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# The Security Council and the Use of Force

## THEORY AND REALITY – A NEED FOR CHANGE?

*by*

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current phenomenon that permanent members first comfortably vote for Chapter VII resolutions, and then block any further steps when these resolutions are ignored by the country to which they are addressed. This is also why I am still not able to give a straightforward judgment on the legality of the war on Iraq.

My position is that it is obviously not as it should be if military action is resorted to without a Security Council mandate, but that it is not right either if a country consistently flouts Chapter VII resolutions and gets away with it because the threat of a veto by one or two permanent members prevents the Security Council from taking action against it. It is difficult to tell which of the two is the more damaging to the authority of the Security Council. Those who feel that such a wishy-washy judgment has nothing to do with international law may well be contributing to a future where international law has nothing to do with the use of force.

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# TOWARDS NEW CIRCUMSTANCES IN WHICH THE USE OF FORCE MAY BE AUTHORIZED? THE CASES OF HUMANITARIAN INTERVENTION, COUNTER-TERRORISM, AND WEAPONS OF MASS DESTRUCTION

*Michael C. Wood**

> Unless the Security Council is restored to its pre-eminent position as the sole source of legitimacy on the use of force, we are on a dangerous path to anarchy.[1]

My chief aim is to draw attention to recent state practice in relation to the difficult and sensitive issues covered by this volume, in the hope of stimulating discussion. I shall, inevitably, refer to the three major conflicts in which the United Kingdom has been involved over the last five years. Kosovo in 1999 raised a major issue of principle concerning 'humanitarian intervention'.[2] Afghanistan in 2001 raised questions of self-defence in the face of large-scale terrorist attacks, a matter given additional prominence by the recent advisory opinion of the International Court of Justice in the *Wall* case.[3] Iraq in 2003, on the other hand, properly analyzed raised no great issue of principle, though it was the most controversial. It turned essentially on the interpretation of a

* The views expressed in this contribution are personal.

1 Secretary-General Says Renewal of Effectiveness and Relevance of Security Council Must Be Cornerstone of Efforts to Promote International Peace in the Next Century, UN Press Release SG/SM/6997 (18 May 1999), *available at* http://www.un.org/News/Press/docs/1999/19990518.SGSM6997.html.

2 *See infra* text accompanying notes 25-26.

3 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Rep. 36 (9 July) [hereinafter *Wall* case]. On the Afghan case, *see infra* text accompanying notes 49-50.

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series of Security Council resolutions, to determine whether the Council had authorized the use of force. The principle that the Council could, acting under Chapter VII of the Charter, authorize the use of force was uncontested; the question was whether it had done so.[4]

I should make three preliminary comments on the title of this chapter:

1. I take 'use of force' to mean the international use of force as an exception to the general prohibition of the use of force in international law; we are not talking about the use of force within a domestic legal framework.
2. What is meant by 'new circumstances'? There is nothing very new about humanitarian catastrophes, terrorism, or weapons of mass destruction. So I take it that 'new' refers to the circumstances in which the use of force 'may be authorized'.
3. Third, 'may be authorized' is itself ambiguous. It may refer to force being authorized by someone (presumably the Security Council of the United Nations). Or it may suggest that the unilateral use of force is authorized under international law. The latter is a strictly legal issue, the former largely (though by no means exclusively) a policy one and, as I see it, the main subject of this volume.

4 The fact that the states concerned did not rely on other possible legal bases for the use of force has not prevented academic speculation and criticism. *See* Letter Dated 20 March 2003 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council, UN Doc. S/2003/350 (2003); Letter Dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc S/2003/351 (2003), *available at* http://www.un.int/usa/s2003_351.pdf; Letter Dated 20 March 2003 from the Permanent Representative of Australia to the United Nations Addressed to the President of the Security Council, UN Doc. S/2003/352 (2003). *See also* the UK Attorney General's reply to a written question (17 Mar. 2003), in: *Hansard*, 646 HL Debs., *WA2*, and the FCO paper *Iraq: Legal Basis for the Use of Force*, *both available in* K. Kaikobad et al. (eds.), *United Kingdom Materials on International Law 2003*, (2003) 73 *British Yearbook of International Law* 565, at 792-96; *also available in* C. Warbrick, D. McGoldrick (eds.) 'Current Developments: Public International Law', (2003) 52 *International and Comparative Law Quarterly* 811, at 811-14. *See also* Legal Department of the Russian Federation Ministry of Foreign Affairs, 'Legal Assessment of the Use of Force Against Iraq', *available in* (2003) 52 *International and Comparative Law Quarterly* 1059; Memorandum of Advice on the Use of Force Against Iraq, provided by the Australian Attorney General's Department and Department of Foreign Affairs and Trade (18 Mar. 2003), *available in* (2003) 4 *Melbourne Journal of International Law* 178. For an official Norwegian view, see R.E. Fife (ed.), 'Elements of Nordic Practice 2001/2003: Norway', *available in* (2004) 73 *Nordic Journal of International Law* 551, 563-69.



There is currently an extensive policy debate, in many forums and of which the conference which gave rise to this volume is part, about what the public international law on the use of force should be in today's world. This debate is not assisted by differences among international lawyers, be they academics or practitioners, and misunderstandings on the part of others, as to what the existing law is. For a government legal adviser what matters, day-by-day, is to be able to say what the law is, not to speculate about what it ought to be. We may have our reflective moments, but they are hardly central to the day-job. Equally, as a legal adviser one needs to distinguish clearly between law and policy, including over use-of-force issues. This applies both to advice before the event and to advice after. Lawyers do no service to the law by questioning the very existence of rules in this field or proposing their overhaul, something no state has done.

Much has been written in the last few years, some of it highly theoretical and speculative, often ignoring what states actually say about the legal basis of their actions. What we need to do is to concentrate on state practice: on what the states concerned actually say and do. Of course, states are not always clear, and may sometimes, deliberately or otherwise, send mixed signals. A particularly unhelpful approach is what one might call the 'accumulation of bad arguments', i.e., collecting together a number of arguments unconvincing in themselves in the hope that together they will appear plausible.

After outlining very briefly the existing rules of public international law on the use of force (*jus ad bellum*), I shall address – also briefly – each of the three 'new circumstances' I have been asked to cover. My conclusion, perhaps simplistic – but that is for discussion – is that existing rules on the use of force are sufficient to meet the enhanced threats of today's world. The existing rules need to be applied case-by-case, in good faith, and with common sense. Efforts to change them, and in particular to come up with new or expanded exceptions to the general prohibition on the use of force, are unlikely to prove successful, even if they were desirable. There are, rightly, strict limits on a state's right to use force unilaterally (and this includes any use of force by regional or subregional organizations, such as the Organization of American States,

NATO,[5] the European Union, or the African Union,[6] or by ad hoc coalitions). But the Security Council has ample powers to authorize, in advance, the use of force to meet these modern threats.[7]

## 1 The Existing Rules of International Law on the Threat or Use of Force

The rules governing the threat or use of force are to be found in the Charter of the United Nations, in other treaties and in customary international law, as evidenced by state practice, including within international organisations (e.g., such General Assembly resolutions as the Friendly Relations Declaration,[8] the Definition of Aggression,[9] and the Declaration on the Non-Use of Force[10]). There is a series of important decisions of international courts, including *Nuremberg* (1946),[11] the *Corfu Channel* case (1949),[12] the *Nicaragua* case (1986),[13]

5 *See* M. Zwanenburg, 'NATO, Its Member States, and the Security Council', in: Blokker, Schrijver (eds.), *The Security Council and the Use of Force* (2005), p. 189 (chapter 10 of this book).

6 *See* B. Kioko, 'The Right of Intervention Under the African Union's Constitutive Act: From Non-Interference to Non-Intervention', (2003) 85 *International Review of the Red Cross* 807; J. Levitt, 'The Peace and Security Council of the African Union and the United Nations Security Council: The Case of Darfur, Sudan', in: Blokker, Schrijver (eds.), *The Security Council and the Use of Force* (2005), p. 213 (chapter 11 of this book).

7 This seems also to be the basic approach of the UN's High-level Panel on Threats, Challenges and Change. *See A More Secure World: Our Shared Responsibility*, Report of the High-level Panel on Threats, Challenges and Change, UN Doc. A/59/565 (2004), paras. 183-209, *available at* http://www.un.org/secureworld; *see also In Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the Secretary-General, UN Doc. A/59/2005 (2005), paras. 74-126.

8 GA Res. 2625, UN Doc. A/8028 (1970). *See also* R. Rosenstock, 'The Declaration of Principles of International Law Concerning Friendly Relations Among States: A Survey', (1971) 65 *American Journal of International Law* 713; I. Sinclair, 'Principles of International Law Concerning Friendly Relations and Cooperation Among States', in: Nawaz (ed.), *Essays in Honour of Krishna Rao* (1976), pp. 107-40.

9 GA Res. 3314, UN Doc. A/9631 (1974).

10 GA Res. 2936, UN Doc. A/8730 (1972).

11 International Military Tribunal (Nuremberg), Judgment and Sentence (1 Oct. 1946), *available at* (1947) 41 *American Journal of International Law* 172.

12 Corfu Channel (UK v. Albania), 1949 ICJ Rep. 4 (Apr. 9).

13 Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US), 1986 ICJ Rep. 14 (27 June).



the *Nuclear Weapons* advisory opinion (1996),[14] the *Oil Platforms* case (2003),[15] and the *Wall* advisory opinion (2004),[16] though some of these decisions are, at least in part, controversial.

The Charter contains a general prohibition of the threat or use of force (Article 2, paragraph 4), and refers to two not unrelated exceptions: forcible measures by or authorized by the Security Council under Chapter VII; and the inherent right of self-defence recognised in Article 51. A possible but controversial further exception, not in the Charter and presumably derived from general international law, is forcible action to avert an overwhelming humanitarian catastrophe (sometimes referred to as humanitarian intervention). The taking of measures with the consent of the territorial state – sometimes called 'intervention by invitation' – or, possibly, pursuant to a treaty, are not true exceptions, but may be of practical importance.

### 1.1 Use of Force by or Authorized by the UN Security Council

The Security Council may use or authorize the use of force, acting under Chapter VII of the Charter. It is not helpful to suggest that authorization may be express or implied: what is needed is simply that the force has been authorized. The suggestion that force is used 'without express authorization' is often merely a way of saying that the 'authorization' relied upon is not clear. The following are the key provisions of the Charter:

- The Security Council must first determine the existence of a threat to the peace, breach of the peace, or act of aggression (Article 39).
- If the Security Council considers non-forcible measures inadequate, it 'may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockades, and other operations by air, sea, or land forces of Members of the United Nations' (Article 42).
- The Security Council may use UN forces ('Blue Helmets') or authorize others to use force on its behalf (e.g., individual member states, ad hoc coalitions, NATO, regional arrangements or agencies). (The Council does

14 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Rep. 226 (8 July).

15 Oil Platforms (Iran v. US), Judgment, 2003 ICJ Rep. 161, para. 74 (6 Nov.).

16 *Wall* case, *supra* note 3.

not usually specify which Article of the Charter it is acting under, but refers generally to Chapter VII.)
- 'The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council' (Article 53).

### 1.2 The Inherent Right of Individual or Collective Self-Defence

As Waldock said: '[t]here are few more important questions in international law than the proper limits of the right of self-defence'.[17] The right of self-defence is recognized in Article 51 of the Charter of the United Nations, which reads:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack [in French, *agression armée*] 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.[18]

There was no intention at San Francisco to change the existing law, which included anticipatory self-defence in the face of an imminent attack. The classic statement remains that in the *Caroline* case (1837),[19] reaffirmed by *Nuremberg*: 'There must be a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation'; and, further, the action taken must involve 'nothing unreasonable or excessive, since the act justified by the

17 C.H.M. Waldock, 'The Regulation of the Use of Force by Individual States in International Law', (1952 II) 81 *Recueil des Cours* 455, at 461. Waldock's lectures remain the best introduction to the international law on the use of force.

18 UN Charter art. 51.

19 *See* Letter from Daniel Webster, US Secretary of State, to Henry Fox, British Minister in Washington (24 Apr. 1841), in: *British and Foreign State Papers 1840-1841* (1857), vol. 29, p. 1138 [hereinafter Webster]; *see also* R.Y. Jennings, 'The *Caroline* and *McLeod* Cases', (1938) 32 *American Journal of International Law* 82.



necessity of self-defence must be limited by that necessity and kept clearly within it.'[20]

The requirements for the exercise of the right of self-defence are as follows:

- There must be an *armed attack* against the territory, embassies, nationals, ships, etc. of a state, or such attack must be imminent.[21]
- The use of force must be *necessary*, i.e., other means to reverse/avert the attack must be unavailable.
- Acts of self-defence must be *strictly confined to the object* of stopping the attack and must be *proportionate* to what is required for achieving that object: '[T]he force must be proportionate to the threat faced and must be limited to what is necessary to deal with the threat'.[22]
- In the case of collective self-defence there must, in addition, be a *request from the victim state*.
- The right of self-defence may only be exercised *until the Security Council has taken measures necessary to maintain international peace and security*, and anything done in exercise of the right of self-defence must be *immediately reported to the Council*.[23]

20 Webster, *supra* note 19, at 1138.

21 *See In Larger Freedom*, *supra* note 7, para. 124. This is not the place to rehearse the old debate about whether self-defence is permissible in the face of an imminent as opposed to an actual attack. On this debate, see, e.g., D. Bowett, *Self-Defence in International Law* (1958); I. Brownlie, *International Law and the Use of Force by States* (1963). State practice seems increasingly to support the right in the case of imminent attacks. Among recent statements to this effect are those of Germany (Deutscher Bundestag, Drucksache 15/3635, Question 32); the Netherlands (Letter DVB/VD-237/04 Dated 29 Oct. 2004 from the Minister of Foreign Affairs to the President of the House of Representatives Concerning the AIV/CAVV Advisory Report on 'Pre-Emptive Action'); and Russia (*see infra* text accompanying note 48, in the context of Beslan).

22 UK Attorney General, Statement in the House of Lords (21 Apr. 2004), in: *Hansard*, 21 Apr. 2004, cols. 370-71, *also available at* http://www.publications.parliament.uk/pa/cm200304/cmselect/cmfaff/441/4060808.htm. For another recent statement of the UK's position on the use of force, see Government Response to the Foreign Affairs Committee's 7th Report: Foreign Policy Aspects of the War Against Terrorism (Cm 6340) (*see especially* responses to recommendations 63, 65, and 66).
the War Against Terrorism (Cm 6340) (*see especially* responses to recommendations 63, 65, and 66).

23 The use of force in self-defence, like any other use of force, must also comply with the law of armed conflict.

Self-defence may include rescue of nationals (sometimes, confusingly, referred to as humanitarian intervention). A state has the right to use limited force to rescue its nationals where the territorial state is unable or unwilling to do so.

## 2 Humanitarian Intervention

The first question is whether there is a right of unilateral humanitarian intervention in general international law; the second question is the circumstances in which the Security Council may authorize humanitarian intervention.

The answer to the first question is controversial.[24] There are some who advocate a right of 'humanitarian intervention', others who refer rather to an exceptional right to use force to avert an 'overwhelming humanitarian catastrophe', and yet others who deny any such right. The leading proponent of the second position seems to have been the United Kingdom, which in 1998 said:

> There is no general doctrine of humanitarian necessity in international law. Cases have nevertheless arisen (as in northern Iraq in 1991) when, in the light of all the circumstances, a limited use of force was justifiable in support of purposes laid down by the Security Council but without the Council's express authorisation when that was the only means to avert an immediate and overwhelming humanitarian catastrophe. Such cases would in the nature of things be exceptional and would depend on an objective assessment of the factual circumstances at the time and on the terms of relevant decisions of the Security Council bearing on the situation in question.[25]

24 *See, e.g.*, C. Greenwood, 'Humanitarian Intervention: The Case of Kosovo', (1999) 10 *Finnish Year Book of International Law* 141; R. Zacklin, 'Beyond Kosovo: The United Nations and Humanitarian Intervention', (2001) 42 *Virginia Journal of International Law* 923.

25 Parliamentary Under-Secretary of State, FCO, Written Reply in the House of Lords (16 Nov. 1998), in: HL Debs., vol. 594, *WA* 139-40, *available in* G. Marston (ed.), 'United Kingdom Materials on International Law 1998', (1998) 69 *British Year Book of International Law* 433, at 593. *See also* A. Roberts, 'NATO's "Humanitarian War" over Kosovo', (1999) 41 *Survival* 102, at 106 (quoting a text described as a note by the FCO of October 1998 'circulated to NATO allies', *reprinted in* G. Marston (ed.), 'United Kingdom Materials on International Law 1999', (1999) 70 *British Year Book of International Law* 387, at 571).



More fruitful is to consider the circumstances in which the Security Council may and should authorize the use of force for humanitarian purposes. There is a growing practice of action by the Council, whether involving non-forceful measures (sanctions) or the use of force. In 2001 the United Kingdom proposed guidelines[26] for when the Council should, as a matter of policy, be ready to act, but so far there is no consensus on such general guidelines as opposed to specific action in concrete cases. There have been many other suggestions, notably those of the International Commission on Intervention and State Sovereignty, and most recently the UN's High-level Panel and the Secretary-General in his *In Larger Freedom* report which further developed the concept of a responsibility to protect.

## 3 Counter-Terrorism

As a preliminary comment I would note that the terms 'war against terrorism' or 'global war on terrorism' are generally used in a rhetorical sense rather than as legal terms of art. Thus, when asked whether the UK was legally at war, an FCO Minister simply responded that '[t]he term "the war against terrorism" has been used to describe the whole campaign against terrorism, including military, political, financial, legislative and law enforcement measures'.[27]

Here again there are two questions. When may states use force in exercise of the right of self-defence against terrorist attacks? And in what circumstances may the Security Council authorize the use of force to avert such attacks?

Terrorists are criminals, and it is first and foremost through law-enforcement mechanisms, enhanced as necessary (though always within the parameters of relevant international human rights standards including, where applicable, any derogations), that they are to be countered. The use of force within a domestic legal system (including such use with the assistance of invited foreign forces) is not within the scope of this book.

26 UK Paper on International Action in Response to Humanitarian Crises, *reprinted in* G. Marston (ed.), 'United Kingdom Materials on International Law 2001', (2001) 72 *British Year Book of International Law* 551, at 695-96.

27 Parliamentary Under-Secretary of State, FCO, Written Reply in the House of Lords (22 Nov. 2001), in: HL Debs., vol. 628, *WA* 153, *available in* G. Marston (ed.), 'United Kingdom Materials on International Law 2001', (2001) 72 *British Year Book of International Law* 551, at 697.

States may act in self-defence in the face of a large-scale terrorist attack (actual or imminent) where the usual requirements for self-defence are met (necessity, proportionality). To deny this would be counterintuitive, and in any event state practice, including the practice of the Security Council, strongly supports it.

Doubt may have been cast on this self-evident proposition by a passage in the International Court of Justice's recent advisory opinion in the *Wall* case, and a digression is therefore in order. The Court dealt at paragraphs 138 and 139 with Israel's argument that 'the construction of the Barrier is consistent with Article 51 of the Charter of the United Nations, its inherent right of self-defence and Security Council resolutions 1368 (2001) and 1373 (2001)'.[28] Its treatment of this matter was subject to criticisms by Judges Higgins,[29] Kooijmans,[30] and Buergenthal.[31]

The Court's analysis is succinct. After citing the first sentence of Article 51 it states, without any intervening argument, that 'Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of an armed attack by [later, "imputable to"] one State against another State'.[32] It then 'also notes that Israel exercises control over the Occupied Palestinian Territory' and that the threat 'originates within, and not outside, that Territory. The situation is thus different from that contemplated by resolutions 1368 (2001) and 1373 (2001)'.[33]

It is difficult to know what to make of this, and in particular to understand what the Court would have done if the situation had not been different from that contemplated in Resolutions 1368 (2001)[34] and 1373 (2001).[35] The criticisms of Judges Higgins, Kooijmans and Buergenthal are persuasive. In particular:

- It seems doubtful whether non-forcible measures fall within self-defence under Article 51.[36]

28 *Wall* case, *supra* note 3, para. 138.
29 *Ibid.*, separate opinion of Judge Higgins, paras. 33-36 [hereinafter Higgins].
30 *Ibid.*, separate opinion of Judge Kooijmans, paras. 35-36 [hereinafter Kooijmans].
31 *Ibid.*, separate opinion of Judge Buergenthal, paras. 4-6 [hereinafter Buergenthal].
32 *Ibid.*, para. 139.
33 *Ibid.*
34 SC Res. 1368, UN Doc. S/RES/1368 (2001).
35 SC Res. 1373, UN Doc. S/RES/1373 (2001).
36 *See* Higgins, *supra* note 29, para. 35. Necessity, considered and rejected by the Court at paragraph 40, was perhaps potentially more relevant.



- There is no basis in the wording of Article 51 for the Court's restriction (if such restriction was indeed intended) to an armed attack *by a state*. Insofar as the *Nicaragua* case is authority for this,[37] it is not widely accepted (and was criticized by Judge Higgins in her academic capacity).[38] It is curious that the Court did not cite *Nicaragua*. Judge Buergenthal agrees with Judge Higgins on this,[39] and as Judge Kooijmans said, it is really beside the point.[40]
- As Judge Kooijmans suggests, the real explanation for the Court's approach to Article 51 in this case may be that the attack came from the Palestinian Occupied Territory.[41] Judges Higgins[42] and Buergenthal[43] do not appear to accept this, considering that it was wrong to exclude self-defence for this reason since the Palestinian Occupied Territory was not part of Israel.

Eick says the following about the *Wall* advisory opinion on this point:

> The ICJ first states that Article 51 of the UN Charter recognizes the right of self-defence where there is an armed attack by a *state* against another state; the Court then however turns to resolutions 1368 (2001) and 1373 (2001) of the UN Security Council, which precisely do not require an attack by a state for the exercise of the right of self-defence. If Israel could not call upon a right of self-defence, then this was because – otherwise than was foreseen in resolutions 1368 (2001) and 1373 (2001) – the terrorist threat did not come from outside the territory controlled itself by the state that was attacked.[44]

This is surely convincing. It seems that the Court was reflecting the obvious point that unless an attack on a state is directed from outside that state's territory the question of self-defence does not arise. For example, the NATO decision of 12 September 2001 was to the effect that, if it was determined that the 9/11 attacks were directed from abroad against the United States, they should be

37 *Ibid.*, para. 33.
38 R. Higgins, *Problems and Process: International Law and How We Use It* (1994), pp. 250-51.
39 *See* Buergenthal, *supra* note 31, para. 6.
40 Kooijmans, *supra* note 30, para. 35.
41 *Ibid.*, paras. 35-36.
42 Higgins, *supra* note 29, para. 34.
43 Buergenthal, *supra* note 31, para. 6.
44 C. Eick, '"Präemption", "Prävention" und die Weiterentwicklung des Völkerrechts', (2004) 37(6) *Zeitschrift für Rechtspolitik* 200 (translation by the present writer).

regarded as actions covered by Article 5 of the North Atlantic Treaty.[45] On the facts, however, it was questionable whether the Palestinian Occupied Territory should be assimilated to the territory of Israel for these purposes.

Turning to state practice in this field, including the recent practice of the Security Council, I can see no support for a restriction of self-defence to defence against armed attacks imputable to a state, and considerable state practice the other way. The action against Al Qaeda in Afghanistan in October 2001 (which was widely supported and scarcely opposed by states) was action in self-defence of anticipated imminent terrorist attacks from Al Qaeda, not from the Taliban. It was necessary to attack certain elements of the Taliban in order to prevent attacks from Al Qaeda. Security Council Resolutions 1368 (2001) and 1373 (2001) support the view that self-defence is available to avert large-scale terrorist attacks such as those on New York and Washington on 9/11. So too do the invocation by NATO and the OAS[46] of their respective mutual defence obligations. In his statement of 21 April 2004, the UK Attorney General said:

> The resolutions passed by the Security Council in the wake of 11 September 2001 recognised both that large-scale terrorist action could constitute an armed attack that will give rise to the right of self-defence and that force might, in certain circumstances, be used in self-defence against those who plan and perpetrate such acts and against those harbouring them, if that is necessary to avert further such terrorist acts.[47]

The European Union statement upon voting in favour of General Assembly Resolution ES-10/18 suggests that EU Member States and those other states associated with the statement would not accept that the armed attack must be by a state:

> The European Union will not conceal the fact that reservations exist on certain paragraphs of the Court's advisory opinion. We recognise Israel's security concerns and its right to act in self-defence.

45 Press Release 124, NATO (12 Sept. 2001), *available at* http://www.nato.int/docu/pr/2001/p01-124e.htm; *also available at* (2001) 40 *International Legal Materials* 1267.

46 *Ibid.* at 1273. *See also* Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc. S/2001/946 (2001), *available at* http://www.un.int/usa/s-2001-946.htm; Letter Dated 7 October 2001 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council, UN Doc. S/2001/947 (2001).

47 UK Attorney General, *supra* note 22, *available at* http://www.publications.parliament.uk/pa/cm200304/cmselect/cmfaff/441/441we27.htm.



Russia's statements following the school siege at Beslan likewise appear to be based upon the assumption that self-defence may be available against attacks from terrorists. The Russian Foreign Minister is reported as saying:

> Question: Recently the Russian Defence Minister said that Russia has a right to strike blows at terrorists' bases at any point of the world. Does his statement not contradict your assertion that it is necessary to respect international law?
>
> Answer: It is necessary to respect international law. In particular, Article 51 of the Charter of the United Nations confirms the right of states to self-defence. The resolutions of the UN Security Council adopted after the 11th of September 2001 unanimously decreed that the right to self-defence extends not only to classical armed attacks, but also to armed attacks which are made by means of a terrorist act. Contemporary international law presumes that if a country is subjected to a terrorist attack and if there are serious grounds to assume that this attack may continue, then the state by way of the exercise of its right to self-defence can take necessary measures to eliminate or diminish such a lingering threat.[48]

The issue whether an 'armed attack' within the meaning of Article 51 may be perpetrated by a non-state actor has been addressed in a number of academic legal analyses of the military action in Afghanistan in 2001. A range of views is expressed, but a number of them are preoccupied with the particular context of Afghanistan, rather than the more general proposition. On the one hand there are those who see no difficulty in principle with the notion that non-state actors may perpetrate an 'armed attack' such as to trigger the right of self-defence.[49] Christopher Greenwood and Sean Murphy both cite the *Caroline* incident itself as an early example. Others believe that Article 51 is limited only to armed

48 Russian Minister of Foreign Affairs Sergei Lavrov, Replies to Questions from Al-Jazeera TV (10 Sept. 2004), *available at* http://www.iss.niiit.ru/sobdog-e/sd-180.htm.

49 *See, e.g.*, T. Franck, 'Terrorism and the Right of Self-Defence', (2001) 95 *American Journal of International Law* 839; C. Greenwood, 'International Law and the "War Against Terrorism"', (2002) *International Affairs* 301; S.D. Murphy, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter', (2002) 43 *Harvard Journal of International Law* 41; C. Greenwood, 'War, Terrorism and International Law', (2003) 56 *Current Legal Problems* 505. John Murphy also suggests that the links between Al Qaeda and the Taliban government were sufficiently close for the former's acts to be imputable to the latter. J. Murphy, *The United States and the Rule of Law in International Affairs* (2004), p. 169.

attacks committed by or attributable to a state and are therefore critical of the US reliance on self-defence as a legal basis for the action.[50]

How are the usual requirements for self-defence to be applied in the face of modern terrorist threats? As the UK Attorney General said in the House of Lords on 21 April 2004:

> The concept of what constitutes an 'imminent' armed attack will develop to meet new circumstances and new threats. For example, the resolutions passed by the Security Council in the wake of 11 September 2001 recognised both that large-scale terrorist action could constitute an armed attack that will give rise to the right of self-defence and that force might, in certain circumstances, be used in self-defence against those who plan and perpetrate such acts and against those harbouring them, if that is necessary to avert further such terrorist acts. It was on that basis that United Kingdom forces participated in military action against Al'Qaeda and the Taliban in Afghanistan. It must be right that states are able to act in self-defence in circumstances where there is evidence of further imminent attacks by terrorist groups, even if there is no specific evidence of where such an attack will take place or of the precise nature of the attack.[51]

There is no basis in international law for going further. In particular, insofar as a right of pre-emptive (or preventive) self-defence[52] implies a departure from the requirement of imminence, it has no basis in law.

The UN Charter does allow for action against emerging terrorist threats, through Security Council authorization under Chapter VII. Article 39 refers to 'threats to the peace' as well as breaches of the peace and acts of aggression. The practice of the Council establishes that terrorist threats may be threats to the peace, leading to Council action under Chapter VIII to restore and maintain

50 *See, e.g.*, A. Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories in International Law', (2001) 12 *European Journal of International Law* 993; J. Charney, 'The Use of Force Against Terrorism and International Law' (2001) 95 *American Journal of International Law* 835; O. Corten, F. Dubuisson, 'Opération "liberté immuable": une extension abusive du concept de légitime défense', (2002) 106 *Revue Générale de Droit International Public* 51; E. Myjer, N. White, 'The Twin Towers Attack: An Unlimited Right to Self-Defence', (2002) 7 *Journal of Conflict and Security Law* 5. For an early view, see O. Schachter, 'The Use of Force against Terrorists in Another Country', (1989) 19 *Israel Yearbook on Human Rights* 209.

51 UK Attorney General, *supra* note 22. *See also* W.H. Taft IV, 'Preemptive Action in Self-Defense', (2004) *Proceedings of the 98th Annual Meeting of the American Society of International Law* 331.

52 *See, e.g.*, National Security Strategy of the United States of America (Sept. 2002), pp. 13-16, *available at* http://www.whitehouse.gov/nsc/nss.pdf.



international peace and security. It is a policy question whether the Security Council should exercise its powers in any particular case. The UN Secretary-General has endorsed the High-level Panel's criteria in this regard.[53]

## 4 Weapons of Mass Destruction

Again, there are the same two questions. In what circumstances may a state use force unilaterally to prevent another state (or non-state actor) from developing, acquiring, deploying, or threatening the use of WMD? In other words, how does the right of self-defence apply to the threat of WMD? And in what circumstances may the Security Council use or authorize the use of force to counter the proliferation of WMD?

Except when treaties provide otherwise, there is no inherent legal distinction between WMD and other arms. WMD may be more dangerous, but it is all relative. Any unilateral action must be in accordance with international law, including the right of self-defence. This was clearly illustrated by the Osiris ('Osirak') nuclear reactor incident in 1981.[54]

As with the other cases we have examined, the answer, when the requirements for self-defence are not met but action is needed, is to have recourse to the Security Council. The Council has ample power to deal with emerging threats from weapons of mass destruction. Its role is recognized, for example, in the Non-Proliferation Treaty,[55] and it has exercised its powers in relation to Iraq's WMD and generally in Resolution 1540 (2004)[56] – which did not itself authorize the use of force.[57] It remains to be seen whether it will be called upon to exercise its undoubted powers in specific cases. Whether it

53 *In Larger Freedom*, *supra* note 7, para. 126; *see also A More Secure World*, *supra* note 7, paras. 204-09.

54 *See* SC Res. 487, UN Doc. S/RES/487 (1981); UN Doc. S/PV.2280-88 (1981); GA Res. 36/27, UN Doc. A/RES/36/27 (1981); UN Doc. A/BUR/36/SR.1-2 (1981); UN Doc. A/36/PV.52-56 (1981).

55 *See* Treaty on the Non-Proliferation of Nuclear Weapons, 1 July 1968, art. X(1), 729 UNTS 161, at 175 (entered into force 5 Mar. 1970).

56 SC Res. 1540, UN Doc. S/RES/1540 (2004).

57 *See* G.H. Oosthuizen, E. Wilmshurst, 'Terrorism and Weapons of Mass Destruction: United Nations Security Council Resolution 1540', *Chatham House Briefing Paper 04/01*, Sept. 2004, *available at* http://www.riia.org/pdf/research/il/BP0904.pdf.

exercises its powers in any particular case is a policy question, for which the criteria suggested by the High-level Panel may prove useful.[58]

## 5 Conclusion

The Leiden conference which inspired the contributions in this book, 'The Security Council and the Use of Force: Theory and Reality – A Need for Change', took place a couple of months before the UN High-level Panel published its report. Its recommendations on the question of the legality of the use of force are:

> 53. Article 51 of the Charter of the United Nations should be neither rewritten nor reinterpreted, either to extend its long-established scope (so as to allow preventive measures to non-imminent threats) or to restrict it (so as to allow its application only to actual attacks).
> 54. The Security Council is fully empowered under Chapter VII of the Charter of the United Nations to address the full range of security threats with which States are concerned. The task is not to find alternatives to the Security Council as a source of authority but to make the Council work better than it has.
> 55. The Panel endorses the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.[59]

In addition, the High-level Panel recommended that in considering whether to authorize the use of force, the Security Council should always address at least five basic criteria of legitimacy.[60] In his report of 21 March 2005[61] the UN Secretary-General essentially endorsed all these recommendations.

The general thrust of the discussion of these issues at the Leiden conference, and in the present contribution, seems fully consistent with the recommendations of the UN High-level Panel and Secretary-General. It is to be hoped that they will be widely accepted and welcomed – but that is a matter for the political organs of the United Nations.

58 *In Larger Freedom*, *supra* note 7, para. 126; *see also A More Secure World*, *supra* note 7, paras. 204-09.
59 *A More Secure World*, *supra* note 7, paras. 53-55.
60 *Ibid.*, paras. 207-08.
61 *In Larger Freedom*, *supra* note 7.

# 6

# THE USE OF FORCE IN PEACEKEEPING OPERATIONS

*Ralph Zacklin**

## 1 Introduction

United Nations peacekeeping has evolved considerably in recent years. Traditionally, the United Nations has been reluctant to allow the use of force in peacekeeping operations. Peacekeeping was designed to be an impartial activity undertaken with the consent of the parties, in which force was only to be used in 'self-defence'. However, the distinction between peacekeeping and peace-enforcement, between 'Chapter VI' and 'Chapter VII' operations, has increasingly become 'blurred' as the tasks have become more complex. Today there is a growing tendency on the part of the Security Council to adopt mandates for peacekeeping operations under Chapter VII and to authorize the use of force to ensure implementation of the mandates. This paper will examine the evolution of the use of force in peacekeeping operations, and will focus on peacekeeping operations that are under the authority of the Secretary-General and operate with the consent of the host state. These are distinct from *peace-enforcement* operations, which are usually multinational forces under unified command, which do not rely on the consent of the host state, are purely military in nature,

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