

Changing Views on the Use of Force: The German Position

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1. Introduction

Despite all the talk of multilateralism and European integration, decisions on 'war and peace' are still very much a national affair. Referring to the question of the possible use of force against Iraq, on 13 September 2002 German Chancellor Gerhard Schröder said in the German Parliament, the Bundestag: "the fundamental existential questions of the German nation will

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be decided in Berlin and nowhere else.”¹ For a long time, the bitter experience of two devastating world wars shaped Germany’s view on the use of force in such a way that there was general agreement that “war and the use of force must never again have their origin in Germany”.² But in recent years the use of military force is once again being seen “as a means of last resort to solve international conflicts”.³ In July 1994, the Federal Constitutional Court unfastened the self-imposed ‘constitutional straitjacket’ that prevented German armed forces from being deployed outside Germany.⁴ Since then, the Bundestag has decided on more than 50 occasions whether to send German soldiers abroad.⁵ Over the last 11 years, Germany has moved from participation in UN peacekeeping operations to full-blown combat operations, with and without authorization by the Security Council.⁶

It has always been accepted, however, that force may only be used in accordance with international law and, especially but not exclusively, the *Charter of the United Nations*.⁷ According to the German Government, the United Nations is founded on the principle of the prohibition of the use of force, a principle that replaces “the law of the strong with the strength of the law”.⁸ The dual nature of the prohibition of the use of force, both as a *Charter* principle and a rule of customary international law, was accepted by the German Government⁹ long before it was spelt out by the International

¹ Deutscher Bundestag, Plenarprotokoll (Stenographischer Bericht) (hereinafter BT-PIPr.), 14/253, 13 September 2002, p. 25576 (all translations from German sources are by the author).

² See the speech by Foreign Minister Klaus Kinkel at a ceremony to mark the 25th anniversary of Germany’s membership of the United Nations hosted by the German United Nations Association Bonn, 14 September 1998, available at <www.germany-info.org/relaunch/politics/speeches/091498.html>, last visited 28 May 2005.

³ See the policy statement of Chancellor Schröder in the Bundestag on ‘Our responsibility for peace’: BT-PIPr. 15/25, 13 February 2003, p. 1876. See also the statement of Foreign Minister Joschka Fischer at the general meeting of the German Society for Foreign Affairs, 24 November 1999, that “the use of force as a last resort cannot always be avoided”, available at <www.germany-info.org/relaunch/politics/speeches/112499.html>, last visited 28 May 2005.

⁴ Bundesverfassungsgericht, Judgment of 12 July 1994, BVerfGE 90, p. 286.

⁵ See Deutscher Bundestag, Drucksachen (hereinafter BT-Drs.) 15/2742, 23 March 2004, p. 1.

⁶ For an overview see W. Hermsdörfer, ‘Die Auslandseinsätze der Bundeswehr’, 17 *Humanitäres Völkerrecht [HuV]* (2004) pp. 17–28.

⁷ See BT-Drs. 15/2742, 23 March 2004, p. 4.

⁸ See BT-PIPr. 15/25, 13 February 2003, p. 1876 (Chancellor Schröder).

⁹ See e.g., BT-PIPr. 10/29, 14 October 1983, p. 1926.

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Court of Justice (ICJ) in the *Nicaragua* case.¹⁰ Germany has also consistently held the view that “the non-use of force [as embodied in Article 2 (4) of the *United Nations Charter*] was a clear and comprehensive norm of *jus cogens*”.¹¹ This norm is, however, not without exception. As Chancellor Schröder said in a policy statement in the Bundestag: “*In particular*, self-defence against an imminent armed attack, as it is described in the UN Charter, or to avert a direct serious danger to international peace mandated by the Security Council are exceptions.”¹² It has been suggested that the protection of human rights, the new threats of terrorism, and the proliferation of weapons of mass destruction have caused some considerable change to the prohibition of the use of force and its exceptions over the last couple of years.

This paper examines the German position on the changing views on the exceptions to the prohibition of the use of force over the last decade. The main emphasis is on the practice of the German Government, a practice that is almost non-existent in the literature on the use of force. While this is understandable with regard to foreign writings, due to the language barrier, it does seem rather surprising that German practice does not feature at all in the German literature. German State practice is therefore compared to the views taken in the German literature and, in particular, in five textbooks on international law, all published in 2004.¹³

¹⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, 27 June 1986, *ICJ Reports 1986*, p. 94, para. 176.

¹¹ UN Doc. A/C.6/41/SR.14, 10 October 1983, p. 9, para. 33.

¹² BT-PIPr. 15/25, 13 February 2003, p. 1876 (emphasis added). *See also* the declaration of the German representative in the 1st Committee on 27 November 1989: “[i]ndividual and collective self defence remain a crucial element of international security . . . However, defence remains an exception to the rule of renunciation of force. There is no doubt that the Charter wanted it to be an exception.” (UN Doc. A/C.1/44/PV.47, p. 47).

¹³ M. Bothe, ‘Friedenssicherung und Kriegsrecht’, in W. Graf Vitzthum (ed.), *Völkerrecht* (De Gruyter, 3rd ed., Berlin, 2004) pp. 589–667; K. Doehring, *Völkerrecht* (C. F. Müller, 2nd ed., Heidelberg, 2004); H. Fischer, ‘Gewaltverbot, Selbstverteidigungsrecht und Intervention im gegenwärtigen Völkerrecht’, in K. Ipsen, *Völkerrecht* (C. H. Beck, 5th ed., Munich, 2004) pp. 1067–1107; M. Herdegen, *Völkerrecht* (C. H. Beck, 3rd ed., Berlin, 2004) §§ 34, 41; S. Hobe and O. Kimminich, *Einführung in das Völkerrecht* (A. Francke, 8th ed., Tübingen, 2004).

2. Authorization of the Use of Force by the UN Security Council

It is generally accepted that the Security Council of the United Nations, acting under Chapter VII of the *Charter*, may authorize States to use force.¹⁴ Thus, the German Government fully supported the use of force against Iraq in 1991 (Operation Desert Storm) on the basis of the Security Council's decisions.¹⁵

2.1. Expanding the Concept of Threats to the Peace

Any authorization of the use of force under Chapter VII of the *UN Charter* requires that the Security Council first determines the existence of a threat to the peace, breach of the peace, or an act of aggression.¹⁶ Traditionally, Chapter VII was regarded as applying to threats to the peace resulting from the use of force between States. However, Article 39 of the *Charter* refers in quite general terms to a 'threat to the peace'. The German Government, referring to recent practice of the Security Council,¹⁷ is of the view that this open formulation can be used to develop international law further so as to include threats to the peace that result from the acts of non-State actors, or from weapons of mass destruction in the hands of violent dictators.¹⁸ The Government is of the opinion that "the powers of the Security Council under Chapter VII of the UN Charter constitute a sufficient legal basis for the fight against the new threats [of terrorism and the proliferation of weapons of mass destruction]".¹⁹ In such cases, the Security Council may even authorize the pre-emptive use of force.²⁰ But Foreign Minister Fischer made it quite clear that "there is no basis in the United Nations Charter for regime change

¹⁴ See e.g., the Speech of President Johannes Rau during his State visit to the United Mexican States, 18–22 November 2003, Bulletin No. 107 of 5 December 2003 (CD-ROM version).

¹⁵ BT-PIPr. 12/3, 17 January 1991, p. 47 (Chancellor Kohl).

¹⁶ *UN Charter*, Article 39.

¹⁷ It was pointed out that the Council, in response to new threats, also applied Chapter VII of the Charter to cases involving the use of force between non-State actors and in Resolutions 1368 (2001) and 1373 (2001) defined acts of international terrorism as a threat to the peace within the meaning of the Charter.

¹⁸ See the speech of K. Voigt, Coordinator of German-American Cooperation, at the Aspen Institute Conference, 2–4 October 2003, available at <www.germany-info.org/relaunch/politics/speeches/100303.html> (last visited 28 May 2005).

¹⁹ BT-Drs. 15/3181, 21 May 2004, p. 25.

²⁰ See BT-Drs. 15/3635, 3 August 2004, p. 17 (question 34).

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by military means”.²¹ The German Government is aware that this further development brings with it the risk of possible different interpretations of a threat to the peace. Definitions will therefore be needed of the spatial dimension of the new form of non-State threats to the peace, and of when these threats begin and end.²²

2.2. The New Concept of Revived Authorization

In response to the Iraqi invasion of Kuwait, on 29 November 1990 the Security Council, acting under Chapter VII of the Charter, adopted Resolution 678 in which it authorized “Member States cooperating with the Government of Kuwait . . . to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area”.²³ In Resolution 660 (1990), the Council had demanded that Iraq withdraw its forces from Kuwait immediately and unconditionally. In Resolution 687 (1991), which sets out the ceasefire conditions after Operation Desert Storm, the Security Council imposed obligations on Iraq to eliminate its weapons of mass destruction in order to restore peace and security in the area.²⁴ In the following years, the United States and the United Kingdom repeatedly claimed that a material breach of the ceasefire conditions set out in Resolution 687 (1991) revives the authority to use force under Resolution 678 (1990).²⁵

2.2.1. The Bombing of Military Targets in Iraq

In 1993, and again in 1998, the United States and the United Kingdom took military action against Iraq on the basis of an alleged revived authority under Resolution 678 (1990). For example, the two countries began bombing military targets in Iraq on 16 December 1998, in response to a long history of non-cooperation by Iraq with the UN weapons inspection regime. The Security Council in its Resolution 1205 (1998) of 5 November 1998 had expressly condemned the decision by Iraq of 31 October 1998 to cease

²¹ Statement by Foreign Minister Joschka Fischer at the meeting of the Security Council on the situation between Iraq and Kuwait: UN Doc. A/PV.4721, 19 March 2003, p. 4.

²² See Voigt, *supra* note 18.

²³ S/RES/678 (1990), 29 November 1990, para. 2.

²⁴ S/RES/687 (1991), 3 April 1991, paras. 8–13.

²⁵ On the revived authorization theory, see e.g., C. Greenwood, ‘International Law and the pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq’, 4 *San Diego International Law Journal* (2003) at pp. 34–36.

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cooperation with the United Nations Special Commission (UNSCOM) as a “flagrant violation of resolution 687 (1991) and other relevant resolutions”.²⁶ In letters to the President of the Security Council, the two countries declared that they had “acted on the basis of the relevant resolutions of the Security Council”.²⁷

Germany also considered Iraq’s decision to end its cooperation with UNSCOM as a “flagrant violation” of the relevant Security Council resolutions (especially Resolutions 687 and 1284) concerning the questions of disarmament and the destruction of Iraqi weapons of mass destruction.²⁸ On 17 December 1998, the German Foreign Office explained that it considered Security Council Resolution 678 (1990) as a sufficient legal basis for the recent military operations in Iraq.²⁹ The Minister of State at the Foreign Office, Günther Verheugen, defended the military operations without a United Nations mandate. He said: “The Security Council was unable to act because of the conflicting positions”. In this situation the United States had relied on earlier Security Council resolutions. He continued: “The United States have not created new international law but are clearly within the framework of the United Nations.”³⁰

2.2.2. The War Against Iraq

In March 2003, the United States, together with the United Kingdom and Australia, took military action against Iraq (Operation Iraqi Freedom). Again, the coalition relied on revived authorization from Resolution 678 (1990). In their letters to the President of the Security Council, the three States argued that Iraq was in material breach of the conditions for the ceasefire at the end of hostilities in 1991 and that the use of force was authorized under Resolution 678 (1990), or that it was consistent with

²⁶ S/RES/1205 (1998), 5 November 1998, para. 1.

²⁷ UN Docs. S/1998/1182, 16 December 1998 (United Kingdom); S/1998/1181, 16 December 1998 (USA).

²⁸ See ‘Erklärung Fischers zur irakischen Entscheidung, die Zusammenarbeit mit UNSCOM einzustellen’, 1 November 1998, available at <www.auswaertiges-amt.de/www/de/infoservice/presse/presse_archiv?archiv_id=655>, last visited 28 May 2005. See also BT-Drs. 14/8704, 26 March 2002, pp. 1–2.

²⁹ ‘Deutscher Sukkurs für Washington und London’, *Neue Züricher Zeitung [NZZ]*, 18 December 1998, p. 5.

³⁰ ‘Fischer: Angriffe schnell beenden’, *tageszeitung [taz]*, 19 December 1998, p. 4.

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Resolutions 678 (199), 687 (1991) and 1441 (2002).³¹ In the latter resolution, which was adopted unanimously on 8 November 2002, the Security Council, acting under Chapter VII, decided that Iraq “has been and remains in material breach of its obligations under relevant resolutions, including resolution 687”. It went on to afford Iraq “a final opportunity to comply” with its disarmament obligations, and accordingly set up an enhanced inspection regime. It concluded by recalling that the Council “has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations”.

Germany’s position on the legality of the military action must be distinguished from its outright, and at times vocal, opposition to the war. German opposition to the war was based on political rather than legal grounds. On 5 September 2002, Chancellor Schröder made it quite clear that Germany would not participate in such a war, even if military action was authorized by the Security Council.³² Statements by Government officials during September 2002 that military action against Iraq required another Security Council resolution must be seen in the context of Germany’s main aim, which was to prevent any such action. In a major political sea change, the German Government announced on 23 November 2003 that it would ‘passively’ support the United States in a war against Iraq. When the Green Party of Foreign Minister Fischer decided, at its party conference on 11 December 2002, that even ‘passive’ support would require another Security Council resolution, the Government’s position on the matter changed. In an interview on 13 December 2002, Foreign Minister Fischer indicated the change in the Government’s position for the first time. He said:

“[t]he key event was the adoption of Resolution 1441 by the UN Security Council, which is binding under international law. It left open the need for a further resolution if Iraq does not meet its obligations. The Council agreed to reconvene because it was impossible to agree on the matter. That is the legal situation, that is the position – without spelling out the consequences. They are a subject for political decision.”³³

³¹ See UN Docs. S/2003/350, 21 March 2003 (UK); S/2003/351, 21 March 2003 (USA); S/2003/352, 20 March 2002 (Australia).

³² ‘Die Bundesregierung und der Irak-Krieg’, *Frankfurter Allgemeine Zeitung [FAZ]*, 31 December 2002, p. 2. See also the statement of Chancellor Schröder in the Bundestag: BT-PIPr. 15/34, 20 March 2003, p. 2727.

³³ ‘Frankfurter Rundschau interview with Foreign Minister Joschka Fischer on 13 December 2002, on issues including the government’s policy on Iraq and the Copenhagen EU Summit’, available at <www.germany-info.org/relaunch/politics/

In another interview, he stated: “Resolution 1441 leaves open whether the Security Council is to adopt another resolution. With resolution 1441 the situation is no longer without international legal authority for action. However, this does not affect the political differences.”³⁴ At the same time, Chancellor Schröder, when asked to comment on the legality of a war against Iraq, avoided giving a clear answer and stated: “The Government does not comment on legal opinions, it conducts politics.”³⁵

However, the German view of the legal basis for military action was a highly political question. In an interview with the *New York Times* on 9 January 2003, Germany’s permanent representative to the UN and its representative on the Security Council, Ambassador Gunter Pleuger, coming close to the American position, said that a second resolution would be “desirable but not necessary” if Iraq committed obvious breaches of past resolutions.³⁶ France, Russia and China, on the other hand, had always contended that a second resolution was required under the terms of Resolution 1441 (2002). Ambassador Pleuger was immediately reprimanded by the Chancellor, who declared that “German foreign policy is decided by the government, not by diplomats.”³⁷ On 14 January 2003, Schröder advocated for the first time a second Security Council resolution prior to any military action against Iraq. He said it was “likely that the European and other partners would work for a second decision with regard to Iraq”. This would be “a sensible course of action”.³⁸ This move was widely regarded as motivated by German domestic and party politics and designed to boost relations with France, which had demanded a second resolution from the beginning. Thus, Schröder declared at the same time that he fully agreed with his Foreign Minister’s position on Iraq – who, of course, had indicated that a second resolution was not really necessary.

speeches/121302.htm>, last visited 28 May 2005. See also ‘UN-Botschafter entfacht deutsche Irak-Debatte neu’, *Frankfurter Rundschau [FR]*, 10 January 2003, p. 1.

³⁴ ‘Die Hoffnung wird immer kleiner’, *Der Spiegel*, 30 December 2002, p. 22.

³⁵ ‘Kreative Mehrdeutigkeit’, *Der Spiegel*, 16 December 2002, p. 36. See also ‘Völkerrecht à la carte’, *taz*, 30 December 2002, p. 3.

³⁶ ‘Germany Will Not Insist On 2nd Vote, Envoy Says’, *New York Times*, 9 January 2003, p. A14. See also ‘Deutschland hält neue Irak-Resolution für entbehrlich’, *Süddeutsche Zeitung [SZ]*, 10 January 2003, p. 9.

³⁷ ‘Germany to do all it can to avoid war: Schroeder’, AFP, 10 January 2003.

³⁸ ‘Bundeskanzler spricht sich erstmals für zweite Irak-Resolution aus’, *Financial Times Deutschland [FTD]*, 15 January 2003, p. 11. See also ‘Schröder: Krieg nur nach zweiter UN-Resolution’, *SZ*, 29 January 2003, p. 6.

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It is suggested that the German Government adopted the highly questionable but not totally untenable 'revived authority theory', not least for domestic legal reasons.³⁹ Actions designed or intended to disturb the peaceful coexistence of nations, especially conducting a war of aggression, are prohibited by Article 26 of the German Constitution and are a criminal offence under section 80 of the German Criminal Code.⁴⁰ If the Government had taken a different legal view, it would probably have had to refuse the United States rights of over-flight, landing rights and the use of its military installations in Germany for the war against Iraq.⁴¹ The Chief Federal Prosecutor in his decision of 21 March 2003 not to investigate the alleged crime of preparing aggression against Iraq, while not pronouncing on the question of the legality of the war, expressly referred to Resolution 1441 (2002) in which, according to the Prosecutor's view, "the Security Council recalled that it had repeatedly warned Iraq that it would face serious consequences as a result of its continued violations of its obligations, and that resolution 678 of 29 November 1990 authorized Member States to use all necessary means to implement resolution 660 of 2 August 1990 in order to restore international security in the area".⁴²

While the German Government seems to have adopted the position of the United States and its allies, German international lawyers almost all considered the military operation against Iraq a clear violation of international law.⁴³ And, it may be added, so did the German public. In a

³⁹ For criticism of the 'revived authority theory', see e.g., C. Tomuschat, 'Völkerrecht ist kein Zweiklassenrecht. Der Irak-Krieg und seine Folgen', 51 *Vereinten Nationen* (2003) pp. 43–44.

⁴⁰ See C. Kreß, 'The German Chief Federal Prosecutor's Decision Not to Investigate the Alleged Crime of Preparing Aggression against Iraq', 2 *Journal of International Criminal Justice* (2004) pp. 245–264.

⁴¹ See S. Graf von Einsiedel and S. Chesterman, 'Doppelte Eindämmung im Sicherheitsrat', 51 *Vereinte Nationen* (2003) pp. 51–52. See also 'Überflugrechte könnten Schröder in die Klemme bringen', *FR*, 31 January 2003, p. 6.

⁴² Generalbundesanwalt beim BGH, Decision of 21 March 2003, reproduced in *Juristen-Zeitung [JZ]* 2003, p. 908.

⁴³ See e.g., 'Völkerrechts-Streit gewinnt an Schärfe: Angriffskrieg spaltet angelsächsische und deutsche Juristen', *FTD*, 20 March 2003, p. 12; 'Ein illegaler Krieg', *Spiegel Online*, 20 March 2003 (quoting R. Wolfrum, M. Bothe, C. Vedder); C. Hillgruber, 'Angriff auf den Irak verstößt gegen das Völkerrecht', *Stuttgarter Nachrichten*, 20 March 2003, p. 5; T. Schweisfurth, 'Aggression', *FAZ*, 28 April 2003, p. 10; P.-M. Dupuy and C. Tomuschat, 'Warten auf den Schlag gegen Bagdad', *ibid.*, 31 July 2002, p. 10; 'Die USA brechen das Völkerrecht', *SZ*, 22

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survey, 62 per cent of Germans thought the war was illegal, while six per cent thought it was in conformity with international law; 32 per cent declared they did not know.⁴⁴ Bruno Simma, who was regularly advising the German Government on matters of international law, was a notable exception among the German international lawyers. In an interview he replied to the question of whether Security Council Resolution 1441 (2002) authorized the use of force:

“The text of resolution 1441 is ambiguous . . . China, Russia and France say now that the resolution does not contain any automaticity with respect to war, while the United States say that they can take action against Iraq on the basis of that resolution. Both views are tenable. As a matter of legal policy, however, the preferable and less dangerous course would be for the Security Council to adopt another resolution which expressly states that the use of force is now permitted.”⁴⁵

This view, however, did not cut much ice with German textbook writers, who all reject the idea of revived authority on the basis of Resolution 678 (1990).⁴⁶

3. The Right of Self-Defence

The right of self-defence, both under Article 51 of the *Charter of the United Nations* and under customary international law, arises (only) “if an armed attack occurs”. This raises two questions: what constitutes an ‘armed attack’, and when, precisely, does such an attack ‘occur’.

March 2003, p. 6 (interview with R. Wolfrum); D. Murswiek, ‘Das exklusive Recht zum Angriff’, *ibid.*, 20 March 2003, p. 2.

⁴⁴ Agence France Press – German, 28 March 2003.

⁴⁵ ‘Präventivschläge brechen das Völkerrecht’, *Süddeutsche Zeitung*, 1 February 2003, p. 11 (interview with B. Simma). See also A. Zimmermann, ‘Deutschland und das Völkerrecht nach dem Irak-Konflikt’ 23 *Rechtspolitisches Forum* (2003) p. 17 who concedes that “it seems at least *tenable*” that the use of force was authorized; C. Kreß, ‘Anmerkung’, *JZ* 2003, p. 916 (“difficult to maintain but not totally untenable”).

⁴⁶ Bothe, *supra* note 13, MN 24; Fischer, *supra* note 13, MN 23; Herdegen, *supra* note 13, § 34 MN 4 and § 41, MN 7; Hobe and Kimminich, *supra* note 13, p. 329; Doehring, *supra* note 13, MN 570, n. 7 (“resolution 1441 was controversial as legal basis for a justified attack by the USA on Iraq and was probably rejected by the vast majority of commentators”).

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3.1. Expanding the Definition of Armed Attack

3.1.1. Attacks on a State's Outposts and Nationals Abroad

Asked how it defined an 'armed attack' in the sense of Article 51 of the *UN Charter*, the German Government replied that "it requires the use of armed force against a State".⁴⁷ One problem of the right of self-defence is that there is no agreement as to what constitutes the use of armed force 'against a State'. It is disputed whether the State itself, i.e. its territory, must be under attack, or whether an attack upon its 'outposts' – such as diplomatic and consular missions, military installations, or nationals abroad – can also legitimate action in self-defence.

The United States have long claimed that the use of armed force against its missions and nationals abroad constitutes an attack on the United States. For example, on 26 June 1993, 23 cruise missiles were fired on Baghdad in response to Iraq's failed "attempt to murder the former Chief Executive of the United States Government, President George Bush and to its continuing threat to United States nationals". The US Government justified its action on the basis of its right to self-defence.⁴⁸ In response to a parliamentary question as to whether it considered reliance on Article 51 of the *UN Charter* as compatible with international law, the German Government replied:

"On 26 June 1993, the Chancellor declared that the Government considers the action of the American Government a justified response to a despicable act of attempted terrorism. The Security Council of the United Nations has not objected to the United States' view that the bombardment of the Iraqi intelligence headquarters in Baghdad with cruise missiles was covered by Article 51 of the UN Charter."⁴⁹

On 20 August 1998, the United States launched Operation Infinite Reach. In response to attacks by Osama bin Laden's terrorist organization on the US embassies in Nairobi and Dar-es-Salaam, cruise missile attacks targeted two "terrorist related facilities" thought to be part of that network, a terrorist training camp in Afghanistan and a pharmaceutical factory in Sudan. In a letter to the Security Council President, the United States stated that it had "exercised its right of self-defence in responding to a series of armed attacks against United States embassies and United States nationals" carried out by the organization of Osama bin Laden. The actions were taken "in response to

⁴⁷ BT-Drs. 15/3635, 3 August 2004, p. 17.

⁴⁸ UN Doc. S/26003, 26 June 1993.

⁴⁹ BT-Drs. 11/5505, 28 July 1993, p. 2.

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these terrorist attacks and to prevent and deter their continuation”.⁵⁰ In the German press the military strikes were widely described as “illegal retaliatory measures” which could not be justified by the right to self-defence,⁵¹ but on 21 August 1998 Chancellor Kohl referred to the right of all States to defend themselves against the horrors of terrorism. He said:

“The Government resolutely condemns all forms of terrorism; it can only be combated if all States take decisive, determined action in a spirit of solidarity. The Government therefore supports all measures aimed at combating this scourge of the international community. This applies especially to yesterday’s attacks by the United States on installations in Afghanistan and Sudan which are implicated in the recent terrorist attacks against the US embassies in Kenya and Tanzania.”⁵²

The German Government has thus, at least implicitly, accepted the United States’ argument that armed attacks against a State’s outposts and nationals abroad give the right of self-defence. On the other hand, the majority of German textbooks on international law still consider that such attacks are not sufficient to constitute an armed attack ‘on a State’.⁵³

3.1.2. Attacks by Non-State Actors

The traditional interpretation of the right of self-defence concerned the use of armed force between States. For example, in 1995, the German Government was of the view that an ‘armed attack’, in the sense of Article 51 of the *UN Charter* and Article 5 of the *North Atlantic Treaty*, required an attack by another State. The attacks on Turkey by the secessionist Kurdistan Workers’ Party (PKK) operating from northern Iraq did not qualify as an ‘armed attack’, with the consequence that Turkey’s military invasion of

⁵⁰ UN Doc. S/1998/780, 20 August 1998.

⁵¹ ‘Vergeltungsmaßnahmen sind völkerrechtswidrig’, *FAZ*, 22 August 1998, p. 3. But see also ‘Staatliche Notwehr’, *SZ*, 22 August 1998, p. 4.

⁵² BT-Drs. 13/11440, 18 September 1998, p. 2. See also ‘Die Bonner Koalition und die SPD billigen das Vorgehen Washingtons’, *FAZ*, 22 August 1998, p. 2.

⁵³ Bothe, *supra* note 13, MN 12; Fischer, *supra* note 13, MN 33–35; Hobe and Kimminich, *supra* note 13, pp. 312–313. Herdegen and Doehring do not deal with the question.

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northern Iraq was regarded as an act of ‘self-help’ and not of ‘self-defence’.⁵⁴

States have employed military force against attacks by non-State actors before, as the United States’ response to the attacks by al-Qaeda on the US embassies in Nairobi and Dar-es-Salaam in 1998 shows.⁵⁵ However, the idea of self-defence against non-State actors came fully to the fore only after the horrific terrorist attacks on New York, Washington and Pennsylvania on 11 September 2001. In its first reaction the next day, the Security Council in Resolution 1368 (2001) condemned the attacks, classifying such acts, as any act of international terrorism, as a threat to international peace and security, and recognizing the inherent right to individual or collective self-defence in accordance with the *UN Charter*.⁵⁶

On 12 September 2001, Chancellor Schröder described the attacks as a “declaration of war on the civilized nations of the world”.⁵⁷ Seven days later, the Chancellor set out the Government’s legal position in a policy statement to the Bundestag, which is worth quoting at some length:

“The United Nations Security Council unanimously stated in its seminal resolution 1368 that the terrorist attacks on New York and Washington present, in the words of the resolution, a threat to international peace and security. With this resolution, the Security Council has further developed existing international law. Hitherto, an armed attack . . . meant an attack by one State on another. With this resolution – that is the crucial new development – the conditions under international law for resolute action against terrorism, including military action, have been established.

The NATO Council has expressed its full solidarity with the United States on the basis of Article 5 of the NATO Treaty. The Council, like the Security Council, has reinterpreted what an armed attack on a Party to the North Atlantic Treaty means. An armed attack, at the time of the conclusion of the Treaty, was understood as a warlike attack on a Member State of NATO by another State. The Council – like the Security Council – now also regards a terrorist attack as an attack on a Party to the Treaty. The attack on the United States thus constitutes an attack on all NATO partners

...

⁵⁴ See BT-Drs. 13/1246, 2 May 1995, p. 5. See also M. Bothe and T. Lohmann, ‘Der türkische Einmarsch im Nordirak’, 5 *Schweizerische Zeitschrift für internationales und europäisches Recht* (1995) pp. 441–454. See also *infra* note 135.

⁵⁵ See *supra* note 50.

⁵⁶ S/RES/1368 (2001), 12 September 2001.

⁵⁷ BT-PIPr. 15/186, 12 September 2001, p. 18293.

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What rights do these decisions create for the United States? Based on the decision of the Security Council, the United States can take measures against the perpetrators, organizers, instigators and sponsors of the attacks. These measures are authorized by international law. And, under the terms of the resolution, which further develops international law, they can and may take equally resolute action against States which support and harbour the perpetrators.”⁵⁸

The German Government adopted the view of an instant development of customary international law. An armed attack from now on was to be defined by reference to the scope and extent of the attack, and no longer by reference to the attacker. For Germany and others, 11 September 2001 was the ‘big bang’, giving birth to a new right to self-defence.⁵⁹

On 7 October 2001, the United States, together with the United Kingdom, launched Operation Enduring Freedom against the al-Qaeda organization and the Taliban regime which was sheltering it in Afghanistan, after the Taliban had repeatedly refused to extradite those responsible for the attacks on the United States. In its letter to the President of the Security Council pursuant to Article 51 of the *UN Charter*, the United States declared Operation Enduring Freedom to be an exercise of its inherent right to self-defence.⁶⁰

⁵⁸ BT-Pl.Pr. 14/187, 19 September 2001, p. 18302. *See also* the Motion of the Government to the Bundestag on the Deployment of German Armed Forces in Support of the Joint Response to the Terrorist Attacks on the United States: BT-Drs. 14/7296, 7 November 2001, p. 1. *See further* the statement of the German representative in the General Assembly: “The Security Council then stated unanimously in its seminal resolution 1368 (2001) that the terrorist attacks perpetrated against the people of the United States of America present a threat to international peace and security, thus confirming a legal basis for resolute action against the perpetrators, organizers and sponsors of the attacks.” (UN Doc. A/56/PV.10, 25 September 2001, p. 1). The right of self-defence against non-State actors was also stressed in BT-PlPr. 14/198, 8 November 2001, pp. 19284, 19285; BT-Drs. 14/7929, 21 December 2001, pp. 1–2. *See also* the more recent statement: “in the meantime it is recognized that non-State actors can also commit an ‘armed attack’.” (BT-Drs. 15/3635, 3 August 2004, p. 17).

⁵⁹ *See* S. Talmon, ‘Grenzen der “Grenzenlosen Gerechtigkeit”. Die völkerrechtlichen Grenzen der Bekämpfung des internationalen Terrorismus nach dem 11. September 2001’, in: W. März (ed.), *An den Grenzen des Rechts* (Duncker & Humblot, Berlin, 2003) pp. 158–170.

⁶⁰ UN Doc. S/2001/946, 7 October 2001 (United States). *See also* UN Doc. S/2001/947, 7 October 2001 (United Kingdom).

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Germany adopted the view that the use of force in self-defence could be directed not just at the terrorists, but also against States which were abetting, supporting or harbouring them. Once the military operations in Afghanistan had started, Chancellor Schröder said in an address to the Bundestag that

“anyone who promotes or assists terrorism, anyone who offers shelter to the organizers or the instigators, anyone who allows them to operate their networks of terror and to prepare their crimes, will be called to account. The Taliban regime was aware of all this. The rulers in Kabul, who are also the oppressors of their own people, had enough time to meet the demands of the international community of States and peoples. They wanted this confrontation.”⁶¹

He stressed that the military strikes were fully in keeping with the decisions of the UN Security Council on the use of legitimate self-defence. This view was echoed in the Government’s motion to the Bundestag requesting – for the first time since the Second World War – approval for the deployment of German combat troops outside Europe. Relying on the right to individual or collective self-defence against the terrorist attacks of 11 September 2001, the Government stated:

“The Taliban regime has for years harboured the leaders and trainers of terrorists who act globally, including the perpetrators of the New York and Washington attacks of 11 September 2001. Even after the attacks against the United States, the regime in Kabul continues to protect the structures that, in short, are called ‘al-Qaeda’. Spokesmen for al-Qaeda have publicly announced further attacks on the United States and have called on others to commit such attacks. By harbouring and protecting such a group, which, because of its apparent contempt for mankind, constitutes a threat to all peoples, the Taliban regime has become an accomplice in past and possible further terrorist attacks.”⁶²

On 16 November 2001, the Bundestag approved the deployment of special forces; nuclear biological and chemical (NBC) defence units; medical units; air-transport capacities; naval forces, including navy aviation; and necessary support units in the fight against terrorism. Germany did not just accept the United States’ claim to self-defence against terrorist attack, but also claimed

⁶¹ Policy Statement made by Federal Chancellor Gerhard Schröder to the German Bundestag, 11 October 2001, BT-PIPr. 14/192, 11 October 2001, pp. 18680, 18682.

⁶² BT-Drs. 14/7296, 7 November 2001, pp. 1–3. *See also* the almost identical statement in BT-Drs. 14/8990, 8 May 2002, p. 1, adding that al-Qaeda had claimed responsibility for the attacks of 11 September 2001.

the right to (collective) self-defence itself. The Government stated that “German armed forces co-operate with the United States and Allies in the military campaign against international terrorism on the basis of Article 51 of the Charter of the United Nations and Article 5 of the North Atlantic Treaty . . .”.⁶³ As a consequence, on 29 November 2001 the permanent representative of Germany to the United Nations informed the President of the Security Council “in accordance with Article 51 of the UN Charter” that Germany was taking measures directed against the terrorist network of Bin Laden, al-Qaeda, and those harbouring and supporting it “in exercise of the inherent right of individual and collective self-defence, in accordance with Article 51 of the Charter of the United Nations”.⁶⁴ It should be noted that there is a subtle difference between the view of the United States and that of Germany with regard to the right to self-defence. While the former based its actions on the “inherent right of individual and collective self-defence”,⁶⁵ Germany relied on “the inherent right of individual and collective self-defence, *in accordance with Article 51 of the Charter of the United Nations*”.⁶⁶ The United States’ statement indicates that a customary law right of self-defence exists over and above the specific provision in Article 51 of the *Charter*, while Germany seems to be of the opinion that the right of self-defence exists within the confines of Article 51, and that the attacks of 11 September 2001 have contributed to an expansion of the *Charter* right. The difference between these two views is that for the United States the right to use force in self-defence against non-State actors always existed, while for Germany it was newly ‘created’.

As part of Germany’s contribution to Operation Enduring Freedom, in February 2002 German warships, together with those of other nations, began patrolling the shipping lanes off the Horn of Africa. The German naval forces had the task, *inter alia*, to “board merchant ships of *neutral* States if there is reasonable ground for suspecting that the ships are engaged in supporting terrorism” and “in case of clear evidence of support of terrorist organizations or activities, to take forcible measures such as the diversion of ships into ports for further inspection of ship and crew”.⁶⁷ The reference to

⁶³ BT-Drs. 14/7296, 7 November 2001, p. 3.

⁶⁴ UN Doc. S/2001/1127, 29 November 2001.

⁶⁵ UN Doc. S/2001/946, 7 October 2001, p. 1. The United Kingdom relied on “the inherent right of individual and collective self-defence, recognized in Article 51” (UN Doc. S/2001/947, 7 October 2001).

⁶⁶ UN Doc. S/2001/1127, 29 November 2001.

⁶⁷ Information of the Ministry of Defence on ‘Beteiligung der Deutschen Marine an der Operation “Enduring Freedom”’, point 6 (on file with author; italics added). *See*

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‘neutral States’ shows that, while Germany based its military action against the al-Qaeda network and the Taliban in Afghanistan on the right to self-defence, it based its maritime interdiction operations with regard to third States on the laws of war.⁶⁸

The German Government is aware of the problems entailed by an extension of the right to self-defence against attacks by non-State actors. In a speech on 22 September 2003, the Minister of Justice said that the Government welcomed this extension of the right of self-defence but that

“this development runs the risk of blurring the concepts. We must remember especially that action against a non-State aggressor will always violate the territorial integrity of a State. This question arises in connection with the action of the international community against al-Qaeda in Afghanistan. The problems of distinction to which this development gives rise are a challenge for modern international law.”⁶⁹

Germany seems to take the view that force may be used against a non-State attacker on the territory of another State only if that State harbours and protects the attacker and is unwilling or unable to extradite those responsible for the attack. The German Government made it clear in November 2001 that “German armed forces will participate in operations against international terrorism in countries other than Afghanistan only with the consent of the respective government”.⁷⁰

While the German Government immediately endorsed the right of the United States to take military action in self-defence against the terrorist attacks, many German international lawyers initially took the view that the United States’ use of military force against the Taliban and al-Qaeda in

also W. Heintschel von Heinegg and T. Gries, ‘Der Einsatz der deutschen Marine im Rahmen der Operation “Enduring Freedom”’, 40 *Archiv des Völkerrechts [AVR]* (2002) pp. 145–182.

⁶⁸ German navy sources were reported in the press as stating that “our activities outside the 12nm national coastal waters would be covered by the laws of war”; see ‘Deutsche Marine darf vor Somalia scharf schießen’, *Die Welt*, 9 January 2002, p. 6. *Contra* Heintschel von Heinegg and Gries, *supra* note 67, pp. 172–173 who regard Security Council Resolution 1373 (2001) as the legal basis for the maritime interdiction operation.

⁶⁹ Vortrag Bundesjustizministerin Zypries – Friedrich-Ebert-Stiftung, 22 September 2003, available at <www.bmj.bund.de/enid/September/Berlin__22_09_2003_-_Voelkerrecht_fo.html>, last visited 28 May 2005.

⁷⁰ BT-Drs. 14/7296, 7 November 2001, p. 4. See also BT-Drs. 14/8990, 8 May 2002, p. 5.

Afghanistan was unlawful.⁷¹ Other German international lawyers attempted to maintain the legality of the United States' action by lowering the standard of attribution set by the ICJ in the *Nicaragua* case,⁷² and by attributing – contrary to the factual situation – the terrorist acts to the State of Afghanistan,⁷³ while yet others tried to justify the action on the basis of 'necessity'.⁷⁴ The view in the textbook literature is divided. A minority, in line with the Government's position, accepts a right of self-defence against non-State actors.⁷⁵ The majority, however, still requires that force be used 'by a State', i.e. that the use of force by a non-State actor be attributable to a State (albeit on the basis of a rather loose 'harbouring' standard of attribution).⁷⁶

⁷¹ See the report of Thomas Frank of a conference of primarily German international lawyers at Göttingen University from 25 to 27 October 2001 (T. Franck, 'Terrorism and the Right of Self-Defense', 95 *American Journal of International Law* (2001) p. 839). See also 'Kein Recht Afghanistan anzugreifen', *Stern*, 20 September 2001, p. 28 (interview with C. Vedder).

⁷² *Nicaragua* case, *supra* note 10, pp. 62–63, 103.

⁷³ See e.g. T. Bruha and M. Bortfeld, 'Terrorismus und Selbstverteidigung', 49 *Vereinte Nationen* (2001) p. 166; J. Delbrück, 'The Fight Against Global Terrorism', 44 *German Yearbook of International Law [GYIL]* (2001) p. 15; C. Tietje and K. Nowrot, 'Völkerrechtliche Aspekte militärischer Maßnahmen gegen den internationalen Terrorismus', 44 *Neue Zeitschrift für Wehrrecht [NZWehrR]* (2002) pp. 8–11.

⁷⁴ U. Fastenrath, 'Ein Verteidigungskrieg läßt sich nicht vorab begrenzen', *FAZ*, 12 November 2001, p. 8. But see K. Ambos, 'Gewaltverbot als zwingendes Völkerrecht', *ibid.*, 27 November 2001, p. 9 who rightly pointed out that a violation of a norm of *jus cogens* such as the prohibition of the use of force cannot be justified on the basis of necessity.

⁷⁵ Doehring, *supra* note 13, MN 759; Hobe and Kimminich, *supra* note 13, pp. 162, 320–321. See also J. A. Frowein, 'Terroristische Gewalttaten und Völkerrecht', *FAZ*, 15 September 2001, p. 10; the same, 'Der Terrorismus als Herausforderung für das Völkerrecht', 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht [ZaöRV]* (2002) p. 887; M. Krajewski, 'Selbstverteidigung gegen bewaffnete Angriffe nicht-staatlicher Organisationen – Der 11. September 2001 und seine Folgen', 40 *AVR* (2002) pp. 189–201; Talmon, *supra* note 59, pp. 158–170. See also the article by M. Krajewski in this volume – ed.

⁷⁶ Bothe, *supra* note 13, MN 11; Fischer, *supra* note 13, MN 28, 49; Herdegen, *supra* note 13, § 34, MN 15, but see also § 41 MN 15. See also C. Hillgruber, 'Interventions- und Gewaltverbot, Kriegsrecht', in J. Menzel *et al.* (eds.), *Völkerrechtsprechung* (Mohr Siebeck, Tübingen, 2005) pp. 820–821.

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3.2. Widening the Notion of 'Occurrence' of an Armed Attack

Another problem of the right of self-defence is the difficulty of determining whether an armed attack has 'occurred'. It has long been disputed whether there is a right to self-defence after an attack is over or before the attack has actually commenced.

3.2.1. Ongoing Attacks

It is not always easy to draw a line between self-defence against an armed attack and mere retaliation for such an attack. The United States waited for 26 days after 11 September 2001 before it began its military campaign in Afghanistan. The German Government took the view that self-defence was permissible because the United States faced a continuing threat of attack from the same terrorist organization. A press release from the German Foreign Office dated 12 November 2001 stated that

“the attack of 11 September was preceded from 1993 by a series of murderous attacks against US installations (World Trade Centre 1993, the attempted simultaneous hijacking and bombing of US aircraft over the Pacific 1993, the attacks on the US embassies in Nairobi and Dar-es-Salaam 1998⁷⁷). All these attacks led in one direction: to Osama bin Laden's terrorist organization al-Qaeda . . . This international terrorist network is of a new quality which can hardly be compared with the familiar terrorist structures of the 1970s and 1980s.”⁷⁸

It was also pointed out that “Spokesmen for al-Qaeda have publicly announced further attacks on the United States and have called on others to commit such attacks”.⁷⁹ In these circumstances the German Government had little difficulty in regarding the events of 11 September as part of an ongoing attack, with future attacks being imminent.

The longer Operation Enduring Freedom continues, the more difficult it becomes to justify military action on the basis of self-defence. However, in October 2004 the German Government was still using self-defence as a justification for the use of armed force. In a motion to Parliament it states:

⁷⁷ The attack on the USS Cole in Aden harbour on 12 October 2000 may be added to these events.

⁷⁸ Auswärtiges Amt, 'Fragen und Argumente zum deutschen Beitrag in der internationalen Koalition gegen den Terrorismus', Press Release, 12 November 2001, available at <www.auswaertiges-amt.de> (last visited on 28 May 2005).

⁷⁹ BT-Drs. 14/7296, 7 November 2001, p. 3.

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“The continuation [of the participation of German armed forces in the collective response to the terrorist attacks on the United States] is based on Article 51 of the Charter of the United Nations, Article 5 of the North Atlantic Treaty, and resolutions 1368 (2001) and 1373 (2001) of the Security Council of the United Nations . . . The threat from international terrorism continues to be a great danger and a major challenge to the international community . . . In resolution 1566 (2004) which was adopted unanimously on 8 October 2004, the Security Council called again on States to cooperate fully in preventing and fighting terrorist acts. The global challenge of terrorism will continue to require the use of military means also in future.”⁸⁰

This approach seems rather questionable because, at least in theory, it provides perpetual authorization for the use of force. As the global challenge of terrorism continues, so will the right to use force in self-defence. In the case of Afghanistan at least, intervention by invitation of the Karzai Government would seem to be a more plausible legal basis for the use of force against the remnants of al-Qaeda and the Taliban in that country.

3.2.2. Imminent and Non-Imminent Attacks

The question of whether international law permits the use of force not in response to an actual attack, but to avert a future attack has long been controversial. The National Security Strategy of the United States of September 2002, which is widely seen as advocating a right to pre-emptive self defence,⁸¹ and the war against Iraq in March 2003 have again brought the issue of ‘pre-emptive self-defence’ to the forefront of the debate over the legal uses of force. In the German academic literature, the use of force against Iraq was seen by many commentators as an illegal use of pre-emptive self-defence.⁸² These commentators fail to acknowledge, however, that the United States, the United Kingdom and Australia did not rely on a right to pre-emptive self-defence as a justification in their reports to the

⁸⁰ BT-Drs. 15/4032, 27 October 2004, pp. 1–2. The deployment of German armed forces engaged in Operation Enduring Freedom must be extended annually by the Bundestag. *See also* BT-Drs. 15/1880, 5 November 2003; 15/37, 6 November 2002.

⁸¹ The National Security Strategy (NSS) of the United States of America, 17 September 2002, available at <www.whitehouse.gov/nsc/nss.pdf>, last visited 28 May 2005.

⁸² For the view that the USA and the United Kingdom relied on self-defence, *see* Schweisfurth, *supra* note 43, p. 10; C. Tomuschat, ‘Andere Begründungen’, *ibid.*, 15 May 2004, p. 36; the same, *supra* note 39, pp. 45–46.

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Security Council but, instead, based their action on a revived Security Council mandate.⁸³

Before addressing the German position on the question of pre-emptive self-defence, it is important to sound a note of caution. There is no agreement regarding the use of terminology in this field. Terms such as ‘pre-emptive’, ‘anticipatory’ or ‘preventive’ self-defence are not always employed with the same meaning; neither are ‘pre-emptive self-defence’ and ‘pre-emptive strike’. The terminology of the High-level Panel on Threats, Challenges and Change, which distinguishes between force used “pre-emptively (against an imminent or proximate threat)” and force used “preventively (against a non-imminent or non-proximate one)” is adopted here.⁸⁴

While the United States and the United Kingdom have long claimed a right to pre-emptive self-defence, Germany originally rejected such a right. During a debate in the First Committee of the UN General Assembly on 27 November 1989, the German representative declared that the logical consequence of the prohibition of the use of force pursuant to Article 2(4) on the one hand and the right to self-defence pursuant to Article 51 of the *UN Charter* on the other hand is the postulate of defensive orientation of armed forces. He continued: “It also precludes pre-emptive or preventive warfare on enemy territory.”⁸⁵ In this as in many other ways, 11 September 2001 represents a turning point in the German position. The German Government now takes the view that “the right of individual or collective self-defence under Article 51 of the UN Charter includes . . . measures against an imminent attack”.⁸⁶ However, “defensive measures against an imminent attack require that the acting State proves convincingly that the threat of attack is *instant, overwhelming and leaves no choice of means and no moment for deliberation*”.⁸⁷ By adopting the so-called ‘Webster formula’,⁸⁸

⁸³ See J. A. Frowein, ‘Is Public International Law Dead?’, 46 *GYIL* (2003) p. 11, Kreß, *supra* note 45, p. 916; S. Talmon, ‘Irak-Krieg ist kein Präzedenzfall’, *FAZ*, 7 May 2003, p. 7.

⁸⁴ ‘A more secure world: our shared responsibility. Report of the High-level Panel on Threats, Challenges and Change’, UN Doc. A/59/565, 2 December 2004, pp. 54–55, para. 189–192.

⁸⁵ UN Doc. A/C.1/44/PV.47, p. 47.

⁸⁶ BT-Drs. 15/3181, 21 May 2004, p. 25.

⁸⁷ BT-Drs. 15/3635, 3 August 2004, p. 17 (italics supplied).

⁸⁸ US Secretary of State Daniel Webster had formulated in 1841, with regard to the famous *Caroline* incident, that an intrusion into the territory of another State can be justified as an act of self-defence only in those cases in which the State can show “a

the German Government has imposed strict limitations on the right of pre-emptive self-defence. The “immediacy and urgency of the threat, and the plausibility of the threat for others” are of prime importance for the legality of the use of force.⁸⁹ Pre-emptive self-defence for Germany is thus first and foremost a question of a State which wants to act in self-defence presenting convincing evidence as to the imminence of the attack. The German understanding of the term ‘pre-emptive self-defence’ is still much more restricted than the meaning attributed to the term by the United States and the United Kingdom.

For this reason, Germany does not consider the United States’ National Security Strategy (NSS) as advocating a right to ‘pre-emptive self-defence’, but as putting forward a claim to ‘preventive self-defence’.⁹⁰ The NSS shifts the goalposts by extending the concept of imminent threat. In fact, it is designed to free the United States from the requirement of imminence. Germany sees the NSS as an attempt to undermine “the tried and tested canon of rules in the UN Charter and of established practices of States by introducing a further-reaching right to preventive self-defence”. The German Government is “opposed to the creation of a gray area between the absolute prohibition of force and the permissible use of force. It would be left to States to draw the dividing line, something which would be very difficult to verify.”⁹¹ In a recent answer to a parliamentary question, the Government stated that “a clarification of the ‘preventive element’ of the right to self-defence is not considered necessary.”⁹² Instead of preventive action by

necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.” For the correspondence between Mr Webster and Lord Ashburton, see *British Foreign and State Papers*, vol. 29, p. 1138.

⁸⁹ Speech by Chancellor Schröder at the opening of the Federal College for Security Studies, 19 March 2004, available at <www.germany-info.org/relaunch/politics/speeches/031904.html>, last visited 28 May 2005.

⁹⁰ See NSS, *supra* note 81, p. 1 (“the United States will . . . work to *prevent* attacks”); p. 6 (“we will not hesitate to act alone, if necessary, to exercise our right of self-defence by acting *preemptively* against such terrorists, to *prevent* them from doing harm against our people and our country”); p. 15 (“To forestall or *prevent* such hostile acts by our adversaries, the United States will, if necessary, act *preemptively*”).

⁹¹ See Voigt, *supra* note 18. See also the speech of the Minister of Justice on 22 September 2003: “Germany is opposed to any erosion of the proven set of rules of the Charter of the United Nations and State practice by an extended right to preventive self-defence.” (*supra* note 69).

⁹² BT-Drs. 15/3635, 3 August 2004, p. 17.

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individual States, Berlin favours preventive action by the Security Council.⁹³ The German Government therefore endorsed the view of the High-level Panel on Threats, Challenges and Change that if there are good arguments for preventive military action, with good evidence to support them, these should be put to the Security Council, which can choose to authorize such action.⁹⁴

The problem with the German literature is that – unlike the German Government – it does not always distinguish clearly between pre-emptive and preventive self-defence, but uses a single term, namely *präventive Selbstverteidigung*, for both imminent and non-imminent threats. This may explain why some of the textbooks still reject even a right to pre-emptive self-defence.⁹⁵ While a majority in the German academic literature now supports a limited right of self-defence against imminent threats, preventive self-defence is generally rejected.⁹⁶

3.3. Retaining the Means of Self-Defence

The means States may employ when acting in self-defence is another disputed question. Germany takes the view, in line with the ICJ's judgment in the *Nicaragua* case, that self-defence warrants only measures which are proportional to the armed attack and necessary to respond to it.⁹⁷ Proportionality of response, however, does not in itself exclude the use of nuclear weapons in self-defence in all circumstances. In answer to a parliamentary question, the German Government stated in April 1998 that it shared the views expressed by the International Court of Justice in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, that any threat or use of nuclear weapons not in conformity with Article 2(4)

⁹³ *Ibid.*

⁹⁴ 'Berlin, begrüßt Vorschläge zur Reform des Sicherheitsrats', *FAZ*, 2 December 2004, p. 6. For the relevant paragraphs of the High-level Panel, see *supra* note 84.

⁹⁵ Bothe, *supra* note 13, MN 19; Fischer, *supra* note 13, MN 29–30; Hobe and Kimminich, *supra* note 13, pp. 316–318 (allowing anticipatory self-defence in exceptional circumstances only). See also O.M. Freiherr von Lepl, 'Die präemptive Selbstverteidigung im Lichte des Völkerrechts', 16 *HuV* (2003) pp. 77–81.

⁹⁶ See e.g., O. Dörr, 'Staats- und völkerrechtliche Aspekte des Irak-Krieges 2003', 16 *HuV* (2003) pp. 183ö, R. Hofmann, 'International Law and the Use of Military Force Against Iraq', 45 *GYIL* (2002) pp. 31–33; K. Meessen, 'Selbstverteidigung als werdendes Völkergewohnheitsrecht', *NZZ*, 18 February 2003, p. 5; G. Nolte, 'Weg in eine andere Rechtsordnung', *FAZ*, 10 January 2003, p. 8.

⁹⁷ BT-Drs. 13/5906, 28 October 1996, p. 2.

and Article 51 of the *UN Charter* was illegal. However, current international law does not prohibit the threat or use of nuclear weapons in extreme circumstances of self-defence in which the very survival of the State is at stake.⁹⁸ For Germany, NATO's doctrine of nuclear deterrence continues to be compatible with international law.⁹⁹

4. Humanitarian Intervention

The Kosovo crisis raised the question of whether international law allows for the use of force besides the right to self-defence, if the Security Council fails to meet its primary responsibility for the maintenance of international peace and security. In late 1997/early 1998 violence on a large-scale flared in the Yugoslav province of Kosovo. The Security Council dealt with the crisis on several occasions and in September 1998 adopted Resolution 1199 (1998) in which it determined that the deterioration of the situation in Kosovo constituted "a threat to peace and security in the region".¹⁰⁰ However, it became clear that Russia would veto any resolution authorizing the use of force against the Federal Republic of Yugoslavia. Calls for NATO to intervene in Kosovo triggered a debate in Germany as to the legal basis for such intervention. On 19 June 1998, Foreign Minister Klaus Kinkel declared in the Bundestag: "NATO is examining military options with direct effect on Kosovo and the whole Federal Republic of Yugoslavia [FRY]. Such measures require a solid legal basis. Considering the present circumstances this can only be a mandate by the Security Council."¹⁰¹ At the same time, the

⁹⁸ BT-Drs. 13/10566, 28 April 1998, p. 4. In 1983, the Government had replied to a parliamentary question that "the use of nuclear weapons, like that of any other weapon, is only permissible under international law in the exercise of the inherent right of individual or collective self-defence against an armed attack." (BT-Drs. 10/445, 5 October 1983, p. 4). On the German Government's view on the legality of the threat or use of nuclear weapons, see also *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Written Statement of the Government of the Federal Republic of Germany, June 1994, available at <www.icj-cij.org>, last visited 28 May 2005. See also the detailed statements of the Government on the question of legality of the threat or use of nuclear weapons triggered by the ICJ's advisory opinion: BT-Drs. 13/9098, 18 November 1997; 13/5689, 4 October 1996.

⁹⁹ BT-Drs. 13/5906, 28 October 1996, pp. 2–4.

¹⁰⁰ S/RES/1199 (1998), 23 September 1998. See also S/RES/1160 (1998), 31 March 1998.

¹⁰¹ BT-Drs.13/242, 19 June 1998, p. 22422. See also 'Kinkel zur aktuellen Lage im Kosovo', 22 July 1998, available at <www.auswaertiges-amt.de/www/de/info-service/presse/presse_archiv?archiv_id=639>, last visited 28 May 2005.

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Minister of Defence, Volker R  he, was quoted in *The Times* on 15 June 1998 as saying that NATO action could be launched without a new United Nations Council resolution.¹⁰² The Government seems to have been deeply divided on the issue. While on 24 August 1998 the Government spokesman, with the backing of the Chancellor, announced that Germany was now ready to participate in a military operation in Kosovo even without the authorization of the United Nations,¹⁰³ the Foreign Minister continued to be of the opinion that another resolution was necessary,¹⁰⁴ and that Resolution 1199 (1998) could only be seen as a ‘springboard resolution’ for further decisions of the Council.¹⁰⁵

On 13 October 1998, the NATO Council authorized limited air operations to prevent a humanitarian catastrophe in Kosovo. NATO Secretary-General Solana summarized the results of the deliberations of the NATO Council, stating, *inter alia*, that the FRY had not yet complied with the urgent demands of the international community despite Security Council Resolutions 1160 (1998) and 1199 (1998), both adopted under Chapter VII. He pointed out that the humanitarian catastrophe continued, because no concrete measures towards a peaceful solution of the crisis had been taken by the FRY; that another Security Council resolution containing a clear enforcement action with regard to Kosovo could not be expected in the foreseeable future and that the deterioration of the situation in Kosovo and its magnitude constituted a serious threat to peace and security in the region as explicitly referred to in Resolution 1199 (1998). He therefore concluded that there were legitimate grounds for the Alliance to threaten and, if necessary, to use force.¹⁰⁶ During the debate in the Bundestag on the decision of the NATO Council, Foreign Minister Kinkel did not give any justification for the threat of force but simply stated that the Government shared the view expressed by the NATO Secretary-General. He added: “With this decision, NATO has not and does not want to create a new legal basis which would give it general authority for intervention. The decision of NATO must not become a precedent. As far as the Security Council

¹⁰² ‘RAF in Kosovo show of force’, *The Times*, 15 June 1998, p. 14. See also BT-Drs.13/242, 19 June 1998, p. 22437.

¹⁰³ ‘Kosovo-Einsatz auf ohne UN-Mandat?’, *FAZ*, 25 August 1998, p. 1.

¹⁰⁴ ‘Kosovo-Resolution des Sicherheitsrats ohne Gewaltanwendung, aber mit Forderungen’, *FAZ*, 24 September 1998, p. 1; ‘Die Nato droht Milosevic’, *ibid.*, 25 September 1999, p. 2.

¹⁰⁵ “‘Sprungbrettresolution’ f  r das Kosovo?’, *FAZ*, 23 September 1998, p. 2.

¹⁰⁶ Quoted in BT-PIPr. 13/248, 16 October 1998, pp. 23129.

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monopoly on force is concerned, we must avoid getting on a slippery slope.”¹⁰⁷

On 23 March 1999, NATO commenced air strikes against the FRY, which lasted until 10 June 1999. In a television address to the German people, Chancellor Gerhard Schröder said:

“Tonight NATO has started air strikes against military targets in Yugoslavia. The Alliance wishes to put a stop to grave and systematic violations of human rights and prevent a humanitarian catastrophe . . . The international community of States cannot stand idly by while the human tragedy in that part of Europe is occurring. We do not wage a war, but we are called upon to enforce a peaceful solution in Kosovo and this includes using military means.”¹⁰⁸

While the Government stated in the Bundestag that “the NATO air operations were permissible in international law”, it did not give any legal basis for these operations. Instead, it declared that “the NATO operation was launched when all other means had failed to settle the dispute peacefully and to avert a human catastrophe” and that “the threat and the use of force by NATO was a means of last resort justified by the exceptional circumstances of the crisis in Kosovo”.¹⁰⁹ The legal basis on which the German Government based its military action against the FRY became clear only some time later, when Defence Minister Rudolf Scharping, during a speech on 18 April 1999, referred to the Government’s right under international law to provide ‘emergency assistance’ (*Nothilfe*). He stated:

“Some have claimed that the NATO air operations violate international law . . . This is despicable and wrong. The prohibition to intervene in the internal affairs of a State, which is a consequence of the sovereignty of States, is well-founded. But State sovereignty is just one legally protected right. It finds its limits in the international law obligation to protect basic

¹⁰⁷ *Ibid.* See also BT-Drs. 13/11469, 12 October 1998, p. 2.

¹⁰⁸ See *Legality of the Use of Force (Yugoslavia v. Germany)*, Preliminary Objections of the Federal Republic of Germany, 5 July 2000, p. 17, para. 2.26. See also *ibid.*, p. 12, para. 2.13, where the German Government declared that the aim of the air strikes was “to induce President Milosevic to withdraw his forces from Kosovo and to co-operate in bringing to an end to the violence”.

¹⁰⁹ BT-Drs. 14/5677, 28 March 2001, p. 50. That action was taken to prevent a “humanitarian catastrophe” was also stressed in numerous other statements; see e.g. BT-Pl.Pr. 14/31, 26 March 1999, p. 2571. See also BT-Pl.Pr. 14/32, 15 April 1999, p. 2621 and *Legality of the Use of Force (Yugoslavia v. Germany)*, CR 99/18, 11 May 1999, para. 1.3.1.

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human rights and to respect the right of people to self-determination. These three important rights demand equal respect. They cannot be played off against each other. What we face here is a conflict of aims . . . The Kosovo conflict drives forward a development that has been going on for years: the development of international law with regard to a question which the UN Charter does not answer satisfactorily.”¹¹⁰

The Defence Minister referred to some (but not all) of the criteria for ‘humanitarian intervention’ established by the European Parliament in a resolution on 20 April 1994.¹¹¹ He continued:

“there must be an extraordinary and extremely serious situation of humanitarian need . . . ; the United Nations must be unable to take effective action . . . ; all other means must have failed . . . ; the military operation must be temporary and proportionate . . . ; the intervention must not be subject to condemnation by the United Nations”. According to Scharping all criteria were fulfilled in the case of Kosovo.

This legal assessment was echoed by both the Chancellor and the Foreign Minister. Chancellor Schröder said on 5 May 1999 in the Bundestag: “In order to alleviate need, we acted on the basis of the right to provide emergency assistance and on the basis of Security Council decisions. For that reason, it really is wrong constantly to question the international legal authority for this action.”¹¹² Foreign Minister Fischer also relied on the idea of ‘emergency assistance’. In an address to the UN General Assembly he asked how the international community would decide in the future when it came to preventing massive human rights violations against an entire people. For him, two developments were conceivable:

“A practice of humanitarian interventions could evolve outside the United Nations system. This would be a very problematic development. The intervention in Kosovo, which took place in a situation where the Security Council had tied its own hands after all efforts to find a peaceful solution had failed, was intended to provide emergency assistance and, ultimately, to protect the displaced Kosovo Albanians. The unity of the European

¹¹⁰ ‘Das transatlantische Bündnis auf dem Weg in das 21. Jahrhundert’, Speech of Defence Minister Rudolf Scharping at the German Atlantic Society, 19 April 1999, Bulletin No. 18 of 21 April 1999 (CD-ROM version). *See also* BT-PIPr. 14/32, 15 April 1999, pp. 2647–2648.

¹¹¹ For the text of the resolution of the European Parliament, *see* OJ C 128, 9 May 1994, p. 225.

¹¹² BT-PIPr. 14/38, 5 May 1999, p. 3096.

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States and the Western Alliance, as well as various Security Council resolutions, were of crucial significance here. However, this step, which is only justified in this special situation, must not set a precedent for weakening the United Nations Security Council's monopoly on authorizing the use of legal international force. Nor must it become a licence to use external force under the pretext of humanitarian assistance. This would open the door to the arbitrary use of power and anarchy and throw the world back to the nineteenth century.

The only solution to this dilemma, therefore, is to further develop the existing United Nations system in such a way that in the future it is able to intervene in good time in cases of very grave human rights violations, but not until all means of settling conflicts peacefully have been exhausted and – this is a crucial point – within a strictly limited legal and controlled framework.”¹¹³

The Government's view that the participation of German armed forces in the air strikes against the FRY did not contravene international law was shared by the Regional Court of Berlin, which was of “the opinion that international law knows the concept of ‘collective emergency assistance’ which, in exceptional circumstances and definitely only within strict limits, can justify military interventions without an express Security Council mandate”.¹¹⁴ This opinion must, however, be contrasted with a judgment of the County Court of Berlin Tiergarten.¹¹⁵ The Court acquitted a person accused of signing and

¹¹³ UN Doc. A/54/PV.8, 22 September 1999, pp. 11–12.

¹¹⁴ Landgericht Berlin, Judgment of 3 August 2000, (566) 78 Js 162/99 Ns (5/00), *Neue Justiz* 2000, p. 661. See also the decision of the Chief Federal Prosecutor of 21 March 2003, *supra* note 42, p. 910: “Exceptions [to the prohibition of the use of force] may be based on the right of self-defence (Article 51 UN Charter), the provisions on collective security in Chapter VII of the Charter . . . and, under certain circumstances, also on unwritten principles of customary international law (confer, for example, the principle of humanitarian intervention . . .).”

¹¹⁵ Amtsgericht Tiergarten, Judgment of 2 March 2000, 239 Ds 446/99, *Neue Zeitschrift für Strafrecht* 2000, p. 652. See also the Judgment of 4 November 1999, *ibid.*, pp. 144–145. A County Court (*Amtsgericht*) in the German judicial system is the court of first instance for criminal offences punishable up to four years in prison. In several other proceedings the accused were acquitted on grounds of freedom of speech or on procedural grounds. Only the decision of the Amtsgericht Tiergarten dealt with the question of the legality of the use of force by NATO against the FRY, and based its decision on the illegality of the operation. The *Kammergericht* (Higher Court of Appeal) Berlin stated that it was “disputed whether the NATO operation in the Kosovo war was violating Art. 2 of the UN Charter and was thus contrary to

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distributing an advert in a newspaper calling on all members of the German armed forces involved in the war against Yugoslavia to desert because the NATO operation against the FRY was an “illegal combat operation under international law”. The Court’s judgment is worth quoting at some length:

“The use of the German Army against the FRY was illegal, as it contravened international law. The illegal act concerned the rules of general international law. The aerial warfare against the FRY violated the absolute prohibition of the use of force in Article 2 (4) of the UN Charter . . . The war against Yugoslavia was also not justified by unwritten customary international law. In so far as it is claimed that the action was justified by the fact that the UN Security Council was inactive or incapable of taking measures under Chapter VII of the UN Charter, there are simply no facts which would justify such a claim. The war was started without waiting for the Security Council to adopt a resolution. It also cannot be argued that the vetoing of the required authorization of the use of force by a permanent member (according to Article 27 (3) of the UN Charter) constitutes an abuse of rights which allows other States to disregard the prerogative of the Security Council and to take the measures considered necessary themselves. On the contrary, permanent membership of the Security Council and the veto right of permanent members were created exactly for that reason: to prevent warlike clashes from being instigated over the heads of the most important States.”¹¹⁶

The Court also rejected a justification of the war on the grounds of emergency assistance. It stated: “An unauthorized intervention of this kind violates international law, even if it is conducted for humanitarian reasons”.¹¹⁷ Other Courts did not expressly declare NATO’s operation to be contrary to international law, but expressed serious doubts about the legality of the operation. These Courts held obiter that the question of the legality of the Kosovo war was “highly controversial”, that the view that NATO was violating international law “is gaining ground and can be well argued” and that, “according to traditional international law”, this was “an obvious conclusion” to be drawn. They also found that the view as to the illegality of the operation was to be taken seriously, as there was “no formal legal basis

international law or whether it was justified by customary international law as humanitarian intervention on behalf of the Kosovo Albanians.” (Order of 10 October 2001, (4) 1 Ss 11/03 (93/01), not published).

¹¹⁶ Amtsgericht Tiergarten, *supra* note 115, p. 653.

¹¹⁷ *Ibid.*

for the NATO operation in international law”.¹¹⁸ The view of the County Court of Berlin Tiergarten also reflects the view of the large majority of German international lawyers at the time, who considered the military operations against the FRY without Security Council authorization a breach of international law.¹¹⁹ In the current textbook literature, opinions are divided. For some authors, the protection of human rights can justify the use of force,¹²⁰ while for others – it is submitted correctly – humanitarian intervention without Security Council authorization violates international law.¹²¹

The NATO intervention in Kosovo is often cited in the literature as State practice in support of a customary right of forcible humanitarian

¹¹⁸ For these unpublished decisions, see M. Jahn, ‘Aufrufe zum Ungehorsam. Verfahren wegen des Kosovo-Kriegs vor den Moabiter Strafgerichten’, *Kritische Justiz* 2000, p. 492.

¹¹⁹ ‘Mehr Druck vom Sicherheitsrat verlangt. Völkerrechtler fordern Kosovo-Resolution’, *FAZ*, 26 October 1998, p. 8; S. Tönnies, ‘Die gute Absicht allein ist suspekt’, *ibid.*, 7 June 1999, p. 12; H. Weber, ‘Rechtsverstoß, Fortentwicklung oder Neuinterpretation?’, *ibid.*, 9 July 1999, p. 8; U. Fastenrath, ‘Menschenrechte *contra* Gewaltverbot. Intervention ohne UN-Mandat?’, *ibid.*, 22 April 1999, p. 5; ‘Krieg, Macht, Recht’, *Forum Recht* 1999, p. 97 (interview with I. Pernice); ‘Jenseits der roten Linie’, *Der Spiegel*, 24 May 1999, pp. 76–77 (quoting Bruno Simma who called the NATO “beyond the red line” as far as current international law was concerned); U. Beyerlin, ‘Rechtsstreit um Kosovo-Einsatz: Sind die Nato-Angriffe legitimiert? Nein’, *Die Welt*, 27 March 1999, p. 2; ‘Die USA brechen das Völkerrecht’, *SZ*, 22 March 2003, p. 6 (interview with R. Wolfrum). For the legality of the NATO operation, see C. Tomuschat, ‘Ein zweites Versailles soll es nicht geben’, *Die Welt*, 14 April 1999, p. 6 (humanitarian intervention “legitimate”); K. Doehring, ‘Wenn “innere Angelegenheiten” an ihr Ende kommen’, *FAZ*, 15 June 1999, p. 12; E. Klein, ‘Keine innere Angelegenheit. Warum die Nato-Aktion im Kosovo aus völkerrechtlicher Sicht zulässig war’, *ibid.*, 21 June 1999, p. 15; C. Tietje, ‘Intervenieren im Namen eines Notstandsrechts’, *ibid.*, 21 June 1999, p. 55.

¹²⁰ Doehring, *supra* note 13, MN 766, pp. 1010–1015; Herdegen, *supra* note 13, § 34, MN 25–32; E. Klein, ‘Die Internationalen und die Supranationalen Organisationen’, in W. Graf Vitzthum (ed.), *Völkerrecht* (3rd ed., De Gruyter, Berlin 2004) pp. 245–355, MN 22.

¹²¹ Bothe, *supra* note 13, MN 22; Fischer, *supra* note 13, MN 26, 58; Hobe and Kimminich, *supra* note 13, pp. 339–340; Herdegen, *supra* note 13, § 34, MN 9, 10 (humanitarian intervention in failed States as an exception). For the illegality, see also Hillgruber, *supra* note 76, p. 822; G. Nolte, ‘Kosovo und Konstitutionalisierung: Zur humanitären Intervention der NATO-Staaten’, 59 *ZaöRV* (1999) pp. 956–957.

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intervention. As far as Germany is concerned, this is not the case. The German Government made it quite clear from the outset of the Kosovo crisis that it did not want to contribute to creating such a State practice. The constant reminder that NATO's action must not set a precedent runs like a red thread through all its statements. The Government did not rely on an existing right of 'humanitarian intervention' as an exception to the prohibition of the use of force, but, instead, relied on the general concept of 'emergency assistance' in exceptional circumstances. As Foreign Minister Kinkel put it, Germany did "not want to create a new legal basis which would give . . . general authority for intervention". On the contrary, it was Germany's aim to maintain the Security Council's monopoly on authorizing the legal use of force.¹²² The problem with the German position is, of course, that 'unique and exceptional circumstances' occur rather frequently. Who could deny other States the right to intervene in circumstances similar to those in Kosovo? A position based on moral exceptionalism does not provide a sound basis for international law. After all, who decides on the exceptional circumstances of a case?

5. Military Rescue Operations

The use of force to rescue nationals in a foreign State without the consent of the government of that State is another controversial issue and, according to the German Government, "raises difficult questions of the prohibition of the use of force".¹²³ States conducting military rescue operations have justified them on the basis of self-defence, necessity, implied consent to the rescue operation, or a separate customary international exception from the protection of the use of force.

Germany conducted its first rescue operation on 14 March 1997, when German troops evacuated 21 German and 95 nationals of other countries from the Albanian capital Tirana.¹²⁴ In the course of Operation Libelle (Dragonfly), German troops exchanged fire with Albanian gunmen, leaving one Albanian wounded. The Albanian Government, due to the unrest in the

¹²² See BT-PIPr. 14/97, 5 April 2000, p. 9012.

¹²³ BT-Drs. 13/6924, 7 February 1997, p. 7.

¹²⁴ In April 1994, the German Government asked the Ministry of Defence to evaluate the possibilities of a rescue operation in Rwanda. In the end, German nationals were rescued by Belgian paratroopers. The Government took the view that military action to rescue German nationals would have been in conformity with international law. See H.-G. Franzke, 'Schutz von deutschen Staatsbürgern im Ausland durch die Bundeswehr?', 38 *NZWehrR* (1996) p. 189.

country, could not be reached in time to ask for its consent.¹²⁵ Foreign Minister Kinkel said in the Bundestag: “The use of German armed forces was necessary as there was no other way to evacuate. It was in conformity with constitutional and international law.”¹²⁶ He did not, however, give any legal basis for the rescue operation. The Government’s position on this question is revealed in the ‘Handbook for Operations and Deployment of the German Armed Forces Outside the Territory of the Federal Republic of Germany in Peacetime’. The section on rescue missions reads as follows:

“Armed intervention without the consent of the foreign State with a view to rescuing one’s citizens concerns one of the limits of the prohibition of the use of force for which there is neither settled State practice nor a uniform view in the literature. The main argument in favour of its permissibility is the justification as a customary international law exception to the prohibition of the use of force in Article 2(4) of the UN Charter. Self-defence and necessity on the other hand are controversial as justifications. The conditions of legality [for rescue operations] are that:

- life and limb of citizens must be in immediate danger;
- the foreign State authorities are unable or unwilling to afford protection;
- peaceful means of dispute settlement are unsuccessful (peaceful means of dispute settlement (diplomatic activities) have failed or are futile);
- authorization by the Security Council cannot be expected or cannot be expected in time;
- and the use of armed force must not interfere disproportionately with the rights of the other (foreign) State or its citizens.”¹²⁷

¹²⁵ On Operation ‘Libelle’, see BT-Drs. 13/7233, 18 March 1997, p. 1. See also V. Epping, ‘Die Evakuierung deutscher Staatsbürger im Ausland als neues Kapitel der Bundeswehrsgeschichte ohne rechtliche Grundlage? – Der Tirana-Einsatz der Bundeswehr auf dem rechtlichen Prüfstand –’, 124 *Archiv des öffentlichen Rechts* (1999) pp. 423–469; C. Kreß, ‘Die Rettungsoperation der Bundeswehr in Albanien am 14. März 1997 aus völker- und verfassungsrechtlicher Sicht’, 57 *ZaöRV* (1997) pp. 329–362; Y. Freiherr von Lersner, ‘Der Einsatz von Bundeswehrsoldaten in Albanien zur Rettung deutscher Staatsangehöriger’, 12 *HuV* (1999) pp. 156–166.

¹²⁶ BT-PlPr. 13/166, 20 March 1997, p. 14971.

¹²⁷ Bundesministerium für Verteidigung, *Handbuch für Einsätze und Verwendungen der Bundeswehr im Frieden außerhalb des Hoheitsgebietes der Bundesrepublik Deutschland*, 1997, Part C, No. 102. See also the article of the head of the Legal Division of the German Ministry of Defence on Operation Libelle: K. Dau, ‘Die

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On several occasions since 1997, the German Government has not expressly ruled out the use of Special Forces to rescue German nationals abroad with or without the consent of the State concerned.¹²⁸ Explaining the new structure of the German armed forces in March 2004, the Minister of Defence stated that one of the tasks of the new 35,000-strong ‘intervention forces’ would be “rescue and evacuation operations in war and conflict zones”.¹²⁹ These operations are now also expressly provided for in section 5(1) of the *Act on Participation of Parliament in Decisions Concerning the Deployment of Armed Forces Abroad (Act on the Participation of Parliament)* of 18 March 2005.¹³⁰

In the German literature, the majority of writers dealing with Operation Libelle took the view that there was insufficient State practice for a customary international right to conduct rescue operations without the consent of the foreign State concerned. Such operations could also not be justified on the basis of self-defence, or a customary international law right to provide emergency assistance. If at all, the operation could be justified on the basis of ‘presumed consent’.¹³¹ The argument that State practice was insufficient seems doubtful at least, considering that in 1997 the German Government was able to point to seven cases since 1997 in which German nationals had been rescued by the armed forces of friendly foreign States.¹³² The textbook literature is divided on the question. While some textbook

militärische Evakuierungsoperation “Libelle” – ein Paradigma der Verteidigung?, 40 *NZWehrR* (1998) p. 91, n. 16: “With regard to international law it must be remembered that evacuation operations involve use of force that is limited in time and space. Their purpose is not to infringe the territorial integrity or political independence of the State concerned but to protect one’s own citizens. Such measures thus do not result in a permanent interference with the objects protected by the prohibition of the use of force in Article 2(4) of the UN Charter. From the viewpoint of international law it can therefore be assumed that rescue operations like Operation Libelle are permissible on the basis of a customary international law exception from the prohibition of the use of force. There is thus no need for a justification on the basis of the right to self-defence.”

¹²⁸ See BT-PIPr. 15/51, 18 June 2003, p. 4228.

¹²⁹ BT-PIPr. 15/97, 11 March 2004, pp. 8601–8602.

¹³⁰ BGBl. 2005 I, p. 775. The Act entered into force on 24 March 2005.

¹³¹ Epping, *supra* note 125, p. 466; Kreß, *supra* note 125, pp. 337–338; U. Fastenrath, ‘Die Rettungsaktion in Tirana. Neues Kapitel in der Bundeswehr-geschichte ohne rechtliche Grundlage?’, *FAZ*, 19 March 1997, p. 8.

¹³² BT-Drs. 13/6924, 7 February 1997, pp. 5–6. See also Freiherr von Lersner, *supra* note 125, p. 165.

authors consider rescue operations without consent to be illegal,¹³³ others base such operations on the ‘inherent’ right of self-defence (i.e. a right over and above the specific provision of Article 51 of the *UN Charter*) or on a customary international law right to rescue nationals abroad.¹³⁴

6. Self-Help Involving the Use of Force

Ever since the *Charter of the United Nations* was adopted in 1945, there has been controversy as to whether the extent and scope of the ‘inherent right’ of self-defence existing under customary international law coincides completely with the right of self-defence under Article 51 of the *UN Charter*, or whether there exists a right to forcible self-help over and above the provisions of Article 51.

Although Germany itself has not claimed a right to use force in ‘self-help’ in cases where the requirements of self-defence are not fulfilled, it has approved of such claims by other States. On 20 March 1995, Turkey launched Operation Steel, targeting bases established by the secessionist Kurdistan Workers’ Party (PKK) in northern Iraq. The Turkish campaign, involving a 35,000-strong force, was designed to “stamp out terrorism against the State”. In its correspondence with the United Nations, Turkey did not rely on self-defence; its justification instead focused on necessity, self-preservation, and Iraq’s inability to deal with the terrorist threat emanating from its territory. Asked how it assessed the Turkish invasion of northern Iraq in terms of international law, the Government replied:

“Turkey justifies its action against the PKK which launches its armed attacks from northern Iraq on the basis of *the customary international law right of self-help* against the perpetrators of these attacks. Such a justification is, under certain conditions, permissible in international law. These conditions include the principle of proportionality, a strict limitation in time of self-help, and the protection of the civilian population. The Government has urged the Turkish Government to observe human rights

¹³³ Bothe, *supra* note 13, MN 21; Fischer, *supra* note 13, MN 33–36 (who sees an emerging customary rule allowing rescue operations in failed States).

¹³⁴ Doehring, *supra* note 13, MN 579, 766; Herdegen, *supra* note 13, § 34, MN 18, 21, 22; Hobe and Kimminich, *supra* note 13, pp. 319–320. On this point, see article by V. A. Kartashkin in this volume – ed.

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norms especially in its operations, to ensure the protection of the civilian population, and to withdraw its troops without delay.”¹³⁵

The German Government relied on the concept of ‘self-help’ as the use of force by Turkey was not directed against an ‘armed attack’. In 1995, the generally accepted view was that an ‘armed attack’ required the use of force by another State. As the actions of the PKK could not be attributed to Iraq, the only possible basis for the use of force, besides the right of self-defence under Article 51 of the *Charter*, was a customary right of forcible self-help.

German textbook literature is divided on the question of forcible self-help. While some authors accept such a right, in line with the position of the German Government,¹³⁶ others reject it.¹³⁷

7. Conclusion

It has been said that Americans are from Mars and Europeans are from Venus. Judged by its realist position on the use of force, Germany seems to be more from Mars than from Venus. Despite its vocal political opposition to the Iraq war, the American and the German legal positions on the use of force largely coincide; something that cannot be said about the practice of the German Government and the views of German international lawyers, who take a much more ‘Venusian’ position. In the case of both Iraq and Kosovo, the German Government followed the American lead into a grey area between the absolute prohibition of force and the permissible use of force. For Germany, as for the United States, the lawful use of force is not restricted to Security Council authorization and the right to self-defence under Article 51 of the *UN Charter*. At least three other legal bases for the use of force have been adopted by the German Government: a right to provide ‘emergency assistance’; a right to rescue nationals abroad; and a right to use force in ‘self-help’. All three are claimed to have their origin in customary international law and are reminiscent of the pre-*Charter* right of forcible self-help.

¹³⁵ BT-Drs. 13/1246, 2 May 1995, p. 2. Questioned about another invasion of northern Iraq by Turkish troops on 7/8 November 1998, the Government replied: “The Government does not deny the right of the Turkish Government to suppress the secessionist activities of the PKK and to protect the territorial integrity of the Turkish State.” (BT-Drs. 14/218, 10 December 1998, p. 1).

¹³⁶ Doehring, *supra* note 13, MN 576–578, 759–777; Herdegen, *supra* note 13, § 34, MN 23, 34.

¹³⁷ Fischer, *supra* note 13, MN 43. Bothe, Hobe and Kimminich do not address the question.

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In spite of their agreement on the legal bases of the lawful use of force, there are important differences in emphasis between the United States and Germany with regard to forcible response to the new threats of international terrorism and the proliferation of weapons of mass destruction. While the United States aims at adapting the criterion of ‘imminence’ in order to allow force to be used pre-emptively against imminent and non-imminent armed attacks, Germany aims at adapting the criterion of ‘threat to the peace’ in order to allow the Security Council to play a more proactive role in upholding world public order. Neither country rules out “timely military intervention” as part of its policy of prevention.¹³⁸ But while the United States is prepared to act alone or together with a coalition of the willing, Germany sees itself as a champion of ‘effective multilateralism’.

¹³⁸ See the Speech by Chancellor Schröder, *supra* note 89.