

Abstract

Forty years have elapsed since the Tehran hostage crisis, yet the question whether a State can lawfully resort to force in reaction to an attack against its diplomatic or consular mission still remains unanswered. This issue is subject to contradicting scholarly interpretations, whereas self-defence as a justification regularly reappears in state practice. A recent example is provided by the U.S. position regarding the killing of Qasem Soleimani in January 2020.

The authors revisited 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, reactions other than the use of force were given by the sending state and the international community. 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 of the last 70 years. Finally, this article also calls for a close rereading of the *Tehran Hostages* judgment to challenge its widespread interpretation as recognizing self-defence in such situations.

1. Introduction

The question of responding in self-defence to attacks against diplomatic and consular missions was first raised forty years ago during the Tehran hostage crisis in 1980.¹ Ever since there is no consensus among publicists concerning the legality of invoking self-defence in such situations.

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¹Almost all publicists 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.

Yet, thus far no comprehensive analysis has been undertaken to clarify whether an attack against diplomatic missions 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 on a doctrinal and on an empirical level. The contours of the right of self-defence are of special normative importance given that Article 51 constitutes the sole vehicle under international law for having lawful recourse to unilateral use of force. Therefore, deeming 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 Tehran 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 study 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 of the Study

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 of force which is often perceived as a *jus cogens* norm,⁴ the existence of other exceptions seeking to establish unilateral

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

³ See [permalink to the database of the attacks](#) at fn. 18.

⁴ Y. Dinstein, *The Interaction between Customary International Law and Treaties*, 322 *Collected Courses of the Hague Academy of International Law* (2007), at 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 para. 67.

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 study are conscious of the fact that characterizing 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 research examines relevant rules with respect to both sources. In absence of express discussion from a legal perspective before the Tehran 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, the present authors focus on the practice of states during the last seventy 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

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* (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 Greenwood, 'Self-Defence', in R. Wolfrum (ed.) *Max Planck Encyclopedias of International Law* (2011), 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, at paras. 177–179.

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

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

modification threshold even higher both in the customary and the treaty law aspect of the prohibition.¹⁰

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 PCIJ's 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 newspapers' archives and state report compilations of the United Nations' Secretary General to single out incidents and reactions.¹⁶ Our database includes more than 730 incidents, representing presumably all significant attacks.¹⁷

As a final preliminary issue, the selection criteria of relevant attacks ought to be clarified. For purposes of the present state practice analysis, those attacks against diplomatic and consular missions were examined where there was a real possibility of inflicting significant damage¹⁸ to

¹⁰ cf. de Hoogh, 'Jus Cogens and the Use of Armed Force', in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (2015) 1161, at 1170, 1172–1173; Kammerhofer, 'The Resilience of the Restrictive Rules on Self-Defence', in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (2015) 627, at 643; Dinstein, *supra* note 4, at paras 257–260; Dörr and Schmalenbach (eds), *supra* note 9, at 912, 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', in R. Wolfrum (ed.) *Max Planck Encyclopedias of International Law* (2006), 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 Tom Ruys, *Armed Attack and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press 2010) 38.

¹⁵ Our source for the reports was the Repertoire of the Practice of the Security Council. At the time of the research, the volumes from 1946 to 2017 were available. Repertoire of the Practice of the Security Council, available at <https://www.un.org/securitycouncil/content/repertoire/structure>

¹⁶ In order to ensure the best coverage of incidents our database was cross-checked with incidents of at least 4 deaths or 10 injuries from two major compilations, the RAND Corporation's 'Database of Worldwide Terrorist Incidents' (available at <https://www.rand.org/nsrd/projects/terrorism-incidents.html>), containing 40.000 attacks between 1968 and 2009, as well as the 'Global Terrorism Database' from the 'National Consortium for the Study of Terrorism and Responses to Terrorism' (available at <https://www.start.umd.edu/gtd/access/>), consisting of 180.000 attacks between 1970 and 2017. See the reports *infra* fn. 57.

¹⁷ The complete database with details and reactions is available online. Kajtár G. and Balázs G. B., *Attacks Against Missions Database*, 6 April 2021. available at <https://doi.org/10.6084/m9.figshare.14378477>

¹⁸ We included for example RPG (rocket propelled grenade) or Molotov cocktail attacks and attempts, but as a *de minimis* criterion, excluded incidents of tearing down flags or hurling eggs or a few stones.

the premises of the mission¹⁹ or hindering its operation.²⁰ 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, nor attacks against buildings used by honorary consuls as working place or private residence, neither 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.²¹ 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.²² 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 paragraph (d) thereof.

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

Several authors maintain that an attack can be considered as an armed attack only if it is mounted against the territory of the 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.²³ These publicists, however, do not contest that certain

¹⁹ 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. Art. 1(1)i, Vienna Convention on Diplomatic Relations (VCDR), 1961, 500 UNTS 95; Art. 1(1)j, Vienna Convention on Consular Relations (VCCR), 1963, 596 UNTS 261.

²⁰ For instance, an enduring siege or hostage-taking.

²¹ cf. Jean d'Aspremont, 'Premises of Diplomatic Missions', *Max Planck Encyclopedias of International Law* (2009) paras 3, 11–12.

²² Dinstein, 'Aggression', in R. Wolfrum (ed.) *Max Planck Encyclopedias of International Law*, (2015), at paras 7, 33; Greenwood, *supra* note 8, at 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 paras 9, 22; GA Res. 3314 (XXIX) 14 December 1974.

²³ 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 T. Ruys, O. Corten and A. Hofer (eds), *The Use of Force in International Law* (2018) 408, at 421; S. E. Nahlik, *Development of Diplomatic Law: Selected Problems*, 222 *Collected Courses of the Hague Academy of*

‘emanations of the state’, particularly troops and warships, can be subjects of an armed attack as exceptions. They put forward various reasons to explain the distinction between embassies and other emanations of the state. Nolte and Randelzhofer argue that because armed forces are instruments of safeguarding political independence, these are excepted from the requirement of territoriality.²⁴ In the view of Schweisfurth and Hakenberg, troops have a ‘quasi-territorial’ nexus with their sending state. Schweisfurth also emphasizes that armed attacks must have an ‘across-the-border’ character.²⁵

Others contend that attacking the territory of the state is not a prerequisite of an armed attack. Ruys and Schachter argue that in ‘special circumstances’ attacks against embassies should be treated in the same way as attacks against armed forces,²⁶ while the Chatham House Principles, Rosenne, as well as Lillich conclude that embassies should always be considered as such.²⁷ 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.²⁸ For Greenwood, an attack on an organ of the state may be

International Law (1990), at 314, fn. 338; *United States Diplomatic and Consular Staff in Tehran*, Judgment, 24 May 1980, ICJ Reports (1980) 3, Dissenting Opinion of Judge Tarazi, at 64–65.

²⁴ Nolte and Randelzhofer, *supra* note 23, at paras 25–28.

²⁵ M. Hakenberg, *Die Iran-Sanktionen Der USA Während Der Teheraner Geisellaffäre 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. Dörr and Randelzhofer take a similar position based on the *Lotus* case. Dörr and Randelzhofer, *supra* note 4, at paras 35–36; *The Case of the S.S. Lotus*, 1927 PCIJ Series A, No. 10, at 25.

²⁶ 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.

²⁷ S. Rosenne, *The Perplexities of Modern International Law: General Course on Public International Law*, 291 *Collected Courses of the Hague Academy of International Law* (2001), at 155; ‘The Chatham House Principles of International Law on the Use of Force in Self-Defence’, 55 *The 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. James A Green, *The International Court of Justice and Self-Defence in International Law* (Hart Publishing 2009) 140.

²⁸ 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. Article 4, GA Res. 3314, *supra* note 23. Later, he considers symbols of

considered as an armed attack. As a result, he treats embassies in the same category as armed forces abroad.²⁹

It may be worth adding that GA Res. 3314 did not include attacks against missions in its (albeit only indicative) enumeration, in spite of the fact that several grave incidents took place prior to its adoption.³⁰ The examples explicitly included in the resolution either concern military measures against the territory of the state, or against emanations of military or of vitally important economic interests.³¹ 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 that therefore states are not entitled to rely on the right of self-defence in such cases.³² Nevertheless, those who subscribe to a more extensive approach also consider attacks against symbolic positions as acts of aggression.³³

The temporal aspect of the necessity criteria of invoking self-defence also raises some practical questions.³⁴ 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.³⁵ 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 certain publicists maintain that

state sovereignty as subject of an armed attack and refers to the US' practice of labelling attacks against embassies as armed attacks. Ronzitti, 'The Expanding Law of Self-Defence', 11 *JCSL* (2006) 343, at 350.

²⁹ Greenwood, *Reflections on the Right of Self-Defence in International Law* (2013), Lecture Video from the United Nations Audiovisual Library, available at https://legal.un.org/avl/ls/Greenwood_PS_video_1.html, at 25'30".

³⁰ See e.g. Section IV.4.4. on a conflict around the Cuban embassy in Santiago de Chile which was debated in Security Council in 1973.

³¹ cf. Nolte and Randelzhofer, 'Article 51', in B. Simma et al. (eds), *The Charter of the United Nations: A Commentary* (3rd ed., 2012) 1397, at 1412. fn. 103.
; Ruys, *supra* note 6, at 204–205.

³² Nolte and Randelzhofer, *supra* note 23, at para. 28.

³³ cf. Ruys, *supra* note 6, at 203. citing a statement of New Zealand.

³⁴ cf. Corten, 'Necessity', in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (2015) 861, at 870, 873; Ruys, *supra* note 6, at 99; *Nicaragua*, *supra* note 7, at para. 237.

³⁵ Gill, 'When Does Self-Defence End?', in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (2015) 737, at 745; C. Gray, *International Law and the Use of Force* (4th ed., 2018), at 205.

at least severe attacks against missions should be regarded as armed attacks.³⁶ The East African embassy bombings of 1998, which took hundreds of casualties, prompted Wedgwood to consider those as ‘armed attacks’ due to the horrific loss of lives ‘if the words retain any meaning’.³⁷ 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 are ought to be regarded as armed attacks.³⁸ 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.³⁹ 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.

One may also consider the *scale and effect* of the attacks, as the ICJ did in *Nicaragua*,⁴⁰ to offer a method to distinguish certain uses of force that can be considered as armed attacks from less grave incidents.⁴¹ Yet one may still argue that even in case of a serious attack against a remote non-military position, the shocking loss of lives means only a psychological and political blow to the sending state rather than a direct attack endangering its security or existence in stark contrast to traditional across-the-border invasions or attacks on 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.⁴²

³⁶ We regarded personal injuries and material damage as primary indicia of the gravity of an attack.

³⁷ Wedgwood, ‘Responding to Terrorism: The Strikes Against Bin Laden’, 24 *Yale Journal of International Law* (YJIL) (1999) 559, at 564.

³⁸ Ruys, *supra* note 27, at 246; Ruys, *supra* note 6, at 152.

³⁹ Dinstein, *supra* note 29, at 215.

⁴⁰ *Nicaragua*, *supra* note 7, at para. 195.

⁴¹ Green, *supra* note 28, at 140. see also Gray, *supra* note 36 at 154; de Hoogh, *supra* note 10, at 1180.

⁴² Green, *supra* note 28, 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 T. Ruys, O. Corten and A. Hofer (eds), *The Use of Force in International Law* (2018) 760, at 780.

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 U.S. embassy.⁴³ The wording created ambiguity,⁴⁴ as the U.S. claimed self-defence during the proceedings, in connection with its ill-fated rescue mission.⁴⁵ The phrase and the U.S. claim taken together led several publicists 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.⁴⁶

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 the Court, as the ICJ only examined issues of diplomatic law and state responsibility.⁴⁷ Moreover, the ICJ used this term in an interchangeable manner with non-legal expressions, such as ‘attack’, ‘assault’ or ‘invasion’, which suggests a descriptive, and not a legal language under Article 51 of the Charter.⁴⁸ 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.⁴⁹ 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.⁵⁰ 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*.

⁴³ *United States Diplomatic and Consular Staff in Tehran*, Judgment, 24 May 1980, ICJ Reports (1980) 3, at paras 57, 64, 91.

⁴⁴ cf. Ronzitti, *The Expanding Law*, *supra* note 29, at 350.

⁴⁵ 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. 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.

⁴⁶ Dinstein, *supra* note 29, at 215; J. Kittrich, *The Right of Individual Self-Defense in Public International Law* (2008), at 36–37; Kreß, *supra* note 29, at 452, 467, 481; Ruys, *supra* note 27, 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, Dissenting Opinion of Judge Schwebel, para. 65.

⁴⁷ Kajtár, ‘Self-Defence against Non-State Actors - Methodological Challenges’, 54 *Annales Universitatis Scientiarum Budapestinensis Rolando Eötvös Nominatae Sectio Juridica* (2013) 307, at 209.

⁴⁸ *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 fn. 8.

⁴⁹ Kajtár, *supra* note 48, at 312–313; *Tehran Hostages*, *supra* note 44, at paras 14, 17, 64.

⁵⁰ UN Charter, Article 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

To sum up this brief mapping exercise of the relevant academic positions as set out in sections A and 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 study 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 review of more than 730 attacks which occurred between the entry into force of the UN Charter and 30 June 2020.⁵¹ The overwhelming majority of these attacks were mob attacks, pre-planned assaults or detonations, moreover 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 targeted. The U.S. 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.⁵² 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

(emphasis added), jusqu'à ce que le Conseil de sécurité ait pris les mesures nécessaires pour maintenir la paix et la sécurité internationales.'

⁵¹ See *supra* note 17.

⁵² Our results may have been influenced by the fact that our principal sources were in English and French and the attacks against U.S. missions are particularly well-documented.

typically protested via a *note verbale* in which they demanded bringing perpetrators to justice and the prevention of similar incidents. On 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.⁵³ 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.⁵⁴ When the attacks took victims, condolences were expressed *vis-à-vis* the affected states and the families.⁵⁵ If damage was incurred, host states offered a payment of damages or an *ex gratia* compensation.⁵⁶ Moreover, in case of serious dissatisfaction with the host state's conduct, envoys were recalled or diplomatic relations were broken.⁵⁷

Our statistical analysis also shows that harsh replies were often preceded by tensions between respective states, therefore the attack was rather the last straw in the given conflict 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 fourth 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 regrets, typically when the attack was attributed to a foreign power or was exceptionally grave. The Security Council voiced its condemnation almost thirty times, mostly in presidential and press statements, but condemned six attacks in resolutions, reaffirming the inviolability of missions and the protective duty of host states. It designated a dozen of incidents as 'terrorist acts' and it upheld that all forms of terrorism endanger international peace and security. It is also noteworthy that it addressed these problems by underlining that perpetrators should be brought to justice, instead of condoning unilateral uses of force or proposing collective security measures.

Even with regard to the Tehran 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-biennially by consensus, in

⁵³ E.g. the 1992 embassy attacks in Libya, see section IV.4.3.

⁵⁴ See for example the 2003 bombings in Istanbul in section IV.4.1.

⁵⁵ A similar incident took place in 2011 in Iran, when British diplomats were held hostage, see section IV.4.3.

⁵⁶ A case in point is a mob attack against U.S. missions in China the wake of the 1999 American bombing of the Chinese embassy in Belgrade, see section IV.4.1.

⁵⁷ This was the Belgian reaction to the 1961 mob attack against its embassy in Cairo, see section IV.4.3.

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.⁵⁸

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.⁵⁹ As a consequence, a tendency of overreporting incidents was observed.⁶⁰ 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 United 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 U.S. itself also refrained from claiming self-defence in relation to the overwhelming majority of the 140 attacks in which U.S. missions were targeted.

The U.S. first adopted a self-defence perspective in 1980, during the Tehran hostages crisis. The preceding U.S. approach can be traced back to a 1973 statement at the Security Council, when the U.S. representative underlined that although their missions ‘have been bombed, burned or shot at’ on 27 occasions in the preceding 8 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.⁶¹ It is not the intention of the present paper to attempt to analyse the reasons for such a divergence in the U.S. state practice, as a number of legal as

⁵⁸ The agenda item is under the title ‘*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, at paras 7, 10). The most recent resolution on this topic was adopted in 2018 (GA Res. 73/205, 20 December 2018).

⁵⁹ See also Gray, *supra* note 36, at 128; *Nicaragua*, *supra* note 7, at para. 200.

⁶⁰ Gray, *supra* note 36, at 121, 125.

⁶¹ SC, Verbatim Record, 1742nd Meeting of the Security Council, UN Doc. S/PV.1742, 18 September 1973, paras 42–43. Undoubtedly, the Tehran hostages incident was markedly different from previous cases, but serious incidents took place in the period given by the permanent representative as well, e.g. a deadly raid of a score of guerrillas at the embassy in Saigon during the Vietnam War in 1968 (The Guardian, *Air strike by US to drive Vietcong out of Saigon*, 1 February 1968, at 1) or a lethal rocket attack in Phnom Penh in 1971 (The New York Times, *Bomb Kills 2 Americans*, 27 September 1971, at 10).

well as non-legal considerations influence the invocation of self-defence.⁶² Nevertheless, for purposes of the present survey, the relatively small number of U.S. self-defence claims may carry importance for ascertaining the customary foundations of self-defence measures in such cases.

Before delving into the detailed analysis of incidents entertaining self-defence claims, two final methodological considerations are due. Firstly, the actual practice of states shows that even though self-defence claims are rather exceptional, publicists tend to focus on them. 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.⁶³

Secondly, reactions 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*.⁶⁴ 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 U.S. embassy in the Iranian capital and kept more than 50 employees as hostages for 444 days.⁶⁵ The U.S. 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.⁶⁶

The Court noted the fact of 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,

⁶² For instance, most of the below-presented self-defence invocations has shown some correlation with domestic political issues. The ongoing presidential re-election campaigns may have influenced the handling of the Tehran hostage crisis (Carter) and the Benghazi attack (Obama), similarly to unfolding political scandals leading to the impeachment of President Clinton (East Africa bombings) or President Trump (Baghdad attack).

⁶³ Gray, *supra* note 36, at 123; Ruys, *supra* note 6, at 33–34.

⁶⁴ Gray, *supra* note 36, at 21. cf. also Ruys, *supra* note 6, at 38.

⁶⁵ CNN, *Iran Hostage Crisis Fast Facts*, 15 October 2020, available at : <https://edition.cnn.com/2013/09/15/world/meast/iran-hostage-crisis-fast-facts/index.html>

⁶⁶ *Letter from the Permanent Representative (S/13908)*, *supra* note 46.

it reprimanded the U.S. for undermining ‘respect for the judicial process in international relations’ by taking action against the Court’s order.⁶⁷ Moreover, the qualification of the incident was touched upon in dissenting opinions.⁶⁸

The official position of the U.S. has been oscillating between deeming it as an issue of diplomatic law and claiming self-defence.⁶⁹ In its initial reactions, it considered the incident 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, it 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’.⁷⁰ It also brought an action before the ICJ on the basis of violations of diplomatic and consular rights.⁷¹ 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’.⁷²

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 Article 11 ARSIWA.⁷³ Concerning the lapse of six months between the alleged armed attack and the measures in response to it, President Carter argued that Operation Eagle Claw rescue mission became a ‘necessity and a duty’; however, his statement blurred whether this action would fit in the classical notion of self-defence. He emphasized that it was a purely ‘humanitarian mission’ aiming to ‘safeguard American lives, to protect

⁶⁷ *Tehran Hostages*, *supra* note 44, at paras 32, 93–94.

⁶⁸ Judge Morozov criticized the majority for not rejecting the U.S.’ claim of self-defence due to the lack of armed attack. (Nonetheless, it can be assumed that the Court would not have disapproved the U.S. 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 attack, whereas Judge Schwebel in his dissenting opinion appended to the Nicaragua case considered this designation as a ‘sound evaluation of the rescue attempt’. *United States Diplomatic and Consular Staff in Tehran*, Judgment, 24 May 1980, ICJ Reports (1980) 3, Dissenting Opinion of Judge Morozov, paras 56–57; Tarazi, *supra* note 24, at 64–65; Schwebel, *supra* note 47, at para. 65.

⁶⁹ Naturally, the evaluation of the incident may have evolved over time, but as Orakhelashvili pointed out, ‘[t]he changing allusion to multiple justifications casts doubt on the validity of all related claims’ Orakhelashvili, *supra* note 5, at 169.

⁷⁰ 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.

⁷¹ *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.

⁷² *Letter from the Permanent Representative (S/13908)*, *supra* note 46.

⁷³ Greenwood, *supra* note 7, at para. 15; *Tehran Hostages*, *supra* note 44, at paras 58, 73–74.

America's national interest and to reduce tensions' and underlined that this 'was not directed against Iran'.⁷⁴

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 U.S. allies generally expressed solidarity and understanding.⁷⁵ 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 U.S. 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 enumerated in the series targeted the U.S. embassy in Beirut (Lebanon) on 6 April. The incident was described as a rocket launched at the embassy, which, however, missed its target and exploded without inflicting any known injuries or damage.⁷⁶ The incident, being only an attempt, in itself most probably would not have formed basis of a self-defence claim, similarly to the other incidents in the series of attacks against the U.S. The armed response from the U.S. was justified as a strike to destroy Libyan facilities used for the attacks and to 'discourage Libyan terrorist attacks in the future'. 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

⁷⁴ Letter from the Permanent Representative (S/13908), *supra* note 46, at 2-3.

⁷⁵ cf. Forteau and Alison See, *supra* note 24, at 309-310,314., at; Ronzitti, *Rescuing Nationals*, *supra* note 29, 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' (The New York Times, *European Allies Express Concern; See Complications From U.S. Raid*, 26 April 1980, 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' (The New York Times, *Trudeau Hopes Hostages Are Safe*, 16 April 1980, at 10) and the Japanese PM voiced that he understood the action 'emotionally' (The New York Times, *Ohira Tries to Tempt Japan's Reaction to Mission*, 16 April 1980, at 10). However, the Indian MoFA stated that 'it cannot condone military adventurism of the type inherent in the attempt by the U.S.' (The New York Times, *India Expresses Concern*, 16 April 1980, at 10), Iran labelled it as a 'blatant act of invasion' (The New York Times, *Waldheim Proposes Reviving Inquiry Panel on Iran*, 16 April 1980, at 10) and the USSR called it an aggressive act that 'grossly violates all the norms of international law' (*Ibid.*).

⁷⁶ 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.

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

The great majority of the international community condemned the American bombing, so did the UN General Assembly in a resolution.⁷⁸ During days of deliberations in the Security Council, nearly forty states, mostly Socialist, Arab and non-aligned states asked for participation and denounced the U.S. intervention expressly as an ‘act of aggression’. Several of them dismissed to qualify the action as self-defence, citing a lack of armed attack or a disregard of necessity and proportionality.⁷⁹ However, the series of incidents were treated as a whole and the attempted embassy attack was not mentioned separately in states’ reactions – except for the UK, which was the only state fully endorsing the U.S. action.⁸⁰ Other Western allies rather declared understanding for the American indignation and refrained from explicit criticism or support.⁸¹ Consequently, no *opinio juris* emerged regarding self-defence in case of embassy attacks in this case either.

3. Bombings in East Africa

Two detonations have destroyed the U.S. embassies in Dar es Salaam (Tanzania) and Nairobi (Kenya) on 7 August 1998. A total of 224 people, including 12 U.S. citizens lost their lives and thousands were injured during these incidents.⁸² The Security Council unanimously qualified the attacks as terrorist attacks as well as criminal acts and called upon all states to

⁷⁸ Gray, *supra* note 36, at 203–204; Kamto, *supra* note 24, at 412–413; Ruys, *supra* note 6, at 425. See the meeting records of the Security Council between 14 and 24 April 1986; GA RES 41/38 UN Doc. A/RES/41/38, adopted with 79 votes in favour, 28 against and 33 abstentions; the SC resolution was vetoed by the U.S., the UK and France.

⁷⁹ cf. Kamto, *supra* note 24, at 416–417.; replies, 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] 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 ‘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’. (SC, Provisional Verbatim Record, 2679th Meeting of the Security Council, UN Doc. S/PV.2679, 17 April 1986, at 27).

⁸¹ E.g. France ‘shares the legitimate indignation of the United States [...] 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 ‘accepts that there is a substantial body of evidence of Libyan involvement [...] the 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://www.cia.gov/news-information/featured-story-archive/2018-featured-story-archive/anniversary-of-us-embassy-bombings-in-east-africa.html>

cooperate in bringing the perpetrators to justice.⁸³ The representative of the U.S. urged cooperation in the investigation and the apprehension of perpetrators in accordance with the Protection of Diplomats Convention.⁸⁴

Nonetheless, the U.S. eventually deemed the explosions as armed attacks when it performed airstrikes on 20 August against a pharmaceutical plant in Sudan and training camps in Afghanistan, which were linked by the U.S. 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

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 UK and France, omitted to remark on the exact legal basis of their response.⁸⁸ Whereas the attacks, especially those concerning the Sudanese plant,⁸⁹ were condemned by roughly the same number of states, for instance by 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

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 *infra* note 139 for the Convention.

⁸⁵ Letter Dated 20 August 1998 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/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 T. Ruys, O. Corten and A. Hofer (eds), *The Use of Force in International Law* (2018) 541, at 546.

⁸⁷ Ruys, *supra* note 27, at 246; see also Wedgwood, *supra* note 38, 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 use of force, states 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 of the action (Gray, *supra* note 36, at 163). In the light of this practice and a striking US armed response it is not surprising that states rather addressed issues of attributability and proportionality instead of the doctrinal question of the target of an armed attack.

⁸⁸ e.g. UK PM: ‘the U.S.A. must have the right to defend itself against terrorism’, France (PM): ‘Wherever terrorism is launched from, we must respond with a decisive and firm answer’ (The New York Times, *After the Attacks, the Reaction - U.S. Raids Provoke Fury in Muslim World; Backing in Europe*, 22 August 1998, at 6).

⁸⁹ Admittedly, the U.S. 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.; e.g. the Russian President ‘My attitude is indeed negative [towards the U.S. action], as it would be to any act of terrorism’ (The New York Times, *After the Attacks, the Reaction - U.S. Raids Provoke Fury in Muslim World; Russia Is Critical*, 22 August 1998, at 6).

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 what has been argued above, it is clear that the attacks carried out in Kenya and Tanzania were met with more sympathy and less harsh criticism than the air strikes in Libya. Nevertheless, the reactions of members of the international community seem rather to express solidarity and understanding than an implicit recognition of the lawfulness of the U.S. strikes. For all these reasons, 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 U.S. 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 The White House labelled it as ‘terrorism’ a week later. Yet, the U.S. has relied on Article 51 of the Charter first on 17 June 2014, when it captured the suspected planner of the attack.⁹² Abu Khattalah was apprehended on Libyan territory without the consent of Libya and transported to the U.S. for trial, as ‘the United States Government ascertained that Ahmed Abu Khattalah was a key figure in those armed attacks’.⁹³ The U.S. 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

⁹¹ United States Department of State, Bureau of Diplomatic Security, ‘Significant Attacks Against U.S. Diplomatic Facilities and Personnel 2007-2016’, July 2017, available at <https://www.state.gov/documents/organization/273695.pdf>, at 31.

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 remarked on the attack, but the U.S. did not comment on the incident. SC, Provisional Verbatim Record, 6832nd Meeting of the Security Council, UN Doc. S/PV.6832, 12 September 2012. The label ‘terrorism’ crystallized in 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. The New York Times, *U.S. Shifts Language On Assault In Benghazi*, 21 September 2012, at 8; *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 United Nations Addressed to the President of the Security Council, UN Doc. S/2014/417, 17 June 2014.

⁹⁴ *Ibid.*

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, as Kretzmer considered that the significant lapse of time between the attack and the reaction raised doubts about the action's purported self-defence nature.⁹⁶

The timeliness of the response is indubitably a delicate issue, but a closer reading sheds light on 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 to respond to the attack against the mission. What is more, the phrase 'further armed attacks against United States persons' suggests that not future attacks against missions, but incidents to come involving *American citizens* were regarded as the basis of a preclusive action. Accordingly, the normative significance of such invocation of self-defence remains obscure.

5. Attack against the U.S. Embassy in Baghdad

An angry mob broke into the fortified embassy compound in Baghdad (Iraq) on 31 December 2019, setting fire and causing damage, but without entering the main building or leading to injuries. The attack followed deadly American air strikes against Iranian-backed militia and months of violent verbal U.S.-Iran confrontation.⁹⁷ President Trump held Iran responsible for the attack and 'threatened' it in a tweet.⁹⁸

During the night of 2 January 2020, a U.S. drone strike targeted Iranian Quds Force commander Qasem Soleimani's convoy at the airport of 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

⁹⁵ Kretzmer, *supra* note 43, at 765.

⁹⁶ *Ibid.*, at 780.

⁹⁷ The New York Times, *Protesters Attack U.S. Embassy in Iraq, Chanting 'Death to America'*, 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!' Tweet by President Trump, available at: <https://twitter.com/realdonaldtrump/status/1212121026072592384>

⁹⁹ Letter dated 8 January 2020 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/2020/20, 9 January 2020.

‘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 U.S. allies voiced support, others expressed understanding, while less friendly states condemned the use of force.¹⁰² Several states made explicit allusion 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 U.S. action.¹⁰³

D *Attacks without Reference to Self-Defence*

Now we shall turn to discussing more in-depth the most significant cases without reference to self-defence in order to 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 from the international community. Moreover, those instances will be given special scrutiny, where attacks were attributable to states. As a result, special attention is given to those incidents the gravity and attributability of which would generally qualify an attack as an armed attack.

¹⁰⁰ Politico, Trump claims Soleimani was planning to blow up U.S. embassy, 9 January 2020, available at: <https://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://foreignaffairs.house.gov/_cache/files/4/3/4362ca46-3a7d-43e8-a3ec-be0245705722/6E1A0F30F9204E380A7AD0C84EC572EC.doc148.pdf

¹⁰² e.g. Latvia (‘We stand in solidarity with our ally- the United States exercising the right of self defense’), UK (‘The US have the right to exercise self-defence’); against China (‘The US act violates international law and should be condemned.’), Malaysia (‘Both are guilty of immoral acts, it is against the law’). 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 <https://www.justsecurity.org/68173/compilation-of-states-reactions-to-u-s-and-iranian-uses-of-force-in-iraq-in-january-2020/#ReactionstoUSStrike>

¹⁰³ *Ibid.*, see *inter alia* Georgia (‘We condemned recent violence, provocative attack to the US Embassy in Baghdad. US has the legitimate right to defend its citizens’), Brazil (‘expresses 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’), for condemnation see e.g. Russia (‘[Russia] consistently upholds the principle of inviolability and security of diplomatic missions [...] Washington [...] used an extrajudicial method to punish the Iranian general.’)

1. Bombings

Bombings accounted for about one third of all incidents as our research identified 230 of such attacks, including explosions, grenade and rocket attacks. Such incidents typically resulted in a high number of casualties. A widely-reacted example is the 2008 Indian embassy bombing in Kabul, Afghanistan, where the more than 60 dead and 130 injured elicited condemnation and regret from 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 to take international action in such situations were also raised. This was the case in 2003, when a bombing of UK-related targets in Istanbul, including the consulate, left dozens dead and hundreds injured. The attacks were deemed as terrorist attacks in a Security Council resolution¹⁰⁶ and reinforced the determination of Iraq war allies UK and the U.S. ‘in confronting this menace, in attacking it wherever and whenever we can’, but their reaction omitted self-defence language.¹⁰⁷ Turkey launched an investigation and advocated for 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 U.S. bombing of the Chinese consulate in Belgrade during the NATO campaign in 1999 against Yugoslavia.¹⁰⁹ Although the U.S.

¹⁰⁴ E.g. Pakistan (SC, Provisional Verbatim Record, 5930th Meeting of the Security Council, UN Doc. S/PV.5930, 9 July 2008, at 9): ‘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.’, Russia (*Ibid.*, at 22): ‘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’; USA (*Ibid.*, at 16): ‘insurgents and terrorists have grown more effective and more aggressive, most recently in the cowardly and despicable attack on the Indian Embassy in Kabul’.

¹⁰⁵ The New York Times, *Suicide Car Blast Kills 41 in Afghan Capital*, 8 July 2008, available at: <https://www.nytimes.com/2008/07/08/world/asia/08afghanistan.html>

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

¹⁰⁷ Citation from British PM Blair, Irish Times, *Bush and Blair pledge unity against terror*, 21 November 2003, available at: <https://www.irishtimes.com/news/bush-and-blair-pledge-unity-against-terror-1.393865>, Le Monde, *Attentats: la Turquie souhaite une aide internationale pour l'enquête*, 23 November 2003, available at: https://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 U.S. strike of 14 April 1986 in Libya during which the premises of the French, Finnish, Iranian and Swiss missions took damage. *Provisional Verbatim Record of the 2674th Meeting*, *supra* note 76, at 12; The Guardian, *Foreigners Stay Calm*, 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 Secretary-General of the UN underscoring that the targeting of diplomatic missions is a ‘flagrant violation of international law’ and alluding to the international responsibility of ‘those in charge’, but not relying on self-defence. Note Verbale Dated 23

issued an apology and referred to a mistake in targeting, American missions in China were attacked by frenzied crowds. The Security Council was convoked on China's request, where it described the attack as a violation of its sovereignty and a 'flagrant flouting' of the provisions of the VCDR and reserved the right 'to take further action', while demanding a NATO investigation and declined the "absurd argument" that the asserted unintentional character would exempt the U.S. from its 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 by 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 for the latter is the 1953 attack on the Soviet embassy in Tel Aviv, resulting in a few injuries and significant material damage. Despite the Israeli apologies, the outraged Soviet Union accused the host state of connivance and broke off diplomatic relations afterwards.¹¹³

2. Assaults

Attackers entered missions in planned raids on more than 160 occasions. These attacks inflicted less injuries or damage. However, many of these were firmly renounced, 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 affected the most hostages and was the second longest with a duration of four months. 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

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; *Repertoire*, *supra* note 15, 19th Supplement (2014-2015), Section X.

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 (2000), at 4–5.

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

that it wants 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 embassy of North Korea in Madrid (Spain) was raided by suspected defectors of the regime, which received particular 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 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 the Kuwaiti-accredited diplomatic missions in 1990, dismissing their immunity as 'there are no diplomatic missions in a country that does not exist'.¹¹⁶ Sending states protested at 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 Iraq also spoke of 'an act of aggression', no self-defence reaction was issued, nor 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 VCCR.¹²⁰

¹¹⁴ The Guardian, *Hostages freed as troops storm Lima embassy - President's tough stance pays off*, 23 April 1997, at 1, 3, Irish Times, *Stand-off as rebels hold 490 hostages*, 19 December 1996, available at: <https://www.irishtimes.com/news/stand-off-as-rebels-hold-490-hostages-1.117316>, The New York Times, *For the Japanese, Hostages' Release Must Have Priority*, 16 December 1996, available at: <https://www.nytimes.com/1996/12/19/world/for-the-japanese-hostages-release-must-have-priority.html>

¹¹⁵ DW, *North Korea says Madrid embassy raid was 'terror attack'*, 31 March 2019, available at: <https://www.dw.com/en/north-korea-says-madrid-embassy-raid-was-terror-attack/a-48133182>; The Guardian, *'Grave terrorist attack': North Korea condemns raid on its Madrid embassy*, 31 March 2019, available at: <https://www.theguardian.com/world/2019/mar/31/grave-terrorist-attack-north-korea-condemns-raid-on-its-madrid-embassy>

¹¹⁶ The New York Times, *Confrontation In The Gulf; France Says Iraq Seized Four At Envoy's Home in Kuwait*, 15 September 1990, at 4.

¹¹⁷ *Ibid.*

¹¹⁸ Among others: Finland: 'complete 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: 'flagrant violation of the fundamental principles and norms governing relations among civilized States', Ethiopia: 'violation of the basic norms governing diplomatic and consular missions', SC, Provisional Verbatim Record. 2940th Meeting of the Security Council, UN Doc. S/PV.2940, 16 November 1990, at 13, 16, 26, 31.

¹¹⁹ *Ibid.*; Le Monde, *"C'est une agression, et nous y répondrons" a déclaré M. François Mitterrand en Tchécoslovaquie*; 16 September 1990, available at : https://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.

Another noteworthy incident concerns the actions of the Democratic Republic of the Congo (DRC) against the Ugandan embassy in Kinshasa during the Congo War. It has been the second, and as of today the last, time that the ICJ touched upon 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 a dire need for arguments for self-defence 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 negative *opinio juris* to the lack self-defence qualification on the part of Uganda, as the East Africa embassy bombings and the corresponding U.S. claim of self-defence took place only a few months before the incident.

3. Mob attacks

Unorganized attacks from 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 evoked severe condemnation. A series of protests emerged in February 1961 in front of Belgian missions, against Belgium's role in the Congo crisis. In Cairo, the capital of the then-United Arab Republic (UAR), protesters destroyed the interior and set the premises of the embassy on fire, after police forces were withdrawn 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, as it was not

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. Eritrea-Ethiopia Claims Commission, *Diplomatic Claim, Eritrea's Claim 20*, Partial Award 19 December 2005, available at <https://pcacases.com/web/sendAttach/759>, at 44, 46–47, IV.D.2.

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

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

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

complying with the enquiry on the Lockerbie incident. On the following day, Libyan students attacked in an apparently coordinated way the missions of those states that voted for the resolution in the Security Council, while Libyan police was standing by. The embassy of the council president, 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, a serious violation of diplomatic law and all diplomats were recalled.¹²⁵ 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 particular states.¹²⁶ The permanent representatives condemned the attack in a presidential statement and demanded Libya to respect its international obligations and pay full compensation.¹²⁷

In a more recent example, in 2011, hundreds of protesters in Tehran looted the British embassy, devastating its interior and holding diplomats hostages for several hours, while police guards were standing 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.¹²⁸ The UK ordered back its ambassador, so did Germany, France and The Netherlands and several delegates condemned the attack during the Security Council's meeting.¹²⁹ Iran apologized and vowed to respect its obligations under the VCDR.¹³⁰

¹²⁵ The New York Times, *Libyans Riot at Embassies; U.N. Protests*, 3 April 1992. at 8.

¹²⁶ Note Verbale from the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations addressed to the Secretary-General, 30 September 1992, In: Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives – Report of the Secretary-General, UN Doc. A/INF/48/4, at 17-18.

¹²⁷ *Ibid.*, 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.

¹²⁸ SC, Security Council Press Statement on Attacks against United Kingdom Diplomatic Premises in Iran, UN Doc. SC/10463, 29 November 2011.

¹²⁹ Gov.uk, *Foreign Secretary statement on storming of British Embassy in Iran*, 29 November 2011, available at: <https://www.gov.uk/government/news/foreign-secretary-statement-on-storming-of-british-embassy-in-iran>; Le Monde, *La France rappelle son ambassadeur en Iran pour "consultation"*, 30 November 2011, available at: https://www.lemonde.fr/asie-pacifique/article/2011/11/30/l-attaque-de-l-ambassade-britannique-a-teheran-condamnee_1610964_3216.html, Le Monde, *Brouille entre Londres et Téhéran après l'attaque de l'ambassade*, 29 November 2011, available at : https://www.lemonde.fr/proche-orient/article/2011/11/29/iran-des-manifestants-saccagent-l-ambassade-britannique-a-teheran_1610758_3218.html

¹³⁰ Report of the Islamic Republic of Iran (30 November 2011), extract, In: Consideration of Effective Measures to Enhance the Protection, Security and Safety of Diplomatic and Consular Missions and Representatives – Report of the Secretary-General, UN Doc. A/67/126, at 11.

4. Shootings

The last major, but comparatively smaller category of incidents comprises attacks, which were committed without an entry to the embassy, by shooting non-explosive projectiles against 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,¹³¹ 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.¹³² 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 principles of the Charter.¹³³

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.¹³⁴ 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.¹³⁵ 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 percent 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

¹³¹ 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.

¹³² 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 of the 1742nd Meeting*, *supra* note 61, at para. 193.

¹³³ *Verbatim Record of the 1742nd Meeting*, *supra* note 61, at 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 basis for the invocation of self-defence. The USSR also warned that such incidents *in the past* were regarded as *casus belli* and ensuring embassies' security served as a 'pretext' to attack other countries. *Verbatim Record of the 1741st Meeting*, *supra* note 132, at paras 21, 88, 94.

¹³⁴ 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>

¹³⁵ SC, Security Council Press Statement on Attack against Israeli Embassy in Athens, UN Doc. SC/11700, 13 December 2014.

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 the table below containing the relevant statistics of the state practice surveyed.

Table 1. Statistics on various reactions without reference to self-defence by states and non-state actors to attacks against embassies

relevant reaction	sending state	host state	other state	UN	other international organization	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
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
regrets	12	53	35	15	4	119
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
individual responses by actors ¹³⁶	251	181	111	33	14	590

This thorough review of state practice has showcased that states have consistently and expressly regarded the overwhelming majority of the vast number 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 claimed, solidarity and understanding were widely expressed, yet legal qualification was scarce and utterly 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 U.S. raised self-defence in cases of an ongoing hostage situation or presumed recurring attacks in connection with allegedly state-backed, organized perpetrators. It is also noteworthy, however, that deterrence, pre-emption and reliance on the protection of nationals doctrine were also featured in these justifications further blurring the contours of the exact cause of action.

¹³⁶ This row sums up the number of replies made by each actor.

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 as to encompass lawful use of force measures to protect missions against forceful attacks. Consequently, if the Court were to be asked to decide about the lawfulness of a military response measure given to an attack similar to the *Tehran Hostages* case, the law as it stands today does not support the legality of such a measure on the ground of self-defence.

5. Conclusions and Perspectives

To summarize the main doctrinal findings of this state practice-based research, it is to be reiterated that from a theoretical point of view, missions do not form part of the territory of the sending state. Several authors have considered that missions should be treated similarly to warships or troops abroad, as these are all external positions of the state. Others have voiced dissent, asserting 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, though a close rereading 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 concerning more than 730 attacks has shown that these incidents were treated within the regime of diplomatic and consular law or criminal law, apart from U.S. claims on five occasions.¹³⁷ These incidents were met with considerable sympathy, but, 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 diverging and scarce 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 show that they had recourse to a wide range

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, at para. 247.

of measures other than self-defence.¹³⁸ These possibilities, however, lie in the regime of criminal law or diplomatic and consular law together with related rules on state responsibility, and as an *ultima ratio*, with the use of force authorized by the Security Council.¹³⁹ It should also be underlined that the possible measures at the states' disposal go beyond the passive-preventive options of strengthening mission defences or breaking 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 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 it is the common case with the U.S. 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, at para. 32; Kreß, *supra* note 29, 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. Art. 3 e, GA Res. 3314, *supra* note 23), however, the '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 29, 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, and not that of the mission would serve as legal basis for claiming self-defence. cf. Art. 3 d, GA Res. 3314, *supra* note 23.

¹³⁹ cf. Dörr and Randelzhofer, *supra* note 4, at 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 139, at 139).

¹⁴¹ Arts 2(1)b, 7, 13, Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, 1973, 1035 UNTS 167.

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.' *Armed Activities*, *supra* note 122, at para. 148.