

A plea against the abusive invocation of self-defence as a response to terrorism

For several years now, the number of terrorist attacks has been on the rise, including in Western countries. Many have equated these attacks with acts of war, requiring an immediate reaction in self-defence by States using military force, either individually or collectively in coalitions set up for that purpose. Thus, numerous military interventions have been conducted in the name of self-defence, including against *Al Qaeda*, ISIS or affiliated groups. While some have downplayed these precedents on account of their exceptional nature, there is a serious risk of self-defence becoming an alibi, used systematically to justify the unilateral launching of military operations around the world. Without opposing the use of force against terrorist groups as a matter of principle — particularly in the current context of the fight against ISIS — we, international law professors and scholars, consider this invocation of self-defence to be problematic. In fact, international law provides for a range of measures to fight terrorism. Priority should be given to these measures before invoking self-defence.

Firstly, we consider that terrorism raises above all the challenge of prosecution and trial of individuals who commit acts of terrorism. A variety of legal tools are available in this respect. They relate first and foremost to police and judicial cooperation (chiefly through agencies such as INTERPOL or EUROPOL), aiming both at punishing those responsible for the crimes committed and preventing future occurrence of such crimes. Although there is certainly room for improvement, this cooperation has often proved effective in dismantling networks, thwarting attacks, and arresting the perpetrators of such attacks. By embracing from the outset the « war against terrorism » and « self-defence » paradigms and declaring a state of emergency, there is a serious risk of trivializing, neglecting, or ignoring ordinary peacetime legal processes.

Secondly, in cases where these ordinary criminal mechanisms must be complemented by military measures, we believe that the first option must remain dialogue between all concerned States. Before launching a military operation in a foreign State, the territory of which is used by a terrorist group, it is essential to try to enter into discussions with the government of that State. From a legal point of view, diplomatic discussions limited to the fight against terrorism in no way preclude criticism of the government's policies or even calling into question its stay in power. Moreover, they do not exclude strong condemnation of all violations of international humanitarian law regardless of their perpetrators.

Thirdly, it should be recalled that, according to Chapter VII of the United Nations Charter, the maintenance of international peace and security rests first and foremost with the Security Council. The Council has qualified international terrorism as a threat to the peace on numerous occasions. Therefore, aside from cases of emergency leaving no time to seize the UN, it must remain the Security Council's primary responsibility to decide, coordinate and supervise acts of collective security. Confining the task of the Council to adopting ambiguous resolutions of an essentially diplomatic nature, as was the case with the passing of resolution 2249 (2015) relating to the fight against ISIS, is an unfortunate practice. Instead, the role of the Council must be enhanced in keeping with the letter and spirit of the Charter, thereby ensuring a multilateral approach to security.

Fourthly, it is only if —and as long as— the Security Council has not adopted the measures necessary for maintaining international peace and security that self-defence may be invoked to justify a military intervention against a terrorist group. In accordance with article 51 of the Charter, the use of force in self-defence on the territory of another State is only lawful if that

State bears responsibility for a violation of international law tantamount to an “armed attack”. This may occur either where acts of war perpetrated by a terrorist group can be attributed to the State, or by virtue of a substantial involvement of that State in the actions of such groups. In certain circumstances, such involvement may result from the existence of a direct link between the relevant State and the group. However, the mere fact that, despite its efforts, a State is unable to put an end to terrorist activities on its territory is insufficient to justify bombing that State’s territory without its consent. Such an argument finds no support either in existing legal instruments or in the case law of the International Court of Justice. Accepting this argument entails a risk of grave abuse in that military action may henceforth be conducted against the will of a great number of States under the sole pretext that, in the intervening State’s view, they were not sufficiently effective in fighting terrorism.

Finally, self-defence should not be invoked before considering and exploring other available options in the fight against terrorism. The international legal order may not be reduced to an interventionist logic similar to that prevailing before the adoption of the United Nations Charter. The purpose of the Charter was to substitute a multilateral system grounded in cooperation and the enhanced role of law and institutions for unilateral military action. It would be tragic if, acting on emotion in the face of terrorism (understandable as this emotion may be), that purpose were lost.