

Self-Defence and International Terrorism

Said Mahmoudi

1 Introduction	204
2 Self-Defence in Response to Terrorist Attacks of September 11	205
3 Possible Prerequisites of Self-Defence against Terrorist Attacks	207
4 ICJ Advisory Opinion on the Israeli Barrier and Self-Defence against International Terrorism	210
5 Concluding Remarks	212

1 Introduction

Since 1945 when a general prohibition against use of force in international relations was introduced in Article 2(4) of the UN Charter, two main options have remained open for a State to resort to military force in its international relations. They are the authorisation of the Security Council as a measure of collective security and the exercise of the right of self-defence according to Article 51 of the Charter. Before the collapse of the Soviet Union, the Security Council was more or less paralysed by the bi-polarism of the world. Due to the conflict of interests of the permanent members, particularly those of the US and the Soviet Union, the Council was not able to fulfil its peacekeeping function by authorising use of force. Self-defence had remained the only viable legal ground for international use of force. Even if several cases of armed attacks during this period could hardly meet the conditions of self-defence,¹ States were keen to justify their actions by invoking Article 51. Due to the nature of this article as an exception to the general prohibition of Article 2(4), the point of departure in the doctrine of international law and the jurisprudence of the courts was a restrictive interpretation of the conditions for use of force in self-defence.

During the same period, some States tried to expand the scope of the application of self-defence by invoking a so-called *anticipatory* self-defence to justify use of force even before any armed attack had taken place.² However, the concept was highly controversial and not generally accepted. The developments after the collapse of the Soviet Union, which resulted in a new world order consisting of one Super Power, seem to have paved the way for more general claims of a right to use force not only in self-defence but also as pre-emptive military strikes.

The US military operations against the Taliban regime in Afghanistan in October 2001 had a particular impact on this development. The US action was a response to the international terrorist attacks three weeks earlier against World Trade Center in New York and the Pentagon in Washington DC. The US war against Afghanistan has given rise to numerous debates among legal scholars. One core issue in the debates is whether one has to strictly stick to a restrictive interpretation of the legal bases for the use of force according to the Charter, or should have a dynamic and flexible interpretation of the relevant legal rules to meet the requirements of today's complex world.

At the heart of this debate is a distinction between a positivist approach to international law as a body of rules that should be applied on all similar situations and be respected by all actors on the one hand, and a pragmatic or "realistic" approach, which considers international law as a process and a means for achieving certain goals and safeguarding certain values on the other. The first approach is adhered to by those who are concerned about the uncontrolled expansion of the use of force on loose grounds and in self-interest. The supporters of the second approach normally base their arguments on concepts

¹ The US attack on Grenada in 1983, allegedly in self-defence, falls in this category.

² For instance Israel justified its attack on Iraq's nuclear installations, OSIRAK, in June 1981 by referring to anticipatory self-defence.

such as human dignity and decency to justify use of force in cases where a “good” actor fights against an “evil” power.

In this context, the advisory opinion of International Court of Justice (ICJ) about the legal consequences of the construction of a wall in the occupied Palestinian territory (hereinafter referred to as the ICJ Advisory Opinion on Israeli Barrier)³ can be of some relevance. The Court’s view on the issue of self-defence against terrorist attacks as well as the separate opinions of some members of the Court may throw some light on the status of the law today.

2 Self-Defence in Response to Terrorist Attacks of September 11

One day after the terrorist attacks on World Trade Center and the Pentagon on 11 September 2001, the UN Security Council adopted resolution 1368 condemning the attacks.⁴ In the preamble of the resolution, the Security Council underlined its determination “to combat by all means threats to international peace and security caused by terrorist acts” and recognised “the inherent right of individual or collective self-defence in accordance with the Charter”. In the operative paragraph 5 of the same resolution, the Security Council expressed “its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations.” In this way, the Security Council for the first time referred to the right of self-defence in the context of a resolution dealing specifically with the combat against international terrorism.

On the same day, the NATO Member States decided to invoke for the first time Article V of the NATO Statute, and to declare terrorist attacks on the US an assault against all Member States.⁵ This decision strengthened the impression that at least the members of the Security Council and the NATO considered these particular terrorist attacks as equal to armed attack in the sense of Article 51 of the Charter.

Almost two weeks later, the Security Council adopted resolution 1373,⁶ underscoring that acts of international terrorism constitute a threat to international peace and security. The Council further reaffirmed “the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations...” Both resolutions of the Security Council as well as the NATO decision were adopted unanimously.

Despite this rare unanimity of the Members States of the Security Council and the unequivocal declaration of preparedness to take *all* necessary steps, arguably even authorising use of force, the United States together with the United Kingdom started their military attacks on Afghanistan on 7 October 2001

³ The text of the Opinion can be found at “<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>”.

⁴ Resolution 1368 (2001) dated 12 September 2001.

⁵ NATO decision of 12 September 2001. For a commentary, see “<http://www.nato.int/docu/review/2001/0104-01.htm>”.

⁶ Resolution 1373 (2001), dated 28 September 2001.

without requesting authorisation from the Council. They both invoked self-defence as the legal ground for their actions.

The choice of self-defence instead of Security Council authorisation was not formally commented on by the US. Strange enough, this relevant legal issue was not widely discussed by many commentators either.⁷ It could be assumed that the US considered self-defence as a right under customary international law, independent of the role of the Security Council. Given the background of the UN Charter and the *raison d'être* of the Council, a relevant question would of course be why we should at all have an international organisation responsible for global peace and security and ready to authorise the use of force if it is anyway possible for a State to invoke self-defence to start military operations against another State. One possible answer is that Council authorisation entails the obligation for the requesting State to report regularly to the Council and to end the operation when the Council so decides. Under self-defence, international control over the military operation is limited, and the termination of the military activities is dependent on the decision of the defending State.

In the particular case of Afghanistan, one probable reason why the US decided not to request Council authorisation for the use of force and instead invoked self-defence was to avoid creating a precedent. This would probably give more discretion to the US for any possible future use of force against international terrorism without a Security Council authorisation. Since the whole world was in a state of shock after September 11 and there was a consensus on the legitimacy of use of force against the perpetrators, no country ventured to question the legal consequences of the US action and its implications for the Security Council's authority.

Even if it is debatable whether all the US military operations in Afghanistan in response to the attacks of September 11 really met the requirements of self-defence,⁸ the important legal issue is the consequences of the self-defence claim on the credibility of the Security Council as the guarantor of international peace and security. In this respect, Charney rightly observes, "the role of the Security Council is not to rubber-stamp requests to engage in the use of force by States, even the United States." He continues "by failing to use the resources of the Security Council, the United States undermines the view that the Council, and the United Nations as a whole, should be the primary vehicle to respond to threats to and breaches of the peace, which strengthens the belief that states may freely act outside the United Nations system."⁹

⁷ In Sweden, I raised this question, first on 8 October 2001 in an interview with the Swedish TV news programme, *Aktuellt*, and then on 28 October 2001 in a debate article in the Swedish morning newspaper, *Svenska Dagbladet*. A symposium in Göttingen, Germany, 25-27 October 2001 also discussed the issue of the illegality of the US attacks based on self-defence. For a commentary, see Franck, T. *Terrorism and the Right of Self-Defence*, 95 *American Journal of International Law*, 2001, p. 839-843. In the US, Jonathan Charney elaborated this issue in an editorial, which was published a couple of months after the attacks. See J. Charney, *The Use of Force Against Terrorism and International Law*, 95 *American Journal of International Law*, 2004, p. 835-839.

⁸ Charney, *ibid.*, p. 835.

⁹ *Ibid.*, p. 837.

The supporters of the US right to self-defence in the case of Afghanistan comments the relation between this right and the power of the Security Council by emphasising that “Chapter VII measures taken under Council authority could *supplement and coexist* with the ‘inherent’ right of a state and its allies to defend against an armed attack (Art. 51)”[emphasis added].¹⁰ They argue that “It is *reductio ad absurdum* of the Charter to construe it to require an attacked state automatically to cease taking whatever armed measures are lawfully available to it whenever the Security Council passes a resolution invoking economic and legal steps in support of those measures.”¹¹ This argumentation is based on the assumption that self-defence, at least for the permanent members of the Security Council, is an autonomous right irrespective of how the Security Council reacts to any specific case of threat to international peace.¹² There is no doubt that States have an “inherent” right to self-defence. But, such right does neither coexist nor supplement an authorised use of force by the Security Council. Use of force in self-defence will be replaced by use of force authorised by the Security Council once the Council has agreed to such a use. Since the Council has the *primary* responsibility for the maintenance of international peace and security, when it evidently will and is able to fulfil this responsibility, its actions should get priority over national measures. Any other interpretation of the Charter renders the existence of the Security Council redundant and its peacekeeping role meaningless. Claiming that a State still has the right to use force in self-defence despite the fact that the Council has already imposed sanctions and has declared its preparedness to authorise other measures including use of force is to deny the whole history behind Article 2(4) of the Charter.

3 Possible Prerequisites of Self-Defence against Terrorist Attacks

The commencement of the military operations by the US and the UK against Afghanistan on 7 October 2001 and the qualification of the attacks as self-defence gave rise to different reactions. The European Union and some of its Member States immediately endorsed the US right of self-defence and gave their full support for the military actions. Almost all other States chose not to comment the legal nature of the military activities.

The case of Islamic countries was notable. Western commentators expected that Islamic countries, which had become the centre of world attention due to what was considered to be Islam-based terrorism and the fact that an Islamic

¹⁰ Franck, *supra*, p. 841.

¹¹ *Ibid.*, p. 842.

¹² The example that normally is mentioned is the Security Council resolution 502 (1982) about the armed conflict between the UK and Argentina concerning Falkland Islands (Malvinas). This resolution required an immediate withdrawal of Argentina from Falkland Islands. When Argentina refused to comply with the resolution, the UK commenced its military attacks in self-defence. What is normally not mentioned is that resolution 502 was adopted by 10 votes. Both China and the Soviet Union abstained. There was no political possibility to get the Security Council’s authorisation for use of force. In the case of Afghanistan, the Council was evidently prepared to give such authorisation.

country had been attacked, would comment on the legality of the American self-defence operations. Four days after the commencement of the war, on 11 October 2001, an emergency meeting of the Organisation of Islamic Countries in Doha, Qatar, issued a communiqué.¹³ The communiqué was silent on the legality issue, focusing instead on the possible violation of the rights of civilians in connection with operations against international terrorism. The communiqué also mentioned that the Conference rejected the targeting of any Arab or Islamic States under the pretext of terrorism. It further stressed the importance of joint exertions to promote dialogue between the Islamic world and the West.

The immediate response of the Security Council and NATO, comprising some 30 countries, to the terror attacks of September 11 was an indication of a possible development of the right to self-defence. This instant move to expand the scope of the applicability of self-defence to the cases of attacks by international terrorist organisations was later corroborated by the practice of other States, particularly Islamic States, who raised no objection to this development. Even if there is so far no authoritative judicial endorsement of the applicability of self-defence to the case of terrorist attacks, there seems to be a general consensus among States on such applicability. However, given the nature of Article 51 of the UN Charter as an exception, which entails a restrictive application, the specific criteria for invocation of self-defence against terrorist operations need to be further elaborated.

In an effort to make such an elaboration, I tried, already on 24 September 2001, to underline the possible legal implications of the Security Council resolutions. I wrote:

“The Security Council seems to equate terrorist acts, or at least those that claim *a great number of civilian victims*, with armed attacks in the sense of Article 51 of the UN Charter. Reference to the recent catastrophe as "a threat to international peace" and talking of "all necessary steps to respond to the terrorist attacks of 11 September 2001" reinforce this impression. We are probably witnessing a development of international law, which, given the objectives of the UN Charter in strict restriction of the use of force, does not necessarily have to be a positive one” [emphasis added].¹⁴

It is submitted in the above text that self-defence cannot be availed against *all* types of terrorist attacks; it is only against acts of the magnitude comparable with those of September 11 both as regards the number of the civilian victims and means and methods of the action. Two more criteria for invocation of self-defence in such cases, which are implied in the situation governing the measures decided by the Security Council, are that the terrorist act should be a *fait accomplis*, and it should be *originated from another State*.¹⁵ In this way, claims

¹³ The main points of this communiqué are given in “<http://www.syrialive.net/Media/news/2001/101101Organization%20of%20Islamic%20Countries%20Final%20session.htm>”.

¹⁴ ASIL Insights, *Terrorist Attacks on the World Trade Center and the Pentagon*, “<http://www.asil.org/insights/insigh77.htm#comment3>”.

¹⁵ Mahmoudi, S. *Sverige försvagar FN*, Svenska Dagbladet, 24 October 2001, p. 22. The requisite of the foreign origin of the attack was mentioned in the NATO statement of 12 September 2001. None of these criteria were expressly mentioned in resolutions 1368 and

of self-defence against possible terrorist activities in the future and against those within the territories under own control are excluded.

During 1-4 October 2001, the UN Member States, within the framework of the general debates at the General Assembly, spoke about the September 11 terrorist attacks. There was a general understanding and sympathy for the US as the victim of international terrorism. Many speeches were focused on concerted efforts against this international crime, and the need for a unified definition of terrorism. Very few States referred to self-defence. Spain, Sweden and the US made some comments in this respect.¹⁶ The representative of Sweden was very explicit on this point, and after referring to the clause on the right to self-defence in resolution 1368, declared “My Government recognizes that right to take measures of self-defence to *prevent* a similar atrocity...”[emphasis added]

Self-defence, in its traditional sense, consists of military operations against an armed attack by the enemy. Such attack may in many cases lead to the temporary presence of the enemy within the territory of the defending State. One purpose of self-defence is thus to push the enemy out of the defending territory. Terrorist attacks do not fit into this pattern. The enemy, even if known, normally hits and then hides for some time. The main objective of the military operations that the defending State may carry out against the responsible terrorist organisation is to prevent the organisation from repeating the atrocities. In that sense, self-defence against international terrorism has been characterised as “preventive”.¹⁷ Using the adjective “preventive” here is somehow unfortunate and can be misleading. It may be associated with the “anticipatory” self-defence. It is important to underscore that irrespective of whether self-defence against international terrorism is called “preventive” or not, it cannot be *anticipatory*. That means that in order to invoke self-defence against international terrorism, either a terrorist act of large scale, originated from abroad has already taken place or there are impelling reasons and solid evidence to believe that such attack is imminent.

Parallel to informing the Security Council on self-defence operations in Afghanistan, the US declared that military actions in self-defence against international terrorism might be carried out against other States. Iraq and Syria were specifically named in that connection.¹⁸ This statement seemed to have implications far beyond the then prevailing perception of a possible extension of the right to self-defence to cases of terrorist attacks. What the US implied in that declaration was an unfettered right for a State to use force in self-defence against other States suspected for support of terrorism even if no terrorist attack has taken place.

1373. A restrictive approach to the issue of use of force, which is in harmony with the purposes of the United Nations, will nevertheless require all possible checks to a whimsical expansion of the right of self-defence.

¹⁶ UN Doc. A/56/PV.17, p. 6 (Spain); A/56/PV.16, p. 23 (Sweden) and A/56/PV.12, p. 8 (the US).

¹⁷ Bring O. & Fisher, D. *A Right of Self-Defence against International terrorism?*, in Amnéus & Svanberg-Torpman (eds.), *Peace and Security, Current Challenges in International Law*, Studentlitteratur, Lund, 2004, p. 177-191, at p. 189-190.

¹⁸ Mahmoudi, Sverige, *op.cit.*

The idea launched by the US in October 2001 was later elaborated in the National Security Strategy of the United States, which was published on 17 September 2002. It was declared in that document:

The United States has long maintained the option of pre-emptive action 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 an enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively.¹⁹

At the same time, the Strategy emphasised:

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.

It is nevertheless obvious that what the US has propagated in this document is a right to pre-emptive military strikes, which has nothing to do with self-defence in its traditional sense or self-defence against international terrorism as was conceived immediately after the terrorist attacks of September 11. The claimed right to pre-emptive military strike against "rouge" States have received support from a few countries including Australia and the UK.²⁰ It remains, however, to be seen how and if it will be accepted as a new rule of international law.

4 ICJ Advisory Opinion on the Israeli Barrier and Self-Defence against International Terrorism

One of the legal issues before the World Court in the Advisory Opinion on the Israeli Barrier was whether the argument of self-defence could justify the construction of the Wall in the Palestinian Occupied Territory. Israel had claimed, "the construction of the Barrier in the Occupied Palestinian Territory is consistent with Article 51 of the Charter of the United Nations, its inherent right to self-defence and Security Council resolutions 1368 and 1373 (2001)."²¹ Israel had also asserted in the General Assembly that the Security Council resolutions "have clearly recognized the right of States to use force in self-defence against terrorist attacks", and therefore surely recognize the right to use non-forcible measures to that end.²²

The Court addressed the question of self-defence very succinctly. It opined:

¹⁹ The texts of the Strategy can be found at "<http://www.whitehouse.gov/nsc/nss.pdf>".

²⁰ Karoubi, M.T. *Just or Unjust War*, Ashgate, Aldershot, 2004, p. 196.

²¹ Advisory Opinion, para. 138.

²² UN Doc. A/ES-10/PV.21, p. 6.

Article 51 ...recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.

The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by the Security Council resolutions 1368 (2001) and 1373 (2001) ...²³

The Court does not directly take a position whether the Security Council resolutions have led to any development of international law with respect to self-defence. But its emphasis on the requirement of attack by another State clearly shows its traditional and restrictive approach to self-defence. The Court's view on self-defence is commented and criticised by Judges Buergenthal (the US), Higgins (the UK) and Kooijmans (the Netherlands).

Judge Kooijmans in his separate opinion argues that Article 51 "conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years." He then regrets that the Court by-passed a new element in the Security Council resolutions on Afghanistan, namely the fact that these resolutions "recognize the inherent right of individual or collective self-defence without making any reference to an armed attack by a State." He underlines that the Security Council called acts of international terrorism "a threat to international peace and security which authorizes it to act under Chapter VII of the Charter. And it actually did so in resolution 1373 without ascribing these acts of terrorism to a particular State."²⁴

Judge Higgins also reminds us that there is nothing in the text of Article 51 that stipulates that self-defence is available only when an armed attack is made by a State. She believes that the Court is in fact influenced by its finding in the Nicaragua Case,²⁵ where it held that military action by irregulars (Contras) could constitute an armed attack if these were sent by or on behalf of the State (the US) and if the activity because of its scale and effects would have been classified as an armed attack had it been carried out by regular armed forces.²⁶

Judge Buergenthal joins the other named judges and says that the Charter does not make the exercise of the right to self-defence dependent upon an armed attack by another State. Neither the Security Council resolutions, in his view, limit their application to terrorist attacks by State actors only. He considers that it is irrelevant that "Israel is alleged to exercise control in the Occupied Palestinian Territory ... or that the attacks do not originate from outside the territory." His conclusion is that attacks on Israel coming from across the so-

²³ Advisory Opinion, para. 139.

²⁴ Separate Opinion of Judge Kooijmans, para. 35.

²⁵ *Military and Paramilitary Activities in and against Nicaragua, Merits, Judgement*, ICJ Reports 1986, p. 14.

²⁶ Separate Opinion of Judge Higgins, para. 33.

called Green Line²⁷ must permit Israel to exercise the right of self-defence. Since the Court has failed to acknowledge this, it has, according to Judge Buergenthal, adopted a formalistic approach to the right of self-defence.²⁸

What is common in these criticisms is that the Court insists on conditioning the exercise of the right of self-defence to the existence of an armed attack from another State despite the fact that Article 51 does not explicitly speak of armed attack by a *State* and does not require a foreign origin for the attack. In this way the critics make a textual reading of Article 51 to fit it to situations that were obviously not in mind when that provision was drafted. If the context in which this article was formulated, its objects and purposes²⁹ as well as those moral values that constituted the foundations of the prohibition of use of force were remembered, there would be very little room, if any, for such extensive interpretations of the right to self-defence.

5 Concluding Remarks

The applicability of the right of self-defence against international terrorism, which gained vast support after the unprecedented attacks of 11 September 2001 in the US, may not be seriously challenged today. Although this new development is yet to be recognised by an authoritative international judicial instance, State practice seems to indicate that such expansion of the right of self-defence has probably taken place. Nevertheless, in the absence of a generally accepted definition of terrorism, any unqualified and extensive claim of use of force in self-defence against international terrorism would be in conflict with the purposes of the United Nations and with all aspirations that have been the reason for its existence.

Even if there are reasons for reliance on concepts such as “flexibility” and “dynamism” to up-date, promote and strengthen international legal rules in many areas, the nature of war in all its forms requires us to be extremely restrictive in opening new possibilities for use of force. The same moral and ethical values that led us in 1945 to put a general ban on the use of force in order “to save succeeding generations from the scourge of war, which twice in our life-time has brought untold sorrows to mankind”,³⁰ should also guide us to resist expanded use of force. We should withstand any effort to go back to the legal situation that prevailed before the adoption of the Charter even if it is in the name of “human dignity” and “decency”. International terrorism and human tragedies should not become an excuse for unwarranted use of force.

²⁷ The armistice demarcation line between Israeli and Arab forces agreed on 3 April 1949. This line is generally considered as the unofficial borderline between the State of Israel and the Palestinian territory. See Advisory Opinion, para. 72.

²⁸ Declaration of Judge Buergenthal, para. 6. Bring also believes that the Court’s argumentation in this respect reflects formalism. See Bring, *O. Myter om Israels mur*, Dagens Nyheter, 24 July 2004, p. 3.

²⁹ Cf. Article 31 of the 1969 Vienna Convention on the Law of Treaties.

³⁰ The first paragraph in the preamble of the UN Charter.

When it comes to possible use of force against international terrorism, it is of utmost significance that actual conditions surrounding the adoption of the Security Council resolutions 1368 and 1373 are constantly kept in mind. The general assumption on 12 September 2001, based on the US information about the perpetrators and the size of the casualties, was that the terrorist attacks had been carried out by an international terrorist organisation, al-Qaeda, which had the active support of the Taliban government in Afghanistan. The civil casualties were estimated to be several thousands. It was only under these conditions that the Security Council spoke of the inherent right of self-defence.

Palestinian terrorist attacks against Israeli targets in recent years and the terrorist attack in Beslan, Russia in September 2004 do not meet these requirements. The terrorist attacks in these cases are either domestic (in Beslan) or have each caused relatively limited casualties. The claims of Israel and Russia to a right of self-defence against international terrorism have therefore no support in international law.