

INTERNATIONAL LAW AND THE USE OF FORCE

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I INTRODUCTION

The use of military force is only lawful if and to the extent that it comes under an accepted exception to the general rule of prohibition outlined in the Charter of the United Nations ('UN Charter').¹ This paper examines whether, in the absence of any explicit authorisation from the United Nations Security Council ('UNSC'), international law allows a state to use military force to compel another into meeting its obligations. In particular, it considers the extension of the traditional, customary law doctrine of self-defence to include pre-emptive and anticipatory attacks. It will be argued that although future extension of the doctrine is inevitable, any broadening of the relevant international law principles must be approached prudently and with the greatest respect for the traditional strict approach.

This paper will firstly explain the international law principles which are relevant to the use of force. Secondly, it will consider the legality of the coalition's recent military action in Iraq. Thirdly, previous cases in which the right to anticipatory self-defence has been relied upon will be examined. Fourthly, the opinions of international law commentators on these issues will be critically analysed. The final section of this paper will consider the possibilities for development of this branch of international law with particular emphasis on codification of relevant principles.

II RELEVANT INTERNATIONAL LAW PRINCIPLES

A *Use of Force*

The prohibition of the use of force is a fundamental principle of customary international law and is enshrined in the UN Charter.² Article 2(4) of the UN Charter provides that '[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations'.

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¹ Entered into force 24 October 1945.

² M Bothe, 'Terrorism and the Legality of Pre-emptive Force' (2003) 14 *European Journal of International Law* 228.

This article is considered to be a *jus cogens* principle, or peremptory norm, of international law in that no state has the right to depart from the rule prohibiting the use of force.³ Therefore, any attempted modification of the norm, such as that which has arguably been advocated by the United States ('US') through its positions on pre-emptive self-defence, must satisfy the elements of state practice⁴ and *opinio juris*⁵ before it can be applied to international customary law. These requirements impose stringent tests⁶ upon the custom in order for it to be categorised as a 'peremptory norm' of international law.⁷ In this context, the only two situations in which force can be used against states are: (1) under a UNSC resolution under Article 42; or (2) in self-defence under Article 51.

B *Self-Defence under Article 51*

Article 51 of the UN Charter states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The right acknowledged under this article is traditionally referred to as an 'inherent right' of self-defence. However, this right is clearly not without limits. To be a valid act under international customary law, an action must generally conform with the classic *Caroline* formula as set down by the US in 1837.⁸ This formula requires a response based on self-defence grounds to be necessary, proportionate and immediate. At the time of formulation, the US asserted that a country claiming such a right must '[s]how a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation ... [the act of self-defence must also involve] nothing unreasonable or excessive'.⁹

³ Article 53 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), provides for this rule against derogation from peremptory norms of general international law.

⁴ The three requirements for a custom to be considered state practice are consistency, duration and generality. Although it is unclear how long a practice must continue, there must be a 'constant and uniform usage': *Asylum* case [1950] ICJ Reports 266.

⁵ That is, a practice will not become customary law until it is performed as a matter of obligation.

⁶ However, it is noted that in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, the court said, in terms of state practice, that the practice had to be consistent but need not be in absolutely rigorous conformity. Accordingly, variations of a custom may be permitted. Yet it cannot plausibly be argued that the use of pre-emptive force is a mere 'variation' of the prohibition of the use of force set out in Article 2(4).

⁷ A Martyn, 'Disarming Iraq Under International Law' (2003) *Department of the Parliamentary Library Current Issues Brief*, No 16, 7.

⁸ *The Caroline Case* 29 BFSP 1137-1138; 30 BFSP 195-196. [AQ – Year]

⁹ A Martyn, 'The Right of Self-Defence under International Law – the Response to the Terrorist Attacks of 11 September' (2002) *Department of the Parliamentary Library Current Issues Brief*, No 8, 10.

It is uncontroversial that lawful self-defence requires the existence of an armed attack.¹⁰ The main point of controversy is whether the phrase ‘if an armed attack occurs’ rules out self-defence before an attack occurs, that is, does international law, as embodied in Article 51 of the UN Charter, confer an anticipatory right to self-defence on states?¹¹ The US position on this issue was set out in September 2002 by President Bush in the National Security Strategy of the United States of America as follows:

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of pre-emption on the existence of an imminent threat – most often a visible mobilization of armies, navies, and air forces preparing to attack.

We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror, and potentially, the use of weapons of mass destruction – weapons that can be easily concealed, delivered covertly, and used without warning ... To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively.¹²

This quote clearly shows that the US was prepared to act pre-emptively and justified its intention by reference to international law principles. From this quote, it can be concluded that the US has interpreted Article 51 to permit the exercise of anticipatory right to self-defence.

In contrast, Professor Brownlie considers that ‘the ordinary meaning of the phrase precludes action which is preventative in character’.¹³ Indeed, a literal reading of Article 51 suggests that self-defence is only lawful following an attack upon a state. However, if this interpretation is adopted, any right to self-defence is virtually rendered nugatory if a state must let itself be harmed, perhaps even fatally, before it can respond with force.¹⁴ Such considerations make the arguments supporting a right to anticipatory self-defence both plausible and convincing.

C *Nicaragua v United States*

However, the existence of a right to anticipatory self-defence in international law has unfortunately not been considered in any depth by the International Court of Justice (‘ICJ’).¹⁵ In *Nicaragua v United States*,¹⁶ although the ICJ did not dismiss the possibility of some limited form of anticipatory self-defence, it refrained from expressing a view on the lawfulness of a response to an imminent threat posed by an

¹⁰ Bothe, above n 2, 228.

¹¹ Martyn, above n 7, 7.

¹² See *The National Security Strategy of the United States* (2002) <<http://www.whitehouse.gov/nsc/nss.pdf>> at 15 November 2004.

¹³ I Brownlie, *International Law and the Use of Force by States* (Clarendon Press, 1st ed, 1963) 275.

¹⁴ Martyn, above n 7, 8.

¹⁵ Ibid.

¹⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14. See also the *Oil Platforms Case (Islamic Republic of Iran v United States of America)* ICJ, No 90 of 2003; judgment delivered 6 November 2003, which substantially reaffirmed the *Nicaragua* criteria on the use of force in self defence.

armed attack, and consequently left open the question of whether there is a right of anticipatory self-defence.¹⁷

Furthermore, it is generally accepted that the *Nicaragua* case confirms that in customary international law, action taken as self-defence remains subject to the *Caroline* requirements of necessity and proportionality.¹⁸ Accordingly, when the ICJ is next faced with a case regarding anticipatory self-defence, it is hoped that the court will reconsider the approach taken in *Nicaragua* and provide an answer to the question of whether there is a right of anticipatory self-defence. Until then, the reasons for judgment of the ICJ in *Nicaragua* are of minimal authoritative assistance to an analysis of this issue.

D Interpretation of Security Council Resolutions

Moreover, there has regrettably been very little academic consideration of the principles relevant to the interpretation of UNSC resolutions.¹⁹ The following passage of the ICJ majority in *Namibia (Advisory Opinion)* is one of the few authoritative guides:

The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.²⁰

This passage advocates an approach similar to that provided for by Article 31(1) of the *Vienna Convention on the Law of Treaties* which provides that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.²¹ Similarly, in justifying the use of force against Iraq, reliance was placed on rules and principles drawn from the law of treaties when attempting to interpret UNSC resolutions.²² However, Cassimatis suggests that '[t]his approach raises difficulties related to the unilateral nature of UNSC resolutions when compared with the consensual nature of treaties'.²³ This proposition is supported by the following observations of Thirlway:

It is unclear to what extent ... the rules as to the interpretation of treaties may be applied, by extension, to the interpretation of the resolutions ... of international organisations. In one sense, a resolution represents, like a treaty ... a coming-together of ... aspirations of

¹⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, [194].

¹⁸ D J Harris, *Cases and Materials on International Law* (Sweet and Maxwell, 5th ed, 1998) 896.

¹⁹ A Cassimatis, 'Confronting Iraq – Does International Law Matter?' (Speech delivered at the International Law Association Twilight Seminar, Brisbane, 15 April 2003) 6.

²⁰ [1971] ICJ Rep 15, 53, as cited in M Byers, 'The Shifting Foundations of International Law: A Decade of Forceful Measures Against Iraq' (2002) 13 *European Journal of International Law* 23.

²¹ [1986] ICJ Rep 14, 23.

²² Cassimatis, above n 19, 7.

²³ *Ibid.*

the States whose representatives have negotiated its drafting. In another sense, it is a unilateral act ... or a statement of its collective view of the situation.²⁴

It is therefore arguable whether UNSC resolutions should be interpreted in accordance with those principles of interpretation traditionally reserved for treaties. Consequently, any formulations given to the resolutions relevant to the 2003 military action in Iraq based on such principles are fundamentally flawed.

III THE LEGALITY OF THE MILITARY ACTION IN IRAQ

The 2003 coalition military action in Iraq is the most recent example of the use of force based on self-defence grounds. Although the coalition primarily justified its military action by relying on the combined effect of UNSC resolutions 678, 687 and 1441, the Australian and US governments also relied on the right to act pre-emptively in self-defence.²⁵ Resolutions 678, 687 and 1441 were adopted under Chapter VII of the UN Charter and their intended effect is summarised below.

A *Effect of Resolutions*

1 *Resolution 678*²⁶

This resolution, adopted 29 November 1990, authorised the use of force against Iraq to eject it from Kuwait and to restore peace and security in the area. It authorised the use, by United Nations ('UN') members, of 'all necessary means' for the specific purpose of upholding Resolution 660 and all subsequent relevant resolutions.²⁷ The broad authorisation granted by the phrase 'all necessary means' included military action.

2 *Resolution 687*²⁸

This resolution, adopted 3 April 1991, set out ceasefire conditions and imposed continuing obligations on Iraq to eliminate its weapons of mass destruction ('WMD') in order to restore international peace and security. It suspended but did not terminate the authority to use force under Resolution 678. The wording of this resolution empowered the UNSC to decide '[s]uch further steps as may be required for the implementation of the present resolution and to secure peace and security in the area'.

²⁴ H Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989' (1996) 67 *British Yearbook of International Law* 1, 29.

²⁵ See for example, L Oakes, Interview with John Howard, Prime Minister of Australia (Nine Network, *Sunday*, 1 December 2002 <http://sunday.ninemsn.com.au/sunday/political_transcripts/article_1192.asp?s=1> at 12 September 2003.

²⁶ *Resolution on Iraq-Kuwait*, SC Res 678, UN SCOR, 2963rd mtg, UN Doc S/Res/678/1991.

²⁷ This resolution, passed on 2 August 1990, demanded the immediate withdrawal of Iraqi forces from Kuwait and the subsequent resolutions all restated this demand.

²⁸ *Resolution on Iraq-Kuwait*, SC Res 687, UN SCOR, 2981st mtg, UN Doc S/Res/687/1992.

3 *Resolution 1441*²⁹

This resolution, adopted 8 November 2002, was a further and more detailed response to Iraq's failure to comply with the obligation to destroy all WMD as required by Resolution 687. This resolution left open the issue of what would occur if Iraq failed to comply with its terms, implying that the UNSC would need to consider the matter when further evidence appeared. The resolution gave Iraq a 'final opportunity to comply with its disarmament obligations' and warned of 'serious consequences' if it did not.

B *Arguments Advanced by the Coalition*

The Australian government has officially relied on the revival of authorisation under Resolution 678, as a result of the failure of Iraq to comply with all the provisions of the ceasefire, to justify the use of force. Prime Minister Howard also suggested that Australia was prepared to act pre-emptively against terrorist targets³⁰ and that attacks could be justified by humanitarian arguments.³¹ The United Kingdom ('UK') government also argued that Iraq's material breaches of Resolution 687 revived the use of force under Resolution 678.³² Although the UK asserted a right of humanitarian intervention to justify its use of force, it did not rely on any alleged right to act pre-emptively in self-defence.

The US has relied on both revival of the use of force under Resolution 678 and the right to act pre-emptively in self-defence. This position was made clear by the US Ambassador to the UN, John Negroponte, in a statement to the UNSC after the vote on Resolution 1441, where he stated that:

If the Security Council fails to act decisively in the event of a further Iraqi violation, this resolution does not constrain any member state from acting to defend itself against the threat posed by Iraq or to enforce relevant UNSC resolutions and protect world peace and security.³³

This statement implies that even without express authorisation for the use of force, the US was prepared to exercise military force either in self-defence or to enforce relevant UNSC resolutions, albeit unilaterally.³⁴ Importantly, the question of whether the principle of unilateral enforcement of UNSC resolutions is sustainable in international law, in the opinion of the writer, should not be answered in the affirmative. Accordingly, the argument that the proposed doctrine of pre-emptive or anticipatory

²⁹ *Resolution on the Situation between Iraq and Kuwait*, SC Res 678, UN SCOR, 4644th mtg, UN Doc S/Res/1441/2002.

³⁰ Oakes, above n 25.

³¹ See for example, J Howard, 'Address to the National Press Club' (Speech delivered at Great Hall, Parliament House, Canberra, 13 March 2003) <<http://www.pm.gov.au/news/speeches/speech74.html>> at 20 September 2003.

³² Lord Goldsmith, 'Legal Basis for the Use of Force Against Iraq' (Statement given 17 March 2003) at <<http://www.number-10.gov.uk/print/page3287.asp>> at 16 September 2003.

³³ Quoted in an Opinion by R Singh and C Kilroy, *In the Matter of the Potential Use of Armed Force by the UK Against Iraq and in the Matter of Reliance for that Use of Force on United Nations Security Council Resolution 1441* (2002) MatrixLaw <<http://www.matrixlaw.co.uk/headline/CND%20draft%20res%2015%20Nov%202002.pdf>> at 27 September 2003.

³⁴ Unilateral in the sense that the method of enforcement did not have UNSC authorisation.

self-defence is sufficiently consistent with international law to justify military action by the US, UK and Australia, cannot be sustained.³⁵

Importantly, Resolution 1441 did not expressly authorise the use of force against Iraq even if it was considered, by the UNSC or any state, to have committed a material breach, that is, it does not confer an ‘automatic trigger’ on member states.³⁶ However, the statement by Ambassador Negroponte quoted above, makes clear that the US considered unilateral military action an option even in the absence of UNSC authorisation.

C Legality of the Action

It could potentially be argued that had Iraq re-invaded Kuwait, the authorisation for UN members to use force under Resolution 678 might have been revived, although a more cautious approach would be that because the resolution was tied to a particular event in history, a new resolution would have been needed.³⁷ However, in the absence of such an invasion, it is unlikely that Resolution 678 operated as standing authorisation for the use of force against Iraq.

Furthermore, the obligations imposed on Iraq under Resolution 687 do not appear to be linked to authorisation of the use of force under Resolution 678 in that the former resolution gives the UNSC the power to decide ‘[s]uch further steps as may be required for the implementation of the present resolution and to secure peace and security in the area’. This resolution therefore, makes no provision for the consequences of failure to comply with the resolution. Rather, it implies that further UNSC consideration will be exercised if and when required under international law. Moreover, it is noteworthy that neither Resolution 687 nor 1441 contain the phrase ‘all necessary means’ as Resolution 678 does. This observation alone provides considerable support for the proposition that neither Resolution 687 nor 1441 authorised the use of force by the coalition against Iraq.

The proposition that Iraq’s failure to comply with the ceasefire agreement allowed member states to use force in response to those violations without additional authorisation is arguably unfounded. The ceasefire was between the UN and Iraq and therefore, the claim that member states can respond unilaterally is an unsustainable view of international law.³⁸ Furthermore, it must be appreciated that although there have been 17 UNSC resolutions dealing with Iraq since 1990, the number of resolutions does not change the plain wording of the text adopted by the UNSC, nor does the cumulation of resolutions justify the use of force.³⁹

The overwhelming view of independent commentators is that the military action was illegal based upon the interpretation of UNSC Resolutions. Furthermore, the majority of

³⁵ Martyn, above n 7, 2.

³⁶ Ibid.

³⁷ A Byrnes and H Charlesworth, *The Illegality of the War against Iraq* (2003) Australian National University
<<http://law.anu.edu.au/CIPL/Media/Iraq%20legality%20opinion%20revised%2021%20March%202003.pdf>> at 3 October 2003, 3.

³⁸ Ibid 4.

³⁹ Ibid 5.

published independent legal analysis has rejected the claim that existing resolutions justify the use of force or that there is any other basis under international law to justify the use of force against Iraq.⁴⁰ Many also argue that the coalition's legal advisers distorted the words of the resolutions in their claim to be acting on behalf of the international community. This paper will now discuss the principal arguments against and in support of the legality of the military action in Iraq, specifically in the context of opinions of leading commentators on these issues.

1 *A Distorted Reading of the Resolutions*

Byrnes and Charlesworth propose that the government's legal justification to go to war was fatally flawed because the interpretation placed on the relevant UNSC resolutions depends upon a distorted reading of their language and undermines the context in which they were adopted.⁴¹ They further argue that the government's arguments neglect the rationale of the role of the UNSC under the UN Charter in dealing with threats to international peace and security.⁴² To support their arguments, Byrnes and Charlesworth rely on a quote of Christine Gray, a leading international law commentator, in which she states:

It is no longer a case of interpreting euphemisms such as 'all necessary means' to allow the use of force when it is clear ... that force is envisaged: the USA, the UK and others have gone far beyond this to distort the words of resolutions ... in order to claim to be acting on behalf of the international community.⁴³

The views of these commentators are primarily based upon a literal reading of the relevant UNSC resolutions. A careful and restricted interpretation of the resolutions is entirely warranted when the exercise of military force is in contemplation. As discussed earlier in this paper, there has been very little academic consideration of the principles relevant to such interpretation and therefore, the coalition relied on rules and principles relevant to treaty interpretation to afford the resolutions a formulation in accordance with its arguably pre-determined intentions.

The coalition's argument that the authorisation for the use of force under Resolution 678 was revived or continued completely ignores the plain wording of this resolution which is explicitly tied to an historical event. Furthermore, Byrnes' and Charlesworth's argument that such justification is entirely inconsistent with the terms of this resolution and the whole structure of Chapter VII of the UN Charter, is cogently framed. Ultimately, the legality of the military action turns on the interpretation of the UNSC resolutions, and despite the coalition's attempts, it is difficult to interpret them in a way that supports the military action.

2 *Dedication to the International Rule of Law*

Cassimatis argues that the issue which has caused international lawyers the greatest concern in this debate has been the 'so-called doctrine of pre-emption', and the apparent

⁴⁰ Ibid.

⁴¹ Ibid 2.

⁴² Ibid 1.

⁴³ C Gray, 'From Unity to Polarization: International Law and the Use of Force against Iraq' (2002) 13 *European Journal of International Law* 9, as cited in Byrnes and Charlesworth, above n 37, 5.

absence of any effective means to discipline its application.⁴⁴ He questions the reliance upon anticipatory self-defence to justify the military action against Iraq particularly because an attack by Iraq did not seem ‘immediately threatened’; the military action was not an ‘urgent necessity’; and nor was there ‘no practicable alternative’.⁴⁵

Cassimatis also argues that no state that supported the military action against Iraq, except for Australia and Israel, based that support on the doctrine of pre-emption as formulated by the US in its National Security Strategy.⁴⁶ Consequently, the doctrine of pre-emption has not been established as a rule of international law due to the traditional requirements for the creation of such principles.⁴⁷ Furthermore, he deplores the formation of a ‘[s]ui generis set of rules for the United States’⁴⁸ and considers it pertinent to advocate a commitment to the rule of law in the face of such a ‘startling proposition’.⁴⁹

Cassimatis’ dedication to the international rule of law affords his argument significant credibility. His emphasis on this fundamental principle throughout his argument successfully highlights the fact that the coalition governments must accept the responsibility of accounting for their actions to the international community because ultimately that is what the international rule of law requires.

3 *A Strong Case for Pre-emptive Action*

Sofaer considers that a strong case can be made for the necessity of pre-emptive action. He argues that the narrow standard which limits responses in self-defence to attacks which are imminent and unavoidable by any other means, can only apply when a potential victim state is able to rely on the police powers of the state from which the attack is anticipated.⁵⁰ He argues that a more flexible standard for determining necessity is appropriate for situations in which the state from which attacks are anticipated is either unwilling or unable to prevent the attacks, or may even be responsible for them.⁵¹

Specifically, Sofaer considers that where WMD are likely to be used by a state, such as was alleged by the coalition against Iraq, and all reasonable means short of force have been exhausted, it is reasonable to expect target states to consider pre-emption.⁵² This proposition clearly reflects the ideas of Dinstein discussed in the next section of this paper. Further, he suggests that pre-emption is a necessary recourse in such circumstances, and therefore, should be properly regarded as part of the inherent right of self-defence.⁵³

Sofaer's argument that a more flexible standard for determining necessity should be applied to those situations in which the traditional approach is impractical has merit. As

⁴⁴ Cassimatis, above n 19, 1.

⁴⁵ Ibid 13.

⁴⁶ Ibid 13.

⁴⁷ Ibid 13.

⁴⁸ [1971] ICJ Rep 15, 38 as cited in Cassimatis, above n 19, 14.

⁴⁹ Cassimatis, above n 19, 14.

⁵⁰ A D Sofaer, ‘On the Necessity of Pre-emption’ (2003) 14 *European Journal of International Law* 209.

⁵¹ Ibid.

⁵² Ibid 226.

⁵³ Ibid 226.

outlined earlier in this paper, the right granted under Article 51 is virtually rendered nugatory in certain circumstances if it does not extend to anticipatory actions. However, the doctrine of pre-emption, in its current form, should not be regarded as part of the inherent right of self-defence primarily because such recognition may result in abuse of the doctrine. In applying and extending these principles, it is imperative to protect and uphold the basic human rights of the citizens of all states involved, and any extension must be tightly controlled to prevent violations of these.

4 *A Right of Interceptive Self-Defence*

As discussed earlier in this paper, there has been no general acceptance of a pre-emptive self-defence doctrine within the UN beyond possibly a right of ‘interceptive’ self-defence. Dinstein proposes that this right allows a state to defend an action of sufficient magnitude that clearly has a hostile intent before the aggressor’s forces actually execute the attack.⁵⁴ Therefore, interceptive, unlike anticipatory self-defence, is justified when the aggressor state has committed itself to an armed attack in an ‘ostensibly irrevocable way’.⁵⁵ Whereas a preventative strike anticipates an armed attack which is merely foreseeable, an interceptive strike counters an armed attack which is imminent and practically unavoidable.⁵⁶ The circumstances required to invoke this right clearly reflect the prerequisites of the traditional *Caroline* formula.

It is Dinstein’s opinion that interceptive, as distinct from anticipatory, self-defence is legitimate even under Article 51 of the UN Charter. The recognition of interceptive strikes as part of the self-defence doctrine is a prudent development of the law relating to the use of force. Furthermore, the arguments advanced by Dinstein to support this recognition are cogently and sensibly framed. However, there are practical issues surrounding the exercise of this right in terms of determining the point at which to strike an aggressor state and the requirement of prior knowledge of the intended attack. Regrettably, forewarning of attacks, particularly acts of terrorism, is unlikely to be provided to a victim state to allow it sufficient time to successfully implement an interceptive strike.

IV THE RIGHT TO ANTICIPATORY SELF-DEFENCE

A *Past Exercise of the Right*

There has been no general acceptance of a pre-emptive self-defence doctrine within the UN beyond a possible right of ‘interceptive’ self defence as proposed by Dinstein.⁵⁷ Interceptive self-defence confers a right on states to defend themselves against actions of another state, of sufficient magnitude which clearly have a hostile intent, before the aggressor’s forces actually execute the attack.⁵⁸ However, there have been very few cases where a state has attempted to legally justify the use of force primarily on the

⁵⁴ Y Dinstein, *War, Aggression and Self-Defence* (Grotius, 1st ed, 1988) 180.

⁵⁵ Ibid 172.

⁵⁶ Ibid 180.

⁵⁷ Ibid.

⁵⁸ Y Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 3rd ed, 2001) 172-173.

grounds of pre-emptive self-defence.⁵⁹ Although not within Dinstein's proposed category, states have still attempted to justify such actions under Article 51.

The most recognised pre-emptive attack was the Israeli airstrike on a nuclear reactor in Iraq in 1981. In June of that year, Israeli airforce jets flew across Jordan and Saudi Arabia to destroy the French built 'Osirak' nuclear facilities in Iraq, which had been identified by Israeli intelligence as nearing a nuclear weapon capable stage.⁶⁰ The pre-emptive strike was defended by Israel as a legitimate response in self-defence under Article 51 of the UN Charter. During this incident, Israel claimed that '[in] removing this terrible nuclear threat to its existence, [it] was only exercising its legitimate right of self-defence within the meaning of this term in international law and as preserved also under the United Nations Charter'.⁶¹

Despite this justification, the attack was unanimously condemned by the UNSC as 'a clear violation of the Charter of the United Nations',⁶² and significantly, the then UK Prime Minister, Margaret Thatcher, characterised the airstrike 'as a grave breach of international law'.⁶³ Similarly, the claim of self-defence was firmly rejected by other states due to the absence of necessity and proportionality in Israel's attack. It is apt to consider at this point, that the authors of *Oppenheim's International Law* consider the requirements of necessity and proportionality to be '[e]ven more pressing in relation to anticipatory self-defence than they are in other circumstances'.⁶⁴

Consequently, it has been argued that just as the requirement of an 'imminent threat' was a serious obstacle for Israel in 1981, the coalition now faces a similar hurdle in justifying its use of force against Iraq in 2003.⁶⁵ As Byers suggests, any right to engage in anticipatory acts of self-defence remained tightly constrained following the Osirak incident.⁶⁶

B *Future Exercise of the Right*

As Cassimatis has outlined, the absence of support for the doctrine of pre-emption by most states means that the traditional requirements for its establishment as a rule of international law have not been satisfied.⁶⁷ Furthermore, vagueness and the possibility of abuse of any broader definition of the right of anticipatory self-defence suggest that maintenance of the traditional strict approach is desirable.⁶⁸ Similarly, to face perceived threats in the future, recourse to the UNSC may indeed be preferable to unilateral use of force based on a doctrine of pre-emptive strikes.⁶⁹

⁵⁹ Byrnes and Charlesworth, above n 37, 8.

⁶⁰ G Robertson, 'After Iraq: A Military Solution in North Korea' (2002-03) *Department of the Parliamentary Library Research Note*, No 29.

⁶¹ Discussion of UNSC Resolution 487 of 1981 as cited in Martyn, above n 7, 8.

⁶² *Resolution on Lebanon*, SC Res 481 of 1981, UN SCOR, 2266th mtg, UN Doc S/Res/14414/1981.

⁶³ Martyn, above n 7, 8.

⁶⁴ Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law* (Longman, 9th ed, 1992) 421.

⁶⁵ Cassimatis, above n 19, 13.

⁶⁶ M Byers, 'Terrorism, The Use of Force and International Law After 11 September' (2002) 51 *International and Comparative Law Quarterly* 406.

⁶⁷ Cassimatis, above n 19, 13.

⁶⁸ Bothe, above n 2, 1.

⁶⁹ *Ibid.*

However, it has been suggested that the right of anticipatory self-defence may be exercised in the near future to discipline North Korea, particularly in regards to its nuclear facilities at Yongbyon.⁷⁰ Parallels have specifically been drawn between North Korea's possession of nuclear facilities and the 1981 Osirak incident discussed above. However, Robertson suggests that not even the elements essential for the attempted justification of the Osirak strike on anticipatory self-defence grounds exist in the case of the Yongbyon facilities.⁷¹

Specifically, he argues that a successful military strike on Yongbyon may not destroy all nuclear facilities due to the possible existence of unknown storage locations; that North Korea restarted its reactor in February 2003, thereby increasing the hazardous effect on the surrounding region in the event of a strike; and that the country has repeatedly stated its intent of massive retaliation in the event of a pre-emptive strike.⁷² These factors clearly indicate that a strike by the US based on anticipatory self-defence grounds may only serve to exacerbate the volatile situation which exists in North Korea.

V DEVELOPMENT OF THE LAW AND POLICY CONSIDERATIONS

A *Codification of Applicable Principles*

The uncertainties highlighted by this paper suggest that there is a real need for codification of the principles applicable to the doctrine of self-defence. By codifying the relevant principles, the International Law Commission would assist in removing the confusion currently associated with the interpretation of UNSC Resolutions, case law and provisions of international treaties. The above analysis makes it clear that conflicting interpretations of these instruments are inevitable if they are to remain in their current form. The following paragraph attempts to codify some general principles relating to the use of force:

1. The use of force in self-defence is legitimate when a state is the victim of an armed attack which –
 - a. has occurred; or
 - b. has been committed to, but has not yet been launched.
2. A victim state must immediately notify the UN of its intent to use force to enable the UNSC to make all reasonable attempts to restore peace before, during and following the attack.
3. Anticipatory self-defence continues to be unlawful. In the event that an attack is anticipated, the potential victim state must immediately report to the UN and make the likely attack the subject of public statements.
4. In the event that the attack is perceived to be launched by “terrorists” acting on behalf of a state, the “responsible” state has an international obligation to:
 - a. take all reasonable steps to prevent the attack; or
 - b. allow the UN to obstruct the attack; or
 - c. grant permission to the potential victim state to enter the country to prevent it.

⁷⁰ Robertson, above n 60, 1.

⁷¹ Ibid 2.

⁷² Ibid 2.

B *Guidelines for Interpretation*

As an alternative, or in addition, to codification, the UNSC could formulate a set of guidelines for the interpretation of its resolutions pertaining to self-defence and the use of force. The following list provides examples of general principles which could be adopted by the UNSC:⁷³

- The terms of UNSC resolutions shall be interpreted in accordance with their ordinary, plain meaning;
- Where the plain meaning is considered to be unclear or ambiguous, the interpreting member state is prohibited from distorting or altering the terms in order to serve its needs or to authorise its intended actions;
- Where a member state considers terms used in an UNSC resolution produce uncertainty, recourse shall be had to the UNSC in order to raise these concerns and to ascertain the correct interpretation; and
- The UNSC shall have the discretion to discipline a member state which it considers has engaged in unauthorised application of an UNSC resolution.

VI CONCLUSION

The difficulty with advocating a wide legal doctrine of self-defence to incorporate a right to anticipatory attacks is that it may become so elastic that the prohibition against the use of force enshrined in Article 2(4) of the UN Charter would be seriously compromised.⁷⁴ It has even been radically suggested that such a change could result in the abolition of the prohibition of the use of force altogether.⁷⁵ Sir Arthur Watts explained the potential for broadening this doctrine with considerable foresight when he stated that:

Self-defence probably has to be an inherently relative concept – relative to the times and circumstances in which it is involved ... All the same, there are limits to the burden which the concept ... can safely, and legally, be called upon to bear ... To stretch the concept to such an extent that it departs from the ordinary meaning of the term ... serves not only to undermine this particular branch of the law, but also to bring the law in general into disrepute.⁷⁶

The recent terrorist attacks and associated strikes have not only encouraged an extension of the self-defence doctrine, but have ensured a significant loosening of the legal constraints on the use of force.⁷⁷ However, the doctrine of pre-emptive strikes formulated by the US proposes to adapt the principles of immediacy and necessity, as

⁷³ It is acknowledged that presently, the UNSC does not provide ‘interpretations’ of its Resolutions and also that it has no capacity to ‘discipline’ member states. However, it is the writer’s opinion that such discretionary power is necessary in order to avoid any further interpretation of Resolutions by rogue states to condone acts that are otherwise unacceptable, and potentially in breach of customary international law principles.

⁷⁴ Martyn, above n 7, 10.

⁷⁵ Bothe, above n 2, 227.

⁷⁶ Sir Arthur Watts, ‘The Importance of International Law’, in M Byers (ed), *The Role of Law in International Politics*, (Oxford University Press, 1st ed, 2000) 11, as cited in Byers, above n 66, 414.

⁷⁷ Byers, above n 66, 414.

outlined by the classic *Caroline* formula, to new perceived threats in a way that may constitute an unacceptable expansion of the right of anticipatory self-defence.⁷⁸

This paper highlights the fact that the uncertainty surrounding extension of these principles emphasises the important role of the traditional strict approach to self-defence in international law. Notwithstanding these challenges and limitations, the careful and controlled extension of the doctrine of self-defence in the future is inevitable given the international political landscape of the 21st century.

⁷⁸ Bothe, above n 2, 227.