

Pre-emptive Self-Defence, International Law and US Policy

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International law has long held that the use of force between states is illegal. There are only two exceptions to this general rule, being Security Council authorisation for the use of force, and that done in self-defence. The latter exception has been subject to much debate, particularly in the interpretation and application of Article 51 of the United Nations (UN) Charter, which today provides statutory authority for the use of force in self-defence. More recently however, the debate has revolved around the so-called doctrine of pre-emption; that is, whether military force that is employed pre-emptively can be justified under the rubric of self-defence. The United States (US) for example, in its recent National Security Strategy, has instituted a policy of using pre-emptive self-defence to 'forestall and prevent hostile acts' by terrorist groups and rogue states using weapons of mass destruction (WMDs) (The White House 2002: 15). In light of this current policy and the international reaction to it in the wake of the Iraq War, the extent to which the US can employ a doctrine of pre-emption that conforms with, and is permitted by, international law, is an important question for analysis.

This article evaluates the notion of pre-emptive self-defence. In particular, it examines whether the customary laws that give rise to that right can be extended to address the threats of terrorism and WMDs. In doing so, it addresses firstly the general laws relating to self-defence and secondly, the limits of the doctrine of pre-emption and the effect of this on US policy. It argues that despite the threat posed by terrorism and WMDs, the extended version of pre-emption sought by the US is not only potentially dangerous, but will be rejected by the international community as a whole. If the US is to maintain its policy of pre-emption, it will be best served by accepting the traditional laws, and by providing solid evidence for each of its claims in a multilateral setting, preferably the Security Council.

The Use of Force in International Law

The UN Charter is the primary instrument guiding the use of force in international relations. It provides a codified version of the international community's condemnation of recourse to war as an instrument of national policy, sentiments which have existed since the end of the First World War and the implementation of the Kellogg-Briand Pact. The present day prohibition on the use of force arises in Article 2(4) of the Charter, which states that:



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. (United Nations Charter).

The purposes of the UN are enshrined in Article 1(1) of the Charter, the primary purpose being to:

Maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace. (United Nations Charter).

These provisions apply equally to both members and non-members of the UN, and prohibit all recourses to force, whether unilateral acts of aggression or multilateral efforts to protect human rights or to conduct humanitarian intervention (Dinstein 2001: Chap. 4).

Notwithstanding these provisions however, there are two exceptions to the general rule against the use of force. The first of these relates to acts authorised by the UN Security Council. Article 42 of the Charter permits the Council (and by extension UN members) to take any such actions to maintain and restore international peace and security, where non-forcible measures would, or have proven to be, inadequate (United Nations Charter). Absent any specific authorisation however, the use of force would be unlawful, and it is not for individual states to determine when threats to the peace have occurred. The Security Council alone has legal authority to authorise forcible military actions (Dinstein 2001: 85).

The second exception to the general rule is the use of force in self-defence. Article 51 of the Charter provides for this exception, stating in part that:

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. (United Nations Charter).

It is commonly agreed that the words 'armed attack' in Article 51 strictly limit the extent of self-defence under the Charter, and indicate that the right cannot be justification for pre-emptive or anticipatory military strikes. Yoram Dinstein for example, has stated that "Article 51 permits self-defence solely when an 'armed



attack' occurs" (2001: 165). This proposition was similarly supported by the International Court of Justice (ICJ) in the 1986 *Nicaragua v The United States of America* case, where the court stated that 'the exercise of this right is subject to the State concerned having been the victim of an armed attack' (ICJ Reports 1986: 103). The use of force outside such an instance would therefore be unlawful.

Self Defence in Customary International Law

Article 51 however, is not the only authority that permits the use of force in self-defence. Customary international law has historically allowed for such a right, and extends further than that in Article 51, encompassing a right to use pre-emptive measures. According to Dinstein, "the customary right of self-defence is also accorded to States as a preventive measure, taken in 'anticipation' of an armed attack" (2001: 165). The requirements giving rise to this customary right were enunciated in the widely cited *Caroline* incident.

In early nineteenth century Canada, which, at the time, was still under British rule, anti-British attacks were being conducted throughout the country. In 1837, a small group of British soldiers entered the United States from Canada, their aim being to destroy the American boat *Caroline*, which had carried supplies to Canadian insurgents in the north. The *Caroline* was set alight and left to drift down river, at least one American being killed in the process. The British justified their actions by invoking the right of self-defence, arguing that the *Caroline* would continue to supply the Canadian rebels otherwise. Accepting this explanation, the then American Secretary of State Daniel Webster set out the basic elements of the right, stating that there should be a "necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation" (Jennings et al. 1996: 420). He stated further that the use of force should not involve "anything unreasonable or excessive, since the act justified by the necessity of self-defence must be limited by that necessity and kept clearly within it" (Jennings et al. 1996: 420). The customary right to self-defence, either in anticipation or otherwise, would therefore be valid when the requirements of necessity and proportionality are fulfilled. Because 'necessity' in Webster's formulation denotes something instant, imminent and immediate, these two elements have been joined by a third, that of imminence.

The Effect of Article 51 on Customary Law

There is some debate however, as to whether the UN Charter extinguishes this customary right, or simply preserves it. A number of commentators for example,



argue that the UN Charter supplants the customary laws, and therefore terminates the right of anticipatory self-defence. Others reject this claim, and argue instead that the words 'inherent right' in Article 51 are evidence that the Charter was intended to recognise and continue the customary right that existed prior to the establishment of the UN (Arend 2003: 92). Article 51 itself professes that "nothing in the present Charter shall impair the inherent right" (United Nations Charter), the implication being that the customary rules continue "to exist - unimpaired - after ratification" (Glennon 2002: 539-558). This latter assertion seems to be the correct one, and was acknowledged by the ICJ in the *Nicaragua* case. The Court stated, inter alia, that "the Charter itself testifies to the existence of the right of collective self-defence in customary international law" (ICJ Reports 1986: 103), and that "the exception to the prohibition of force constituted by the right of individual or collective self-defence [is] already a matter of customary international law" (ICJ Reports 1986: 103). While the Court remained silent on the issue of pre-emptive or anticipatory self-defence, its comments are still evidence that Webster's formulation of the customary law rules (which permit anticipatory self-defence) are still valid in international law. A right to anticipatory self-defence may therefore arise under the *Caroline* elements, despite being precluded by Article 51.

State practice since the inception of the UN also indicates, as suggested in *Oppenheim's International Law*, that the customary international laws are still valid, and continue to exist "alongside the law established by the Charter" (Jennings et al. 1996: 418). The issue of self-defence has arisen numerous times in the Security Council, and in three particular instances, there was some discussion on the right of anticipatory self-defence based on the *Caroline* elements.

The Cuban Missile Crisis

During the 1962 Cuban Missile Crisis, the US instituted what it called a 'defensive quarantine' around Cuba, done in response to the positioning of offensive Soviet missiles on the island. The US defended its actions on the basis of self-defence. Because the US had not actually suffered an armed attack, but feared the Soviet missiles could be used against them, the issue of pre-emptive self-defence arose. While the validity of the customary rules were not specifically addressed at the subsequent Security Council discussions, the requirements of Webster's formulation were examined in relation to the US's actions. This amounts to an implied acknowledgment that the customary laws have continued relevance despite Article 51. A number of delegates for example, asked whether America's decision to



implement a defensive quarantine could be justified because of a necessity of self-defence, instant, overwhelming and leaving no choice of means and no moment for deliberation (Arend 2003: 94).

The Six Day War

The so-called Six-Day War of 1967, in which Israel invaded neighbouring Arab territories, was justified by the Israelis on the basis that they were “acting in anticipation of what was believed to be an imminent attack by Arab states” (Arend 2003: 95). The notion of anticipatory self-defence was not looked upon favourably in this case, however the debate over Israel’s actions were hardly objective, and “support for Israel tended to fall along predictable political lines” (Arend 2003: 95). As a result there was no clear consensus one way or the other, as to whether pre-emptive self-defence is valid in international law. However the fact that the Israelis justified their actions by claiming anticipatory self-defence, and that this became an important issue throughout the Security Council debates is evidence that states do consider it a valid legal notion.

The Osirak Reactor

Israel again claimed anticipatory self-defence after it destroyed an Iraqi nuclear reactor in 1981. The Israelis based their argument on the belief that the reactor could have been used in the creation of nuclear weapons, which it believed would be used against them. Israel was widely condemned for its actions however, and even the US voted for a resolution to that effect (House of Commons 2001: 86). Much of the debate on this issue examined, as was the case in previous examples, the rules enunciated in the *Caroline* case. In particular, delegates were concerned with the necessity and immediacy elements. Representatives from Sierra Leone and the United Kingdom (UK) for example, stated that “the plea of self-defence is untenable where no armed attack has taken place or is *imminent*”, and that in this instance, “there was no instant or overwhelming necessity for self-defence” (Arend 2003: 95).

Operation Iraqi Freedom

More recently, much of the debate over the United States’ invasion of Iraq focused on the necessity of such an action, particularly given the belief amongst many states that continued weapons inspections were a more favourable alternative to the use of force. Additionally, the ability of the US to show that Iraq posed an imminent threat to its national security was a vital feature of the debate, evidenced by continued attempts by the US and UK governments to provide reports to that



effect. A number of countries, while maintaining that military intervention in Iraq was wrong, believed that the use of force might have been justifiable if the US had proven beyond a doubt that Iraq not only possessed WMDs, but also was a clear and immediate threat to the US, its allies or interests. This would have required the US to show that the threat posed by Iraq was sufficient enough to bring it within the *Caroline* elements, thereby giving rise to the legitimate use of pre-emptive self-defence.

These examples illustrate that while the law relating to anticipatory self-defence is not entirely settled, there is a basis for that right in customary international law, and that states generally accept this as the case. Based on these considerations, it is therefore arguable that the customary right to self-defence, as enunciated in the *Caroline* case and which allows for a right to anticipatory self-defence, is still valid today as a complement to Article 51. This is an assertion supported by state practice since the *Caroline* incident and the founding of the UN Charter.

The Limits of Pre-emptive Self-Defence

There remains some debate however, as to the limits of the customary laws. Of particular concern is the *extent* to which self-defence can be used pre-emptively. This debate has become more pronounced in light of Operation Iraqi Freedom and US calls to alter the existing framework. Historically, most emphasis has been placed on the dual requirements of necessity and imminence, suggesting that pre-emptive self-defence can be validly exercised only when these elements are fulfilled. A British report has argued for example, that "if an attack is judged to be imminent, then the argument is more likely to be accepted that an anticipatory right of self-defence arises" (House of Commons 2001: 85). This is further supported by the assertion that it is unreasonable for a state to have to wait for an armed attack to occur before taking action (Jennings et al. 1996: 422). As Dinstein contends, "it would be absurd to require that the defending State should sustain and absorb a devastating (perhaps a fatal) blow, only to prove an immaculate conception of self-defence" (Dinstein 2001: 172).

The concept of imminence however, has been complicated by the perceived threats that exist today. The dual issues of WMDs and terrorism are proving difficult in this respect. The imminence of a terrorist attack is extremely difficult to determine, and, in comparison to the massing of troops along a border, is near impossible to detect (Deller 2003: 98). Because of such concerns, the US has argued that the concept of



imminence should be adapted to the threats the world currently faces (The White House 2002: 15). This policy is a result of the September 11 terrorist attacks, and in light of the devastation caused by those attacks, is one that might seem desirable. However the difficulties that could potentially arise from such a policy are numerous. An extension of the imminence criteria for example, would leave the customary rules open to abuse (Deller 2003: 2), a fact acknowledged by the US itself (The White House 2002: 15). Many argue for example, that the right of pre-emptive self-defence, if applied too broadly, could be used by states to “cloak aggression in the mantle of self-defence” (Rivkin 2002: 18). This would in turn provide a dangerous precedent and could, as Mary Ellen-O’Connell believes, provide “justification for Pakistan to attack India” and for “North Korea to attack South Korea, and so on” (O’Connell 2002: 19).

This poses a fundamental dilemma for the United States’ National Security Strategy, as extending the current criteria will not only create a dangerous precedent, but finding a new framework that avoids such issues will be extremely difficult in itself. These concerns aside, the US will find it difficult even to institute change in this area, because many American allies, particularly in Europe, seem reluctant to alter their understandings of the laws of self-defence and the role of multilateralism in international relations (Payne 2003: 8). Indeed the build-up to the Iraq War illustrates that most world leaders believe that any attempts by the US to extend the imminence criteria are nothing more than blatant American unilateralism. This has proven detrimental even in the post-war environment, as the rift between the US and some European Union (EU) and Security Council members has spilled over to the reconstruction stage (Payne 2003: 8), indicating that any future attempts to employ an extended form of pre-emptive self-defence will be wholly rejected.

Pre-emption and US Foreign Policy

What options then, does this leave for US policy makers, and how can they employ a pre-emptive doctrine that is legal? Firstly, the US needs to accept the *Caroline* elements as the governing norms of pre-emptive self-defence, at least when dealing with rogue states. While this would require the government to back away from its stated policy goals of adapting the imminence criteria (Arend 2003:101), it is a less controversial tactic and will make it easier for the US to win support for any future pre-emptive strikes. The Iraq War has shown that the international community would be more willing to accept the use of pre-emptive force if the *Caroline* elements can be fulfilled with conclusive evidence of an immediate threat.



A potential problem with this approach is that it seems not to address America's concerns about the threats of WMDs and terrorism. It is arguable however, that the *Caroline* elements remain applicable to the current security environment to the extent that states are capable of obtaining WMDs, hosting terrorist training camps (with the host government's knowledge or otherwise), or supplying weapons and components to terrorists. These activities are directly comparable to those that originally gave rise to the doctrine of pre-emption in 1837 - namely the supply of weapons and provisions to Canadian insurgents. The *Caroline* case therefore provides strong legal precedent, not only because the rules governing pre-emptive self-defence were first enunciated in that case, but also because the *situation* that gave rise to those rules is one that could occur today. The British argument in 1837 was that it was the victim of ongoing attacks by Canadian insurgents, and that it was therefore justified in acting pre-emptively to prevent future attacks. Analogies can be drawn between this and the US argument that it is the victim of ongoing terrorist incidents "carried out sporadically over a long period of time" (House of Commons 2001: 83). If strong evidence existed for example, that a particular state was involved in supplying terrorist groups with weapons or other forms of support, then the customary law rules would be fulfilled without requiring any alteration or extension. This may have been a better justification for the Iraq War, had solid evidence been available of a link between Saddam Hussein and *al-Qaeda*, and could provide a more valid basis for future pre-emptive strikes.

It is true that the traditional rules still provide no help in situations where states are merely acquiring WMDs, without aiding or being associated with terrorist groups, and in authorising force against terrorists themselves. However the use of force cannot be the only means with which to deal with these particular issues. The US National Security Strategy itself states that force will not be used in all cases to pre-empt emerging threats (The White House 2002: 15). The best approach may therefore be to utilise existing international counter-terrorism, intelligence and law enforcement agencies to deal with those particular threats, while maintaining the *option* of pre-emptive military strikes (under the current framework) to address the issue of rogue states that sponsor or aid terrorist groups.

Secondly, the US should avoid acting unilaterally unless a threat is imminent in the strict sense, and should, in all other cases, act only if the customary elements can be fulfilled. This would require the US to provide strong evidence in each instance to



show that pre-emption is justified, and raises the question of who is to judge the validity of each claim. International law allows states some latitude to make their own assessments as to threats, but does not permit a wide discretion (House of Commons 2001: 83). Because the UN Security Council has for some time had legal authority to authorise the use of force, the US should, in the absence of an imminent threat, seek to justify its actions in that forum. While the Americans did attempt this prior to Operation Iraqi Freedom, they did so only when it became clear that a strike against Iraq would not be supported unless a full range of diplomatic and political measures were pursued beforehand. As a consequence of this, an Administration that was keen to justify war provided information and intelligence that was, as many reports now suggest, wrong. This has only added to the controversy surrounding the war.

If pre-emption is to be employed in the future therefore, the US must first address the international community both through and outside the Security Council, providing strong and *credible* evidence that a particular threat requires action. The massive diplomatic, political and intelligence gathering efforts the US undertook prior to Operation Enduring Freedom in Afghanistan provide a better example of how this may be achieved than the rather hasty efforts prior to the Iraq War. By seeking to justify its actions in a multilateral setting such as the Security Council, the US can soothe tensions with both friends and adversaries who believe that the US is a “unilateralist, overbearing hyperpower”, and should reassure the world that America will use its power with restraint and responsibility (Record 2003: 16). Such a policy would also remove the possibility of states abusing the laws of pre-emptive self-defence, and, as Anthony Arend believes, “contribute to a return to a more rule based legal regime” (2003: 102).

Conclusion

This is vitally important to the legitimacy of the United States’ pre-emptive policy. A right of self-defence that encompasses both actions done in response to an armed attack, and actions done in *anticipation* of an armed attack, are provided by customary international law after the *Caroline* incident. However, the extent of the customary rules remain somewhat controversial - as evidenced by the debate over the US’s recent National Security Strategy and Operation Iraqi Freedom.

The US has argued that the notion of imminence should be extended to allow for pre-emptive strikes against terrorist groups, and to forestall the use of WMDs by



rogue states. However the dangers that might arise from an alteration of the existing framework are numerous. To extend these requirements too far for example, would leave the notion of self-defence open to abuse, and could give states an opportunity to cloak aggressive military strikes under the mantle of pre-emptive self-defence. Despite this, the notion of pre-emption is permitted in international law, and the US can therefore maintain a policy of pre-emption that is legal. It is arguable that the *Caroline* elements remain applicable to the current security environment, at least to the threat of rogue states that sponsor terrorism, and therefore allow the US the option of using pre-emption under the traditional legal framework. To do this however, the US needs to accept the traditional elements as law, and to avoid using the right unilaterally. The US should seek to justify its actions in a multilateral setting such as the Security Council, ensuring that it does so with credible evidence. This will go some way to soothing the tension that arose over the Iraq War, and will limit the problems that could arise from an extended doctrine of pre-emption. It will also give the US an option of pre-emptive action that conforms with international law.

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