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**Pre-Emption and Prevention: An Ethical
and Legal Critique of the Bush Doctrine
and Anticipatory Use Of Force
in Defence of the State**

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ABSTRACT

This paper is a critique of the recent emphasis evident in US foreign policy towards the use of military force in anticipatory self-defence. It addresses the claims of the so-called 'Bush Doctrine' by examining the ethical and legal dimensions of 'pre-emptive war'. In this paper, I propose that two distinct strategies may be discerned from within the doctrine: those that are truly *pre-emptive* and those that are *preventive*. From an ethical perspective, the moral reasoning of the just war tradition will be used to demonstrate that whilst many of the claims made by the US are valid, any policy of preventive war targeted against sovereign states cannot be justified. Likewise, the provisions of international law may be said to permit the lawful use of force in self-defence (even anticipatory self-defence), but that claims for preventive war fall clearly outside its boundaries. My paper argues that the ethical and legal 'norms' operating within international relations that limit the use of force, and also that permit lawful and justified actions in self-defence must be upheld; and that the claims of the Bush Doctrine in regard to *prevention* are therefore largely invalid.

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**PRE-EMPTION AND PREVENTION: AN ETHICAL AND LEGAL CRITIQUE
OF THE BUSH DOCTRINE AND ANTICIPATORY USE OF FORCE IN
DEFENCE OF THE STATE**

INTRODUCTION

In the wake of continuing US military action in Afghanistan and Iraq, and as a result of the conduct of a new, hybrid, ‘war on terror’, much focus has been placed on the concept of military pre-emptive action as a legitimate form of national self-defence. In the *National Security Strategy of the United States of America 2002* (NSS), the Bush Administration revealed a desire to extend the legal right of self-defence to include what it calls ‘pre-emptive’ military strikes against threats not yet ‘fully materialized’. In the language of the NSS, this extension is a matter of ‘common sense’ and a ‘right’ for states; it refers as such to an extant tradition of pre-emption within the established norms governing self-defence. In this paper, I analyse the claim that nation states do in fact have an extant ‘right’ to anticipatory self-defence, and explore the ethical and legal dimensions of the use of force in this fashion.

PRE-EMPTION AND PREVENTION

The NSS specifically states how it will deal with three types of threat agents: terrorist groups, weak states, and rogue states. First, it promises to ‘disrupt and destroy’ terrorist organizations of ‘global reach’ through ‘direct and continuous action...before it reaches our borders’ and that the US will ‘not hesitate...to exercise our right of self-defense by acting pre-emptively’ (NSS, 2002, 5-6). Second, the US will ‘hold to account nations that are compromised by terror, including those who harbour terrorists’, by ‘denying further sponsorship, support, and sanctuary to terrorists by convincing or compelling states to accept their sovereign responsibilities’ (NSS, 2002, 6). Finally, the US will ‘be prepared to stop rogue states and their terrorist clients *before* they are able to threaten or use weapons of mass destruction...to forestall or prevent such hostile acts [we will], if

necessary, act pre-emptively' (NSS, 2002, 14-15). I contend that within these three 'pledges' it is possible to detect two different types of anticipatory strategies that seek to stretch the traditional 'rights' of state self-defence: *pre-emptive* self-defence, and *preventive* self-defence.¹

At the most basic level, prevention involves the immediate use of force in order to avoid the risk of war later under less favourable circumstances; pre-emption on the other hand involves the initiation of military action because it perceives an imminent attack and identifies the clear advantages of striking first (Brodie, 1959, 225 and 241). Jack Levy has further identified that pre-emption and prevention differ along four separate dimensions (Levy, 1987, 82). The first difference is the time that elapses until the actual threat of war materializes. Pre-emption is a tactical response to an immediate threat, while prevention is a more strategic response to a long-term threat, or one that has yet to develop. For Dan Reiter, this time distinction is vital, as it enables the separation of wars that emerge from 'concerns with long-term shifts in power' (preventive) from wars emerging out of 'crisis dynamics' (pre-emptive) (Reiter, 1995, 45). Second, the source of the threat may differ. A pre-emptive attack is designed to forestall deployment of existing forces or weapons and prevention aims to halt the creation of new assets. Third, the consequences of failure to act are different; for the pre-emptor, it is the near certain attack by his/her adversary and the loss of any tactical 'initiative', whereas for the preventer it is the gradual deterioration of his/her relative military power and the strategic risk of a more costly war. Finally, the incentives to strike first are different. A pre-emptor has a perceived incentive to strike first, which is then further intensified by military technology favouring the offensive or by the existence of military doctrines emphasising the offensive. For the preventer, Levy believes that the incentive to strike first is not necessarily present; rather it may be feasible because of the 'margin of safety provided by the preventer's own military superiority' (Levy, 1987, 90-92).

¹ I am indebted to Dr Nicholas Wheeler from the University of Wales, Aberystwyth, for pointing out the significance of this distinction to me in personal discussions during February 2003.

Using these definitions, the Bush Doctrine contains strategies that are clearly delineated as either 'pre-emptive' or 'preventive'. In pursuing a 'war' on terrorism, the US may plan and execute operations against terrorist groups, weak states and even rogue states that can be termed pre-emptive. Strikes against terrorist training camps or operations to arrest terrorist leaders fall within this rubric. Some strategies envisaged by the Bush Doctrine are however clearly more preventive, such as an attack launched against weak or rogue states to eliminate a threat before it is formed, or in the case of WMD, before a capability is operational. Indeed, the proposed use of force to implement 'regime change' on those states and adversaries that are either WMD capable or that seek to acquire WMD is clearly the 'preventive core' of the Bush Doctrine. This strategy is preventive on two levels; first, it seeks to destroy non-existent or emergent capabilities that the US assumes are matched by hostile intent in the future, and second because they clearly seek to use immediately the military superiority of the US, rather than risk any future conflict in which the US itself may be deterred (NSS, 2002, 14-15).

THE ETHICAL DIMENSION

In the contemporary era, the aggressive use of force by nation states has come to be universally viewed as lacking moral justification. Michael Walzer makes the claim that '[a]ggression is the name we give to the crime of war...[and] it is the only crime that states can commit against other states: everything else...is a misdemeanour' (Walzer, 2000, 51). 'Aggression' in this normative sense does not refer simply to the initiation of hostilities (who was the 'first to fire') but to the unjustified initiation of hostilities through the 'violation of the territorial integrity or political sovereignty of an independent state' (Walzer, 2000, 52). What makes aggression a 'crime' from a moral reasoning perspective is the idea that the violation of territorial integrity and political sovereignty is a violation of the fundamental 'rights' of the state within international society.

The idea that aggressive behaviour by states is a crime may be explained on two levels. First, states may be said to possess 'rights' in and of themselves, in much the same way as citizens possess rights within the state. This is more correctly known as the 'domestic

analogy'; and rests on the reasoning that states make up a political 'society' directly reflective of the political communities formed by men and women (Walzer, 2000, 58). The moral judgement, therefore, is that aggression by states in international society should be compared then with murder or armed robbery by individuals in domestic society. A second explanation is that a state's 'rights' are themselves derived from the rights of the individuals who are its citizens; and therefore aggression is further a violation of fundamental 'human rights' (Luban, 1980, 160-181). Whilst the exact content of these 'human rights' may be contested, it is sufficient to say here that the poignancy of this idea stems from the understanding that all human beings have at least a 'natural' right to 'life and liberty'. Hence in the view of Michael Walzer, 'when states are attacked, it is their members who are challenged, not only in their lives, but in the things they value most, including the political association they have made' (Walzer, 2000, 53).

In addition to these rights based theories, aggressive war is also seen as criminal by the standards of 'generally held values' and 'communal morality' based on the modern interpretation of history. James Turner Johnson believes that 'one encounters the values that shape moral decisions through reflection on history, and historical events shape human understanding of what is morally valuable' (Johnson, 1981, 22). For Johnson, this idea not only offers an account of the way human moral reasoning works, but also points to the way in which moral traditions develop in a culture. Similarly, David Hendrickson believes that the 'norm against preventive war became embedded because experience with the contrary practice...led to results nearly fatal to civilization' (Hendrickson, 2003, 1-10). Hence, the development of a modern moral prohibition on aggressive war may also be attributed in part to the historical 'experience' (either directly or indirectly) of the extreme levels of violence, destruction and suffering caused through war initiated by aggressor states in the twentieth century.

Many of these ideas stem from the 'just war' tradition. This tradition, alongside 'pacifism' and 'world order' (or *realpolitik*), represents one of three great moral traditions that seek a 'quest for peace' (Reichberg, 2002, 16). Unlike pacifism (which

insists that war is never justified) and world order (which denies that moral judgments should enter considerations for the use of force), the just war tradition attempts to prescribe under what conditions the use of force in international society may in fact be acceptable. Jean Bethke Elshtain has recently summarised the criteria of the so-called *jus ad bellum* as: preventing harm to the innocent, openly declared by a legitimate authority, fought for a just cause, begun with the right intentions, be of last resort and have a reasonable chance of success (Elshtain, 2003, 57-58). Of particular note, the normative test for 'just cause' has principally come to encompass only resistance to the 'crime' of aggression within the international system; and the use of force by states in self-defence as one of the few cases where war can be morally justified (Rengger, 2002, 359). The principles of the just war tradition may be presented, therefore, as the 'obligatory political counterpart to unjust violence'; and it is in this context that the claim of states possessing a moral 'right' to self-defence can be made (Reichberg, 2002, 22).

In order to better understand the idea that self-defence presents not simply a 'just cause' for resort to war, but is further an inherent right of states, it is necessary to return to rights based theories on aggression. Michael Walzer combines the various levels of the 'theory of aggression' into what he calls the 'legalist paradigm', which may be summed up in six propositions: there exists an international society of states, who, in the absence of a universal state, protect the rights of their citizens; this international society has a law that establishes the rights of its members – territorial integrity and political sovereignty - which are based ultimately on the natural human rights to life and liberty; any use of force, or imminent threat of force, by one state against another constitutes aggression and is a criminal act; aggression justifies two kinds of violent response, a war of self-defence and a war of law enforcement; nothing but aggression can justify war; and once the aggressor state has been militarily repulsed, it can also be punished (Walzer, 2000, 61-62).

For Walzer, the moral argument for the right to use force in self-defence then is a logical extension of the claim that the rights of states have been violated by aggression. Within the moral reasoning of the just war tradition, it is significant that these rights are not

merely passive (or negative), they also have an active (or positive) aspect, because it is only through the state that citizens can defend their rights. So, whilst states exist to defend the rights of their members, ‘citizens defend one another and their common life – the government is merely their instrument’ (Walzer, 1980, 211). There are two further arguments that may be extracted from within this idea that give strength to the claim for an inherent state ‘right’ of self-defence: the existence of a ‘social contract’ and the nature of ‘international society’.

Communitarians like Walzer strongly believe in the existence of a ‘social contract’ between the state and its citizens. Walzer writes that this contract is not constitutive of a ‘series of transfers from individual men and women to the sovereign’, but is rather a ‘metaphor for a process of association and mutuality’ (Walzer, 2000, 54). The ongoing character of this contract is that the state claims to protect its citizens against ‘external encroachment’, protection of not only the ‘lives and liberty’ of individuals, but of ‘shared life and liberty, and the independent community they have made’. Therefore, in a ‘genuine contract’, it ‘makes sense to say that territorial integrity and political sovereignty can be defended in exactly the same way as individual life and liberty’ (Walzer, 2000, 54). If the main tenets of the ‘legalist paradigm’ are accepted, two propositions follow: first, there is a ‘presumption in favour of military resistance once aggression has begun...[in order to] maintain rights and deter future aggressors’; and second, the use of force to resist the ‘crime of aggression’ may not be merely morally permissible, it is perhaps even ‘morally desirable’ (Walzer, 2000, 59).

There are also strong moral arguments for at least two exceptions to these norms that may permit a state to use force ‘offensively’ (that is, without first receiving an actual attack on their ‘territorial integrity or political sovereignty’) whilst acting in their own self-defence. First, pre-emptive attacks against an adversary may be morally justified as acts taken in ‘anticipatory self-defence’. This position has been advanced and generally accepted by a variety of commentators on ethics in international affairs. Stanley Hoffman believes that, if the ‘legalist paradigm’ is accepted, then ‘in those cases where self-defence is justified, in some instances at least anticipatory self-defence ought to be morally tolerated’

(Hoffman, 1981, 60). In a much firmer stance, William V O'Brien writes that 'anticipatory self-defence is a legitimate form of self-defence if there is a clear and present danger of aggression...thus, military coercion may be employed not only to repel but also to prevent imminent illegal military coercion and, if necessary, to attack the proximate sources of recurring illegal military coercion' (O'Brien, 1981, 26). The moral case for anticipatory action then remains linked to the threat of aggression. For Walzer, aggression is said to have occurred when 'potential enemies...are engaged in harming us and have already harmed us, by their threats, even if they have not yet inflicted any physical injury'. The line between legitimate and illegitimate 'first strikes' is 'not going to be drawn at the point of imminent attack but at the point of sufficient threat' (Walzer, 2000, 81).

Refining this distinction of 'sufficient threat', Walzer has proposed a 'general formula' to govern the ethical pre-emptive use of force: 'states may use military force in the face of threats of war, whenever the failure to do so would risk their territorial integrity or political independence...under such circumstances, it can fairly be said that they have been forced to fight and that they are victims of aggression' (Walzer, 2000, 85). Using this conception of threat, Walzer also makes an important distinction between the ethics of pre-emptive and preventive war. He believes that prevention, on the far end of the 'anticipation spectrum', is a strategy of attack responding to a 'distant danger', more a matter of 'foresight and free choice' for the state considering such action (Walzer, 2000, 75). The underlying motivations for a strategy of preventive war are more likely to be a desire to maintain or redress the current 'balance of power' between states, or through a 'cynical fear' of the 'intent of one's neighbours'. Regardless, neither meets the appropriate conception of sufficient threat required by Just War reasoning for anticipatory use of force, and hence the 'moral necessity of rejecting any attack that is merely preventive in character' (Walzer, 2000, 76-80).

Second, the wider use of force against an adversary prior to the outbreak of hostilities does seem to be justified if the state is facing what Walzer terms a 'supreme emergency' (Walzer, 2000, 251). This is a more difficult argument to make from an ethical

perspective in general terms than ‘anticipatory self-defence’. Supreme emergency is usually evoked in order to illustrate the moral efficacy of particular actions or decisions taken by states *post facto*. It is typically associated with the ethical debate as to whether *jus ad bellum* can override *jus in bello* in circumstances in which they conflict (Holmes, 1989, 167). Nonetheless, I believe that the idea merits some consideration in respect to the strategy of pre-emptive war. In its most basic form, the supreme emergency idea is that certain necessities of life may require the overriding of profound and otherwise ‘absolute’ moral prohibitions in extreme situations (Coady, 2002, 16).

Supreme emergency then is a rhetorical term that also contains an argument. There exists both a fear and danger beyond that of ‘ordinary war’ that may ‘well require exactly those measures that the war conventions bar’ (Walzer, 2000, 251). Walzer has chosen to define supreme emergency using two criteria that correspond to the levels on which the concept of ‘necessity’ works: first with the imminence of the threat, and the second with its nature (Walzer, 2000, 252). Importantly, both criteria must be applicable before a sufficient argument can be made to justify extraordinary measures using force. Where aggression can be seen as a violation of the rights of states, a supreme emergency is likely to represent the most dangerous version of this situation where ‘the very existence of a community may be at stake’ (Walzer, 2000, 228).

I would argue that if our moral reasoning justifying self-defence (and further anticipatory self-defence) is predicated on an assessment of ‘sufficient threat’ and ‘aggression’, then at some point this same reasoning can also be applied to the requirements governing the conduct of ‘offensive’ war and the use of pre-emptive or preventive military actions. Hoffman asserts that there may be a legitimate cause for offensive war in pursuit of important ‘community causes’; by which he means non-selfish causes whose ends transcend the (evident) interest of the initiating state, and that can be called ‘world order ends’ (Hoffman, 1981, 61). Similarly, Coats claims that states may legitimately have a ‘right to wage [offensive] war’ in so far as their actions ‘can be convincingly construed as a defence of the international order and a securing of the common international good’ (Coats, 1997, 126-127).

Hence, an offensive war against an adversary that presents a clear and present danger to the existence of an individual state, or one who threatens the values and interests of the international community, could at the very least be morally permissible and justified as a 'necessary war' of individual or collective self-defence. Michael O'Keefe has proposed that 'international terrorism could represent a threat to the existence of a state if weapons of mass destruction were used, [and] it could be argued that...would represent a supreme emergency' (O'Keefe, 2002, 108). Given the scope of recent international terrorist activity and the vast problems associated with global WMD proliferation, this would indeed seem to encompass Walzer's criteria for both exceptional 'imminence' and 'nature' of any given threat.

THE BUSH DOCTRINE: IS IT ETHICAL?

President Bush is correct in asserting the moral 'right' of the US to self-defence. This 'right' is based on the predication that aggression is a crime as it violates the 'rights' of the state and/or the 'natural' human rights of its citizens. Indeed, states are responsible for defending their citizens from external attack or even threat of attack. The US clearly has a right of self-defence against the demonstrated and continuing aggression of international terrorist organizations. Furthermore, Jean Bethke Elshtain believes that the US has 'a duty...[and] moral responsibility to respond' in order to protect not just US citizens, but the people of the 'entire world' (Elshtain, 2002, 264). In the face of what is most certainly a threat, it is natural for the US to attempt to degrade the ability of international terrorist organizations to undertake further aggressive action.

I assert that international terrorism does present a sufficient threat to morally justify the pre-emptive military use of force in anticipatory self-defence. Given the dangers of the nature of the threat, I am also inclined to agree with Michael Walzer that, in relation to the threat of international terrorism, 'perhaps the gulf between pre-emption and prevention has now narrowed such that there is little strategic, and therefore little moral, difference between them' (Walzer, 2002). Thus, the ongoing element of the threat could

also meet the requirements for exceptional ‘imminence’ demanded in order for pre-emptive or preventive actions justified by necessity during a ‘supreme emergency’. However, when assessing the Bush Doctrine’s strategy of preventive war against ‘rogue states’, the moral justifications in my view are not present; and may therefore even constitute aggressive war on behalf of the US. I believe that the problem originates in the conflation evident within the Bush Doctrine of international terrorism, weak states that harbour terrorist organisations, and the possession of WMD by rogue states. As William Galston has pointed out, ‘[e]ach constitutes a threat [but] they are not the same threat and do not warrant the same response, it serves no useful purpose to pretend that they are seamlessly connected, let alone one and the same’ (Galston, 2002, 5).

Hence, it is not clear that rogue states (even those that do possess WMD) automatically pose a sufficient threat to the US to morally justify pre-emptive attacks, and they certainly do not constitute the clear and present danger of a ‘supreme emergency’ to justify a ‘necessary’ preventive war. Rather than making the concept of ‘imminence’ (always an inherently subjective measurement) obsolete as described by the NSS, the onus must surely fall on the Bush Administration to convincingly demonstrate (publicly) the irrefutable ‘nature’ (a much more objective factor) of the threat to US territorial integrity or political sovereignty. Unfortunately, this is an undertaking that they have so far failed to do in any adequate, substantial or even convincing way. The moral reasoning of the Just War tradition has therefore provided a relevant and valuable set of tools for understanding the ethical dimension of ‘pre-emptive war’; and has further provided an equally valuable method of assessing the moral justifications both for and against the pre-emptive and preventive strategies of the Bush Doctrine respectively. Thus, the US may indeed have a ‘right’ to make war in self-defence; however, as Nicholas Rengger maintains, ‘the Just War tradition demands that any [such] claim must be morally justified, and not simply asserted’ (Rengger, 2002, 361).

THE LEGAL DIMENSION

The prohibition of the use of force by states and the criminalization of aggressive war has ‘entrenched itself in an impregnable position’ as a peremptory norm in contemporary international law (Dinstein, 2001, 113). Thus, the normative stance of international law may be said to represent two ideas: first, that ‘no legal system can afford to disregard the distinction between the lawful and the unlawful resort to war’; and second, that with regards to the resort to war by states, the doctrine of ‘reason of state’ has been supplanted by international law (Draper, 1990, 204). It is true that, for at least 300 years prior to the early twentieth century, legal writers recognised that states were free to go to war to redress wrongs committed against them. There were rules for peacetime and rules for the conduct of armed hostility, but there were no established rules restricting the right to resort to force in the first instance. Josef Kunz has described this period as one of the ‘old international law’, which was dominated by the ‘dogma of the absolute sovereignty of each state’. During this period, war was the ‘principle vehicle of dynamic development’ driven by the reliance of all states on the conception of ‘self-help’ (Kunz, 1933, 630-650). However, integrating the secular (or natural) aspects of the older just war tradition into modern substantive (or positive) international legal statutes and standards has been the great achievement and end result of an intense period of codification during the twentieth century.

It is in the Charter of the United Nations that the present day *jus ad bellum* finds its normative legal force. Article 2 (3) states that ‘[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered’, while Article 2 (4) indicates that ‘[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations’. As articulated in Article 2(4) of the Charter, the prohibition on the use of inter-state force has become the cornerstone of customary international law; and as such may be seen to be binding on all states, whether or not Members of the United Nations (Dinstein, 2001, 87-91). The ‘criminalization’ of aggressive war was initially attained through the conclusion of the International Military Tribunal annexed to the London Agreement (known as the London

Charter 1945), and continues today under the jurisdiction of the International Criminal Court (ICC), established by the Rome Statute in 1998.

The thesis of the unlawful employment of aggression is inextricably linked to an antithesis, namely that a lawful (hence legitimate) recourse to force is available to those states faced with such an attack in self-defence. No state is obliged by either customary or international treaty law to remain passive when another state takes action inimical to its legally protected interests. When this happens, any state so affected may be entitled to take counter-measures. Responses to such acts of aggression would include ‘an entitlement to use armed force in order to defend itself against an attack, to repel the attackers, and to expel them from its territory’ (Jennings and Watts, 1996, 417-418). However, prior to the twentieth century (and other than in the work of religious and secular Just War philosophers), ‘self-defence was not a legal concept but merely a political excuse for the use of force’ (Dinstein, 2001, 62). Today, with the general prohibition of aggression firmly in place from both an ethical and a legal normative perspective, the ‘right’ of self-defence exists as the only explicit legal exception to this norm, and is enshrined in Article 51 of the UN Charter.

It is important to note that Article 51 of the Charter pronounces self-defence to be an ‘inherent right’. Unlike the ethical conception of ‘natural’ rights, Yoram Dinstein believes that ‘[a] legal right is an interest protected by law, and it must be validated within the framework of a legal system...self-defence, as an international legal right, must be proved to exist within the compass of positive international law’ (Dinstein, 2001, 163). The best interpretation of the meaning of self-defence as an ‘inherent right’ was provided by the International Court of Justice (ICJ) in its Judgement in the *Nicaragua* case in 1986. In this case, the ICJ took the expression to be a reference to customary international law, which exists alongside the treaty law established by the Charter (Jennings and Watts, 1996, 418). According to the ICJ then, Article 51 of the Charter refers to, and acknowledges the existence of, self-defence as a pre-existing right of a customary nature. Dinstein sees this as a ‘sensible interpretation’ of Article 51 that rationalises the employment of the adjective ‘inherent’ without ‘ascribing to it far fetched

(and insupportable) consequences’ (Dinstein, 2001, 165). A similar interpretation was made by the ICJ in its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, stating that ‘the Court cannot lose sight of the fundamental right of every state to survival, and thus the resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake’ (Dinstein, 2001, 159). Whilst not without dissent, the ICJ based these conclusions on the evidence of state practice and *opinion juris* over time. By making reference to Article 51 as representing a norm of customary international law, the ICJ is also judging that the right of self-defence is therefore conferred on all states in the international community, regardless of whether or not they are members of the UN.

Most states recognise that the basic core of self-defence within international law is that any act of self-defence in response to armed attack must meet two conditions: necessity and proportionality (Gray, 2000, 105). The first condition denotes that there exists a necessity to rely on force because no alternative means of redress is available, in other words, ‘force should not be considered necessary until peaceful measures have been found wanting, or when they clearly would be futile’ (Schachter, 1984, 1635). Ian Brownlie has described proportionality as the ‘essence of self-defence’ (Brownlie, 1963, 279); and whilst this remains a contested concept, Dinstein proposes that it is perhaps best to consider the demand for proportionality ‘in the province of self-defence as a standard of reasonableness in the response to force by counter-force’ (Dinstein, 2001, 184). The ICJ has reaffirmed that necessity and proportionality are limits on all acts of self-defence in both the *Nicaragua* case and the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*; noting that the dual conditions represent ‘a rule of customary international law’ that ‘applies equally to Article 51 of the charter’ (Gray, 2000, 106).

The customary requirements of necessity and proportionality are often traced back to the 1837 *Caroline* incident. These dual conditions were first established as a precedent following a pre-emptive attack by British forces in Canada on a Canadian rebel ship that was planning an attack from the USA. In what has become a most famous reply, the US

Secretary of State, Daniel Webster, called upon the British Government to show a ‘necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation’, the act of which should involve ‘nothing unreasonable or excessive’ (Jennings, 1938, 89). R.Y. Jennings believes that Webster’s ‘formula’ constitutes the *locus classicus* of the law of self-defence’ (Jennings, 1938, 92); and certainly the language used by Webster has continued to influence contemporary international legal decisions. The International Military Tribunal at *Nuremberg* quoted Webster’s formulation as a standard for evaluating (and rejecting) the German allegation that the invasion of Norway in 1940 constituted a legitimate exercise of self-defence (Dinstein, 2001, 219).

The ICJ has also recently upheld validity of these two conditions. In the *Nicaragua* case, the ICJ found that ‘observance of the necessity and the proportionality of the measures taken in self-defence was necessary’ if action in self-defence was to be lawful, and that the state claiming to be acting in self-defence must have been the victim of an armed attack (Jennings and Watts, 1996, 421). The continuing utility of these two customary ‘conditions’ to states within international law is that they are often the only factors relied upon in deciding the legality of particular actions. Therefore they constitute a ‘minimum test’ by which to determine that a use of force does (or does not) constitute self-defence (Gray, 2000, 107).

One extension to this rubric is anticipatory self-defence. Anticipatory self-defence is the idea that it is permissible for a state to use force against an armed attack which has not yet actually begun, but is reasonably believed to be imminent. It should be emphasised that in general terms the anticipatory use of force falls under the prohibition of aggression in Article 2(4) of the UN Charter; entailing a presumption that it is therefore illegal (Detter, 2000, 86). However, another view is that while anticipatory action in self-defence is normally unlawful, it is not necessarily unlawful in all circumstances. The extent to which this idea holds validity can be determined by a further examination of the one explicit legal exception to the prohibitive norm - the ‘inherent right’ of states to act in their own self-defence established under Article 51 of the UN Charter. In essence, the

case for (or against) anticipatory self-defence on legal grounds revolves around a debate as to the scope of the right of self-defence. This is an area of international law that is 'particularly contentious and difficult to analyse' (Byers, 2002a). Nonetheless, I believe that just as it was possible to ascertain the nature and content of a right to self-defence in both international customary and treaty law, so it may be tenable to speak about an extension to that right. This may be sufficiently demonstrated through a wider reading of the scope of 'self-defence', and also the meaning of 'armed attack', as defined within Article 51 of the UN Charter.

A literal and restrictive reading of Article 51 presents a clear and succinct argument that the right of self-defence arises only if an 'armed attack' occurs and that this right should be narrowly construed in order to restrict the use of force amongst states. The meaning of aggression under Article 2(4) clearly includes threats, but only an actual 'armed attack' on a states 'territorial integrity' or 'political independence' (or indeed UN Security Council authorisation) provides the sufficient pre-requisite to legitimate the use of counter-force in self-defence. Those who argue for a restrictive interpretation maintain that any broader interpretation of Article 51 provides states with an opportunity to flagrantly violate the rules prohibiting the use of force (Dinstein, 2001, 165-169 and Gray, 2000, 96-105). However, the possibility of abuse is not a sufficient reason for denying the existence of the right. Whilst accepting this provision of treaty law, a second, wider reading of Article 51 could therefore present a counter argument that by reference to the 'inherent right' of self defence, the Charter also preserves the earlier well defined customary right to pre-emptive self-defence. Thus, Article 51 only highlights one form of self-defence (namely response to an armed attack) that does not negate other patterns of legitimate action in self-defence vouchsafed by customary international law (Arend, 2003, 90-93). This approach does have some formal legal support. In his Dissenting Opinion to the *Nicaragua* case, ICJ Judge Schwebel rejected a reading of Article 51 that implied that the right of self-defence existed 'if, and only if, an armed attack occurs' (Dinstein, 2001, 168).

Whilst this debate about the scope of 'self-defence' would seem to be unresolvable, there are three aspects of international law regarding the meaning of 'armed attack' that do lend weight to the case for justified anticipatory use of force in self-defence. First, the United Nations General Assembly (UNGA) *Definition of Aggression* does enumerate that an 'act of aggression' can result from 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State'. Furthermore, the ICJ has upheld the legality of this view in the *Nicaragua* case by using this same logic to define an 'armed attack' (Dinstein, 2001, 118 and Gray, 2000, 97). The UN Security Council has more recently also reaffirmed the 'inherent right' of states to act in self-defence against terrorism in Resolution 1368, and in Resolution 1373 it has pronounced that states 'shall take the measures necessary to prevent the commission of terrorist acts' (Rowe, 2002, 301-322). These two resolutions support previous debates in the Security Council that it may be within the inherent right of self-defence to try to 'turn the tide of terrorism', to discourage further attacks and that 'the right of self-defence is not an entirely passive right' (Gray, 2000, 117). Second, since assaults by irregular troops and terrorists are typically conducted by small groups employing 'hit and run' tactics, it can be strongly argued that, should a distinctive pattern of behaviour emerge, a series of 'pin-prick' assaults might be weighed in its totality and count thus as actual 'armed attack' under the accepted UN definition (Dinstein, 2001, 182 and Gray, 2000, 107).

Finally, the UNGA *Definition of Aggression* refers to the first use of force as constituting only *prima facie* evidence of aggression. In many instances, this reflects the reality that the opening of fire is an unreliable test of responsibility for an armed attack. Hence, an 'armed attack' may in theory precede the actual firing of the first shot, and therefore legally justify a response. The use of force by a state acting in self-defence would not then be truly 'anticipatory', but would be rather what Dinstein has called 'interceptive'. Dinstein defines interceptive self-defence to 'have taken place after the other side has committed itself to an armed attack in an ostensibly irrevocable way' (Dinstein, 2001, 172). While a pre-emptive strike is, by definition, designed to respond to an armed attack that is merely foreseeable, an interceptive strike counters an armed attack that is

imminent and unavoidable. This presents a useful and alternate way of locating the right of self-defence within international law. When considered in combination with the former two wider definitions of 'armed attack', it would seem to present a legitimate way for states to lawfully respond to the threat of terrorism in particular, even under the limitations of Article 51 of the Charter.

THE BUSH DOCTRINE: IS IT LEGAL?

President Bush's assertion that the US has legal 'right' to self-defence is indeed a claim grounded in international law. In the case of lawful counter-force to an armed attack, the UN Charter recognises the 'inherent right' of states to act in their own self-defence in Article 51. And as the ICJ has affirmed, this codified right of treaty law exists alongside a correlative (and supportive) right established through state practice and customary requirements. The customary right of self-defence applies to all states and is defined by the two conditions of necessity and proportionality established by the precedent of the *Caroline* case. However, in further asserting the claim of a 'centuries old right' of anticipatory self-defence (with no reference to the UN Charter system), the US is proceeding on a less than solid legal foundation and is seeking to return to an older legal doctrine of 'self-help' rather than 'self-defence'. This doctrine has been expressly purged from international relations during the twentieth century by the codification of treaty law prohibiting aggression and by the vast majority of state practice limiting the unilateral use of force. Certainly, the customary rights of self-defence established in 1837 by the *Caroline* case do provide for action taken pre-emptively, nevertheless, this right now exists alongside the much more restrictive conditions of Article 51. The legal debate surrounding the scope of self-defence is, as I have shown, highly problematic and far from resolution, and so any attempt to argue for an extension lacks sufficient justification in my opinion.

With regard to the ability of the US to respond lawfully to the threat of terrorism, there does appear to be considerable legal support for strategies that are pre-emptive. The key to this argument is, however, not linked to any extension of the scope of self-defence, but

rather that the lawfulness of any use of force against terrorist organizations should rest on a wider understanding of the definition of ‘armed attack’ (Gray, 2000, 112). The assault on the World Trade Centre and the Pentagon on 11 September 2001 must surely be considered an ‘armed attack’. Clearly, the transformation of fuel laden civilian aircraft into precision guided missiles targeted at US civil, political and military installations qualifies as an ‘actual armed attack, which is clear, unambiguous, subject to proof, and not easily open to misinterpretation or fabrication’ (Henkin, 1979, 142). The UN Security Council has affirmed that terrorist groups constitute a legitimate target under international law and has approved measures taken to ‘prevent’ the commission of terrorist acts. I would contend that these two factors alone constitute sufficient justification for the lawful prosecution of military operations against terrorist organizations that constitute a threat to any member nation of the UN. Indeed, arguments for ‘pre-emption’ may not even be the appropriate label given the ongoing and persistent nature of the terrorist threat. The military use of force might instead be classified as ‘interceptive’, which is a term more at ease within the normative legal boundaries of Article 51.

When assessing those aspects of the Bush Doctrine that are preventive, however, I do not believe that the US is making either a sufficient or a tenable argument. They are clearly illegal when measured against the standards of Article 51 of the UN Charter. Even if one accepts that the customary right of self-defence includes a right to use force in ‘anticipation’ of an armed attack, the targeting of ‘rogue states’ falls clearly outside this rubric. Indeed, Michael Byers believes that the Bush Doctrine ‘makes no attempt to satisfy the criteria of the *Caroline* case; there is no suggestion of waiting for a necessity of self-defence that is instant, overwhelming, leaving no choice of means and no moment of deliberation’ (Byers, 2002b).

Likewise, the more preventive strategies of the Bush Doctrine seek an extension to the scope of self-defence that is outside the normative foundations of both international treaty law and international customary law. As Oscar Schachter writes, the ‘basic premise’ of international law governing the use of force must be that ‘the right of self-defence,

inherent though it may be, cannot be autonomous. To consider it as above or outside the law renders it more probable that force will be used unilaterally and abusively' (Schachter, 1989, 277). This is exactly what the Bush Doctrine proposes and it is exactly what the normative legal order prohibiting the aggressive use of force is designed to prevent.

CONCLUSION

In this paper, I have critically analysed the claim of the Bush Doctrine that nation states have an extant 'right' to use force in anticipatory self-defence, and have explored the normative boundaries that limit any such 'pre-emptive war'. This has been an important exercise, because even though the Bush Doctrine is in reality an inherently pragmatic example of a foreign policy concerned with national security interests, it cannot escape the very theoretical foundations that both empower and restrict action within international relations. Furthermore, the very notions and language that the Bush Doctrine itself uses to justify its strategies (words like 'rights', 'aggression' and 'self-defence') are themselves inherently normative concepts. The 'common sense' strategies suggested by the Bush Doctrine certainly enhance the possibility that force can be used in ways that deal effectively with threats to US national security. Yet, at the same time, the Bush Doctrine blatantly ignores the need to legitimise the use of force. I would argue that legitimacy with respect to the use of force in the international sphere (or indeed in the domestic) can only be derived from adherence to the normative rules provided to us by what Richard Falk so ably describes as the 'mutually reinforcing traditions' of ethics and international law (Falk, 2002, 49-56).

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