WMD), which arguably makes it not only unrealistic but also unreasonable to require that a state faced with an imminent threat of attack should remain idle until the attack has been launched. As Bowett aptly suggests: “No state can be expected to await an initial attack which, in the present state of armaments, may well destroy the state’s capacity for further resistance and so jeopardize its very existence”.²¹⁹

The High-level Panel also recognises the continued legality of anticipatory self-defence: “a threatened state, according to long established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate”.²²⁰ The UN Secretary General, Kofi Annan, has adopted the view of the High-level Panel.²²¹

State practice

In any event, the wording of Article 51 could not exclude state practice after 1945 from affirming the continuance of anticipatory self-defence as a customary right. Some states have explicitly supported such a right, including the USA, UK, Israel, Canada, Japan and Iraq.²²² However, formal invocations of anticipatory self-defence have been rare, states apparently preferring to rely on a broad interpretation of the term “armed attack” in Article 51.²²³

USA – Soviet Union/Cuba, 1962 (The Cuban Missile Crisis). On 22 October 1962, the USA imposed a naval “quarantine” on Cuba to compel the removal of secretly deployed Soviet missiles on the island, which were said to pose an imminent threat to US security. However, the USA did not invoke a right of anticipatory self-defence under Article 51. In any event, since the US quarantine was actually a case of preventive action, it will be dealt with below (Section 4.3).

Israel – Egypt, Jordan and Syria, 1967 (The Six Day War). Israel’s successful military action in early June 1967 to pre-empt an apparent imminent Arab invasion is regarded by many as the textbook example of anticipatory self-defence. However, Israel formally (although according to most scholars unconvincingly²²⁴) relied on self-defence against an actual armed attack, characterising the previous blockade by Egypt of the Tiran Strait as in itself an act of war and further claiming that its Arab neighbours had in fact attacked first.²²⁵ Although Israel therefore did not formally invoke anticipatory self-defence, it was nevertheless the imminent danger of extinction facing Israel due to the military build-up on the Arab side, combined with statements by Egypt’s President Nasser, that Israel should be destroyed, and the recent withdrawal of the UN emergency force which dominated the Israeli statement in the Security Council.²²⁶ Once the war had erupted, the Security Council called for an immediate ceasefire, without condemning either party,²²⁷ a Soviet proposal to condemn Israel gathering only four votes. In the General Assembly, while some states rejected a right of anticipatory self-defence, others supported Israel’s actions; no condemnation resulted.²²⁸

The Six Day War

On 18 May 1967 Egypt (UAR) requested the UN Secretary General to withdraw the UN emergency force which had served as a buffer between Israel and Egypt since the war of 1956. On the withdrawal of UN forces, Egypt immediately occupied the former buffer zone and declared the Gulf of Aqaba and the Strait of Tiran closed to Israeli shipping. At the same time Palestinian irregular forces increased infiltration along the border between Israel and Syria. Egypt's President Nasser declared that Israel should be destroyed, and similar statements were made by other Arab leaders. A massive Arab invasion of Israel seemed imminent. On June 5 both Israel and Egypt informed the Security Council that they had been the victim of an armed attack by the other. On June 6, Israeli military aircraft bombed airbases in Egypt, Jordan and Syria, destroying in a swift action almost the entire air strike capability of its neighbours. The ensuing Arab attack was therefore quickly repelled by Israel, who forced the enemy to retreat and occupied parts of enemy territory on 7 June. In the days that followed cease-fire agreements were negotiated. A formal peace was not concluded until 1979 between Israel and Egypt or until 1994 between Israel and Jordan. Technically, Israel and Syria are still in a state of war today.

Iraq – Iran (1980). In 1980 Iraq invaded Iran, first invoking a right of anticipatory self-defence, with allegations that Iran was preparing to invade Iraq, but quickly shifting position by invoking self-defence against a prior armed attack by Iran. Iraq was not condemned in the UN at the time.²²⁹ However, in a 1991 report the UN Secretary General concluded that Iraq had initiated the war in contravention of international law.²³⁰

Israel – Iraq, 1981 (Osirak). Israel explicitly relied on a right of anticipatory self-defence to justify its targeted military action against Iraq in destroying the Osirak-type nuclear reactor, which Israel suspected had been built to develop nuclear weapons for use against Israel. Israel's action was unanimously condemned in the Security Council.²³¹

However, since this is, in substance, an example of preventive action, it will be dealt with below (Section 4.3)

Assessment

A right of anticipatory self-defence in response to an imminent threat of attack was long established in customary international law prior to 1945. However, the wording of and background to Article 51 of the UN Charter and the fact that such a right has only been invoked rarely since 1945 and has been explicitly supported by only a few states makes the current status of the doctrine controversial.²³² In the 1986 *Nicaragua Case* the International Court of Justice explicitly refrained from taking a stand on the continued lawfulness of anticipatory self-defence under customary international law.²³³ It remains to be seen whether events following 11 September 2001, which affirmed a right of post-attack self-defence to prevent further likely attacks (see Section 4.1.2), may also have increased international acceptance of a right of anticipatory self-defence, even in the absence of previous attacks. The doctrine of anticipatory action may evidently be subject to abuse. At the same time, given compelling evidence of a truly imminent threat against a state (the Caroline formula), that state cannot reasonably be expected to remain idle. In such cases it is to be presumed that most states, if not recognising anticipatory action as a lawful exercise of self-defence, will at least accept it as justified on moral and political grounds, the imminent threat of attack constituting extenuating circumstances mitigating the formal breach of international law.²³⁴

The concept of an “imminent threat of attack” and the underlying Caroline formula requiring a “necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation” holds some limited room for discretion and flexibility, including taking into account the nature of the new threats. However, even where a potential attack would have grave consequences, the requirement of imminence cannot be ignored.²³⁵ To justify anticipatory action, the threat of attack must not only be real, e.g. actual possession by a state of WMD, combined with evidence of that state’s hostile intent directed against (a) specific state(s).²³⁶ At least as regards state threats, there must also be factual evidence that the attack is imminent, whereas as regards terrorist threats, which by their nature materialise without prior warning and against which other measures of prevention appear

useless in advance, the mere existence of a credible threat directed against (a) specific state(s) may arguably be considered an imminent threat of attack.

4.3. Potential future (threat of) attack: “preventive self-defence”?

Whereas a right of anticipatory self-defence against an imminent threat of attack, although controversial, may reasonably be invoked, it has generally been agreed that the right of self-defence does not include the use of force to counter potential future threats, especially in the absence of previous attacks or of an imminent threat of attack – so-called *preventive action*.

The Caroline formula of anticipatory self-defence clearly does not cover such preventive military action. The Nuremberg Military Tribunal, in its judgment of 1946 on war crimes committed by members of the German Nazi regime, rejected the defence that Germany’s invasion of (neutral) Norway was justified as preventive self-defence in order to forestall an Allied invasion. Finding on the facts that, at the most, the purpose of the German attack was possibly to “prevent an Allied occupation at some future date”, the Tribunal stated, quoting directly from the Caroline formula: “It must be remembered that preventive action in foreign territory is justified only in cases of “an instant and overwhelming necessity for self-defence, leaving no choice of means and no moment for deliberation” (The *Caroline Case*, ...)”.²³⁷ Equally, legal doctrine, if even considering the option, has rejected preventive action as having no legal basis in current international law.²³⁸

State practice

State practice after 1945 contains only a few instances of military force that might arguably be labelled preventive military action:

USA – Soviet Union/Cuba, 1962 (The Cuban Missile Crisis). On 22 October 1962 the USA imposed a naval “quarantine” on Cuba to compel the removal of secretly deployed Soviet missiles, arguing that they posed an imminent threat to US security. However, the USA did not invoke a right of preventive self-defence under Article 51, but relied on regional peace-keeping (under the Inter-American Treaty of Reciprocal Assist-

ance of 1947) in accordance with Article 52.²³⁹ The “quarantine”, involving the interception by US naval forces of Soviet ships carrying missiles destined for Cuba, was a use of force in contravention of international law, the necessity of which can be assessed only in political terms, taking into account the aggravated Cold War climate prevailing at the time. The incident clearly forms no precedent for preventive action under international law.

Israel – Iraq, 1981 (Osirak). On 7 June 1981 Israel conducted a targeted air attack against an Iraqi nuclear research plant, destroying a nuclear reactor suspected by Israel of being a facility for the development of nuclear weapons to be used against itself. Israel explicitly relied on anticipatory self-defence as justification.²⁴⁰ However, since in any event there was clearly no imminent threat of attack, Israel’s attack was, in fact, an instance of preventive military action to eliminate a potential future threat of nuclear attack. A unanimous Security Council strongly condemned Israel’s action as a “clear violation of the Charter of the United Nations and the norms of international conduct”.²⁴¹ The USA subsequently stated that its condemnation was only motivated by Israel’s failure to exhaust peaceful means.²⁴²

Osirak 1981

On 7 June 1981 nine Israeli aircraft carried out targeted bombings against the Tuwaiti nuclear research centre near Baghdad, Iraq, destroying the “Osirak” nuclear reactor. According to Israel, the reactor was in its final stages of construction and was intended for the development of nuclear weapons, which could be operational by 1985, and which, in light of the hostile rhetoric of Iraqi leaders against Israel, were likely to be used in a future nuclear attack against Israel. According to Israel, it was necessary to act now before the reactor turned “hot”, in which case its destruction would result in a massive radioactive fallout over Baghdad, endangering thousands of lives. Iraq being a party to the 1968 Non-Proliferation Treaty, the nuclear plant had been subjected to international control and inspection by the IAEA, which, at the time, had not found any indications that nuclear

weapons were being developed, nor experienced any lack of cooperation on the part of Iraq. The Security Council, in condemning Israel's attack in Resolution 487 (1981), stressed this fact, recognising the sovereign right of Iraq to develop a peaceful nuclear capacity and calling upon Israel to subject itself to IAEA control by adhering to the 1968 Treaty. Israel, however, claimed that Iraqi purchases of uranium etc. were more compatible with weapons production than with peaceful use, and argued that IAEA inspections were easy to circumvent.

USA, UK and others – Iraq, 2003. On 20 March 2003 the USA, assisted by the UK, Australia and other countries, including Denmark, launched Operation Iraqi Freedom, a comprehensive military invasion designed to disarm Iraq, which was suspected of possessing WMD, and to remove its leader, Saddam Hussein. However, neither the USA²⁴³ nor the other states involved in the military action formally invoked a right of preventive self-defence under Article 51, relying instead on previous Security Council resolutions as the legal basis for the use of force. Therefore, in legal terms, the 2003 war in Iraq provides no precedent for preventive action.

The 2002 US National Security Strategy of “preemptive action”

Following 11 September 2001, President Bush launched a new doctrine of national security in order to prevent, by military force if necessary, threats against the United States emanating from terrorists and “rogue” states with (aspirations to acquire) WMD. This so called “Bush doctrine” was formalised in the US National Security Strategy (NSS) of September 2002.²⁴⁴

The basic rationale of the 2002 NSS is that “rogue” states and terrorists must be prevented from threatening the USA and others, notably with WMD; that deterrence is useless against “rogue” states and terrorists; and that exclusive reliance on a reactive response is unacceptable in light of the magnitude of the potential damage.²⁴⁵ The alleged legal basis of the new doctrine is the right of anticipatory self-defence. It is argued that the concept of an “imminent threat” must be adapted to the realities of the new threats:

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of pre-emption on the existence of an imminent threat – most often a visible mobilization of armies, navies, and air forces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists do not seek to attack us using conventional means. Instead, they rely on terror and, potentially, the use of weapons of mass destruction – weapons that can be easily concealed, delivered covertly, and used without warning. [...] The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively. The United States will not use force in all cases to pre-empt emerging threats, nor should nations use pre-emption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world’s most destructive technologies, the United States cannot remain idle while dangers gather. We will always proceed deliberately, weighing the consequences of our actions. To support preemptive options, we will

- *build better, more integrated intelligence capabilities to provide timely, accurate information on threats, wherever they may emerge;*
- *coordinate closely with allies to form a common assessment of the most dangerous threats; and*
- *continue to transform our military forces to ensure our ability to conduct rapid and precise operations to achieve decisive results.*

*The purpose of our actions will always be to eliminate a specific threat to the United States or our allies and friends. The reasons for our actions will be clear, the force measured, and the cause just.*²⁴⁶

However, despite its label of “pre-emption” and its reference to anticipatory self-defence, the “Bush doctrine” also envisages purely preventive action against potential threats of future attacks.²⁴⁷ Acting against “emerging threats” from “rogue states” and terrorists “before they are able to threaten or use weapons of mass destruction”²⁴⁸ goes far beyond any conceivable right of anticipatory self-defence under current international law.²⁴⁹ For its part, the High-level Panel rejects the notion that

the right of anticipatory self-defence extends to situations “where the threat in question is not imminent but still claimed to be real: for example the acquisition, with allegedly hostile intent, of nuclear weapons-making capability”.²⁵⁰

Furthermore, very few states have so far been willing to support the “Bush doctrine” explicitly as a justified expansion, or rather reinterpretation, of the right of self-defence;²⁵¹ Israel has for long adhered to a similar doctrine itself. The Australian government has indicated some support for the “Bush doctrine” as a necessary adaptation of the right of anticipatory self-defence to modern realities in the context of non-state terrorism,²⁵² but the UK government has taken the position that the current right of anticipatory self-defence is flexible enough to address the most imminent of the new threats.²⁵³ Russia has asserted a right of self-defence if necessary to eliminate the threat from terrorists operating out of Georgia,²⁵⁴ but since Russia refers to several previous attacks by these terrorists on Russian territory, Russia is not relying on a right of purely preventive action, but rather on the legality of post-attack self-defence against terrorists as recognised by Resolution 1368.

Assessment

Under current international law, the right of self-defence does not include purely preventive action. In the absence of a previous armed attack or the imminent threat of such attack, the use of force to prevent potential future threats of armed attack, including threats emanating from states with WMD and from terrorists, is not covered by the right of self-defence.²⁵⁵

The NSS, despite its label of “preemptive action” and references to anticipatory self-defence, in substance also envisages purely preventive action.²⁵⁶ It asserts a right to use military force against threats emanating from “rogue” states that are suspected of possessing or developing WMD as well as their terrorist clients, even before that threat has fully emerged, let alone become imminent. In this respect the NSS has no legal basis in current international law on self-defence. Furthermore, only a few states have so far been willing to support it explicitly.

5. Conclusion

The right of self-defence, long-established in international law, allows a state to use military force necessary and proportionate to counter an

armed attack, until the Security Council has taken the measures necessary to restore international peace and security (Article 51 of the UN Charter). The following remarks sum up the basic conditions of self-defence only, before turning to an assessment of the scope and limits of the current right of self-defence as a framework for addressing new threats from international terrorism and states possessing WMD.

The right of self-defence: basic conditions

The right of self-defence of every state has its legal basis in Article 51 of the UN Charter, as well as in long-standing principles of customary international law. For the right of either individual or collective self-defence to apply, the following minimum conditions must be met:

Armed attack. An “armed attack” (Article 51) denotes a qualified form of the use of force which, due to its scale and effects, amounts to an act of armed aggression. Presumably, several minor incidents in total may amount to an armed attack.

Directed from abroad. The attack must be directed from abroad, by another state or by foreign non-state actors. As regards attacks conducted by non-state actors, the conventional requirement is that there must be “substantial” state involvement in the attack. However, events following 11 September 2001 seem to affirm that the threshold has been lowered so that merely harbouring non-state actors responsible for the attack is sufficient to establish state complicity and thus warrant self-defence. Arguably, the right of self-defence applies in general to attacks by non-state actors, even in the absence of state involvement.

Against a state. The attack must be directed against a state. This notably includes attacks against a state’s territory or armed forces. Presumably self-defence may also be invoked to respond to attacks against nationals and assets abroad; in any event such action, if limited to protective purposes, is likely to be considered legitimate by most states.

Actuality of the (threat of) attack. Reactive self-defence, responding to an armed attack which has already been launched, is at the core of the right of self-defence (Article 51). If the attack is ongoing, the need for a military response is evident. If the attack has already been completed,

the necessity of self-defence depends on a continuing threat of further attacks from the same source and the necessity of preventing or deterring such further attacks.

The status of anticipatory self-defence, or the use of force to preempt an imminent (threat of) armed attack, is controversial. Whereas this right was well established prior to 1945, Article 51 provides only for a right of self-defence “if an armed attack occurs”. States have been reluctant to rely on anticipatory self-defence in concrete cases, preferring a flexible reading of Article 51. However, several states maintain a right of anticipatory self-defence, and strong arguments of common sense and necessity speak in its favour. A credible legal argument may thus be made for a right of anticipatory self-defence in cases where there is compelling evidence of the existence of an imminent (threat of) attack. In any case, anticipatory action in such circumstances will presumably be regarded by most states as legitimate.

Preventive action, i.e. the use of force to eliminate a perceived potential threat of future attack, in the absence of previous attacks or an imminent threat of attack is not covered by the current right of self-defence. Neither Article 51 nor state practice provide any basis for invoking self-defence on the basis that a state or a non-state actor is likely to strike sometime in the future, somewhere in the world. The NSS, to the extent that it includes purely preventive action, has no legal basis in international law; only a few states have so far explicitly supported such a right.

Self-defence and international terrorism

To the extent that the use of military force may be an effective response to the threat posed by international terrorism, the current scope of the right of self-defence, as adapted by events following 11 September 2001, to a large extent provides a suitable framework.

Most terrorist attacks are pin-prick actions, leaving the victim state unable to respond on the spot. Resolution 1368 (2001) and subsequent events have affirmed that the right of self-defence applies to terrorist attacks and continues to apply even after a terrorist attack has occurred, if it is necessary to prevent likely further terrorist attacks from the same source. A state regime which has knowingly harboured the terrorists responsible can also be targeted by proportionate measures of deterrence. If deterrence has proved useless, the forcible removal

of the regime may arguably be considered lawful exceptionally, although this is controversial. It can be argued that the right of self-defence against terrorist attacks is independent of any state involvement, in which case, however, the terrorists responsible must be the sole target of action in self-defence, and only if, exceptionally, the state unwillingly hosting the terrorists proves unwilling or unable (as with failed states) to eliminate the threat itself.

The issue of anticipatory self-defence against an imminent threat of attack is unlikely to arise often in the context of international terrorism, since, presumably, in the absence of previous attacks, the actual intent of attack as well as its time and place will most often remain concealed from the outside world until it is too late.

For the same reason, the issue of purely preventive action against terrorists is unlikely to be very relevant, since international terrorist groups or organisations will most often appear as such only after they have attacked, in which case the right of self-defence will provide a legal framework for hunting down the relevant group or organisation. However, should it be that a private group or organisation without a previous record of terrorist attacks made credible threats of attack against (a) specific state(s), a case for the existence of an imminent threat of attack and thus a right of anticipatory self-defence might reasonably be argued.

Self-defence and threats emanating from states

As regards threats emanating from one state against another state, the right of self-defence applies in case of an ongoing armed attack in order to repel the attack, and presumably also after the attack has been completed if it is necessary to prevent or deter further attacks, i.e. if there is evidence of an ongoing threat of further attacks from the aggressor state. The latter may not be the case as often as in the context of terrorist attacks. More relevant in the context of state attacks, is that a credible legal argument can be made for a right of anticipatory self-defence on compelling evidence of an imminent (threat of) state attack.

However, purely preventive action against states that are perceived as a threat is not covered by the current right of self-defence. This holds true even if the relevant state possesses or is developing WMD, and even if the regime is considered irresponsible by many states.

Concluding assessment

To sum up, the current right of self-defence covers military action necessary to respond to an armed attack which has already occurred or, at the most, to an imminent threat of attack. Although the concept of an imminent threat entails some element of discretion, the right of self-defence clearly does not cover purely preventive action against potential future threats in the absence of prior attacks or a truly imminent threat of attack against a specific state. Whereas the right of self-defence, including post-attack self-defence, seems overall to provide a suitable framework for combating international terrorism, the absence of a legal basis for purely preventive action may in some cases be considered problematic as regards “rogue” states with (aspirations to acquire) WMD. However, under the current system, preventive military action against general threats to international peace and security, whether emanating from terrorists or states with WMD, is a matter not of self-defence but of collective action by the Security Council.