Self-Defence in International and Criminal Law

The doctrine of imminence

Onder Bakircioglu

ROUTLEDGE

Self-Defence in International and Criminal Law

The doctrine of imminence

Onder Bakircioglu

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

First published 2011
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

Simultaneously published in the USA and Canada
by Routledge
711 Third Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloguing in Publication Data
Bakircioglu, Onder.
Self-defence in international and criminal law: the doctrine of imminence/Onder Bakircioglu.
p. cm.
Includes index.
1. Self-defense (International law) I. Title.
KZ4043.B35 2011
345'.04–dc22

2010051273

ISBN: 978-0-415-59422-6 (hbk)
ISBN: 978-0-203-81381-2 (ebk)

Typeset in Baskerville
by Wearset Ltd, Boldon, Tyne and Wear

Printed and bound in Great Britain by
CPI Antony Rowe, Chippenham, Wiltshire

Table of cases

Acknowledgements

This book originated as a doctoral thesis which was written under the direction of Professor Caroline Fennell. Without her continuous support, encouragement and constructive criticism, this work could not have been completed. During the writing of the thesis and its subsequent transformation into this book, I have benefited from the support and encouragement of numerous people. My profound thanks are firstly due to my mother, Perihan Bakircioglu, to whom this book is dedicated, for her continuous inspiration and encouragement. I am indebted, for encouragement and advice, to Professor Brice Dickson, Professor John Mee, Dr Conor O'Mahony, Dr Olufemi Amao, Dr Pablo Cortés, Dr Sibo Banda, Dr Jean Allain, Dr Rory O'Connell, Dr Nidal Jurdi, Haydar Olmez, Fatih Ozturk, Nuri Bakircioglu, Erkan Bakircioglu, Hakan Bakircioglu, Sinéad Ring, Patrick McCarthy, Phyllis Comerford, John McNally, Edet Essien and Yasar Aydin. I would like also to thank Professor Dermot Walsh, one of my examiners, and the anonymous reviewers of Routledge, whose detailed and acute comments have been very helpful in revising the draft. Finally, I wish to acknowledge that this research would not have been possible without the financial support of the School of Law, University College Cork.

Some parts of this book have been previously published in other forms, and appear here in revised versions: "A Socio-Legal Analysis of Jihad" (2010) 59 *International and Comparative Law Quarterly* 413–440; "The Future of Preventive Wars: The Case of Iraq" (2009) 30 *Third World Quarterly* 1297–1316; "The Right to Self-Defence in National and International Law: The Role of the Imminence Requirement" (2009) 19 *Indiana International and Comparative Law Review* 1–49; and "The Contours of the Right to Self-Defence: Is the Requirement of Imminence Merely a Translator for the Concept of Necessity?" (2008) 72 *The Journal of Criminal Law* 131–169.

Contents

Introduction

On 11 September 2001, nineteen "terrorists,"[1] affiliated with al-Qaeda,[2] hijacked four commercial passenger jet airliners. The hijackers crashed two of the planes into the twin towers of the World Trade Center in New York City and one into the Pentagon in Washington, DC. The fourth plane could not reach its target as some passengers and flight crew attempted to regain control of the plane from the hands of the hijackers, which led to it crashing into a field in Pennsylvania. Thousands of civilians perished as a result of this unprecedented attack, which was ranked the most atrocious act of "terrorism" in American history.[3]

In the immediate aftermath of these attacks, the then-president of the United States, George W. Bush, declared that these "were more than acts of terror; they were acts of war."[4] This distinction aimed at laying the political and psychological ground for a military response against the perpetrators of 11 September.[5] As it was soon afterwards determined that al-Qaeda, which mainly operated in Afghanistan under the Taliban rule, bore responsibility for the attacks, the United States (hereinafter the US) made

1 As is well-known, "terrorism" is a loaded term, the meaning of which is almost always defined or understood differently by the parties to a conflict.

2 Al-Qaeda, an Islamic fundamentalist network, was officially founded in Afghanistan in 1988 by Osama bin Laden. However, al-Qaeda was already in operation during the Soviet war on Afghanistan, fighting, with the aid of the United States, against the Soviet invasion. See further E. Gross, "The Struggle of a Democracy against the Terror of Suicide Bombers: Ideological and Legal Aspects" (2004) 22 *Wis. Int'l L. J.* 597, at 624ff.

3 See S. Schmemann, "U.S. Attacked; President Vows to Exact Punishment for 'Evil'" *New York Times* (12 September 2001); M. A. Khalil, "Iraq, Afghanistan, and the War on Terrorism: Winning the Battles and Losing the War" (2005) 33 *Ga. J. Int'l & Comp. L.* 261, at 261.

4 See K. Q. Seelye and E. Bumiller, "After the Attacks: The President Bush Labels Aerial Terrorist Attacks 'Acts of War'" *New York Times* (13 September 2001).

5 In a televised interview, this view was supported by the Secretary of State, Colin Powell: "Well, the American people had a clear understanding that this is [sic] a war. That is the way they see it. You can't see it any other way, whether legally that is correct or not." C. L. Powell, "We Will Go After Those Responsible" interview by ABC News (12 September 2001). Available at: www.globalsecurity.org/military/library/news/2001/09/mil-010912-usia10.htm.

a non-negotiable demand for the immediate custody of the al-Qaeda leadership. President Bush, in his speech delivered on 20 September 2001, tied the US demands directed at the Taliban regime to a wider "war on terror" discourse:

> Americans should not expect one battle, but a lengthy campaign, unlike any other we have ever seen.... We will starve terrorists of funding, turn them one against another, drive them from place to place, until there is no refuge or no rest. And we will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbour or support terrorism will be regarded by the United States as a hostile regime.[6]

This approach stretched the traditional contours of the self-defence doctrine by envisioning an unlimited time frame for any defensive military act and by holding governments responsible for operations emanating from their territories, irrespective of whether they actually supported such "terrorist" groups, or had the capability to suppress their activities. The aerial bombing of Afghanistan on 8 October 2001 began on the basis of this reactive policy. Indeed, when the Taliban regime asked for evidence of bin Laden's responsibility for the attacks, its request was summarily rejected and the war was deemed inevitable.[7]

Later, the US fleshed out its "preventive war doctrine,"[8] also known as the Bush Doctrine, which favours preventative force to eliminate potential threats emerging from so-called "rogue states"[9] and "terrorists." This new

6 G. W. Bush, "Address to a Joint Session of Congress and the American People" (20 September 2001). Available at: http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html.

7 See R. Falk, "Appraising the War Against Afghanistan" *Social Science Research Council*. Available at: www.ssrc.org/sept11/essays/falk.htm. In the immediate aftermath of the air strikes, the Taliban renewed its offer to negotiate about turning bin Laden over if the US stopped bombing Afghanistan. Yet, President Bush once again forcefully rejected the offer, stating that "when I said no negotiations, I meant no negotiations." E. Bumiller, "President Rejects Offer by Taliban for Negotiations" *New York Times* (15 October 2001), at A1.

8 This book will use the term "preventive war" in contrast to the concepts of "pre-emptive" and "anticipatory" self-defence. As will be discussed in Chapter 3, some commentators maintain that pre-emptive or anticipatory self-defence may under exceptional circumstances satisfy the requirements of Article 51 of the UN Charter.

9 The concept "rogue state" designates a state that is considered to be threatening world peace. This pejorative label evokes images of an authoritarian state that regularly violates the principal norms of international law, severely restricts human rights and sponsors "terrorism," which accordingly cannot be deterred by peaceful means. See further F. Cameron, *US Foreign Policy after the Cold War: Global Hegemon or Reluctant Sheriff*? 2nd Ed. (Routledge: New York, 2005), at 142.

military strategy claimed entitlement to employ unilateral force to prevent incipient threats before they matured. The US administration explained the rationale of this preventive strategy in two main documents. The first was set forth by the president in his speech to the US Military Academy on 1 June 2002, when he articulated the need to abandon the Cold War doctrines of deterrence and containment on the grounds that they were not effective "against shadowy terrorist networks with no nation or citizens to defend."[10] Bush declared that containment was ineffectual against dictators who could easily use weapons of mass destruction (hereinafter WMD) against the US or provide them to their "terrorist" allies. Therefore, he noted, "[the US] must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge."[11]

This doctrine was further elaborated in the 2002 National Security Strategy, where the need for preventive action was considered to be not only prudent, but also legal and legitimate. It was postulated that in the present world, given the existence of WMD and the new forms of "terrorism," it was no longer necessary for a state to wait until the threat became *imminent*. The United States' new security strategy stressed a need for a broader understanding of self-defence, one that reduced the role of the imminence rule to merely establishing the necessity to act. Accordingly, if the war was necessary to prevent an enemy from striking the first blow (possibly with WMD), it would be absurd to require the defending state to sustain and absorb a fatal attack before resorting to defensive force.[12] It was further maintained that the traditional right of self-defence was not in harmony with the realities of modern warfare and recent innovations in military technology, which could easily be employed by radical "terror" organisations or "outlaw" states. Warfare was not only more devastating, as the argument went, but it could occur with less warning, providing considerable advantage to the enemy if allowed to attack first.[13] The Bush administration, on that account, asserted that it would be unreasonable to depend upon the traditional principles governing the use of defensive force. The rationale for a dramatic change in the doctrine of self-defence was articulated by President Bush thus:

10 G. W. Bush "Graduation Speech at West Point" West Point, New York (1 June 2002). Available at: http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020601-3.html.

11 Ibid.

12 See *The National Security Strategy of the United States of America*, September 2002, at 13. Available at: http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/; also see W. P. Nagan and C. Hammer, "The New Bush National Security Doctrine and the Rule of Law" (2004) 22 *Berkeley J. Int'l L.* 375, at 406–409.

13 See *The National Security Strategy of the United States of America*, supra note 12, at 13–14; M. L. Rockefeller, "The 'Imminent Threat' Requirement for the Use of Pre-emptive Military Force: Is it Time for a Non-Temporal Standard?" (2005) 33 *Denv. J. Int'l L. & Pol'y* 131, at 139.

> For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat.... We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means.... Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction.... The greater the threat, the greater the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States, will, if necessary, act preemptively.[14]

Following the release of the 2002 National Security Strategy (hereinafter NSS), the US attempted to justify its new military strategy with a long-standing American tradition, one that found its roots in Daniel Webster's famous doctrine of pre-emption, formulated in response to the *Caroline* incident.[15] However, as will be seen in Chapter 3, this case in reality adopts quite a restrictive approach by requiring the presence of an imminent threat before any defensive measure may legitimately be invoked.[16] The NSS, therefore, rested its chief premises on the controversial concept of "anticipatory" (or pre-emptive) self-defence, which might arguably be resorted to only under exceptional circumstances in international law.

Notably, the US military action in Afghanistan did not meet any significant challenge from the international community as the military force was generally deemed necessary against the perpetrators of the 11 September attacks, who were operating from within Afghanistan under the Taliban rule. International support for the use of force further grew, particularly when al-Qaeda's responsibility for the 11 September attacks was amply demonstrated and the possibility of future attacks appeared

14 G. W. Bush, "Prevent Our Enemies from Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction" West Point, New York (1 June 2002). Available at: http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss5.html.

15 See The White House, Office of the Press Secretary (20 September 2002). Available at: www.iwar.org.uk/military/resources/nss-2002/peace.htm; R. N. Gardner, "Neither Bush nor the 'Jurisprudes' " (2003) 97 *AJIL* 585, at 585–587.

16 See "Letter from US Secretary of State Daniel Webster to British Minister Henry Fox" (24 April 1841) 29 *Brit. & For. St. Papers 1840–1841*, at 1137; M. Rogoff and E. Collins, "The Caroline Incident and the Development of International Law" (1990) 16 *Brook. J. Int'l L.* 493, 497–498.

imminent.[17] Nonetheless, this international support withered away in the face of an expanding claim of entitlement to use unilateral force against incipient threats.[18] Indeed, when the Iraq War was waged in the absence of a tangible, let alone an imminent, threat (on the grounds that the US could not afford a devastating attack that may emerge from the use of WMD by Saddam Hussein's regime or its possible delivery of WMD to fundamentalist organisations), the international community showed serious concern over the legitimacy of the US military action.

Curiously, the Bush administration never claimed that Hussein's regime posed an *imminent* threat of attacking the US, or of delivering WMD to "terrorist" groups, such as al-Qaeda.[19] Also, even from the outset, the main reasons for going to war against Iraq (i.e. Hussein's alleged WMD programmes and his ties to al-Qaeda) appeared not to have been strong enough to justify a preventive war under the doctrine of self-defence. Indeed, following the Security Council resolution 1441 (2002),[20] which required Iraq to cooperate with the United Nations weapons inspectors forthwith, Iraq, to the surprise of many, confirmed that it was "ready to receive the inspectors so that they can ... ascertain that Iraq has produced no weapons of mass

17 See S. Murphy, "Terrorism and the Concept of 'Armed Attack' in Article 51 of the UN Charter" (2002) 43 *Harv. Int'l L. J.* 41; C. Gray, *International Law and the Use of Force*, 3rd Ed. (New York: Oxford University Press, 2008), at 203; L. Moir, *Reappraising the Resort to Force: International Law, Jus ad Bellum and the War on Terror* (Oxford: Hart Publishing, 2010), at 59ff.; R. P. Appelbaum and W. I. Robinson, *Critical Globalization Studies* (New York: Routledge, 2005), at 212–213.

18 However, although the unilateral use of military force against Iraq was inconsistent with the legal framework of international law, when the US launched *Operation Iraqi Freedom* on 19 March 2003, over seventy per cent of the US population supported the war, and the average American believed that the use of force against Iraq was a justifiable act of self-defence. It is also reported that, following the American military victory in Iraq, in April 2003, some eighty per cent of Americans believed the war had made them more secure, and over seventy per cent regarded the war as being a crucial step forward against international terrorism. P. H. Gordon and J. Shapiro, *Allies at War: America, Europe, and the Crisis over Iraq* (New York: McGraw-Hill, 2005), at 192; M. E. O'Connell, "Enhancing the Status of Non-State Actors through a Global War on Terror" (2005) 43 *Colum. J. Transnat'l L.* 435. It should be added that currently a considerable number of US citizens seem to be much more critical about the US defence policies than they had been immediately after the traumatic experience of 9/11.

19 As will be discussed in Chapter 3, in an attempt to justify the war, the US and its allies initially argued that the previous Security Council resolutions, which were adopted during the Gulf War to effect the liberation of Kuwait, authorised military force against Iraq. They further argued that armed force was necessary to defend the US and the international community from the deadly threat posed by Iraq and to liberate the Iraqi people from an oppressive regime. See the letter dated 20 March 2003 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, UN Doc. S/2003/350 (21 March 2003); P. Shiner, "The Iraq War, International Law and the Search for Legal Accountability" in: P. Shiner and A. Williams (eds.), *The Iraq War and International Law* (Oxford: Hart Publishing, 2008), at 17ff.; cf. B. Elshtan, *Just War against Terror* (New York: Basic Books, 2003), at 42.

20 S/Res/1441, 8 November 2002.

destruction in their absence from Iraq since 1998."[21] The International Atomic Energy Agency (IAEA) resumed inspections on 27 November 2002 and submitted its report on 27 January 2003 (less than two months before *Operation Iraqi Freedom*), confirming "the accuracy and completeness of Iraq's declaration that ... since 1998 [Iraq's] nuclear activities have been limited to the non-proscribed use of radioisotopes."[22] IAEA's report concluded that there had been "no evidence of ongoing prohibited or nuclear-related activities" in Iraq.[23] This report was compiled as a result of meticulous investigation. The weapons inspectors searched hundreds of Iraqi sites, conducted numerous interviews and reviewed copious documents in an attempt to discover signs of nuclear activity.[24] Nevertheless, the report did not cast any shadow of doubt upon President Bush's "conviction" that Iraq had not disarmed. On 17 March 2003, he categorically said that "intelligence gathered by this and other governments leaves no doubt that the Iraq regime continues to possess and conceal some of the most lethal weapons ever devised."[25]

Soon after the occupation of Iraq, though, it became undeniably clear that Iraq had no stockpiles of WMD, nor any links with al-Qaeda, as alleged by the US-led coalition forces. This, yet again, did not prevent the US from flatly advocating the preventative war strategy, nor did it terminate the ongoing occupation of Iraq.[26] As will be shown below, this naturally fuelled controversy about the law of international self-defence and the temporal requirement (imminence) thereof, a relaxation of which would inevitably be attended by such alarming consequences as encouraging and legitimising the use of lethal force against hypothetical enemies at any given time.

21 IAEA Update Report for the Security Council Pursuant to Resolution 1441 (2002), 27 January 2003, at para. 9. Available at: https://iaea.org/NewsCenter/Focus/IaeaIraq/unscreport_290103.html.

22 Ibid. at para. 23(a).

23 Ibid. at para. 65.

24 See R. A. Payne, "Deliberate Before Striking First" in: W. W. Keller and G. R. Mitchell (eds.), *Hitting First: Preventive Force in U.S. Security Strategy* (Pittsburgh: University of Pittsburgh Press, 2006), at 129ff.

25 G. W. Bush, "Address to the Nation" (17 March 2003). Available at: www.america.gov/st/washfile-english/2003/March/20030317211428ssor0.0325281.html.

26 In October 2004, Charles Duelfer, the CIA's special advisor to the Iraq Survey Group, confirming previous reports, eventually declared that "Iraq [had] destroyed its stockpiles of chemical and biological weapons program, after the 1991 Persian Gulf War." Arms Control Association, "Duelfer Disproves U.S. WMD Claims" (November 2004). Available at: www.armscontrol.org/act/2004_11/Duelfer. President Bush simply stated that the world was better off without Saddam Hussein and that the US could not take the chance of his regime passing WMD to outlaw regimes and groups. See "Iraq War Debate Fuelled by Report" *BBC News* (7 October 2004). Available at: http://news.bbc.co.uk/1/hi/world/middle_east/3722306.stm. A detailed Pentagon study also confirmed that Hussein's regime had no links with al-Qaeda. See Institute for Defence Analyses, "Saddam and Terrorism: Emerging Insights from Captured Iraqi Documents" Vol. 1, (2007). Available at: http://a.abcnews.com/images/pdf/Pentagon_Report_V1.pdf; also see T. Rockmore, J. Margolis and A. T. Marsoobian (eds.), *The Philosophical Challenge of September 11* (Oxford: Blackwell Publishing, 2005), at 55.

However, the controversy over the need to modify the right to self-defence has not been exclusive to international law. Indeed, when the present author decided to analyse the right of self-defence in the light of the new challenges mentioned above, he soon noticed the close nexus between self-defence in international law and its national (criminal law) counterpart. To start with, historically, the doctrine of international self-defence had largely been shaped through analogy and reference to the right of self-defence in national law.[27] Second, the governing principles of the self-defence doctrine have essentially remained the same both in domestic and in international law, namely the danger must be "imminent" and defensive force must be "necessary" and "proportionate" to ward off the unlawful threat involved.[28] Also, from the perspective of imminence, both national and international law envisage a strict requirement of imminence, which renders any act taken within the context of pre-emptive or anticipatory self-defence illegal. For the purposes of our inquiry, the most telling connection between national and international law is the existence of a similar (if not the same) controversy about whether or not the right to self-defence should be revised by removing or relaxing the traditional imminence rule. In both disciplines, the debate over the requirement of imminence has been centred on similar concerns, issues and tensions. Likewise, arguments advanced to deal with the problem are hinged upon analogous premises. Admittedly, these similar arguments are meant to address different scenarios, yet the striking closeness of the logic and reasoning behind the attempt to alter the doctrine of self-defence makes it worthwhile to study the doctrine from a wider and comparative perspective. A comparative method provides an important opportunity to take advantage of the lessons learned from the criminal law (which has long been subject to rich juridical and academic scrutiny) in an attempt to shed a brighter light upon a comparable debate conducted in international law.[29]

27 See M. D. Vattel, *The Law of Nations* (Philadelphia: T. & J. W. Johnson & Co., 1883), at bk. II/IV/XLIX; M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3rd Ed. (New York: Basic Books, 2000), at 58.

28 S. Wallace, "Beyond Imminence: Evolving International Law and Battered Women's Right to Self-Defence" (2004) 71 *U. Chi. L. Rev.* 1749, at 1750.

29 It is to be noted that recent literature, albeit limited, has shown some interest in the connection between the claims of the Bush administration and those of the feminist critique. For examples, see K. K. Ferzan, "Defending Imminence: From Battered Women to Iraq" (2004) 46 *Ariz. L. Rev.* 213; Wallace, supra note 28; J. C. Moriarty, "While Dangers Gather: The Bush Pre-emption Doctrine, Battered Women, Imminence, and Anticipatory Self-Defence" (2006) 30 *N. Y. U. Rev. L. & Soc. Change* 1; M. Skopets, "Battered Nation Syndrome: Relaxing the Imminence Requirement of Self-Defence in International Law" (2006) 55 *Am. U. L. Rev.* 753; W. R. F. Kaufman, "Self-Defence, Imminence, and the Battered Woman" (2007) 10 *New Crim. L. Rev.* 342; G. P. Fletcher and J. D. Ohlin, *Defending Humanity* (New York: Oxford University Press, 2008), at 155–177.