

Menschen, und zugleich ist es höchst prinzipiell – eben weil der Mensch ein Mensch ist.

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Terrorism and the use of force: From defensive reaction to pre-emptive action?

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Abstract: Terrorism has become a serious security risk. Due to the scale and gravity of some terrorist acts, it is difficult to regard them merely criminal acts. The fight against terrorism consequently demands new methods, which can include even use of force. This article discusses under which circumstances States may exercise self-defence against non-State terrorism. It concludes that terrorist attacks can trigger the right of self-defence if such attacks are sufficient in gravity and attributable to a State. Anticipatory self-defence may be lawful if used after the initial attack in order to prevent additional attacks. But States may not exercise pre-emptive self-defence against terrorist threats.

Keywords: Terrorism, use of force, self-defence, anticipatory, pre-emptive

1. Introduction

The use of force is undoubtedly among the most debated topics within international law as well as international relations. The rules concerning the use of force form a central part of the international legal system and together with other fundamental principles they have provided for a long time the framework for organised international intercourse and successful co-existence of States. The events of 11 September 2001 in the United States have challenged crucial legal categories of international law and have introduced new dimensions to the debate over the legality of the use of force. Terrorism has become a serious threat and States need to find appropriate measures to effectively defend themselves. Although non-military measures can have positive effects on the prevention of terrorism, we have to inevitably ask whether States can also resort to military measures. After the destruction of the World Trade Cen-

ter, some States and commentators have advocated for the need and right to use force against terrorists and States that support them. Such claims can be politically popular, but they do not come without legal complications because no use of force can be regarded lawful unless it can be based on an exception to the general prohibition to use force, which is valid as a matter of law. The present article examines the relationship between terrorism and the use of force; more precisely whether terrorist attacks or threats trigger the right to self-defence and what conditions and limits apply to the exercise of self-defence in such circumstances.

2. Legal Framework of the Use of Force

The United Nations was created in a mood of popular outrage after the unprecedented horrors of the Second World War. Its creation resulted in the most important and certainly the most ambitious modification of international law in the twentieth century, namely the prohibition to use force in international relations. This fundamental rule is

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prescribed in Article 2(4) of the United Nations Charter, which demands that »all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations«. This provision introduced a general prohibition to use force, although some commentators have argued that the prohibition to use force is actually qualified because the wording of the provision stipulates that States should refrain from the threat or use of force »against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations«. If we take into account the *travaux préparatoires* and read the United Nations Charter as a whole, we have to conclude that the prohibition to use force was meant to be very broad as well as unqualified.

As every rule, the prohibition to use force is not without exceptions. The United Nations Charter includes two explicitly mentioned exceptions, namely individual and collective self-defence (Article 51) and Security Council enforcement actions (Chapter VII). The Security Council authorisation to use force is usually clear enough; it is the right to self-defence that has proved to be problematic and which has been used, through strange and violent interpretations, to justify numerous military operations directed against another State.

3. Self-Defence against Terrorist Attacks and Threats

The right of self-defence can be traced back to ancient times and since then it has been considered as an essential and inherent element of State sovereignty.¹ All instruments, which have restricted or prohibited the use of force, have explicitly or implicitly recognised such a right. Therefore the United Nations Charter did not create, but simply recognised the right of self-defence and subjected its exercise to certain limits. Article 51 states that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Self-defence has generally been associated with inter-States relations, but after the events of September 11 it is necessary to ask whether the concept of self-defence is capable of in-

cluding also terrorism. Article 51 does not itself specify that the right to self-defence applies only between States. This condition has been taken as implicit because self-defence is an exception to the general prohibition to use force and Article 2(4), which contains that prohibition, concerns expressly States.² Nonetheless, there is no reason why the right to self-defence has to be confined only to inter-State relations; the violent actions of non-State actors may, in principle, be comparable to those of States.

3.1 Definition and Scope of »Armed Attack«

Article 51 limits the right of self-defence and it explicitly assert that States can lawfully exercise self-defence »if an armed attack occurs«. If the latter is a prerequisite for lawful self-defence, then we have to establish the definition and scope of »armed attack«. It was left undefined at the San Francisco Conference because the drafters considered the term »armed attack« to be self-evident and sufficiently clear. However, this was too optimistic judgment because it soon proved to be rather difficult to agree on a uniform definition of »armed attack« as some preferred a restrictive and others a liberal interpretation of Article 51.

Actually there is no reason to assume that the plain language of Article 51 does not convey exactly the meaning that was intended and written. To begin with, the interpretation of a treaty must begin with the ordinary meaning to be given to the terms of the particular treaty.³ An attack is usually understood to mean a real action, for example, military operations and hostilities, not a mere threat.⁴ Therefore »armed attack« would mean actual armed attack that is underway or that has already occurred. We will reach a similar conclusion if we read Article 51 together with other parts of the United Nations Charter, especially Article 2(4). These two provisions are asymmetrical in their terms because Article 2(4) prohibits both the actual use as well as the threat of force, but Article 51 makes no reference to »threat«. This cannot plausibly be just a mistake; it is difficult to believe that the absence of the words »or threatens« at the end of the phrase »if an armed attack occurs« is simply due to a drafting oversight. Furthermore, the intention of the drafters and the purpose of the United Nations Charter was to minimise the unilateral use of force and the drawing of a line at the precise point of an armed attack, an event the occurrence of which could be objectively established, served the purpose of eliminating uncertainties.⁵ All this permits to conclude that no threat of force would justify the use of defensive force under the United Nations Charter; a view supported by the majority of States and commentators.

2 Article 2(4) demands that all *members of the United Nations* shall refrain from the threat or use of force and according to Article 4(1) only *States* can become members of the United Nations.

3 Article 31(1) of the Vienna Convention on the Law of Treaties (1969). True, this convention does not apply to the interpretation of the United Nations Charter because the latter was adapted before the mentioned convention entered into force, but the same rule exists also in applicable customary international law.

4 See Michael Bothe, »Terrorism and the Legality of Pre-emptive Force« in *European Journal of International Law*, Vol. 14, 2003, p. 229.

5 Michael J. Glennon, »The Fog of Law: Self-Defense, Inference, and Incoherence in Article 51 of the United Nations Charter« in *Harvard Journal of Law & Public Policy*, Vol. 25, 2002, p. 546.

1 See Stanimir A. Alexandrov, *Self-Defense against the Use of Force in International Law*, The Hague: Kluwer Law International, 1996, pp. 1-76 for more information on self-defence before the United Nations.

Now, what about a terrorist attack? Does the concept of armed attack cover terrorist attacks? True enough, the armed attack in Article 51 originally referred to the employment of the regular armed forces of a State, but this does not mean that terrorist attacks cannot be equated with classical armed attacks. The General Assembly included certain terrorist activities in its resolution titled *Definition of Aggression*, which defined an act of aggression, *inter alia*, as »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 actual armed attack conducted by regular forces] or its substantial involvement therein«.⁶ The International Court of Justice (ICJ) accepted this provision as being an expression of customary international law and considered that covert military operations can be classified as armed attacks because of their scale and effect.⁷ Therefore a non-State violent attack can trigger the right of self-defence provided that such attack is sufficient in gravity and the involvement of a State is sufficient in degree. Such approach to legal reasoning can be called a constructive armed attack or a situation equivalent to an armed attack.⁸

The constructive armed attack is not completely foreign for international legal reasoning, but whether such construction has really become positive international law is another question. Nevertheless, it is worth mentioning that the famous *Caroline* dispute,⁹ which has been cited to support the wider concept of self-defence, shows that an armed attack need not necessarily emanate from a State (in that situation the danger came from a non-State group that most would probably call terrorist today). Nowhere in the correspondence between the United Kingdom and the United States or in the subsequent reliance on the Webster formula on self-defence has been hinted that the applicability of the Webster formula is dependent on the source of the armed attack.¹⁰ It would indeed be strange to regard the right of self-defence to be dependent upon whether the respective attack was carried out by a State or non-State actor.

If we take the terrorist attacks of September 11, we can surely assert that the level of violence used in these attacks reached the level of sufficient gravity and if such destruction had been the work of a State, it would have amounted to an armed attack for the purpose of Article 51.¹¹ The reaction of the international community to the 11 September event confirmed that the concept of armed attacks is not limited to State acts. Although the Security Council did not author-

6 Article 3(g), UN Doc. A/RES/3314 (XXIX) (1974).

7 *Military and Paramilitary in and against Nicaragua (Merits)*, ICJ Reports, 1986, p. 3, para. 195.

8 Michael Bothe, *supra* note 4, p. 230.

9 See Warner Meng, »The Caroline« in Rudolf Bernhardt, *Encyclopedia of Public International Law*, Volume I, Amsterdam: North-Holland, 1992, pp. 537-538.

10 Christopher Greenwood, »International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq« in *San Diego International Law Journal*, Vol. 4, 2003, p. 17.

11 The destruction was as dramatic as the attack on Pearl Harbor, but the death toll was even higher and comparable to the United States Civil War days. The further consequences were severe, including the intense fear across the United States, temporary halt to all civilian air traffic and closure of the New York stock exchange for six days. Sean D. Murphy, »Terrorism and the Concept of «Armed Attack» in Article 51 of the U.N. Charter«, *Harvard International Law Journal*, Vol. 43, Winter, 2002, p. 41, at 47.

ise the United States to use force,¹² it expressly recognised the right of self-defence in two resolutions adopted in the immediate after these terrorist attacks.¹³ The resolutions do not explicitly state that terrorist attacks equal to armed attacks, but the recognition of the right of self-defence had to mean that the Security Council considered those terrorist attacks (at that time, it was already known that those attacks were most likely the work of a terrorist group rather than a State) as armed attacks for the purpose of Article 51. The position of the Security Council was widely accepted; other international institutions adopted similar positions and many States directly or indirectly agreed that United States military operation in Afghanistan was an appropriate exercise of the right of self-defence. For example, the North Atlantic Council agreed on 12 September 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«.¹⁴ Similarly, the ministers for foreign affairs declared at the Organization of American States meeting on 21 September that »these terrorist attacks against the United States of America are attacks against all American states«.¹⁵

However, it remains still uncertain whether a non-State violent attack can be considered an armed attack completely without being attributable to a State. The mentioned institutions, for example, did not expressly establish the connection of a State to the terrorist attacks against the United States before classifying them as »armed attacks«. NATO asked instead whether these attacks were »directed from abroad against the United States« and if yes, they would constitute »armed attacks«. The abandonment of the requirement that there has to be a nexus between a non-State actor and a State is a step of mixed consequences. On the one hand, it would enable States to define all violent attacks of sufficient gravity more easily as »armed attacks«. On the other hand, however, such a possibility is not necessarily useful because the link remains essential for deciding towards whom the forcible reaction can be directed.¹⁶

3.2 Responsibility for the Violent Attacks of Non-State Actors

Because non-State actors are located within the territories of States, the use of defensive force against their violent attacks is always related to a serious complication – each use of force against a non-State actor is inevitably use of force against a State. A State is not generally considered responsible for the acts of individuals or groups, who are not in the service of that State. Nevertheless, there are instances where certain acts of private individuals and groups are attribut-

12 See Geir Ulfstein, »Terrorism and the Use of Force« in *Security Dialog*, Vol. 34, No. 2, June 2003, pp. 154-158 for detailed discussion on whether the Security Council approved the use of force or not.

13 UN Doc. S/RES/1368 (2001); UN Doc. S/RES/1373 (2001).

14 Press Release (2001) 124, available at <http://www.nato.int/docu/pr/2001/p01-124e.htm> (31 May 2004).

15 Terrorist Threat to the Americas, OEA/Ser.F/II.24, RC.24/RES.1/01 (2001).

16 Such requirement results from Article 2(4), which prohibits the use of force in the »international relations«.

able to a State and so even if they are not officially affiliated to that State. All depends on the level of control the State has over these individuals or groups. The point of departure for examining the issue of State responsibility for non-State actors is the *Nicaragua* case, where the ICJ found that the responsibility depends on whether the State had »effective control«, that is, »directed or enforced« the perpetration of the acts concerned.¹⁷

However, there are reasons to believe that the position of such a strict approach has weakened after the events of 11 September and the international community has approved a more liberal approach. The evaluation of the sufficient involvement of a particular State in a terrorist attack and the determination of its responsibility for such an attack is a difficult task. The »effective control test« imposes to the attacked State an unrealistic obligation to provide evidence of specific instructions or directions of the host State relating to the terrorist attack. The Appeal Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) provided an alternative approach in the *Tadic* case. The ICTY considered the »effective control test« and its conformity with the law of State responsibility as well as State and court practice. The ICTY claimed that international law does not require that the »control should extend to the issuance of specific orders or instructions relating to single military actions« and therefore it is enough if the State has »overall control« over the individuals or groups.¹⁸ So, according to the »overall control test«, if the respective State is not willing or able to take suppressive measures against the terrorist groups within its territory and their continuing or perhaps even future attacks, it will be responsible for the acts of these groups and this responsibility may result in military actions against the concerned State.

The facts of the September 11 events indicate that the use of force against Afghanistan could not be justified with the »effective control test« because neither the United States nor any other State had produced undeniable proof that the Taliban regime knew about the attacks on the World Trade Centre or assisted al-Qaeda to carry out these attacks. But it was certain that al-Qaeda had operated in the territory of Afghanistan for some time already and had established close and mutually beneficial relationships with the Taliban regime.¹⁹ The latter had refused to close down the terrorist training camps and surrender Osama bin Laden even after his indictment for the attacks on the United States embassies in East Africa in 1998 and the warship USS Cole in Yemen in 2000.²⁰ The opinion and practice of the interna-

tional community indicated that this link, which was undeniably weaker than required previously, was deemed enough to validate the exercise of self-defence against Afghanistan.

There is a number of provisions, which present a framework for the analysis of the Taliban regime's responsibility. The International Law Commission has adopted the Draft Articles on Responsibility of States for Internationally Wrongful Acts, which foresee that a State can be responsible for non-State actors if certain criteria are satisfied.²¹ Article 8 provides that if a person or group acted on the instructions or under the direction or control of a State, such conduct shall be considered as the conduct of that State. True, it is quite difficult to argue that the Taliban regime actually directed or controlled the specific actions of al-Qaeda. It is also difficult to consider al-Qaeda as a *de facto* organ of Afghanistan according to Article 4(2). But then again the Taliban government can be found responsible because of the omission of its organs or officials the government by default essentially allowed al-Qaeda to exercise governmental functions (Article 9), for example, using force in international relations and fighting alongside with Taliban soldiers in the civil war. Furthermore, the fact that the Taliban regime did not condemn the terrorist attacks, declined to extradite Osama bin Laden with other members of al-Qaeda and refused to stop the operation of al-Qaeda in Afghanistan can be taken as serious evidence of the silent adoption of the actions of al-Qaeda as its own (Article 11). Moreover, there exists a general duty under international law that States should not allow anyone to use its territory in a way that endangers other States, including as a base for attacks. For example, the General Assembly Friendly Relations resolution demands that States shall not tolerate the use of their territory for terrorist attacks.²²

Although the Taliban regime did not necessarily have effective control, it did have overall control over al-Qaeda. Moreover, the Taliban regime violated international law in allowing al-Qaeda to operate within its territory and in opposing any attempts to stop the operation of al-Qaeda terrorist camps. By doing this, the Taliban regime exposed itself to possible military operations, which constituted a lawful exercise of self-defence. However, the »overall control test« should not be taken lightly as it may also open the way for abuses as it raises difficult issues with respect to the permissible scope of self-defence.²³

17 *Military and Paramilitary in and against Nicaragua (Merits)*, *supra* note 7, para. 115.

18 *Prosecutor v. Tadic*, Judgment, 15 July 1999, para. 145.

19 Britons published a paper that carefully linked al-Qaeda and Taliban to each other. Paragraph 11, for example, stated that »Osama Bin Laden and the Taliban regime have close alliance on which both depend for their continued existence«. The paper shows that the forces under the control of Osama bin Laden has fought alongside the Taliban in the civil war in Afghanistan. In return, the Taliban has allowed al-Qaeda to operate freely, including planning, training and preparing for terrorist activity. British Release Evidence against bin Laden, 04 October 2001, available at <http://www.pm.gov.uk/output/Page3682.asp> (31 May 2004).

20 Frank A. Biggio, »Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism«, *Case Western Reserve Journal of International Law*, Vol. 34, Fall, 2002, pp. 1-4.

21 UN Doc. A/RES/56/10 (2001).

22 UN Doc. A/RES/2625 (XXV) (1970). There are number of other General Assembly and Security Council resolutions, which include such duty. Declaration on the Enhancement of Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, UN Doc. A/RES/42/22 (1987), chapter I, para. 6; Measures to Eliminate International Terrorism, UN Doc. A/RES/49/60 (1994), chapter I, para. 5; Measures to Eliminate International Terrorism, UN Doc. A/RES/51/210 (1996), chapter I, para. 5. Two Security Council resolutions adopted under Chapter VII specifically demanded that the territory of Afghanistan should not be freely used for terrorist purposes. UN Doc. S/RES/1267 (1999); UN Doc. S/RES/1333 (2000).

23 See for example Carsten Stahn, »International Law under Fire: Terrorist Acts as »Armed Attack«: The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism«, *Fletcher Forum of World Affairs Journal*, Vol. 27, Summer/Fall, 2003, pp. 47-49 for detailed discussion.

3.3 Anticipatory or Pre-Emptive Action

Although most commentators use the terms »anticipatory« and »pre-emptive« interchangeably, the distinction between these two terms offers a useful precision. The anticipatory military action refers to military action that is taken against an imminent attack. The pre-emptive military action describes military action that is taken against a threat, which has not yet materialised and which is uncertain or remote in time.

3.3.1 Anticipatory Action

As discussed above, Article 51 requires an »armed attack« as a pre-condition to the use of defensive force and no imminent armed attack or threat of such attack justifies the use of force. The imminence of an armed attack cannot usually be assessed with objective criteria and therefore a decision for anticipatory action is necessarily left to the discretion of the concerned State. Such discretion involves a possibility of mistake, which can have devastating results, and a manifest risk of abuse, which can seriously undermine the prohibition to use force. Although the arguments that the United Nations Charter permits anticipatory self-defence are unpersuasive, several States and commentators have quite successfully defended the right of anticipatory self-defence under customary international law.

The proponents of anticipatory self-defence refer to the famous *Caroline* incident.²⁴ The agreement between American and British governments has long been regarded as a definitive statement of the anticipatory right of self-defence. Daniel Webster accepted that there was a right of anticipatory self-defence in the face of an imminent armed attack, provided that there was »a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation«.²⁵ No doubt, the theory of anticipatory self-defence has numerous weaknesses, but States have occasionally exercised anticipatory self-defence, whether calling it properly so or not, and other States have occasionally approved such action.²⁶ An armed attack may be so imminent and certain that it is not feasible to require the soon-to-become victim State to wait to act in self-defence until the armed attack has actually started; in such case, a situation equivalent to an armed attack prevails.²⁷ To be sure, that anticipatory self-defence is not exercised mistakenly or abusively, it must be shown that the other actor has »committed itself to an armed attack in an ostensibly irrevocable way«.²⁸

The permissibility of anticipatory self-defence is least controversial in the situation where after an armed attack there

24 See *BFSP* Vol. 26, 1937-1938, pp. 1372-1377; *BFSP* Vol. 29, 1840-1841, pp. 1126-1142; *BFSP* Vol. 30, 1841-1842, pp. 193-202 for the correspondence between the United Kingdom and the United States.

25 *BFSP* Vol. 29, 1840-1841, p. 1138.

26 See René Värk, »The Use of Force in the Modern World: Recent Developments and Legal Regulation of the Use of Force«, *Baltic Defence Review*, Vol. 10, No. 2, 2003, p. 27 for further detailed discussion.

27 Michael Bothe, *supra* note 4, p. 231.

28 Yoram Dinstein, *War, Aggression and Self-defence*, Third Edition, Cambridge: Cambridge University Press, 2001, p. 172.

is clear and convincing evidence that the enemy is preparing to attack again. The victim State need not wait for a new attack to be mounted, but at the same time the defensive response must be carried out within a reasonable time from the initial attack in order to fit the characterisation of self-defence, not to be considered as an armed reprisal or punishment. The international community confirmed such approach in respect of the 11 September events. The United States and its allies consistently based their justification for military action against Afghanistan on the right of self-defence.²⁹ The coalition has argued that the 11 September terrorist attacks were part of a series of armed attacks against the United States, which had already begun in 1993, not in 2001, and that even more armed attacks in the same series were planned.³⁰ The United States and the United Kingdom claimed to have clear and convincing evidence that the United States faced on-going attacks; the evidence was called »compelling« by the NATO members. After the launch of operation Enduring Freedom, the United States found documentary evidence in Afghanistan confirming that more armed attacks in the series were indeed being planned. So, the military operation in Afghanistan was itself justified as (anticipatory) self-defence, but the coalition was rightfully criticised for the extent of collateral damage and the means of warfare.

3.3.2 Pre-Emptive Action

In September 2002, President George W. Bush submitted to the Congress a report on the national security strategy, which asserted an evolving right to use force pre-emptively against the threat originating from rogue States and terrorists.³¹

The United States has long maintained the option of pre-emptive 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.

Pre-emptive self-defence is clearly unlawful under international law. There is nothing in contemporary legal norms and writing or State and court practice, which would suggest that such a broad, even overly broad, construction of a

29 See for example Letter from the Permanent Representative of the United States of America to the United Nations, 7 October 2001, UN Doc. S/2001/946 (2001).

30 Mary Ellen O'Connell, »Lawful Self-Defense to Terrorism«, *University of Pittsburgh Law Review*, 2002, Vol. 63, p. 899.

31 National Security Strategy of the United States of America, p. 15.

situation equivalent to an armed attack is a part of customary international law.³² Such precautionary approach would be alarming, undesirable and wide-open to mistakes or abuses, and it is difficult to understand how this would contribute to global stability and maintenance of international peace and security. States simply may not use force against another State when an armed attack is merely a hypothetical possibility. The International Military Tribunal at Nuremberg rejected the argument of Germany that the invasion of Norway was a necessary act of self-defence in order to prevent a future Allied invasion and to pre-empt subsequent possible Allied attack from there. When Israel attacked the Iraqi nuclear reactor in 1981, Israel specifically argued that Article 51 allowed self-defence in order to pre-empt a threat to Israeli national security.³³ Israel explained that it had been forced to defend itself against the construction of a nuclear weapon in Iraq, which itself would not have hesitated to use such weapon against Israel. The nuclear reactor, Israel argued, was to become critical in a matter of weeks and Israel had decided to strike before the nuclear reactor became an immediate and greater menace to Israel. So, Israel did react neither to an actual armed attack nor to a situation equivalent to an armed attack, but instead to a potential and remote threat. All members of the Security Council disagreed with the Israeli interpretation of Article 51 and supported without reservation the resolution, which condemned »the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct«.³⁴

There is no doubt that force can and should be used preemptively, but this is the prerogative of the Security Council. Article 39 states that the Security Council shall determine the existence of any »threat to the peace« and accordingly shall make recommendations or decide what measures shall be taken to maintain or restore international peace and security. Nothing in the United Nations Charter suggests that the authority of the Security Council to take pre-emptive measures is limited to those threats that are imminent. The historical and drafting background – the importance of the lack of pre-emptive action against Nazi Germany in contributing to the causes of the Second World War – strongly suggests that the pre-emptive power of the Security Council was intended to be much more far-reaching than the power of individual States to take action as self-defence against threats of armed attack.³⁵ The collective security system is the best means to fight the threats to international peace and security because the Security Council is a collective institution, which represents better the interests and needs of the international community and which can also eliminate the cases, where an individual State abuses the possibility of threat or even fabricates a threat in order to further its political or economic interests.

The United States-led invasion of Iraq in March 2003 was clearly illegal in the light of the previous discussion. The

coalition lacked a clear authorisation of the Security Council to use force as well as any other plausible legal justification for invasion, namely self-defence. Did Iraq attack someone? Was there an imminent armed attack threatening someone? No, Iraq had not done anything that would have triggered the right of self-defence. There were merely accusations that Iraq was developing nuclear weapons and was allegedly involved with terrorists, especially with Osama bin Laden and al-Qaeda. But these accusations were not believably or publicly proven. Furthermore, the mere possession of weapons of mass destruction without a threat of use does not amount to an unlawful armed attack. Even if a State is forbidden to acquire or ordered to destroy weapons of mass destruction, the violation of a disarmament requirement does not itself amount to an armed attack or a situation equivalent to an armed attack. If the reasons for the invasion of Iraq had been founded, legitimate and justified, but especially concerning the general and common interest of the international community, the United States and its allies would have obtained a proper authorisation from the Security Council. The members of the United Nations conferred to the Security Council primary responsibility for the maintenance of international peace and security.³⁶ States do not have the right either to take over the responsibility of the Security Council nor to start individually exercising secondary responsibility.

4. Conclusion

The period after the Second World War has introduced several new international peace and security threats, among them terrorism. During the last decades, the terrorists have acquired a capacity to carry out attacks, which are comparable to those of States concerning their gravity. The right of self-defence cannot remain indifferent to such changes and has to adapt in order to provide effective defence to States. Practice indicates that there is no reason to claim that the concept of »armed attack« is not capable to include violent attack of non-State origin if these attacks are sufficient in gravity and the involvement of a State is sufficient in degree. States that facilitate the execution of terrorist attacks, harbour terrorist or otherwise assist them, can expose themselves to possible military operations, which constitute a lawful exercise of self-defence (such operations are still subject to necessity and proportionality). It appears that States have accepted anticipatory exercise of self-defence if after the initial armed attack there is clear and convincing evidence that the enemy is preparing to attack again. But there is nothing in contemporary international law to suggest that States can also act pre-emptively to a threat or a hypothetical threat; the right to react to a threat still belongs exclusively to the Security Council.

32 Michael Bothe, *supra* note 4, p. 232.

33 Stanimir A. Alexandrov, *supra* note 1, pp. 159-165.

34 UN Doc. S/RES/487 (1981).

35 Christopher Greenwood, *supra* note 10, p. 19.

36 Article 24(1) of the United Nations Charter.