



International Law

ILP WP 05/01

PRINCIPLES OF INTERNATIONAL LAW ON THE USE OF FORCE BY STATES IN SELF-DEFENCE

This publication contains:

- I Principles of International Law on Self-Defence**
- II The list of participants**
- III The responses to the Questionnaire**

**Elizabeth Wilmshurst
October 2005**

Chatham House is an independent body which promotes the rigorous study of international questions and does not express opinions of its own. The opinions expressed in this publication are the responsibility of the authors.

© The Royal Institute of International Affairs, 2005

This material is offered free of charge for personal and non-commercial use, provided the source is acknowledged. For commercial or any other use, prior written permission must be obtained from the Royal Institute of International Affairs.

In no case may this material be altered, sold or rented.

Introduction

The purpose of this study is to provide a clear statement of the rules of international law governing the use of force by states in self-defence. The rules are being challenged in the light of what are seen as new threats from terrorism and from the possession of weapons of mass destruction, and there has been controversy as to whether they need revision or redefinition. The study was prompted by various statements and actions by states, recent developments in the United Nations and by decisions of the International Court of Justice.

In the resolution incorporating the Outcome of the World Summit in September 2005 the UN General Assembly affirmed that the relevant provisions of the UN Charter are sufficient to address the full range of threats to international peace and security, and has reaffirmed the authority of the Security Council to mandate coercive action to maintain and restore peace and security. But the resolution did not deal with the question as to when it is lawful for a state to use force in the exercise of its inherent right of self-defence.

This study was undertaken because we believe that, in the light of current challenges, it is of importance to world order that there be clarity and understanding about the relevance and application of international law to the use of force by states.

A questionnaire was sent to a small group of international law academics and practitioners and international relations scholars in this country, asking for their views on the criteria for the use of force in self-defence. At a meeting at Chatham House the participants discussed a paper which had been drawn up on the basis of the responses to the questionnaire.

Following that meeting a set of Principles was prepared by the International Law Programme at Chatham House. They are put forward here with the intention of contributing to discussion and comment. Readers are encouraged to communicate any views and reactions. Depending upon the outcome of this stage of the study, further meetings may be held and the Principles further refined.

While the Principles are intended to give a clear representation of the current principles and rules of international law, the law in this area is politically and legally contentious, and the interpretation of the Principles and their application to particular cases will rarely be without difficulty.

The Principles do not necessarily represent the views of all the participants in the study.

Comments are invited on the Principles. Any comments should be addressed to Iwona Newton at Chatham House (inewton@chathamhouse.org.uk).

Participants

Sir Franklin Berman QC is a barrister at Essex Court Chambers and Visiting Professor of International Law at the Universities of Oxford and Cape Town; formerly Legal Adviser at the Foreign & Commonwealth Office.

Daniel Bethlehem QC is Director of the Lauterpacht Centre for International Law at the University of Cambridge, and barrister at 20 Essex Street, London.

James Gow is Professor of International Peace and Security, and Co-Director of the International Peace and Security Programme, King's College London.

Christopher Greenwood QC is Professor of International Law at the London School of Economics and Political Science, and a barrister at Essex Court Chambers.

Vaughan Lowe holds the chair of Chichele Professor of Public International Law, is a Fellow of All Souls College, University of Oxford, and a barrister at Essex Court Chambers.

Sir Adam Roberts holds the chair of Montague Burton Professor of International Relations and Fellow of Balliol College, University of Oxford.

Philippe Sands QC is Professor of Law and Director of the Centre of International Courts and Tribunals at University College London, and is a barrister at Matrix Chambers.

Malcolm Shaw QC is Sir Robert Jennings Professor of International Law at the University of Leicester, and is a barrister at Essex Court Chambers.

Gerry Simpson is a Reader in the Department of Law at the London School of Economics and Political Science.

Colin Warbrick is Professor of Law at the University of Durham.

Nicholas Wheeler is Professor in the Department of International Politics at the University of Wales, Aberystwyth.

Elizabeth Wilmshurst is senior fellow, international law, at Chatham House.

Sir Michael Wood is the Legal Adviser at the Foreign & Commonwealth Office.

PRINCIPLES OF INTERNATIONAL LAW ON SELF-DEFENCE

The Charter of the United Nations prohibits the use of force against another state except where the Security Council has authorised the use of force to maintain or restore international peace and security; and where a state is exercising its inherent right of individual or collective self-defence recognised by Article 51 of the Charter¹.

The principles set out below are intended to provide a clear statement of international law regarding the inherent right of self-defence.

All the principles need to be read together.

Even in a case where a state is legally entitled to use force, there may be reasons of prudence and principle not to exercise that right.

1. The law on self-defence encompasses more than the right to use force in response to an ongoing attack.

Article 51 preserves the right to use force in self-defence “if an armed attack occurs”, until the Council has taken the necessary measures. On one view, the right is confined to circumstances in which an actual armed attack has commenced.² But the view that states have a right to act in self-defence in order to avert the threat of an *imminent* attack - often referred to as ‘anticipatory self-defence’³ - is widely, though not universally, accepted.⁴ It is unrealistic in practice to suppose that self-defence must in all cases await an actual attack.

¹ The question whether there is also a right to take action in exceptional circumstances of humanitarian emergency, or to protect fundamental rights, is not dealt with here; nothing in this paper can be regarded as prejudicing the question one way or the other. Although Article 51 mentions the right of collective self-defence, this study deals only with individual self-defence.

² The International Court of Justice (ICJ) expressly left open the issue of the lawfulness of a response to the threat of an imminent armed attack in the *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits, 1986 ICJ Rep. 14, at para. 194). When the question of the existence of an armed attack featured in the Court’s overall reasoning on the law of self-defence, it appeared before the treatment of the principles of necessity and proportionality. The same framework was followed by the Court some 17 years later in the *Oil Platforms Case (Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America, 2003 ICJ Rep.)* where it first investigated the existence of an armed attack (paras. 61 to 64 and 72) before it turned to the application of the principles of necessity and proportionality (paras. 73 and 74).

³ For the purposes of this document the term ‘anticipatory’ self-defence is preferred over ‘pre-emptive’ self-defence, although the latter is also in current use, for example in the report of the United Nations Secretary-General’s High-level Panel on Threats, Challenges and Change: ‘A More Secure World: Our Shared Responsibility’ para.189.

⁴ The United Nations Secretary-General’s response “In Larger Freedom” to the high-level panel report mentioned above states: “Imminent threats are fully covered by Article 51, which

The difference between these two schools of thought should not be overstated: many of those in the first school take the view that an attack has commenced when there are active preparations at an advanced stage, if there is the requisite intent and capability; and many of those in the other school require not dissimilar conditions before force in self-defence may lawfully be used in respect of an imminent attack. Further, those who deny the right of anticipatory self-defence may accept that a completed attack is sufficient to trigger a right to respond in anticipation of another attack⁵.

The requirements set out in the *Caroline* case⁶ must be met in relation to a threatened attack. A threatened attack must be 'imminent' and this requirement rules out any claim to use force to *prevent* a threat emerging⁷. Force may be used in self-defence only when it is necessary to do so, and the force used must be proportionate.

2. Force may be used in self-defence only in relation to an 'armed attack' whether imminent or ongoing.

- **The 'armed attack' may include not only an attack against a state's territory, but also against emanations of the state such as embassies and armed forces.**
- **Force in self-defence may be used only when: the attack consists of the threat or use of force (not mere economic coercion, for example); when the attacker has the intention and the capability to attack; and the attack is directed from outside territory controlled by the state.**
- **In the case of a threatened attack, there must be an actual threat of an attack against the defending state itself.**

The inherent right of self-defence recognised in Article 51 of the Charter of the United Nations "if an armed attack occurs" forms an exception to the general prohibition against the use of force under Article 2(4).

safeguards the inherent right of sovereign states to defend themselves against armed attack. Lawyers have long recognised that this covers an imminent attack as well as one that has already happened" (at para. 124). In the resolution adopting the World Summit Outcome the UN General Assembly reaffirmed that "the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security" and reaffirmed "the authority of the Security Council to mandate coercive action to maintain and restore international peace and security" but did not comment on the meaning of Article 51.

⁵ As in the *Caroline* incident, and in the case of the intervention in Afghanistan in 2001, which was categorised by the US and the UK as the exercise of the right of anticipatory self-defence (see UN Doc. S/2001/946 and UN Doc. S/2001/947).

⁶ The exchange between the US and the UK agreed that there be "a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation" and the use of force, "justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it".

⁷ See commentary for section 4, below.

For the purpose of Article 51, an armed attack includes not only an attack against the territory of the State, including its airspace and territorial sea, but also attacks directed against emanations of the State, such as its armed forces or embassies abroad. An armed attack may also include, in certain circumstances, attacks against private citizens abroad or civil ships and airliners.⁸ An 'armed attack' therefore is an intentional intervention in or against another state without that state's consent or subsequent acquiescence, which is not legally justified.

An armed attack involves the use of armed force and not mere economic damage. Economic damage, for example, by way of trade suspension, or by use of a computer virus designed to paralyse the financial operations of a state's stock exchange or to disable the technology used to control water resources, may have a devastating impact on the victim state but the principles governing the right to use force in self-defence are confined to a *military* attack. A purely 'economic' attack might however give rise to the right of self-defence if it were the precursor to an imminent armed attack.

An armed attack means any use of armed force, and does not need to cross some threshold of intensity.⁹ Any requirement that a use of force must attain a certain gravity and that frontier incidents, for example, are excluded is relevant only in so far as the minor nature of an attack is *prima facie* evidence of absence of intention to attack or honest mistake. It may also be relevant to the issues of necessity and proportionality. In the case of attacks by non-State actors, however, different considerations may come into play (see section 6 below).

The term 'armed attack' requires the attacker to have the intention to attack. In the *Oil Platforms Case* the ICJ made reference to this requirement when it inquired into the question whether the US was able to prove that certain of Iran's actions were "specifically aimed" at the US or that Iran had "the specific intention" of harming US vessels¹⁰. But to the extent that this may be read as suggesting that military attacks on a state or its vessels do not trigger a right of self-defence as long as the attacks are not aimed specifically at the particular state or its vessels but rather are carried out indiscriminately, this part of the ICJ's ruling in *Oil Platforms* has been criticised as not supported by international law.

⁸ This study does not, however, deal with the rescue of citizens abroad, which raises different issues.

⁹ There are statements by the International Court of Justice which suggest that there may be instances of the use of force which are not of sufficient gravity as to scale and effect to constitute an armed attack for the purpose of self-defence. (*Nicaragua case*, note 2, at paras.191 and 195 and *Oil Platforms Case*,*supra* note 2, at paras. 51, 63-64 and 72. But these statements are not generally accepted.

¹⁰ Note 2 above, at para. 64.

An armed attack is an attack directed from outside territory controlled by the State. In its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*¹¹ the ICJ's observations may be read as reflecting the obvious point that unless an attack is directed from outside territory under the control of the defending state the question of self-defence in the sense of Article 51 does not normally arise.

In the case of a threatened attack, there must be an actual threat of an attack against the defending state itself, whether directed against that state or by an indiscriminate attack. This is an aspect of the criterion of necessity. It addresses the question whether it is necessary for the target state to take action.

3. Force may be used in self-defence only when this is necessary to bring an attack to an end, or to avert an imminent attack. There must be no practical alternative to the proposed use of force that is likely to be effective in ending or averting the attack.

The criterion of necessity is fundamental to the law of self-defence¹². Force in self-defence may be used only when it is necessary to end or avert an attack. Thus, all peaceful means of ending or averting the attack must have been exhausted or be unavailable. As such there should be no practical non-military alternative to the proposed course of action that would be likely to be effective in averting the threat or bringing an end to an attack. Necessity is a threshold, and the criterion of imminence can be seen to be an aspect of it, inasmuch as it requires that there be no time to pursue non-forcible measures with a reasonable chance of averting or stopping the attack.

Necessity is also a limit to the use of force in self-defence in that it restricts the response to the elimination of the attack and is thus linked to the criterion of proportionality. The defensive measure must be limited to what is *necessary* to avert the on-going attack or bring it to an end.

¹¹ Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, 9 July 2004, at para. 139.

¹² The criterion of 'necessity' if force is legally to be used in self-defence can be traced back to the language of the *Caroline* formula:

"[i]t will be for ... [Her Majesty's] Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation" and the action must not be "unreasonable or excessive, since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."

The ICJ held in the *Nicaragua* case (above note 2) that "the specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it" was "a rule well established under customary international law", and re-affirmed this in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (1996 ICJ Rep. 226)

In applying the test of necessity, reference may be made to the means available to the state under attack; the kinds of forces and the level of armament to hand¹³ will be relevant to the nature and intensity of response that it would be reasonable to expect, as well as the realistic possibilities of resorting to non-military means in the circumstances.¹⁴

4. A state may use force in self-defence against a threatened attack only if that attack is 'imminent'.

There is a risk of abuse of the doctrine of anticipatory self-defence, and it needs to be applied in good faith and on the basis of sound evidence. But the criterion of imminence must be interpreted so as to take into account current kinds of threat and it must be applied having regard to the particular circumstances of each case. The criterion of imminence is closely related to the requirement of necessity.

- **Force may be used only when any further delay would result in an inability by the threatened state effectively to defend against or avert the attack against it.**
- **In assessing the imminence of the attack, reference may be made to the gravity of the attack, the capability of the attacker, and the nature of the threat, for example if the attack is likely to come without warning.**
- **Force may be used only on a proper factual basis and after a good faith assessment of the facts.**

The concept of 'imminence' reflects the *Caroline* formulation of 'instant, overwhelming, leaving no choice of means, and no moment for deliberation'. In the context of contemporary threats imminence cannot be construed by reference to a temporal criterion only, but must reflect the wider circumstances of the threat.

There must exist a circumstance of irreversible emergency. Whether the attack is 'imminent' depends upon the nature of the threat and the possibility of dealing effectively with it at any given stage. Factors that may be taken into account include: the **gravity** of the threatened attack – whether what is threatened is a catastrophic use of WMD; **capability** - for example, whether the relevant state or terrorist organisation is in possession of WMD, or merely of material or component parts to be

¹³ This formulation leaves open the question whether greater mechanised force can be justified by the reduction in risk to the lives of the defending State's forces, a question which is more normally dealt with by the rules of international humanitarian law.

¹⁴ In its decision in the *Oil Platforms* case (above note 2), the ICJ elaborated on the "necessity" criterion. It held that "the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any 'measure of discretion'" (para.73). In practice of course the assessment of the necessity of a particular action is far from straightforward, and can be undertaken only on the basis of the facts available at the time, but with a good faith assessment of those facts.

used in its manufacture; and the **nature** of the attack – including the possible risks of making a wrong assessment of the danger. Other factors may also be relevant, such as the geographical situation of the victim state, and the past record of attacks by the state concerned.

The criterion of imminence requires that it is believed that any further delay in countering the intended attack will result in the inability of the defending state effectively to defend itself against the attack. In this sense, necessity will determine imminence: it must be necessary to act before it is too late. There is a question as to whether 'imminence' is a separate criterion in its own right, or simply part of the criterion of 'necessity' properly understood. As an additional criterion however it serves to place added emphasis on the fact that a forcible response in these circumstances lies at the limits of an already exceptional legal category, and therefore requires a correspondingly high level of justification.

To the extent that a doctrine of 'pre-emption' encompasses a right to respond to threats which have not yet crystallized but which might materialise at some time in the future, such a doctrine (sometimes called 'preventive defence') has no basis in international law. A fatal flaw in the so-called doctrine of prevention is that it excludes by definition any possibility of an *ex post facto* judgment of lawfulness by the very fact that it aims to deal in advance with threats that have not yet materialised.

Each case will necessarily turn on its own facts. A forceful action to disrupt a terrorist act being prepared in another state might, depending upon the circumstances, be legitimate; force to attack a person who may in the future contemplate such activity is not. While the possession of WMD without a hostile intent to launch an attack does not in itself give rise to a right of self-defence, the difficulty of determining intent and the catastrophic consequences of making an error will be relevant factors in any determination of 'imminence' made by another state.

The determination of 'imminence' is in the first place for the relevant state to make, but it must be made in good faith and on grounds which are capable of objective assessment. Insofar as this can reasonably be achieved, the evidence should be publicly demonstrable. Some kinds of evidence cannot be reasonably produced, whether because of the nature or source, or because it is the product of interpretation of many small pieces of information. But evidence is fundamental to accountability, and accountability to the rule of law. The more far-reaching, and the more irreversible its external actions, the more a state should accept (internally as well as externally) the burden of showing that its actions were justifiable on the facts. And there should be proper internal procedures for the assessment of intelligence and appropriate procedural safeguards.

5. The exercise of the right of self-defence must comply with the criterion of 'proportionality'.

- **The force used, taken as a whole, must not be excessive in relation to the need to avert or bring the attack to an end.**
- **The physical and economic consequences of the force used must not be excessive in relation to the harm expected from the attack.**

In the *Caroline* formulation, the principle of proportionality was stated to require "nothing unreasonable or excessive, since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."

The ICJ has confirmed that it is a well-established rule of customary international law that a use of force in self-defence must be "proportional to the armed attack and necessary to respond to it."¹⁵

This requires that the level of force used is not greater than that necessary to end the attack or remove the threat. As such it is another way of looking at the requirement of necessity.

The proportionality requirement has been said to mean in addition that the physical and economic consequences of the force used must not be excessive in relation to the harm expected from the attack¹⁶. But because the right of self-defence does not allow the use of force to 'punish' an aggressor, proportionality should not be thought to refer to parity between a response and the harm already suffered from an attack, as this could either turn the concept of self-defence into a justification for retributive force, or limit the use of force to less than what is necessary to repel the attack.

The force used must take into account the self-defence operation "as a whole". It does not relate to specific incidents of targeting (which is a matter for international humanitarian law). Thus, in the *Oil Platforms Case*, the ICJ stated that in assessing proportionality, it "could not close its eyes to the scale of the whole operation"¹⁷.

¹⁵ *Nicaragua case* (note 2 above), para.176; see also, para.41 of the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (above note 12).

¹⁶ For example, the Attorney General stated in the House of Lords on 21 April 2004: "the force used must be proportionate to the threat faced and must be limited to what is necessary to deal with the threat." (Lords, Hansard, col. 371).

¹⁷Note 2 above, at para. 77.

**6. Article 51 is not confined to self-defence in response to attacks by states.
The right of self-defence applies also to attacks by non-state actors.**

- In such a case the attack must be large scale.
- If the right of self-defence in such a case is to be exercised in the territory of another state, it must be evident that that state is unable or unwilling to deal with the non-state actors itself, and that it is necessary to use force from outside to deal with the threat in circumstances where the consent of the territorial state cannot be obtained¹⁸.
- Force in self-defence directed against the government of the state in which the attacker is found may be justified only in so far as it is necessary to avert or end the attack, but not otherwise.

There is no reason to limit a state's right to protect itself to an attack by another state. The right of self-defence is a right to use force to avert an attack. The source of the attack, whether a state or a non-state actor, is irrelevant to the existence of the right. The ICJ *Wall* Advisory Opinion should not be read as suggesting that the use of force in self-defence is not permissible unless the armed attack is by a state.¹⁹ There is nothing in the text of Article 51 to demand, or even to suggest, such a limitation.²⁰

This conclusion is supported by reference to the *Caroline* case; the criteria in *Caroline* were enunciated in the context of a marauding armed band, not orthodox state-to-state conflict.

State practice in this field, including the recent practice of the Security Council, gives no support to the restriction of self-defence to action against armed attacks imputable

¹⁸ See note 22.

¹⁹ Note 11 above, at para. 139: "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State." But the European Union statement made upon the adoption of General Assembly resolution ES-10/18 (concerning the *Wall* Advisory Opinion) suggests that EU member states and the other states associated with the statement would not accept the possible implication of the Opinion that self-defence is not available unless the armed attack is 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." The matter came up again in a recent case in the ICJ; the Court stated that in the absence of attribution of the armed force to a State there is no right of self-defence against that State. (*Case concerning Armed Activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*)(Merits, 2005 ICJ Rep., at paras. 146,147)). In line with the *Wall* Advisory Opinion this should not be read as prohibiting action in self-defence against non-state actors as such.

²⁰ While certain writers have argued that Article 51 concerns only responses to aggression against another state, their argument based on the French text is not persuasive. True, the French text of Article 51 uses the term *aggression armée*, and *aggression* is also the term used in Article 39, but the French Government accepted during the debates on the definition of aggression that aggression in Article 39 was not the same concept as *aggression armée* in Article 51; further, the English, Chinese and Spanish texts of the Charter use different terms for Articles 39 and 51.

to a state; indeed there is state practice the other way. The action against Al Qaeda in Afghanistan in October 2001 (which was widely supported 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 pre-empt 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 11 September 2001.²¹ So too do the invocations by NATO and the OAS of their respective mutual defence obligations

The right of states to defend themselves against ongoing attacks, even by private groups of non-state actors, is not generally questioned. What *is* questioned is the right to take action against the state that is the presumed source of such attacks, since it must be conceded that an attack against a non-state actor within a state will inevitably constitute the use of force *on* the territorial state. It may be that the state is not responsible for the acts of the terrorists, but it is responsible for any failure to take reasonable steps to prevent the use of its territory as a base for attacks on other states. Its inability to discharge the duty does not relieve it of the duty. But the right to use force in self-defence is an inherent right and is not dependent upon any prior breach of international law by the state in the territory of which defensive force is used.

Thus, where a state is unable or unwilling to assert control over a terrorist organisation located in its territory, the state which is a victim of the terrorist attacks would, as a last resort, be permitted to act in self-defence against the terrorist organisation in the state in which it is located²².

The same criteria for the use of force in self-defence against attacks by states are to be used in the case of attacks by non-state actors, but particular considerations are relevant.

²¹ It should however be noted that Security Council resolution 1368(2001) does not settle the matter entirely, as in that case there was already significant evidence of a degree of responsibility of a state (Afghanistan) for the continuing ability of the terrorists to carry out attacks.

²² The ICJ Judgement in the *Case concerning Armed Activities on the territory of the Congo* note 19 above, at paras. 146 and 147) implies that unwillingness or inability of a State to deal with irregular forces on its territory is insufficient to create a right in self-defence against the State. However, the Court does not answer the question as to the action a victim State may take in the case of an armed attack by irregular forces, where no involvement of the State can be proved. According to Judges Kooijmans and Simma the occurrence of an armed attack is sufficient to create a right of action in self-defence, whether or not the actions are attributable to a State (Separate Opinions of Judge Kooijmans, paras. 26-30 and of Judge Simma, paras.7-12).

The attack or imminent attack by non-state actors must be large-scale.²³

For action in self-defence to be 'necessary', it must first be clear that measures of law-enforcement would not be sufficient. To show the necessity of action against the territory of another state not directly responsible for the acts of the non-state group requires, *inter alia*, the demonstration that there is no other means of meeting the attack and that this way will do so. Terrorist organisations are not easily rooted out by foreign armed forces.

Where, therefore, the attack is not ongoing but imminent, the territorial state is entitled to proceed in its own way against the group on its territory. In this context, the requirement of 'imminence' means that action in self-defence by another state may not be taken save for the most compelling emergency.

7. The principles regarding the right of self-defence form only a part of the international regulation of the use of force.

- ***Measures taken in the exercise of the right of self-defence must be reported immediately to the Security Council. The Council retains the right and responsibility to authorise collective military action to deal with actual or latent threats.***
- ***Any military action must conform with the rules of international humanitarian law governing the conduct of hostilities.***

²³ It is in this context (rather than that of an attack by a state itself) that it is relevant to consider the ICJ's remarks in the *Nicaragua* judgment (*supra* note 2). At para. 195 the Court stated that: "... it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "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 (inter alia) an actual armed attack conducted by regular forces,* "or its substantial involvement therein." ... The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, *if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.*" (italics added)

Responses to questionnaire

“There are few more important questions in international law than the proper limits of the right of self-defence”²⁴

A questionnaire was completed by the international lawyers and international relations scholars in the United Kingdom who are listed below. This paper sets out their individual responses.

The responses were written for the purpose of this questionnaire alone and do not necessarily reflect the totality of the writers' views.

Contents

<i>Q1. What is an ‘armed attack’ for the purposes of Article 51?</i>	p. 14
<i>Q2. Does the right of self-defence relate only to an attack from another State, or does it also relate to attacks from non-state actors, eg a terrorist group, and if so, Under what conditions?</i>	p. 20
<i>Q3. Must there be an actual armed attack before the right of self-defence comes into play?</i>	p. 33
<i>Q4. If the use of force in self-defence is permissible in relation to anticipated armed attacks, what does the criterion of ‘imminence’ mean, particularly in relation to current threats? What evidence need there be of a threat of an imminent armed attack before the use of force in self-defence is justifiable?</i>	p. 39
<i>Q5. What does the criterion of ‘proportionality’ mean?</i>	p. 52
<i>Q6. What does the criterion of ‘necessity’ mean?</i>	p. 57
<i>Q7. Is it permissible to use force in self-defence against a terrorist grouping within another State although that State may not be unwilling, but simply unable, to deal with a terrorist organisation itself?</i>	p. 62

Note

Issues which are **not** covered by this study include: the use of force authorised by the Security Council; the use of force in collective self-defence; the use of force to avert an overwhelming humanitarian catastrophe/humanitarian intervention; use of force with the consent of the state concerned; and the use of force to rescue nationals abroad where the territorial state is unable or unwilling to do so.

Question 1: What is an ‘armed attack’ for the purposes of Article 51?

Daniel Bethlehem

The jurisprudence of the International Court of Justice (ICJ) in the *Nicaragua Case*²⁵, *Oil Platforms Case*²⁶, *NATO (Provisional Measures)*²⁷ and the *Wall Advisory*

²⁴ Waldock, *Recueil*, 1952 II, p 461.

Opinion²⁸ suggests a requirement that the term “armed attack” be construed to mean an armed attack on a significant scale across international boundaries which takes the form of a continuous assault rather than an accumulation of individual attacks each of which in isolation is of lower intensity than the accumulated whole.

In my view, this appreciation of the concept of armed attack is problematic as it does not accurately reflect the nature of many attacks with which States are faced and to which they, ideally with a UN Security Council *imprimatur*, may be compelled to respond. In my view, “armed attack” should be construed to mean any use of armed force. Such an interpretation would bring the scope and application of Article 51 into line with Article 2(4) of the UN Charter. The appropriate principles to limit the scale of any response to an armed attack are the principles of necessity and proportionality, not a complex and unsustainable definition of the concept of “armed attack”.

James Gow

Aside from a traditional approach involving the formal armed forces of one state against another, it is impossible to say. Otherwise, dual use technology, in the broadest sense, might mean that almost anything could constitute an armed attack for the purposes of Article 51 of the Charter of the United Nations. The better approach, though not easy, might be to try to establish that which might not be covered. A middle ground test case might be anthrax in the mail, or attacks on computer infrastructure, such as computer viruses. More radically, could a Kosovo-like assault on a population group constitute an armed attack on others such as NATO, because their security, one way or another, was being jeopardised?

Christopher Greenwood

The term “armed attack” is plainly confined to the use of armed force and does not include economic coercion. To my great regret the ICJ seems wedded (see *Nicaragua* and *Oil Platforms* Cases) to the notion that not every use of force against a state constitutes an armed attack, suggesting that there has to be some threshold of intensity which is crossed before violence becomes an “armed attack”. This has never made any practical or logical sense but the world appears to be stuck with it. The only consolation is that in the *Oil Platforms* Case the ICJ appeared to set the threshold quite low – mining of a single warship might constitute self-defence.

²⁵ International Court of Justice, Judgment (Merits) of 27 June 1986, “*Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*”.

²⁶ International Court of Justice, Judgment of 6 November 2003, “*Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*”.

²⁷ International Court of Justice, Order of 2 June 1999 on Request for Provisional Measures, “*Legality of Use of Force (Yugoslavia v. United States of America/Spain)*”.

²⁸ International Court of Justice, Advisory Opinion of 9 July 2004 on “*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*”.

A related question is against whom the attack has to be directed. It seems to be common ground that an armed attack on the territory of a state (whether inhabited or not, whether metropolitan or colonial), or its armed forces or embassies abroad is an armed attack on the state but doubt exists about attacks on merchant ships, civil airliners or private citizens abroad. My own view is that attacks on merchant ships were treated by several states (not just the 'usual suspects') as an armed attack on the state of the flag during the Iran-Iraq war and that this is right. The same principle can presumably be extended to civil aircraft. Nationals abroad are more of a problem but if they are attacked because of their nationality or in order to exert pressure on the state, I think that amounts to an armed attack on the state itself. It would be odd (to say the least) if force could be used to protect uninhabited rocks but not hundreds of one's people – population, after all, being one of the inherent criteria of statehood.

Vaughan Lowe

An 'armed attack' is an intentional, forcible and coercive intervention in another state without that state's prior or retrospective consent or subsequent acquiescence, which is not justified as an exercise of the right of self-defence or as an intervention for humanitarian purposes, and which has as its aim the imposition of the will of the attacker upon some part of the territory of the other state or upon some aspect of the policy of the other state.

I think that it is necessary to distinguish 'attacks' from simple violations of sovereignty, of the kind that might be inflicted by an aircraft straying into airspace without authorisation. An attack must be intentional. Moreover, it must involve the threat or use of force. Those elements seem to me to be implicit in the concept of an attack. The reference to the aim for which force is threatened or used seems to me to be necessary in order to distinguish an attack from a broader category of cross-frontier violence. I think that a private person shooting across a frontier for personal reasons – a murder – is a crime but not an attack on the state wherein the victim is located. But I do not think that all attacks are necessarily attacks by, or imputable to, states. It is therefore necessary to have a criterion other than the identity of the attacker to take such episodes out of the category of 'attacks'. That is what this reference to the aim does. The definition of the necessary aim is intended to locate the intention in the area of public action, so that an attack must necessarily involve some challenge to the authority of the target state.

I do not think that the attack need be particularly large in scale. A few soldiers sent over the border would suffice, though, on the other hand, a few shots from a border patrol could be classed as a border incident, and not an attack, because there is no intention of imposing the will of the attacker upon some part of the territory of the other state or upon some aspect of the policy of the other state.

The attack is an "armed attack" if it involves the threat or use of potentially lethal force. Throwing stones across the border would not ordinarily amount to an attack,

though it might if the stones were used in such a manner that they were capable of inflicting death and were intended to do so.

The attack is an attack by a state if that state is responsible as a matter of international law for that attack. As mentioned above, I do not think that all attacks emanate from states. The World Trade Centre attack was an attack, regardless of whether or not it was imputable to any state.

Sir Adam Roberts

The whole issue of exactly which forms of action can be understood as being encompassed in the notion of “armed attack” is notoriously difficult. That is a principal reason why the UN Charter accords the UN Security Council a broad degree of discretion about the circumstances in which it can take action.

Where states consider that there is a necessity to use force in circumstances that go beyond self-defence in an *actual* armed attack, it is generally desirable to seek and obtain multilateral authorisation. The United Nations Security Council is the only body in the world with the undisputed legal right to authorise forcible measures against sovereign states pre-emptively.

Philippe Sands

The right of self-defence encompasses a right to use force in anticipation of an actual armed attack, where there is an imminent threat.

Malcolm Shaw

There are several issues worth noting here. First, the concept of “armed attack” is clearly differentiated from that of aggression in the UN Charter, but has been left somewhat confused since the *Nicaragua* Case held that the provision of weapons or logistical or other support to rebels conducting an attack would not of itself amount to an armed attack but might amount to intervention in the affairs of another state or a “threat or use of force”²⁹. The distinction between the use of force and armed attack in such circumstances is rather thin, especially if the provision of the assistance in question is critical with regard to the existence and scale of operations by the “rebels” (as termed by the Court) and thus impacts upon the legitimation of the response by the state attacked. This distinction in practice is also unlikely to be convincing for a state who is subject to rebel attack and who will find it difficult not to seek to interdict the supply of weapons etc.. Accordingly, the notion of armed attack within the context of justifying recourse to force in self-defence should be understood as including

²⁹ Note 2 *supra*, para.195.

actions which contribute significantly to the attack itself. Of course, this must be interpreted in the light of the circumstances and in the light of the other criteria with regard to self-defence.

Secondly, the Court seems also to have adopted a *de minimis* approach to armed attack³⁰. This, again, must be treated with some care since an attack may assume different dimensions in the light of the political or psychological circumstances of the moment. What in one context may seem relatively insignificant, may in others assume considerable importance prompting the need to respond in self-defence.

This links with the third point, the question as to when an armed attack actually starts. There is clearly some overlap here with “imminent” attack, but there may be circumstances where the events immediately preceding the opening of fire may need to be seen simply as part of the precipitated attack. An armed attack may in reality commence with an insignificant military movement into an area of little interest, for example, in a desert, which is intended to confuse and deceive prior to the main movement of forces. What is a state that correctly interprets the initial move to conclude as to recourse to force in self-defence? As technology develops, so this notion needs to be interpreted in that light, so that, for example, the “locking on” of missile radar on to a plane may in some circumstances witness an imminent attack, while in others it may be seen itself as the start of that attack. Similarly, certain cyberspace attacks may be seen as initiating an armed attack. The test in this situation will in reality revolve around whether the attacking state has clearly on the best available evidence committed itself to an armed attack³¹.

Fourthly, at the other end of Article 51 “armed attack” is the linguistic debate as to whether armed attack is restricted to aggression against a state alone. This is the position adopted by many French scholars on the basis of the French text which differs from the English language text of the provision. This impacts on responses to terrorism issues (see below).

Gerry Simpson

Traditionally, the concept of an “armed attack” was understood to involve a cross-border use of military force by one state against another. Those who drafted the UN Charter had in mind a particular paradigm: the German invasion of Poland in 1939. In other words, the UN Charter was designed to prevent or forestall or confront a repeat of the last war, the Second World War. This may account for its lack of precision and guidance in relation to unconventional uses of force since then. Of course, the *Nicaragua* decision provided an occasionally helpful, sometimes tautological, elaboration of the *jus ad bellum*. The majority held that the term “armed attack” could encompass the sending of armed groups by one state into the territory of another state providing this action reached the gravity of an ordinary “armed attack”.

³⁰ See *Nicaragua*, note 2 *supra* at para. 191 and *Oil Platforms*, note 3 *supra* at paras. 51, 63-64 and 76.

³¹ See, for example Dinstein, “*War, Aggression and Self-Defence*”, Cambridge University Press, at p. 172.

Colin Warbrick

An armed attack is the use of military force by one state against the territory or quasi-territorial entities of another state or against the armed forces of the other states outside the latter's territory (I leave out of account here the question of attacks on a state's nationals), of such a magnitude to be more than a "mere frontier incident" [*Nicaragua*, para 195]. "Attack" must be understood to include the launching of an attack against the territory of the other state as well as the actual use of force within that territory, e.g. a missile attack begins when the missiles are launched; when a fleet leaves port or a squadron its airbase, en route to the territory to be attacked or when ground troops begin their movement towards the target state. It is a military assessment that the attack has started (and it may have done in legal terms, even if the attack could be called off before there were any incursion into the territory of the target state). So, even if the view were taken that the attack on Israel did not commence with the closure of Tiran³², the movement of considerable Egyptian forces across Sinai towards Israel was an "attack", even though the progress of the forces might have been halted before they reached Israel's territory.

Also, depending on the facts, an "attack" may be a campaign against a state rather than a single event, so that the mere fact that one episode in the campaign has come to an end does not mean that the campaign of armed attack has terminated. The right of self-defence persists during the campaign. Kuwait was subject to an armed attack by Iraq from 2 August 1990 until about the end of February 1991 and the right of self-defence continued throughout this period. Equally, an attack continues so long as the self-defending state is taking steps to use defensive force to bring the effects of the attack to an end (e.g. in the Falklands conflict).

Nicholas Wheeler

There is no definition of the key terms "armed attack", "inherent right" or "self-defence" in Article 51; the assumption being that these terms would be interpreted by the political organs of the UN, especially the Security Council. In customary international law, an armed attack has been understood as a large-scale, cross-border aggression. The effect of a literal reading of the phrase 'if an armed attack occurs' is that a state must wait until the armed attack has actually commenced and that any relaxation of that requirement, such that a state could exercise force before the armed attack has actually commenced, is a misreading of the narrow limits of Article 51.

³² See Gray "*International Law and the Use of Force: Foundations of Public International Law*", pp.130-131; and Franck, "*Fairness in International Law and Institutions*", pp.101-105.

Sir Michael Wood³³

Any unlawful attack (actual or imminent) using armed force by one state against the territory, embassies, nationals, ships etc. of another state is an armed attack for the purposes of Article 51. Large-scale terrorist attacks may also be included (see response to question 2).

To the extent that the ICJ has suggested that lesser uses of force are not an armed attack the Court was misguided. There is no sound basis for suggesting that the armed attack must have reached some particular level of gravity. Dicta in *Oil Platforms* may exacerbate the problem left by *Nicaragua*, which appeared at least to be limited to indirect armed attacks.

Question 2: Does the right of self-defence relate only to an attack from another state, or does it also relate to attacks from non-state actors, e.g. a terrorist group, and if so, under what conditions?

Sir Franklin Berman

When the focus is directed at the response to an actual armed attack, there seems no reason to limit the right of self-defence to an attack *by* another state (presumably this is what the question means, i.e. it looks to the person of the attacker rather than the geographical origin of the attack). There is nothing in the text of Article 51 to demand, or even to suggest, such a reading, and logic would be decisively against it. Granted a similar 'attack', why should a state's legal capacity to protect itself depend on the identity of the attacker? To the extent that the ICJ may be thought to have suggested something different in the *Wall* Advisory Opinion, this should be disapproved. The criteria which emerged following the *Caroline*³⁴ incident were enunciated in the context of a marauding armed band, not orthodox state-to-state conflict. The *necessity* and *proportionality* criteria are perfectly capable of adapting themselves to the foreseeable variety of possible cases; other limitations are covered under question 7 below.

There is no particular reason why a state, confronted with a genuine question of imminence (see under question 4 below), should first have to enter into an investigation of the extent to which the particular attack was 'attributable' (e.g. in the state responsibility sense) to the state from the territory of which the attack emanated, or represented a conscious policy decision at the highest level, etc., before its entitlement to an immediate protective response comes into play. Questions of that kind are by no means negligible, and in some cases may take a

³³ This response and his others are made in a personal capacity and do not necessarily represent the views of Her Majesty's Government.

³⁴ Exchange of letters between US Secretary of State Daniel Webster and Lord Ashburton, Foreign Secretary of Great Britain, relating to the case of the *SS Caroline*, 1837; 29 BFSP 1137-1138; 30 BFSP 195-196; See Jennings (1938) 32 AJIL 82 and Rogoff and Collins (1990) 16 Brooklyn JIL 493.

primary position; in others, they may be more relevant to the second move – or to a longer-term strategy – than to the immediate response.

Daniel Bethlehem

In the light of the *Wall* Advisory Opinion, there is some doubt as to whether the right of self-defence relates to attacks by non-state actors. Although the Court sought to limit the scope of its analysis to the Israel-Palestine situation, it is evident from the Separate Opinions of Judges Kooijmans and Higgins that the Court's thinking went beyond the case before them and challenged the appreciation which informed Security Council Resolutions 1368 (2001) and 1373 (2001).

It is evident, however, from the *Nicaragua* Judgment, that the Court acknowledges the existence of a right of self-defence against non-state actors if they receive state support. This is consistent with the Security Council's appreciation in respect of Afghanistan.

In my view, if the law is to be credible, a right of self-defence must be acknowledged against non-state actors conducting themselves from foreign territory in circumstances in which they use or threaten force illegally and the State on whose territory they are based (a) actively supports the group, or (b) takes no effective action to forestall the use or threat of force by the group, or (c) is unable to take effective action to forestall the use or threat of force by the group. Once again, the appropriate principles to limit the scale of any response to an armed attack are the principles of necessity and proportionality.

James Gow

Only if one disregards UN Security Council resolutions 1368 and 1373, as well as the extensive support for the approach taken by the US in response to the attacks of 11 September 2001.

Christopher Greenwood

In my view, it can definitely stem from a terrorist group or other non-state actor. To the extent that the ICJ suggested the contrary in the *Wall* Advisory Opinion, it was just wrong and its approach is manifestly at odds with state practice in the aftermath of the attacks of 11 September 2001. The text of Article 51 does not contain anything to suggest that an armed attack must emanate from a state. The *Caroline* incident was all about attacks by non-state actors. Most laymen would think international lawyers were mad if they believed that there was no right of self-defence against terrorist attack. Nor am I in the least persuaded by the argument based on

the French text. True the French text of Article 51 uses the term “*aggression armée*”, and “*aggression*” is also the term used in Article 39 but (a) the French Government apparently accepted during the debates on the definition of aggression that aggression in Article 39 was not the same concept as *aggression armée* in Article 51; and (b) the English, Chinese and Spanish texts of the Charter use different terms for Articles 39 and 51.

In my opinion, if the use of force by a terrorist group reaches the level of intensity needed for it to be classed as an armed attack if it had been carried out by a state, then it is to be treated as an armed attack for Article 51 purposes. That was the almost universal reaction to the attacks of 11 September 2001 amongst governments and international bodies³⁵.

Of course, the above analysis does not imply that there is then a right for the state attacked to use force against another state or in the territory of another state. I thought it was lawful to do so in Afghanistan in 2001 because of the scale of Afghan support for *Al-Qaeda* but such action would only be justified in exceptional circumstances.

Vaughan Lowe

The right of self-defence is a right to use force to avert an attack. The source of the attack, whether a state or a non-state actor, is irrelevant to the existence of the right. No-one is obliged by international law passively to accept an attack. The character of the source does, however, affect the measures that can be taken in response. Broadly, if the threat of the attack is made by a state, a response against that state within the bounds of proportionality, as set out following the *Caroline* incident, is lawful. If the threat emanates from a non-state actor, no forcible action in self-defence is lawful if the state in which the actor is located is able and willing to take reasonable measures to nullify the threat.

Much of the concern with the responsibility for attacks seems to me to stem from the mistaken belief that force can only be used outside the territory of a state against an attacker if the attack emanates from another state that is thereby in breach of international law. That seems to me to be wrong. Force may be used to avert a threat because no-one, and no state, is obliged by law passively to suffer the delivery of an attack. That is what it means to say that the right is ‘inherent’. Defensive force is in no sense dependent upon the attack being a violation of international law.

If the attack does come from another state, the principles of necessity and proportionality as defined following the *Caroline* incident will clearly apply. I think that they apply also if the attack comes from someone other than a state. In the latter case, however, it would be an unjustified violation of the sovereignty of the state from which the attack emanates if defensive force were used in circumstances where that

³⁵ See, for example, decisions of the UN Security Council, NATO, and the OAS, etc..

state was able and willing to take effective action that would neutralise the attack.

Sir Adam Roberts

Although there are hazards in doing so, there is a strong case for recognising openly that a major terrorist attack, and/or sustained terrorist campaign, can constitute an “armed attack”.

In the wake of the events of the previous day, UN Security Council Resolution 1368 of 12 September 2001 was right to recognise ‘the inherent right of individual or collective self-defence in accordance with the Charter’. However, this does not settle the matter entirely, as in that case there was already significant evidence of a degree of responsibility of a state (Afghanistan) for the terrorist attacks. This leaves open the question of terrorist attacks in cases where there is a lack of clear evidence connecting them to a state.

On this key distinction (between terrorist attacks where there is clear evidence connecting them to a state, and where there is not), Albrecht Randelzhofer writes with a surprising degree of certainty:

Acts of terrorism committed by private groups or organizations as such are not armed attacks in the meaning of Art. 51 of the UN Charter. But if large scale acts of terrorism of private groups are attributable to a state, they are armed attack in the sense of Art 51.³⁶

The logic of this view is a little hard to follow. It might conceivably suggest that states do not have a right of self-defence against pirates, ‘barbarians’, or armed gangs if they have no known connection with a particular state. Yet in actual cases the right of states to defend themselves against ongoing attacks, even by private groups, is not generally questioned. What *is* questioned is the right to take action against the state that is the presumed source of such attacks, as distinct from taking action against the on-going attack itself.

Going back to the original Charter text and to the first principles, Article 51 would appear to be open to a broader interpretation than that of Randelzhofer. Article 51 specifies neither that an armed attack has to be by a state, nor that it has to assume a conventional form.

On this matter, I cannot agree with a key part of the ICJ’s reasoning in the *Wall* Advisory Opinion of 2004. The ICJ Opinion discusses Article 51 in only two paragraphs; paragraph 138 and paragraph 139. In the latter of these, after quoting from Article 51, the ICJ Advisory Opinion continues:

³⁶ Albrecht Randelzhofer in Bruno Simma (ed.) (1994) “*The Charter of the United Nations, A Commentary*”, p. 802.

“Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State.”³⁷

The ‘thus’ in that sentence is misleading: the Charter is not specific on the point that armed attack has to be ‘by one State’. The ICJ Opinion’s paragraph 139 continues:

“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 Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.

“Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.”³⁸

It is surprising that the ICJ, in the only discussion of Article 51 in the entire Advisory Opinion, did not explain and justify a conclusion that seems, on the face of it, hard to square with the language of the Charter. On this specific point, i.e. regarding the scope of Article 51, the dissenting Declaration made by Judge Thomas Buergenthal is much more persuasive.

In what it says about Article 51, the ICJ’s *Wall* Advisory Opinion is likely to reinforce concerns that the ICJ is not as rigorous as it should be; and also that it is not knowledgeable about security issues, and has failed to understand the basic fact that states have for centuries been concerned about possible attacks by non-state entities as well as by other states.³⁹

There are undeniably some difficulties in the position I have advanced here – namely that major terrorist attacks, whether or not they are clearly linked to a particular state, may constitute “armed attack” and therefore, by implication, may justify a military response. Most of the difficulties relate to the consequences that flow from such a position, as the following four considerations suggest:

1. It is not always possible to be sure from whence an attack came, or which (if any) state or states bear responsibility for it.
2. The exact nature of a state’s responsibility for a terrorist attack may be complex and debatable. Is a state responsible when it tried, but ineffectually, to stop activities within its borders? Or when a small faction

³⁷ Note 5 *supra*, para.139.

³⁸ *Ibid.*

³⁹ My criticisms here of the ICJ’s *Wall* Advisory Opinion should not be taken to imply support for Israel on the wall generally. I am on record as supporting the application of international humanitarian norms to the Israeli-occupied territories. My concern is simply that the Advisory Opinion includes some general statements that are based on weak reasoning, show little understanding of realities on the ground on both the Israeli and Palestinian sides, and offer poor guidelines for the future.

of the government has got out of hand and encouraged activities of which the rest of the government disapproves?

3. Even if a victim state is fairly sure which state is responsible for the attack, the evidence that can be presented in public at the time may be incomplete; and it may be unconvincing to third parties. Thus the Libyan responsibility for the Berlin discotheque bombing in 1986 was formally established only in 2003/4, in a court case in Berlin. The US has of course taken military action against Libya already in 1986, and at the time there was some international scepticism about whether Libya was responsible, as well as about the efficacy of bombing as a response.
4. The historical record of wars against alleged sources of terrorism is not strong. Cases that give grounds for doubt about any kind of blanket approval of military action in purported response to terrorist attacks include Serbia 1914, Lebanon 1982, and Iraq 2003.

These four considerations need to be explicitly recognised. The conclusion to be drawn from them is that if (as I believe it should be) the concept of “armed attack” is accepted as encompassing certain types or patterns of terrorist attacks, then that should not be taken as an automatic licence to respond militarily. Any argument for military action needs to be made carefully in each case. Moreover, precisely because of the debatable character of the use of force in such cases, a multilateral response would be likely to command more legitimacy than a purely unilateral one.

As to whether an attack originating in occupied territory can constitute an “armed attack”, the core issue here is whether, when an attack emanates from an occupied territory under its control, and takes place on the territory of the occupying power, it can constitute “armed attack”. On this question, too, I consider that the case for a positive answer is strong.

Here it is again necessary to refer to the ICJ’s above-quoted paragraph 139 of the *Wall* Advisory Opinion. On this particular question the Court’s logic again appears flawed.

It is true that the suicide bombings with which Israel has been faced in recent years appears to have originated in the West Bank and Gaza, and that these territories have a special status, with much or all of them under Israeli occupation. This case is therefore significantly different from the assault on the USA of 11 September 2001, on which there was evidence that it originated in a foreign sovereign state. However, it is questionable to suggest or imply that there can be no right of self-defence against an attack that originates in territory in which Israel is deemed to exercise control.

In most circumstances the existence of a right of self-defence is accepted. For example, if an attack originates within a state, that state would in principle be seen as entitled in international law to take action against those launching such an attack: that is part of its prerogative as a sovereign state. Similarly, if an attack originates outside a state, i.e. in the territory of another state, then the attacked state would in principle be seen to be within its rights in taking action against it. All this raises the question as

to whether the status of occupied territory is so special and unique that the right of the occupying power to self-defence is in some way significantly more restricted than the rights of governments in other situations. It is not clear that there is any such restriction in international law.

A further issue arises, which the ICJ did not discuss: whether at all relevant times the areas of the West Bank and Gaza under the control of the Palestinian National Authority should be deemed to be occupied territory. It is odd that the ICJ simply assumed that Israel exercises control over the whole of the West Bank and Gaza. It did not even consider the possibility that in certain areas of these territories its control was limited. The Palestinian National Authority is not even mentioned in the Advisory Opinion.

In conclusion, there is a strong case for asserting that terrorist actions by a non-state entity, originating in occupied territory or in a territory under a type of administration that does not constitute a fully recognised state, and aimed at the occupying power, can constitute "armed attack". Further, such actions can at least in certain circumstances bring into play the right of self-defence. However, there is a need for extreme caution about how that right is exercised.

Philippe Sands

In my opinion, the right to exercise self-defence relates not only to an attack from another state but also to attacks from non-state actors. That point seems to me to be relatively clear, following the determination by the United Nations Security Council that the inherent right to self defence may be exercised in relation to terrorist acts⁴⁰. In this regard, I regret the language adopted by the ICJ in its *Wall* Advisory Opinion of 2004. This part of the Opinion fails to take into account developments across the world, in particular a rise of non-state organisations which are committed to terrorist activities, an increase in the number of "failed states", and the dangers posed by the proliferation of weapons of mass destruction.

Malcolm Shaw

Although certain French writers⁴¹ have argued that Article 51 concerns only responses to aggression against another state and despite one reading of paragraph 139 of the *Wall* Advisory Opinion, I think it clear that the right of self-defence operates with regard to attacks from non-state actors such as terrorist groups. Security Council resolutions 1368 and 1373 can only be interpreted in this light. Practice is also replete with example of terrorist groups being directly targeted. Of

⁴⁰ See UN Security Council Resolution 1368 "Threats to international peace and security caused by terrorist acts", S/RES/1368 (2001).

⁴¹ See, for example, Alain Pellet, "*Non, ce n'est pas la guerre!*", *Le Monde*, 20 September 2001; "No, this is not war!" in EJIL discussion forum on 'The Attack on the World Trade Center: Legal Responses' at http://www.ejil.org/forum_WTC/ny-pellet.html.

course, the context is critical. An attack by one state upon persons suspected of terrorist involvement in that state but present in a neighbouring state would constitute aggression/use of force where the latter is acting in accordance with normal international norms of non-intervention (e.g. IRA activists in Ireland or ETA activists in France). However, if the state subjected to the action is unable or unwilling to take measures against the terrorists, who are preparing further activities to be visited upon the target state, then action may be taken within the context of self-defence. Examples may include Southern Lebanon up to 1982 or Afghanistan in 2001.

Again, circumstances are key and the legitimacy of the action will depend upon the dangers posed by the terrorists and the failure of the state in which they are located to take appropriate action to restrain attacks upon the target state. The evolution of more and more devastating weaponry and the phenomena of rogue and failed states are both highly relevant in this context.

Gerry Simpson

The phrase “from another state” carries, at least, four possible meanings.

- A use of force by one state against another using conventional forces, such as in the case of the Iraqi invasion of Kuwait in 1990;
- A use of force by one state, deploying armed groups or armed bands to carry out cross-border raids, against another, such as was the situation outlined in the ICJ’s *Nicaragua Case*;
- A terrorist attack against one state planned, initiated and launched from the territory of another state that either supports or harbours the terrorist group, such as the case of the attacks of 11 September 2001 launched against the United States by groups (*Al-Qaeda*) believed to be operating from inside (and with the knowledge and/or support of the *de facto* government of) Afghanistan;
- A terrorist attack against one state planned, initiated and launched from the territory of another state without that state’s approval or in the face of that state’s active (but ineffective) opposition.

The first two cases give rise to a right to use force in self-defence. The third is a little trickier. Something would depend on the gravity of the incident in question (it would have to be analogous to the use of military force by a state (*Nicaragua*)). But there is a further problem. The attack on America on September 11th, 2001 may have reached the level of an armed attack but the *responsibility* of the state of Afghanistan for that attack creates a different set of difficulties. The 2001 ILC Articles on State Responsibility⁴² offer some help but these were not intended to cover the question of self-defence. The ICJ gave a restrictive view of this case when it found that there was

⁴² ILC (2001) “*Draft Articles on Responsibility of States for Internationally Wrongful Acts*”, see Report of the International Law Commission on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10)*, chp.IV.E.1.

"no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf".⁴³

In the fourth case, I would argue that there is no right under international law to use force in self-defence.

Colin Warbrick

The reactions of states to the events of 11 September 2001 suggest that an operation by a non-state actor of sufficient magnitude to constitute an armed attack were it carried out by a state will be regarded as an event giving rise to a right of self-defence⁴⁴. However, caution needs to be exercised in assessing the consequences of this proposition, in particular, what precisely it means for the exercise of self-defensive force by the victim state on the territory of other states, since there will be no "territory" of the actual attacker. This is to accept that, since an "armed attack" can come from a non-state actor, the notion of "attack" should embrace the same extensions *mutatis mutandis* as those alluded to above with respect to attacks by states. But the hard question remains: against what targets may self-defensive force be used in the event of an armed attack by a non-state actor? (See my response to question 7, below).

Nicholas Wheeler

This question was posed starkly by the US response to the terrorist attacks on 11 September 2001. A non-state terrorist group attacked the USA, but the counter-attack was directed against the territory of Afghanistan that had provided a safe haven for *Al-Qaeda*. The UN Security Council in Resolutions 1368, 1373 and 1378 recognised the right of self-defence to respond to attacks of this kind. Here, the Security Council recognised that large-scale terrorist attacks could constitute an "armed attack" that gives rise to a right of self-defence. The US claimed that it was acting in self-defence in taking action against the Taliban and *Al-Qaeda*, with military action being undertaken to defend the United States against potential future attacks of the kind experienced in New York and Washington DC. The threat of future attacks, in the light of past attacks, justifying the claim that the USA acted pursuant to a right of self-defence.

Critics of the legality of the war in Afghanistan argue that the terrorist attacks on 11 September 2001 fail to meet the requirement of an "armed attack" because this is restricted to the use of force by states, and requires, in the words of the 1974

⁴³ See the *Nicaragua* Judgment (1986), note 2 *supra*, at 62, para.101.

⁴⁴ See UN SC Resolution 1368 (2001), note 17 *supra*.

General Assembly's Definition of Aggression⁴⁵, activity analogous to large-scale cross-border attacks.⁴⁶

Set against this, the drafters of the UN Charter did not envisage non-state violence on the scale of the events of 11 September 2001, and it is necessary for interpretations of Article 51 to evolve to meet the challenges posed by groups like *Al-Qaeda*. The resolutions adopted by the Council in the immediate aftermath of the 11 September attacks provide strong support for a new custom that supports a right of self-defence against states that are believed to have harboured groups who have committed attacks – and crucially, are preparing further attacks - against the territory of the state claiming the right of self-defence. What is left unclear here is whether this right to self-defence extends to anticipatory action against terrorist groups – and their state sponsors - before they have launched an attack. For example, could the US, believing there to be an imminent threat from *Al-Qaeda*, have reasonably claimed a right of self-defence in attacking terrorist bases in Afghanistan on 10 September, 2001?

Sir Michael Wood

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). State practice, including the practice of the Security Council, strongly supports this position. The right of self-defence applies if the attack comes or is directed “from” outside the state exercising the right, though it may be perpetrated by non-state actors. This appears to be the underlying rationale of the ICJ in the *Wall* Advisory Opinion.

The ICJ dealt (at paragraphs 138 and 139 of the *Wall* Advisory Opinion) 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)”. Its treatment of this matter was subject to criticisms by Judges Higgins (paragraphs 33 to 36 of her Separate Opinion), Kooijmans (paragraphs 35 and 36 of his Separate Opinion) and Buergenthal (paragraphs 4 to 6 of his Declaration).

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 recognises the existence of an inherent right of self-defence in the case of an armed attack by⁴⁷ one state against another state”. 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 and 1373.

⁴⁵ United Nations General Assembly Resolution 3314 (XXIX) “*Definition of Agression*” (1974).

⁴⁶ Simpson, G. “*Great Powers and Outlaw States*”, p.332.

⁴⁷ See also later in paragraph 139, “imputable to”.

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

(a) it seems doubtful whether non-forcible measures fall within self-defence under Article 51: see the Separate Opinion of Judge Higgins at paragraph 35;⁴⁸

(b) 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 this⁴⁹, it is not widely accepted⁵⁰. It is curious that the Court did not cite the *Nicaragua* Judgment. Judge Buergenthal agrees with Judge Higgins on this, and as Judge Kooijmans said, at paragraph 35 of his Opinion, it is really beside the point;

(c) 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. Judges Higgins⁵¹ and Buergenthal⁵² 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.⁵³

This is surely convincing. It seems that the Court was merely 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 attacks of 11 September were directed from abroad against the USA they should be regarded as

⁴⁸ Note 5, *supra*. Necessity, considered and rejected by the Court at para.140, and was perhaps potentially more relevant.

⁴⁹ *Ibid*, para.33.

⁵⁰ See also criticism of this reasoning by Judge Higgins in her academic capacity in Higgins, R. "Problems and Process: International Law and How We Use It", pp.250-251.

⁵¹ Separate Opinion of Judge Higgins on "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", ICJ Reports (2004), para.34.

⁵² Separate Opinion of Judge Buergenthal on "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", ICJ Reports (2004), para.6.

⁵³ Eick, C. "Präemption", 'Prävention' und Weiterentwicklung des Völkerrechts", ZRP 2004, 200 at 201 (my translation). See also Watts, "Physical Barriers to Armed Infiltration: Self-Defence and Israel's Wall in the Occupied Palestinian Territories".

actions covered by Article 5 of the North Atlantic Treaty⁵⁴. On the facts 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 11 September 2001. So too do the invocation by NATO and the OAS of their respective mutual defence obligations⁵⁵. In his statement of 21 April 2004 in the House of Lords, the 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.⁵⁶

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.

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 on Al-Jazeera that:

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

⁵⁴ See "Statement by the North Atlantic Council" NATO press release (2001) 124.

⁵⁵ 40 ILM(2001), 1267 and 1270.

⁵⁶ Statement of Attorney General, Lord Goldsmith, to the House of Lords, *Hansard*, 21 April 2004, column 370.

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.

The issue of 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 such as Franck,⁵⁷ Greenwood,⁵⁸ Murphy⁵⁹ and Sofaer,⁶⁰ 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. Greenwood and Murphy both cite the *Caroline* incident itself as an early example. Verhoeven,⁶¹ Byers⁶² and Ratner⁶³ each suggest that whatever may previously have been the law, following the attacks of 11 September 2001 almost all states acquiesced in the invocation by the US and the UK of the right of self-defence as the legal basis for the action in Afghanistan. In somewhat similar vein, Gray⁶⁴ appears to suggest that Afghanistan should be largely confined to its facts (a massive terrorist attack, continuing threat of global terrorism by those responsible for it, the response was directed at a country which had allowed the terrorists to operate from its territory and refused to surrender them, and the findings of the Security Council contained in resolutions 1368 and 1373). Others (including Cassese,⁶⁵ Charney,⁶⁶ Corten and Dubuisson,⁶⁷ Myjer and White⁶⁸) believe that Article 51 is limited only to armed 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. In an article from 1989, Schachter⁶⁹ suggests that there is nothing in the text of

⁵⁷ Franck, T (2001) “*Terrorism and the Right of Self-Defence*”, 95 AJIL 839.

⁵⁸ Greenwood, C. (2002) “*International Law and the ‘War on Terrorism’*” (2002) International Affairs Vol.78, Issue 2, April 2002, 301.

⁵⁹ Murphy S.D. (2002) “*Terrorism and the Concept of ‘Armed Attack’ in Article 51 of the UN Charter*” 43 Harv. JIL 41, though 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.

⁶⁰ Sofaer, A. (2002) “*Terrorism as War*” ASIL Proceedings 254: see also J. Murphy *The United States and the Rule of Law in International Affairs* (2004) at p. 169.

⁶¹ Verhoeven, J. “*Les ‘étirements’ de la légitime défense*” (2002) 48 AFDI 49.

⁶² Byers, M. “*Terrorism, the Use of Force and International Law after 11 September*” (2002) 51 ICLQ 401.

⁶³ Ratner, S. “*Jus ad Bellum and Jus in Bello after September 11*” (2002) 96 AJIL 905.

⁶⁴ See Gray, *loc.cit.*, note 9, *supra*, at pp.164-179.

⁶⁵ Cassese, A. “*Terrorism is also Disrupting some Crucial Legal Categories in International Law*” (2001) 12 EJIL 993.

⁶⁶ Charney, J. “*The Use of Force Against Terrorism and International Law*” (2001) 95 AJIL 835.

⁶⁷ Corten, O. and Dubuisson, F. “*Opération ‘liberté immuable’: une extension abusive du concept de légitime défense*” (2002) 106 RGDIP51.

⁶⁸ Myjer, E. and White, N. “*The Twin Towers attack: an Unlimited Right to Self-Defence*” (2002) 7 Journal of Conflict and Security Law 5.

⁶⁹ Schachter, O. “*The Use of Force against Terrorists in Another Country*” (1989) 19 Is. YB HR 209

Article 51 which limits “armed attack” to acts by or imputable to a state, but finds such a limitation is implicit from the ICJ Judgment in the *Nicaragua* Case and earlier work of the ILC on State Responsibility⁷⁰. Finally, Bruneel and Toope⁷¹ require that there be a necessary link (direct support or at least tacit approval) between the target state of a self-defence action and the terrorists perpetrating the attack, although ‘states without any effective government may be an exception’.

Question 3: Must there be an actual armed attack before the right of self-defence comes into play?

Sir Franklin Berman

This is a stale question; although it has been running for decades, the debate has thrown up no new elements leading to any conclusion other than that it remains unrealistic to suppose that self-defence must *in all cases* await an actual attack. There is (again) nothing in the way Article 51 is worded to require it to be interpreted this way; nor, in any event, does the negotiating history display a clear intention to cut down the right of self-defence in this way, such as would be necessary to impose a literalist reading in order to produce so unrealistic a result.

It might in any case be observed that the *whole* of the law of self-defence rests upon the neutralization of threats. This is what the *proportionality* rule establishes; the law doesn’t provide for a tit-for-tat response, an eye for an eye, but allows the injured state to do what is reasonably necessary to deal with the *threat* it is facing, even if the threat comes into being as the result of an actual attack, not an imminent one.

The ICJ judgment in the *Nicaragua* Case remains as unsatisfying now as it was at the time, as a pronouncement on a fundamental point of international law. The Court’s failure, without the benefit of full argument from an absent defendant, to develop the full capacity of the combined *necessity* and *proportionality* criteria remains a particularly unhappy feature of the decision. A sliding scale calibrated according to the nature and magnitude of the threat, and its origin (the actors involved etc.) is perfectly feasible, and certainly would not have the effect of encouraging abusive claims; on the contrary, it would pose a criterion which, simply because of its practical realism, conduces better to the functioning pattern of accountability that is so plainly lacking at present. The *Caroline* incident was as much about anticipatory self-defence as about the riposte to actual armed attacks.

⁷⁰ Note 19, *supra*.

⁷¹ 53 ICLQ (2004) 785 at p.795 and footnote 58. In the case of ‘state failure’, the authors say, ‘the simple presence of terrorists may be enough to justify a carefully targeted armed response, addressed at the terrorists alone. This approach would of course amount to a limited extension of self-defence to resist the armed attacks or imminent attacks of non-State actors, but only in the rare situations where no state authority exists.’

Much of the 'problem' is artificial, and derives from an insistence on looking at self-defence as if it were a legal institution wholly separate from the Chapter VII powers of the Security Council, which, even on the literal terms of Article 51, it plainly is not.

The answer lies in the nature of the particular threat, and in the nature of the measures apt to neutralise it. There is little room for abstract general propositions; *necessity* and *proportionality*, applied properly and in good faith, are adequate to cope with all reasonably foreseeable circumstances.

Daniel Bethlehem

This question was expressly left open in the *Nicaragua Case*. While there may be some who still contend that the language of Article 51 expressly excludes any right of anticipatory defence, I do not believe that this view is sustainable. The better view, in my opinion, is that international law does permit anticipatory self-defence. The debate, such that it is, is centred around the circumstances in which such a right can be exercised.

James Gow

In conventional terms, yes, but that could, just, mean 'intercepting' an attack that has not yet inflicted a blow, but is about to do so, or is in the process of attempting to deliver the first blow. However, in a meaningful sense, for the contemporary international environment, it absolutely should not. Some questions, in some cases, will be so risky that not to take action, even if there is an element of doubt, will be unacceptable. The key issue to work through this question on the near horizon is that of Iran. I have no doubt that no recent US Administration (post-Carter) and no future US Administration could countenance Iran's acquiring of a nuclear weapons capability, nor that it will use force, if appropriate, one way or another, on one scale or another, to prevent such acquisition (with the only alternative being to 'permit', 'encourage' and 'assist' Israel to perform the mission instead, something that would have even more negative impact on the security environment than the US's striking).

Leaving aside the very important question (which, I presume, should impact on consideration of proportionality) of 'how' the action will be deemed to be necessary and that it will be taken is sure, in the given situation. This would be an act of self-defence, pre-emptively, because waiting until a later state would be too late. Iran's connection with *Hizbollah* would be a factor here, increasing the sense of risk. At the same time, that link would probably not be sufficient to justify a use of destructive force even under the widened interpretation of the right to self-defence mentioned in the previous answer. An interesting question of policy and practice in seeking to determine some kind of boundary or threshold would be consideration of what Iran could do reasonably to maintain nuclear programmes, even to acquiring a nuclear weapons capability that would be acceptable and would not make it be viewed as a threat.

Christopher Greenwood

Not in my opinion. I think state practice supports a right of anticipatory self-defence against an imminent armed attack but not the kind of pre-emptive action where an attack is not imminent that the US contemplated in the Security Strategy Document⁷².

Vaughan Lowe

No. It is enough if an attack is imminent. The relevant questions here are all well-known and I do not intend to wade through them. The key principles seem to me to be:

1. that the factual circumstances must be such as to demonstrate a plain probability of an attack; and,
2. that the use of forcible defensive action must to be postponed in favour of non-forcible measures and measures not involving an infringement of the sovereignty of another state, so that forcible measures are employed only at the point where there is no reasonable alternative that is reasonably likely to be effective in averting or stopping the attack.

Sir Adam Roberts

That there has to be some right of states to act pre-emptively (i.e. eliminating the prospect of an imminent attack by disabling a threatening enemy) is quite widely but not universally accepted. The acceptance of this principle is partly a recognition of a fact of life – that states and their citizens are inevitably attracted to the idea of preventing the possibility of attacks, rather than waiting until they occur and then responding.

In the writings of international lawyers, an acceptance that there must be some scope for pre-emptive action is usually associated with the view that Article 51 of the UN Charter simply recognises a pre-existing right of self-defence, which continues in the UN era.

Similarly those who oppose pre-emptive action tend to see Article 51 as replacing the traditional right to self-defence. See, for example Professor Randelzhofer's reasoning where he states that 'an anticipatory right of self-defence would be contrary to the wording of Art. 51...as well as its object and purpose'⁷³, going on to assert that 'Art.

⁷² National Security Strategy of the United States of America (2002), available at <http://www.whitehouse.gov/nsc/nss.html>, reprinted in 41 ILM 1478 (2002)..

⁷³ Randelzhofer in Simma, B. (ed.) (1994) "*The Charter of the United Nations, A Commentary*", p.803.

51, including its restriction to armed attack, supersedes and replaces the traditional right to self-defence'.⁷⁴ One weakness of this position is that, by setting a standard that might prove unrealistic, it risks reducing international law on the *jus ad bellum* to near-irrelevance.

The better conclusion is that there is a respectable argument that the right of self-defence can come into play even before there is an actual armed attack. However, there are, undeniably, very great risks in opening the door to pre-emptive military action by states. Pre-emption is likely to depend on thoroughly subjective judgements about a presumed threat. Information from intelligence agencies may be inaccurate or tainted. Other states may be sceptical about the justifications made by a state engaging in pre-emptive action. Thus there is a need for procedural and substantive safeguards to reduce the risk of abuse.

Philippe Sands

The right of self-defence encompasses a right to use force in anticipation of an actual armed attack, where there is an imminent threat (this view is set out more fully in my Memorandum to the House of Commons Select Committee, paragraph 9 [below]). In this regard, I reiterate my agreement with the views set out in a memorandum prepared by Professor Christopher Greenwood (October 2002, paras. 20-26 [see below]).

Memorandum of Professor Philippe Sands (June 2004):

"9. The conditions under which self-defence may justify the use of force are set out in the memoranda of Professor Greenwood (paras. 20-26). I subscribe fully to the views he there expresses. In particular, I agree that the right of self-defence encompasses a right to use force in anticipation of an actual armed attack, where there is an imminent threat. In addition, since the UN Security Council has determined that the inherent right to self-defence may be exercised in relation to terrorist acts (see resolution 1368 (2001) of 12 September 2001) the right to anticipatory self-defence extends to non-statal terrorist acts also."

Memorandum of Professor Christopher Greenwood (October 2002):

"21. The question is whether the right of self-defence under customary international law which is preserved by Article 51 of the Charter would justify military action against Iraq on the basis of a threat of armed attack. In my opinion, it would do so if the threat was of an imminent armed attack but not otherwise.

22. Although Article 51 refers to the right of self-defence "if an armed attack occurs", the United Kingdom has consistently maintained that the right of self-defence also applies where an armed attack has not yet taken place but is

⁷⁴ Ibid., p.806.

imminent. A large number of other governments (including those of the USA, France, other NATO states and the former USSR) have espoused this view. It also has strong support from commentators. Thus, Judge Rosalyn Higgins (writing before her election to the ICJ) has said that—

"... in a nuclear age, common sense cannot require one to interpret an ambiguous provision in a text in a way that requires a state passively to accept its fate before it can defend itself. And, even in the face of conventional warfare, this would also seem the only realistic interpretation of the contemporary right of self-defence. It is the potentially devastating consequences of prohibiting self-defence unless an armed attack has already occurred that leads one to prefer this interpretation—although it has to be said that, as a matter of simple construction of the words alone, another conclusion might be reached." (*Problems and Process* (1994), p. 242)

The same view has been taken by Sir Humphrey Waldock (81 RC (1952-II) 496-8), Judge Schwebel (136 RC (1972-II) 478-83), Sir Gerald Fitzmaurice (92 RC (1957-II) 171), Sir Robert Jennings and Sir Arthur Watts (*Oppenheim's International Law*, 9th ed., 1992, vol. I, p. 421) and Sir Derek Bowett (*Self-Defence in International Law* (1958) 187-92). Waldock, Schwebel and Jennings are all past Presidents of the ICJ.

23. I accept that other writers, notably Professor Ian Brownlie (*International Law and the Use of Force by States* (1963) 257-61), have taken the contrary view but, with great respect to them, I believe that the view expressed by Judge Higgins and the other writers quoted above accords better with state practice and with the realities of modern military conditions.

24. Nevertheless, the right of anticipatory self-defence is quite narrowly defined. Ever since the United Kingdom-US exchange in what has become known as the *Caroline* case in 1837-38, the right has been confined to instances where the threat of armed attack was imminent. In my opinion, that still reflects international law and, in so far as talk of a doctrine of "pre-emption" is intended to refer to a broader right to respond to threats which might materialise some time in the future, I believe that such a doctrine has no basis in law.

25. In assessing what constitutes an imminent threat, however, I believe that it is necessary to take account of two factors which did not exist at the time of the *Caroline*. The first is the gravity of the threat; the threat posed by a nuclear weapon or a biological or chemical weapon used against a city is so horrific that it is in a different league from the threats posed by cross-border raids by men armed only with rifles (as in the *Caroline*). The second consideration is the method of delivery of the threat. It is far more difficult to determine the time scale within which a threat of attack by terrorist means, for example, would materialise than it is with threats posed by, for example, regular armoured forces. These would be material considerations in assessing whether Iraq posed an imminent threat to the United Kingdom or its allies.

26. If Iraq did pose such an immediate threat then, in my opinion, military action against Iraq for the purpose of dealing with that threat would be lawful. The degree of force used would have to be proportionate to the threat and no more than necessary to deal with that threat (including preventing a recurrence of the threat). In addition, the use of force would have to comply with the separate requirements of the Geneva Conventions and other applicable rules of international humanitarian law.”

Gerry Simpson

The plain words of Article 51 suggest a strict reading of the term, “armed attack” but a slim majority of scholars, drawing on the word “inherent” in Article 51, take the view that there is a right to anticipatory self-defence in heavily circumscribed instances. There are serious difficulties around the doctrine in this area. A restrictive reading leads to the absurdity of a suicidal abstention from the use of defensive force. An expansive reading risks swallowing altogether Article 2(4)’s prohibition on force.

One further problem: what is an actual armed attack? It is not at all clear precisely when an armed attack begins. Some of what is characterised as anticipatory self-defence may be classical self-defence. For example, is the arming of nuclear missiles combined with a decision to launch them the beginning of an armed attack or the prelude to an armed attack? Is the mass movement of tanks to a border area, combined with high levels of bellicosity, an armed attack or simply posturing? Some of this is psychological. Debates still rage around the Six-Day War, supposedly the high point of anticipatory self-defence, about (a) whether there really was intention on the part of Egypt to invade Israel (b) whether intention was necessary and (c) whether intention was/is discoverable?

Colin Warbrick

Yes, in the extended sense as set out in my response to question 1.

Nicholas Wheeler

Those who oppose a narrow and restrictive view of Article 51 argue that it places states in a position where they are expected to absorb what could be a devastating attack before they are permitted to respond. Some forms of “armed attack” against a state could be so overwhelming that if the defending state is required to wait until they have actually occurred, no effective defence will be possible. Critics of a narrow reading of Article 51 argue that the drafters of the UN Charter never intended it to be

interpreted in this way. Here, they argue that a proper interpretation of Article 51 supports a right of pre-emptive or anticipatory self-defence.

Those who argue for this broad interpretation of Article 51 rely on the language in that provision which states that 'nothing in the present Charter shall impair the inherent right of self-defence'. From this, it is argued a right of anticipatory self-defence exists in customary international law, and that this legal right to use force pre-emptively is not extinguished by Article 51. This claim goes back to the *Caroline* incident of 1837. The *Caroline* was a US vessel which was allegedly preparing to transport guerrilla forces and ammunition to assist rebels who were challenging British rule in Upper Canada. The British attacked the ship before it put to sea and sent it over Niagara Falls. The criteria for exercising a right of anticipatory self-defence emerged during the treaty negotiations a few years later in an exchange of letters between the British and American Governments. The British Foreign Secretary, Lord Ashburton defended attacking the *Caroline* on grounds of self-defence. But the American Secretary of State, Daniel Webster, replied that for the plea of self-defence to be accepted, the British Government would have 'to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation'.

It is argued that a broad interpretation of the rule of self-defence is supported by state practice. Examples cited here include the response of the USA to the Cuban Missile Crisis in 1962, the US bombing of Libya in 1986, and Israel's bombing of the Iraqi nuclear reactor at *Osiraq* in 1981. The United States' 2002 National Security Strategy⁷⁵ sought to justify the new policy of pre-emption by representing it as being in conformity with the existing legal right of anticipatory self-defence. Condoleezza Rice, the President's National Security Advisor, and a key figure in the drafting of the National Security Strategy, contended that the case for pre-emption should be seen as a continuation of a long tradition in which 'the United States has long affirmed the right to anticipatory self-defense'.⁷⁶ But it is evident that what was being proposed in the National Security Strategy was a radical departure from anything that Daniel Webster envisaged as justifiable self-defence.

Sir Michael Wood

No. An imminent attack suffices, see, for example, the exchange of letters following the *Caroline* incident⁷⁷.

Question 4: If the use of force in self-defence is permissible in relation to anticipated armed attacks, what does the criterion of 'imminence' mean,

⁷⁵ Note 49, *supra*.

⁷⁶ Condoleezza Rice, 2002 Wriston Lecture, New York, 1 October 2002.

⁷⁷ Note 11, *supra*.

particularly in relation to current threats? What evidence need there be of a threat of an imminent armed attack before the use of force in self-defence is justifiable?

Sir Franklin Berman

Logic and prudence both dictate that ‘imminence’ should mean just what it says. *Quaere* however whether ‘imminence’ is a separate criterion in its own right, or simply part of the criterion of ‘necessity’ properly understood, i.e. that force is only admissible as a lawful response to a threat when there is no other means of countering it. There may however be some rhetorical point in retaining the additional criterion, if it serves to place added emphasis on the fact that a forcible response in these circumstances lies at the limits of an already exceptional legal category, and therefore requires a correspondingly high level of justification.

The question of evidence plays an especially important part in this calculus (presumably ‘justifiable’ in the question means ‘lawful’, i.e. justifiable in law, not justifiable on some other measure). This is not however to decry the general importance of evidence in relation to the permissible use of force, an aspect which has been damagingly neglected in the literature. The self-defence rule cannot possibly mean that force is lawful whenever the state *thinks* that a particular application of force is necessary to deal proportionately with what it conceives to be a particular threat against it (immaterial whether the threat derives from an actual use of force or an imminent one) – even if ‘thinks’ is glossed to be ‘sincerely believes’ or even ‘very sincerely believes’; that would destroy its value and standing as a legal rule designed to balance the rights of both sides in a quarrel. The fatal flaw in the new-minted doctrine of ‘*pre-emption*’ is that it excludes by definition any possibility of an *ex post facto* judgement of lawfulness by the very fact that it aims to deal in advance with threats that have not yet come into existence; it is thus inherently self-justifying and can have no place in an ordered system of law. To make the general rule of self-defence into one that was in the last analysis self-judging would expose it to the same fundamental objection. How would such a rule protect the interests of a generally peaceable and law-abiding state against a hostile, lawless neighbour?

Evidence is, in short, fundamental to accountability, and accountability to the rule of law. The more far-reaching, and the more irreversible, its external actions, the more a right-thinking state should accept (internally as well as externally) the burden of showing that its actions were justifiable on the evidence. This does not however mean that the law refuses the state a reasonable margin of appreciation in the light of the particular circumstances to which it is called upon to react.

Daniel Bethlehem

The concept of “imminence” reflects US Secretary of State Webster’s formulation in his letter following the 1897 *Caroline* incident of ‘instant, overwhelming, leaving no

choice of means, and no moment for deliberation'. While it has now entered the lexicon of the law relating to anticipatory self-defence, "imminence" has traditionally been implicitly construed by reference to the notions of immediacy as understood in the sense of the *Caroline* incident.

In my view, if "imminence" is to be a useful concept at all in the context of contemporary threats, it cannot be construed by reference to a temporal criterion only but must reflect the wider circumstances of the threat. In this regard, there may be some utility in looking at a threat of armed attack as akin to the inchoate offence of an attempt to commit a criminal act in domestic law in which the offence is completed when the last (or perhaps critical) preparatory step is undertaken. On this view, an imminent attack may occur when the State or group which threatens the attack has put in place all the necessary elements for such an attack. The one appropriate exception to this, stretching the temporal framework more broadly, is in circumstances in which an early preparatory act may so raise the threshold of the threat and the likelihood of attack that it gives rise to a right of anticipatory self-defence on the ground of necessity.

As regards threats posed by the use of WMD, I expressed the view, in my evidence to the Foreign Affairs Select Committee, that there would be some advantage in the development of a concept of a "threat of catastrophic attack" and that, faced with a threat of attack of this kind, it would be appropriate to begin to think beyond imminence to reasonable foreseeability, i.e., away from temporal notions of threat and towards action required to neutralise the risk of catastrophic harm. In its recommendations, the Committee addressed this point in the following terms:

"We conclude that the concept of 'imminence' in anticipatory self-defence may require reassessment in the light of the WMD threat but that the Government should be very cautious to limit the application of the doctrine of anticipatory self-defence so as to prevent its abuse by states pursuing their national interest. We recommend that in its response to this Report the Government set out how, in the event of the legitimisation of the doctrine of anticipatory self-defence, it will persuade its allies to limit the use of the doctrine to a 'threat of catastrophic attack'. We also recommend that the Government explain its position on the 'proportionality' of a response to a catastrophic attack, and how to curtail the abuse of that principle in the event of the acceptance of the doctrine of anticipatory self-defence by the international community."⁷⁸

On the question of the evidence necessary before a State can act by way of anticipatory self-defence, the threshold should be both high and, insofar as this can reasonably be achieved, the evidence should be publicly demonstrable. In the light of recent events, this issue will clearly be pivotal to the on-going debate on these issues. Related to this, I am of the view that the ICJ's rejection, in the *Oil Platforms* Case, of any margin of appreciation by States on this issue, requiring strict and

⁷⁸ Foreign Affairs Select Committee (2004), para.429.

objective proof of a threatened attack, is incredible and will not, and should not, be the governing standard in these matters.

James Gow

Imminence must mean something that is not too late – but that could not always be precisely defined. Evidence in cases such as this will be notoriously difficult to adduce. There might be sketchy information, painting a dangerous picture, but one that might in the end prove to be benign. It might be that there is no way that the evidence can reasonably be produced, perhaps because of its nature, or source, perhaps because it is the product of interpretation of many small pieces of information. This could be the case even after a use of destructive force. It might be that information turns out to be wrong. But it will be almost impossible not to act in some situation or another. Context will define, as it always has regarding proportionality as an issue. The questions have to be not only what evidence need there be, but who must be aware of it/shown, as well as how it can be communicated, at which stages before, during and after an engagement, and with what conditions specifically and broadly set for responsible action under the right to self-defence.

Christopher Greenwood

I think one still starts with the criteria as defined following the *Caroline* incident, but we need to take account of two other factors in assessing what is meant by imminence – the gravity of the threat (e.g. a more generous notion of imminence if what is threatened is another '9/11' rather than the minor acts of the *Caroline* incident) and the means of delivery. It is far more difficult to assess the timeline for a covert attack as intelligence here is a bit like seeing the periscope of the submarine in World War II – one only gets a glimpse and it is difficult to say exactly when the attack will occur. I think the UK Attorney General set the standard too high in his April 2004 statement⁷⁹ when he said that the attack must actually be imminent. The correct standard seems to me to be one of reasonable suspicion but that requires real evidence that an attack is imminent sufficient to convince a detached bystander and not just someone who wants to be convinced.

Vaughan Lowe

The requirement of “imminence” is satisfied if there is evidence that an attack is planned, that preparations for the attack have been commenced, and that it is intended to proceed to commit the attack, and if it is reasonably believed that any further delay in countering the intended attack will probably result in the inability of

⁷⁹ Note 33, *supra*.

the defending state effectively to defend itself against the attack. This follows from the previous answer.

If a state wishes to be exonerated for its use of force in self-defence, it must be prepared to adduce the evidence that it considered to be the justification for its action. If it is not prepared to do that, it can of course still use force in self-defence, but it must accept the consequences of its decision not to justify its action –as it would if its attempted justification were found to be inadequate.

Sir Adam Roberts

Contemporary debates about pre-emptive and preventive uses of force are not limited to the question of responding to imminent attack – i.e. pre-emptive action. Successive US administrations have also indicated some interest in a right of military action to nip a future threat in the bud – what is properly called preventive action. The classic work of official advocacy of such approaches is of course The National Security Strategy of the United States.

It is somewhat confusing that these two debates have both been subsumed under the label of pre-emption. In the field of strategic studies ‘pre-emptive strike’ refers to military action to prevent an imminent military attack. Confusingly, the Attorney-General’s statement in the House of Lords on 21 April 2004 referred to ‘a pre-emptive strike against a threat that is more remote’. I do not quarrel with the substance of his remark (namely that such an attack is not authorised in international law), but I do disagree with the label – ‘preventive’ being the more correct term in this case.

I have discussed aspects of these debates, and various other issues more fully in a 2003 booklet on *International Law and the Use of Military Force*.⁸⁰ In what follows I shall summarise my view on this very briefly. I will stick to the question of pre-emptive military action against imminent attack, but one has to recognise that this shades by degrees into the conceptually separate matter of preventive military action.

The criteria which emerged following the *Caroline* incident strike me as of limited value in assessing whether pre-emption may be justified in a particular case. Except at the tactical level, the situation in the *Caroline* incident was not basically about pre-emption, as in December 1837 the rebellion in Canada was actual and ongoing. Moreover, the case for pre-emptive action today could not be confined to the ‘*Caroline* criteria’, and in particular by the criterion that there is ‘no moment for deliberation’. Many crises that involve possible questions of pre-emptive military action have been the subject of extensive domestic and international deliberation: witness the long debates about possible terrorist and/or nuclear threats from Iraq, Iran, North Korea, and so on.

⁸⁰ Roberts, A (2003) “*International Law and the Use of Military Force: The United Nations, the United States and Iraq*”, Europaem: OXFORD. This is the text of a Europaem Lecture that I delivered at Leiden University, 6 June 2003.

'Imminence' of attack has to mean intent, capacity, plans and active preparations to attack. Because of the high risk of abuse of any right of pre-emption (however qualified that right was), there should be a high standard of evidence. The evidence should be thoroughly tested by proper procedures within government and perhaps also internationally. Here again, the criterion of 'no moment for deliberation' found in the *Caroline* case strikes me as unfortunate: it is likely to be the enemy of judicious consideration and proper procedure.

Philippe Sands

I reiterate the views set out at Paragraphs 8 to 16 of my Memorandum of June 2004 to the House of Commons Select Committee on Foreign Affairs (below). In particular, I consider that to the extent that a doctrine of "pre-emption" encompasses a right to respond to threats which have not yet crystallized but which might materialise at some time in the future, then such a doctrine has no basis in international law. I agree with the view expressed by the Attorney General in his statement to the House of Lords on 21 April 2004 covering the circumstances in which the use of force in anticipatory self-defence may be permitted. The conditions set forth following the *Caroline* incident have to be read against modern and recent developments, so that the concept of imminence be treated as a flexible one which is to be determined by reference to *capability* and *intent*. Each case will necessarily turn on its own facts, and is dependent on a decent level of confidence and trust in the process of assessing the circumstances in which an armed attack is imminent. The determination of "imminence" is one which each state is entitled to take. However, such determination is to be made on grounds which are capable of objective assessment and must be motivated by the application of proper criteria. In this regard the circumstances leading up to the recent Iraqi conflict have undermined the credibility of systems for gathering and assessing intelligence in the United Kingdom. Trust needs to be restored.

Memorandum of Philippe Sands dated June 2004 to the House of Commons Select Committee on Foreign Affairs (paragraphs 8-16):

8. "The possibility that terrorist organisations or rogue states might obtain WMD has concentrated minds on the circumstances under which a state is entitled to use force in self-defence to prevent a future attack, within the meaning of Article 51 of the United Nations Charter. Again, this argument was not made in relation to Iraq.
9. The conditions under which self-defence may justify the use of force are set out in the memoranda of Professor Greenwood (paras. 20-26). I subscribe fully to the views he there expresses. In particular, I agree that the right of self-defence encompasses a right to use force in anticipation of an actual armed attack, where there is an imminent threat. In addition, since the UN

Security Council has determined that the inherent right to self-defence may be exercised in relation to terrorist acts (see resolution 1368 (2001) of 12 September 2001) the right to anticipatory self-defence extends to non-statal terrorist acts also.

10. I also agree with Professor Greenwood that the right of anticipatory self-defence must be narrowly defined. As Professor Thomas Franck has put it:

“The problem with recourse to anticipatory self-defence is its ambiguity. In the right circumstances, it can be a prescient measure that, at low cost, extinguishes the fuse of a powder keg. In the wrong circumstances, it can cause the very calamity it anticipates.” (*Recourse to Force: States Action Against Threats and Armed Attacks*, Cambridge University Press, 2002, p. 107).

11. In what circumstances might a threat be said to be imminent, such as to justify the exercise of anticipatory self-defence? Does it encompass threats which have not yet materialised but which might materialise some time in the future? The US National Security Strategy (September 2002) appears to suggest that it does. It states that:

“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 civilisation openly and actively seek the world’s most destructive technologies, the United States cannot remain idle while dangers gather.” (p. 15, emphasis added).

In his Memorandum to this Committee Professor Greenwood wrote of the US National Security Strategy that “so far as talk of a doctrine of “pre-emption” is intended to refer to a broader right to respond to threats which might materialise some time in the future, I believe that such a doctrine has no basis in law” (para. 24). I agree with Professor Greenwood’s statement.

12. In his speech of 5 March 2004 the Prime Minister said:

“Containment will not work in the face of the global threat that confronts us. The terrorists have no intention of being contained. The states that proliferate or acquire WMD illegally are doing so precisely to avoid containment. Emphatically I am not saying that every situation leads to military action. But we surely have a duty and a right to prevent the threat materialising; and we surely have a responsibility

to act when a nation's people are subjected to a regime such as Saddam's." (emphasis added).

Some press reports of this speech have suggested that the Prime Minister was endorsing the United States' doctrine of pre-emption.⁸¹ It is not clear to me that that was his intention.

13. The Attorney General, Lord Goldsmith, made an important statement in the House of Lords on 21 April 2004. In response to a question from Lord Thomas of Gresford as to whether the Government accepted the legitimacy of pre-emptive armed attack as a constituent of the inherent right of individual or collective self-defence under Article 51 of the United Nations Charter, the Attorney General said:

"It is argued by some that the language of Article 51 provides for a right of self-defence only in response to an actual armed attack. However, it has been the consistent position of successive United Kingdom Governments over many years that the right of self-defence under international law includes the right to use force where an armed attack is imminent.

It is clear that the language of Article 51 was not intended to create a new right of self-defence. Article 51 recognises the inherent right of self-defence that states enjoy under international law. [...] It is not a new invention. The Charter did not therefore affect the scope of the right of self-defence existing at that time in customary international law, which included the right to use force in anticipation of an imminent armed attack.

The Government's position is supported by the records of the international conference at which the UN charter was drawn up and by state practice since 1945. It is therefore the Government's view that international law permits the use of force in self-defence against an imminent attack but does not authorise the use of force to mount a pre-emptive strike against a threat that is more remote. However, those rules must be applied in the context of the particular facts of each case. That is important.

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

⁸¹ See e.g. Financial Times, 6 March 2004, p. 2, "*PM defends pre-emptive attacks on rogue states*".

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.

Two further conditions apply where force is to be used in self-defence in anticipation of an imminent armed attack. First, military action should be used only as a last resort. It must be necessary to use force to deal with the particular threat that is faced. Secondly, the force used must be proportionate to the threat faced and must be limited to what is necessary to deal with the threat.

In addition, Article 51 of the Charter requires that if a state resorts to military action in self-defence, the measures it has taken must be immediately reported to the Security Council. The right to use force in self-defence continues until the Security Council has taken measures necessary to maintain international peace and security. That is the answer to the Question as posed.⁸²

14. I agree with the view expressed by the Attorney General. It is clear, reasonable and balanced, and accurately summarises the current state of international law. It confirms also that the use of force against Iraq would not have been justified on grounds of anticipatory self-defence, and that the Government was correct not to go down that route.
15. In any particular case the key issue will be whether an attack is 'imminent'. In the *Caroline* incident in 1837 the US Secretary of State famously set out the circumstances of a "necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation". The concept of imminence is a flexible one, as it must be in an age in which technology allows great devastation to be wrought in a very short period of time. 'Imminence' has to be determined by reference to capability and intent. There may be circumstances in which capability could include the acquisition (by a state or a terrorist organisation or even an individual on behalf of a terrorist organisation) of material or component parts to be used in the manufacture of WMD, and not possession of the finished product. Each case will turn on its own facts, so that the process by which the evidence which points to an 'imminent' attack is collected and assessed by the government will be of great importance.
16. The greater the level of confidence and trust in the government's assessment process the more likely it is that any decision to use force will be considered to be legitimate. The process of assessment will be based on intelligence material which cannot be made public. However, the public is entitled to be reassured that the process of assessment is sound and is motivated by the application of the proper criteria. This is where the recent Iraqi conflict has caused potentially great harm, since the presentation of the evidence has

⁸² Hansard, 21 April 2004, column 370.

tended to undermine the public's confidence in the assessment of the threat. In present circumstances it is likely that situations will occur where the exercise of anticipatory self-defence may be required. It is therefore of the utmost importance that steps be taken, as a matter of urgency, to restore public trust in governmental decision-making."

Malcolm Shaw

The concept of "imminence" within the context of anticipatory self-defence is relative. It depends upon the nature of the threat and the possibility of dealing adequately with it at any given stage. What is imminent will vary as technology evolves. The aim of self-defence is to defend the territory and population of a state and the extent to which this is feasible will be dependent upon the character of the attack (foot soldiers, chariots, tanks, planes, missiles) as well as the vulnerability of the target state and the intention of the attackers. Russia and China can absorb initial attacks and be in a position to regroup and counter-attack even if hundreds of miles of territory have been lost. Other states, not so well endowed geographically, cannot and thus must act in time to prevent the anticipated destruction, such as may have been the case with regard to Israel in 1967. "Imminent" will also need to be interpreted in the light of changing threats in the light of changing practice.⁸³ Today, of course, terrorist threats are high on the agenda and after 11 September 2001 and other outrages, no longer to be hived off as the problem of a few relatively unimportant states.

However, "imminent" does not mean "perhaps sometime in the future". A forceful action to disrupt an imminent terrorist act being prepared in a neighbouring state may well be legitimate; force to attack person who may in the future contemplate such activity is not. Distinguishing the two is not easy. Relevant factors would include the pattern of events to date, statements and threats made, the level of the threat (e.g. preparations for the use of a 'dirty bomb' in a city) and the realistic possibility of averting the threats by non-forcible means. Current events have highlighted the issue of evidence. Clearly credible evidence reasonably believable in the circumstances is required and it may be that the test of this has or will harden in the light of the Iraq situation. In such situations, it is difficult to envisage in all reality judicial tests of "beyond reasonable doubt" determined by objective bodies as being the sole determinant. While it is easy to say that hindsight will determine the issue and the consequences will be drawn at that stage, it is important that those responsible for taking the measures in question have assured themselves as to reasonable and adequate evidential methodologies.

Gerry Simpson

⁸³ See, for example, UN Security Council resolutions adopted on 12 September 2001 and subsequently.

Self-defence is auto-interpretative. In a decentralised international legal order states themselves will often have to make these sorts of decisions. The definition provided following the *Caroline* incident is the best we have in relation to imminence: there must exist a circumstance of irreversible emergency. Recent efforts by the USA⁸⁴ to establish a right to pre-emptive (or 'precautionary') self-defence have not received widespread support from states and are to be resisted. These efforts attempt to enlarge the meaning of "imminence" to accommodate so-called new, unprecedented threats. Imminent is re-read to mean "possible" or "likely at some point in the future". This stretches language and international law too far. As Philip Jessup put it: '...of all the clichés which infect patriotic exhortations, the most subtly poisonous is that which calls the war in progress at the moment "different from other wars"'.⁸⁵

Colin Warbrick

I should largely follow Brownlie's views, and eliminate "imminence". Instead, the test should be, "when has an armed attack occurred?", though I think the practice indicates a rather more favourable test for the defender than that, as Brownlie says, extra-territorial action must "unequivocally" be the commencement of an attack.⁸⁶ As I have indicated in my response to question 1, this is primarily a military question and involves the assessment of actual events, rather than speculation - but the evidence will need interpretation and the risk it demonstrates will be subject to assessment.

Even if one were to go further and accept some notion of imminence of attack as sufficient to justify defensive force, there must be an "attack" which is imminent, a concrete prospect, not a speculative possibility of unspecified action (and what is more the concrete threat should be directed against the self-defending state). Even during the Cold War, when the possible damage which might have been inflicted on a state was of a quite different order that did not override the proscription of Article 2(4). This surely is a case for Security Council authorised action - the threat is not to a state but to international peace and security.

The Attorney General's statement to the House of Lords in April 2004 sought to divorce the concept of "imminence" from "attack" when he said that a right of self-defence arose,

"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."⁸⁷

Although he took care to distance himself from the notion of a right to use pre-emptive force, it is not clear what the difference is at what might call the really

⁸⁴ See National Security Strategy of the United States of America, note 49 *supra*.

⁸⁵ Jessup, P in Schwarzenberger, G. (1944) "*Totalitarian Lawlessness and International Law*", Jonathan Cape: LONDON, at p.39. Note also Schwarzenberger's rebuke to those with, "the all-too-ready and frequent tendency to pin the label of novelty on anything which does not happen to have come to one's individual attention", p.39.

⁸⁶ *Ibid.*

⁸⁷ Note 33, *supra*.

imminent end of imminence between the Attorney General's formulation and pre-emptive force. His statement is a claim that there is a right to use force where the state facing attack cannot be identified, even in anticipation - whatever such a right of action would be, it would not be self-defence.

Nicholas Wheeler

Speaking in the House of Lords on 21 April 2004, the Attorney General, Lord Goldsmith, said:

It is argued by some that the language of Article 51 provides for a right of self-defence only in response to an actual armed attack. However, it has been the position of successive United Kingdom Governments over many years that the right of self-defence under international law includes the right to use force where an armed attack is imminent.⁸⁸

The question is what constitutes imminence in this context. According to the criteria which emerged following the *Caroline* incident, imminence is defined as a threat that is 'instant, overwhelming, leaving no choice of means, and no moment of deliberation'. However, Michael Walzer argues we should be uncomfortable with this definition if it is invoked to refer only to 'the immediate moment' and thereby does away with the category of cases where there is room for deliberation about how to respond.⁸⁹ He suggests that it is possible to distinguish between justifiable pre-emption and unjustified aggression by deciding whether the following criteria are met: 'a manifest intent to injure, a degree of active preparation that makes that intent a positive danger, and a general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk'.⁹⁰ He maintains that Israel's first strike against the Egyptian air force in 1967 met this threshold of 'sufficient threat'.⁹¹

The National Security Strategy of the United States agrees that the existing legal right of pre-emption rests 'on the existence of an imminent threat – most often a visible mobilization of armies, navies, and air forces preparing to attack'.⁹² It argues that we need to broaden the concept of imminence to recognise the nature of the threat posed today by 'Rogue states and terrorists [who] do not seek to attack us using conventional means'.⁹³ Groups like al-Qaeda armed with weapons of mass destruction (WMD) could kill millions of civilians from secret bases, and without

⁸⁸ Quoted from written evidence submitted by Professor Philippe Sands QC to the House of Commons Foreign Affairs Committee, 1 June 2004.

⁸⁹ See Walzer, M (1977) *Just and Unjust Wars: A Moral Argument with Historical Illustrations* Allen Lane: LONDON.

⁹⁰ *Ibid.*, p.81

⁹¹ Although as Michael Byers points out, Israel claimed that Egypt's blocking of the Straits of Tiran was a prior act of aggression thereby justifying self-defence under Article 51 of the Charter. See Byers, M. 'Preemptive Self-defense: Hegemony, Equality and Strategies of Legal Change', 11 *Journal of Political Philosophy* (November 2003), p.180.

⁹² National Security Strategy of the United States (2002), note 49 *supra*.

⁹³ *Ibid.*

warning. To address the challenge from transnational terrorism, the Bush Administration declared that, '*to forestall or prevent such hostile acts by our adversaries, the United States will act pre-emptively*'.⁹⁴ The National Security Strategy points out that given the enormous costs of inaction in the face of such terrifying weapons, there is a '*compelling case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack*'.⁹⁵

The above formulation is very different from the criteria established following the *Caroline* incident because it justifies military action aimed at warding off a potential danger before it materialises into a specific intention and preparations to attack. There is nothing new about this idea, and Walzer cites the case of the War of the Spanish Succession.⁹⁶ This was fought against France in the belief that it was necessary to prevent the balance of power tipping dangerously in Louis XIV's favour. Here, war was justified by the fear that if Europe failed to act against France, it would eventually succumb to its hegemony. Walzer critiques this type of thinking on the grounds that '*war is justified...by fear alone and not by anything other states actually do*'.⁹⁷ For the architects of the Bush doctrine, the '*fear*' that WMD might find their way into American cities provides sufficient justification for anticipatory strikes even where there is no imminent threat from an adversary.

In rejecting the attempt in the US National Security Strategy to broaden the concept of imminence to cover preventive war (such as the War of the Spanish Succession and the more recent case of Iraq in 2003), it is important to distinguish between what Gareth Evans calls imminent and non-imminent threats.⁹⁸ He argues that there are real non-imminent threats such as the coupling of WMD, rogue states and terrorism, but these cannot justify unilateral action on grounds of a right of anticipatory self-defence. Instead, Evans argues that we should address these threats before they materialise into real dangers, but we should do so collectively. And if action is to be taken against non-imminent threats on the grounds that waiting greatly increases the risk, then such action should only be taken by the Security Council acting under its powers under Chapter VII of the UN Charter. In cases where the Council is not satisfied that a strong case has been made supporting preventive armed action against emerging threats – as was the case with in Iraq in 2003 – there is no legal basis for states to act unilaterally.

Sir Michael Wood

As the Attorney General said in the House of Lords on 21 April 2004:

The concept of what constitutes an "imminent" armed attack will develop to

⁹⁴ Ibid (emphasis added).

⁹⁵ Ibid. (emphasis added).

⁹⁶ Note 56, *supra*, pp.78-80.

⁹⁷ Ibid. p.77.

⁹⁸ Evans, G. "*When is it Right to Fight? Legality, Legitimacy and the Use of Military Force*", 2004 Cyril Foster Lecture, Oxford University, 10 May 2004.

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.

There is no basis in international law for going further. In particular, in so far as a right of pre-emptive (or preventive) self-defence implies a departure from the requirement of imminence it has no basis in the law. Put another way, as Hans Blix did in his third Hersch Lauterpacht Memorial Lecture on 24 November 2004:

“Although ‘imminence’ may be a severe time requirement, ‘a growing threat’ would be an unacceptably lax criterion and would not tally with the generally accepted position that force should be used only as a last resort.”⁹⁹

Question 5: What does the criterion of ‘proportionality’ mean?

Sir Franklin Berman

It seems now to be safely established that the proportion required is that between the *threat* and the means chosen to deal with it (see the ICJ's *Nuclear Weapons* Advisory Opinion¹⁰⁰), though it would probably be better to qualify ‘means chosen’ by ‘reasonably’. The problem seems to reside less in the assessment of reasonable means than in the reasonable assessment of what ‘the threat’ amounts to. An invasion and occupation of Iraq, and the replacement of its system of government, could not have been covered by the law of *self-defence* on the argument that that was the only way to deal effectively with the threat posed to neighbouring states (for example, Israel) by Iraq's weapons of mass destruction.

Daniel Bethlehem

⁹⁹ See http://lciil.law.cam.ac.uk/lectures/hersch_lectures_2004.php

¹⁰⁰ International Court of Justice, Advisory Opinion of 8 July 1996 on “*Legality of the Threat or Use of Nuclear Weapons*”, ICJ Reports 1996.

The concept of proportionality has not been defined but has simply been construed in rough and ready terms to mean some kind of parity between attack and response. The analysis by Derek Bowett¹⁰¹ concerning reprisals suggested that the Security Council viewed proportionality almost in terms of a casualty head-count. The Security Council's refusal to condemn Israel on 5 October 2003, for bombing Syria, without loss of life, in response to a terrorist attack by Islamic Jihad (which receives Syrian backing) the previous day which killed 19 people and injured a further 60, suggests that the Security Council continues to operate on the basis of a rough and ready assessment of parity.

The concept of proportionality was and remains a feature of the law on reprisals and, in this context, may be more sophisticated than the concept as used in a self-defence context as the concept of reprisals contains an element of prospective proportionality, i.e., such as action as is necessary to achieve a return to legality.

In my view, the concept of proportionality must be construed to include, as appropriate, both a retrospective and a prospective element. In other words, force used by way of self-defence must be assessed by reference to the scale of an attack that has already been initiated and the harm in the process of being done. Where, however, force is used by way of anticipatory self-defence, proportionality must be assessed by reference to the scale of the attack that is threatened and the force that is necessary to effectively address the threat of attack. Where the force used by way of self-defence is in response to an accumulation of attacks – currently impermissible, in the light of the *Oil Platforms* Judgment but which in my view should be permitted (see my response to question 1, above) – proportionality must be assessed by reference to what is necessary to effectively forestall the threat of future attacks.

James Gow

It means nothing particularly. It is defined by context – and must be defined, or justified in terms of the context. A particular use of force, at one time, in one situation, under one interpretation, might be justified, but the same use of force, in different circumstances, might not. Attached to this is the issue of whether there are any situations or use of destructive force that no context can justify.

Christopher Greenwood

That the force used in self-defence must not be manifestly excessive in relation to the threat posed or the value of the goal you are permitted to achieve. For example, a high level of force with many casualties may be necessary to recapture an

¹⁰¹ Bowett, D. “*Reprisals Involving Recourse to Armed Force*”, 66 AJIL 1 (1972)

uninhabited rock or to rescue a single hostage, but one would have to question whether it was proportionate in either case.

That said, I think the ICJ was right in *Nuclear Weapons Advisory Opinion*¹⁰² to reject the argument that the use of a nuclear weapon was so destructive it could never be proportionate. Similarly, I would reject the suggestion that for a small state to defend itself against invasion in circumstances where it could not win and would simply cause heavy loss of life must be disproportionate. There is no support for that in state practice.

Vaughan Lowe

The requirement of “proportionality” is satisfied if:

1. no greater force is used than is necessary to avert the imminent attack; and,
2. the physical and economic consequences of the force used in order to defend against an imminent attack are not disproportionate in relation to the harm that might reasonably be expected to be a consequence of the successful completion of the attack.

The Attorney General’s speech in the House of Lords in April 2004 identified these two distinct limbs of proportionality.¹⁰³ The first limb is another way of looking at the requirement of necessity. The second is perhaps that which is more accurately termed a requirement of proportionality. An example of the first would be that killing attackers is not justified if they can be apprehended and disarmed without killing them. An example of the second would be that extensive bombing of a naval base in the attacking state would not be justified if the anticipated attack were believed to consist in the dispatch of a frigate and a dozen troops to occupy an uninhabited island.

Sir Adam Roberts

The principle of ‘proportionality’ can refer to two different things:

1. the proportionality of a military action taken in response to a grievance – in which sense it is a link between *jus ad bellum* and *jus in bello*; and,
2. proportionality in the conduct of armed hostilities (*jus in bello*).

The latter encompasses the proportionality of a military response to an adversary’s military actions, the proportionality of a military action in relation to the anticipated military advantage to be gained, and proportionality in reprisals.

¹⁰² Note 77, *supra*.

¹⁰³ Note 33, *supra*.

Both of these aspects are of particular importance in a war that is partially justified in terms of pre-emption. This is because, when the initiation of a war is a subject of contestation, the means by which it is conducted are also likely to be the subject of international criticism.

Some of the operational rules relating to proportionality are contained in the treaties and customary rules of the laws of war. They are not simple to apply, and do not necessarily require exact equivalence between one side's action and the other side's reaction.

Philippe Sands

Both criteria fall to be applied on a case-by-case basis. The examples given by Thomas Franck¹⁰⁴ in his 2002 Hersch Lauterpacht Memorial Lectures may provide a basis for discussion.

Malcolm Shaw

Proportionality means that there has to be a sense of relationship between the threat and the response. What is proportionate will depend upon the nature of the threat faced and the means available in practice to counter it, as well as the requirements of law.¹⁰⁵ Case law is vague on the precise conditions required. Time may also alter the equation. Israel was roundly condemned for bombing the Iraqi nuclear reactor just before it went critical in 1981. I suspect that such criticisms faded as from 1990.

The first issue will be to determine against what the proportionate response is to be measured since simply to pronounce that the action must be proportionate to the armed attack begs the question. Indeed, it seems to me that the appropriate determinant is not the armed attack as such but the totality of the threat that this represents. An analysis of the threat needs to be considered and realistic. Is the aim to grab a few miles of land or to extinguish the target state or murder large numbers of the population or "ethnically cleanse" the territory in question? Is the aim to attack a military location or a city?

The different levels of threat will of necessity require a different response. Reasonable evidence will, of course, be critical and may condition the reaction of third states after the event, but such evidence is time-conditioned in that the test will be what is reasonable at the time in the light of knowledge known or reasonably to have been known at the time of response.

¹⁰⁴ Franck, T.M. (2002) "*Recourse to Force: State Action against Threats and Armed Attacks*", Hersch Lauterpacht Memorial Lectures Series, Cambridge University Press: CAMBRIDGE

¹⁰⁵ See *Nuclear Weapons Advisory Opinion*, note 77, *supra*, at p.245

Gerry Simpson

Under customary international law, any action in self-defence must be proportionate and necessary.¹⁰⁶ The Court has held that any act of self-defence ought to be proportional to the armed attack and necessary to respond to it.¹⁰⁷ Proportionality, then, refers to a similarity in scale between the attack and the response.

Colin Warbrick

This is a very difficult question. As military doctrine inclines to the use of overwhelming force, questions of proportionality shade into ones of necessity (see next question) or become matters of *jus in bello*. Also, there remains an unresolved question in international law: proportionate to what?:

- to the damage that the attack has done and its continuation threatens?;
- to that which is necessary to bring the attack to an end?; or,
- to that which is necessary to prevent a repetition in the absence of satisfactory guarantees by the other state that there will not be a repeat?

What does not seem to be legally relevant as a matter of principle, but which may be of importance as a matter of practice or from a political perspective, is the damage anticipated or actually suffered. This is a question of responsibility rather than self-defence. Relying on it encourages the use of self-defence to cover what is really punishment or enforcement action.

The more the attack is against the survival of the state (or perhaps these days, the government) rather than against an interest of the state, the wider the scope for legitimate proportionate force in response. Attacks by non-state actors may seldom threaten the governmental structures of a state (though perhaps one should not be too sanguine about ruling out "mercenary" action against weak governments). Accordingly, the proportionality calculation should take into account the relatively limited consequences for a defending state, particularly where it claims the right to act against the territory of a state not directly or not at all responsible for the attack.

Nicholas Wheeler

Proportionality in this context means the use of no more force than is required to defend the threatened state.

¹⁰⁶ See *Nuclear Weapons Advisory Opinion*, note 77, *supra*, at para.41

¹⁰⁷ See *Nicaragua Case*, note 2, *supra*, at para.176

Sir Michael Wood

Acts of self-defence must be *proportionate* to what is required for achieving that object: “the force used must be proportionate to the threat faced and must be limited to what is necessary to deal with the threat”.¹⁰⁸

Question 6: What does the criterion of ‘necessity’ mean?

Sir Franklin Berman

See my response to question 4 above.

Daniel Bethlehem

In the *Wall* Advisory Opinion, the Court referred to Article 25 of the State Responsibility Articles and, in particular, to the requirement therein that “necessity” requires that the conduct in question “is the only means for the state to safeguard an essential interest against grave and imminent peril”. Leaving aside whether Article 25 of the State Responsibility Articles was appropriately invoked by the Court in this context, it is undisputed that the concept of necessity contemplates circumstances in which a state is faced with an immediate requirement to act against a grave peril. The concept can be traced back directly to the language of the formula used following the *Caroline* incident, ‘the necessity of self-defence, instant, over-whelming, leaving no choice of means, and no moment for deliberation’.

The interpretation of “necessity” in a self-defence context is, in my view, closely linked to the scale of the attack or threatened attack and the idea of prospective proportionality, i.e., what is necessary to effectively address the attack or threatened attack. It is also bound up with the question of whether a State has, or ought to have, a margin of appreciation when it comes to assessing a ‘grave and imminent peril’. The ICJ, in the *Oil Platforms* Case and the *Wall* Advisory Opinion, rejected both elements, in my view wrongly, as well as ignoring its assessment, in the *Gabcikovo* Case¹⁰⁹, as well as in various examples of State practice (cited in the ILC State Responsibility commentaries), which suggest that necessity does admit of some margin of appreciation.

In my view, the use of force by way of self-defence may be justified as necessary in circumstances in which:

- (a) there is a well-founded appreciation of grave peril;

¹⁰⁸ See Statement by the Attorney General, note 33, *supra*.

¹⁰⁹ International Court of Justice, Judgment of 25 September 1997 in the “*Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*”

This document is for private discussion only, not for quotation.

- (b) the use of force is in the circumstances the only available means or, if other means are available, is likely, on a considered assessment of all the circumstances, to be the only effective means available to address the threatened peril; and,
- (c) any delay in the use of force by way of self-defence would result in a significant increase in the risk of peril.

The use of force on grounds of necessity is also limited by the principle of proportionality.

James Gow

It means that those making the decisions have no reasonable alternative but to take action. In this context, the much-mooted notion of 'wars of choice' seems to me redundant, at least in the context of liberal democracies. There might be choices over how much to contribute, in which ways, to a use of destructive force, but I cannot imagine any democratic leader(s) who would take a decision to engage armed forces, or other means of applying restrained coercive violence, without judging that they had no other, or better, option. In this context, the interaction with 'imminence' must be weighed. Necessity will determine imminence – it will be necessary to act before it is too late. Here, another question informing reflection must be, once again, what must an actor – state or non-state (or virtual state?) – do to demonstrate that it is not a threat, in a broad sense, and so that action is not justified. Certainly, there will be an increasing onus on those charged with being a threat to show that they are not.

Christopher Greenwood

That the force used is no more than is reasonably necessary to achieve the goal permitted – for example, the expulsion of an invader, the prevention of future terrorist threats from a particular source.

Applying that test is very complicated since it has to take account of such factors as the need to keep your own casualties as low as possible. The Belgrano sinking is an instance of how difficult the test can be to apply.

Vaughan Lowe

The criterion of necessity means that there should be no reasonable alternative to the proposed course of action that is likely to be reasonably effective in averting the threat. That principle has several strands.

Firstly, it answers the question, “what force may be used?” It means that less forceful, or less extensive means would be insufficient to remove the threat or reduce it to an acceptable level. That point is important as it is generally not necessary to kill every last soldier (or insurgent) in order to remove the threat for all practical purposes, or at least to reduce it to a level at which, say, normal policing action can reasonably be expected to avert a renewed attack. That suggests that the analysis is dynamic, in the sense that throughout a use of force in self-defence the question should be continuously asked, is there a real need for further force to be used. In other words, defensive force should be controlled, and not consist in the triggered release of a pre-ordained response.

Threats constitute a particular problem. The making of a threat to kill may be said to be a lesser degree of force and to inflict a lesser degree of harm than an actual moderate physical assault. There have, I think, been explicit threats in recent history to use ‘disproportionate force’ in response to any attack. I do not think that the law is either very clear or very important in this context. It is plain that such threats are unhelpful in any society which seeks to maintain the principle of proportionality.

Secondly, it answers the question, “when may force be used?” Necessity is an aspect of imminence, in as much as it requires that there be no time to pursue non-forceful measures with any reasonable chance of averting or stopping the attack.

The third strand is another aspect of the above question of *when* force may be used, which might be thought of as the “who” question. It is the question of whether it is necessary for the target state to take action, or whether another state is able and willing to act, and intends to do so.

Finally, it raises the question of, “against whom” a necessary response may be directed. The purpose of defensive force is to disarm the (imminent) attacker and stop, or avert, the attack. Action against third parties, such as the central government of the state in which the attacker is found, may be justified if it is controlling the attack, but may not be justified if the attackers are operating independently of that government. Defensive force cannot be used to punish states for a failure to repress terrorist actions emanating from their territory.

Sir Adam Roberts

The criterion of “necessity”, in relation to a planned use of force in another state, has to refer first and foremost to the lack of reasonable alternatives to the projected military action. Other military or non-military means of achieving an objective need to be carefully considered and, if at all possible, pursued.

This meaning of necessity is especially important in the kinds of crises that have given rise to discussion of pre-emptive and preventive uses of force. For example, the fact that a terrorist insurgency is getting military support from another state does not in itself prove the necessity for attacking the territory of that state. The UK did not conduct its counter-insurgency operations in Malaya from 1948 onwards, or in

Northern Ireland more recently, on that basis – and it would have run into trouble if it had argued in these cases that it was entitled to attack China and Ireland respectively. I do not deal here with the *jus in bello* principle of ‘military necessity’, which is somewhat distinct, though with certain points of overlap.

Philippe Sands

See my response to question 5 above.

Malcolm Shaw

Necessity is linked to proportionality in that the response has to be limited to measures appropriate in order to deal with the threat (see my response to question 5, above). Indeed, necessity is a gloss on proportionality and restricts the response to the elimination of the threat.

Necessity will also relate to the means available so that the kinds of forces and the level of armament to hand will be relevant to the type and intensity of response that it would be reasonable to expect, as well as the realistic possibilities of resorting to non-military means in the circumstances. What this means in practice is, however, uncertain. Tanzania in responding legitimately to a Ugandan attack upon the Kagera salient in 1978 continued on to Kampala and overthrew the regime. There was little meaningful criticism. Again, the UN authorised coalition forces in 1991 stopped at the Iraqi border after expelling invading troops from Kuwait.

Gerry Simpson

Necessity refers to the action required to terminate the attack and/or subdue the threat. Thus, necessity and proportionality could come into serious conflict. The standard formulation, of course, is conjunctive: self-defence has to be both proportionate *and* necessary.

The difficult case is the act of self-defence that seeks to extinguish a serious threat or ongoing use of force through measures that appear disproportionate to the original armed attack. As Myjer and White put it: “Does an attack on a small part of the United States justify an armed response against a whole country?”¹¹⁰ One way round this problem is to say that proportionality is to be judged against the threat as well as the armed attack itself. This seems more pragmatic but risks collapsing proportionality and necessity.

¹¹⁰ See Myjer & White, note 45, *supra*, at p.8.

With anticipatory self-defence, the position is murkier still. Necessary to counter-act this attack? This and future attacks? Proportionate to the expected attack?

Colin Warbrick

It might be useful to refer to the case-law of the European Court of Human Rights as a guide to the idea of necessity.¹¹¹ The Court takes as its first standard action being "absolutely necessary" (coincidentally, for lawfully self-defence, *inter alia*, in Article 2(2) of the Convention). What this requires of the state is an investigation of the circumstances to see that there is no alternative, careful planning about the deployment and use of the force determined to be absolutely necessary, and a strict limitation of the actual use of force to the purposes identified in the Convention. This is a more demanding test than the international law standard of "necessity". Whether action is merely "necessary" for some purpose or other requires a proportionality assessment, taking into account the importance of the individual right which would be interfered with by the proposed action. The state is expected to produce evidence to support its claim of necessity. Considerable weight is attached to the existence of alternative means for securing the state's ends. Futility of action to achieve the claimed aim is the clearest demonstration of absence of necessity. The Court distinguishes the test of necessity from "reasonableness" or good faith. Reasonableness does not take sufficient notice of what is at stake for the individual; good faith does not protect against (patently) inadequate decision-making.

The interest which is at stake when a state claims the right to respond by self-defence may be the lives and property of a state and its nationals when the latter is not directly implicated or not implicated at all in a wrongful act against the defending state. Necessity means that the force used was the only way in which the armed attack could have been terminated and that the force used was directed solely to terminating the attack and, if the defending state is faced with a campaign against, of preventing or minimising the effects of future elements of the campaign against it. The force must be used for self-defence purposes and no other but hard questions arise about the necessity of removing a regime implacably opposed to the self-defending state and willing to resume hostilities when it is able, if left in place. Considerations of self-determination have an impact on programmes for regime change. That is to say, even necessity is limited by other rules of law.¹¹² As the defeats of Germany and Japan show, overthrow of particularly recalcitrant governments might find legal justification in some circumstances, even as exercises of self-defence.

Nicholas Wheeler

¹¹¹ However, I do not suggest that its categories supplant state practice in the field of the use of force.

¹¹² Though Judge Fleischauer, in his separate opinion in the ICJ *Nuclear Weapons Advisory Opinion*, was saying that this limit may not apply in cases of *extreme* necessity. Note 77, *supra*.

This document is for private discussion only, not for quotation.

The requirement of necessity incorporates two related aspects: first, that all peaceful means of defending the state have been exhausted, and second, that the scale of the threat is of sufficient gravity to warrant the use of force.

Sir Michael Wood

The use of force in self-defence must be necessary, meaning that other (non-forcible) means to reverse/avert the attack must be unavailable.

Question 7: Is it permissible to use force in self-defence against a terrorist grouping within another state although that state may not be unwilling, but simply unable, to deal with a terrorist organisation itself?

Sir Franklin Berman

The answer in principle is 'yes', but lies at a level of generality that renders it of singularly little practical usefulness. The trivial case is that of a state that is *willing* (though unable); such a state must be presumed to be ready to act jointly with other states specially affected, or at least to consent to their acting, in such a way as to remove any question mark over legality.

It is implicit that the first step has to be to call on the target state to meet its obligations, and that squares with the practice of the UN Security Council, e.g. in respect of Libya and Afghanistan. A state that merely claims to be willing, but declines to act alone or in combination with others, puts itself by that fact into the 'unwilling' category. It also makes itself a wrongdoer (in respect of other states directly affected), so diminishing its rights in relation to corrective measures they are entitled to take within the limits laid down by international law.

That said, the nature and degree of the force that may legitimately be employed will not be identical to the case where the territorial state's own actions give rise to the threat to the other state or states. Specifically, the fact that in international armed conflict a belligerent state's infrastructure and civilian population are exposed to the risk of collateral damage can't readily be assumed to apply to the case of limited punitive operations aimed at neutralizing a terrorist organization.

The closest analogy (though a fruitful one) is intervention by a belligerent on neutral territory to put a stop to hostile activities carried out by an opposing belligerent there.

Daniel Bethlehem

A state is required to ensure that its territory is not used for the commission of unlawful acts. Where a state is unable to assert control over a terrorist organisation located in its territory, the state which is a victim of the terrorist attacks would, as a last resort, and on the basis of the principles addressed above, be permitted to act in self-defence against the terrorist organisation in the state in which it is located.

James Gow

This is a particularly difficult issue – though the simple answer is ‘yes’, as it has already happened. However, there is clearly a case theoretically at least for saying that the US operations against Afghanistan and Sudan, while self-defensive, were also acts of aggression against those states, because the states themselves had not been involved *per se* in the attacks on the Nairobi and Dar es Salaam US embassies. This appears to be the case acutely regarding Sudan, where the information, as I understand it, later proved to be out of date and wrong. Therefore, regarding each of the elements of the self-defence equation in the changing context, there has to be some indication of what the conditions are for any actor (state or otherwise) reasonably taking action it believes to be justified at the time and for which it does not believe that there is an alternative to demonstrate responsibility afterwards. Clearly any lives lost cannot be restored. But it seems to me that, while action might be necessary, there must be responsibility after the fact (whatever the case, but especially if it is shown clearly that action, in this uncertain world, was appropriate, in terms of that which was known (while more could not reasonably be known) but the legitimacy of which is compromised by the emergence of information which was not known and could not be known

Christopher Greenwood

In an extreme case, I think it is, but only as a last resort. There is an analogy with the right of a belligerent to destroy enemy forces which are using neutral territory or waters in a case where the neutral is unable to enforce its neutral rights.

Vaughan Lowe

Yes. The state may not be responsible for the acts of the terrorists, but it is responsible for any failure to take reasonable steps to prevent the use of its territory as a base for attacks on other states. Its inability to discharge the duty does not relieve it of the duty. If it refuses an ‘offer’ to send troops into the state to nullify a threat of an imminent attack, it must find some other way of discharging its responsibility. If it does not, it should be regarded as ‘unable or unwilling’ to discharge its responsibilities.

But in any event, I repeat an earlier point.¹¹³ The right to use force in self-defence is an inherent right. It is not limited to 'forcible counter-measures' and thus not dependent upon any prior breach of international law by the state in which defensive force is used.

Sir Adam Roberts

It is extremely hard to answer this question in the abstract. In principle it would be wrong to give a negative answer. However, a positive answer should not be seen as a green light. Terrorist organisations are not easily rooted out by foreign armed forces, especially when the latter are ignorant of the geography, culture and language of the society concerned. Intervention may make most sense when there are significant local allies (whether the government, or regional forces) who will collaborate in addressing the problem posed by the terrorist organisation.

Philippe Sands

If it is accepted that force may be used against non-statal actors where the host state is unwilling to act, then there is no reason in principle why force cannot be used when a host state is willing but unable to act. However, the circumstances in which force can be used may differ, particularly in regard to the nature and extent of prior engagement with the host state, and the question of whether (and under what conditions) its formal consent may be required (see Grenada).

Malcolm Shaw

See my response to question 2 above. Inability to act is not a defence since the target state is still under attack from the first state. However, where the state, although unable to deal with the terrorist organisations, is indeed willing to take action, it must take steps to seek assistance in order to mitigate its powerlessness and thus render the proposed response from the target state unnecessary.

Gerry Simpson

There are two general problems worth raising here. The first concerns the problem of nomenclature. The terms "pre-emptive self-defence", "preventative war", "anticipatory self-defence" and "precautionary self-defence" are not terms of art and their, often interchangeable, use has created great confusion e.g. a group of politicians I spoke with this summer reversed the usual international law categorisations of anticipatory (immediate) and pre-emptive (precautionary) self-defence.

¹¹³ See response to question 2, *supra*.

Secondly, though, I wonder if the search for universalisable rules is misconceived. Perhaps in approaching the issue of force there ought to be more emphasis on the apparent prerogatives of Great Powers and the vulnerability of outlaw states. Might it not be the case that principles of international law applying to self-defence outside the Charter are likely to operate in ways rather similar to the operation of collective security under the terms of the Charter? The putative legitimacy of a use of force in each case may become conditional on the status of the actors employing such force and the status of those who are subject to such attacks. Tentatively in Kosovo and, more confidently, in Afghanistan, the Great Powers, may have attempted a redefinition of sovereign equality itself.

Colin Warbrick

What distinguished the response against Afghanistan were the particular facts. In the case of the 11 September 2001 attack, the magnitude of the damage inflicted by the non-state actor was exceptional but its legal relevance was as evidence of what the continuation of the campaign against the USA might mean. Responsibility for the attack fell to *Al-Qaeda*, established by the group's own statements, and more were plausibly threatened. That the group benefited from facilities in Afghanistan was also made out; the non-co-operation of the government of Afghanistan to engage in an operation against *Al-Qaeda* was established to a much lesser degree. The Taliban government was in breach of obligations under The Security Council Resolution to hand over Bin Laden to a state willing to prosecute him (though those resolutions did not give, nor were claimed by any state to give, an independent right to use force to enforce them). Non-co-operation might have been in breach of an obligation owed to the UN (though not to the US); further, it might have been evidence of the necessity of taking action to prevent or limit the next episodes in *Al-Qaeda*' campaign, regardless of any responsibility of Afghanistan.

I am not sure how much we can extrapolate from this. The existence of a campaign or the presence of an attack as understood above from non-state groups requires demonstration, to give rise to a right of self-defence at all. There was evidence of complicity of the Ugandan authorities with the hijackers in the Entebbe incident. To demonstrate the necessity of action against the territory of another state not directly responsible for the acts of the non-state group requires, inter alia, the demonstration that there is no other means of meeting the attack (and that this way will do so). The state potentially under threat might be persuaded to co-operate in the face of a legitimate threat to its territory but, save for the most compelling emergency, the territorial state is surely entitled to proceed first in its own way against an identified group on its territory. The Security Council might authorise action. It seems to me likely that satisfying the necessity test will be rare.

Nicholas Wheeler

One of the criticisms levelled against the US after its attacks on the Taliban and *Al-Qaeda* is that the government of Afghanistan was not responsible for the actions of terrorist groups based on its territory. The question is, “at what point do we decide that the conduct of a terrorist group is attributable to that of the state upon whose territory the group is based?” Those who deny the legality of *Operation Enduring Freedom* argue that the Taliban lacked control over Osama bin Laden. In the *Nicaragua* Case, the ICJ maintained that the USA was not responsible for the breaches of international humanitarian law by the *Contras* since ‘it had not directed and controlled the individual operations giving rise to these breaches’.¹¹⁴ Applying this precedent to the case of Afghanistan, it is argued that the Taliban’s involvement in the attacks on the United States of 11 September 2001 was too distant for it to be held responsible for the attack.

The implication of this is that the US was not legally justified in using force against Afghanistan, even though it had knowingly harboured the terrorist group that launched such a devastating attack upon the territory of the USA. This is not a realistic position, and the support given to the US position by Security Council resolutions and many other states, demonstrated that international society acknowledged that there was a legal basis to use force in self-defence against attacks such as those launched on 11 September 2001.

Sir Michael Wood

Yes (provided, of course, that the other conditions for self-defence are met). Compare the “unable or unwilling” test for intervention to protect nationals. In many cases, however, where a state is unable it will consent to action so there will be no need to have recourse to the right of self-defence.

¹¹⁴ See note 2, *supra*, quoted in Simpson (2004), p.333.

Case references and Resolutions

Exchange of letters between US Secretary of State Daniel Webster and Lord Ashburton, Foreign Secretary of Great Britain, relating to the case of the *SS Caroline*, 1837; 29 BFSP 1137-1138; 30 BFSP 195-196; See Jennings (1938) 32 AJIL 82 and Rogoff and Collins (1990) 16 Brooklyn JIL 493.

International Court of Justice, Advisory Opinion of 9 July 2004 on “*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*”, ICJ Reports (2004).

Separate Opinion of Judge Higgins on “*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*”, ICJ Reports (2004).

Separate Opinion of Judge Buerenthal on “*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*”, ICJ Reports (2004).

International Court of Justice, Order of 2 June 1999 on Request for Provisional Measures “*Legality of Use of Force (Yugoslavia v. United States of America/Spain)*” ICJ Reports (1999) 124.

International Court of Justice, Advisory Opinion of 8 July 1996 on “*Legality of the Threat or Use of Nuclear Weapons*”, ICJ Reports 1996, 226; 35 ILM 809 and 1343.

International Court of Justice, Judgment of 25 September 1997 in the “*Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*” ICJ (1997).

International Court of Justice, Judgment of 6 November 2003, “*Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*”.

International Court of Justice, Preliminary Objections, “*Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*”, ICJ Reports (1996) 803.

International Court of Justice, Judgment (Merits) of 27 June 1986, “*Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*”, ICJ Reports 1986, 14.

United Nations Security Council Resolution 1373 “*Threats to international peace and security caused by terrorist acts*”, S/RES/1373 (2001).

United Nations Security Council Resolution 1368 “*Threats to international peace and security caused by terrorist acts*”, S/RES/1368 (2001).

United Nations General Assembly Resolution 3314 (XXIX) “*Definition of Aggression*” (1974).

Publications

- Bowett, D. "*Reprisals Involving Recourse to Armed Force*", 66 AJIL 1 (1972).
- Brunnée, J and Toope, S (2004) "*The Use of Force: International Law After Iraq*" ICLQ 53: 785-806.
- Byers, M. "*Terrorism, the Use of Force and International Law after 11 September*" (2002) 51 ICLQ 401.
- Byers, M. "*Preemptive Self-defense: Hegemony, Equality and Strategies of Legal Change*", 11 Journal of Political Philosophy, November 2003, pp.171-190.
- Cassese, A. "*Terrorism is also Disrupting some Crucial Legal Categories in International Law*" (2001) 12 EJIL 993.
- Charney, J. "*The Use of Force Against Terrorism and International Law*" (2001) 95 AJIL 835.
- Corten, O. and Dubuisson, F. "*Opération 'liberté immuable': une extension abusive du concept de légitime défense*" (2002) 106 RGDIP 51.
- Dinstein, Y. (2001) "*War, Aggression and Self-Defence*", (3rd ed.) Cambridge University Press: CAMBRIDGE.
- Eick, C. "*Präemption, Prävention und Weiterentwicklung des Völkerrechts*", (2004) ZRP, 200.
- Evans, G. "*When is it Right to Fight? Legality, Legitimacy and the Use of Military Force*", 2004 Cyril Foster Lecture, Oxford University, 10 May 2004.
- Franck, T.M. (2002) "*Recourse to Force: State Action against Threats and Armed Attacks*", Hersch Lauterpacht Memorial Lectures Series, Cambridge University Press: CAMBRIDGE.
- Franck, TM (2001) "*Terrorism and the Right of Self-Defence*", 95 AJIL 839.
- Franck, T.M. (1998) "*Fairness in International Law and Institutions*", Clarendon Press: OXFORD.
- Gray, C. (2000) "*International Law and the Use of Force: Foundations of Public International Law*", Oxford University Press: OXFORD.
- Greenwood, C. (2002) "*International Law and the 'War on Terrorism'*", International Affairs, Vol.78, Issue 2, April 2002, 301.
- Hansard, 21 April 2004, column 370 "*Statement by the Attorney General*".

Higgins, R. (1994) *Problems and Process: International Law and How We Use It*, Oxford University Press: OXFORD.

International Law Commission (2001) *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, Report of the International Law Commission on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10)*, chp.IV.E.1.

Murphy, J.F. (2004) *The United States and the Rule of Law in International Affairs*, Cambridge University Press: CAMBRIDGE.

Murphy S.D. "Terrorism and the Concept of 'Armed Attack' in Article 51 of the UN Charter" (2002) 43 Harv.JIL, 41.

Myjer, E. and White, N. "The Twin Towers attack: an Unlimited Right to Self-Defence" (2002) 7 Journal of Conflict and Security Law 5.

National Security Strategy of the United States of America (2002), available at <http://www.whitehouse.gov/nsc/nss.html>, reprinted in 41 ILM 1478 (2002).

NATO "Statement by the North Atlantic Council", Press Release (2001) 124.

Ratner, S. "Jus ad Bellum and Jus in Bello after September 11" (2002) 96 AJIL 905.

Roberts, A (2003) *International Law and the Use of Military Force: The United Nations, the United States and Iraq*, Europaeum: OXFORD.

Schachter, O. "The Use of Force against Terrorists in Another Country" (1989) 19 Is. YB HR 209.

Schwarzenberger, G. (1944) *Totalitarian Lawlessness and International Law*, Jonathan Cape: LONDON.

Simma, B. (ed.) (1994) *The Charter of the United Nations, A Commentary*, Clarendon Press: OXFORD.

Simpson, G. (2004) *Great Powers and Outlaw States*, Cambridge University Press: CAMBRIDGE.

Sofaer, A. "Terrorism as War" (2002) ASIL Proceedings 254.

Verhoeven, J. "Les 'étirements' de la légitime défense" (2002) 48 AFDI 49.

Waldock, Academie de droit international: Recueil des Cours, 1952(II) At p.456.

Walzer, M. (2000) *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, (3rd edn.), Basic Books: NEW YORK.

This document is for private discussion only, not for quotation.

Watts, A. *“Physical Barriers to Armed Infiltration: Self-Defence and Israel’s Wall in the Occupied Palestinian Territories”*