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INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 3 | Issue 4

2020

The Use of the Force in International Laws is Limitless or Limited: A Critical Analysis

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ABSTRACT

"International Law has no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects of the relation".

"This view, which was widely held during the 19th century, abandoned the distinction between the bellum justum and bellum injustum. The prohibition of the use of force and the principle of non intervention in internal or external affairs of other states are two of the fundamental principles of the international laws governing international relations. The use of force has been a long standing phenomenon in international relations and has been considered to be directly linked to the sovereignty of states the limitless power wielded by states to use all possible means to guard and protect their interests."

The Kellogg-Briand Pact outlawed the waging of "aggressive war" but when the United Nation Charter was adopted in 1945, it not only outlawed "aggressive war" but also prohibited any use of force or threat thereof. It covered both war and n-war armed conflicts.

This paper will explains the international law principles which prohibits the use of force and the relevant use of force, then it will consider the legality of the coalition's recent military action , previous cases in which the right to anticipatory self- defence has been relied upon, the opinion of international law commentators on these issues will be critically analysed and finally the possibilities for development of this branch of international law with particular emphasis on codification of relevant principles.

Keywords- *Just ad ballion, Just in bello, Force, Humanitarian, UN Charter, Security Council.*

I. INTRODUCTION

The rule governing resort to the force from a central element within international law, and together with other principle such as territorial sovereignty and the independence and equality of states provides the framework for international order. While domestic system have, on the

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whole, manage to prescribed a virtual monopoly on the use of force for the governmental institutions, reinforcing the hierarchical structure of authority and control, international law is in a different situation. It must seek to minimise and regulate the resort to force by states, without itself being able to enforce its will. Reliance has to be placed on consent, consensus, reciprocity and good faith. The role and manifestation of the force in the world community is, of course, dependent upon political and other non-legal factors as well as upon the current state of the law, but the law must seek to provide mechanisms to restrain and punish the resort to violence.

Right of state to have recourse to use of force or war as a last resort to protect their vital interest or settle dispute has increasingly become a limited option. But the decentralised character of the international society, the absence of centralised machinery to settle international dispute and politico-legal condition allows state the right to use of force.

W.E. Hall explains this customary position by stating that:

"International law has no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose, and busy itself only in regulating the effect of the relation[2]**"**

II. HISTORICAL BACKGROUND OF USE OF FORCE

The doctrine of the just war arose as a consequence of the Christianisation of the Roman Empire and ensuring abandonment by Christians of pacificism. Force could be used provided it complied with the divine will. The concept of the *Just War* embodied element of Greek and roman philosophy and was employed as the ultimate sanction for the maintenance of an ordered society. *St. Augustine* defined the just war in terms of avenging of injuries suffered where the guilty party has refused to make amends. War was to be embarked upon punish wrongs and restore the peaceful status quo but no further. Aggression was unjust and the recourse to violence had to be strictly controlled. *St. Thomas Aqunias*[3] in the 13th century took the definition of the just war a stage further by declaring that it was the subjective guilt of the wrongdoer that had to be punished rather than the objectively wrong activity. He wrote that war could be justified provided it was waged by the sovereign authority, it was accompanied by a just cause i.e. the punishment of wrongdoers and it was supported by the right intentions on the part of belligerents.

[2] W.E. Hall International Law, 8th edition, (Clarendon Press oxford), 1924 p.82
[3] Summa Theologica II 40, "The evolution of the concept of the just war in international law.

With the rise of the European nation-state, the doctrine began to change[4]. It became linked with the sovereignty of state and faced the paradox of war between Christian states, each side being convinced of the justice of its cause. This situation tended to modify the approach to the just war. The requirement that serious attempt at a peaceful resolution of the dispute were necessary before turning to force began to appear.

The First World War marked the end of the balance of power system and raised a new question of unjust war. It also resulted in efforts to rebuild international affairs upon the basis of a general international institution which would oversee the conduct of the world community to ensure that aggression could not happen again. This creation of the League of National reflected a completely different attitude to the problem of force in international order.

(A) War and the Covenant of the League of Nation

The covenant of the League declared that members should submit dispute likely to lead to a rupture to attribute or judicial settlement or inquiry by the council of the league. In no circumstance were members to resort to war until 3 months after the arbitral award or judicial decision or report by the council. This was intended to provide a cooling off period for passion to subside and reflected the view that such a delay might well have broken the seemingly irreversible chain of tragedy that linked the assassination of Austrian Archduke in Sarajevo with the outbreak of the general war in Europe. League members agreed not to go to war with members complying with such an arbitral award or judicial decision or unanimous report by the council.[5]

The league system did not, it should be noted, prohibit war or the use of force, but it did set up a procedure designed to restrict it to tolerable level. It was a constant challenge of the inter war year to close the gaps in the covenant in an effort to achieve the total prohibition of war in international law and this resulted ultimately in the signing in1928 of the General Treaty for the renunciation of war (the Kellogg-briand Pact)[6]. The parties to this treaty condemned recourse to war and agreed to renounce it as an instrument of national policy in their relations with one another.[7]

(B) The Pact of Paris and State Practice on War

The covenant of the League in no sense abolished war. But the General treaty for the renunciation of war, also known as Kellogg-Briand Pact of Paris, signed on Aug 27, 1928,

[4] Brownline, use of force, pp-7 ff.
[5] Brownline, use of force chapter 4, article 10-16 of the covenant
[6] Distein war, chapter-4, A.K. Skubiszewski, the use of force by state, Mannual of Public international Law
[7] Article 1

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between the United States and France[8], laid down a comprehensive prohibition on war and renounced it "as an instrument of national policy in their relations with one another".

The treaty also suffered from few shortcoming viz., (i) uncertainty as to how far the prohibition against waging war included measure of force short war[9], (ii) absence of any provision for the authoritative ascertainment of breach of treaty, and effective machinery to decide whether war has been resorted to or not, (iii) failure to provide for collective enforcement of its obligations and (iv) absence of a duty under the pact to submits dispute between its signatories to a binding settlement. Nevertheless, in spite of these weaknesses, the treaty was important instrument which considerably restricted the right of the signatories to resorts to war.

During the inter-war period, right to wage war was also limited by a few other instruments such as the draft treaty of mutual assistance, 1923 (Art. I declaring aggressive war as an international crime). Protocol for the pacific settlement of international controversies, 1924 (Geneva protocol, Art-III) and the Lacaron treaty, 1925. The Anti-War treaty of Non-aggression and conciliation, 1933 signed at Rio de Janeiro stated that "the High contracting parties do solemnly declare that they condemn war of aggression in their mutual relationship or with other states.

III. Overview of art. 2(4) and self defence u/art. 51 of UN charter

Article 2(4)[10] of the charter declares that:

"All the members shall refrain in their international relations from the threat of the use of the force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the United Nations."

This provision is regarded now as a principle of customary international law and as such is binding upon all states in the world community. The reference to "force" rather than war is beneficial and thus covers situations in which violence is employed which fall short of technical requirement of the state of war.

Article 2(4) was elaborated as a principle of international law in 1970 Declaration on principles of International Law and analysed systematically.

First, war of aggression constitutes a crime against peace for which there is responsibility under international law.

[8] 94LNTS 57
[9] International Law Association, 1943, report of 38th conference of the ILA, Budapest
[10] La charte des nations unies: commentarie Article par article, 3rd edition, Paris, 2005

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Secondly, states must not threaten or use force to violate existing international frontiers or to solve international dispute.

Thirdly, states are under a duty to refrain from acts of reprisal involving the use of force.

Fourthly, state must not use force to deprive people of their right to self-determination and independence.

Fifthly, state must refrain from organising, instigating, assisting, or participating in act of civil strife or terrorist act in another state and must not encourage the formation of armed bands for incursion into another state's territory. Many of these items are crucial, but ambiguous. Although the declaration is not of itself a binding legal document, it is important as an interpretation of the relevant charter provisions[11]. Important exceptions to article 2(4) exist in relations to collective measures taken by the united nation[12] with regards to the self defence[13]. Whether such an exception exists with regard to humanitarian intervention is the subject of some controversy.[14]

Article 2(6) of the charter provides that UN "shall ensure that states which are not members of the United Nations act in accordance with these principle so far as may be necessary for the maintenance of international peace and security". In fact, many of the resolutions adopted by the UN are addressed simply to "all states". In particular, for example, security council resolutions 757(1992) adopted under chapter VII of the charter and therefore binding upon all the members states, imposed comprehensive sanctions upon the federal republic of Yugoslavia (Serbia and Montenegro). However, the invocation in that decision was to 'all states' and not to members states.

(A) 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 Members 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

[11] G. Arngio-Ruiz, the UN declarationon friendly relations and the system of source of international law, General Assembly, 44/22
[12] See chapter 21, p. 946 of international law, 8th edition, Malcolm N. Shaw.
[13] p. 861 of international law, 8th edition, Malcolm N. Shaw.
[14] p. 880 of international law, 8th edition, Malcolm N. Shaw.

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 to the classic *Caroline* formula as set down by the US in 1837.[15] 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 how a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of nothing unreasonable or excessive'.[16]

It is uncontroversial that lawful self-defence requires the existence of an armed attack. 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. 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.

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

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

[16] 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.

action which is preventative in character".[17] 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. Such considerations make the arguments supporting a right to anticipatory self-defence both plausible and convincing."

IV. CASE STUDY

(A) Nicaragua vs. United States[18]

In case of **Nicaragua vs. United States**[19] where U.S. had challenged the jurisdiction of I.C.J. The issue arose in this case was that Is the jurisdiction to entertain a dispute between two states, if they both accept the Court's jurisdiction, within the jurisdiction of the International Court of Justice? And the issue, where no ground exists to exclude the application of a state, is the application of such a state to the I.C.J. admissible?

It was held that the jurisdiction of the Court to entertain a dispute between two states if each of the States accepted the Court's jurisdiction is within the jurisdiction of the International Court of Justice. Even though Nicaragua declaration of 1929 was not deposited with the Permanent Court, because of the potential effect it had that it would last for many years, it was valid.

Thus, it maintained its effect when Nicaragua became a party to the Statute of the I.C.J because the declaration was made unconditionally and was valid for an unlimited period. The intention of the current drafters of the current Statute was to maintain the greatest possible continuity between it and the Permanent Court. Thus, when Nicaragua accepted the Statute, this would have been deemed that the plaintiff had given its consent to the transfer of its

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

[18] https://www.casebriefs.com/blog/law/international-law/international-law-keyed-to-damrosche/chapter-2/military-and-paramilitary-activities-in-and-against-nicaragua-nicaragua-v-united-states/2/

[19] The United States had challenged the jurisdiction of the I.C.J. When U.S. was held responsible for illegal military and paramilitary activities in and against Nicaragua in a suit brought in 1984 by Nicaragua. Though a declaration accepting the mandatory jurisdiction of the Court was deposited by the United States in a 1946, it tried to justify the declaration in a 1984 notification by referring to the 1946 declaration and stating in part that the declaration shall not apply to disputes with any Central American State.

Apart from maintaining the ground that the I.C.J lacked jurisdiction, the States also argued that Nicaragua failed to deposit a similar declaration to the Court. On the other hand, Nicaragua based its argument on its reliance on the 1946 declaration made by the United states due to the fact that it was a "state accepting the same obligation" as the United States when it filed charges in the I.C.J. against the United States. Also, the plaintiff intent to submit to the compulsory jurisdiction of the I.C.J. was pointed out by the valid declaration it made in 1929 with the I.C.J's predecessor, which was the Permanent Court of International Justice, even though Nicaragua had failed to deposit it with that court. The admissibility of Nicaragua's application to the I.C.J. was also challenged by the United States.

declaration to the I.C.J.

When no grounds exist to exclude the application of a state, the application of such a state to the International Court of Justice is admissible. The five grounds upon which the United States challenged the admissibility of Nicaragua's application were that the plaintiff failed because there is no indispensable parties rule when it could not bring forth necessary parties, Nicaragua's request of the Court to consider the possibility of a threat to peace which is the exclusive province of the Security Council, failed due to the fact that I.C.J. can exercise jurisdiction which is concurrent with that of the Security Council, that the I.C.J. is unable to deal with situations involving ongoing armed conflict and that there is nothing compelling the I.C.J. to decline to consider one aspect of a dispute just because the dispute has other aspects due to the fact that the case is incompatible with the Contadina process to which Nicaragua is a party.

Although the questions of jurisdiction and admissibility are primarily based on the principle that the I.C.J. has only as much power as that agreed to by the parties, these can be quite complicated. The 1946 declaration of the United States and the 1929 declaration of Nicaragua was the main focus of the case on declaration and each of these declarations pointed out the respective parties' intent as it related to the I.C.J's jurisdiction.

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. In *Nicaragua v United States*,[20] 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 armed attack, and consequently left opens the question of whether there is a right of anticipatory self-defence.

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.[21] 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

[20] *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.

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

authoritative assistance to an analysis of this issue.

(B) Oil Platforms (Islamic Republic of Iran v. United States of America) Judgment, 6 November 2003[22]

On 2 November 1992, the Islamic Republic of Iran filed in the Registry of the Court an Application instituting proceedings against the United States of America with respect to the destruction of Iranian oil platforms. The Islamic Republic founded the jurisdiction of the Court upon a provision of the Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States, signed at Tehran on 15 August 1955. In its Application, Iran alleged that the destruction caused by several warships of the United States Navy, in October 1987 and April 1988, to three offshore oil production complexes, owned and operated for commercial purposes by the National Iranian Oil Company, constituted a fundamental breach of various provisions of the Treaty of Amity and of international law.

To uphold the claim of Iran, the Court held that it must be satisfied both that (1) the actions of the United States, complained of by Iran, infringed the freedom of commerce and navigation between the territories of the Parties guaranteed by Article X (1), and (2) that such actions were not justified to protect the essential security interests of the United States as contemplated by Article XX (1) 1 (d). NB: Article XX (1) (d) states: "The present Treaty shall not preclude the application of measures: necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests."

The Court noted that the contention of the United States that its attacks on the oil platforms were justified "as acts of self-defence, in response to what it regarded as armed attacks by Iran, and on that basis it gave notice of its action to the Security Council under Article 51 of the United Nations Charter." The United States contended that, "even if the Court were to find that its actions do not fall within the scope of Article XX, paragraph 1 (d), those actions were not wrongful since they were necessary and appropriate actions in self-defence."

The Court concluded that "the United States was only entitled to have recourse to force under the provision in question if it was acting in self-defence. The United States could exercise such a right of self-defence only if it had been the victim of an armed attack by Iran and the United States actions must have been necessary and proportional to the armed attack against it."

"After carrying out a detailed examination of the evidence provided by the Parties, the Court

[22] https://ruwanthikagunaratne.wordpress.com/2017/08/17/list-of-icj-cases-relating-to-self-defense-and-other-matters-related-to-the-use-of-force/

found that the United States had not succeeded in showing that these various conditions were satisfied, and concluded that the United States was therefore not entitled to rely on the provisions of Article XX, paragraph 1 (d), of the 1955 Treaty."

V. LEGALITY OF MILITARY ACTION (EXAMPLE OF 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 U.S. governments also relied on the right to act pre-emptively in self-defence.[23] 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

RESOLUTION 678[24]

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. The broad authorisation granted by the phrase 'all necessary means' included military action.

1. *Resolution 687*[25]

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 such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area.

RESOLUTION 1441[26]

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,

[23] See for example, L Oakes, Interview with John Howard, Prime Minister of Australia (Nine Network, *Sunday*, 1 December 2002
[24] *Resolution on Iraq-Kuwait*, SC Res 678, UN SCOR, 2963rd mtg, UN Doc S/Res/678/199
[25] *Resolution on Iraq-Kuwait*, SC Res 687, UN SCOR, 2981st mtg, UN Doc S/Res/687/1992
[26] *Resolution on the Situation between Iraq and Kuwait*, SC Res 678, UN SCOR, 4644th mtg, UN Doc S/Res/1441/2002

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 targets[27] and that attacks could be justified by humanitarian arguments.[28] The United Kingdom government also argued that Iraq's material breaches of Resolution 687 revived the use of force under Resolution 678.[29] 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's state from acting to defend itself against the threat posed by Iraq or to enforce relevant UNSC resolutions and protect world peace and security.[30]

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. 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 self-defence is sufficiently consistent with international law to justify military action by the US, UK and Australia, cannot be sustained.[31]

Importantly, Resolution 1441 did not expressly authorise the use of force against Iraq even if

[27] Oakes, above n 25
[28] See for example, J Howard, 'Address to the National Press Club' (Speech delivered at Great Hall, Parliament House, Canberra, 13 March 2003)
[29] 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
[30] 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
[31] Martyn, above n 7, 2

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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's states. 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.[32] 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 'such 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 members 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 members states can respond unilaterally is an unsustainable view of international law. 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 cumulating of resolutions justify the use of force.

The overwhelming view of independent commentators is that the military action was illegal based upon the interpretation of UNSC Resolutions. Furthermore, the majority of published independent legal analysis has rejected the claim that existing resolutions justify the use of

[32] 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%20 2003.pdf> at 3 October 2003, 3.

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force or that there is any other basis under international law to justify the use of force against Iraq. 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.

(D) 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. 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. 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.[33]

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.

[33] 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

(E) 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 absence of any effective means to discipline its application. 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'.

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. 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. Furthermore, he deplores the formation of a 'sui generis set of rules for the United States' and considers it pertinent to advocate a commitment to the rule of law in the face of such a 'startling proposition'.

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.

(F) 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.[34] 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.

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. This proposition clearly reflects the ideas of Dinstein discussed in the next section of this paper. Further, he

[34] A D Sofaer, 'On the Necessity of Pre-emption' (2003) 14 *European Journal of International Law* 209.

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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.

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 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.

(G) 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. Therefore, interceptive, unlike anticipatory self-defence, is justified when the aggressor state has committed itself to an armed attack in an ostensibly irrevocable way. 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. 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.

VI. INTERNATIONAL HUMANITARIAN LAW

War is aimed at overpowering the enemy, using force and other means available at the disposal of the state. Nevertheless, the state's right is limited in this regard and it is required to follow

certain rules or Laws of war in order to limit the suffering and pain of the people involved in war and to limit the area of war or armed hostilities.[35] These laws are now more commonly referred to as international humanitarian law[36] and are applicable to all type of armed conflicts. They are binding on the states as well as on individuals, including members of the armed forces, heads of the state, minister and officials. They are equally binding on United Nation forces if engaged in military operations, because the United Nations is also the subject of international law.[37] The law, among others, prohibits the killing of civilians, the ill-treatment of prisoners of war, and use of weapons of mass destruction or poisonous gases.

(A) India and Nuclear Non-Proliferation Treaty (NPT)

All the major countries are parties to the NPT, with total membership of 189, but India, Pakistan, Israel are not its members, though they are nuclear threshold countries with the capability to make nuclear weapons[38]. India's refusal to accede to the treaty is based on its discriminatory character in verification and treatment which allows nuclear power to retain their weapon and control its further proliferation, but non-nuclear power is denied their acquisition. The execution of such a resolution is doubtful, because the nuclear weapons nations, who own these weapons, also possess the veto power in the Security Council. However India is also committed to the "No first use policy".[39] The General Assembly adopted a draft convention on the Prohibition on the use of Nuclear Weapons in 1989, which requires states parties not to use nuclear weapons under any circumstances. The use of nuclear weapons has a bearing on the environmental and humanitarian law. The 1960 convention on the Prohibition of Military or Other Hostile Use of Environmental Modification Techniques (ENMOD Convention) under Article 1 enjoins the state parties not to engage in 'military or any other hostile use of environmental modification technique having widespread, long lasting or server effects as the means of destruction, damage or injury to any other state party'. So even if the nuclear weapons are not specifically prohibited under any international convention, their use is not justified under international law.

VII. RECOMMENDATIONS

The uncertainties highlighted by this paper suggest that there is a real need for codification of

[35] The ILC in 1949 considered the sustainability of the laws of war as a topic of codification.
[36] The term found its expression in the "Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts" held in Geneva in 1974-77
[37] Cf. Reparation for injuries suffered in the service of the united nations case 1949 ICJ Rep, p. 174
[38] South Africa has also developed nuclear weapons but has since disassembled in arsenal in 1979 before joining the NPT.
[39]< http://www.indianembassy.org/policy/CTBT/nuclear_doctrine_aug_17_1999.html>

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.

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:[40]

- 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 members state is prohibited from distorting or altering the terms in order to serve its needs or to

[40] *It is acknowledged that presently, the UNSC does not provide 'interpretations' of its Resolutions and also that it has no capacity to 'discipline' members 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.*

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authorise its intended actions;

- Where a members 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 members state which it considers has engaged in unauthorised application of an UNSC resolution.

VIII. 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. It has even been radically suggested that such a change could result in the abolition of the prohibition of the use of force altogether. 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.[41]

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. However, the doctrine of pre-emptive strikes formulated by the US proposes to adapt the principles of immediacy and necessity, as 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.

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.

[41] 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.

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