

## **Anticipatory Self-Defence: A Discussion of the International Law**

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*The law must be related to the changing standards of life, not yielding to every shifting impulse of the popular will but having regard to fundamental assessments of human values and the purposes of society.<sup>1</sup>*

### **I. Introduction**

As Viscount Simonds noted the law must be relevant and responsive to change, yet it is essential that the law does not yield to knee jerk urges. This thought is particularly relevant to the current shifting impulses that have resulted from the threats of global terrorism, which are currently placing great pressures on the international law governing the state use of force. This article will examine the legality of the doctrine of anticipatory self-defence. This examination requires the discussion of the different and conflicting debates on the legality of the doctrine. The article will demonstrate that the constituent elements of arguments on both sides of the debate have their merits, and as such it is not possible to state with any conviction or certainty that the arguments of either school of thought are conclusive.

Central also to this discussion is the outline of the analogy between the development of the doctrine of humanitarian intervention and the doctrine of anticipatory self-defence. This analogy will assist in delineating the future legal development of anticipatory self-defence. The legal relevance of Article 51 of the UN Charter, custom, emerging state practice, *jus cogens*, emerging threat / Bush doctrine, converge to cloud the understanding of the legality of anticipatory self-defence.

### **II. The Legality of Anticipatory Self-Defence under International Law**

Broadly speaking it is possible to divide academic opinion into two schools of thought on the legal status of Article 51. The first school of thought are of the opinion that an armed attack must have occurred before a state can lawfully act in self-defence.<sup>2</sup> Several prominent academics and jurists have contended that Article 51 and or customary international law permit the application of the doctrine of anticipatory self-defence.<sup>3</sup>

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<sup>1</sup> *per* Viscount Simonds in *Shaw v DPP* [1962] AC 220 at 267-268.

<sup>2</sup> See for example: See for example: Brownlie *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963), Dinstein, *War, Aggression and Self-Defense* 168 (3d ed. 2001).

<sup>3</sup> Importantly even if the customary rule had survived, it could be argued that this customary rule had been displaced by a contrary customary rule that prohibits the use of force in anticipation of an armed attack.

The legal framework governing the use of force by states is a complicated blend of treaty law and custom. The difficulties surrounding anticipatory self-defence are caused, in part, by the distinction between the relevant treaty law and custom. Articles 2(4)<sup>4</sup> and 51<sup>5</sup> form the foundations of the Charter regime governing the use of force. This regime represents a manifest departure from that of the League of Nations, and is definitely a product of the international climate after the Second World War. The resort to armed force is prohibited under international law, except where the United Nations Security Council gives permission or where Article 51 permits the use of force if used as a means of self-defence. However international relations have changed since the Second World War, as have the nature of inter-state disputes. The struggles of national liberation movements for independence during the decolonisation process did not fit easily into the framework of the Charter regime.<sup>6</sup> The wording of Article 51 has given rise to many disagreements, perhaps as a result of its simplicity. The literature on the legal status of anticipatory self-defence can be divided into opinion into three primary schools of thought.<sup>7</sup> Those schools of thought include:

1. Those who argue that Article 51 of the United Nations Charter is exhaustive of the situations under which the use of force can be used.
2. Those scholars that argue that the customary international law that predated the United Nations Charter still exists.
3. Those legal scholars who suggest that the “*emerging threat*” (also known as the Bush Doctrine) doctrine provides for the legality of anticipatory self-defence.

An ancillary issue which will be addressed is that of whether anticipatory self-defence can be classed as a rule of *jus cogens*. This has not been addressed to any large extent in the academic literature, but is a valid and reasonable line of academic enquiry.

### 1. The Debate on Whether Article 51 is Exhaustive

An area in which the ambiguities surrounding Article 51 are perhaps the most acute is in relation to the use of force by States in self-defence *before* an armed attack has taken place. The debate on this issue has been running for some years; however it has come to prominence in the past decade or so. Certain states claim or defend the right to use force

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<sup>4</sup> Article 2(4) of the UN Charter states: "All 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."

<sup>5</sup> Article 51 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." Available at <http://www.un.org/aboutun/charter/chapter7.htm>.

<sup>6</sup> Gray, *International Law and the Use of Force* (2000) p3.

<sup>7</sup> The arguments of the first two schools of thought are outlined in Franck, *Recourse to Force, State Actions Against Threats and Armed Attacks* (Cambridge University Press, Cambridge, 2002) and Gray, *International Law and the Use of Force* (Oxford University Press, New York, 2004). Corten also gives a solid analysis of all the arguments although he favours the restrictionist school of thought. Corten 'The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate', [2005] 16 *Eur. J. Int'l L.* 803.

even before their territory or members of their armed forces abroad are attacked.<sup>8</sup> Despite this the dominant view amongst states and international lawyers is that anticipatory self-defence is not permissible under international law. Unfortunately, for clarity's sake, no detailed provisions on self-defence could be included in General Assembly resolutions such as the *Declaration on Friendly Relations*,<sup>9</sup> the *Definition of Aggression*,<sup>10</sup> and the *Declaration on the Non-Use of Force*<sup>11</sup> due the disagreements between countries on the issue. The debate centres on whether the UN Charter provisions, in particular Article 51, is exhaustive of the situations in which one can use force in self-defence. Those supporting a right to anticipatory self-defence frequently cite the customary rule that existed prior to the enactment of the UN Charter. In the seminal decision on self-defence, the *Caroline* case<sup>12</sup>, it was not doubted that the British Government had the right to anticipate further attacks.<sup>13</sup> This was subject to the conditions of necessity and proportionality.<sup>14</sup>

Those who argue that the pre-existing customary law on anticipatory self-defence was extinguished by Article 51 are referred to as restrictionists. Restrictionists argue that Article 51 of the UN Charter requires that an armed attack must have occurred before a state can legally respond in self-defence. The strengths of the restrictionist legal argument emanates from the wording of Article 51 which explicitly affirms 'nothing in the present Charter shall impair the inherent right of individual or collective self-defence *if an armed attack occurs* against a Member State of the United Nations'.<sup>15</sup> Of particular importance is the wording 'if an armed attack occurs' which *prima facie* confirms the exhaustive nature of Article 51.<sup>16</sup>

Those who support the proposition that the pre-Charter customary law still operates are referred to as counter-restrictionists / adaptavists.<sup>17</sup> They argue strongly against the assertion that Article 51 extinguished the customary law.<sup>18</sup> Central to the reasoning of this school of thought is the term 'inherent right' contained in Article 51. Proponents suggest that this term is an explicit reference to the customary international law of the time that

<sup>8</sup> This view is shared by many commentators, see Sofaer, *On the Necessity of Pre-emption* 2003 EJIL 209; Alexandrov, *Self Defence against the Use of Force in International Law* (1996); Arend and Beck, *International Law and the Use of Force: Beyond the UN Charter* (1993); McDougal and Feliciano, *Law and Minimum World Public Order* at 234 (1961). Also see the dissenting opinion of Judge Schwebel in *Case Concerning Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 347.

<sup>9</sup> Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations", [1970] UN General Assembly Resolution: 2625 (XXV).

<sup>10</sup> The definition was adopted without a vote during the General Assembly's 2319th plenary meeting and attached as an annex to *General Assembly Resolution 3314* (XXIX) (December 14, 1974).

<sup>11</sup> Declaration on the Non-Use of Force", [1988], UN General Assembly Resolution 42/ 5.

<sup>12</sup> See Harris, *Cases and Materials on International Law*, at 655.

<sup>13</sup> *Ibid* at 656

<sup>14</sup> For more on the principles of necessity and proportionality see, Gardam, Judith, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press).

<sup>15</sup> Emphasis added.

<sup>16</sup> However, as we shall see later, the counter restrictionist perspective emphasises other aspects of Article 51 in support of their thesis. Noteworthy also is that many of the restrictionists advocate the use of other measures other than force instead of anticipatory self-defence. Such measures include economic sanctions, and recourse to the Security Council.

<sup>17</sup> Martinez, 'September 11<sup>th</sup>, Iraq and the Doctrine of Anticipatory Self Defence', [2003] 72 UMKC 123 at 134.

<sup>18</sup> Proponents of this style of reasoning include Arend and Beck *International Law and the Use of Force: Beyond the U.N. Charter Paradigm* (Routledge, London, 1993), Cohan, 'Formulation of a State's Response to Terrorism and State Sponsored Terrorism' [2002] 14 PILR 77, Schachter, *International Law: The Right to Use Armed Force*, (1984) MLR 1620.

provided for anticipatory self-defence as a customary right.<sup>19</sup> This rationale is supplemented by two other arguments.<sup>20</sup> Firstly that the phrase “armed attack” encompasses the planning, organisation, and the logistical groundwork for an assault and as such Article 51 should permit the employment of anticipatory self-defence.<sup>21</sup> Secondly it is contended that even if Article 51 did not permit the use of anticipatory self-defence its employment is permissible on the basis that the pre-existing customary law survived the arrival of the United Nations Charter.<sup>22</sup>

Schwebel, an American judge of the International Court of Justice, succinctly outlines the typical stance of the proponents by saying:

I do not agree that the terms or intent of Article 51 eliminate the right of self-defence under customary international law, or confine its entire scope to the express terms of Article 51.<sup>23</sup>

Schwebel in his judgment in the *Nicaragua* case cites with approval the views of Sir Humphrey Waldock, who asks the question whether Article 51 cuts down the customary right and make it applicable only in the context of resistance to an armed attack by another State. Waldock argues that this does not seem to be the case.<sup>24</sup> He argues that this would be a misreading of the intention of Article 51 to interpret it as forbidding forcible self-defence in resistance to an illegal use of force not constituting an armed attack

However it is suggested that these are very weak legal justifications for a right to anticipatory self-defence, and that they have been crafted to legitimise the proponents’ desire to have the right accepted in international law. Brownlie is of the opinion that the approach ignores the principle of effectiveness and asks the important question: ‘Why have treaty provisions at all?’<sup>25</sup> It might be argued that when referring to the use of ‘inherent’ that Article 51 claims a declaratory and not a constitutive character.<sup>26</sup> Van den Hole, in addition to referring to the drafting history of Article 51, believes that the wording of the Article ‘supports the position that the UN Charter preserves the customary international law concept of self-defence’.<sup>27</sup>

This runs contrary to the self-evident fact that the Charter’s intention was to render unilateral use of force subject to the control of the United Nations.<sup>28</sup> Furthermore, within Article 51, the Security Council is given a key role, which is the right to self-defence only exists ‘until the Security Council has taken measures necessary to maintain international peace and security.’ Also, any member state who invokes this right to self-defence must inform the Security Council of such immediately. This is compelling evidence that Article 51 is constitutive in nature.

Why would those who drafted the article create this regime if the article was intended to be merely a declaration of the customary law? The natural and logical conclusion to be drawn

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<sup>19</sup> The advocates of this doctrine argue that the use of the term inherent is an explicit reference to the customary international law and as such it was the intention of the framers of the United Nations Charter to permit anticipatory self-defence.

<sup>20</sup> Martinez ‘September 11<sup>th</sup>, Iraq and the Doctrine of Anticipatory Self-Defence’, [2003] 72 UMKC 123 at 134.

<sup>21</sup> *Ibid*

<sup>22</sup> *Ibid*

<sup>23</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 347.

<sup>24</sup> Waldock *The Regulation of the Use of Force by Individual States in International Law* (1952)

<sup>25</sup> Brownlie, *International Law and the Use of Force by States* (1963) p 272

<sup>26</sup> Kelsen, *Law of the UN* (1950)

<sup>27</sup> Van den Hole, Leo, ‘Anticipatory Self-Defence under International Law’ [2003] *American University International Law Review* 69 at 78.

<sup>28</sup> Brownlie, at 273.

is that a state has a right to self-defence if *and only if* an armed attack occurs. To think that the occurrence of an armed attack is only one of the circumstances in which self-defence can be invoked diminishes the Article 51 regime. It is also repugnant to the general superiority of treaty law over custom when there is a conflict. A detailed examination of the relationship between treaty and custom is outside the scope of this article. It is sufficient to suggest that when a treaty is later in time than the customary rule, subject to rule of *jus cogens*, the treaty will prevail<sup>29</sup>.

While the authors believe that anticipatory self-defence is not strictly legal under international law, a considerable portion of the academic community do not espouse the same view. For this reason it seems important to bear in mind that the doctrine of anticipatory self-defence was widely accepted prior to the introduction of the United Nations Charter in 1945.<sup>30</sup> While the opinion of the international community diverged as to the status of anticipatory self-defence it must be acknowledged that there is not a consensus of opinion that opposes the doctrine.<sup>31</sup> As such, it would seem unwise to disregard the arguments of the counter-restrictionists as they will certainly influence the development of the doctrine.

#### Assessment of the International Court of Justice's Interpretation of Article 51

The ICJ has demonstrated a marked unwillingness to engage with the issue of anticipatory self-defence. In the *Nicaragua Case* the ICJ sidestepped the issue of anticipatory self-defence presumably due to its controversial nature.<sup>32</sup> The ICJ in an *Advisory Opinion on the Legality of the Use of Nuclear Weapon in Armed Conflict* also failed to engage with the issue of self-defence.<sup>33</sup> Similarly, in *Democratic Republic of Congo v Uganda* the ICJ was unwilling to deal with the issue of anticipatory self-defence.<sup>34</sup> The ICJ in this case responded negatively to the self-defence arguments of Uganda.<sup>35</sup> The failure of the ICJ to engage properly with the issue of humanitarian intervention only serves to perpetuate the uncertainty of Article 51 and whether it encompasses preventative measures in the form of responses to pending threats.<sup>36</sup> It is clear from reading the literature regarding Article 51 and the doctrine of anticipatory self-defence that there is no clear agreement on the legality of the doctrine. It seems certain that the understanding of anticipatory self-defence will remain clouded and indistinct until such time as the ICJ or the United Nations makes a pronouncement on the issue.

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<sup>29</sup> Dixon, *Textbook on International Law* (2000). Also see Thirlway, *International Customary Law Codification* (Leiden, 1972).

<sup>31</sup> Arend and Beck 1993 at page 79.

<sup>32</sup> The ICJ held in the case that the parties in the case had relied upon the right of self-defence as contained within Article 51 of the Charter and as such sidestepped the address of the issue in their judgment.

<sup>33</sup> *Advisory Opinion of the International Court of Justice on the Legality of the Use of Nuclear Weapons in Armed Conflict*: 06-07-1996 ICJ.

<sup>34</sup> 1999, General list no. 116.

<sup>35</sup> Okowa, 'Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)' [2006] 55 ICLQ at page 752.

<sup>36</sup> *Ibid*

## 2. The Emerging Threat / Bush Doctrine

The “emerging threat”<sup>37</sup> doctrine or the “Bush Doctrine”<sup>38</sup> is a relatively recent addition to the debate on anticipatory self-defence. The doctrine has its origins in the September 11, 2001 attacks on New York, Washington D.C. and Pennsylvania. The kernel of the doctrine is that unilateral pre-emptive force may be used even in instances where an attack by an enemy has neither taken place nor is imminent.

The doctrine involves a dilution of the criteria required by the pre-Charter customary law, which required an attack to be imminent. This requirement was replaced by the mere requirement of showing that an attack is emerging.<sup>39</sup> More specifically, the Bush Administration proposes that pre-emptive action may be taken against “hostile” states and terrorist groups who are alleged to be developing weapons of mass destruction. The doctrine is stated in the following terms in the Bush Administration’s National Security Strategy, released to the United States Congress in September 2002:

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. The greater the threat, the greater the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively.<sup>40</sup>

In the post September 11 era, the most obvious example of the use of the emerging threat doctrine is the war in Iraq. The initial response of the United States to these attacks was the invasion of Afghanistan and the toppling of the Taliban regime. Kelly notes that while the United States were legally permitted to attack Afghanistan under the self-defence provisions of the United Nations Charter, the US led invasion of Iraq was neither legal under the Charter nor under the pre-Charter customary law.<sup>41</sup> Even if the debate regarding the exhaustive nature of Article 51 of the Charter were left unresolved, the emerging threat doctrine is still clearly contrary to both positive and customary law. Interestingly, the United Kingdom was careful not to rely on anticipatory self-defence, in any guise, in its justification for joining with the United States in the invasion of Iraq, preferring instead to rely on previous UN Security Council resolutions authorising the use of force against Iraq.<sup>42</sup>

The Bush doctrine is not without its supporters. Professor Glennon of the University of California supports the view of Secretary Rumsfeld that the global security environment has changed, and thus the rules on warfare must change. This argument is typical of the adaptivist school of thought. Glennon states that

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<sup>37</sup> Kelly, M., ‘Time Warp to 1945 – Resurrection of the Reprisal and Anticipatory Self-Defence Doctrines in International Law’ [2003] 13 *Journal of Transnational Law and Policy* 1 at 3.

<sup>38</sup> Eckert, A. & Mofidi, M., ‘Doctrine or Doctrinaire – The First Strike Doctrine and Pre-emptive Self-Defence Under International Law’ [2004] 12 *Tulane Journal of International and Comparative Law* 117.

<sup>39</sup> Kelly, M., at 3.

<sup>40</sup> National Security of the United States of America, at p.15, available at <http://www.whitehouse.gov/nsc/nss.pdf> (last visited 16 October, 2006).

<sup>41</sup> Kelly, at p 2.

<sup>42</sup> Rivkin, D., Casey, L. & DeLaquil, M., ‘War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century – Preemption and the Law in the Twenty-First Century’ [2005] 5 *Chicago Journal of International Law* 467 at 490.

Waiting for an aggressor to fire the first shot may be a fitting code for television westerns, but is unrealistic for policy makers entrusted with the solemn responsibility of safeguarding the well-being of their citizenry.<sup>43</sup>

It is irrefutable that global warfare has changed since 1945, when the United Nations Charter was drafted. American academic Abraham Sofaer notes that globalisation and advances in technology are facilitating the capacities of terrorists to travel, move money and cause damage with modern weapons.<sup>44</sup> While it is generally accepted that the nature of warfare has changed over the past six decades, it should not be forgotten that the use of anticipatory self-defence where there is an emerging threat is permissible under the Charter regime where the Security Council gives its consent. One can reasonably conclude that the emerging threat doctrine conflicts with both the UN Charter and also the pre-Charter customary law. Eckert and Mofidi also reach this conclusion:

Does the Bush Doctrine of preemption comport with the law of self-defence? The answer appears to be no, regardless of which approach - restrictionist or liberal - is applied.<sup>45</sup>

### 3. Anticipatory Self-Defence as a Rule of Jus Cogens

An issue that must be examined is that of peremptory norms or rules of *jus cogens*.<sup>46</sup> These are rules of an elevated status which cannot be displaced by custom or treaty provision. If anticipatory self-defence could be classed as a rule of *jus cogens* then Article 51 or any customary rule prohibiting it could not deny it of legally binding character. Article 53 of the Vienna Convention on the Law of Treaties 1969<sup>47</sup> declares that a treaty is void if at the time of its conclusion it conflicts with a peremptory norm of general international law i.e. a norm accepted as being part of a higher form of law. In the *Nicaragua Case* the ICJ affirmed *jus cogens* as an accepted doctrine in international law and declared that the prohibition on the use of force was a 'conspicuous example of a rule of international law having the character of *jus cogens*.'<sup>48</sup> But despite this example of clarity there is very little agreement as to what rules have been elevated to this status and the problem is compounded by the lack of examples or criteria in the Vienna Convention.

The notion that self-defence and, in particular, anticipatory self-defence, is a rule of *jus cogens*, has been suggested or at least implied by many scholars. Sofaer says that:

Properly applied, pre-emption is an aspect of a state's legitimate self defence authority. The power to act in self defence after an attack is based on the need to prevent further attacks, not on any right to exact revenge. Therefore, just as pre-emption was to Grotius the first ground for the 'just' war, it is the key justification for using force in the post-Charter era.<sup>49</sup>

Sofaer uses language that suggests self-defence and anticipatory self-defence form part of higher law which has been recognised throughout the ages at least since the time of Hugo

<sup>43</sup> Glennon, M.J., 'The Fog of Law: Self-Defence, Inherence, and Incoherence in Article 51 of United Nations Charter' [2002] 25 *Harvard Journal of Law and Public Policy* 539 and 552.

<sup>44</sup> Sofaer; *On the Necessity of Pre-Emption* (2003) EJIL 209.

<sup>45</sup> Eckert, A., & Mofidi, M., 'Doctrine or Doctrinaire - The First Strike Doctrine and Pre-Emptive Self-Defence under International Law' [2004] 12 *Tulane Journal of International and Comparative Law* 117 at 145.

<sup>46</sup> For a detailed analysis of the doctrine of *jus cogens* in international law see, Danilenko, G.M., 'International Jus Cogens: Issues of Law Making' [1991] 2(1) *European Journal of European Law* 42.

<sup>47</sup> United Nations: Vienna Convention on the Law of Treaties Adopted 22-05-69 Entered into Force on the 27-01-1980.

<sup>48</sup> 4 *ICJ Reports* (1986) 100.

<sup>49</sup> Sofaer; *On the Necessity of Pre-Emption* (2003) EJIL 209 at 225.

Grotius, (1583-1645), Dutch jurist, humanist, and statesman, whose legal writings laid the foundations for modern international law. According to Megennis, “the writings of Grotius, especially *De Jure Bellum ad Pacum*, are an efficient focal point for the definition of ‘natural rights’ in the international law context.”<sup>50</sup> However, Sofaer attempts to blur the distinction between self-defence and anticipatory self-defence by saying they both have the same motive, to prevent attack; the former to prevent further attack and the latter to prevent attack in the first place. This, however, must be dismissed as ignoring the clear and practical distinctions between the two. Self-defence is to be used to repel the attackers and dismiss them from your territory as opposed to being a means of preventing *further* attacks. Sofaer’s contention that ‘pre-emption was to Grotius the first ground for just war’ has to be rejected for being incorrect. Self-defence was for Grotius the first ground for just war. Sofaer may be using the term pre-emption to include all forms of self-defence which must not be supported, as it is disingenuous and serves to hide the obvious distinction that exists between a state using force to repel an aggressor and a state using force against another because it suspects an attack. In fact, Grotius makes it clear in *On the Law of War and Peace* that an attack must have occurred or is imminent, which is the current position in international law if understood to include the pre-Charter customary international law.

The danger ... must be immediate and imminent in point of time. But those who accept fear of any sort as justifying anticipatory slaying are themselves greatly deceived...[I]f a man is not planning an imminent attack, but it has been ascertained that he has formed a plot, or is preparing an ambuscade, or that he is putting poison in our way...I maintain that he cannot lawfully be killed, either if the danger can in any other way be avoided, or if it is not altogether certain that the danger cannot be otherwise avoided.<sup>51</sup>

Rivkin *et al* are more explicit in their invocation of the doctrine of *jus cogens*:

... [I]f is highly questionable whether the Charter could have limited the ability of states to defend themselves against an obvious, *growing threat* that has not, as yet, manifested itself in a first strike. There are ... certain rules that are so fundamentally a part of the international system that they cannot be altered by treaty. These norms are identified by the Latin term *jus cogens*, and there is no end of the debate about what principles may fall within this critical category. The right to self-defence is certainly among them.

Again, the conceptually distinct concepts of self-defence and anticipatory self-defence are conflated. Additionally, within the anticipatory self-defence category, the clear distinction between an imminent threat and a growing/emerging threat is not maintained. The use of force following an armed attack is fundamentally different from the use of force based upon a suspicion that another state may be preparing an attack. While there are almost insurmountable difficulties in attempting to determine whether a rule is one of *jus cogens*, it is concluded that the evidence supporting the assertion that anticipatory self-defence is a rule of *jus cogens* is scarce and weak.

#### 4. Sub-conclusion

The commentary concerning the legality of anticipatory self-defence is interesting. What is particularly interesting is that legal arguments advanced from both sides of the divide are logically reasoned. However, the polarisation of argument is not necessarily useful in understanding how the doctrine of anticipatory self-defence is going to develop. It seems

<sup>50</sup> Magenis, S.D., ‘Natural Law as the Customary International Law of Self-Defence’ [2002] 20 *Boston University International Law Journal* 413 at 416.

<sup>51</sup> Grotius, H *De Jure Belli Ac Pacis Libri Tres* (Francis W Kelsey translation, 1925) 173.



certain that the understanding of anticipatory self-defence will remain clouded and indistinct until such time as the ICJ or the United Nations makes a pronouncement on the issue. What is certain is that, in the present context of global terrorism, the doctrine is relevant and increasingly will be looked to as a tool in combating emerging threats.

### III. The Desirability of a Right to Anticipatory Self-Defence

#### 1. Generally

An important issue to be addressed is that of the desirability of a general right to anticipatory self-defence in international law. Given the current global climate, have we reached a stage where anticipatory self-defence is critical if we are to maintain international peace and security? It may be unreasonable, perhaps unwise, to expect a state to absorb the enemy's first blow before taking action in self-defence. However, is the opening up of broader possibilities for anticipatory self-defence desirable? Should a regime that permits states to unilaterally attack each other before an actual attack occurs be endorsed? The dangers of doing so are apparent. Bothe<sup>52</sup> believes that to adapt the right to self-defence to these new perceived threats is unacceptable and would lead to vagueness and increase the risk of abuse. He argues:

[I]f we want to maintain international law as a restraint on the use of military force, we should very carefully watch any attempt on the part of opinion leaders to argue that military force is anything other than an evil that has to be avoided. The lessons of history are telling. If we revert to such broad concepts, such as the just war concept, to justify military force we are stepping on a slippery slope, one which would make us slide back into the nineteenth century when war was not illegal<sup>53</sup>.

States can at present apply to the United Nations Security Council to seek permission to act pre-emptively. It would seem this regime provides the correct checks and balances in comparison to a system whereby states could, relying on their own judgment, decide whether anticipatory self-defence is justified. Not only does this undermine the United Nations but it threatens international peace and stability. Surely those states who advocate a right of anticipatory self-defence would not defend the right of so called 'rogue' states to use force pre-emptively. Recourse to the Security Council appears to be the best and most mature option.<sup>54</sup> The usual rebuttal to this line of reasoning is that the use of vetoes and the highly political nature of deliberations render the UN Security Council route unsatisfactory. Bothe however believes that negotiations leading to a fair and reasonable result are not impossible.<sup>55</sup>

Certain scholars conclude that the UN Charter has failed and that "the legal prohibitions on use of force contained in that charter should no longer continue to restrict state action in the *de jure* sense (noting they have already been abandoned in the *de facto* sense)."<sup>56</sup> Bothe insists, however, that international relations have matured considerably from the days of the 'automatic veto' of the Cold War. Despite the potential problems associated with recourse to the Security Council, it offers the best option open to us at the moment and is preferable to unbridled unilateralism.

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<sup>52</sup> Bothe, *Terrorism and the Legality of Pre-emptive Force* (2003) EJIL 227.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> Kelly, at 35.

## 2. The "Emerging Threat" / "Bush" Doctrine

In the previous section, it was concluded that the Bush / emerging threat doctrine has no basis in international law, and is therefore illegal. It would be unsatisfactory to conclude the debate there. International law should not remain static or fossilized in the 1945 mould, and should be capable of developing and adapting in accordance with global developments. The fundamental problem with the Bush doctrine is its reliance on unilateralism. If Security Council support is not forthcoming, then unilateral action can be taken. This coupled with the broader nature of the threat involved allows states "more latitude in unilateral action".<sup>57</sup> Murphy points out the long term dangers associated with making a loose anticipatory self-defence the standard in international law.<sup>58</sup> He suggests that the standards for invasion are presently cut-and-dry, if a state is attacked then that state can respond. However he argues that if anticipatory self-defence becomes the standard, then a *Pandora's Box* will be opened. Kelly also notes some observable consequences of the Bush Doctrine, such as the potential of other states to employ the use of the doctrine.<sup>59</sup> Kelly points out that a lack of clear guidelines, results in states being free to interpret when a threat has sufficiently "emerged" to justify armed pre-emption. He suggests that almost any country could conceivably avail of the doctrine's legitimising effect against "emerging threats" in neighbouring states under the diluted trigger mechanism.

The principles of proportionality and necessity, which regulated the operation of anticipatory self-defence in customary law, are concepts absent from the Bush doctrine. The National Security Statement insists that the greater the threat, the more compelling the case for anticipatory action "even if uncertainty remains as to the time and place of the enemy's attack." The emerging threat doctrine alters the pre-existing customary law on anticipatory self-defence in two regards. In addition to lowering the status of the threat from being imminent to emerging, the doctrine appears to permit a great degree of "guess-work" regarding firstly, the actual actions of the "enemy" and secondly, their intentions. This has been accepted to by Rivkin *et al*, staunch proponents of anticipatory self-defence. They suggest that in the context of the post Iraq invasion revelation that there were no WMD stockpiles that:

As a legal matter ... the principle of anticipatory self-defence does not, and has never, required that the threat have been genuine - only that it be perceived to be so in good faith.<sup>60</sup>

This assertion must be rejected because the very reason why customary international law conditions the use of anticipatory self-defence on the attack being imminent is to fulfil the general obligation that an attack be necessary, on the one hand, and proportionate on the other. The parameters of the "emerging threat" standard inherent in the Bush Doctrine are very difficult to determine as the National Security Strategy is silent on this issue. Additionally, the US administration has made no policy clarifications on this matter.<sup>61</sup> Eckert and Mofidi succinctly state the dangers of the Bush Doctrine in the following terms:

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<sup>57</sup> Kelly, M., at 3.

<sup>58</sup> Murphy, S., 'Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter', 43 Harv. Int'l L.J. 41 at 47.

<sup>59</sup> *Ibid.*

<sup>60</sup> Rivkin, at 496.

<sup>61</sup> Kelly, at 33

Not only is the Bush Doctrine jurisprudentially suspect, it is also strategically questionable. The Bush Doctrine's expansion of the scope of anticipatory self-defence risks setting a dangerous precedent, which can easily be manipulated. It ignores state practice and reciprocity, a cardinal principle of international law ... To fashion a doctrine out of preemption encourages a perception of superpower arrogance and unilateralism.<sup>62</sup>

#### **IV. The Likelihood of Future Acceptance in International Law**

It is necessary to be cautious when discussing international law, which is by its nature an especially amorphous area of law that relates to the relationship between custom and treaty, as well as resolutions of the Security Council, and case law established in international courts. At present there is a reluctance to accept anticipatory self-defence. However as circumstances change, the law must be open to change. The dynamic nature of international law has seen a shift towards the legitimisation of humanitarian intervention. While the authors are of the opinion that a general right to anticipatory self-defence is not desirable, it would be injudicious to conclude the discussion there. The prospective acceptance of self-defence as part of active customary law needs to be considered.

##### **1. Anticipatory self-defence as a rule of customary international law**

To determine whether the right to pre-emption could in future be part of customary law, it is necessary to consider the debate regarding the exhaustiveness of Article 51. The question shall be dealt with from two standpoints. Firstly from the perspective of one who believes Article 51 is indeed exhaustive and secondly from the perspective of one who does not believe art 51 served to displace the customary rule.

(i) Article 51 is exhaustive.

If it is accepted that art 51 is exhaustive and that the Charter therefore prohibits resort to self-defence in anticipation of an armed attack, the question may validly be asked: is it possible that the right could come to be accepted as a rule of customary international law *again*? It would *prima facie* appear to be almost impossible for a new customary rule to displace a treaty provision. The principle of *pacta sunt servanda* is the basis of the binding nature of treaties. States enter into binding agreements to ensure the performance of the treaty's provisions by the other parties. The 1969 *Vienna Convention on the Law of Treaties* states this general principle in Article 26:

Every treaty is binding upon the parties to it and must be performed by them in good faith.

Parties to treaties are not permitted to depart from the provisions contained therein when the performance of such becomes onerous or simply inconvenient. To allow such would defeat the purpose of treaties. If one believes Article 51 is exhaustive, which is the dominant view amongst nations,<sup>63</sup> then its terms are binding and departure from these terms by a party to the UN Charter would be unlawful. However, the position is not clear where a contrary customary rule develops subsequent to a treaty. It might be argued that because the

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<sup>62</sup> Eckert & Mofidi, at 150.

<sup>63</sup> Gray, at 112

custom is later in time than the treaty it should triumph. But this ‘cuts against the certainty and vitality of obligations freely and deliberately undertaken.’<sup>64</sup> According to Dixon:

In practice, it is likely that subsequent custom can modify treaty obligations for state-parties only in very exceptional circumstances, perhaps only where there is manifest and overwhelming consensus among parties to the treaty that [the contrary treaty provision] should be abandoned.<sup>65</sup>

So for anticipatory self-defence to become a rule of customary international law there must be an overwhelming consensus among signatories to the UN charter that it should be accepted.

In practice, the actual invocation of the right to take pre-emptive actions is quite rare.<sup>66</sup> States generally attempt to justify the use of force as being in response to an armed attack rather than base their actions on anticipatory self-defence. Gray suggests, the reluctance to invoke the right indicates its questionable status as a customary rule of international law. States in justifying their actions will not resort to an argument that it knows will be rejected by most states. For example Israel did not seek to rely on anticipatory self-defence when it launched what appeared to be a pre-emptive strike on Egypt, Syria and Jordan in 1967. Israel argued that the actions were taken in response to a prior armed attack. In the Security Council debates on the action Israel claimed that Egypt’s blocking of the Straits of Tiran to passage by Israeli ships was an act of war. This, according to Israel, was the armed attack justifying self-defence under the Article 51 regime. Additionally, when the USA forcibly intercepted nuclear weapons in transit from USSR to Cuba during the Cuban Missile Crisis of 1962, the aggressor did not rely on the doctrine of anticipatory self-defence, relying instead on regional peacekeeping under Chapter VIII of the UN Charter.<sup>67</sup>

One of the crucial criteria for a rule to become a rule of customary law is state practice i.e. actual activity, national legislation and statements of both a hypothetical nature and those made in relation to actual disputes<sup>68</sup>. Clearly anticipatory self-defence does not fulfil this requirement. Some proponents claim that the justification made by states has no impact; it is sufficient that they *in fact* act pre-emptively for it to count as an example of state practice. Gray however says of these proponents:

This is another example of certain writers going beyond what states themselves say in justification of their action in order to try to argue for a wide right of self defence.

Arend and Beck point out that a large number of states are in favour of anticipatory self-defence.<sup>69</sup> However Gray is quick to indicate that this is based on the states using force and that these proponents do not refer to statements made by states opposing their standpoint. Thus, it is clear that the first limb of the two-element theory is not satisfied.<sup>70</sup> Traditionally for a rule to become one of customary international law there must be, as Thirlway puts it, “...an established, widespread, and consistent practice on the part of states; and a psychological element known as the opinion *juris sive necessitas*”.<sup>71</sup>

It has long been recognised that state practice is not enough; that for a rule to attain the status of an international custom states must recognise that the rule binds them as law.

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<sup>64</sup> Dixon, *Textbook on International Law* (Blackstone Press, London, 2000) at 37.

<sup>65</sup> *Ibid*

<sup>66</sup> Gray.

<sup>67</sup> *ibid*

<sup>68</sup> Dixon.

<sup>69</sup> Arend and Beck, *International Law and the Use of Force: Beyond the UN Charter* (1993)

<sup>70</sup> Thirlway, *Sources of International Law*, at p117

<sup>71</sup> *Ibid* at p125

There must be a belief that the rule is obligatory and binding as opposed to just being convenient. This belief is known as the *opinio juris*. The necessity of this requirement was emphasised in the *Lotus Case* and was affirmed in the *North Sea Continental Shelf Case*. Therefore it is highly doubtful that a contrary customary rule has developed since the enactment of the UN Charter. Neither of the two requisite elements has been met. State practice is rare and the express resort to anticipatory self-defence as a justification for use of force is even more unusual. Add to this the rejection of anticipatory self-defence by most states and it becomes patently obvious that a customary rule has not developed and certainly not to the extent needed for a customary rule to displace a treaty provision i.e. an overwhelming and manifest consensus among signatories to abandon the provision.

(ii) Article 51 is not exhaustive / the customary rule survived the enactment of the UN Charter.

Several eminent academics and jurists have contended, as has been discussed previously, that in fact the customary rule has survived. Even if this were the case, it could be argued that this customary rule has been displaced by a contrary customary rule that prohibits the use of force in anticipation of an armed attack. For a new customary rule to develop in place of an existing custom, this new custom must satisfy the aforementioned two-element test namely there must be the requisite state practice contrary to the existing rule that is supported by *opinio juris*.

As mentioned above, actual invocation of anticipatory self-defence is rare. When states use force that appears to be in anticipation, they often try to bring their actions within the context of an armed attack having taken place.<sup>72</sup> For example the USS Vincennes incident in which US vessel shot down an Iranian civilian airbus during the Iranian-Iraqi war in 1988. This incident was justified by the USA initially as being part of an ongoing battle and that it was involved in a response to an armed attack by Iran.<sup>73</sup> Gray gives the following account of the incident:

[The USA] said that its forces had exercised self-defence under international law by responding to an attack by Iran: Iranian aircraft had fired on a helicopter from the USS Vincennes, then Iranian patrol boats had closed in. In the course of exercising its right to self-defence the USS Vincennes fired at what it believed to be a hostile Iranian military aircraft after sending repeat warnings.

Gray states that it is very striking that the USA did not expressly rely on anticipatory self-defence, even though its rules of engagement had been altered to allow its forces to take action against enemy ships and aircraft displaying 'hostile intent'.<sup>74</sup>

What is important for the current discussion is that when the incident was debated many states considered the action of the US as being anticipatory self-defence, and further condemned this as being an unlawful breach of Article 51 of the UN Charter. Importantly the United Kingdom defended the actions of the USA. However the UK did not expressly do so on the grounds of their right to use pre-emptive force.

<sup>72</sup> This approach is taken on the basis that a military response to an armed attack is easier to justify legally under Article 51 of the United Nations Charter.

<sup>73</sup> Gray is of the opinion that the United States forces exercised self-defence under international law by reacting to an attack by Iran. Iranian aircraft had fired on a helicopter from the USS Vincennes and Iranian patrol boats had closed in. In the course of putting into effect its right to self-defence the USS Vincennes fired at what it believed to be a hostile Iranian military aircraft after sending repeat warnings.

<sup>74</sup> Gray, at 113.

On the very rare occasion that a state will explicitly justify their actions on the right to anticipatory self-defence, the reaction of the global community confirms the argument that state practice is firmly against the existence of such a right. When Israel attacked an Iraqi nuclear reactor in 1981, it asserted a right to use pre-emptive force.<sup>75</sup> The reactor represented a threat to its integrity, as it was claimed that Israel was the intended target for the nuclear weapons produced there. During the Security Council debates Israel failed to refer to any clear example of state practice to support its position.<sup>76</sup> Some states rejected anticipatory self-defence generally, while others held the view that the facts of the incident did not justify the use of pre-emptive force, because Israel failed to prove that Iraq had plans to attack them. Even the USA condemned the actions of Israel, however this was on the grounds that Israel had not exhausted peaceful means for the conclusion of the dispute. What is important is the fact that none of the states sitting in the Security Council agreed with the anticipatory self-defence justification employed by Israel. The international climate has changed to a substantial degree in the past few years. The United States have become more vocal in relation to their view on pre-emption.

The president [of the United States] of course supports pre-emptive action... September 11 changed everything, and nations must respond and change their doctrines to face new and different threats. That's the way of the world, it always has been. And a nation that remains in the status quo after an event like September 11th can only endanger its own people.<sup>77</sup>

It seems clear that had the customary rule survived the UN Charter, that state practice is now in conflict with this custom. Then, what of *opinio juris*? The Mexican representative in the case just discussed said of the actions of Israel in the Security Council:

The concept of preventive war, which for many years served as justification for the abuses of powerful States, since it left it to their discretion to define what constituted a threat to them, was definitively abolished by the Charter of the United Nations.

Generally most states believe that the state practice is binding upon them, as the above quoted representative believes. However, it is more difficult to show that the *opinio juris* is such to compound the state practice. The Security Council has not made any pronouncements through resolution to the effect that anticipatory self-defence is unlawful due to divisions within the UN on the issue. Also certain General Assembly resolutions i.e. *Declaration on Friendly Relations*, the *Definition of Aggression*, and the *Declaration on the Non-Use of Force* which include provisions on self-defence, were silent on the issue, again reflecting divisions on the issue. Gray notes that those states supporting a prohibition made the argument expressly while a lower profile was adopted by states opposed to the inclusion of a prohibition.<sup>78</sup>

## 2. Analogous Issue of Humanitarian Intervention

The use force for the fulfilment of humanitarian objectives provides a useful focus in helping to understand the status and evolution of anticipatory self-defence in international

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<sup>75</sup> The reactor represented a threat its integrity, as it was claimed that Israel was the intended target for the nuclear weapons produced there.

<sup>76</sup> Gray, at 115

<sup>77</sup> "Bush Backs Howard on Pre-emptive Strikes" [http://www.theage.com.au/articles/2002/12/03/10387\\_12918330.html](http://www.theage.com.au/articles/2002/12/03/10387_12918330.html).

<sup>78</sup> Gray, at 112

law.<sup>79</sup> Humanitarian intervention has gained and continues to gain greater acceptance among the international community. *Prima facie*, forcible humanitarian countermeasures are illegal under international law where the Security Council has not consented to such actions. However there is much debate as to the legality of forcible humanitarian intervention.<sup>80</sup> One notable difference between humanitarian intervention and anticipatory self-defence is that humanitarian intervention never formed part of international law and until recently was not the subject of disagreement such as that which has surrounded anticipatory self-defence.

There is undeniably a growing consensus among the international community that there are circumstances and situations where humanitarian intervention is necessary. This consensus has been reinforced by numerous acts of humanitarian intervention taken without explicit UN Security Council authorisation. As with the doctrine of humanitarian intervention it is debatable whether the doctrine survived the UN Charter as Chapter VII established firm rules on all uses of Force.<sup>81</sup> Nevertheless as we shall see humanitarian intervention has become an increasingly accepted norm of international law. The important point here is that humanitarian intervention is gaining acceptance as a legitimate rule of customary law, despite attitudes previously held by prominent states within the international community.<sup>82</sup>

In the *Nicaragua Case*, the ICJ considered whether the protection of human rights could provide a justification for the use of force. Importantly in the case the ICJ acknowledged that customary international law on the use of force survived the Charter. However the ICJ also held that while the USA might form its own appraisal of the situation as to respect for human rights, a strictly humanitarian objective could not be compatible with the mining of ports, the destruction of oil installations, with the training, arming and equipping of the contras.<sup>83</sup> The ruling by the ICJ is important judgement, however it lacks clarity and it remains to be seen whether the ICJ completely rejects the notion of humanitarian intervention or whether its judgement amounts to a rejection on the particular facts of that particular case.

A considerable shift in the policies of certain states has occurred in recent years, most notably regarding the United Kingdom and France. The Security Council ceasefire resolution after the 1991 Iraq-Kuwait conflict made no provision for the protection of the Kurdish people in Northern Iraq and the Shiites in the south. When the government of Iraq took action against the Kurds and Shiites, the Security Council initially treated it as an internal matter but under pressure from France, the Security Council passed resolution 668 which called for an end to the repression.<sup>84</sup> Despite the fact that this resolution did not grant

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<sup>79</sup> Indeed the humanitarian argument was one of the justifications advanced by the United States in justifying the invasion of Iraq in 2003. See Luban, David 'Preventive War', [2004] 32 *Philosophy & Public Affairs*, 207.

<sup>80</sup> Cassese, *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?* (1999) *EJIL* 23. The controversy in relation to humanitarian intervention was highlighted when NATO employed the use of force in Kosovo in 1999 without sanction from the Security Council. Resultantly disagreements ensued between states and commentators as to the legality of NATO's actions and it was claimed that there was an emerging right to humanitarian intervention.

<sup>81</sup> O' Donoghue, Aoife 'Humanitarian Intervention Revisited' [2005] 1 *HanseLR* 165-175, page 166.

<sup>82</sup> When Vietnam invaded Cambodia in 1978, the aggressors did not justify their actions on the basis of humanitarian intervention, claiming instead to be acting in self-defence. The General Assembly repeatedly condemned Vietnam by resolutions for example (General Assembly Resolution 34/22) and many states, such as France and the United Kingdom, said that violations of human rights was not a legitimate ground for the use of force (1979 UNYB 271 at 274.).

<sup>83</sup> *Nicaragua Case*, para 268.

<sup>84</sup> Security Council Resolution No. 668, 05 – 04 – 91.

the use of force to help the Kurds, France, the US and the UK intervened forcibly to protect the Kurds and Shiites. Initially the aggressors did not use the doctrine of humanitarian intervention as their justification but rather applied the rationale after Iraq made complaints to the Security Council. Significantly the intervening countries stated that their actions were intended to prevent repression of the minorities in Iraq. The argument was also made that their actions were consistent with resolution 688. Notably these arguments were to set a pattern that followed in subsequent cases.<sup>85</sup> Interestingly the United Kingdom has increasingly endorsed the right of humanitarian intervention particularly throughout the 1990s.<sup>86</sup> In a speech delivered in 2002 by the Secretary of State for Foreign and Commonwealth Affairs, Mr Robin Cook, the United Kingdom departed from its preceding policy,<sup>87</sup> and endorsed a right of intervention on humanitarian grounds.<sup>88</sup>

Cassese argues that a customary rule may emerge legitimising the use of force without Security Council authorisation.<sup>89</sup> The fact that the Security Council did not condemn the action taken outside the auspices of the UN is telling and flags the increasing normative legitimacy of humanitarian intervention.

The military action taken by NATO in Kosovo departs from the UN Charter system for collective security. However, it is important to note that the UN Security Council on this occasion came close to a consensus on a course of action and would have sanctioned intervention had it not been for the Russian veto. Importantly the Security Council passed a resolution subsequent to the intervention in Kosovo under Chapter VII of the UN Charter that permitted UN member states to create and support a peace keeping mission in Kosovo.<sup>90</sup> This resolution aptly illustrates and reinforces the contention that humanitarian intervention is becoming normalised and an integrated norm of international customary law.<sup>91</sup> The example of Kosovo stitches into a larger tapestry of similar instances in Liberia, Sudan and Sierra Leone.<sup>92</sup>

The analogy between humanitarian intervention and anticipatory self-defence illustrates how international law can change, evolve and respond to issues prohibited by the Charter. However we must bear in mind the amorphous nature of international law and avoid any comparisons with domestic law. State practice is succeeding in ensuring a place for humanitarian intervention in customary law the doctrine of anticipatory self-defence may very well move in the same direction.

Within the Security Council it is hard to imagine that there will be a time in the near future where the opinions of all the member states will be voiced in concert creating a seamless

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<sup>85</sup> Lobel and Ratner, 'Bypassing the Security Council: ambiguous authorisation to use force, cease-fires and the Iraqi inspection regime' (1999) 93 AJIL 124.

<sup>86</sup> Supra note Gray 2000 Edition at page 27.

<sup>87</sup> As detailed in the FCO Policy Document No. 148, p947.

<sup>88</sup> Harris, at 958.

<sup>89</sup> Cassese; *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?* (1999) EJIL 23.

<sup>90</sup> Security Council Resolution 1244, 1999.

<sup>91</sup> The failure of the UN Security Council to agree on a particular course of action in responding to humanitarian crises has speeded the growth and acceptance of the doctrine of humanitarian intervention. This is analogous to the pressures placed on the states in terms of responding to threats to their national security.

<sup>92</sup> The acceptance of humanitarian intervention is further supported by reference to the ECOWAS intervention in Liberia in 1990. The action taken in Liberia by ECOWAS was taken outside the realms of Security Council sanction. Although a Security Council resolution retrospectively authorised the sanction. Similarly an intervention of the African Union in Sudan and another operation by ECOWAS in Sierra Leone further demonstrate that humanitarian intervention is increasingly becoming accepted by the international community.



web of response to emerging crises. As such it seems certain that the doctrine of anticipatory self-defence will evolve in the same direction as humanitarian intervention. It also seems certain that the bells and whistles of legality and legitimacy will increasingly be associated with the doctrine.<sup>93</sup>

It seems obvious that the evolution of humanitarian intervention is going to hinge upon the ability of the UN Security Council to respond to humanitarian crises. One can point to a number of recent UN sanctioned operations to show the ability of the UN to muster the necessary international political accord to respond to such crises.<sup>94</sup> However, it is where the United Nations fails to reach a political consensus on a course of intervention in response to humanitarian crises that the difficulties arise. It is under this set of circumstances that political difficulties displace pressure on international law and the doctrines of humanitarian intervention and anticipatory self-defence are picked up as tools to legitimise and legalise unilateral action.

While there is uncertainty regarding the future nature of the international legal system much will depend upon the interpretation of the United Nations Security Council resolutions and treaties, on how we fashion and modify rules of customary international law.<sup>95</sup> The analogy between development of humanitarian intervention and anticipatory self-defence has a dimension that is worthy of consideration albeit in brevity as it falls outside the thesis of this article. Significantly a humanitarian interventionist styled sound bites featured strongly in the statements of the coalition of the willing that invaded Iraq in 2003. There was undoubtedly a consensus between supporters and opponents of the war in Iraq that the Saddam Hussein regime was characterised by serious human rights violations. This humanitarian argument fed into the language used to make the case for war. Indeed the United Kingdom proffered the moral case for military action on the grounds of these human rights violations.

While the legal justifications offered by the UK government, did not expressly refer to the notion humanitarian intervention it is none the less interesting and perhaps concerning that this language has become closely associated with the reasoning for war. This development is concerning as the potential employment of the doctrines of humanitarian intervention and anticipatory self-defence as legal justifications may serve to encourage states to take unilateral military action and may serve to undermine the role of the United Nations in resolving global conflicts. To say that the matter of the legality of the armed conflict against Iraq in 2003 was divisive is an understatement. The primary justification given by the UK government for the lawful nature of the Iraq war (2003) was an implied mandate from the Security Council. The implied mandate was said to be derived from a combination of Security Council Resolutions 678<sup>96</sup> and 1441.<sup>97</sup> Many international lawyers remain unconvinced that such a mandate can be inferred from those resolutions.

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<sup>93</sup> The doctrine of anticipatory self-defence and the doctrine of humanitarian intervention will continue to share a number of legal ideological difficulties. The most important being that the employment of such doctrines legitimises unilateral military action that is exterior to the machinery of the United Nations.

<sup>94</sup> See for example UN operations in Somalia, Haiti, Rwanda and East Timor. Although it should be noted that there was much criticism of the slow response of the UN in delivering some these operations.

<sup>95</sup> Byers, 'The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq' *European Journal of International Law* 13 (2002) 21, at page 41.

<sup>96</sup> United Nations: Security Council Resolution, 0678, 29-11-1990.

<sup>97</sup> United Nations: Security Council Resolution, 1441 08-11-2002.

## V. Conclusion

The United States sought to justify the invasion of Iraq through the advancement of three core arguments. The first argument is a *legal argument*, that is, the view that the war was necessary to enforce resolutions of the United Nations.<sup>98</sup> A *humanitarian argument* was also advanced that the war would remove a brutal dictator, and a *preventive war* argument that would stop rogue states and their terrorist patrons before they are able to threaten or use weapons of mass destruction against the United States.<sup>99</sup> Luban suggests that while all the arguments have their merits the argument of prevention was the principal justification of the Bush administration. This is important in putting the discussion of the legality of anticipatory self-defence into context. The justifications points up the lack of concern that the US have in relation to complying with international law. The arguments made by the adaptivist commentators have arguably created sufficient breathing space for the United States to peruse foreign policy that is arguably legal. However the danger is that too much breathing space has been created and now the US and other states may feel that there is enough freedom to take unilateral action against states that pose remote or distant dangers to national security.

What has become apparent throughout this discussion is how entwined international law and politics are. Through the comparison with humanitarian intervention it has been shown how a doctrine which had little appeal just over a decade ago is on the verge of becoming a rule of customary law despite not being authorised by the UN Charter. The analogy between the acceptance of humanitarian intervention and anticipatory self-defence is aptly noted by Eyal Benvenisti of the University of Jerusalem who states:

If we take the related issue [related to anticipatory self-defence] of humanitarian intervention, many people say, I think rightly, that humanitarian intervention has been ultimately accepted in 1990s. There was an evolution of the law and pre-emptive self-defence may be another evolution of the law with the same concerns. Ultimately it's a question for the international community to decide and I think we'll see an evolution in that direction.<sup>100</sup>

It would appear that the larger states can force their will upon the international community. Some of the greater world powers, most notably the USA are in favour of a right to anticipatory self-defence. One should not underestimate the influence of these states over international law.

Perhaps then the debate on anticipatory self-defence needs to transcend a focus on the legality of the doctrine. Arguably an examination of the legitimacy of the use of force, and an examination of the facts and circumstances surrounding the action would form a better framework for critiquing the increasing application of the doctrine. Central to this paradigm shift must be examination of the belief of the state that the action taken was necessary. As such the force used by the state should be judged not on legal concepts which are abstract, but rather should be appraised on the particular factors that gave rise to the employment of force.<sup>101</sup>

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<sup>98</sup> Luban, David 'Preventive War', [2004] 32 *Philosophy & Public Affairs*, 207.

<sup>99</sup> *Ibid.*

<sup>100</sup> See, [www.crimesofwar.org/print/expert/bush-Benvenisti-print.html](http://www.crimesofwar.org/print/expert/bush-Benvenisti-print.html)

<sup>101</sup> Taft & Buchwald, 'Pre-emption, Iraq and International Law', [2003] 97 *AJIL* 557.