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Beyond Tehran and Nairobi: Can Attacks against Embassies Serve as a Basis for the Invocation of Self-defence?

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Abstract

Forty years have elapsed since the Iran hostage crisis, yet the question whether a state can lawfully resort to force in reaction to an attack against its diplomatic or consular mission remains unanswered. This issue is subject to contradictory scholarly interpretations, whereas self-defence as a justification regularly reappears in state practice. A recent example is provided by the US position regarding the killing of Qasem Soleimani in January 2020. This article revisits this controversial issue from an empirical perspective, focusing on extensive analysis of state practice based on 730 incidents. Both the empirical and the theoretical inquiry led the authors to call into question the possibility that states may lawfully rely on self-defence in such circumstances. Only one state has ever invoked self-defence regarding attacks against its embassies, and it only did so on five occasions, which were all contested by the international community. In all other 725 instances, the sending state and the international community reacted in ways other than the use of force. This research also analyses these various responses triggered by attacks against embassies. Moreover, it is virtually impossible to prove the fulfilment of the necessity and proportionality criteria of the action taken in self-defence in light of state practice over the last 70 years. Finally, this article also calls for a close re-reading of the Tehran Hostages *judgment to challenge the judgment's widely accepted interpretation as recognizing self-defence in such situations.*

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1 Introduction

The question of responding in self-defence to attacks against diplomatic and consular missions was first raised 40 years ago during the Iran hostage crisis in 1980.[1] Ever since, there has been no consensus among legal scholars concerning the legality of invoking self-defence in such situations, and no comprehensive analysis has been undertaken to clarify whether an attack against a diplomatic mission can be regarded as an armed attack within the meaning of Article 51 of UN Charter.[2] This void in the scholarly literature is quite surprising, considering the significance of this problem both at a doctrinal and at an empirical level. The contours of the right of self-defence are of particular normative importance, given that Article 51 constitutes the sole vehicle under international law of lawful recourse to unilateral use of force. Therefore, classifying such attacks as armed attacks would considerably widen the scope of Article 51 of the UN Charter, i.e. when states can use force based on their unilateral decision. This is far from a solely doctrinal question. Notably, at least one mission has been attacked every month since the Iran hostage crisis.

Against this background, this article attempts to clarify the normative landscape relating to more than 730 attacks against diplomatic and consular missions.[3] In order to contribute to the scholarly discourse, it revisits primary sources and comparatively assesses the academic positions offered on respective incidents. This research takes an empirical approach to investigate the question whether self-defence actions in response to attacks against missions are supported under customary international law, and is based on an extensive examination of state practice and *opinio juris* to reveal the legal character of victim states' reactions to such incidents.

After setting out its methodological approach (Section 2), the article will briefly present the main views in the scholarly debate surrounding the normative characterization of attacks against diplomatic and consular missions (Section 3). It will continue by contrasting these scholarly positions with a comprehensive overview of state practice (Section 4). Based on the survey of customary international law, it will conclude by arguing for a more nuanced normative characterization of such incidents under international law (Section 5).

2 Methodology

This research focuses on the invocation of self-defence; extra-Charter exceptions from the prohibition of the use of force are not entertained here. While the right to self-defence is a universally recognized exception to the general prohibition on the use

[1] Almost all legal scholars focus only on attacks against diplomatic missions. However, we also included consular representations in the scope of this research. Hereinafter we will use the term 'mission' to refer to both types of representations.

[2] Cf. M.N. Shaw, *International Law* (8th ed., 2017), at 863.

[3] See Kajtár and Balázs, Attacks Against Missions Database, 6 April 2021, available at https://doi.org/10.6084/m9.figshare.14378477.

of force which is often perceived as a *jus cogens* norm,[4] the existence of other exceptions seeking to establish unilateral use of force is excessively debated.[5] Notwithstanding the general aim of restricting the use of force, the wording of the Charter's relevant provisions has left many ambiguities regarding specific issues and its interpretation is heavily influenced by methodological considerations.[6] The authors of this article are conscious of the fact that classifying attacks against embassies from the perspectives of the right to self-defence forms part of a larger debate on the legal limits of the use of force.

Norms regarding the prohibition on the use of force and the right of self-defence are incorporated both in treaty law, especially in the UN Charter, and in customary international law.[7] Consequently, this article examines the relevant rules in both types of sources. In the absence of express discussion from a legal perspective before the Iran hostages incident, there is no conclusive answer to the original standpoint with regard to these attacks, since inferences from the general rules remain dependent on individual approaches. In order to map the current landscape of invoking self-defence in response to such attacks, this article focuses on the practice of states during the last 70 years as evidenced by their conduct. Such state practice can exert substantive influence both on treaty provisions (as subsequent practice) and customary international law (as its objective element) through their reinterpretation and modification.[8] Moreover, it may also serve as a foundation of an emerging customary norm if it is supported by *opinio juris*. The general rules of reinterpretation and modification of treaties set a high threshold for state practice.[9] Regarding the prohibition on the use of force, several authors consider that its oft-alleged *jus cogens* nature may elevate the reinterpretation and modification threshold even higher both in the customary and the treaty law aspect of the prohibition.[10]

4 Y. Dinstein, *The Interaction between Customary International Law and Treaties* (2007), para. 252; Dörr and Randelzhofer, 'Article 2(4)', in B. Simma et al. (eds), *The Charter of the United Nations: A Commentary* (3rd ed., 2012) 200, at 231, para. 67.

5 Cf. Orakhelashvili, 'Changing *Jus Cogens* Through State Practice? The Case of the Prohibition of the Use of Force and Its Exceptions', in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (2015) 157, at 174–175.

6 Cf. Corten, 'The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate', 16 *European Journal of International Law* (*EJIL*) (2005) 803, at 803; T. Ruys, *Armed Attack and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (2010), at 6.

7 See Greenwood, 'Self-Defence', *Max Planck Encyclopedias of International Law*, April 2011, available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e401, para. 7; Ruys, *supra* note 6, at 7, 22; *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgment, 27 June 1986, ICJ Reports (1986) 14, paras 177–179.

8 Dinstein, *supra* note 4, paras 268, 281–282; Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331, art. 31(3)(b) (hereinafter 'VCLT'); *North Sea Continental Shelf Cases*, Judgment, 20 February 1969, ICJ Reports (1969) 3, para. 77.

9 VCLT, *supra* note 8, art. 31(3)b; Dörr, 'Article 31 – General Rule of Interpretation', in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2012) 521, at 555, 557; M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), at 431–432.

10 Cf. de Hoogh, 'Jus Cogens and the Use of Armed Force', in Weller, *supra* note 5, at 1161, 1170, 1172–1173; Kammerhofer, 'The Resilience of the Restrictive Rules on Self-Defence', in Weller, *supra* note 5, at 627, 643; Dinstein, *supra* note 4, paras 257–260; Schmalenbach, 'Article 53 – Treaties conflicting with a peremptory norm of general international law ("jus cogens")', in O. Dörr and K. Schmalenbach (eds),

Ascertaining the *opinio juris* accompanying states' responses to these attacks is an arduous task, as most use of force incidents do not elicit response, let alone legal qualification, from the international community.[11] Inspired by the Permanent Court of International Justice's (PCIJ) position that a mere tolerance of practice cannot constitute an endorsement of its legality,[12] certain authors maintain that the acquiescence of states does not suffice for the modification of the rules of force,[13] although no clear-cut criteria exist in this respect.[14] Self-defence claims were primarily identified from state reports sent to the Security Council on the basis of Article 51 of the Charter.[15] We relied on newspaper archives and state reports compiled by the UN Secretary General in order to single out incidents and reactions.[16] Our database includes more than 730 incidents, presumably representing all significant attacks.[17]

As a final preliminary issue, the selection criteria of relevant attacks ought to be clarified. For the purposes of the present state-practice analysis, we examined those attacks against diplomatic and consular missions where there was a real possibility of inflicting significant damage to the premises of the mission[18] or hindering its operation.[19] As we were especially interested in the qualification of attacks against mission premises, the database does not include attacks that were directed against diplomatic or consular personnel outside the mission; attacks against buildings used by honorary

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Vienna Convention on the Law of Treaties: A Commentary (2012), 897912, 917; Villiger, supra note 9, at 671–673; I. Buga, *The Modification of Treaties by Subsequent Practice* (2018), at 152;

11 Cf. D.A. Lewis, N.K. Modirzadeh and G. Blum, *Quantum of Silence: Inaction and Jus Ad Bellum* (2019), at 79.

12 Cf. *ibid.* at 11; Orakhelashvili, *supra* note 5, at 171; *Jurisdiction of the European Commission of the Danube*, 1927 PCIJ Series B, No. 14., at 36–37.

13 Cf. Lewis, Modirzadeh and Blum, *supra* note 11, at 9, 39; Marques Antunes, 'Acquiescence', *Max Planck Encyclopedias of International Law*, September 2006, available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1373, at paras 14–16; cf. Orakhelashvili, *supra* note 5, at 171, citing Quigley, 'The Afghanistan War and Self-Defence', 37 *Valparaiso University Law Review* (2003) 542, at 554.

14 T. Ruys, *Armed Attack and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (2010), at 38.

15 See *Repertoire of the Practice of the Security Council*, available at www.un.org/securitycouncil/content/repertoire/structure (last visited 24 July 2021). At the time of writing, only volumes 1946–2017 were available.

16 In order to ensure the best coverage of incidents, our database was cross-checked with incidents of at least four deaths or 10 injuries from two major compilations: RAND Database of Worldwide Terrorist Incidents, available at www.rand.org/nsrd/projects/terrorism-incidents.html (last visited 24 July 2021) (containing 40,000 attacks between 1968 and 2009); National Consortium for the Study of Terrorism and Responses to Terrorism, Global Terrorism Database, available at www.start.umd.edu/gtd/access/ (last visited 24 July 2021) (covering 180,000 attacks between 1970 and 2017).

17 The full database is available online: Kajtár and Balázs, *supra* note 3.

18 Types of attacks include, for example, rocket-propelled grenade (RPG) and Molotov cocktail attacks and attempts; however, as a *de minimis* criterion, excluded incidents of tearing down flags or hurling eggs or rocks. Premises of the mission include the buildings and parts of buildings used for purposes of the missions, including the residence of the head of the diplomatic mission. See Vienna Convention on Diplomatic Relations, 1961, 500 UNTS 95, art. 1(1)i (hereinafter 'VCDR'); Art. 1(1)j; Vienna Convention on Consular Relations, 1963, 596 UNTS 261, art. 1(1)j (hereinafter 'VCCR').

19 E.g. through an enduring siege or hostage-taking.

consuls as working place or private residence; or attacks against offices of international organizations enjoying immunity.

3 The Doctrinal Debate

The main issue of interest concerning attacks against diplomatic and consular missions lies in the nature of the nexus between the mission and its sending state. It is clear that missions do not belong to the territory of their sending state; they merely enjoy procedural exemptions and, inter alia, immunity from the jurisdiction of the host state.[20] However, both theory and practice recognize the possibility of committing armed attacks (in the sense of Article 51 of the Charter) against extraterritorial state positions, mostly reflecting the scenarios put forth by UN General Assembly Resolution 3314. Admittedly, this document originally intended only to provide examples for the act of aggression.[21] As the resolution fails to mention missions, it is highly debated whether they can also be considered as potential targets of armed attacks, and whether self-defence may be also invoked in response, alike attacks against warships or foreign-stationed troops mentioned in Article 51 3(d)of its Annex.

A *Should We Treat Missions Similarly to Troops Stationed Abroad?*

Several authors maintain that an attack can be considered to be an armed attack only if it is mounted against the territory of a state. Accordingly, given that a mission does not belong to the territory of the sending state, it is not possible to commit an armed attack against the necessarily extraterritorial embassies.[22] These authors, however, do not contest that certain 'emanations of the state', particularly troops and warships, can be subjects of an armed attack as exceptions. Instead, they explain the distinction between embassies and other emanations of the state in different ways. Nolte and Randelzhofer argue that because armed forces are instruments of safeguarding political independence, these are excepted from the requirement of territoriality.[23] In Schweisfurth and Hakenberg's view, troops have a 'quasi-territorial' nexus with their

[20] Cf. d'Aspremont, 'Premises of Diplomatic Missions', *Max Planck Encyclopedias of International Law*, March 2009, available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e977, at paras 3, 11–12.

[21] Dinstein, 'Aggression', *Max Planck Encyclopedias of International Law*, September 2015, available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e236, at paras 7, 33; Greenwood, *supra* note 7, para. 21; Nolte and Randelzhofer, 'Article 51', in B. Simma et al. (eds), *The Charter of the United Nations: A Commentary* (3rd ed., 2012) 1397, at 1403, 1410, paras 9, 22; GA Res. 3314 (XXIX), 14 December 1974.

[22] Forteau and Alison See, 'The US Hostage Rescue Operation in Iran 1980', in T. Ruys, O. Corten and A. Hofer (eds), *The Use of Force in International Law* (2018) 306, at 312; Kamto, 'The US Strikes Against Libya', in Ruys, Corten and Hofer, *supra*, at 408, 421; S. E. Nahlik, *Development of Diplomatic Law: Selected Problems*, 222 Collected Courses of the Hague Academy of International Law (1990), at 314 n.338; *United States Diplomatic and Consular Staff in Tehran*, Judgment, 24 May 1980, ICJ Reports (1980) 3, at 64–65 (Dissenting Opinion of Judge Tarazi).

[23] Nolte and Randelzhofer, *supra* note 21, paras 25–28.

sending state. Schweisfurth also emphasizes that armed attacks must have an 'across-the-border' character.[24]

Others contend that attacking the territory of a state is not a prerequisite to an armed attack. Ruys and Schachter argue that, in 'special circumstances', attacks against embassies should be treated the same way as attacks against armed forces;[25] while the Chatham House Principles, Rosenne, as well as Lillich conclude that embassies should always be considered as such.[26] In Dinstein's opinion, if an installation is lawfully positioned in the territory of another state and the host state attacks it, self-defence may be invoked, regardless of whether it is a military base or a mission.[27] For Greenwood, an attack on an organ of the state may be considered to be an armed attack. As a result, he puts embassies in the same category as armed forces abroad.[28]

It may be worth adding that GA Resolution 3314 did not include attacks against missions in its (albeit only indicative) list, even though several grave incidents had taken place prior to its adoption.[29] The examples explicitly included in the resolution concerned military measures either against the territory of the state, or against

[24] M. Hakenberg, *Die Iran-Sanktionen der USA während der Teheraner Geiselaffäre aus völkerrechtlicher Sicht* (1988), at 226; Schweisfurth, 'Operations to Rescue Nationals in Third States Involving the Use of Force in Relation to the Protection of Human Rights', 23 *German Yearbook of International Law* (1980) 159, at 164. See also Dörr and Randelzhofer, *supra* note 4, paras 35–36 (taking a similar position on the *Lotus* case); *The Case of the S.S. Lotus*, 1927 PCIJ Series A, No. 10, at 25.

[25] Ruys, 'The 'Protection of Nationals' Doctrine Revisited', 13 *Journal of Conflict & Security Law* (*JCSL*) (2008) 233, at 245–246; Schachter, 'International Law in the Hostage Crisis: Implications for Future Cases', in C. Warren and P. H. Kreisberg (eds), *American Hostages in Iran* (1985) 325, at 328. Among others, Ruys there cites Arangio-Ruiz, who rejects the 'across-the-border' requirement of armed attacks, although he does not mention embassies. G. Arangio-Ruiz, *The UN Declaration on Friendly Relations and the System of the Sources of International Law* (1979), at 105.

[26] S. Rosenne, *The Perplexities of Modern International Law: General Course on Public International Law* (2001), at 155; 'The Chatham House Principles of International Law on the Use of Force in Self-Defence', 55 *International and Comparative Law Quarterly* (2006) 963, at 965. Lillich deems a mission to be a 'sovereign property' of its sending state, which warrants self-defence. Lillich, 'Lillich on the Forcible Protection of Nationals Abroad', 77 *International Law Studies* (2002), at 73. Green does not deny that a mission attack constitutes a use of force against the sending state, but he contests whether their gravity can amount to an armed attack. J.A. Green, *The International Court of Justice and Self-Defence in International Law* (2009), at 140.

[27] Y. Dinstein, *War, Aggression and Self-Defence* (5th ed., 2012), at 214. See also, for a similar position, Kreß, 'The State Conduct Element', in C. Kreß and S. Barriga (eds), *The Crime of Aggression: A Commentary* (2017) 412, at 467. It is worth mentioning that Ronzitti rejects the possibility of self-defence if a host state attacks an embassy within its territory, mostly on the basis that it is not enumerated by Resolution 3314 – which is, however, only an indicative list. N. Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* (1985), at 66; cf. GA Res. 3314 (XXIX), 14 December 1974, art. 4. Later, he considers symbols of state sovereignty as subject of an armed attack and refers to the United States' practice of labelling attacks against embassies as armed attacks. See Ronzitti, 'The Expanding Law of Self-Defence', 11 *JCSL* (2006) 343, at 350.

[28] Greenwood, 'Reflections on the Right of Self-Defence in International Law', *United Nations Audiovisual Library of International Law Lecture Series*, at 25 min. 30 sec., available at https://legal.un.org/avl/ls/Greenwood_PS_video_1.html.

[29] See, e.g., Section 4.D.4. on a conflict around the Cuban embassy in Santiago de Chile which was debated in Security Council in 1973.

emanations of military or of vitally important economic interests.[30] It can be argued that the role of missions is rather symbolic, compared to that of military units or fleets. For instance, Nolte and Randelzhofer advance the argument that attacks against diplomatic missions do not threaten the existence or the security of the host state, and therefore that states are not entitled to rely on the right of self-defence in such cases.[31] Nevertheless, those who subscribe to a more extensive approach also consider attacks against symbolic positions as acts of aggression.[32]

The temporal aspect of the necessity criterion of invoking self-defence also raises some practical questions.[33] Mission attacks are typically brief incidents (such as an explosion) or singular events lacking a continuous nature (e.g. a spontaneous mob attack). Therefore, only in extraordinary, prolonged cases would an action in response be able to halt and repel the attack in question. As a result, unduly delayed responses are prone to be qualified as reprisals, as these actions presumably rather embody a punitive than a defensive character.[34] Again, this argument does not provide a conclusive answer with regard to the question under scrutiny.

As seen above, several authors avoided the question of extraterritoriality, and instead emphasized other circumstances under which such attacks may qualify as armed attacks. One of these special circumstances is the gravity of the attack, since some writers maintain that at least severe attacks against missions should be regarded as armed attacks.[35] The East African embassy bombings of 1998, which resulted in hundreds of casualties, prompted Wedgwood to consider them to be 'armed attacks' due to the horrific loss of lives, 'if the words retain any meaning'.[36] Ruys emphasizes that the United States' qualification of these attacks as armed attacks was not rebutted by the international community, and as a result, he asserts that at least grave attacks ought to be regarded as armed attacks.[37] Dinstein applies this argument implicitly, when he contends that the destruction of a mission by a third state means an armed attack against both the sending and the host state.[38] This line of argumentation either presupposes an affirmative answer to the previous question, and hence puts emphasis on the gravity criterion, or it assumes that certain conditions can permit a divergence from a general prohibitive rule. Again, it cannot provide us with a decisive answer to the underlying dilemma of whether attacks against missions can be treated similarly to attacks against troops stationed abroad.

30 Cf. Nolte and Randelzhofer, *supra* note 21, at 1412 n.103; Ruys, *supra* note 6, at 204–205.

31 Nolte and Randelzhofer, *supra* note 21, para. 28.

32 Cf. Ruys, *supra* note 6, at 203, citing a statement of New Zealand.

33 Cf. Corten, 'Necessity', in Weller, *supra* note 5, at 861, 870, 873; Ruys, *supra* note 6, at 99; *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgment, 27 June 1986, ICJ Reports (1986) 14, para. 237.

34 Gill, 'When Does Self-Defence End?', in Weller, *supra* note 5, at 737, 745; C. Gray, *International Law and the Use of Force* (4th ed., 2018), at 205.

35 We regarded personal injuries and material damage as primary indicia of the gravity of an attack.

36 Wedgwood, 'Responding to Terrorism: The Strikes Against Bin Laden', 24 *Yale Journal of International Law (YJIL)* (1999) 559, at 564.

37 Ruys, *supra* note 25, at 246; Ruys, *supra* note 6, at 152.

38 Dinstein, *supra* note 27, at 215.

One may also consider the *scale and effect* of the attacks, as the International Court of Justice (ICJ) did in *Nicaragua*,[39] in order to offer a method of distinguishing between certain uses of force that can be considered to be armed attacks and less grave incidents.[40] However, one may still argue that, even in the case of a serious attack against a remote non-military post, the shocking loss of lives means only a psychological and political blow to the sending state, rather than a direct attack endangering the state's security or existence, in stark contrast to traditional across-the-border invasions or attacks against its armed forces.

In levelling these remarks, we must also note that a *de minimis* criterion cannot provide an unequivocal standard, especially vis-à-vis attacks against missions, where the paucity of widely known examples yields a wide margin of appreciation for commentators ascertaining this threshold.[41]

B *Did the ICJ Qualify the Hostage-taking in the Tehran Hostages Case as an 'Armed Attack'?*

In the *Tehran Hostages* judgment, the ICJ used the phrase 'armed attack' to refer to certain actions against the US embassy.[42] The wording created ambiguity,[43] as the United States claimed self-defence during the proceedings, in connection with its ill-fated rescue mission.[44] The phrase and the US claim, taken together, led several commentators to conclude that the Court used this expression in the legal sense of Article 51 of the Charter, which resulted in attributing a quasi-precedential value to this decision in favour of ascertaining a right to self-defence in response to attacks against embassies.[45]

In contrast, several arguments call into question this alleged precedential value. First of all, it needs to be pointed out that there was no question of use of force before

[39] *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgment, 27 June 1986, ICJ Reports (1986) 14, para. 195.

[40] Green, *supra* note 26, at 140. See also Gray, *supra* note 34, at 154; de Hoogh, *supra* note 10, at 1180.

[41] Green, *supra* note 26, at 41. The diverging assessment of the *de minimis* criterion is well-illustrated in the case of the 1998 East Africa embassy bombings, which were regarded as very grave by Wedgwood and Ruys, however Green considered these to be 'comparatively small-scale in themselves . . . in contrast to "traditional" notions of cross-border military incursions'. *Ibid.*, at 140. For comparison, in Kretzmer's opinion, the 2012 Benghazi attack in which four people were killed met the requirements for an armed attack. Kretzmer, 'US Extra-Territorial Actions Against Individuals: Bin Laden, Al Awlaki and Abu Khattalah – 2011 and 2014', in Ruys, Corten and Hofer, *supra* note 22, at 760, 780.

[42] *United States Diplomatic and Consular Staff in Tehran*, Judgment, 24 May 1980, ICJ Reports (1980) 3, paras 57, 64, 91 (hereinafter '*Tehran Hostages* case').

[43] Cf. Ronzitti, 'The Expanding Law of Self-Defence', *supra* note 27, at 350.

[44] Letter dated 25 April 1980 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc. S/13908, 25 April 1980 (hereinafter 'Letter from the US Permanent Representative, UN Doc. S/13908'). Operation Eagle Claw was a failed military action ordered by President Carter to end the Iran hostage crisis by rescuing the embassy staff held at the US Embassy in Tehran on 24–25 April 1980.

[45] Dinstein, *supra* note 27, at 215; J. Kittrich, *The Right of Individual Self-Defense in Public International Law* (2008), at 36–37; Kreß, *supra* note 27, at 452, 467, 481; Ruys, *supra* note 25, at 246; Ruys, *supra* note 6, at 201; *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgment, 27 June 1986, ICJ Reports (1986) 14, para. 65 (Dissenting Opinion of Judge Schwebel).

the Court, as the ICJ only examined issues of diplomatic law and state responsibility.[46] Moreover, the ICJ used this term in an interchangeable manner with non-legal expressions, such as 'attack', 'assault' or 'invasion', which suggests a descriptive, rather than legal, language under Article 51 of the Charter.[47] This is supported by the fact that the judgment first mentions an 'armed group' attacking the embassy in paragraph 14, and later the term 'armed attack' is used with explicit reference to that paragraph.[48] The fact that this expression had been used in the everyday meaning of the phrase is also corroborated by the French version of the judgment, which does not employ the language of Article 51 (*agression armée*), but resorts to the ordinary expression *attaque armée* to describe the event.[49] These all point to the conclusion that the phrase 'armed attack' was used in the colloquial sense of *an attack by a group of armed people*.

To sum up this brief mapping exercise of the relevant academic positions as set out in Sections 3.A and 3.B, it appears that scholarly literature is deeply divided on the legal characterization of responses to attacks against diplomatic missions regardless of which argument we zero in on in our review. To support the clarification of this scholarly debate, the present study offers a comprehensive survey of relevant state practice to reveal the customary law bases of the debated issues. Our analysis comprises hundreds of attacks against missions to discern relevant state practice and *opinio juris*, which will be discussed in the section that follows.

4 State Practice of Attacks Against Missions

The forthcoming analysis will introduce general observations from the empirical prong of this article and will discuss the findings as to the most notable incidents targeting missions with and without the invocation of self-defence.

A *General Observations*

The present research is based on a survey of more than 730 attacks which occurred between the entry into force of the UN Charter and 30 June 2020.[50] The overwhelming majority of these attacks were mob attacks, pre-planned assaults or detonations; in addition, dozens of incendiary attacks and shootings also occurred. Incidents have taken place in more than 170 cities of over 100 states, while two-thirds of all attacks took place in Europe and in the Middle East. Missions of more than 90 states were

[46] Kajtár, 'Self-Defence against Non-State Actors – Methodological Challenges', 54 *Annales Universitatis Scientiarum Budapestinensis Rolando Eötvös Nominatae Sectio Juridica* (2013) 307, at 209.

[47] *Ibid.*, at 313; cf. Stein, 'Contempt, Crisis, and the Court: The World Court and the Hostage Rescue Attempt', 76 *American Journal of International Law* (*AJIL*) (1982) 499, at 500 n.8.

[48] Kajtár, *supra* note 46, at 312–313; *Tehran Hostages* case, Judgment, 24 May 1980, ICJ Reports (1980) 3, paras 14, 17, 64.

[49] UN Charter, art. 51: 'Aucune disposition de la présente Charte ne porte atteinte au droit naturel de légitime défense, individuelle ou collective, dans le cas où un Membre des Nations Unies *est l'objet d'une agression armée*, jusqu'à ce que le Conseil de sécurité ait pris les mesures nécessaires pour maintenir la paix et la sécurité internationales.' (Emphasis added.)

[50] See Kajtár and Balázs, *supra* note 3.

targeted. The United States sustained one of every five attacks. What is more, the five permanent members of the Security Council, together with Turkey and Iran, suffered almost 60% of all attacks.[51] About 20% of all attacks entailed at least one casualty. Mob attacks were significantly more common where the victim state and the host state had tense relations, whereas hostage taking was more frequent when the victim and the host state had friendly relations. Nonetheless, no statistically significant difference could be detected in terms of the reactions regarding different types of attacks.

The primary sources covered in this survey provided around 600 individual responses to more than 320 cases. Conspicuously, apart from a handful of cases these incidents were exclusively treated within the ambit of diplomatic and consular law. Accordingly, sending states typically protested via a *note verbale* in which they demanded that perpetrators be brought to justice and similar incidents prevented. In a number of instances, the actions were labelled as terrorist acts, and states reiterated that the protection of missions is the host state's duty.[52] The official reactions of states also reveal that in response to such acts host states condemned the attacks, investigated the cases and increased protective measures of respective missions.[53] When the attacks took victims, condolences were conveyed to the affected states and the families.[54] If damage was incurred, host states offered a payment of damages or an *ex gratia* compensation.[55] Moreover, in case of serious dissatisfaction with the host state's conduct, envoys were recalled and/or diplomatic relations were broken.[56]

Our statistical analysis also shows that harsh replies were often preceded by tensions between the respective states; the attack was then the last straw in the conflict rather than the sole cause of the severe reaction. It is also relevant in terms of the legal characterization of the responses of the international community that about a quarter of the sending state responses not only repudiated the action, but expressly referred to a violation of diplomatic law or more precisely to the obligation to ensure inviolability of missions.

Likewise, other states regularly condemned the incidents and sent their condolences, typically when the attack was attributed to a foreign power or was exceptionally grave. The Security Council voiced its condemnation almost 30 times, mostly in presidential and press statements; it also condemned six attacks in resolutions, reaffirming the inviolability of missions and the protective duty of host states. The Security Council designated a dozen incidents as 'terrorist acts' and upheld that all forms of terrorism endanger international peace and security. It is also noteworthy that the Council addressed these problems by underlining that perpetrators should be brought to justice, instead of condoning unilateral uses of force or proposing collective security measures.

[51] Our results may have been influenced by the fact that our principal sources were in English and French, and the attacks against US missions are particularly well documented.

[52] For example, on the 1992 embassy attacks in Libya, see Section 4.D.3.

[53] For example, on the 2003 bombings in Istanbul, see Section 4.D.1.

[54] A similar incident took place in 2011 in Iran, when British diplomats were held hostage: see Section 4.D.3.

[55] A case in point is a mob attack against US missions in China in the wake of the 1999 American bombing of the Chinese embassy in Belgrade: see Section 4.D.1.

[56] This was the Belgian reaction to the 1961 mob attack against its embassy in Cairo: see Section 4.D.3.

Even with regard to the Iran hostage crisis, no mention was made of a self-defence situation by organs of the UN, including the Security Council. In the wake of the crisis, the UN General Assembly commenced a series of resolutions, adopted annually or biennially by consensus, in which it condemned all acts of violence against missions and called upon host states to bring the offenders to book. It also initiated a reporting procedure and publication of reports.[57]

B *On the Invocation of Self-defence*

State reports sent to the Security Council indicated recourse to self-defence on five occasions in connection with attacks against missions, which will be discussed below. Such reports are prescribed by Article 51 of the Charter, and the ICJ attributed an important evidential value to them with regard to the appraisal of the lawfulness of self-defence measures.[58] As a consequence, a tendency of overreporting incidents was observed.[59] Against this backdrop, it is safe to assume that these reports encompass all situations where states deem themselves a victim of an armed attack.

All five of these reports emanated from the Unites States, standing in stark contrast to more than 725 other incidents in the last 75 years when no reference was made to self-defence. Interestingly, the United States itself also refrained from claiming self-defence in relation to the overwhelming majority of the 140 attacks in which US missions were targeted.

The United States first adopted a self-defence perspective in 1980, during the Iran hostage crisis. The preceding US approach can be traced back to a 1973 statement at the Security Council, when the US representative underlined that although their missions 'have been bombed, burned or shot at' on 27 occasions in the preceding eight years, they had not requested the convocation of the Security Council. They considered that these 'crimes' had not been 'threats to international peace and security', and emphasized the importance of seeking redress by contacting the authorities of the host state.[60] It is not the intention of the present article to attempt to analyse the reasons for such a divergence in the US state practice, as a number of legal as well as non-legal considerations

[57] The agenda item is titled 'Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives'. The practice of state reports and the Secretary General's summary was initiated by the General Assembly in 1980 (GA Res. 35/168, 15 December 1980, paras 7, 10). The most recent resolution on this topic was adopted in 2018 (GA Res. 73/205, 20 December 2018).

[58] See also Gray, *supra* note 34, at 128; *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgment, 27 June 1986, ICJ Reports (1986) 14, para. 200.

[59] Gray, *supra* note 34, at 121, 125.

[60] SC, Verbatim Record, 1742nd Meeting of the Security Council, UN Doc. S/PV.1742, 18 September 1973, paras 42–43. Undoubtedly, the Iran hostages incident was markedly different from previous cases, but serious incidents took place in the period given by the permanent representative as well; for example, the deadly guerrilla raid against the embassy in Saigon during the Vietnam War in 1968 ('Air Strike by US to Drive Vietcong out of Saigon', *The Guardian*, 1 February 1968, at 1) or a lethal rocket attack in Phnom Penh in 1971 ('Bomb Kills 2 Americans', *New York Times*, 27 September 1971, at 10).

influence the invocation of self-defence.[61] Nevertheless, for the purposes of the present article, the relatively small number of US self-defence claims may carry weight in ascertaining the customary foundations of self-defence measures.

Before delving into a detailed analysis of incidents involving self-defence claims, two final methodological considerations are in order. Firstly, the actual state practice shows that, even though self-defence claims are an exception, they tend to be the focus of legal analyses. This may be partly explained by the fact that in the use of force domain, (potential) violations of rules are much more salient than the conduct respecting the prohibition on the use of force. This phenomenon may give the impression that far-reaching claims are the norm rather than the exception.[62]

Secondly, expressions of solidarity should not be confused with endorsements of legality. Debates in the Security Council or in the General Assembly are known to be evasive about providing legal assessments, and supportive statements are regularly limited to understanding and sympathy, lacking *opinio juris*.[63] This observation seems to be correct for mission attacks, as well.

C *Incidents with the Invocation of Self-defence*

1 The Tehran Hostages Case

On 4 November 1979, thousands of infuriated people captured the US embassy in the Iranian capital and kept more than 50 employees as hostages for 444 days.[64] The United States initiated legal proceedings before the ICJ at the end of November. However, it also launched a military rescue mission on 24 April 1980, just a month prior to the delivery of the judgment. The operation was aborted far away from Tehran and a report of self-defence was sent to the Security Council as a justification.[65]

The Court noted the intervention, underscoring that it would not rule on the legality of the operation, as no use-of-force issue was raised in the *Tehran Hostages* case. Yet, it reprimanded the United States for undermining the 'respect for the judicial process in international relations' by taking action against the Court's order.[66] Moreover, the qualification of the incident was touched upon in dissenting opinions.[67]

[61] For instance, most self-defence invocations presented later in this article have shown some correlation with domestic political issues. The concurrent presidential election campaigns may have influenced the handling of the Iran hostage crisis (President Carter) and the Benghazi attack (President Obama), as did the unfolding political scandals leading to the impeachment of President Clinton (the East Africa bombings) and President Trump (the Baghdad attack).

[62] Gray, *supra* note 34, at 123; Ruys, *supra* note 6, at at 33–34.

[63] Gray, *supra* note 34, at 21. Cf. also Ruys, *supra* note 6, at 38.

[64] 'Iran Hostage Crisis Fast Facts', CNN (15 October 2020), available at: https://cnn.it/3eDYPDH.

[65] Letter from the US Permanent Representative, UN Doc. S/13908, *supra* note 44.

[66] *Tehran Hostages* case, Judgment, 24 May 1980, ICJ Reports (1980) 3, paras 32, 93–94.

[67] Judge Morozov criticized the majority for not rejecting the United States' claim of self-defence due to the absence of an armed attack. (Nonetheless, it can be assumed that the ICJ would not have disapproved of the US action, if it had considered the action as a lawful exercise of the right of self-defence.) Judge Tarazi objected to qualifying the incident as an armed attack, whereas Judge Schwebel, in his dissenting opinion appended to the *Nicaragua* case, considered this designation as a 'sound evaluation of the rescue attempt'. See *United States Diplomatic and Consular Staff in Tehran*, Judgment, 24 May 1980, ICJ Reports (1980) 3,

The official position of the United States has been oscillating between considering the incident to be an issue of diplomatic law and claiming self-defence.[68] It initially viewed the incident as a breach of the inviolability of the mission by 'a group of Iranians', mentioning a violation of 'international peace and security and of comity', but not alluding to an armed attack or to the possibility of self-defence. Instead, the United States requested the Security Council to take measures to 'secure the release of the diplomatic personnel being held and to restore the sanctity of diplomatic personnel and establishments'.[69] It also brought an action before the ICJ on the basis of violations of diplomatic and consular rights.[70] Yet, half a year later it launched a military action, and attempted to justify the operation as self-defence in response to an 'Iranian armed attack'.[71]

The justification raised some ambiguities, as the ICJ found that the attack itself was not attributable to Iran in a use of force sense, despite the fact that its responsibility for the continuing occupation and the detention of hostages as internationally wrongful acts was established later based on Tehran's subsequent acknowledgement and adoption, which became the core of Article 11 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).[72] Concerning the lapse of six months between the alleged armed attack and the measures in response to it, President Carter argued that the 'Eagle Claw' rescue mission became a 'necessity and a duty'; however, his statement was unclear on whether this operation fit the classical notion of self-defence. He emphasized that it was a purely 'humanitarian mission' aiming to 'safeguard American lives, to protect America's national interest and to reduce tensions' and underlined that this 'was not directed against Iran'.[73]

The international reception of the rescue mission was mixed. Socialist and Muslim states denounced the attack and considered it a violation of international law, while Western states and other US allies generally expressed solidarity and understanding.[74]

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paras 56–57 (Dissenting Opinion of Judge Morozov); *United States Diplomatic and Consular Staff in Tehran*, Judgment, 24 May 1980, ICJ Reports (1980) 3, at 64–65 (Dissenting Opinion of Judge Tarazi); *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgment, 27 June 1986, ICJ Reports (1986) 14, para. 65 (Dissenting Opinion of Judge Schwebel).

68 Naturally, the evaluation of the incident may have evolved over time, but as Orakhelasvili pointed out as a general observation, '[t]he changing allusion to multiple justifications casts doubt on the validity of all related claims': Orakhelashvili, *supra* note 5, at 169.

69 Letter dated 9 November 1979 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc. S/13615, 9 November 1979.

70 *United States Diplomatic and Consular Staff in Tehran*, Memorial of the Government of the United States of America, 12 January 1980, ICJ Reports (1980) 121, at 190.

71 Letter from the US Permanent Representative, UN Doc. S/13908, *supra* note 44.

72 International Law Commission (ILC), Articles on Responsibility of States for Internationally Wrongful Acts, GA Res. 56/83, 12 December 2000 (hereinafter 'ARSIWA'). See also Greenwood, *supra* note 7, para. 15; *Tehran Hostages* case, Judgment, 24 May 1980, ICJ Reports (1980) 3, paras 58, 73–74.

73 Letter from the US Permanent Representative, UN Doc. S/13908, *supra* note 46, at 2–3.

74 Cf. Forteau and Alison See, *supra* note 22, at 309–310, 314; Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity*, *supra* note 27, at 44–47; Ruys, *supra* note 6, at 226. Examples of favourable reactions included the UK's Foreign Office which said that it did not condemn the action because 'the blame lay with the militants holding the Americans hostage' (Vinocur, 'European Allies Express Concern; See Complications From U.S. Raid', *New York Times*, 26 April 1980,

As the appraisal of the legal basis was omitted from these reactions, no firm *opinio juris* regarding the possibility or impossibility to invoke self-defence can be discerned from the aftermath of the hostage crisis.

2 Attack against the Embassy in Beirut

One of the best-known examples of invoking self-defence concerned the US bombing of Libyan territory on 14 April 1986 in response to a series of attacks against American targets, most notably the bombing of a discotheque in West Berlin. Another strike in that series of attacks targeted the US embassy in Beirut (Lebanon) on 6 April. The incident was described as involving a rocket which was aimed at the embassy but missed its target and exploded without inflicting any known injuries or damage.[75] The incident, being only an attempt, in itself most probably would not have formed the basis of a self-defence claim, similar to other incidents in the series of attacks against the United States. The armed response by the United States was justified as a strike to destroy Libyan facilities used in the attacks and also as a measure intended to 'discourage Libyan terrorist attacks in the future'.[76] With regard to this language, it is apt to recall here that Judge Rosalyn Higgins wrote extra-judicially that 'the former is the language of retaliation, the latter of reprisals. Neither is really the language of self-defence'.[77]

The great majority of the international community condemned the American bombing, as did a General Assembly resolution.[78] During the deliberations in the Security Council, nearly 40 – mostly Socialist, Arab and non-aligned – states asked to participate and denounced the US intervention expressly as an 'act of aggression'. Several of them dismissed the argument of qualifying the action as self-defence, citing a lack of armed attack or a disregard of necessity and proportionality.[79] However, the series of incidents

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at 10), the West German chancellor stated that 'We have deep understanding and compassion for the situation of the American President' (*ibid.*), the Canadian PM called it a 'valiant effort' ('Trudeau Hopes Hostages Are Safe', *New York Times*, 26 April 1980, at 10) and the Japanese PM voiced that he understood the action 'emotionally' (Sterba, 'Ohira Tries to Temper Japan's Reaction to Mission', *New York Times*, 26 April 1980, at 10). However, the Indian Ministry of Foreign Affairs stated that 'it cannot condone military adventurism of the type inherent in the attempt by the U.S.' ('India Expresses Concern', *New York Times*, 26 April 1980, at 10), Iran labelled it as a 'blatant act of invasion' (Nossiter, 'Waldheim Proposes Reviving Inquiry Panel on Iran', *New York Times*, 26 April 1980, at 10) and the USSR called it an aggressive act that 'grossly violates all the norms of international law' (*ibid.*).

75 SC, Provisional Verbatim Record, 2674th Meeting of the Security Council, UN Doc. S/PV.2674, 15 April 1986, at 17; Letter dated 14 April 1986 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc. S/17990, 14 November 1986.

76 Letter dated 14 April 1986, *supra* note 75.

77 R. Higgins, *Problems and Process: International Law and How We Use It* (1994), at 245.

78 Gray, *supra* note 34, at 203–204; Kamto, *supra* note 22, at 412–413; Ruys, *supra* note 6, at 425. The Security Council discussed the issue from 14–to 24 April 1986; GA Res. 41/38, 20 November 1986, UN Doc. A/RES/41/38, adopted with 79 votes in favour, 28 against and 33 abstentions; the SC resolution was vetoed by the United States, the United Kingdom and France.

79 Cf. Kamto, *supra* note 22, at 416–417. For replies, see, e.g., India: 'deeply shocked by . . . a clear act of aggression . . . in total disregard of international law' (SC, Provisional Verbatim Record, 2675th Meeting of the Security Council, UN Doc. S/PV.2675, 15 April 1986, at 47); Hungary: '[The suggestion that it]

were treated as a whole, and the attempted embassy attack was not mentioned separately in states' reactions – except for the United Kingdom, which was the only state to fully endorse the US action.[80] Other Western allies expressed understanding for the American indignation and refrained from explicit criticism or support.[81] Consequently, no *opinio juris* emerged regarding self-defence in the case of embassy attacks in this case either.

3 Bombings in East Africa

Two detonations destroyed the US embassies in Dar es Salaam (Tanzania) and Nairobi (Kenya) on 7 August 1998. A total of 224 people, including 12 US citizens, lost their lives, and thousands were injured.[82] The Security Council unanimously qualified the attacks as terrorist attacks as well as criminal acts, and called upon all states to cooperate in bringing the perpetrators to justice.[83] The representative of the United States urged cooperation in the investigation and the apprehension of perpetrators in accordance with the Protection of Diplomats Convention.[84]

Nonetheless, the United States eventually qualified the explosions as armed attacks when, on 20 August, it carried out airstrikes against a pharmaceutical plant in Sudan and training camps in Afghanistan, which were linked by the United States to the terrorist organization of Bin Laden.[85] The airstrikes were carried out 'in response to these terrorist attacks . . . and to prevent and deter their continuation', as it was reported to the Security Council.[86]

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was an act of self-defence is nothing but an ill-conceived attempt to justify the illegitimate and to misinterpret another clear rule of international law' (SC, Provisional Verbatim Record, 2677th Meeting of the Security Council, UN Doc. S/PV.2677, 16 April 1986, at 32); Uganda: 'The evidence thus far proffered does not persuade us that an armed attack within the meaning of Article 51 had taken place' (SC, Provisional Verbatim Record, 2682nd Meeting of the Security Council, UN Doc. S/PV.2682, 21 April 1986, at 16).

80 See SC, Provisional Verbatim Record, 2679th Meeting of the Security Council, UN Doc. S/PV.2679, 17 April 1986, at 27 ('The United States was justified in drawing the conclusion from this episode and from all that preceded it . . . . The United States has, as any of us do, the inherent right of self-defence, as reaffirmed in Article 51 of the Charter').

81 For example, France 'share[d] the legitimate indignation of the United States . . . [but] it should not associate itself with the United States intervention against Libya' (SC, Provisional Verbatim Record, 2682nd Meeting of the Security Council, UN Doc. S/PV.2682, 21 April 1986, at 42); Australia 'accept[ed] that there [was] a substantial body of evidence of Libyan involvement. . . . [T]he United States should desist from further military action against Libya' (SC, Provisional Verbatim Record, 2676th Meeting of the Security Council, UN Doc. S/PV.2676, 16 April 1986, at 18).

82 Central Intelligence Agency, *20th Anniversary of the US Embassy Bombings in East Africa*, 2 April 2018, available at https://web.archive.org/web/20201109025501/www.cia.gov/news-information/featured-story-archive/2018-featured-story-archive/anniversary-of-us-embassy-bombings-in-east-africa.html.

83 SC Res. 1189, 13 August 1998, paras 2–3.

84 SC, Provisional Verbatim Record, 3915th Meeting of the Security Council, UN Doc. S/PV.3915, 13 August 1998, at 4. See also Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, 1973, 1035 UNTS 167 (hereinafter 'Protection of the Diplomats Convention').

85 Letter dated 20 August 1998 from the Permanent Representative of the United States of America to the President of the Security Council, UN Doc. S/1998/780, 20 August 1998.

86 *Ibid.* This language may be connected to the concept of anticipatory self-defence, but response and deterrence are rather the language of reprisals. Cf. Cannizzaro and Rasi, 'The US Strikes in Sudan and Afghanistan – 1998', in Ruys, Corten and Hofer, *supra* note 22, at 541, 546.

Ruys emphasizes that the qualification of 'armed attack' was not rebutted by any state.[87] Yet, the picture may be more nuanced than that. Notably, even states expressing empathy, such as the United Kingdom and France, omitted to remark on the exact legal basis of their response.[88] At the same time, the US attacks, especially those against the Sudanese plant,[89] were condemned by roughly the same number of states, including Russia, China and the states of the Non-Aligned Movement and the Arab League.[90] The preventive and deterring aims of the strikes as well as the fact that they were launched two weeks after the attacks also cast some doubt on the classification of the strike as a lawful self-defence measure.

To summarize, it is clear that the US attacks carried out in Kenya and Tanzania were met with more sympathy and less harsh criticism than the air strikes in Libya. Overall, the reactions by members of the international community seem rather to express solidarity and understanding than an implicit recognition of the lawfulness of the US strikes. As a result, this particular incident also leaves a degree of uncertainty with regard to the *opinio juris* of states supporting self-defence in such cases.

4 Destruction of the Benghazi Mission

A group of armed attackers assaulted the US mission in Benghazi, Libya, on 11 September 2012. They killed the ambassador and three other people and wounded several others, while inflicting heavy damage on the building.[91] A week later, the White House labelled the attack 'terrorism'. Yet, the United States relied on Article 51 of the Charter first on 17 June 2014, when it captured the suspected planner of the

[87] Ruys, *supra* note 27, at 246; see also Wedgwood, *supra* note 36, at 564. Murphy concluded from the various reactions that '[p]erhaps the U.S. attacks were unlawful, but the global reaction to them suggests a measure of acceptance': Murphy, 'Self-Defence and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?', 99 *AJIL* (2005) 62, at 69–70. It should be noted that states generally avoid engaging in doctrinal debates regarding the use of force, and on most occasions rely only on a necessity-proportionality test to decide on the legality of the use of force, instead of first assessing legal grounds for the action (Gray, *supra* note 34, at 163). In light of this practice and of the United States' armed response, it is not surprising that states have tended to address issues of attributability and proportionality, instead of the doctrinal question of the target of an armed attack.

[88] See, e.g., Jehl, 'U.S. Raids Provoke Fury in Muslim World: Backing in Europe', *New York Times*, 22 August 1998, at A6 (citing UK PM: 'the U.S.A. must have the right to defend itself against terrorism'; French PM: 'Wherever terrorism is launched from, we must respond with a decisive and firm answer').

[89] Admittedly, the United States in this instance did not offer convincing evidence of chemical weapon production in the factory, which might have also played a role in triggering some of the critical reactions. Cf. Lobel, 'The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan', 24 *YJIL* (1999) 537, at 557.

[90] Cannizzaro and Rasi, *supra* note 86, at 543–544, 548; T. M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (2004), at 94–95; Lobel, *supra* note 89, at 538; Ruys, *supra* note 6, at 426. See also, e.g., Wines, 'Russia Is Critical', *New York Times*, 22 August 1998, at A6 (citing the Russian President: 'My attitude is indeed negative [towards the US action], as it would be to any act of terrorism').

[91] US Department of State, Bureau of Diplomatic Security, 'Significant Attacks Against U.S. Diplomatic Facilities and Personnel 2007–2016', July 2017, at 31, available at https://web.archive.org/web/20171128173302/https://www.state.gov/documents/organization/273695.pdf.

attack.[92] Abu Khattalah was apprehended on Libyan territory, without the consent of Libya, and transported to the United States for trial, as 'the United States Government ascertained that Ahmed Abu Khattalah was a key figure in those armed attacks'.[93] The United States justified the action on the basis of self-defence, because '[t]he investigation also determined that he continued to plan further armed attacks against United States persons' and therefore his arrest was 'necessary to prevent such armed attacks' in the future.[94]

The international community did not condemn the intervention. In fact, apart from Libya, which considered the intervention to be a violation of its sovereignty,[95] international reaction was muted. Nonetheless, criticism emerged from scholarly literature: for example, Kretzmer considered that the significant lapse of time between the attack and the reaction raised doubts about the nature of the action as purported self-defence.[96]

The timeliness of the response is undoubtedly a delicate issue, but a closer reading reveals further concerns. As a matter of fact, although there is an undeniable connection with the Benghazi attack, the letter of Ambassador Power describes an anticipatory action: Khattalah was apprehended 'to prevent such armed attacks', not in response to the attack against the mission. What is more, the phrase 'further armed attacks against United States persons' suggests that, rather than any future attacks against missions, it was possible that future incidents involving *American citizens* were regarded as the basis for a preemptive action. Accordingly, the normative significance of the invocation of self-defence remains obscure.

5 *Attack against the US Embassy in Baghdad*

An angry mob broke into the fortified embassy compound in Baghdad, Iraq, on 31 December 2019, starting a fire and causing damage, but without entering the main building or inflicting any injuries. The attack followed deadly American air strikes against Iran-backed militia and months of violent verbal United States–Iran confrontation.[97] President Trump held Iran responsible for the attack and 'threatened' it in a tweet.[98]

[92] It is interesting to note that during the Security Council's meeting on the day following the attack, the Under-Secretary-General and the representative of Libya mentioned the incident, while the United States made no comment (SC, Provisional Verbatim Record, 6832nd Meeting of the Security Council, UN Doc. S/PV.6832, 12 September 2012). The label 'terrorism' crystallized the following week, after President Obama spurred some criticism in the presidential race for being ambiguous in this regard, speaking about bringing the perpetrators to justice. Cooper, 'U.S. Shifts Language on Assault in Benghazi', *New York Times*, 21 September 2012, at A8; *Remarks by the President on the Deaths of U.S. Embassy Staff in Libya*, 12 September 2012, available at https://obamawhitehouse.archives.gov/the-press-office/2012/09/12/remarks-president-deaths-us-embassy-staff-libya.

[93] Letter dated 17 June 2014 from the Permanent Representative of the United States of America to the President of the Security Council, UN Doc. S/2014/417, 17 June 2014.

[94] *Ibid.*

[95] Kretzmer, *supra* note 41, at 765.

[96] *Ibid.*, at 780.

[97] Hassan, Hubbard and Rubin, 'Protesters Attack U.S. Embassy in Iraq, Chanting "Death to America"', *New York Times*, 31 December 2019, available at https://nyti.ms/36oiWPO.

[98] '. . . Iran will be held fully responsible for lives lost, or damage incurred, at any of our facilities. They will pay a very BIG PRICE! This is not a Warning, it is a Threat. Happy New Year!': RealDonaldTrump, *Twitter*, 13:19, 31 December 2019, available at https://web.archive.org/web/20200102001814if_/https://twitter.com/realdonaldtrump/status/1212121026072592384.

During the night of 2 January 2020, a US drone strike targeted Iranian Quds Force commander Qasem Soleimani's convoy at the airport in Baghdad, killing him and nine others. According to the official note sent to the Security Council on 8 January 2020, the action was taken in self-defence, 'in response to an escalating series of armed attacks . . . in order to deter the Islamic Republic of Iran from . . . further attacks . . . and to degrade the . . . supported militias' ability to conduct attack'.[99] The note asserted that the embassy attack was one of a series of incidents committed by 'Qods Force-backed militias' and listed it separately from the 'armed attacks' attributed to Iran. Other justifications advanced by the Trump administration also referred to Soleimani's role in approving the attack and planning imminent attacks against other embassies,[100] although they considered the already occurred attacks sufficient for self-defence.[101]

International reactions were mixed; several US allies voiced support, others expressed understanding, while less friendly states condemned the use of force.[102] Several states made explicit reference to the embassy attack. However, those were references to the inviolability of the mission or the condemnation of the mission attack in general, and not an appraisal from a self-defence perspective, regardless of whether they condoned or deplored the US action.[103]

D *Attacks without Invocation of Self-Defence*

Now we shall turn to an in-depth discussion of the most significant cases which do not invoke self-defence, and provide a more fine-grained overview of the attacks. The incidents have been classified according to the way in which the attacks were carried out, and have been examined with regard to both their objective gravity (i.e. number of casualties, injuries, material damage) and the subjective assessment of the situation, highlighting uncommonly severe reactions or condemnation by the international community. Moreover, attacks were attributable to states will be closely examined.

[99] Letter dated 8 January 2020 from the Permanent Representative of the United States of America to the President of the Security Council, UN Doc. S/2020/20, 9 January 2020.

[100] Oprysko, 'Trump Claims Soleimani Was Planning to Blow Up U.S. Embassy', *Politico*, 9 January 2012, available at www.politico.com/news/2020/01/09/trump-soleimani-embassy-plot-096717.

[101] The White House, *Notice on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* (2020), available at https://bit.ly/3ivAFwi.

[102] See, e.g., Anssari and Nußberger, 'Compilation of States' Reactions to U.S. and Iranian Uses of Force in Iraq in January 2020', *Just Security Blog*, 22 January 2020, available at www.justsecurity.org/68173/compilation-of-states-reactions-to-u-s-and-iranian-uses-of-force-in-iraq-in-january-2020/ (comparing Latvia's reaction, 'We stand in solidarity with our ally- the United States exercising the right of self defense', and UK's reaction, 'The US have the right to exercise self-defence', with China's, 'The US act violates international law and should be condemned', and Malaysia's, 'Both are guilty of immoral acts, it is against the law').

[103] *Ibid.* (e.g. Georgia's reaction, 'We condemned recent violence, provocative attack to the US Embassy in Baghdad. US has the legitimate right to defend its citizens', Brazil, '[E]xpress[ing] its support for the fight against the scourge of terrorism . . . also condemns the recent attacks on the US Embassy in Baghdad and calls for respect for the Vienna Convention'; versus Russia's 'consistently uphold[ing] the principle of inviolability and security of diplomatic missions . . . . Washington . . . used an extrajudicial method to punish the Iranian general').

As a result, special attention is given to those incidents the gravity and attributability of which would generally qualify the attack as an armed attack.

1 Bombings

Bombings accounted for about one-third of the 230 incidents identified in our research, including explosions, grenade and rocket attacks. These incidents typically resulted in a high number of casualties. An example that provoked widespread reaction is the 2008 Indian embassy bombing in Kabul, Afghanistan, which left more than 60 dead and 130 injured, eliciting condemnation and sympathy among members of the international community.[104] India considered it as a 'cowardly terrorist attack', designating the perpetrators as criminals and vowing an investigation.[105]

The possibility of an international action in such situations was also raised. This was the case in 2003, when a bombing of UK targets in Istanbul, including the consulate, left dozens dead and hundreds injured. The attacks were qualified as terrorist attacks in a Security Council resolution,[106] and reinforced the determination of Iraq's war allies, the United Kingdom and the United States, to 'confront . . . this menace, . . . attack . . . it wherever and whenever we can'; however, this reaction omitted self-defence language.[107] Turkey launched an investigation and advocated international inquiry.[108]

On a number of occasions, air strikes carried out during international conflicts damaged embassies as well. The most prominent case features the US bombing of the Chinese consulate in Belgrade during the NATO campaign against Yugoslavia in 1999.[109]

[104] See, e.g., SC, Provisional Verbatim Record, 5930th Meeting of the Security Council, UN Doc. S/PV.5930, 9 July 2008 (citing Pakistan: 'We deeply regret the loss of life and damage caused by that unacceptable suicide bombing. Any attack on civilians or diplomatic missions is highly reprehensible', *Ibid.*, at 9; Russia: 'We are seriously concerned about the continuing degradation of the military and political situation in Afghanistan caused by the terrorist activity of the Taliban, Al-Qaida and other extremists, the most recent example of whose criminal activity was the explosion', *Ibid.*, at 22; the United States: '[I]nsurgents and terrorists have grown more effective and more aggressive, most recently in the cowardly and despicable attack on the Indian Embassy in Kabul', *Ibid.*, at 16).

[105] Wafa and Cowell, 'Suicide Car Blast Kills 41 in Afghan Capital', *New York Times*, 8 July 2008, available at https://nyti.ms/36PWX6l.

[106] SC, Res. 1516, 20 November 2003, para. 1.

[107] 'Bush and Blair Pledge Unity Against Terror', *Irish Times*, 21 November 2003, available at www.irishtimes.com/news/bush-and-blair-pledge-unity-against-terror-1.393865 (citing British PM Blair); 'Attentats: La Turquie souhaite une aide internationale pour l'enquête', *Le Monde*, 23 November 2003, available at www.lemonde.fr/archives/article/2003/11/23/attentats-la-turquie-souhaite-une-aide-internationale-pour-l-enquete_343062_1819218.html.

[108] *Ibid.*

[109] Other examples include the US strike of 14 April 1986 in Libya, during which the premises of the French, Finnish, Iranian and Swiss missions sustained damage. See Provisional Verbatim Record, 2674th Meeting of the Security Council, *supra* note 75, at 12; 'Foreigners Stay Calm', *The Guardian*, 16 April 1986, at 2. In the course of an attack against Sana'a, Yemen, by the Saudi-led coalition in 2015, Iran reported damage to its embassy to the UN Secretary-General, underscoring that the targeting of diplomatic missions was a 'flagrant violation of international law' and alluding to the international responsibility of 'those in charge', but not relying on self-defence. See Note Verbale dated 23 April 2015 from the Permanent Mission of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General, UN Doc. A/69/884, 23 April 2015; Suppl. 19 (2014–2015), in *Repertoire of the Practice of the Security Council*, *supra* note 15, sec. X.

Although the United States issued an apology and referred to a target error, American missions in China were attacked by frenzied crowds. China requested the convocation of the Security Council, and described the attack as a violation of its sovereignty and a 'flagrant flouting' of the provisions of the Vienna Convention on Diplomatic Relations (VCDR). It further reserved the right 'to take further action', while demanding a North Atlantic Treaty Organization (NATO) investigation, and rejected the 'absurd argument' that the asserted unintentional character of the attack should exempt the United States from responsibility.[110] Several members of the Security Council also condemned the attack, but the replies stopped short of considering it as an armed attack.[111] The disagreement was eventually settled six months later through a mutual compensation scheme.[112]

The host state's involvement was also implied from time to time, either by act or omission. An early example of the latter is the 1953 attack on the Soviet embassy in Tel Aviv, which resulted in a few injuries and significant material damage. Despite the Israeli apologies, the outraged Soviet Union accused the host state of complicity and broke off diplomatic relations.[113]

2 Assaults

Attackers entered missions in planned raids on more than 160 occasions. These attacks inflicted fewer injuries and damages than bombings. Nevertheless, many of these attacks met with firm condemnation, especially when they involved hostage-taking and when state troops were claimed to be the perpetrators.

The Peruvian hostage-taking by the Tupac Amaru Movement in 1996–1997 involved the largest number of hostages and, at four months, was the second longest in duration. The assailants of the Japanese embassy in Lima took several hundred hostages, including dignitaries and members of the diplomatic corps. The incident drew widespread international condemnation; nonetheless, Japan entirely entrusted Peru with the handling of the situation, while declaring that it wanted to evade forcible actions for security reasons. It even lightly criticized the host state when the crisis was finally resolved by the special forces' intervention.[114]

Recently, in 2019, the North Korean embassy in Madrid, Spain, was raided by suspected defectors from the regime. The attack received widespread media attention, especially after an alleged CIA involvement. Nevertheless, the North Korean reaction was categorical; it labelled the attack as a grave breach of state sovereignty

[110] SC, Provisional Verbatim Record, 4000th Meeting of the Security Council, UN Doc. S/PV.4000, 8 May 1999, at 2–3.

[111] *Ibid.*, at 3, 8–10.

[112] Dumbaugh, *Chinese Embassy Bombing in Belgrade: Compensation Issues*, CRS Report for Congress, 12 April 2000, at 4–5, available at www.everycrsreport.com/reports/RS20547.html.

[113] 'Russia's Break with Israel Sequel to Bombing', *The Advocate*, 13 December 1953, at 1, available at https://trove.nla.gov.au/newspaper/article/69434663.

[114] Díaz-Límace et al., 'Hostages Freed as Troops Storm Lima Embassy: President's Tough Stance Pays Off', *The Guardian*, 23 April 1997, at 1, 3; Cisneros, 'Stand-off as Rebels Hold 490 Hostages', *Irish Times*, 19 December 1996, available at www.irishtimes.com/news/stand-off-as-rebels-hold-490-hostages-1.117316; Kristof, 'For the Japanese, Hostages' Release Must Have Priority', *New York Times*, 16 December 1996, available at https://nyti.ms/2V27RmK.

and a flagrant violation of international law, while demanding an investigation from Spanish authorities.[115]

Notable incidents of state participation in such attacks include the actions of the Iraqi army during the invasion of Kuwait against Kuwaiti-accredited diplomatic missions in 1990, dismissing the immunity of these posts on the basis that 'there are no diplomatic missions in a country that does not exist'.[116] Sending states expressed their protest to the Iraqi government, as the missions of Belgium, Canada, France and the Netherlands were targeted.[117] The delegates at the Security Council's meeting condemned the acts as flagrant violations of diplomatic law.[118] Although France and Kuwait also spoke of 'an act of aggression', no self-defence reaction was carried out; nor were there any later on during the Gulf War.[119] The Security Council 'strongly condemned' the 'aggressive acts perpetrated by Iraq against diplomatic premises and personnel' and demanded compliance with the VCDR and the Vienna Convention on Consular Relations (VCCR).[120]

Another noteworthy incident concerns the actions of the Democratic Republic of the Congo (DRC) against the Ugandan embassy in Kinshasa during the Congo War in 1998. This was the second time, and the last to date, that the ICJ mentioned an attack against an embassy.[121] Uganda tried to justify its intervention in the territory of the DRC on the basis of self-defence.[122] Even though Uganda was in dire need of self-defence arguments to justify its military actions in the Congo War, it refrained from claiming an armed attack, and it only asserted that the embassy's occupation by the DRC military amounted to a violation of the VCDR.[123] One may also attribute a

[115] 'North Korea Says Madrid Embassy Raid Was "Terror Attack"', DW, 31 March 2019, available at www.dw.com/en/north-korea-says-madrid-embassy-raid-was-terror-attack/a-48133182; AFP, '"Grave Terrorist Attack": North Korea Condemns Raid on its Madrid Embassy', *The Guardian*, 31 March 2019, available at www.theguardian.com/world/2019/mar/31/grave-terrorist-attack-north-korea-condemns-raid-on-its-madrid-embassy.

[116] Ibrahim, 'France Says Iraq Seized Four at Envoy's Home in Kuwait', *New York Times*, 15 September 1990, at 4.

[117] *Ibid.*

[118] See, e.g., SC, Provisional Verbatim Record, 2940th Meeting of the Security Council, UN Doc. S/PV.2940, 16 November 1990, at 13, 16, 26, 31 (Finland: '[C]omplete disregard of its obligations and customary international law and the Vienna Convention'; China: '[A] serious violation of international law, the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations'; USSR: '[F]lagrant violation of the fundamental principles and norms governing relations among civilized States'; Ethiopia: 'violation of the basic norms governing diplomatic and consular missions').

[119] *Ibid.*; '"C'est une agression, et nous y répondrons" a déclaré M. François Mitterrand en Tchécoslovaquie', *Le Monde*, 16 September 1990, available at www.lemonde.fr/archives/article/1990/09/16/c-est-une-agression-et-nous-y-repondrons-a-declare-m-francois-mitterrand-en-tchecoslovaquie_3985554_1819218.html.

[120] SC, Res. 667, 16 September 1990.

[121] The last time that an international arbitration tribunal addressed the capture of an embassy was during the Eritrea–Ethiopia War. In February 1999, Ethiopian troops broke into the Eritrean embassy, abducted the staff and ransacked the property. Accordingly, the Eritrea–Ethiopia Claims Commission found Ethiopia responsible for violating the VCDR. See Eritrea–Ethiopia Claims Commission, *Diplomatic Claim, Eritrea's Claim 20*, Partial Award 19 December 2005, sec. IV.D.2, at 44, 46–47, available at https://pcacases.com/web/sendAttach/759.

[122] *Case Concerning Armed Activities on the Territory of the Congo*, Judgment, 19 December 2005, ICJ Reports (2005) 168, para. 43.

[123] *Case Concerning Armed Activities on the Territory of the Congo*, Counter-Memorial of the Republic of Uganda, 21 April 2001, vol. 1, paras 397–408, available at www.icj-cij.org/public/files/case-related/116/8320.pdf.

negative *opinio juris* to the absence of self-defence invocation on the part of Uganda, as the East Africa embassy bombings and the corresponding US claim of self-defence had taken place only a few months earlier.

3 Mob Attacks

Unorganized attacks by demonstrators or furious crowds occurred 208 times. They generally resulted in relatively few victims, yet oftentimes inflicted significant damage to the premises of missions. On many occasions, these attacks were committed simultaneously in various countries by protesters or émigrés contesting a certain act or decision of the sending state.

A good number of such attacks provoked severe condemnation. A series of protests against Belgium's role in the Congo crisis were organized in February 1961 in front of Belgian missions. In Cairo, the capital of the then-United Arab Republic (UAR), protesters destroyed the interior of the embassy and set the premises on fire, after police forces were ordered to withdraw and remained unresponsive during calls for help. Belgium strongly protested the 'violation of the most sacred rules of international law' and broke diplomatic relations after the UAR refused to apologize and pay compensation.[124]

The host state's alleged connivance was cited regularly later on as well. For instance, in 1992, the Security Council imposed sanctions on Libya in Resolution 748, since the country failed to comply with the enquiry on the Lockerbie incident.[125] On the following day, Libyan students mounted an apparently coordinated attack against the missions of those states that voted for the resolution in the Security Council, while the Libyan police stood by. The embassy of the council president's home country, Venezuela, was gutted by flames from incendiary bombs, while firefighters and police did not respond. Venezuela denounced the attack as an organized, criminal, terrorist attack, and a serious violation of diplomatic law, and all diplomats were recalled.[126] The incident provoked widespread condemnation in the Security Council, especially when Libya attempted to defend the protests as they were directed against the Security Council, and not individual states.[127] The permanent representatives condemned the attack in a presidential statement, and demanded that Libya respect its international obligations and pay full compensation.[128]

[124] de Vos, 'La Belgique rompt ses relations diplomatiques avec la République arabe unie', *Le Monde*, 28 February 1961, available at www.lemonde.fr/archives/article/1961/02/28/la-belgique-rompt-ses-relations-diplomatiques-avec-la-republique-arabe-unie_2264111_1819218.html.

[125] SC Res. 748 (1992).

[126] Lewis, 'Libyans Riot at Embassies; U.N. Protests', *New York Times*, 3 April 1992, at A8.

[127] 'Note Verbale from the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations addressed to the Secretary-General, 30 September 1992', in Report of the Secretary-General, *Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives*, UN Doc. A/INF/48/4, 31 August 1993, at 17–18.

[128] *Ibid.* See also Letter dated 2 April 1992 from the Permanent Representative of Venezuela to the United Nations Addressed to the President of the Security Council, UN Doc. S/23771, 2 April 1992; Statement of the President of the Security Council, UN Doc. S/23772, 2 April 1992.

In a more recent example, in 2011, hundreds of protesters in Tehran looted the British embassy, devastating its interior and holding diplomats hostage for several hours, while police guards stood idly by. This occasion prompted the Security Council's president to issue a press statement recalling the Vienna Convention and called upon Iran to its respect.[129] The UK recalled its ambassador, as did Germany, France and the Netherlands; several delegates also condemned the attack during the Security Council's meeting.[130] Iran apologized and vowed to respect its obligations under the VCDR.[131]

4 Shootings

The last major, but comparatively smaller, category of incidents comprises attacks committed without an entry into the embassy and involving non-explosive projectiles aimed at the building.

State involvement also occurred in this category, notably during the 1973 Chilean coup d'état against President Allende, when the new government forces were engaged in a conflict with the Cuban embassy. Cuba, a staunch supporter of the *ancien régime*, alleged that a diplomat was seriously wounded in the gunfight,[132] while Chile asserted that the embassy was conducting illegal operations and opened fire on the guard detachment. During the debates in the Security Council, Cuba only argued a violation of the VCDR, meanwhile Chile expressly invoked Article 51 of the Charter in its defence.[133] Even Cuba's allies supporting its position refrained from characterizing the actions as self-defence; instead, they also emphasized the inviolability of the mission and UN Charter principles.[134]

[129] SC, Security Council Press Statement on Attacks against United Kingdom Diplomatic Premises in Iran, UN Doc. SC/10463, 29 November 2011.

[130] Foreign & Commonwealth Office and Rt Hon Hague, 'Foreign Secretary Statement on Storming of British Embassy in Iran', Gov.uk, 29 November 2011, available at www.gov.uk/government/news/foreign-secretary-statement-on-storming-of-british-embassy-in-iran; 'La France rappelle son ambassadeur en Iran pour "consultation"', *Le Monde*, 30 November 2011, available at www.lemonde.fr/asie-pacifique/article/2011/11/30/l-attaque-de-l-ambassade-britannique-a-teheran-condamnee_1610964_3216.html; 'Brouille entre Londres et Téhéran après l'attaque de l'ambassade', *Le Monde*, 29 November 2011, available at www.lemonde.fr/proche-orient/article/2011/11/29/iran-des-manifestants-saccagent-l-ambassade-britannique-a-teheran_1610758_3218.html.

[131] Report of the Islamic Republic of Iran, 30 November 2011, in Report of the Secretary-General, Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives, UN Doc. A/67/126, 3 July 2012, at 11.

[132] Letter Dated 13 September 1973 from the Chargé d'affaires Ad Interim of the Permanent Mission of Cuba to the United Nations Addressed to the President of the Security Council UN Doc. S/10995, 13 September 1973, at 1.

[133] SC, Verbatim Record, 1741st Meeting of the Security Council, UN Doc. S/PV.1741, 17 September 1973, paras 54, 62–63, 65, 74; Verbatim Record, 1742nd Meeting of the Security Council, *supra* note 60, para. 193.

[134] Verbatim Record, 1742nd Meeting of the Security Council, *supra* note 60, paras 13, 77. It should be noted that although the term 'armed attack' was used by Cuba and the USSR, they interpreted it as violation of the VCDR, not as the basis for the invocation of self-defence. The USSR also warned that, *in the past*, such incidents were regarded as *casus belli*, and ensuring the security of a country's embassies served as a '*pretext*' for attacking other countries. See Verbatim Record, 1741st Meeting of the Security Council, *supra* note 133, paras 21, 88, 94.

Another notable incident took place in 2014 in Athens, when a domestic terrorist organization raked the Israeli embassy with Kalashnikov rifle fire. Greece immediately commenced an investigation and condemned the attack, while Israel lodged a protest.[135] The Security Council issued a press statement in which it underlined the need for criminal investigation and combat against terrorism, which threatens international peace and security.[136] Yet no claim of an armed attack was made by either party.

5 *Overall Lessons Learnt from the Survey of State Practice*

More than 99% of all attacks against missions occurred without reporting self-defence by the sending state. Members of the international community deem the legal nature of such incidents not to be a self-defence action, as suggested by the wide variety of responses triggered by such acts. These reactions are listed in Table 1 containing the relevant statistics of the state practice surveyed (Table 1).

The detailed review of state practice in Table 1 shows that states have consistently and expressly regarded the overwhelming majority of such incidents as ordinary crimes or terrorist incidents to be handled within the ambit of diplomatic and consular law, as well as criminal law, and emphatically not as armed attacks. When self-defence was invoked, solidarity and understanding were widely expressed, yet legal qualification was scarce and very divided. Furthermore, attacks labelled as self-defence were not necessarily the gravest attacks; and vice versa, grave incidents were not necessarily treated as armed attacks, as evidenced by the foregoing section. The United States invoked self-defence in cases of an ongoing hostage situation or presumedly recurring attacks in connection with allegedly state-backed, organized perpetrators. It is also noteworthy that deterrence, pre-emption and reliance on the protection-of-nationals doctrine were also used to further blur the justification for the action.

For all these reasons, in the view of the present authors, state practice and *opinio juris* neither establish a new customary right of self-defence in response to mission attacks, nor support a broad reading of the existing right to self-defence that would encompass lawful use of force to protect missions against attacks. Consequently, if the ICJ were to be asked to decide the lawfulness of a military response in the wake of an attack, as in the *Tehran Hostages* case, the law as it stands today does not support the legality of such a response on the ground of self-defence.

5 Conclusions and Perspectives

To summarize the main doctrinal findings of this research into state practice, from a theoretical point of view, missions do not form part of the territory of a sending

[135] Israel Ministry of Foreign Affairs, *Attack on the Israeli Embassy in Athens*, 12 December 2014, available at https://mfa.gov.il/MFA/PressRoom/2014/Pages/Attack-on-the-Israeli-embassy-in-Athens-12-December-20141212-9485.aspx.

[136] SC, Security Council Press Statement on Attack against Israeli Embassy in Athens, UN Doc. SC/11700, 13 December 2014.

Table 1: Reactions by states and non-state actors to attacks against embassies without reference to self-defence

Relevant response	**Sending state**	**Host state**	**Other state**	**UN**	**Other int'l org.**	**Total responses by type**
Apology	1	14	—	—	—	15
Broken diplomatic relations	5	—	—	—	—	5
Compensation	13	34	1	1	—	49
Condemnation	58	58	71	31	9	227
Condolences	12	53	35	15	4	119
Crime	17	14	3	3	1	38
Diplomatic retorsion	18	—	6	—	—	24
Extradition	2	—	—	—	—	2
Investigation	56	69	6	15	—	146
Protest	78	—	—	—	7	85
Security increase	50	54	4	8	—	108
Terrorism	57	37	18	17	3	115
Threats	15	—	—	—	—	15
Violation of diplomatic law	62	19	15	18	5	101
Total individual responses per actor	251	181	111	33	14	590

state. Several authors have considered that missions should be treated similarly to warships and troops abroad, as these are all outposts of the state. Others have asserted a different function, legal nature or necessity of self-defence. Furthermore, the *Tehran Hostages* case has been regularly invoked as evidencing the ICJ's support for self-defence, although a close reading of the judgment suggests that the term 'armed attack' was used in an everyday meaning, outside the use of force context.

The present survey of state practice, covering more than 730 attacks, has shown that, on five occasions, these incidents were treated within the regime of diplomatic and consular law or criminal law, apart from US claims.[137] These incidents were met with considerable sympathy; however, two circumstances call into question whether state practice is sufficient to support an interpretation leaning towards permitting self-defence actions in response to such attacks. On the one hand, members of the international community have given only scarce, diverging legal appraisal of these conflicts, precluding consistent state practice in this regard. On the other hand, the majority of such incidents were clearly considered outside the use of force domain, automatically excluding affirmative *opinio juris* regarding the right to self-defence.

Importantly, the above does not suggest that states are left with no means to respond to attacks against their missions. The practice of states shows that they have

[137] One may also point to the International Criminal Tribunal for the former Yugoslavia, which has emphasized, '[n]o matter how powerful or influential a country is, its practice does not automatically become customary international law': Judgment, *Prosecutor v. Radoslav Brđanin* (IT-99-36-A), Appeals Chamber, 3 April 2007, para. 247.

had recourse to a wide range of measures other than self-defence.[138] These possible measures, however, fall under criminal law or diplomatic and consular law, alongside related rules on state responsibility, and, as the *ultima ratio*, under the use of force authorized by the Security Council.[139] It should also be underscored that the possible measures at the states' disposal go beyond the passive/preventive options of strengthening mission defences or breaking off diplomatic relations.[140] Furthermore, the Protection of Diplomats Convention, which enjoys a near-universal adherence, ensures the punishment of those responsible, as it embodies an *aut dedere, aut judicare* obligation in relation to the perpetrators of attacks against missions. It also opens the door to dispute settlement mechanisms in case of nonconformity.[141]

Yet we must acknowledge that even these legal avenues cannot guarantee an absolute protection of missions; nor can they ensure that every perpetrator will be brought to justice as it was showcased by several regrettable occasions. However, since 1945, self-defence measures and collective actions have not been the *ultima ratio* option for resolving conflicts or protecting state interests. These are mere tools with the sole purpose of restoring the territorial integrity of states as well as international peace and security in certain narrowly defined circumstances,[142] from which, most probably, we have to exclude attacks against missions.

[138] Needless to say, even a restrictive reading of self-defence would not exclude the possibility for guards to protect themselves and the mission with forcible measures. In our opinion, when a mission is attacked, it can be considered as an attack on the host state. Therefore, when a mission is protected by the armed forces of the sending state (as in the case of US Marine Embassy Guards; cf. E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4th ed., 2016), at 140), the host state shares its monopoly to use force, permitting the guards to exercise certain state powers on its behalf. This is not under the regime on the prohibition on the use of force, as the latter covers the use of force only in *international relations*, hence enforcement actions taken within the state's own territory are not covered. Consequently, self-defence as an exception to the general prohibition cannot come into play (cf. Dörr and Randelzhofer, *supra* note 4, para. 32; Kreß, *supra* note 27, at 434). The use of force by a stationed foreign army, without the consent of the host state or in excess of the given mandate, would amount to a use of force against the host state (cf. GA Res. 3314 (XXIX), 14 December 1974, art. 3(e)); however, 'prior valid consent of the state . . . negates the existence of a use of force . . . in any other manner inconsistent with the UN Charter' (Kreß, *supra* note 27, at 429). Notably, the sending state may also exercise its right to self-defence if the attack on these guards would surpass the *de minimis* criterion; but in such a case, the targeting of the armed forces, rather than of the mission, would serve as a legal basis for claiming self-defence (cf. GA Res. 3314 (XXIX), 14 December 1974, art. 3(d)).

[139] Cf. Dörr and Randelzhofer, *supra* note 4, para. 36.

[140] Denza suggests the closure of the mission without breaking diplomatic relations, strengthening physical defences and providing own armed guards: Denza, *supra* note 138, at 139.

[141] Protection of the Diplomats Convention, *supra* note 84, arts 2(1)b, 7, 13.

[142] This is well corroborated by the wording of the ICJ in *Armed Activities*:

> Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interests beyond these parameters. Other means are available to a concerned State, including, in particular, recourse to the Security Council.
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> *Case Concerning Armed Activities on the Territory of the Congo*, Judgment, 19 December 2005, ICJ Reports (2005) 168, para. 148.