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SELF-DEFENSE IN AN AGE OF TERRORISM

INTRODUCTORY REMARKS BY MARK DRUMBL*

We will examine the use of military force to respond in self-defense to actual, imminent, anticipated, or potential armed attacks by members of nonstate terrorist groups.

Terrorism is a longstanding scourge. It also is a longstanding concern of the UN Security Council, though the concern intensified after September 11, 2001. On that day, individual terrorists associated with a non-state actor—al Qaeda, sited in Afghanistan—attacked the United States. The United States and a broad coalition of nations characterized this as an armed attack and responded with military force predicated on the individual and collective right of self-defense that exists under customary international law and is recognized as inherent by Article 51 of the UN Charter. The UN Secretary-General, stated that this use of force, which began on October 7, 2001, was set in the context of Security Council resolutions that had condemned terrorism and referenced the right of nations to individual or collective self-defense.[1]

However, the use of military force against terrorists by the United States did not end with the Afghan campaign. It continues. Individual terrorists have been pursued with force, for example, in Yemen. Among the reasons evoked for use of force against Iraq was the need for the United States and United Kingdom to preempt the possible dissemination of weapons of mass destruction by Saddam Hussein to terrorists.

I believe the general consensus that supported the use of force in Afghanistan as a legitimate exercise of self-defense has diluted as the use of that force expands into other theaters of operation. As the consensus becomes more ambiguous, there is cause to reflect on the legal precedent, if any, established by the use of force against Afghanistan and al Qaeda. Is the Afghan situation unique, or does it constitute state practice that redefines the contours of self-defense either under custom or through interpretation of Article 51? If self-defense has been redefined, to what extent can this new precedent be applied to other places and spaces? How elastic has self-defense become? Is it the law that is changing or just the national practices of some states?

Thorny questions cascade one from the other. The questions touch on the scope of state responsibility for terrorist attacks, the point at which a terrorist attack rises to the level of an armed attack, and the interplay between criminal law and the law of armed conflict. Moreover, there is a need to define the evidentiary bases upon which choices to use force can be evaluated.

Assuredly, there is a diverse array of opinion on whether the preemption element of the U.S. president's National Security Strategy squares with legal precedent, the logic of self-defense, and international political realities. Some legal scholars have gone all the way back to the celebrated *Caroline* case[2] and the scope of the imminence requirement to self-defense. They ask what criteria determine when preemption applies and what are the distinctions between anticipatory self-defense, preemptive force, precautionary conflict, and preventive war. Here, four distinguished members of the community of international lawyers present their uniquely qualified approaches to facilitate our consideration of these issues.

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[1] Secretary General's Statement, Press Release UN Doc. SG/SM/7985 AFG/149 (Oct. 8, 2001). The Security Council Resolutions are Resolutions 1368 and SC Res. 1373.

[2] JOHN BASSETT MOORE, DIGEST OF INTERNATIONAL LAW 412 (1906).

REMARKS BY W. MICHAEL REISMAN*

Radical changes in the technology of weapons and the nature of adversaries now challenge the *jus ad bellum* that was largely codified in the United Nations Charter: Unilateral and discretionary uses of proactive military force, until then lawful, were henceforth prohibited; reactive military force was to be limited to self-defense against an armed attack, and then only until the international community could come to the assistance of a victim of unlawful military force. All uses of force were to be necessary, proportionate, and discriminating. The major powers in the Security Council undertook to cooperate to ensure the collective defense of victims of aggression.

Even those who assumed that the Security Council would wield the power the Charter assigned it appropriately did not imagine that the Council would act quickly, but time was of the essence less then than now, given the character and potential of the arsenals of adversaries. Before air warfare was expanded and refined, weapons were essentially kinetic and usually limited in reach to the peripheries of targeted territories. A surprise attack could be costly to its victim, but not decisive. Most important, critical weapons were likely to be available in militarily significant quanta only to other states, whose elites, however different their cultures and values, generally shared an interest in maintaining the state system of which all were part. Each elite's own territorial base made it at once member and beneficiary of and hostage to the system, susceptible to the dynamic of reciprocity and retaliation that is the source of the effectiveness of international law. All of these factors shaped a common interest in a legal regime that restricted the rationale for self-defense to an actual armed attack.

The introduction of vastly more destructive and rapidly delivered weapons began to undercut the cogency of that legal regime. The reason was simple: a meaningful self-defense could be irretrievably lost if an adversary with much more destructive weapons and poised to attack had to initiate (in effect, accomplish) its attack before a right of self-defense came into operation. This development prompted a claim to expand the right of reactive self-defense (RSD) to "anticipatory" self-defense (ASD).

ASD addressed the security of the intended victim in a weapons environment in which he who struck first could deliver an unacceptable measure of damage, if not win outright. But in order to move from RSD to ASD, the objectively verifiable requirement of an armed attack had to yield to a subjective perception of a "threat" of such an attack that was—in the sole judgment of the state that thought it was about to become a target—so palpable, imminent, and prospectively destructive that the only defense was its prevention. ASD is open to abuse by self-serving interpretations in ways that RSD was not. Hence ASD's legal authority remained cloudy and much of formal legal doctrine rejected its lawfulness. Nevertheless, security planners could not afford to exclude the possibility of it.

The dynamic of reciprocity and retaliation that underlies international law does not operate for non-state actors, for they are neither beneficiaries of nor hostages to the territorial system. As long as non-state actors did not have significant arsenals, their indifference or even hostility to world public order was inconsequential, but the proliferation of atomic, biological, and chemical ("ABC") weapons and their diffusion into the hands of nonstate actors who may operate from within failed or feckless states has changed that. Even an ABM system that worked could not screen biological and chemical weapons. Nor can the most effective perimeter defense prevent the infiltration and detonation of a "dirty bomb." And deterrence—the "stick" half of the reciprocity-retaliation dyad—cannot operate when there is no address to deter. These developments have given impetus to a new claim of "preemptive" self-defense (PSD).

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PSD is a claim of authority to use, unilaterally and without international authorization, high levels of violence in order to arrest a development that is not yet operational and hence is not yet *directly* threatening, but which, if permitted to mature, could be neutralized only at a high, possibly unacceptable, cost. A credible claim for ASD must point to a palpable and imminent threat; a claim for PSD need only point to a possibility, a contingency. The further one moves from an actual armed attack as the requisite threshold of RSD to the palpable and imminent threat of attack that is the threshold of ASD, and from there to the conjectural and contingent threats of *possible* attack, which is the threshold of PSD, the greater the interpretive latitude given the would-be unilateralist and the heavier the burden of proof. In an international system marked by radically different values and perceptions of facts, an act of PSD may look like a serious or hysterical misjudgment to some actors and like naked aggression to others.

The U.S. claim to PSD is not new. It was made implicitly throughout the 1990s by the Clinton administration with respect to aerial military action to "degrade" Iraqi military capacities. In December 2002, former President Clinton stated that plans to attack North Korea had been prepared and Pyongyang was told it would be struck if it did not end its nuclear program. If threats or overt but relatively limited acts aimed at degradation of an adversary's arsenal fail, may further and even more intrusive preemptive acts against the adversary be taken in "self-defense"?

International law has grappled with the claim of PSD for decades. The Israeli destruction of the Osirak reactor near Baghdad in 1981, a quintessential preemptive action, was widely condemned at the time. Scarcely a decade later, with the lethal and aggressive character of the regime in Baghdad exposed, opinions about the preemptive action of 1981 were revised in many quarters, suggesting that there were unarticulated but operative criteria for assessing the lawfulness of preemptive actions.

All acts of self-defense are by their nature initiated unilaterally and evaluated for their lawfulness only after the fact. In all claims to self-defense, review of the action will be based on a prudential contextual assessment of factors such as the degree of the threat, the availability of a meaningful organized international response, the urgency of unilateral action to prevent or deflect the attack, and whether the means chosen were proportionate to the threat presented. Thus, on a case-by-case basis, the legal danger of an abuse of preemptive self-defense is no greater than for anticipatory self-defense, which also does not have to be justified by an armed attack. Humanitarian intervention does not even require demonstration of a real or conjectural threat against an intervening state.

The problem is thus not the absence of legal criteria. The danger presented by the PSD doctrine is systemic: If writ large and generally available in international law, it could, even more than ASD, lead to more international violence by lowering the threshold for unilaterally determined contingencies that warrant acts of self-defense. This could create an imperative for all latent adversaries to strike sooner in order to strike first, raising the general expectation of violence—and its likelihood. It is not hard to imagine circumstances in which PSD might appear justified. Yet if universalized, the claim, by increasing the expectation and likelihood of violence, could undermine minimum order.

The dilemma does not derive from the power of a single state but is inherent in a legal system whose central institutions continue to be weak and that accordingly reserves to each state, in Article 51 of the Charter, a right to engage in unilateral action when it is necessary for its self-defense, while assigning to a small group of powerful states the residual responsibility for global security. Because there does not appear to be a will to strengthen central institutions, in new and more threatening environments, international law may have to appraise individual PSD claims in terms of the customary law principles of necessity, proportionality, and discrimination.