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### Anticipatory action in self-defence: The law of self-defence - past, presence and future

Tibori Szabó, K.J.

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## 8 Self-defence in state-to-state conflicts

### 8.1 Introduction

The present chapter will examine those conflicts of the twentieth century that had states as belligerent parties and in which claims of self-defence were contemplated or used. The aim of this chapter is to examine the temporal dimension of self-defence as interpreted by the state practice involving state-to-state conflicts. The specific cases will be tested against the variables identified in the introductory remarks of Part II. Accordingly, each instance of state practice will be analysed on the basis of necessity (the conditionality of an armed attack and immediacy) as well as proportionality.

The chapter will conclude on the overall significance of these variables regarding the outcome (condemnation, criticism or acceptance) of the cases. The outcome will be discerned from the reaction of states before the UN Security Council or General Assembly, the echoes in legal literature and, where possible, official reports regarding the legality of specific instances of the use of force. Additionally, conclusions will be drawn as to the perceived temporal dimension of self-defence and the place of anticipatory action within it.

Each case will follow a similar structure. First, a summary of the facts will be provided. Secondly, general reaction to the claims will be described. Thirdly, the variables and the outcome will be analysed.

### 8.2 The Jewish War of Independence (1948)

There are several instances in which self-defence was invoked in the Middle East in the past 60 years. Since the declaration of independence of Israel in May 1948, there has been a continuous conflict between various Arab states and Israel, as well as between the Palestinian people and the Israeli government. This conflict several times escalated in wars and in those instances, one or both parties invoked the right to self-defence.

A short historical overview is necessary at this point, as several instances of state practice will deal with armed conflicts in the region. The *aliya* of Jews to Palestine (then under British mandate) started at the end of the nineteenth century as a result of the Russian pogroms.<sup>1</sup> The Balfour Declaration of 1917 increased the influx of the Jewish immigrants, while tension in Palestine was escalating with riots and murders between the Jewish and Arab population.<sup>2</sup> Jewish immigration to Palestine accelerated as Nazism spread through Europe. The numbers of Jewish settlers increased with 200.000 during 1932 and 1938 and with another 75.000 between 1945 and 1949.<sup>3</sup>

Facing the new demographic landscape of Palestine, the UN General Assembly adopted Resolution 181 of 29 November 1947 and proposed the creation of independent Jewish and Arab states as well as of a Special International Regime for Jerusalem. The

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<sup>1</sup> D.S. Sorenson, *An Introduction to the Modern Middle East* (Boulder, Westview Press 2008) p. 15.

<sup>2</sup> W. Laqueur and B. Rubin, eds., *The Arab-Israeli Reader: A Documentary History of the Middle East Conflict*, 6th rev. edn. (London, Penguin Books 2001) p. 16. For the impact of the Balfour Declaration on the Palestinian conflict, see Sorenson, pp. 17-18; P. Mansfield, *A History of the Middle East* (London, Penguin Books 2003) pp. 159-160.

<sup>3</sup> Sorenson, p. 22.

Jewish representatives welcomed the proposal because it proposed the creation of a Jewish state, which (although included a large area of desert in the south, the Negev) constituted 55% of Palestine, with the borders reaching well beyond the area where Jewish settlements actually existed. The Arab representatives refused the plan, mainly because the proposed Jewish state would have retained an Arab population almost equal in number to the Jewish population.<sup>4</sup>

Events further escalated in the following months and by the time the British mandate was reaching its end, the Jewish leaders were determined to declare independence.<sup>5</sup> The last British high commissioner left Palestine on 14 May 1948 and, on the very same day, the Provisional State Council in Tel Aviv declared the independence of Israel. The next day, forces of Transjordan, Egypt, Syria and Iraq entered Palestine.<sup>6</sup>

At the start of the war, several legal arguments were advanced before the UN Security Council by the warring sides and third parties alike. The Jewish representatives maintained that the move of the Arab forces was an act of aggression.<sup>7</sup> Belgium argued (on behalf of Egypt and Transjordan) that the mere presence of armed forces on foreign territory should not be characterized a threat to peace under Article 39, and suggested that the Arab action could also be interpreted under Article 51.<sup>8</sup> The Jewish representatives replied that, in order to invoke Article 51, there must have been an armed attack against any of these states, which did not happen.<sup>9</sup> As a response, the representative of the Arab Higher Committee maintained that the Palestinian people possessed the unquestionable right to sovereignty over Palestine. Accordingly, by their declaration of independence, the Jewish minority created a dangerous threat to peace and, for that reason, the Palestinian people asked the help of neighbouring Arab countries. The representative of the Arab Higher Committee was thus putting forward a justification on the basis of collective self-defence.<sup>10</sup> In the first few weeks, the Security Council took a cautious stand in the conflict and adopted several resolutions calling for a cease-fire without condemning actions on either side.<sup>11</sup> On 15 July 1948, after Israeli representatives accepted the terms of the truce, the Security Council adopted Resolution 54 in which it declared the situation a threat to the peace under Article 39 and ordered, pursuant to Article 40 'the Governments and authorities concerned' (in fact, the Arab states that rejected several appeals for acceptance of the truce) to desist from further military action and issue cease-fire orders to their military.<sup>12</sup> Notwithstanding the grave tone of Resolution 54, the Security Council saw itself bound to issue several other resolutions throughout 1948 to ensure the cessation of hostilities.<sup>13</sup>

The armed action of the Arab states is an instance of condemned claim of self-defence. Indeed, no armed attack or threat thereof could be identified on the Jewish side.

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<sup>4</sup> Laqueur and Rubin, pp. 69-71; Mansfield, pp. 234-235; Sorenson, p. 23.

<sup>5</sup> Mansfield, p. 235; Sorenson, p. 23.

<sup>6</sup> Laqueur and Rubin, p. 81; Mansfield, p. 236.

<sup>7</sup> *Repertoire of the Practice of the Security Council, 1946-1951* (New York, United Nations 1954) ch. 8, p. 328 (hereafter, *Repertoire*), available at <[www.un.org/Depts/dpa/repertoire](http://www.un.org/Depts/dpa/repertoire)> (accessed 10 August 2010).

<sup>8</sup> *Ibid.*, ch. 7, p. 493.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*, pp. 493-494.

<sup>11</sup> SC Res. 48, 49, 50 (1948).

<sup>12</sup> SC Res. 54 (1948).

<sup>13</sup> SC Res. 56, 57, 59, 60, 61, 62, 66 (1948).

The Jewish declaration of independence might have justified arguments pertaining to self-determination, but not self-defence. Consequently, the absence of the requirement of necessity (the conditionality of an armed attack and immediacy) rendered this instance of state practice an unlawful claim of self-defence.

### 8.3 The Korean War (1950)

The war between the two Koreas started with the North launching a full-scale invasion against the South on 25 June 1950.<sup>14</sup> Three years earlier, in 1947, the Soviet Union had refused to support the recommendation of the General Assembly calling for free elections in Korea under the supervision of a United Nations Commission. Consequently, the elections had been observed in South Korea alone.<sup>15</sup> The government thus elected was recognized as the only legitimate government in Korea.<sup>16</sup> For that reason, the possibility of a conflict was foreseeable from 1948 onwards. The aim of the North Korean action was to establish control over the entire territory of Korea and overturn the government recognized as legitimate in the South.<sup>17</sup>

On the day North Korea launched its attack, the UN Security Council passed Resolution 82 in which it characterized the move as a ‘breach of the peace’ and demanded the immediate cessation of hostilities and the withdrawal of the North Korean forces to the 38<sup>th</sup> parallel.<sup>18</sup> On 27 June, Resolution 83 was passed by the Security Council and the North Korean invasion was coined an ‘armed attack’. Although no reference was made to Article 51 of the Charter, Resolution 83 recommended Member States to ‘furnish assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.’<sup>19</sup>

The Korean War started with a claim of self-defence on the part of South Korea that was accepted by many states and most of the legal literature.<sup>20</sup> Both elements of the requirement of necessity were present. North Korea invaded South Korea, thus there was an ongoing armed attack that unquestionably created an immediate need to resort to armed action to oust the invader. The requirement of proportionality was clearly met until the defensive action reached the 38<sup>th</sup> parallel.<sup>21</sup> The proportionate nature of the campaign beyond that parallel was questioned by public officials and legal literature alike.<sup>22</sup> On one hand, with the North Korean troops withdrawn behind the dividing line, the necessity and proportionality of further use of force was questionable.<sup>23</sup> On the other hand, the prospect of North Korean troops regrouping and launching a second invasion proved to be enough

<sup>14</sup> For an elaboration of the history of the Korean War, see W. Stueck, *The Korean War: An International History* (Princeton, Princeton University Press 1997).

<sup>15</sup> Higgins, p. 223; Stueck, pp. 26-27.

<sup>16</sup> S. Alexandrov, *Self-Defense against the Use of Force in International Law* (The Hague, Kluwer Law International 1996) p. 252.

<sup>17</sup> Higgins, p. 223; Stueck, p. 3.

<sup>18</sup> SC Res. 82 (1950) preamble and Part I.

<sup>19</sup> SC Res. 83 (1950) para. 6.

<sup>20</sup> Alexandrov, p. 252; Bowett 1958, p. 194; Brownlie 1963, p. 331; Higgins, p. 223.

<sup>21</sup> For the history and political importance of the 38<sup>th</sup> parallel as demarcation line between North and South Korea, see A.L. Grey, ‘The 38th Parallel’, 29 *Foreign Affairs* (1951) pp. 482-487.

<sup>22</sup> Alexandrov, pp. 257-261; G.F.G. Stanley, ‘The Korean Dilemma’, 7 *International Journal* (No. 4, 1952) p. 279.

<sup>23</sup> Alexandrov, pp. 257-261;

of a threat for some to find the crossing of the parallel justifiable.<sup>24</sup> The significance of this instance of state practice for collective enforcement measures will be discussed in Chapter 11.<sup>25</sup>

#### 8.4 The Sinai Campaign (1956)

In 1954, after conducting a research on the country's security threats, Israeli Prime Minister David Ben-Gurion concluded that the Arab states could be ready for another war some time in 1956. Ben-Gurion saw the new Egyptian President, Gamal Abdul Nasser, as the primary threat facing Israel.<sup>26</sup> Both states were eager to arm themselves with the assistance of the US and European countries. After France, the United Kingdom and the United States agreed to control the sale of weapons in the region, the Egyptian president turned to the Soviet Union to acquire the supplies he wanted.<sup>27</sup> That move made the Israeli government even more concerned; the possibility of Egypt overcoming the limitations of its inferior military equipment was viewed as a serious threat by the Israelis. Moreover, the involvement of the Soviet Union in Middle Eastern affairs was also an unwelcome development in the eyes of Ben-Gurion.<sup>28</sup> To make matters worse, in July 1956, Nasser, frustrated that the US and UK withdrew their funding for the Aswan high dam, decided to nationalize the Suez Canal, having earlier closed the Straits of Tiran to Israeli shipping.<sup>29</sup> The potential threat posed by Egypt against Israel was indeed serious, but there was no conclusive evidence that it was imminent as well. In fact, Ben-Gurion and some of his cabinet members long contemplated a preventive war against Egypt, but did not want to risk the criticism of its supporters.<sup>30</sup> As then Israeli Defence Minister, Moshe Dayan, asserted, 'preventive war means an aggressive war initiated by Israel directly' and 'Israel cannot afford to stand against the entire world and be denounced as the aggressor.'<sup>31</sup>

Egyptian plans to nationalize the Suez Canal seemed to offer an adequate opportunity to launch the Israeli campaign. Moreover, the United Kingdom and France were also determined to seize the Canal by force.<sup>32</sup> As a consequence, on 29 October 1956, Israel launched its military offensive against Egypt and moved into the Sinai Peninsula. Two days later, after a foreseeable rejection of an Anglo-French ultimatum by Nasser, the United Kingdom and France launched airstrikes against Egypt. On 5 November, an Anglo-French force landed near Port Said, captured the city and advanced along the line of the Suez Canal.<sup>33</sup>

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<sup>24</sup> J.W. Spanier, *The Truman-MacArthur Controversy and the Korean War* (Cambridge, Massachusetts, Belknap Press of Harvard University Press 1959) pp. 88-91.

<sup>25</sup> See *infra* 11.2.

<sup>26</sup> K.P. Mueller et al., *Striking First: Preemptive and Preventive Attack in US National Security Policy* (RAND Project Air Force, 2006) p. 191.

<sup>27</sup> *Ibid.*, pp. 191-192; Sorenson, p. 26.

<sup>28</sup> Mueller et al., p. 192.

<sup>29</sup> *Ibid.*, p. 193, Sorenson, p. 26.

<sup>30</sup> Mueller et al., p. 195.

<sup>31</sup> *Ibid.* (quoting Moshe Dayan).

<sup>32</sup> Mansfield, pp. 256-257; Mueller et al., p. 196; Sorenson, p. 26.

<sup>33</sup> Mansfield, p. 257; Mueller et al., p. 196.

The 1956 invasion of Egypt received a very negative reaction from most members of the Security Council.<sup>34</sup> Before the UN General Assembly, Israel justified its actions as self-defence against the blocking of the Suez Canal and the support for raids of armed groups (*fedayeen*) by Egypt. Israel claimed that the ‘long and uninterrupted series of encroachments [...] constitute in its totality the essence and reality of an armed attack.’<sup>35</sup> This justification was rejected by most Member States. Although the nationalization of the Suez Canal did amount to a serious aggravation of the overall situation, between the announcement of such plans by Nasser at the end of July 1956 and the Israeli attack on 29 October 1956, Egypt showed willingness to negotiate and actively participated in talks organized by the US to solve the problem.<sup>36</sup> Moreover, Israel never offered conclusive proofs of the involvement of the Egyptian government in sponsoring guerrilla groups and never succeeded in demonstrating a magnitude of damage equivalent to an armed attack. According to a contemporary commentator, Quincy Wright, the existence of ‘an instant and overwhelming danger of such attack’ (armed attack) could not be maintained by Israel, because an armed attack had to threaten ‘the territory, official agencies, or perhaps the lives of the citizens of the state,’ whereas violation of the right of transit through a canal or stoppage of merchant vessels through a strait was less than that.<sup>37</sup>

The justifications brought by the UK and France received even less support. In their view, the invasion of Egypt was necessary to stop hostilities between Egypt and Israel, to prevent the nationalization of the Suez Canal and to prevent the stoppage of traffic, as well as to assure future freedom of traffic.<sup>38</sup> As Wright opined at that time, such justifications could not possibly constitute ‘the instant and overwhelming necessity for defence which justifies the use of armed force in international relations.’<sup>39</sup>

The Sinai campaign is another instance in which a claim of self-defence was condemned as unlawful. The blocking of naval passage – however serious – does not amount to an armed attack. Moreover, between July and October 1956, opportunities were present for negotiations; thus there was always a choice of means to solve the conflict and there was never a present and inevitable necessity to resort to self-defence. Moreover, the Israeli ground offensive and the British-French airstrikes could hardly be viewed as moderate responses to the situation under the requirement of proportionality.

## 8.5 The UK bombing of a Yemeni fort (1964)

In 1964, the United Kingdom bombed the *Harib* fort in Yemen in response to cross-border raids against the South Arabian Federation. Before the Security Council, the UK claimed that several of those incidents, all started by the Yemeni forces, had been registered over the previous year and reported to the Council.<sup>40</sup> Moreover, a fresh series

<sup>34</sup> SCOR, 11<sup>th</sup> Sess., 749<sup>th</sup> and 750<sup>th</sup> mtg., UN Doc. S/PV.749 and S/PV.750.Rev.1 (30 October 1956).

<sup>35</sup> GAOR, 1<sup>st</sup> Emergency Spec. Sess., UN Doc. A/PV.562 (1956), paras. 105-145.

<sup>36</sup> Mueller et al., p. 196.

<sup>37</sup> Q. Wright, ‘Intervention 1956’, 51 *American Journal of International Law* (1957) p. 272.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*, p. 273.

<sup>40</sup> *Repertoire*, Supp. 1964-1965, ch. 8, p. 128; Letter dated 1 July 1963 from the Permanent Representative of the United Kingdom addressed to the President of the Security Council, UN Doc. S/5343 (1963); Letter dated 10 September 1963 from the Permanent Representative of the United Kingdom addressed to the President of the Security Council, UN Doc. S/5424 (1963).

of incidents had begun in March 1964, all of which had been reported to the Security Council.<sup>41</sup> Those incidents had convinced the government of the South Arabian Federation and the government of the United Kingdom that ‘a deliberate and increasing attack by Yemen against the Federation was under way.’<sup>42</sup> The UK considered itself responsible for the defence and protection of its territories, including the Federation, and ‘it was in the fulfilment of that responsibility that the counter-attack of 28 March had been launched.’<sup>43</sup> The UK went on to show that the attack was directed at one particular target, the *Harib* fort, ‘a military and isolated target about one mile outside Harib town itself.’<sup>44</sup> Moreover, before the attack, ‘leaflets in Arabic were dropped in the area advising all persons to leave immediately.’<sup>45</sup> The weapons used (rockets and cannon fire) did not go astray and ‘all possible measures had been taken in order to minimize the loss of life and property.’<sup>46</sup> The exposé of the UK representative was received with scepticism by the members of the Council. Several representatives (such as those of Iraq, Syria and Egypt) contended that the British action could not be characterized as a defensive response, but rather as an act of reprisal.<sup>47</sup> The British delegate rejected the accusations by asserting that the action was taken in response to an urgent request from the Federation ‘to protect the interests and integrity of their country.’<sup>48</sup> He went on to explain that there was a clear distinction between reprisals and self-defence. The former was of a retributive or punitive nature, whereas the latter was authorized by the Charter against an armed attack.<sup>49</sup> The British delegate contended that:

‘The use of armed force to repel or prevent an attack - that is, legitimate action of a defensive nature - may sometimes have to take the form of a counter-attack. [...] The territory of the Federation had been subjected to a series of acts, over a considerable period, of an aggressive nature, against which the people of the Federation have asked to be defended.’<sup>50</sup>

The Security Council was not convinced of the necessity and proportionality of the British intervention and, consequently, it condemned the action as a reprisal.<sup>51</sup> This instance of state practice involves a claim of self-defence against a hit-and-run type of an attack, which will be thoroughly discussed in Chapter 10 as the main tactic of non-state actors. The reason why the claim of self-defence put forward by the UK was rejected by the Security Council was that the sporadic attacks of Yemeni forces were not viewed as serious enough to amount to an armed attack that gave rise to immediate need to act

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<sup>41</sup> Letter dated 20 March 1964 from the Permanent Representative of the United Kingdom addressed to the President of the Security Council, UN Doc. S/5618 (1964); Letter dated 28 March 1964 from the Permanent Representative of the United Kingdom to the United Nations addressed to the President of the Security Council, UN Doc. S/5628 (1964); Letter dated 30 March 1964 from the Permanent Representative of the United Kingdom addressed to the President of the Security Council, UN Doc. S/5632 (1964).

<sup>42</sup> *Repertoire*, Supp. 1964-1965, ch. 8, p. 128.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*; SCOR, 19<sup>th</sup> Sess., 1106<sup>th</sup> mtg., UN Doc. S/PV.1106 (2 April 1964) para. 54.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Repertoire*, Supp. 1964-1965, ch. 8, p. 128.

<sup>47</sup> *Ibid.*; SCOR, 19<sup>th</sup> Sess., 1106<sup>th</sup>-1109<sup>th</sup> mtg., UN Doc. S/PV.1106-S/PV.1109 (2-7 April 1964).

<sup>48</sup> *Repertoire*, Supp. 1964-1965, ch. 11, p. 194.

<sup>49</sup> *Ibid.*

<sup>50</sup> SCOR, 19<sup>th</sup> Sess., 1109<sup>th</sup> mtg., UN Doc. S/PV.1109 (7 April 1964) paras. 26-27.

<sup>51</sup> SC Res. 188 (1964).

(necessity). Although the UK representative went to great length in emphasizing the carefully targeted nature of the airstrike (proportionality), the claim was overall rejected by the Security Council members. The approach of the Security Council to claims of self-defence against hit-and-run attacks will be elaborated in Chapter 10.

## 8.6 The Gulf of Tonkin incident (1964)

Arguments similar to those of the UK regarding the *Harib* fort were put forward by the United States in connection with its actions against North Vietnamese torpedo boats and supply facilities. On 2 August 1964, the US destroyer *Maddox* was cruising off the coast of North Vietnam, in the Gulf of Tonkin. The ship was authorized to gain intelligence on North Vietnamese radar facilities and to maintain communications with South Vietnamese commandos conducting raids along the North Vietnamese coast.<sup>52</sup> As it was patrolling three to five miles inside the twelve-mile limit claimed by North Vietnam, it was approached by three high-speed North Vietnamese torpedo-boats in attack formation. All three attacking vessels directed machine-gun fire at the *Maddox* and two of them fired torpedoes which the *Maddox* evaded by changing course. After the attack was broken off, the *Maddox* continued on a southerly course in international waters. The US saw that as a ‘clearly deliberate armed attack against a naval unit of the United States on patrol on the high seas.’<sup>53</sup> Two days later, in the early evening hours of 4 August, officers of destroyers *Maddox* and *C. Turner Joy* believed that they were under attack from North Vietnamese torpedo boats. In a strong, sonar-distorting storm, the questionable sonar readings suggested that many torpedoes might have been launched against the ships, but since no sightings of torpedoes or vessels were confirmed and since neither destroyer sustained any damage, clear evidence of an actual attack could not be established.<sup>54</sup>

Nonetheless, then US President Lyndon B. Johnson believed that the evidence was enough to order air attacks against four torpedo-boat bases and a major oil storage facility deep into the territory of North Vietnam.<sup>55</sup> Announcing the US response on television, the president referred to ‘repeated acts of violence against the armed forces of the United States’ and justified the raids as a necessary defensive response.<sup>56</sup> The same arguments were advanced before the Security Council. The US complained of ‘deliberate and repeated armed attacks’ against naval vessels ‘on routine operations.’<sup>57</sup> Although the evidence of the second attack was far from being conclusive, the US delegate asserted before the Council that on 4 August, the destroyers *Maddox* and *C. Turner Joy* were again subjected to an attack by several motor torpedo-boats of the North Vietnamese Navy. Moreover, it was claimed that ‘numerous torpedoes were fired’ and that ‘the attack lasted for over two hours.’<sup>58</sup> Accordingly, the US invoked its right to self-defence and

<sup>52</sup> E. Martel, ‘Gulf of Tonkin’, 7 *OAH Magazine of History* (No. 2, 1993) p. 36.

<sup>53</sup> *Repertoire*, Supp. 1964-1965, ch. 8, p. 135; SCOR, 19<sup>th</sup> Sess., 1140<sup>th</sup> mtg., UN Doc. S/PV.1140 (5 August 1964) paras. 35-42.

<sup>54</sup> Martel, p. 36.

<sup>55</sup> *Ibid.*, p. 37.

<sup>56</sup> *Ibid.*

<sup>57</sup> SCOR, 19<sup>th</sup> Sess., 1140<sup>th</sup> mtg., UN Doc. S/PV.1140 (5 August 1964) para. 34.

<sup>58</sup> *Repertoire*, Supp. 1964-1965, ch. 8, p. 135; SCOR, Sess., 1140<sup>th</sup> mtg., UN Doc. S/PV.1140 (5 August 1964) para. 42.

justified the ensuing air attacks on this basis.<sup>59</sup> It characterized the raids as ‘limited and relevant measures to secure its naval units against further aggression.’<sup>60</sup> The United Kingdom reacted favourably to the American argument. The British delegate stated that the US had a right in accordance with the principle of self-defence in international law to take action directed to prevent the recurrence of attacks on its ships. Accordingly, ‘preventive action in accordance with that aim is an essential right which is embraced by any definition of that principle of self-defence.’<sup>61</sup> Conversely, the representative of Czechoslovakia contended that the US response exceeded the limits of self-defence, because the alleged Vietnamese attack had been immediately followed by an equally alleged act of self-defence. Consequently, there was no need for the air attacks against naval bases in North Vietnam and the US response was in fact an act of reprisal.<sup>62</sup> No resolution was adopted by the Security Council on the issue, because of the veto powers of the US. Nonetheless, the reaction in the Security Council showed that the US claim failed on both the necessity and proportionality conditions. Assuming that the second attack on the US warships did indeed take place, the magnitude of the attacks, taken collectively, was far from amounting to an armed attack giving rise to an immediate need to carry out airstrikes deep into the territory of North Vietnam.

### **8.7 The Six-Day War (1967)**

The 1967 war was initiated by Israel with a pre-emptive strike against Egypt as a result of a dangerous escalation of events. Apart from the general backdrop of Arab-Israeli hostility, the build-up to the Six-Day War featured some additional, highly risky elements. Dangerous developments were occurring on two fronts: on the Syrian-Israeli border and in Egypt.

The rise of the Ba’ath party in Syria greatly contributed to the increase of tensions between the two countries. Clashes on the Israeli-Syrian border became regular between 1964 and 1967. Tensions between the two countries were not only militarily expressed. Apart from organizing guerrilla attacks, the Syrian government also wanted to reduce the amount of water getting to Israel through the Jordan River.<sup>63</sup> A skirmish on the Syrian-Israeli border on 7 April 1967 increased the pressure between the two sides.<sup>64</sup>

At the same time, Egypt was also increasingly hostile. The Soviet Union sent an informative note to Egypt warning it about Israeli troops massing on the Syrian-Israeli border. Nasser dispatched an envoy to Damascus to verify the Israeli troop deployments. The envoy reported back that he had seen nothing to confirm the Soviet note, but by that time Nasser had already mobilized Egyptian troops into the Sinai.<sup>65</sup>

One of the reasons Nasser was so determined about mobilizing troops was the pressure coming from the Syrian and Jordanian sides. He felt that he had to act because

<sup>59</sup> SCOR, 19<sup>th</sup> Sess., 1140<sup>th</sup> mtg., UN Doc. S/PV.1140 (5 August 1964) para. 46.

<sup>60</sup> *Ibid.*, para. 44.

<sup>61</sup> *Repertoire*, Supp. 1964-1965, ch. 11, p. 195.

<sup>62</sup> *Ibid.* See also F.B. Schick, ‘Some Reflections on the Legal Controversies concerning America’s Involvement in Vietnam’, 71 *International and Comparative Law Quarterly* (1968) p. 981.

<sup>63</sup> Mueller et al., p. 198.

<sup>64</sup> *Ibid.*, pp. 198-199.

<sup>65</sup> Sorenson, p. 27; Mueller et al., p. 199.

of that pressure, but not necessarily because of his firm belief in an imminent Israeli threat.<sup>66</sup>

The situation became even tenser when, on 14 May, Israel detected Egyptian troops crossing the Suez Canal and moving into the Sinai Peninsula. Three days later Nasser demanded the withdrawal of UNEF<sup>67</sup> and, on 23 May, he ordered the closing of the Straits of Tiran.<sup>68</sup> In addition, the Egyptian administration had been threatening with preventive action in case the Israelis developed a nuclear weapon at the Dimona nuclear reactor, in the Negev desert, close to the Egyptian border. Consequently, the moving of the Egyptian troops into the Sinai, increased Israeli fears of an aerial or land attack against Dimona.<sup>69</sup>

The Israelis were reluctant to start hostilities, especially because the US was aiming for a diplomatic solution. The Johnson administration proposed to organize an international armada to break the blockade of the Strait, but the operation never took place, because key countries refused to participate.<sup>70</sup> Israeli Prime Minister Eshkol ordered a limited mobilisation, in the hope of deterring the Egyptians and careful not to obstruct potential diplomatic solutions. Eshkol held back the military for three weeks, in hope of a diplomatic solution by the US, which unfortunately never came.<sup>71</sup>

On 24 May 1967, two weeks before the outbreak of the war, Israel complained to the Security Council about 'massive troop concentrations' built up in the Sinai Peninsula. In Israel's view, the eviction of UNEF and the closing of the Straits 'were part of an overall plan, the design of which was unfolding' and that 'the action of Egypt constituted a challenge of utmost gravity not only to Israel, but also to the whole international community.'<sup>72</sup> Over the next few days, Egyptian authorities issued numerous declarations concerning the existence of a 'state of war' with Israel and expressed their intention to launch a general assault against Israel.<sup>73</sup> Few days later, on 29 May, the representative of Egypt, referring to the Israeli-Syrian border incident of 7 April 1967 and to the 'accurate information' about Israeli troops-concentration on the same border, explicitly stated that 'the Government [of Egypt] had decided, in co-operation with its Arab allies, to defend the Arab nation by all measures.'<sup>74</sup> Further, the Egyptian representative asserted that the presence of UNEF would have conflicted with such a decision and 'also for the sake of the safety of the Force,' the Egyptian government decided to expel it, 'peacefully' restoring the situation back to the 1956 status quo.<sup>75</sup>

The Security Council proved to be incapable to calm the situation and war seemed inevitable. Consequently, Israel decided to resort to anticipatory action. On 5 June 1967, Israeli aircraft attacked Egyptian warplanes and destroyed most of the Egyptian air force.

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<sup>66</sup> Mueller et al., p. 200.

<sup>67</sup> United Nations Emergency Force, established in November 1956 as a result of UN General Assembly resolutions to supervise the cease-fire line in the aftermath of the Israeli Sinai campaign.

<sup>68</sup> Sorenson, p. 26; Mueller et al., p. 200.

<sup>69</sup> Mueller et al., p. 200.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid., p. 202.

<sup>72</sup> *Repertoire*, Supp. 1966-1968, ch. 8, p. 135.

<sup>73</sup> Statement of Mr. Eban (Israel), SCOR, 22<sup>th</sup> Sess., 1348<sup>th</sup> mtg., UN Doc. S/PV.1348(OR) (6 June 1967) para. 150; Q. Wright, 'Legal Aspects of the Middle East Situation', 33 *Law and Contemporary Problems* (1968) p. 9.

<sup>74</sup> *Repertoire*, Supp. 1966-1968, ch. 8, p. 136.

<sup>75</sup> Ibid.

At the same time, Israeli forces crossed the Sinai and marched into the Gaza Strip. The next day, on 6 June, Jordanian troops opened fire on Israeli positions in Jerusalem, while Israeli troops captured towns on the Jordanian border.<sup>76</sup> On 7 June, Resolution 234 was unanimously passed by the Security Council calling for a cease-fire. Arab states, with the exception of Jordan, rejected it. Consequently, Israeli troops captured Sharm el-Sheikh, broke the blockade of Eilat and took Jericho in the West Bank.<sup>77</sup> Overwhelmed by the Israeli victories, Arab states accepted the ceasefire.

Several questions regarding the legal aspects of the Six-Day War have raised significant controversies. First, both sides have invoked the right of self-defence to justify their actions. Before the Security Council, the Egyptian delegate characterized Israel's actions as a 'treacherous aggression' and asserted that his country 'had no other choice than to defend itself by all means in accordance with Article 51 of the Charter of the United Nations.'<sup>78</sup> Israeli Minister of Foreign Affairs, Abba Eban argued, on the other hand, that the situation had already passed beyond the utmost point of danger when Israeli forces launched their attack. His country had thus 'responded defensively in full strength' in accordance with the 'inherent right of self-defence formulated in Article 51 of the United Nations Charter.'<sup>79</sup>

The sequence of events that led to the Israeli pre-emptive strike did indeed create a situation where an armed attack seemed unavoidable. Although the US was pressing for a diplomatic solution, its intention never materialised. The escalation of events in the last days of May and early days of June 1967 created a serious threat for Israel. The expulsion of UNEF, the closure of the Straits of Tiran, the extensive mobilizations on the Israeli border and the repeated threats coming from Nasser and other Egyptian representatives convinced the Israeli government that the threat of an armed attack was not only serious, but also imminent.<sup>80</sup> Even though, taken separately, the Arab steps could not amount to an armed attack or a threat thereof, their aggregation was interpreted as showing the imminence of an invasion. It is irrelevant whether the situation was indeed as desperate as it seemed. Assuming that the Israeli authorities assessed the available information in good faith, their resort to a pre-emptive strike was justified. Hindsight knowledge should not play a role in assessing the legality of pre-emption, when the threat of an armed attack is seen as sufficiently credible and imminent to justify defence.<sup>81</sup> As Dinstein maintains, the legality of defensive action must be weighed 'on the ground of the information available' and on the basis of a reasonable interpretation at the moment of action.<sup>82</sup> Although it has been maintained since then that Nasser did not actually want to resort to force,<sup>83</sup> at that particular moment, the Israeli government saw itself facing an apparently hopeless situation. The perception of the threat by Israel can be compared with

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<sup>76</sup> Mueller et al., p. 204.

<sup>77</sup> Sorenson, p. 27.

<sup>78</sup> Statement of Mr. Kony (United Arab Republic), SCOR, 22<sup>th</sup> Sess., 1347<sup>th</sup> mtg., UN Doc. S/PV.1347(OR) (5 June 1967) para. 53.

<sup>79</sup> Statement of Mr. Eban (Israel), SCOR, 22<sup>th</sup> Sess., 1348<sup>th</sup> mtg., UN Doc. S/PV.1348(OR) (6 June 1967) paras. 153, 155.

<sup>80</sup> Wright 1968, p. 27; A. Shapira, 'The Six Day War and the Right of Self-Defence', 6 *Israel Law Review* (1971) pp. 75-76.

<sup>81</sup> Dinstein 2005, p. 192; Gill 2007, p. 139.

<sup>82</sup> Dinstein 2005, p. 192.

<sup>83</sup> Mueller et al., p. 200.

the perception the British War Cabinet had in 1940 when it decided to resort to *Operation Catapult*. Even though, with hindsight knowledge, it could be established that the other side was in fact not preparing to attack, the threat was perceived as present and inevitable on the basis of the available information at the time, interpreted in good faith.<sup>84</sup>

Another thorny issue in relation to the Six-Day War was the annexation of Arab territories by Israel. Israeli forces managed to take East Jerusalem from Jordanian control and annex the Golan Heights, the Gaza Strip, the West Bank and the Sinai Peninsula.<sup>85</sup> Numerous authors have expressed their opinion that the continuous Israeli occupation of Arab territories suggested that the June 1967 actions went beyond the limits of self-defence.<sup>86</sup> The wording of Security Council Resolution 242 of November 1967 seems to confirm that opinion. The resolution did not condemn the Israeli action and attempted to secure a trade-off between the parties by restating the pre-war status quo. It affirmed, nevertheless, that ‘the establishment of a just and lasting peace in the Middle East’ had to include the ‘withdrawal of Israel armed forces from territories occupied in the recent conflict.’<sup>87</sup> Arab states have interpreted this statement as a demand of immediate and unconditional withdrawal.<sup>88</sup> Israel has regarded that requirement conditional upon the satisfaction of another one, also affirmed by the Security Council in the same resolution: ‘termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area.’<sup>89</sup> The substantive issues arising from the different interpretations are numerous and they go beyond the purpose of the present research. It may suffice to note that the protracted occupation of territories annexed during armed action (be that defensive) cannot be justified within the limits of the right of self-defence.

The Six-Day War is an instance of state practice in which anticipatory action in self-defence was undertaken. The claim of self-defence was generally accepted by both states and legal publicists.<sup>90</sup> The Israeli action meets the requirements of necessity. On the basis of the information available at the time and in the face of the escalating events, the Israeli Cabinet concluded, in good faith, that an armed attack was imminent and that it was absolutely necessary to act. From the point of view of proportionality, the immediate actions of Israel were lawful. The continuous annexation of territories exceeded, however, the limits of self-defence.

## 8.8 The ‘Yom Kippur War’ (1973)

After the 1967 war, a series of smaller clashes occurred between Egyptian troops and the Palestine Liberation Organization, on the one side, and Israeli forces, on the other. The

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<sup>84</sup> See *supra* 4.6.

<sup>85</sup> Sorenson, p. 28; Mueller et al., p. 204.

<sup>86</sup> Wright 1968, p. 27; D.W. Greig, ‘Self-Defence and the Security Council: What Does Article 51 Require’, 40 *International and Comparative Law Quarterly* (1991) pp. 394-395; Mueller et al., p. 204. See *per a contrario*: Shapira, pp. 77-79.

<sup>87</sup> SC Res. 242 (1967) para. 1(i).

<sup>88</sup> Greig 1991, p. 395.

<sup>89</sup> SC Res. 242 (1967) para. 1(ii). Greig 1991, p. 395.

<sup>90</sup> Dinstein 2005, p. 192; Gill 2007, pp. 138-139; Shapira, pp. 75-76; Wright 1968, p. 27.

‘War of Attrition’, as it became known, was waged by Egypt in order to make Israel hand back the Sinai Peninsula.<sup>91</sup>

After the death of Nasser in September 1970, President Anwar Sadat attempted to soften the Israelis with a more peaceful rhetoric, calling for a diplomatic solution. Since that approach did not secure the desired result, President Sadat became more and more inclined to pursue a military solution.<sup>92</sup>

For the most of 1973, Israeli intelligence saw the occurrence of war improbable.<sup>93</sup> Israel had been receiving numerous threats from all surrounding Arab states, which were all dismissed as regular large-scale military exercises or deterrence tactics.<sup>94</sup> Worrisome information only came few days before the attack.<sup>95</sup> Nonetheless, Israel decided not to launch a pre-emptive strike. First, it was still not completely clear to Israeli intelligence that an attack would take place and, secondly, the Israeli government did not want to provoke a negative US reaction.<sup>96</sup> What the Israeli cabinet did do, however, was the mobilization of approximately 100,000 men in preparations for a potential attack.<sup>97</sup>

The so-called Yom Kippur War started with a double-attack of Egyptian forces from the Sinai and Syrian forces from Golan. The Israelis suffered great losses in the beginning, but regained their momentum towards the end of the war.<sup>98</sup>

The Israeli decision not to act pre-emptively is an example of state practice in which resort to self-defence was contemplated, but not pursued. Israeli intelligence did not have enough information to secure a credible justification of an anticipatory strike. Although the threat of an armed attack was perceived by Israel, there was no conclusive evidence of its imminence. For that reason, the Israeli government chose to sit and wait for the Arab offensive to begin. The fear of a negative US reaction should not be dismissed either. Without having comprehensive information on the imminence of an Arab attack, Israel could have never convinced the US that its anticipatory action met the requirements of necessity.

## 8.9 The Iran-Iraq War (1980-1988)

Iran and Iraq had long disputed the border between them along the Shatt al-Arab river. In Algiers in 1975 the two countries finally reached an agreement that established the border to be running along the median course of the river.<sup>99</sup> This accord became to be known as the Algiers Agreement.<sup>100</sup>

In the immediate aftermath of the Islamic Revolution, the new Iraqi regime, led by Saddam Hussein, adopted an appeasing approach towards the government of Ayatollah

<sup>91</sup> Mueller et al., p. 206; Sorenson, pp. 28-29.

<sup>92</sup> Mueller et al., p. 206.

<sup>93</sup> Ibid., p. 207; Sorenson, p. 30. See *per a contrario*, A. Levite, *Intelligence and Strategic Surprise* (New York, Columbia University Press 1987) p. 153; ‘Israel new attack was coming: Envoy to the US asserts’, in *New York Times*, 11 October 1973, p. 1.

<sup>94</sup> Mueller et al., p. 207. Sorenson, p. 30.

<sup>95</sup> Mueller et al., p. 207; Sorenson, p. 30.

<sup>96</sup> Mueller et al., p. 207.

<sup>97</sup> Ibid.

<sup>98</sup> Mansfield, pp. 294-295.

<sup>99</sup> Sorenson, *Modern Middle East*, p. 34.

<sup>100</sup> E. Karsh, *The Iran-Iraq War 1980-1988* (Oxford, Osprey 2002) pp. 12, 22.

Khomeini. In a speech of July 1979, Saddam Hussein expressed Iraq's desire to establish relations of friendship and co-operation with Iran, based on the principle of non-interference in internal affairs.<sup>101</sup> The Iranian regime, however, seemed to be far less amiable. Khomeini planned to disseminate his religious doctrine throughout the Muslim world.<sup>102</sup> He regarded Saddam an atheist and demanded the overthrow of his regime.<sup>103</sup> By the end of 1979, both countries were fully engaged in blaming each other for subversive campaigns. Tehran was accused for aiding Kurdish separatists and Shiite movements in Iraq, whereas Iraq was blamed for supporting Arab elements in Iran.<sup>104</sup> Moreover, Iran was accused of organizing or supporting several terrorist and sabotage acts against the Iraqi population and some high-ranking officials.<sup>105</sup> Similar accusations were made by Iran as well: the 'continual dispatch of mercenaries and Ba'ath agents and armed groups' into several Iranian provinces as well as the provision of assistance to 'anti-revolutionary elements' and 'persons sought in Iran for having committed crimes against the population during the Shah's regime.'<sup>106</sup>

Against this background, the controversy that accelerated the sequence of events was related to the Shatt al-Arab border. On 7 September 1980, Iraq accused Iran of shelling Iraqi border towns.<sup>107</sup> The shelling was said to have taken place three days earlier, on 4 September 1980.<sup>108</sup> These border towns were located on the territory which, according to the Algiers Agreement, belonged to Iraq. Consequently, Iraq moved to 'liberate' them. In fact, it was deploying its army along the Iran-Iraq border.<sup>109</sup>

After both parties denounced the Algiers agreement, on 22 September 1980, Iraq launched a full-scale invasion against Iran. As justification, Iraq invoked its right of 'preventive self-defence to defend its people and territories' against the alleged Iranian shelling.<sup>110</sup> Since the military offensive covered a much greater area than that of the shelled towns, Iraq claimed that 'it was necessary to push the Iranian forces away from Iraqi towns situated within the range of Iranian heavy and long-range artillery capable of shelling.'<sup>111</sup> Consequently, Iraq maintained that 'the presence of the Iraqi military forces inside Iranian territories is solely for defensive purposes.'<sup>112</sup>

Instead of a quick victory for Iraq, the war dragged out, with both sides launching indecisive attacks and producing a large number of casualties.<sup>113</sup> Iraq was led by its belief

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<sup>101</sup> Ibid., p. 13.

<sup>102</sup> Karsh, pp. 12-13.

<sup>103</sup> Sorenson, p. 34.

<sup>104</sup> Karsh, p. 13; K.H. Kaikobad, "'Jus ad Bellum': Legal Implications of the Iran-Iraq War", in I.F. Dekker and H.H.G. Post, eds., *The Gulf War of 1980-1989* (Dordrecht, Martinus Nijhoff 1992) pp. 52-53.

<sup>105</sup> Statement of Mr. Hammadi (Iraq), SCOR, 35<sup>th</sup> Sess., 2250<sup>th</sup> mtg., UN Doc. S/PV.2250 (15 October 1980) paras. 18-19, 21-22; Karsh, p. 13.

<sup>106</sup> Statement of Mr. Rajai (Iran), SCOR, 35<sup>th</sup> Sess., 2251<sup>st</sup> mtg., UN Doc. S/PV.2251 (17 October 1980) para. 18.

<sup>107</sup> Karsh, p. 14.

<sup>108</sup> Letter dated 27 October 1980 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General, Annex: Letter dated 24 October 1980 from the Minister of Foreign Affairs of Iraq, UN Doc. S/14236 (1980) (hereafter, Letter Iraq 1980).

<sup>109</sup> Karsh, p. 14.

<sup>110</sup> Letter Iraq 1980.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

<sup>113</sup> Sorenson, p. 34.

that the Islamic Revolution had weakened Iran's military capabilities.<sup>114</sup> Although this was partly true, the Iranian forces regained their momentum and soon moved on to the offensive.<sup>115</sup> The war protracted for eight years and it escalated to include missile attacks against cities in both countries, the use of chemical weapons by Iraq and attacks on oil tankers in the Gulf.<sup>116</sup>

During the war, the Security Council stopped short of condemning either side for aggression, although it repeatedly called for cease-fire and vehemently condemned the use of chemical weapons.<sup>117</sup> Nonetheless, in December 1991, then UN Secretary-General, Javier Perez de Cuellar, characterized the Iraqi invasion as an aggression and thus, a clear violation of the prohibition to use force. In his view, the attack of 22 September 1980 against Iran could not be justified on the basis of the UN Charter.<sup>118</sup> Even if Iran was responsible for 'some encroachment on Iraqi territory,' such acts could not justify 'Iraq's aggression against Iran.'<sup>119</sup>

Assuming that Iran did indeed organize or support subversive campaigns and terrorist attacks against Iraq and assuming that it did shell a few towns on the border, the threat posed by its conduct was never of such gravity as to justify a full-scale invasion. Moreover, there was no evidence of Iran preparing for an armed action against Iraq and its subversive tactics never got close to overturning the Iraqi government. In other words, there was neither one major event, nor a sequence of events that could amount to an armed attack or a threat thereof, certainly not one of a scale to justify the Iraqi invasion. Even though Iraq invoked its right to 'preventive'<sup>120</sup> self-defence, the understanding given to self-defence at that time – on the basis of the UN Charter and customary law – did not justify Iraq's action. Iran, on the other hand, had all reasons to invoke the right of self-defence, at least in the beginning of the war. Ensuring the withdrawal of Iraqi forces from its territory and putting an end to the threat posed by those forces was in the limits of self-defence as understood at that time. The reaction of Iran has since been recognized as justifiable under Article 51 of the UN Charter.<sup>121</sup>

The Iran-Iraqi war has a double significance for the concept of self-defence. First, it pertains to an unjustified claim of self-defence on behalf of Iraq. The threat posed by Iranian subversive activities and alleged cross-border shelling never reached the threshold of an armed attack creating an immediate need for action. Consequently, the Iraqi claim of 'preventive'<sup>122</sup> self-defence did not meet the requirement of necessity. Secondly, this instance of state practice involves a justified claim of self-defence on behalf of Iran. The invasion of Iranian territory by Iraqi troops clearly amounted to an ongoing armed attack and created an immediate need to take action and oust the invader. The protracted nature

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<sup>114</sup> Ibid.; Karsh, pp. 14, 19.

<sup>115</sup> Karsh, pp. 33-42, 48-51.

<sup>116</sup> Sorenson, pp. 34-35.

<sup>117</sup> SC Res. 479 (1980); 514 and 522 (1982); 540 (1983), 554 (1984); 582 and 588 (1986); 598 (1987); 612 and 620 (1988).

<sup>118</sup> *Further Report of the Secretary-General on the Implementation of Security Council Resolution 598*, UN Doc. S/23273 (1991) para. 6.

<sup>119</sup> Ibid., para. 7. On the significance of this report, see Gray 2004, p. 97.

<sup>120</sup> Letter Iraq 1980.

<sup>121</sup> I.F. Dekker, 'Criminal Responsibility and the Gulf War of 1980-1989: The Crime of Aggression', in I.F. Dekker and H.H.G. Post, eds., *The Gulf War of 1980-1989* (Dordrecht, Martinus Nijhoff 1992) pp. 258-259.

<sup>122</sup> Letter Iraq 1980.

of the conflict on both sides did, however, exceed the proportionality requirement of self-defence.

### 8.10 The Falklands War (1982)

Another instance of self-defence against invasion was the Falklands War of 1982 between Argentina and the UK. The sovereignty over the Falkland Islands (Las Malvinas) has been subject to a longstanding dispute between the two states. The dispute concerns both the question of discovery and that of ownership of the Islands.<sup>123</sup> Since 1833, the Falklands have been under British rule, but Argentina maintained claims of sovereignty. Several rounds of negotiations took place in the second half of the twentieth century between the two countries, but no settlement was reached.<sup>124</sup>

The situation significantly deteriorated by December 1981, when Argentinean scrap-metal merchant Constantino Davidoff visited South Georgia (South Atlantic island under British rule, some 700 nautical miles eastwards from the Falklands) without respecting the formalities for landing on the island.<sup>125</sup> The British protested, but soon enough a similar incident took place. On 19 March 1982, 40 Argentinean workmen under the leadership of Davidoff, contracted to dismantle an old whaling station on South Georgia, failed to ask permission to land from the British base and upon arrival hoisted the Argentine flag.<sup>126</sup> While lodging another formal protest against the unauthorised landing, Britain also sent its ice patrol ship, the HMS *Endurance*, stationed at Port Stanley (Falkland Islands) at that time, to remove the Argentineans from South Georgia. Although some of the workmen were taken aboard the *Endurance* and eventually repatriated, a small number remained. The British feared that the *Endurance* could be intercepted by Argentine warships at sea, so negotiations on the remaining men hit a harder tone.<sup>127</sup> In the ensuing diplomatic correspondence with his Argentinean counterpart, UK Foreign Secretary Lord Carrington pledged Britain's commitment to resolving the conflict by peaceful means:

‘Our principal objective now is to avoid that this issue should gain political momentum. It is essential for us not to lose the vital political climate for our mutual efforts regarding the peaceful resolution of the Falkland dispute through negotiations. For this end, we must proceed cautiously and with prudence on this incident.’<sup>128</sup>

The British pledge was made on condition that the remaining Argentinean workmen would leave South Georgia immediately. Argentina, however, rejected such a possibility and ordered instead the reinforcement of its own naval forces. In fact, the Argentinean Junta, lead by General Leopoldo Galtieri, had been planning an invasion of both the Falklands and South Georgia as early as January 1982, with alternative target dates set in

<sup>123</sup> L. Freedman, *The Official History of the Falklands Campaign*, Vol. 1 (London, Routledge 2005) pp. 3-8.

<sup>124</sup> L. Freedman and V. Gamba-Stonehouse, *Signals of War: The Falklands Conflict of 1982* (Princeton, N.J., Princeton University Press 1991) pp. 7-13.

<sup>125</sup> *Ibid.*, pp. 42-43.

<sup>126</sup> *Ibid.*, pp. 47-48.

<sup>127</sup> Freedman Vol. 1, pp. 184-185.

<sup>128</sup> *Ibid.*, p. 182.

May or July of that year. Fearing further British reinforcements, on 26 March, the Junta decided to bring forward the invasion plan for the beginning of April.<sup>129</sup> On the same day, the British intelligence source in Buenos Aires sent out warnings that an Argentine invasion of the Islands was imminent. Two days later, Argentina formally restated its claim to the Falkland Islands and Dependencies and refused further negotiations with Britain on the South Georgia issue. A designated naval task force set sail on 28 March from Puerto Belgrano southwards. Three days later, the Argentinean task force changed course and headed directly to the Falklands.<sup>130</sup> At the same time, the British government ordered several warships to sail south from Gibraltar.<sup>131</sup>

In a letter dated 1 April 1982, Britain requested a UN Security Council meeting. In this letter, Britain decried the refusal of the Argentinean government to resolve the conflict by diplomatic means and warned of an imminent invasion of the Falkland Islands. The Argentinean representative contended that his country had been the victim of 150 years of repeated acts of aggression on behalf of the United Kingdom and that the situation at hand amounted to a serious and imminent threat that left Argentina no choice than to resort to legitimate defence.<sup>132</sup>

Notwithstanding the ensuing statement of the Security Council to refrain from the use or threat of force, in the early hours of 2 April 1982, Argentina launched *Operation Rosario* and invaded the Falklands.<sup>133</sup> An emergency cabinet meeting in London on the same day approved the sending of a task force to liberate the Falkland Islands.<sup>134</sup>

The next day, Argentina occupied South Georgia as well. The UN Security Council passed Resolution 502 determining ‘the existence of a breach of peace in the region’ and demanding an immediate withdrawal of all Argentinean forces from the Islands.<sup>135</sup>

With Argentina refusing to comply with the demands of the SC Resolution, preparations for deployment of the task force started on the same day, 3 April. By 7 April, the first wave of the task force was sailing towards the operation zone.<sup>136</sup> In the following days, several other ships and troops were sent to the South Atlantic. The task force used Ascension Island (British dependency located in the South Atlantic, some 3300 miles from the Falklands) as an interim base. Situated approximately midway between the UK and the operation zone, Ascension could serve as a replenishment base for the ships. More importantly, the island also had an US-built runway, which the Royal Air Force was allowed to use. Even so, some of the aircraft had to be adapted for air-to-air refuelling.<sup>137</sup>

Because of the great distance, it took the task force three to five weeks to reach the operation zone. On 26 April 1982 British forces retook South Georgia; the Argentinean

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<sup>129</sup> Ibid., p. 187.

<sup>130</sup> Freedman and Gamba-Stonehouse, p. 109.

<sup>131</sup> Ibid., p. 76.

<sup>132</sup> *Repertoire*, Supp. 1981-1984, ch. 8, pp. 224-226.

<sup>133</sup> The amphibious landing of some 200 Argentinean Marines with armoured vehicles was backed by air force. The aircraft carrier *25 de Mayo*, escorted by several destroyers, provided support with approximately 1000 Marines on board. L. Freedman, *The Official History of the Falklands Campaign*, Vol. 2 (London, Routledge 2005) pp. 7-9.

<sup>134</sup> Freedman and Gamba-Stonehouse, p. 124.

<sup>135</sup> SC Res. 502 (1982).

<sup>136</sup> In addition to aircraft carriers *Hermes* and *Invincible*, three submarines, eleven destroyers and frigates as well as several other ships set sail. Freedman and Gamba-Stonehouse, pp. 128-129.

<sup>137</sup> Freedman, Vol. 2, pp. 62-64.

forces on the Falkland Islands surrendered on 14 June 1982.<sup>138</sup> The war claimed almost 300 British and more than 600 Argentinean casualties as well as substantial material losses on both sides.<sup>139</sup>

Although both parties invoked Article 51 of the UN Charter in justifying their actions,<sup>140</sup> the wording of Resolution 502 clearly favoured the British position. The unprovoked Argentinean attack on South Georgia and the Falkland Islands could hardly be characterized as a legitimate use of the right to self-defence.

The question remains whether the temporal remoteness of the British response can be justified within the limits of legitimate self-defence. The invasion of the Falklands occurred on 2 April 1982, whereas the actual hostilities between Argentinean and British forces started only four weeks after, when the naval force reached the operation zone. According to Neff, the British operation was not strictly-speaking self-defence, because the takeover had already occurred. It was rather a 'recovery operation, a reversal of a *fait accompli*.'<sup>141</sup> This opinion gives little attention to the geographical disparity between Britain and the South Atlantic islands. Some 6700 nautical miles separated Britain from its Southern Atlantic territories.

First, even before the Argentinean invasion took place, the British ordered the deployment of several warships to the South Atlantic from either the Gibraltar or from home ports. All these precautionary measures were taken before the actual invasion occurred, but it took time until the ships arrived at their destination.

Secondly, on the very day of the Falklands attack, the British cabinet met up in an emergency session and decided to send a task force to liberate the Islands. That decision was endorsed by the House of Commons the next day, while South Georgia was being invaded.<sup>142</sup> Britain took prompt action in the face of an ongoing attack and decided the resort to self-defence while the invasion was still ongoing and in its immediate aftermath. Accordingly, after three days of hasty preparations, on 5 April the first ships of the task force pulled out of ports around Britain and from Gibraltar.<sup>143</sup> The geographical disparity between the departure points (home ports or Gibraltar) and the target (South Atlantic) as well as the amount of time needed for assembling a considerable amphibious task force are factors that cannot be ignored when considering the justifiability and timeliness of the British defensive action.

Thirdly, the expressed purpose of the British action was to 'secure the withdrawal of Argentine forces from the Islands.'<sup>144</sup> In other words, the aim of the British operation was to repel the attack of the occupying forces. The fact that it took four weeks for the British vessels to actually get to the Islands, engage in hostilities and drive out the Argentinean forces does not render the principal objective of the operation remote.

The Falklands War is an instance of state practice where a justified claim of self-defence was made against an invasion that clearly created an immediate need for action. It is an instance of remedial self-defence, when action was taken after the armed attack

<sup>138</sup> Ibid., pp. 248-249, 651-652.

<sup>139</sup> Ibid., pp. 772-780.

<sup>140</sup> *Repertoire*, Supp. 1981-1984, ch. 8, pp. 224-226.

<sup>141</sup> Neff, p. 330.

<sup>142</sup> Freedman and Gamba-Stonehouse, p. 122.

<sup>143</sup> Ibid., p. 128.

<sup>144</sup> Letter by Mr. John Biffen, Lord President of the Council to Mr. George Foulkes, M.P., 20 May 1982, 53 *British Yearbook of International Law* (1982) pp. 519-520.

had occurred. The fact that the actual clash of forces occurred four weeks after the armed attack achieved its purpose is immaterial as long as the necessity to overcome that result existed.

### 8.11 US bombing of Libya (1986)

This instance of state practice involves another claim of self-defence against hit-and-run attacks. The air strikes took place against the background of a number of terrorist attacks against United States nationals and property around the world during the course of 1985 and early 1986.<sup>145</sup> Libya was also suspected of harbouring and supporting several Palestinian and other armed groups that were accused of carrying out terrorist attacks in Western countries.<sup>146</sup> In 1984, a British policewoman was caught in cross fire outside the Libyan embassy London and was shot dead by Libyan assailants.<sup>147</sup> In 1985, a Libyan diplomat at the United Nations was declared *persona non grata* in connection with a plot to kill Libyan dissidents in the US.<sup>148</sup> In December 1985, airline offices at airports in Rome and Vienna were bombed and Libya was widely suspected of involvement.<sup>149</sup> During the several years prior to the American air strike, the Libyan President, Colonel Qadhafi, made frequent public statements about ‘exporting revolution’ and forcing ‘America to fight on a hundred fronts.’<sup>150</sup> Tensions were further aggravated with the bombing of a West-Berlin discotheque on 5 April 1986. The La Belle discotheque was frequented by American servicemen and the explosion killed two people (one US soldier and a Turkish woman) and injured more than 200 (including 50 US soldiers).<sup>151</sup>

The US invoked its right of self-defence and characterized the air strikes as ‘pre-emptive action against terrorist installations’ that would ‘not only diminish Colonel Qadhafi’s capacity to export terror,’ but it would also ‘provide him with incentives and reasons to alter his criminal behaviour.’<sup>152</sup> The aerial bombings targeted air fields, military barracks and training camps near Tripoli, Benina and Benghazi.<sup>153</sup> The bombing

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<sup>145</sup> Franck 2002, pp. 89-90; C. Greenwood, ‘International Law and the United States’ Air Operation against Libya’, 89 *West Virginia Law Review* (1987) p. 934.

<sup>146</sup> S.G. Baker, ‘Comparing the 1993 US Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51’, 24 *Georgia Journal of International and Comparative Law* (1994) p. 104; Greenwood 1987, pp. 934-935; G.F. Intoccia, ‘American Bombing of Libya: An International Legal Analysis’, 19 *Case Western Reserve Journal of International Law* (1987) pp. 180-181; J.A. McCredie, ‘The April 14, 1986 Bombing of Libya: Act of Self-Defense or Reprisal’, 19 *Case Western Reserve Journal of International Law* (1987) p. 218.

<sup>147</sup> Greenwood 1987, p. 934; Intoccia, p. 181.

<sup>148</sup> Intoccia, p. 181.

<sup>149</sup> Greenwood 1987, p. 934; Intoccia, p. 182; McCredie, p. 215.

<sup>150</sup> Greenwood 1987, p. 934; Intoccia, pp. 181-182

<sup>151</sup> Greenwood 1987, p. 934. According to another account, two American soldiers died in the bombing and 154 persons were wounded, of which 50 to 60 were US servicemen (Intoccia, p. 185). See also The President’s Address to the Nation, 14 April 1986, reprinted in *Department of State Bulletin I* (June 1986) for mentioning 230 wounded.

<sup>152</sup> The President’s Address to the Nation, 14 April 1986, reprinted in *Department of State Bulletin I* (June 1986).

<sup>153</sup> Intoccia, p. 179; Greenwood 1987, p. 936.

resulted in 37 dead and 93 wounded.<sup>154</sup> During the bombing of Qadhafi's military headquarters (which also served as his personal residence), his step-daughter was killed and two of his sons were wounded.<sup>155</sup>

Before the Security Council, US Ambassador Walters reiterated the claim of acting under 'the inherent right of self-defence' on the basis of which the United States executed 'a series of carefully planned airstrikes against terrorist-related targets in Libya.'<sup>156</sup> Walters went on to explain that US forces had struck targets that were part of Libya's military infrastructure (command and control system, intelligence communication, logistics and training facilities), sites used 'to carry out Libya's harsh policy of international terrorism.'<sup>157</sup> The ambassador deplored the bombing of the West-Berlin discotheque and went on to say that:

'[I]n the light of that reprehensible act of violence – only the latest in an ongoing pattern of attacks by Libya – and of clear evidence that Libya was planning a multitude of future attacks, the United States was compelled to exercise its right of self-defence. The United States hopes that this action will discourage Libyan terrorist acts in the future.'<sup>158</sup>

Ambassador Walters also pointed out that all prior efforts to stop Libyan terrorism – 'quiet diplomacy, public condemnation, economic sanctions and demonstrations of military force' – had failed and the targeted bombing of military sites was the only effective solution left.<sup>159</sup>

The significance of Ambassador Walter's statement for claims of self-defence against hit-and-run attacks will be elaborated in Chapter 10.<sup>160</sup> It is enough to note at this point that despite the efforts of Walters to demonstrate that the airstrikes were both necessary and proportionate, the majority of the Security Council members rejected the explanation.<sup>161</sup> The US, the United Kingdom and France vetoed a draft resolution that would have condemned the American airstrikes.<sup>162</sup> The UN General Assembly adopted, nonetheless, a resolution condemning them.<sup>163</sup>

The reaction to the US airstrikes was mixed, although many countries had later acquiesced to economic sanctions imposed upon Libya for its terrorist activities. Some authors have, nonetheless, defended the US line of argumentation.<sup>164</sup>

The claim of self-defence put forward by the US was rejected at the time by most Security Council members and the majority of states in the General Assembly.<sup>165</sup> It is

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<sup>154</sup> Intoccia, p. 179; McCredie, p. 215. According to Greenwood, the number of civilian casualties was unknown, but press reports at the time spoke of a death-toll of approximately 100 persons and injuries to a greater number. Greenwood 1987, p. 936.

<sup>155</sup> Intoccia, p. 179.

<sup>156</sup> SCOR, 41<sup>th</sup> Sess., 2674<sup>th</sup> mtg., UN Doc. S/PV.2674 (15 April 1986) p. 13.

<sup>157</sup> *Ibid.*, pp. 13-14.

<sup>158</sup> *Ibid.*, p. 17.

<sup>159</sup> *Ibid.*, p. 16.

<sup>160</sup> See *infra* 10.3.

<sup>161</sup> SCOR, 41<sup>th</sup> Sess., 2674<sup>th</sup>-2682<sup>nd</sup> mtg., UN Doc. S/PV.2674-S/PV.2682 (15-21 April 1986).

<sup>162</sup> *Ibid.*, 2682<sup>nd</sup> mtg., UN Doc. S/PV.2682 (21 April 1986) p. 43.

<sup>163</sup> GA Res. 41/38 (1986).

<sup>164</sup> Greenwood 1987, pp. 933-960; McCredie, pp. 215-242. Dinstein characterized them as 'defensive armed reprisals'. Dinstein 2005, p. 229. For an elaboration of Greenwood's opinion, see *infra* 10.3.

<sup>165</sup> Franck 2002, p. 90.

important to highlight here that the claims of self-defence against hit-and-run tactics were based on a more complicated view on the requirements of necessity and proportionality. State-to-state conflicts were generally understood in terms of invasion or occupation (such as the Korean War, the Iran-Iraq War, the Falklands War). An invasion or an occupation was clearly viewed as an armed attack creating an immediate need for action by virtually all members of the United Nations. Hit-and-run attacks carried out by the regular armed forces of a state against the citizens or territory of another were seen as hardly reaching the threshold of an armed attack as required by Article 51, even though there was nothing in pre-Charter customary law that would preclude such a conclusion.<sup>166</sup> The approach of the Security Council and the attitude of legal literature to claims of self-defence against hit-and-run attacks will be elaborated in Chapter 10.<sup>167</sup>

### 8.12 The Persian Gulf War (1990-1991)

On more than one occasion since gaining independence, Iraq had asserted territorial claims over Kuwait. Both countries used to belong to the Ottoman Empire and since Kuwait was a district in the Basra province under the Ottoman administrative system, Iraq maintained that Kuwait was bound to become part of it.<sup>168</sup> Apart from the long-standing territorial claims, Iraq also had immediate reasons for invading Kuwait. Accordingly, the eight-year war between Iran and Iraq left both belligerents exhausted with an enormous cost in human and material resources.<sup>169</sup> Iraq found itself burdened with a heavy debt to Kuwait and other countries and was forced to abandon several of its development projects.<sup>170</sup> In order to help itself out of the impasse, Iraq tried to persuade the Arab Gulf oil-producing countries to increase the price of the oil, but its proposal was not accepted partly because of the reluctance of Kuwait to accept the new quota.<sup>171</sup> Iraq and Kuwait also shared a large oil deposit, the Rumallia field. Iraq accused Kuwait of slant-drilling into the Iraqi side of the field for its own gains and demanded the payment of compensation.<sup>172</sup> Against this background, on 2 August 1990, Iraqi forces launched a massive attack on Kuwait, quickly defeated the small Kuwaiti army and, within days, took hold of Kuwait City.<sup>173</sup>

Before the Security Council, Kuwait requested the adoption of a resolution that would put an immediate end to the invasion and that would force Iraq to withdraw immediately and unconditionally.<sup>174</sup> At the same meeting, the Iraqi representative maintained that Iraqi armed forces were only restoring order in Kuwait and that they would withdraw as soon as that objective was reached.<sup>175</sup> At the end of the session, the Security Council adopted Resolution 660 in which it condemned the Iraqi invasion under Articles 39 and

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<sup>166</sup> See *supra* 6.6.1.

<sup>167</sup> See *infra* 10.3 – 10.5.

<sup>168</sup> M. Khadduri and E. Ghareeb, *War in the Gulf, 1990-91: The Iraqi-Kuwait Conflict and Its Implications* (New York, Oxford University Press 1997) p. 6.

<sup>169</sup> *Ibid.*, p. 79.

<sup>170</sup> *Ibid.*, p. 80.

<sup>171</sup> *Ibid.*, pp. 86-87.

<sup>172</sup> Sorenson, p. 35.

<sup>173</sup> *Ibid.*

<sup>174</sup> SCOR, 45<sup>th</sup> Sess., 2932<sup>nd</sup> mtg., UN Doc. S/PV.2932 (2 August 1990) p. 8.

<sup>175</sup> *Ibid.*, p. 11.

40 of the Charter as a breach of international peace and security and demanded the immediate withdrawal of the invading forces.<sup>176</sup> Four days later, after the Iraqi failure to comply with the resolution, the Security Council imposed severe economic sanctions amounting to a general ban on importing products from and exporting products to Iraq.<sup>177</sup> Resolution 661 also made reference in its preamble to the ‘inherent right of individual or collective self-defence in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter.’<sup>178</sup>

After several subsequent resolutions ignored by Iraq, on 29 November 1990, the Security Council authorized states cooperating with Kuwait to ‘use all necessary means’ to implement earlier resolutions and restore international peace and security in the area.<sup>179</sup> On that basis, on 16 January 1991, a coalition of several countries led by the United States launched a massive air and ground campaign against Iraq.<sup>180</sup> The Iraqi troops withdrew from Kuwait in the last days of February 1991.<sup>181</sup> In April 1991, the Security Council adopted Resolution 687, which outlined Iraq’s disarmament obligations. The authority of Resolutions 678 (1990) and 687 (1991) was invoked by the US in 2003 to assert that Security Council enforcement measures against Iraq could be implicitly reactivated.<sup>182</sup>

The significance of the Security Council enforcement measures and their relationship with collective self-defence will be discussed in Chapter 11.<sup>183</sup> At this point it is sufficient to note that the Iraqi invasion of Kuwait was a clear instance of armed attack that created an immediate need to oust the invader. This instance of state practice involves the exercise of self-defence after an armed attack has occurred; it thus had a remedial nature.

### 8.13 US missile attack against Iraqi intelligence headquarters (1993)

Tensions were running high between the United States and Iraq after the Persian Gulf War. On 14 April 1993, as former US President George Bush was beginning a three-day visit in Kuwait City to attend a special ceremony in appreciation of his leadership in the previous war, Kuwaiti authorities uncovered an assassination plot against him. Fourteen men were arrested for smuggling plastic explosives into Kuwait intended to be used to assassinate the former president.<sup>184</sup>

The ensuing FBI and CIA investigative reports concluded that ‘it was highly likely that the Iraqi Government originated the plot and more than likely that Bush was the target.’<sup>185</sup> Additionally, the CIA independently reported that ‘there was a strong case that

<sup>176</sup> SC Res. 660 (1990) paras. 1 and 2.

<sup>177</sup> SC Res. 661 (1990) para. 3.

<sup>178</sup> *Ibid.*, preamble.

<sup>179</sup> SC Res. 678 (1990) p. 2.

<sup>180</sup> *Ibid.*, pp. 169-170.

<sup>181</sup> *Ibid.*, pp. 178-179.

<sup>182</sup> See *infra* 9.5.2.

<sup>183</sup> See *infra* 11.2.

<sup>184</sup> Baker 1994, pp. 101-102.

<sup>185</sup> *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases* (US Department of Justice, Office of the Inspector General 1997) Part 3, section D: The Bush Assassination Attempt (hereafter, *The FBI Laboratory*, section D), available at <[www.fas.org/irp/agency/doj/oig/fbilab1/05bush2.htm](http://www.fas.org/irp/agency/doj/oig/fbilab1/05bush2.htm)> (accessed 15 April 2010).

Saddam Hussein directed the plot against Bush.<sup>186</sup> As a consequence, President Bill Clinton ordered an airstrike against the headquarters of the Iraqi Intelligence Service (IIS). On 26 June 1993, US naval forces launched 23 cruise missiles against the IIS buildings in Baghdad. Three missiles missed their targets and hit a neighbouring residential area, killing eight Iraqi civilians.<sup>187</sup>

The US duly reported its action to the Security Council and justified it as self-defence under Article 51 of the UN Charter. Ambassador to the UN, Madeleine Albright claimed that the airstrike was carried out only after having concluded that there was no reasonable prospect that new diplomatic initiatives or economic pressure could influence the Iraqi government to cease planning such attacks against US citizens.<sup>188</sup> Further, she asserted that the target had been carefully chosen to minimize the risk of civilian casualties.<sup>189</sup> Most of the Security Council member either endorsed or accepted the attack.<sup>190</sup> France, Hungary, Japan, New Zealand, Russia and the UK expressed their full support for the action.<sup>191</sup> Russia went as far as to assert that the US action was justified by the right of individual and collective self-defence in accordance with Article 51 of the Charter.<sup>192</sup> Brazil, Spain and the Group of Non-Aligned countries also accepted the attack, although their reaction was more moderate.<sup>193</sup> China was the only member of the Security Council that questioned the legality of the US airstrike.<sup>194</sup>

The US airstrikes against Iraq were another instance of self-defence against hit-and-run attacks carried out by regular forces of a state against the citizens of another. Assuming that the information available regarding the assassination attempt was interpreted in good faith by the US government and presupposing that the absence of any reasonable prospect to prevent the planning of such attacks in the future was clearly established, the US action could be regarded meeting the requirement of necessity. The airstrikes were carried out with surgical accuracy, so the requirement of proportionality also seemed to be met. The specific issues raised by claims of self-defence against hit-and-run tactics will be elaborated in Chapter 10.

#### 8.14 The South Ossetia War (2008)

Another instance of state-to-state conflicts in which claims of self-defence were raised was the so-called South Ossetia War between Russia and Georgia. The historical and political background of the conflict between Russia and Georgia involves two sets of complex, overlapping relations between Georgia and Russia on one hand, and internal

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<sup>186</sup> Ibid.

<sup>187</sup> Baker 1994, pp. 102-103; *The FBI Laboratory*, section D.

<sup>188</sup> Letter dated 26 June 1993 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/26003 (1993); Franck 2002, p. 94.

<sup>189</sup> Letter dated 26 June 1993 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/26003 (1993); Franck 2002, p. 94.

<sup>190</sup> Baker 1994, p. 103; Franck 2002, p. 94.

<sup>191</sup> SCOR, 48<sup>th</sup> Sess., 3245<sup>th</sup> mtg., UN Doc. S/PV.3245 (27 June 1993) pp. 13 (France), 16 (Japan), 21-22 (UK), 22 (Russia), 23 (New Zealand).

<sup>192</sup> Ibid., p. 22.

<sup>193</sup> Ibid., pp. 16-17 (Non-Aligned Countries), 17-18 (Brazil), 23-25 (Spain).

<sup>194</sup> Ibid., p. 21.

relations between Georgia and the breakaway territories of South Ossetia and Abkhazia on the other.<sup>195</sup> This duality was also reflected in the August 2008 armed conflict: there was both an internal conflict (between Georgia and South Ossetia and between Georgia and Abkhazia), and an international conflict between Georgia and Russia.<sup>196</sup> The present section will mainly focus on the conflict between Georgia and Russia, because it is the one that triggered self-defence claims. As regards the internal conflict between Georgia and its breakaway regions, suffice is to say that it involves historically complex claims of self-determination.<sup>197</sup> Nonetheless, it is important to note that one of the main bones of contention in the Georgian-Russian relationship has been the latter's peacekeeping role in Abkhazia and South Ossetia with Georgia repeatedly demanding an internationalisation of the peacekeeping mission to counterbalance Russian control.<sup>198</sup>

In the months leading up to August 2008, sporadic hostile actions and increasingly belligerent rhetoric marked Georgian-Russian relations. Tension in the Georgian-South Ossetian conflict zone started to rise in mid-June 2008 with explosions and mine incidents close to various Georgian- as well as South Ossetian-administrated villages.<sup>199</sup> After the July incident with a Russian airplane admittedly flying over South Ossetia, Georgia recalled its ambassador to Russia.<sup>200</sup> Although both the Georgians and Ossetians launched numerous artillery attacks on each other's villages and checkpoints throughout July, many experts did not expect that one of the parties to the conflict could be rationally intending to open hostilities.<sup>201</sup>

During the evening and night of 1-2 August 2008, a series of intense and extensive exchanges of sniper fire and mortar shelling occurred between the parties causing fatalities and casualties.<sup>202</sup> The exchanges of fire continued in the nights of 2-3 and 3-4 August. According to the OSCE Mission to Georgia they were the most serious outbreak of hostilities since the 2004 conflict.<sup>203</sup> From the afternoon of 6 August onwards fire was exchanged along the entire line of contact between the Georgian and South Ossetian sides.<sup>204</sup> The exchange of fire continued on 7 August with international observers noting movements of Georgian troops and equipment towards the conflict zone.<sup>205</sup> Diplomatic efforts undertaken that day between the Russian and Georgian sides did not bring any positive results. On the same day, in the afternoon, a ceasefire was observed by both parties that lasted until the evening hours.<sup>206</sup> Shortly before midnight, Georgian forces

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<sup>195</sup> Report of the Independent International Fact-Finding Mission on the Conflict in Georgia, Vol. 2 (September 2009) p. 2, available at <<http://www.ceiig.ch/Report.html>> (accessed 2 June 2010) (hereafter, Report of Fact-Finding Mission in Georgia).

<sup>196</sup> *Ibid.*, pp. 229-230.

<sup>197</sup> *Ibid.*, pp. 2-7; N. Higgins and K. O'Reilly, 'The Use of Force, Wars of National Liberation and the Right to Self-Determination in the South Ossetian Conflict', 9 *International Criminal Law Review* (2009) pp. 567-583.

<sup>198</sup> Report of Fact-Finding Mission in Georgia, p. 15.

<sup>199</sup> *Ibid.*, p. 204.

<sup>200</sup> *Ibid.*, p. 30.

<sup>201</sup> *Ibid.*, p. 31.

<sup>202</sup> *Ibid.*, p. 207.

<sup>203</sup> *Ibid.*, pp. 207-208. The 2004 conflict involved intense fighting between Georgian forces and South Ossetian militia between 8 and 19 August 2004 (see *ibid.*, pp. 12-15).

<sup>204</sup> *Ibid.*, p. 208.

<sup>205</sup> *Ibid.*

<sup>206</sup> *Ibid.*, pp. 208-209.

opened fire and in the early morning hours of 8 August launched a ground offensive against the city of Tskhinvali (the capital of South Ossetia).<sup>207</sup>

As a response, Russia engaged ground and air forces as well as the Black Sea Fleet, also attacking targets on Georgian territory outside South Ossetia.<sup>208</sup> As a result of the Russian armed action, by midnight on 10 August, most Georgian troops had left the territory of South Ossetia.<sup>209</sup> The withdrawing Georgian troops were followed by Russian forces, which crossed the administrative boundaries of South Ossetia and occupied a number of locations in Georgian territory.<sup>210</sup> The armed conflict continued in other parts of Georgia and on the Abkhazian front until 12 August 2008.<sup>211</sup>

According to Georgia, the Russian intervention started earlier than 8 August and was, *inter alia*, a breach of Article 2(4) of the UN Charter and international customary law.<sup>212</sup> Furthermore, according to the Georgian government, its response was confined entirely to its own sovereign territory, was reluctantly undertaken, and was a proportionate, necessary and wholly justified exercise of its customary and Charter right to use force in self-defence.<sup>213</sup>

According to Russia, the aggression perpetrated by the Georgian government against South Ossetia prompted the exercise of self-defence. The purpose of the defensive action was to protect the civilian population of the region and the Russia peacekeeping contingent from the unprovoked Georgian aggression and prevent such armed attacks against them in the future.<sup>214</sup>

Virtually all members of the Security Council expressed grave concern over the escalation of the conflict and called for a diplomatic solution as well as a swift restoration of peace.<sup>215</sup> The representative of the US specifically called upon Russia to cease air and missile attacks against Georgia.<sup>216</sup> At the 10 August meeting of the Security Council, the US representative contended that the Russian action went beyond any reasonable measure to protect its peacekeepers and the civilian population.<sup>217</sup> The criticism as to the extent of the Russian armed action gradually increased over the following days. Other Security Council members, such as Costa Rica, France, Panama and the UK, adopted a more critical position regarding the Russian intervention.<sup>218</sup> The representative of Panama asserted that the Russian intervention was ‘entirely disproportionate and,

<sup>207</sup> Ibid., p. 209.

<sup>208</sup> Ibid., p. 210.

<sup>209</sup> Ibid., p. 211.

<sup>210</sup> SCOR, 63<sup>rd</sup> Sess., 5953<sup>rd</sup> mtg., UN Doc. S/PV.5953 (10 August 2008) p. 3; Report of the Fact-Finding Mission in Georgia, p. 211.

<sup>211</sup> SCOR, 63<sup>rd</sup> Sess., 5953<sup>rd</sup> mtg., UN Doc. S/PV.5953 (10 August 2008) p. 4; Report of the Fact-Finding Mission in Georgia, pp. 212-213.

<sup>212</sup> Submission by Georgia entitled: ‘Use of Force Issues Arising out of the Russian Federation Invasion of Georgia, 2008’, in Report of Fact-Finding Mission in Georgia, p. 186.

<sup>213</sup> SCOR, 63<sup>rd</sup> Sess., 5951<sup>st</sup> and 5952<sup>nd</sup> mtg., UN Doc. S/PV.5951 and S/PV.5952 (8 August 2008) p. 5 and p. 3, respectively; Submission by Georgia entitled: ‘Use of Force Issues Arising Out of The Russian Federation Invasion of Georgia, 2008’, in Report of Fact-Finding Mission in Georgia, p. 186.

<sup>214</sup> Submission by the Russian Federation entitled: ‘Additional General Remarks on the Conflict in August 2008 on Georgia’s Aggression against South Ossetia in August 2008’, in Report of Fact-Finding Mission in Georgia, pp. 188-189.

<sup>215</sup> SCOR, 63<sup>rd</sup> Sess., 5951<sup>st</sup> mtg., UN Doc. S/PV.5951 (8 August 2008).

<sup>216</sup> Ibid., 5952<sup>nd</sup> mtg., UN Doc. S/PV.5952 (8 August 2008) p. 7.

<sup>217</sup> Ibid., 5953<sup>rd</sup> mtg., UN Doc. S/PV.5953 (10 August 2008) p. 6.

<sup>218</sup> Ibid., pp. 10 (France), 11 (UK), 14 (Costa Rica), 15 (Panama).

therefore, illegitimate,' because it abused the basic restrictions of the right of self-defence.<sup>219</sup>

The legality of the Georgia-Russia armed conflict as self-defence was assessed by an independent fact-finding mission appointed by the Council of the European Union.<sup>220</sup> The report found that self-defence claims could only be partly maintained. Accordingly, the on-the-spot reaction of Georgian forces to the shelling on 7 August 2008 as well as their defensive actions against Russian troops moving into Georgian territory could be justified as self-defence.<sup>221</sup> Nonetheless, the Georgian offensive of 8 August 2008 against South Ossetia did not meet the requirements of self-defence, because it exceeded the requirements of proportionality. The report stated:

[I]t is not *per se* decisive that the offensive ordered by President Saakashvili exceeded the South Ossetian armed attacks on Georgian villages, police and peacekeepers by far in quality and the quantity. Proportionality must be judged on the basis of the answers to the following questions: Was the objective of the Georgian air and ground offensive indeed nothing else but the repulsion of the armed attacks on the Georgian villages, peacekeepers and police? Was there a reasonable relationship between the form, substance and strength of the attack on Tskhinvali and this objective?<sup>222</sup>

The report answered these questions in the negative and found that the Georgian offensive against the South Ossetian capital had a political objective rather than a defensive purpose.<sup>223</sup>

The report rejected the Georgian view that the Russian side carried out an armed attack prior to the Georgian offensive. It also rejected the view that the Russian military preparations of 7 August 2008 could be interpreted as an imminent armed attack. The report stopped short of discussing the legality *per se* of self-defence against an imminent threat of an armed attack. Instead it contended that there were only signs of an 'abstract danger' and not of a 'concrete danger of an imminent attack.'<sup>224</sup> Consequently, the mere Georgian expectation that Russia might plan an invasion did not justify Georgian self-defence.<sup>225</sup>

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<sup>219</sup> Ibid., p. 15.

<sup>220</sup> On 2 December 2008, Ambassador Heidi Tagliavini was appointed Head of the Independent International Fact-Finding Mission on the Conflict in Georgia by the Council of the European Union. According to the Mission's mandate as agreed by the Council, the aim of the fact-finding mission was to investigate the origins and the course of the conflict in Georgia, including with regard to international law, humanitarian law and human rights, and the accusations made in that context (including allegations of war crimes). On 30 September, the results of the investigation were presented in the form of a report to the parties to the conflict, the Council of the European Union, the Organisation for Security and Co-operation in Europe and the United Nations.

<sup>221</sup> Report of Fact-Finding Mission in Georgia, pp. 249-250, 262.

<sup>222</sup> Ibid., p. 251.

<sup>223</sup> Ibid.

<sup>224</sup> The report found that despite all the tensions between the conflicting parties in the night of 7 to 8 August, and although there were Russian troops near the Georgian border north of the Roki tunnel, which had been deployed there for the 'Kavkaz 2008' exercise, it could not be verified that they were about to launch an attack on Georgia. Neither could an alleged 'large-scale incursion of Russian troops into Georgian territory' starting already in the morning of 7 August 2008 be verified by the Mission, although there were strong indications of some Russian military presence in South Ossetia beyond peacekeepers prior to 8 August 14.30 p.m. Report of Fact-Finding Mission in Georgia, pp. 255-256.

<sup>225</sup> Ibid., p. 256.

While the report admitted that there was a Georgian armed attack on Russian peacekeeping forces and military bases, it also asserted that the Russian response exceeded the requirements of necessity and proportionality.<sup>226</sup> While Russian peacekeepers had the right to an immediate response in self-defence, the expulsion of the Georgian forces from South Ossetia, and the defence of South Ossetia as a whole was not a legitimate objective for Russia.<sup>227</sup> Consequently, in the face of extended Russian military action into the territory of Georgia, the Georgian armed forces were acting in legitimate self-defence.<sup>228</sup>

In conclusion, it can be maintained that an armed attack existed on both sides, but at different times. The continuous shelling of Georgian positions on 7 August 2008 could only justify on-the-spot reaction. Instead, Georgian troops moved into offensive and attacked the capital of South Ossetia. That action qualified as an armed attack. Nonetheless, for the Russian side, that armed attack could only justify purely defensive action on the part of Russian peacekeepers and other military elements. Instead, the Russian response went beyond the remaining requirements of self-defence (immediacy and proportionality) and constituted a further armed attack that triggered defensive action from the Georgian forces. The approach of the Security Council shows that, although members were reluctant to condemn the use of force *per se*, criticism as to the necessity and proportionality of the armed conflict was repeatedly voiced.

### 8.15 Concluding remarks

This chapter analysed thirteen instances of state practice which had two common elements. First, as with all instances analysed in Part II, they involved a claim of self-defence – used or contemplated. Secondly, specific for this chapter, they pertained to conflicts between states.

On the basis of these cases, it can be established that, in the case of state-to-state conflicts, the temporal dimension of the post-Charter concept of self-defence pertained to three moments: before, during and after an armed attack. The Six-Day War is an instance of the lawful exercise of anticipatory action in self-defence before an armed attack had occurred. The Israeli attitude before the outbreak of the Yom Kippur War is an instance of state practice where anticipatory action was not resorted to, although contemplated, because there was no perception of an imminent threat. The Korean War and the Iran-Iraq War are cases in which self-defence was exercised against an ongoing armed attack. The Falklands War and the Persian Gulf War involved the exercise of self-defence after an armed attack had occurred with the purpose of ousting the invader. The South Ossetia War involved both claims of anticipatory and remedial action in self-defence, although only some of the claims were justified.

The cases involving hit-and-run tactics (UK bombing of a Yemeni fort, the Gulf of Tonkin incident, the US bombing of Libya and the US airstrikes against Iraq) purport a more complicated temporal dimension of self-defence that will be discussed in Chapter 10.<sup>229</sup>

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<sup>226</sup> Ibid., pp. 269, 274-275

<sup>227</sup> Ibid., p. 274.

<sup>228</sup> Ibid., p. 262.

<sup>229</sup> See *infra* 10.3-10.5.

The necessity requirement was viewed as clearly met in cases where an invasion was unfolding. Clearly, an invasion amounted to an armed attack and created an immediate need for action. Therefore, in such cases, the requirement of necessity was viewed as automatically fulfilled without need for much explanation on the part of the target state.<sup>230</sup> Nonetheless, in the case of the Falklands War, it was maintained that self-defence was obsolete, because the invasion was already completed by the time the British task force reached the operation zone.<sup>231</sup>

Concerning the conditionality of an armed attack, it is reasonable to conclude that in post-Charter state-to-state conflicts, a restrictive interpretation of that notion was perceivable. First of all, non-forceful ‘attacks’ were not accepted as basis for self-defence (Jewish War of Independence, Sinai Campaign).<sup>232</sup> Secondly, whereas ‘attack’ in the pre-Charter sense of the word could refer to many different forms of the use of force, in post-Charter state practice, ‘armed attack’ pertained to the most serious forms of force.<sup>233</sup> For that reason, self-defence against hit-and-run attacks was viewed with reluctance by most permanent and non-permanent members of the Security Council because of the question of proportionality between the attacks and the defensive response.<sup>234</sup>

The requirement of proportionality in the illustrated cases was generally measured against the need to preclude the armed attack from happening or oust the invader. That view was expressly confirmed in the September 2009 Report of the Fact-Finding Mission on the Georgia conflict.<sup>235</sup> The content of the requirement of proportionality was considerably blurred when it came to self-defence against hit-and-run tactics. Accordingly, it was maintained by states who purported such claims that the defensive action was needed to preclude the occurrence of future attacks and, for that reason, it had to be proportionate to the need to neutralize the source of such attacks. Such reasoning led to defensive actions that were clearly bigger in scale than the hit-and-run attacks and that were prone to criticism on behalf of other states.<sup>236</sup>

As said above, the thirteen cases of state-to-state conflicts involving claims of self-defence have shown that the temporal dimension of self-defence in such instances pertained to three moments: before, during and after the armed attack. Unlike in pre-Charter state practice, the remedial aspect of self-defence in state-to-state conflicts was more prominent than the anticipatory one. Nonetheless, anticipatory action in self-defence was acknowledged as lawful if the requirements of necessity and proportionality were met.

The content of these requirements was still in line with their pre-Charter understanding. The changes apparent from the cases analysed pertained to the notion of armed attack. Unlike in pre-Charter state practice, in state-to-state conflicts, an armed attack was generally seen as a serious form of the use of force (invasion or bombardment). Nonetheless, the instances involving hit-and-run tactics were of considerable lower threshold than full-scale armed actions. The debate concerning their characterization as armed attack will receive further attention in Chapter 10. The element

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<sup>230</sup> See *supra* 8.3 and 8.9.

<sup>231</sup> Neff, p. 330.

<sup>232</sup> See *supra* 8.2 and 8.4.

<sup>233</sup> See *supra* 6.6.1.

<sup>234</sup> See *supra* 8.5, 8.6 and 8.11.

<sup>235</sup> See *supra* 8.14. Report of Fact-Finding Mission in Georgia, p. 251.

<sup>236</sup> See *supra* 8.5, 8.6 and 8.11.

of immediacy pertaining to necessity was acknowledged in all cases in close connection to the conditionality of an armed attack. The requirement of proportionality continued to be viewed as limiting force to what was needed to ward off an attack.