Opinion piece: *Pax Washington* and the UN Charter – an Australian Perspective on the War with Iraq

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INTRODUCTION

Critics of the Coalition of the Willing are saying that 'unilateral' action against Iraq leapfrogged United Nations (UN) processes.[1] In reality, the UN does not have effective peacekeeping capacity as the provisions of the UN Charter relating to international peacekeeping are moribund. If Security Council endorsed collective self-defence, and, preventive self-defence was the stated basis of the US led Coalition[2] for the disarmament of Iraq, is the move from self-defence to preventive self-defence an advance or an erosion of international law? Recalling that states practice shapes public international law this article examines the practical effect of Coalition policies on the UN Charter to conclude that, in the absence of workable UN Security Council peacekeeping mechanisms, customary rules of international law may re-emerge as the regulatory base.

CUSTOMARY LAW

When the UN Charter progressively entered into force after its adoption on 26 June 1945, some rules of customary law were adopted, modified or replaced. Far from displacing customary international law, Art 51 expressly acknowledged the existence under customary law of the individual and collective right of self-defence, but subordinated that right to a proposition whereby a State attacked would notify the Security Council (SC) of the incident and its response in self-defence, whereupon the Security Council would decide upon future action. The proposition that the UN would impose peace has remained textual with the SC unable to perform as planned.[3] In this circumstance we must still look to customary law.

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[1] Twenty-nine of the 191 UN Member States supported the 20 March 2003 military intervention. Four of the 15 members of the Security Council supported military intervention.

[2] Comprising the US, UK, Australia and Poland.

[3] See text of Art 51 and discussion under 'Armed Attack'.

Customary international law developed over centuries so as to reflect state practices that became commonly assumed positions on issues such as territorial boundaries, maritime rights of passage and the right of self-defence. Scholars agree that rules of customary law can change when States have expressly replaced the customary rule by a widely or universally adopted international treaty, or by a commonly assumed State practice.[4] In this context it may be helpful to recall that certain rules of customary international law, including some of the practices of which we now speak, emerge from States practice not abstract legal theory. Suggestions that there are doctrinal lines in this area of international law derived solely from the UN Charter are misleading.

Sweeping assertions by some Australian academics that the Coalition of the Willing breached the UN Charter are based largely on the text of certain unimplemented Chapter VII Charter provisions from which new norms of international law have not developed. These assertions have been unhelpful for many in the community who genuinely wish to understand the issues. In this respect some academic commentators should consider adopting an important rule of the practising legal profession, namely, identifying in argument alternative statements of the law (in this context where peremptory norms *have not* emerged from UN practice), and avoiding patently wrong propositions of law.[5]

There is also the question of who is morally qualified to comment. Minorities in Iraq that suffered genocidal persecution might properly regard the equivocal performance by some prominent Australian legal scholars during the Indonesian/Australian occupation of East Timor's land and sea-bed resources as hardly qualifying them to pontificate again whilst Coalition forces sought to remove a dictator who oppressed and murdered at will.

MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY

The UN Security Council (SC) with five permanent members, namely, the United States, the United Kingdom, France, China and Russia with a primary veto right, and ten rotating members has not worked well under pressure. SC responses to breaches of peace have been at best belated and at other times whimsical and hypocritical. SC voting often appears affected by political objectives exterior to peacekeeping and antithetical to humanity. The tortuous

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[4] Art 38(1) of the Statute of the International Court of Justice (ICJ) summarises in no order of priority the sources of international law as: '(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.

[5] Art 38(1)(d)(Above) of the Statute of the ICJ reinforces the need for this ethical standard. The scholarship in a recent study, *The Charter of the United Nations – A Commentary* in 2 Vols edited by Bruno Simma and others, OUP 2002 meets the exacting requirements of Art 38(1)(d) and has been of great assistance to the writer. All citations relate to Vol 1. As to peremptory norms limiting the UN Charter provisions see Simma at 711:29 and general discussion of customary law and UN resolutions Simma Above 268-73.

twelve year SC response to the Iraqi regime of Saddam Hussein appeared to be more of the same. Since 1945 more than 200 SC Resolutions affecting issues of world peace have been vetoed. During the founding debates the US and Great Britain opposed the insertion of veto rights, arguing that the veto was incompatible with the fundamental principles of the UN; unfortunately the Soviet Union's demand prevailed.[6]

Art 24 of the Charter confers 'primary responsibility' upon the SC for the 'maintenance of international peace and security'. So long as the SC is exercising in respect of any dispute or situation the functions assigned to it, the General Assembly, 'shall not make any recommendation with regard to that dispute or situation unless the SC so requests'. This Art 12(1) restriction upon the role of the General Assembly does not limit the jurisdiction of the International Court of Justice to adjudicate in relation to an incident.[7] No application to the ICJ affecting the actions of the Coalition of the Willing has been announced at the time of writing.

When the SC is not exercising its functions in accordance with the Art 24, the General Assembly, '... may make recommendations to the Members of the United Nations or to the SC or to both' on any questions or matters within the scope of the UN Charter.[8] The drafting history of Arts 10, 12 and 24 is of a compromise between the Great Powers that wanted the SC to be the primary guardian of world peace and other Member States seeking a role for the General Assembly.[9] The compromise was the auxiliary role given to the General Assembly to examine issues and to 'make recommendations'. The US and the UK accepted that the SC role was only to bring a cessation to any fighting and not to enforce terms of settlement. In practice, the SC exceeds its original authority.[10]

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[6] *'The Diaries of Sir Alex Cadogan'* 1938-1945 Ed D Dilks NY [1971] NY 661 and citations. 'By August 29 [1944], the Americans had come round to the view that a party to a dispute, whether a Permanent Member or not, should not vote upon it; whereas the Russians insisted on unanimity of the Great Powers in all circumstances, so that a Permanent Member should have a veto in a dispute in which its interests were involved. Eden telegraphed on 6 September that Britain could not accept the Russian view; and Cadogan remarked to Gromyko that even if Britain and America did support it, no other government would. There would therefore be no World Organisation. Gromyko stood pat. Cadogan, doubting whether he understood the arguments, suggested an intervention in Moscow. Roosevelt telegraphed Stalin, who replied that the understanding reached at Tehran implied the unanimity of the four Great Powers. Russia had to be mindful of "certain absurd prejudices" on the part of other powers, which frequently hampered 'an objective attitude' towards the Soviet Union. On 13 September, Gromyko told Cadogan that Russia's insistence on unanimity was 'final and unalterable.' See also Simma Vol. 1 9:42 ibid.

[7] See *United States Diplomatic and Consular Staff in Teheran* ICJR (1980) 3, 22; *Nicaragua Jurisdiction and Admissibility* ICJR (1984) 392; *Aerial Incident at Lockerbie* ICJR (1992) 21.

[8] Article 10.

[9] *'The Diaries of Sir Alex Cadogan'* above 750-1: 'Much of the debate focused on the "President's compromise" whereby, although a Great Power party to a dispute would not vote, the other four Permanent Members must agree before the Council could try to find a peaceful settlement. In other words, the Council's action is such an instance might be stopped by the abstention of one Great Power. The five resisted prolonged efforts of smaller powers to abolish this "hidden veto"'.

[10] Simma above 703, 705-6 *e.g.* enforcing terms of settlement in Bosnia and after the Iraq-Kuwait ceasefire and establishing transitional government as in East Timor 1999 – 2002.

Tension between the respective roles of the General Assembly and the Security Council over breaches of peace – the use of force, economic sanctions and other measures surfaced soon after the Charter was signed. The more memorable example was UNGA Resolution 377 of 3 November 1950[11] known as the *Uniting for Peace Resolution* whereby the General Assembly resolved to embark upon collective military measures on the Korean Peninsular in light of the failure of the SC to 'exercise its primary responsibility for the maintenance of international peace and security.'

By 'recognising' or 'endorsing' or 'authorising' collective self-defence measures taken by Members States the SC side-steps its primary duty to deploy UN Military Missions. When the Charter was drafted it was not anticipated that the SC would 'contract out' its peacekeeping role.

Art 12(1) prohibits the General Assembly from taking an overlapping peacekeeping role when the SC is 'exercising its responsibilities'. By endorsing *non-UN* initiated peacekeeping and at the same time remaining seized with responsibility[12] the SC denies to the General Assembly its secondary responsibility. Are SC Resolutions that authorise or endorse other Member States' collective self-defence measures an exercise of the SC responsibilities under Arts 11 and 24? The jury is out on this issue with scholars fairly evenly divided.[13]

The seventeen Iraq resolutions between 1990 and November 2002 are instructive of the language used to paper over the non-implementation of provisions, in particular Arts 42, 43 and 45, relating to a UN led military action.

An examination of SCR 665 of 25 August 1990 that authorised all Member States 'to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council' to *inter alia* enforce the pre-existing trade embargo, and of SC 678 that authorised 'all necessary means to uphold and implement prior resolutions to restore international peace and security', exemplifies the problem foreseen in 1945 by New Zealand and other small State delegations who argued for a joint General Assembly and Security Council role.[14]

A 'determination' by the SC pursuant to Art 39 that there is a threat to the peace, breach of the peace or act of aggression is binding on all Members who must adhere to the Art 25 obligation to accept and carry out the Security Council's decision. Art 25 requires Members to give the UN 'every assistance in any action it takes in accordance with the present Charter.' Since the UN's own military capacity has been stultified throughout it's history the question arises as to whether the SC's practice of securing military assistance by

[11] Wrongly attributed to the SC by two Australian scholars Williams & Hovell (footnote 32). The Korean intervention led to an intense debate as to the legality of non-SC approved military action by Member States. See also fn 86.

[12] See SCR 676: 'Decides to remain actively and permanently seized of the matter until Kuwait has regained its independence and peace has been restored in conformity with the relevant resolutions of the Security Council'.

[13] Simma Vol 1 126 fn 116.

[14] Cadogan Supra 750-751.

authorising Member States to discharge UN responsibilities has become, in international law, a States practice.

IS THE SECURITY COUNCIL ACTING WITHIN ITS AUTHORITY?

In recent years the Security Council interposed itself in its neutered role of responsibility without power by 'endorsing' or 'authorising' military missions not established within the auspices of the UN. It is stretching language and the history of the Charter to accept that in these circumstances the SC is 'exercising its responsibilities' or is properly 'seized with responsibility'.

Although John Foster Dulles once described the SC as 'a law unto itself' the SC is a specific organ of the UN and it must work within the terms of the Charter.[15] The *travaux préparatoires* reveal an attempt to carefully regulate the functions of the SC with New Zealand and India in particular bringing a common law approach to expressly delineating the SC powers *vis a vis* the General Assembly.[16] In their treatise on Chapter VII Professors Frowein and Krisch bring a systemic view:

> ... the SC does not enjoy a Kompetenz-Kompetenz, i.e. competence for their authoritative interpretation. While it is true that every organ must, in the first place, determine its own jurisdiction, such a determination is binding only if supported by the member States in general. In this vein, the generally approved report of a sub-committee of the Committee on Legal Questions at San Francisco stated that "[i]t is to be understood...that in an interpretation made by an organ of the Organisation ...is not generally acceptable it will be without binding force". Although the practice of the organs is an important element of treaty interpretation, in particular with respect to the evolutionary interpretation of constituent instruments of international organisations, *it represents a binding determination of the content of the Charter only if supported by State practice in general.* Accordingly, the ICTY has insisted on the existence of limits to the discretionary powers of the SC, however broad these may be.[17] [emphasis added]

Arguably the SC may not be properly 'seized with responsibility' when the proposed exercise of such responsibility has been vetoed. The SC may be similarly disabled when the veto is employed in an attempt to withdraw a SC endorsement of collective self-defence measures including terms of ceasefire. Whilst the *Provisional Rules of Procedure* of the SC permit the inclusion of a security matter on the SC's agenda, in practical terms a divided SC may lack competence to nullify or withdraw a prior competent resolution approving the use of force. This issue is addressed further under 'Armed Attack'.

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[15] Simma above 710 fn 78.

[16] One may also note with irony the rejected French proposal at the Committee on Legal Questions in San Francisco [1944] that if the SC could not reach a decision Members of the UN '... reserve to themselves the right to act as they may consider necessary and in the interests of peace, right and justice.' 9UNC10 Docs 696. See also Cadogan above 658.

[17] Above Simma 710 and the articles and authorities cited therein. The reference to the International Criminal Tribunal for the former Yugoslavia (ICTY) is to the trial of war criminal Tadic where the question of jurisdiction was raised, see Tadic (Jurisdiction) ILM35 (1996).

Although the *travaux préparatoires* anticipated that the SC would act only after reaching consensus the Korean emergency posed the dilemma of what to do when one Permanent Member declined to participate. Over subsequent years the SC adopted the practice of treating a non-participation or abstention as a neutral event that would not hinder the remaining Permanent Members from reaching a consensus. This approach was endorsed, controversially, in the writer's view, by the ICJ in its 1971 *Advisory Opinion on Namibia.*[18]

An important question arises when the SC authorisation to a non-UN force already engaged in collective self-defence is unqualified as to duration. Professor Randelzhofer argues eloquently and textually that in this ongoing situation sanctions and actions are not an exercise of collective self-defence.[19] In his view Arts 42, 48(1) and Art 106 envisage the use of Member State forces when the SC, though seized with responsibility, requires military assistance. Recognising that this approach sits uneasily with the right of collective self-defence preserved in Art 51 Prof Randelzhofer said,

> ... To qualify the military activities of the above-mentioned States against Iraq as measures of collective self-defence neglects a decisive aspect of their behaviour. Acting on the basis of Article 51 of the Charter it would not have been necessary to wait for a resolution of the SC. But these States apparently did not act before the SC had adopted Res. 678.

The premise that Kuwait and its allies were not acting in collective defence before SCR 678 on 29 November 1990 is open to question. The words of the SCR 678, '2. Authorises Member States *cooperating* with the Government or Kuwait...' suggest otherwise as do contemporary declarations of intended force by Kuwait's allies. Indeed the Secretary General appears to acknowledge that the SC had endorsed collective self-defence measures.[20] While this issue is open to textual debate[21] it is clear on the facts that collective self-defence measures under way pursuant to Art 51 were not terminated by the SC in accordance with Art 51 when the SC authorised Member States to use force.[22]

Textually, Professor Randelzhofer's reliance on Art 42, 48(1) and Art 106 to colour the endorsement of the use of force by the States 'cooperating' with Kuwait is debatable. Arts 42 and 48(1) are clearly predicated upon agreements made under Art 43 for Member States to place military forces at the disposal of

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[18] ICJR (1971) 16-58. Contra see Stone above 232-233 and fn 16 above.

[19] Above 126-7.

[20] UN Press Release SG/SM/1200 – 24 April 1991.

[21] Above Simma 757, where the learned author does not address the reason why SCR 678 referred to Member States *cooperating with the Government of Kuwait* rather than with the United Nations Security Council.

[22] Above Simma 757, '...according to Art 51, the SC may terminate the right to self-defence only through measures necessary to maintain international peace and security i.e. through measures which are effective with respect to this objective ...in practice though, as has been shown above, the call for a ceasefire would be considered sufficiently effective *once the aggressor has credibly expressed its readiness to observe it*' [emphasis added]. It is notorious that Iraq's purported acceptance of the ceasefire terms in SCR 687 of 3 April 1991 via its Deputy Prime Minister's letter of 27 February 1991 was followed within two days by SCR 688 condemning the persecution by Iraq in Kurdish populated areas. Moreover, almost 12 years of warnings to Iraq of non-adherence to ceasefire terms starkly documents the failed ceasefire.

the SC. On any interpretation, Art 48 can acquire no greater ambit than that given it via the pre-condition in Art 43.

Likewise, Art 42 is to be read with Art 43 in context. The *travaux préparatoires* reveal that Chapter VII provisions were drafted as an inter-related package with no suggestion that Art 42 alone might allow the SC to 'contract out' the Art 47 UN Military Staff Committee direction of peacekeeping military operations.

The *travaux préparatoires* do not envisage the adaptation of Art 42 to paper over the non-implementation of Chapter VII peacekeeping processes. Moreover it is doubtful whether the SC can itself expand its powers.[23] Nevertheless, a number of eminent scholars now adopt the view that 'authorisations' by the SC for Member States to use force in order to restore peace and security ostensibly (but not often with any express mention) under Art 42 constitute a 'recognised States Practice'.[24]

Having taken this position, the proponents of this view then say it becomes a question of fact as to whether self-defence measures may continue concurrently with this authorisation. An examination of many such Security Council Resolutions does not reveal an express relevance on Art 42 yet Art 42 is promoted in UN corridor discussions as an alleged legal basis for the 'authorisation' and 'endorsement' of non-UN military and economic sanctions.

Not one of the 17 Security Council Resolutions since 1990 relating to Iraq expressly mentions Art 42 as the empowerment. No formula as to the precise status of military forces 'authorised' by the SC was adopted by the General Assembly. Indeed, the UN does not accept responsibility for operations, logistics or discipline of such military deployments – witness the disclaimers issued by the Secretary-General as Coalition forces approached Baghdad in 1991 and 2003. Again, SCR 1264 of 15 September 1999 authorising the Australian led INTERFET peacekeeping deployment to East Timor contained no express mention of Art 42, or, matters such as rules of engagement.

Against this background, scholarly reference to Art 42 as the basis for SC 'authorisations' presents as an *ex post facto* reformulation of SC resolutions.[25] It

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[23] Simma above 710.

[24] Above Simma, Prof Kirsch '...although this deviates from the original concept of the Charter, States Practice has recognised it as an exercise of the Council's powers under Art 42 and thus an action of collective security:' p138:6. Also Profs Reinisch and Bryde, '...it seems more in line with the concept of the Charter to permit action by the SC under Art 42 even though the conditions, as set out originally have not been met.' p756:20. But see Cadogan above pp 659-660 – the proposal that States '... should maintain a 'quota' of forces instantly ready to move at the order of the Council.'

[25] Compare the explicit text of SCR 221 of 9 April 1966 relating to economic measures against Southern Rhodesia clearly in furtherance of Article 41 and the call to the UK Government to intercept oil tankers at sea by force if necessary again clearly in furtherance of Article 42 with SCR 678 of 29 November 1990 'authorises Member States *cooperating* with the Government of Kuwait ...' - an express recognition in the writer's opinion of collective self-defence. Again, SCR 1441 of 8 November 2003: '... Recalling that in its resolution 687 (1991) the Council declared that a ceasefire would be based on acceptance by Iraq of the provisions of that resolution, *including the obligations on Iraq contained therein'* [emphasis added]. Words overlooked by the two Australian academics who advised the Australian Opposition Leader Simon Crean (c/f footnote 31) that the ceasefire was '... permanent upon Iraq's acceptance of,

appears that there is no developed States practise that regularises the contracting out of UN peacekeeping responsibilities.[26]

Art 2(5) says, inter alia, 'All members shall give the United Nations every assistance in any actions it takes in accordance with the present Charter ...'

Professor Krisch recognises that a formal obligation under Art 2(5) is only activated when a decision by the SC has binding force under Chapter VII. While Chapter VII was activated after Iraq's invasion of Kuwait no peacekeeping mechanism under Art 43 was established. Instead, the SC resolved to 'authorise' Coalition forces. Professor Krisch asserts that:

> Although this deviates from the original concept of the Charter State practice has recognised it as an exercise of the Council's powers under Art 42 and thus an action of collective security. Accordingly, Art 2(5) in principle also applies to authorisations of military ... enforcement actions ...[27]

Writing of the UN's Korean War experience, Professor Stone said that the argument that Art 2(5) is engaged when the UN approves voluntary action:

> ... is to confuse the question of the nature of a Council or Assembly "recommendation" as a "collective" expression of the individual wills of the Members, with that of a collective "decision" imposing Charter obligations on the Members.

In a prescient insight Prof Stone concluded:

> ... By breakdown of the decision making apparatus of the Security Council United Nations Members were left to their liberty of action within the residual sphere, the task of peace enforcement resolving itself into co-ordination of Members' individual decisions within this sphere.[28]

Another weakness in the argument that Art 42 cures the irregularity of the SC 'authorisations' or 'endorsement' of non-UN Military deployment is in the dormant Art 44 that provides:

> When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfilment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

Clearly, Art 44 is predicated on enforcement measures under Art 42. Although the *travaux préparatoires* indicate that the next step after Art 42 action would be the raising of a UN Military contingent by agreement under Art 43, if we

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and not compliance in perpetuity with, its terms' [emphasis added]. Patently wrong advice that was to be released to the Australian public.

[26] Described by Quigley as the 'privatisation of collective security' 249-50.

[27] Above Simma 138:6.

[28] Stone above 236-7. See discussion under 'Residual Customary Right to Resort to War'.

concede for the purpose of argument that State practice now leapfrogs Art 43, what becomes of Art 44?

Art 44 represents a high water mark for the smaller and medium sized powers at the 1944 San Francisco Committee meetings. Unlike the rest of Chapter VII, Art 44 was not brought to San Francisco by the Great Powers. The representatives of Australia, Brazil, Canada, Egypt, New Zealand and South Africa argued for full voting rights on the Security Council on all votes relating to deployment of their armed forces. Those familiar with the struggle in 1941-42 between British Prime Minister Churchill and Australian Prime Minister Curtin over Britain's attempt to divert Australian troops returning from the Middle East to defend India instead of Australia may understand the vigour behind the Australian argument at San Francisco.

Given recent events in Iraq it may be of more than passing interest to note the reference by Professors Bryde and Reinisch to the unsuccessful proposal at San Francisco by Egypt seconded by Brazil and Greece that SC participation extend to '... all States offering assistance, facilities, and right of passage', pursuant to agreements under Art 43.[29] Against the history of Art 44 those who breathe life into Art 42 and claim a new States practice consolidate further the influence of the Permanent Members UK. If Art 42 is now contrived to give the UN the right to 'authorise' the use of non-UN forces, there seems no good reason why Art 44 could not be adapted to better reflect the letter and spirit of the Charter. Australia's long tradition of supplying the UN with military contingents may justify an early initiative on behalf of the smaller powers.

If Art 42 can be revived so imaginatively, or constructively depending upon a point of view, why was Art 44 not similarly revived to give those States that contributed forces and facilities to the SC endorsed response to the Iraqi invasion of Kuwait full participation in SC decisions affecting the use of force? In this way, States like Italy, Germany, Kuwait, Saudi Arabia, Egypt, Syria, Turkey, Australia, New Zealand, Greece and Japan would not have been hostage to the US/UK – Russia/France wrangle during long years of oppression and suffering in Iraq. Art 44 provides a method in such circumstances for regional participation. This may have avoided the perception of Anglo-centric dominance of the Coalition of the Willing and not left Australia so aligned to the United States and the United Kingdom.

After the 2003 Iraq experience some Member States may be more circumspect in allowing the SC to surrender effective control by open-ended authorisations. Similarly, 'authorised' States may be reluctant to assist in circumstances where subsequent use of the veto may render them open to being described in mid-stride as 'belligerent parties'.[30] As has been observed earlier, the lawfulness of continued military operations after the SC loses unanimity may rely upon the terms of the original authorisation and Art 51 recognised customary law based (collective) self-defence.

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[29] Simma above 764.

[30] Secretary-General Kofi Anan's media briefing on 26 March 2003 calling upon the 'belligerent parties' to exercise restraint and *Press Release* SC 7706 that day '... belligerents who controlled the territory ...'.

In the absence of an Art 43 agreed UN Military Mission, Member States such as France and Germany felt free to decide the degree and length of their participation in measures of collective security.[31] This may strengthen the view that without both responsibility and *power* to direct operations the SC is not 'exercising' its Art 24 'primary responsibility' and US led collective self-defence operations lawfully continued in, as Professor Stone says, the 'residual sphere' of international law. This is discussed further under 'Residual Customary Right to Resort to War'.

Ironically the claim of 'unilateralism', though not supported by this writer, may apply equally to those States interpreting SCR 678 as binding until withdrawn, and, to those States that prior to the attainment of the SCR endorsed ceasefire goal of 'peace *and security* in the region' withdrew from implementation of the full terms of SCR 678. Since the terms of each subsequent SCR reaffirmed earlier resolutions and effectively gave Iraq a further opportunity to comply with the ceasefire terms it may be argued that the conditional ceasefire was ineffective and the war not concluded. France and Germany's unilateral departure further weakens any claim that the SC was effectively 'exercising' its responsibilities in accordance with Art 24.

DID SCR 687 ESTABLISH A 'PERMANENT CEASEFIRE' WITH IRAQ?

Those who assert that SCR 687 actually established a 'permanent ceasefire' face two difficulties. Firstly, the collective self-defence of Kuwait endorsed by the UN was an exercise of the customary right of self-defence (expressly reserved in Art 51) that embraces customary law relating to *'conditional ceasefire'*. Namely, the defeated party undertaking to refrain from threats and the use of force, and, disbandment of forces beyond those required for the domestic policing jurisdiction and self-defence. Since Iraq remained manifestly in breach of the ceasefire it is difficult to comprehend in customary terms how a 'permanent ceasefire' was achieved.

Secondly, in textual terms SCR 687 is said by Professor Williams and a colleague to support 'in context' a permanent ceasefire.[32] This view is surely wrong since SCR 688 two days after the 3 April 1991 SCR 687 described the ongoing persecution of Kurds and the Shi'ite minority as a threat to 'international peace and security in the region'.

In support of the contention that the SC was not endorsing collective self-defence it is argued that SCR 678 in authorising 'the restoration of international peace and security *in the area*' went beyond *self*-defence as envisaged in Art 51.[33] Since the inherent right of self-defence includes neutralisation of the

[31] Simma above 756.
[32] Williams & Hovell, 'Opinion provided on March 20, 2003 to the Hon Simon Crean MP Leader of the Opposition Parliament of Australia', see also fn35.
[33] Simma above 757.

aggressor from further attacks by restoring peace *and security* the proposition appears untenable or at best polemic.[34]

A further suggestion that the '... context of the resolution (SCR 678), and the specific language of the authorisation, clearly tie the use of force to the liberation of Kuwait'[35] is patently wrong. In 'context' SCR 676 actually referred inter alia to the SC remaining 'seized of the matter until Kuwait has regained its independence *and peace has been restored*' and SCR 668 referred to a 'threat to peace and security *in the region*'.

It is a fundamental misconception to view the use by the SC of the words 'peace and security' as limited to the liberation of Kuwait. It is accepted without argument by those who practice law at UN level that the UN is charged generally with bringing peace and its concomitant effects. For this reason States Party concede a wide and legitimate role for the UN in promoting and maintaining 'peace'. As goes the well-known aphorism, 'peace is more than the absence of war', so goes the UN function, '... to bring about a stabilization of international relations in order to curtail the likelihood of war.'[36] Accordingly, the words ' peace and security' import elements that go well beyond merely expelling the Iraqi forces across Kuwait's border.

Self-defence

The United Nations Charter removed the freedom States had to wage war and placed primary responsibility upon the UN Security Council for the 'maintenance of international peace and security'. Art 2(4) of the Charter obliges Member States to refrain from the threat or use of force. Art 51 of the Charter nevertheless, preserves customary rights of *self-defence* namely:

> 51. 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 the measures necessary to maintain international peace and security. Measures

[34] Simma above 805:42 '...it would be a false conception of the principles of proportionality and necessity to argue that a State, victim of an armed attack, is generally limited to expelling the foreign troops from its territory in exercising its right of self-defence, but is banned from pursuing them across the border into their territory.'

[35] *Advice to The Hon Simon Crean, Leader of the Opposition, Canberra, Australia,* 20 March 2003 by Williams and Hovell, who also overlooked the numerous requests by the Government of Kuwait endorsed by SCR calling upon Iraq to return Kuwaiti nationals and property. On 26 March 2003 the Government of Kuwait representative was reported as having informed the UN General Assembly, *inter alia*, 'Since 20 March [2003], Iraq had launched several missiles against the targets on the territory of Kuwait. He called on the Security Council to demand that Iraq stop hostile actions against his country. The Iraqi Government was trying to draw Kuwait into the war, hut his country was resisting such attempts. The missiles, which Iraq was aiming against civilian areas in Kuwait, exceeded the range of 150 kilometres. That proved the invalidity of Iraq's allegations that it did not possess such weapons. Resolution 1441 had proclaimed Iraq in material breach of its obligations in the field of disarmament, as well as its obligations related to the return of Kuwait nationals and property,' he continued. 'The Iraqi Government was fully responsible for the situation it was in now...' SC 4726th Meeting (PM) Press Release SC/7705.

[36] See Profs Wolfrum & Zöckler above Simma 41:9.

> taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Against the background of an ongoing world war Art 51 of the UN Charter was drafted to specifically limit the customary right of *self-defence* to a temporary period before the SC took action such as sending in UN peacekeepers. The Art 51 prohibition on *continued* unilateral self-defence has never worked in practice because the SC has been unable to intervene militarily or enforce an effective ceasefire already secured by Member States acting in collective self-defence.

There is a general consensus that the SC has not been and remains unlikely to be effective in providing the swift response anticipated by Art 51. In consequence, the customary practice of States entering defence treaty arrangements (as distinct from UN approved 'regional arrangements') continued despite the new order promised by the UN Charter. A good example is the 1951 ANZUS Treaty, whereby Australia and New Zealand moved under the US umbrella. In legal terms the ANZUS treaty was an emphatic post-Charter re-affirmation of the right of 'collective self-defence.'[37] After the Charter was signed it seemed arguable under the *Caroline* doctrine[38] that collective self-defence arrangements anticipate an 'armed attack', yet Art 51 only permits 'self-defence' after an armed attack has begun.

The UN Charter provisions mandating a standing UN defence structure with military staff from Member States[39] died in the early frosts of the Cold War. Thus, the aspirations of many that the UN Charter provisions would displace mutual defence pacts and create a new international practice regulating warfare, were dashed. Although Art 51 sought to embrace customary law relating to the meaning of concepts such as 'armed attack' and to limit further expansion of the concept of self defence, only an optimist would suggest that Art 51 has created a new practice in international law. Dr Nick Wheeler's plea that the UN Security Council '... needed to retain its primacy as the guardian of peace and security ...'[40] is nothing short of breathtaking.

Writing during the Cold War, Professor Stone presented a bleak picture of Art 51 and the situation where a veto is used *after* self-defence measures have commenced:

> It is not surprising, in this light, to find that the deterioration in the relations of the permanent Members, and consequent paralysis of the Security Council, have been reflected in an increasing resort by Members

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[37] See Prof J Stone, *Legal Controls of International Conflict* (1954) Sydney, Maitland Press, 262-5, especially the conclusion, 'In short, the invocation of "collective self-defence" as a residual obligation of Members under Article 1 cannot conceal the fact that "collective self-defence" comes not to fulfil the Charter, but because, alas, the Charter remains unfulfilled.'

[38] Discussed in this paper under 'Pre-Emptive Self-Defence'.

[39] ChVII embracing Articles 39-54.

[40] Dr Nick Wheeler, Occasional Address to the Australian National University, 26 February 2003.

> to alliances cast in the form of advance blueprints for 'collective self-defence'. The use of Art 51 shows itself, like that of the veto, as the frontier for the moment reached between the traditional anarchic international system, and the real collective security system projected in the Charter. Resort to 'self-defence' and the veto push the frontier back into the traditional anarchy. By these resorts the alignments of States in the North Atlantic Treat and related organisations, and in the series of mutual assistance treaties sponsored by the Soviet Union, could fight a war to the bitter end, under the title of self-defence, without determination by the Security Council of the legality of either side's conduct, or as to the responsibility for it, or any effective Security Council measures to end the war. To this extent 'self-defence' under Article 51 has reoccupied the field of the Security Council as a collective peace-enforcing agency.[41]

In light of the regrettable non-implementation of Art 51 in practice it is of concern to note the uncritical acceptance of assertions by Australian jurists[42] and academics, notably Professor George Williams in his National Press Club address on 29 January 2003, that any 'unilateral' attack on Iraq by Australia would be illegal under the UN Charter. This black letter reliance on the stillborn provisions of Art 51 ignores the ongoing development of customary practice with respect to the concept of 'armed attack' and 'self defence'.

Professor Williams said that the use of force against Iraq was prohibited, unless a breach of UN Security resolutions had been clearly established, or it was an act of self-defence. Professor Williams went on to say that Australia was not justified as a matter of law in joining unilateral action against Iraq, adding that '... clearly the *self-defence* of Australia is not at stake in the terms that it is defined in international law'.[43]

Although it is textually correct to say that the UN Charter prohibits the unilateral use of force, unless that force is part of UN enforcement action, or is an exercise of a right of individual or collective self-defence a black letter reading of the UN Charter overlooks two important effects. Firstly, the modern reformulation of certain customary international laws with respect to the inherent right of self-defence. Secondly, that when the SC is unable to assume or concur on continued responsibility for peacekeeping, self-defence measures including collective action may lawfully continue.

'ARMED ATTACK' IN ARTICLE 51

Many commentators adopted the position that the words 'armed attack' in Art 51 prohibited an attack on Iraq because the US, the UK and Australia had not been the subject of an 'armed attack'.

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[41] *Legal Controls of International Conflict,* op. cit. p 246.
[42] Letter to *Sydney Morning Herald,* 26 February 2003 by 41 experts, and Professor Hilary Charlesworth, ABC Radio National, 10 March 2003.
[43] *Australian Financial Review,* 30 January 2003.

Although the ruling of the International Court of Justice in the *Nicaragua Judgment*[44] suggests that the customary right of self-defence may be exercised, '... solely in case of an armed attack', the Court gave no reason for this strict interpretation. The Court's interpretation has not found favour with a number of UN members, particularly those who have had to face 'armed attack', not by a State as historically defined, but by terrorism suspected of being State sponsored.[45]

After the September 11 2001 attacks Resolution 1368 of the Security Council (SCR 1368) expressly acknowledged, '... the inherent right of individual or collective self-defence in accordance with the Charter'. The SC also condemned the terrorism as '... a threat to international peace and security'.

After commencing military action in Afghanistan both the United States and the United Kingdom reported to the Security Council on 8 October 2001 that they were exercising their inherent right of individual and collective self-defence. The then President of the Security Council spoke, without demur, for the entire Security Council in accepting that the United States and United Kingdom were acting in self defence.

Whilst SCR 1368 reflected a modernised interpretation of the words 'armed attack' in Art 51, the resolution was framed against a background of long standing disagreement at the UN as to the meaning of the term 'armed attack'. The closest UN agreed position was the 14 December 1974 UN General Assembly Resolution (3314) known as the 'Definition of Aggression', which said in effect that 'armed attack' was the most serious form of aggression. The Definition recognises that armed attack through prima facie evidence of aggression may be justified if it is a proper act of anticipatory 'self-defence'.

Against the background of a world system struggling to interpret the meaning of 'armed attack' in the neutered Art 51, Professor Williams displayed considerable confidence in his interpretation of the words. Professor Williams' bold claim that Australia was not collectively exercising its right of self-defence because it was not responding to an 'armed attack' by Iraq[46] or to a threat to international peace and security is problematic. Also unhelpful in its problematic premise that the Charter text covers the whole law was a call by the President of the NSW Bar Association, Bret Walker SC for the Australian Government to reveal '... any legal advice it may have that a pre-emptive strike against Iraq without Security Council authority can be justified under the *provisions of the UN Charter*' [emphasis added].[47]

In his great treatise on the dynamics of disputes and war law, Professor Julius Stone, writing in 1954, predicted the ills that already threatened to beset Art 51:

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[44] ICJ Reports (1986) 103:195.
[45] See Simma above 801.
[46] This argument is described by Professor Randelzhofer as 'very controversial'. Summa above p792:9 and scholarly texts cited thereat.
[47] Media release on 7 March 2003.

> ... the general effect of Article 51 guards from impairment by the Charter the exercise of force by one or more Members in case of armed attack on one of them. This tolerance only ceases if and when the Security Council has taken measures necessary to maintain peace and security. Yet it must be apparent that in any major conflict thus arising, at least one permanent Member would be interested in preventing the Council taking such measures: and since such a Member would certainly use its veto, there would be no means of impugning or ending the measures of "self-defence". The war could then legally run its full course without United Nations action.[48]
>
> ...
>
> ... Regrettably, the provisions (of the UN Charter) are so qualified, and the difficulties of operation have proved as yet quite insuperable.
>
> First, all of them are subject under Article 51 to "the inherent right of individual or collective self-defence" if an armed attacked occurs against a Member. And though theoretically the Security Council may take over responsibility from such Members, and act against the attacker, it will only be able to do so where the votes of its permanent (Great Power) Members concur. *This concurrence has not yet been available, and as long as it is not, "war" of "self-defence" may lawfully continue.* Second, "decisions" which the Council has power to take to determine the existence of threat to the peace, breach of the peace or act of aggression, and to act for the restoration of peace and security, can only be taken by a vote with similar concurrence. *This also has rarely been, and is unlikely to be available; as long as it is not available, the war even insofar as it involves Members may legally continue unchecked, even though Members are in fact violating their Charter obligations.* Third, even if such decisions were taken, the Security Council would still have no forces available to enforce them except insofar as a Member State had, with its own consent, placed armed forces at its disposal.[49] [emphasis added]

An examination of the series of Security Council Resolutions on Iraq commencing with SCR 662 of 2 August 1990 (ordering Iraq to withdraw its forces from Kuwait and imposing economic sanctions) and moving through to SCR 1441, reflects an early concurrence on using for the first time in history all the SC's powers in Chapter VII of the Charter. Thereafter, the SC failed to agree on measures for the restoration of peace and security.

By early 2003 disagreement related to whether 'disarmament by peace' preferred by France, China and Russia could be achieved. Although the *Coalition of the Willing* could have asserted that the initial measures of collective self-defence of Kuwait by the US, UK and other States that were endorsed by the SC[50] lawfully continued[51] as measures taken outside the

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[48] *Legal Controls of International Conflict* op. cit. p 245.

[49] Above 303.

[50] SCR 665 of 25 August 1990.

[51] Above 303. See also Stone on the *'Legal Standing of Action in Korea'* 234—5:

> ... The fact that certain Soviet legal arguments against the Korean action as Security Council enforcement action may have to be accepted, does not mean that the Soviet conclusions themselves are sound. The mere fact that this action is not action of the Security Council under Chapter VII does not mean, of necessity, nor in the present view at all, that such action is unlawful under the Charter, much less

Security Council Coalition States have not resorted to this argument, instead relying upon a controversial interpretation of the seventeen Security Council Resolutions on Iraq since August 1990. While policy considerations may have encouraged Coalition States to keep the debate within the context of UN resolutions such an approach has led some observers to look no further in response.[52]

The fact that some of the original participating States no longer wished to continue the collective 'self-defence' measures, may not weaken the lawful basis upon which the remaining Coalition Forces continued operations to defeat and neutralise any future threat from the aggressor.[53]

SCR 688 on 5 April 1991 condemned the persecution of the Kurdish and Shi'ite minorities in Northern and South-east Iraq and formally resolved that the persecution 'threatened international peace and security in the region'. In response to SCR 688 the allies created 'no-fly zones'[54] as part of the lawfully endorsed collective 'self-defence' measures aimed at neutralising the aggressor.

The question at issue now is whether those States the SC authorised via SCR 665 on 25 August 1990 to continue *their* collective 'self-defence' of Kuwait are limited by the terms of successive resolutions that led to a threat of 'serious consequences'.[55] Some States, notably France, Germany and Russia argued that SCR 665 and SCR 687 of 3 April 1991, authorising force, and, determining the conditions of the cease-fire after Iraqi forces were defeated were spent once a ceasefire was achieved. The notion that Security Council Resolutions might be self executory and thus vacated is novel and unsupported by UN practice or the facts relating to SCR 687 and SCR 688.

The cease-fire resolution SCR 687 was unprecedentedly invoked under Chapter VII of the Charter and pursuant to Art 25 is binding on all States. The provisions of SCR 687 related to the neutralisation of chemical, biological and

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> that it is an aggression against North Korea. Between these extreme choices lies a third legal possibility. In the present submission, the most accurate legal characterisation of the action of United Nations Members in Korea lies in this tertium quid. This is that the Korean action is action which the United Nations as individual States are permitted to take, as distinct from being either obliged to take it, or prohibited from taking it, under the Charter. This permission, or licence, or "privilege", or "liberty", has two conceivable bases. One is "the inherent right of individual or collective self-defence" with South Korea. On this basis, subject to report to the Security Council, the action could lawfully continue "until the Security Council has taken the necessary measures to maintain international peace and security". This, in the present alignment of the Security Council, would warrant its indefinite continuance. The other is the liberty of each State to resort to war under customary international law, which will exists even for United Nations Members, except where prohibited by the Charter.

[52] A good example of the narrow Australian academic debate focusing upon the text of successive SCR was the dismissive view by Professor Gillian Triggs who rejected out of hand the collective defence argument advanced by Professor Stephen Hall of Hong Kong University. ('The Law Report', ABC Radio, 25 March 2003).

[53] For a list of the literature for and against this view see Simma 126 fn116, and fn 51 in this text.

[54] See Simma above 462:26.

[55] SC 1154 ('severest') and SC 1441 ('serious').

nuclear weapons. Properly, in the writer's view the United States, United Kingdom and Australia adopted the position that the material breach of the various resolutions by the Iraqi Government breached the cease-fire – such as it was – and reactivated SCR 678, being the original authorisation of 28 November 1990 when the SC called for the application of 'all measures necessary to end the Iraqi invasion of Kuwait *and to restore peace and security in the area*'[56] [emphasis added].

Operation Desert Fox in December 1998 by the US and the UK followed alleged breaches by Iraq, leading to the departure of UN disarmament inspectors there pursuant to the ceasefire terms of SCR 687. At this stage China, Russia and France stood out, arguing that Operation Desert Fox was not authorised by UN Resolution, as SCR 678 was spent and subsequent resolutions did not expressly authorise force. Clearly, peace and security in the area had not been restored and SCR 1154 of 2 March 1998, which threatened Iraq with 'severest consequences', for 'any violation' of SCR 687 had reaffirmed the immediacy of the conditional ceasefire terms.

Some significance has been attached to the use of words 'serious consequences' in SCR 1441 of 8 November 2002. The words have been said to support a threat of something less than force but the text of SCR 1441 says otherwise:

> 12. Decides to convene immediately upon receipt of a report in accordance with paragraphs 4 or 11 above, in order to consider the situation and *the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security;*
> 13. Recalls, in that context, that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations [emphasis added].

Giving the words their natural meaning reveals an explicit threat to re-activate SCR 687 and rely upon prior resolutions including SC 1154. As we have seen SCR 687 temporarily stayed collective self-defence measures while the SC tried to establish secure peace and security. The ongoing breach of the ceasefire reactivated collective self-defence measures. Critics of this view have to explain the terms of SCR 1154 that expressly warned Iraq that it faced a resumption of forcible measures of disarmament.[57]

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[56] Address to the House of Representatives, Parliament House, Canberra by the Hon John Howard, Prime Minister, 18 March 2003: 'In the final analysis, the absolute conviction of the government is that disarming Iraq is necessary for the long term security of the world and is therefore manifestly in the national interest of Australia ... Iraq's past and continuing breaches of the cease-fire obligations negate the basis for the formal cease-fire. Iraq has by its conduct demonstrated that it did not and does not accept the terms of the cease-fire. Consequently, we have received legal advice that "the cease-fire is not effective and the authorisation for the use of force in Security Council resolution 678 is reactivated". It follows, so I am advised, that referring to the use of such force against Iraq as "unilateral" is wrong. Any informed analysis of the Security Council resolutions leads to this conclusion.'

[57] '3. Stresses that compliance by the Government of Iraq with its obligations, repeated again in the memorandum of understanding, to accord immediate, unconditional and unrestricted access to the Special Commission and the IAEA in conformity with the relevant resolutions is necessary for the implementation of resolution 687 (1991), but that any violation would have *severest consequences for Iraq* ...' [emphasis added].

Polemical issues of how to interpret the out of context words 'serious consequences' are of no effect on collective 'self-defence' measures lawfully invoked under customary international law and endorsed by the SC. The situation could have been different if the SC itself had taken over the military operations against Iraq by deploying a UN Military Mission.

Some commentators believe that the US is trying to change the UN Charter to suit its own mission. Others argue that the Kuwait Government called upon other States to come to its collective defence, and that call was lawful in international law and remains lawful, until Kuwait's peace and security is restored. Claims of 'unprecedented unilateral action' by the US and its Allies are not validated by history. In 1990 there was the Kosovo Rescue then in 1994 the SC approved 'in-bound' US led forces entering Haiti and restoring the elected government. Secondly, the UN approved restoration of peace and security is aimed in law not merely at protecting the population (including endangered minorities) and restoring democracy (implicit in the concept of peace, order and security), but to neutralise any continuing threat by the invader.[58]

Residual customary right to resort to war

If one accepts for the purpose of argument that the Coalition States were not authorised by the Security Council Resolutions subsequent to SCR 687 to forcibly disarm Iraq is there any authority in law for the Coalition's actions? In his discourse on the legality of the actions of Member States after the invasion of South Korea by the North Professor Stone found further authority in customary law.

Professor Stone took as his premise the words of Art 2(4) calling upon Member States to

> ... 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.* [emphasis added]

He then observed that each State has the liberty to '...resort to war under customary international law, which still exists even for United Nations Members, except where prohibited by the Charter.' Examining Art 1, in particular the words, '...to maintain international peace and security and to that end: to make effective collective measures for the prevention and removal of threats to the peace ...', Professor Stone argued that since the SC could not make a valid decision and there was a recognised unresolved threat to peace and security it was consistent with Arts 1 and 2(4) for Member States to act. In such circumstances, 'the residual liberty for Members to resort to force is not dependent upon whether the Security Council has been able to make a valid 'decision' on enforcement measures, or even validly determine' the existence of a breach of the peace.[59]

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[58] Simma above 462-63.
[59] Stone above 234-7.

TERRORISM AND THE 'JUST WAR' IN INTERNATIONAL LAW

The former Soviet Union long championed a view of public international law, that wars of national liberation against colonial or other economic domination are lawful. Elements within Islam have also accommodated this claimed moral justification for the struggle against politico/economic oppression by the United States.

In the context of modern international law and the emergence of world terrorism, the idea that a *just war* can include terror is a legacy of the Stalinist Soviet Union wanting to have it both ways in 1945. Whilst the Soviet Union agreed that Arts 2(4) and 51 of the UN Charter regulated *all* wars and subordinated them to the peacekeeping role of the United Nations, it continued to champion and arm a struggle against colonialism/imperialism outside the UN decolonisation mechanisms.[60] This struggle soon attracted bloody East/West Great Power rivalry throughout the developing world.

Conscientious attempts by the Arab nations to declare a position on fundamental issues were misused as lighthouses on the path to terror. Witness, for example, the 1990 *Cairo Declaration on Human Rights in Islam*, Art 11(b) of which says:

> ... Colonialism of all types being one of the most evil forms of enslavement is totally prohibited. Peoples suffering from colonialism have the full right to freedom and self-determination. It is the duty of all States and peoples to support the struggle of colonized peoples from the liquidation of all forms of colonialism and occupation, and all States peoples have the right to preserve their independent identity and exercise control over their wealth and natural resources.

Likewise, the 1994 *Arab Charter on Human Rights*, that was adopted by the Council of the League of Arab States on 15 September 1994 and subsequently subscribed to by nearly all of the 22 Members of the Arab League, asserts in Art 1 the following:

> (a) All peoples have the right of self-determination and control over their natural wealth and resources and, accordingly, have the right to freely determine the form of their political structure and to freely pursue their economic, social and cultural development.
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> (b) Racism, zionism, occupation and foreign domination pose a challenge to human dignity and constitute a fundamental obstacle to the realization of the basic rights of peoples. There is a need to condemn *and endeavour to eliminate* all such practices.

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[60] Professor Randelzhofer's wide ranging discussion of 'Self Determination' and 'Wars of Liberation and the Prohibition on the use of Force' presents a topical overview of how the UN charter and the Universal Declaration of Human Rights 1950 embraced the post-colonial era. Above Simma 47-63.

The Arab Charter is a laudable document that promotes universal values and supports international cooperation and the cause of world peace.[61] The sentiments in the Cairo Declaration and the Arab League Charter have been abused, for example, by al-Qaeda, the Iraqi sponsored Hamas and the Iranian sponsored Hazbullah. By claiming the reach of American power to be a war on Islam they have taken the struggle beyond self-determination.[62]

In this context some Muslim scholars see the endorsement of terrorism by some Muslim clerics[63] as an exemplar of the failure of Islam to achieve consensus on the Divine Word and its relationship to secular government. The counter-terrorist response to this dissonance within Islam treats terrorism as a crime but the nature of the Muslim faith without hierarchical leadership gives no authoritative voice as to criminality. In contrast there is unanimous, and in the writer's view correct, jurisprudential condemnation by Muslim scholars and clerics of Israeli retaliatory strikes 'terrorising' civilians.

JUSTIFYING TERROR

Both the Cairo Declaration and the Arab Charter were drafted against the background of a spirited UN General Assembly debate, which led to the 1974 UN *'Definition of Aggression'*. The Soviet Union supported the many States wanting strong recognition of the 'just struggle' – including forcible measures – against colonialism. Whilst Art 7 of the draft Definition included the right to use 'force', a compromise was reached substituting the ill-defined concept of the people's right 'to struggle' for liberation. Both camps went away with their interpretation of Art 7. This deliberate lack of definition that so typifies the failings of the UN has accommodated arguments that in the 'struggle' against oppression the use of force including terror may either be 'justified' or excused as 'understandable.'[64] Recently, there was some boundary setting by post-colonial States on what they will not countenance as part of any so called 'just struggle' against oppression.[65]

The East Timorese resistance struggle provides a moral example to those who excuse or 'explain' the use of terror against non-combatants. Despite the appalling suffering of the East Timorese people over almost 25 years successive resistance field commanders, latterly Xanana Gusmao, and in the diaspora, Josè Ramos Horta, never authorised the killing of non-combatants. During some of the worst periods particularly in the mid 1980's when misguided Vatican diplomacy sent the then Monsignor Bello into the mountains to meet Xanana Gusmao with a surrender and safe passage proposal no 'facing annihilation' reprisals took place against civilian targets. Indonesian married quarters,

[61] See Article 35 of the Arab Charter: 'Citizens have the right to live in an intellectual and cultural environment in which Arab nationalism is a source of pride, in which human rights are sanctified and in which racial, religious and other forms of discrimination are rejected and international cooperation and the cause of world peace are supported.'

[62] Prof Bernard Lewis, *What Went Wrong* (2002) Phoenix, 118.

[63] For example, the translated Teachings of Abu Bakar Bas'asyir.

[64] See *Simma* above 128:50 for further debate.

[65] Reflected in the recent Memoranda of Understanding on counter-terrorist measures between Australia and the post-colonial States of Indonesia, the Philippines, Malaysia, Thailand and Fiji.

children and clergy were respected. Despite enormous provocation no casualties were inflicted on Indonesian diplomatic staff who were easy targets abroad.

Both within East Timor and abroad the leadership insisted on the application of humane principles of resistance. Terror was not seen as an acceptable response to terror despite the means and 'technical' capacity for operations abroad. Nevertheless, some argue that in a heavily militarised State such as Israel, where a large proportion of the population are reservists or armed civilians supporting Israeli government policy, the definition of 'non-combatant' is blurred.

Recognising the unresolved jurisprudence and the importance of moral leadership we can say that after SCR 1368 there seems little doubt that State sponsored terrorism *in aggregate*, such as Libya's 1970's world-wide sponsorship, or on *a September 11 scale* constitutes 'armed attack' for Art 51 purposes. In this sense, the US and UK response to Libyan directed terrorism, by bombing Tripoli and Bengahazi on 15 April 1986 and the Afghanistan anti-Taliban operations, may accord with international law so long as other precepts are followed. Namely, the response must be proportionate and not merely a reprisal and it must adhere to international law, such as the protection of civilians and historic monuments and the non-use of certain weapons. In retrospect the strikes on Tripoli and Bengahazi were in every sense misguided, except for their plausible legality when launched. An analysis of the effect of so-called strategic bombing near civilian areas in Afghanistan is yet to be debated in terms whether high altitude bombing of populated areas is simply a crime.

A core factual question is whether terrorism is State sponsored and ongoing. Certainly, the September 11 2001 attacks and the accompanying declaration of hostilities against the United States and its Allies by al-Qaeda leader Osama Bin Laden have enabled the US and its allies to justify operations in Afghanistan and the Yemen. Would this have extended to Iraq? So far as SCR 1368 is concerned the answer would appear to depend upon a verifiable Iraqi connection involving Iraqi regime endorsed use of al-Qaeda irregular forces, knowing material support or tacit assistance by way of sanctioning.[66]

International law has long recognised that participation by a State in the use of force by clandestine intruders or armed bandits is an act of aggression. In this way the United States found itself before the International Court of Justice (ICJ) in the *Nicaragua* case as the alleged State sponsor of 'acts of aggression' against the Nicaraguan people. By a majority the ICJ accepted the notion that material support alone to the paramilitary forces did not colour the United States as perpetrating an 'armed attack' on Nicaragua. The Court's finding on this point was questioned almost as soon as it was made. There was wide international support for the minority judgment of Judge Jennings' colouring the 'acts of aggression' as sufficient to constitute 'armed attack'.

[66] For example, al-Qaeda's connection with Ansar al Islam a co-host terrorist organisation allegedly working with Iraqi military intelligence in Kurdish held Northern Iraq.

A common sense view is that the scale of the threat is relevant to the formulation of 'armed attack'. Almost all States supporting the 1974 non-binding[67] UNGA *Definition of Aggression* agreed that 'armed attack' and 'acts of aggression' are not coextensive terms. Indonesia, among other non-aligned States, argued that 'armed attack' is the most serious form of aggression. There seems to be broad international agreement on this point.

In the *Nicaragua* Case the majority view was that the supply of weapons and other material support by the United States did not amount to the level of involvement that might characterise the activity 'as the sending of an expeditionary force' and thus an 'armed attack'. In the light of world terrorism, particularly the unanimously endorsed UNGA resolutions and SCR 1368 and SCR 1373, which may constitute international law, the dissenting opinion of Judge Jennings in *Nicaragua* is to be preferred, ironically, by the current United States Administration. A States practice view on al-Qaeda type terrorism is emerging as a result of both the General Assembly and the SC adopting by consensus a unified view that September 11, 2001 constituted an 'armed attack'.

STATE HAVENS

States either incapable of dealing with terrorists within that State or tacitly permitting the perpetration of large scale terrorism from within that State's boundaries should be mindful of the precedental nature of SCR 1368.[68] In light of SCR 1368 a disinclination to deal with home based terrorism that exposes another State to ongoing attacks on such scale as to constitute 'armed attack' would justify the victim State(s) exercising individual or collective self-defence within the complicit State's boundaries.

One cannot deny that crimes against humanity on both sides of the Palestinian struggle for self-determination have overflowed into international terrorism. Now that the entire UN community has by successive UNGA Resolutions rejected terrorism as a method of confronting oppression[69] there is a firm international jurisprudence facing all States and 'would be' States that support, provoke or practice terrorism.

Likewise, after the Kosovo Option to protect a minority suffering violations of fundamental rights and after SCR 1264 approved intervention in East Timor, and, bearing in mind the UNGA formula reached to deal with the 1950 Korean Crisis those in Israel and Palestine who cannot bring peace may need to watch the increasing resolve of the world community to intervene on humanitarian grounds.

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[67] For an extensive overview of the legal effect of UNGA resolutions, recommendations and declarations see Profs Klein and Hailbronner above Simma 267-73. See also *South West Africa (Ethiopia v South Africa; Liberia v South Africa)* [1960-1966] ICJR 1966, 50: 'Resolutions of the United Nations General Assembly ... are not binding, only recommendatory ...'.

[68] SC Resolutions have force of law until withdrawn, modified or replaced by the Security Council – they do not lapse unless they are self-executing. SCR 1368, SCR 1373 and UNGAR 56/1 are both declaratory and indefinite – see Article 25.

[69] See also fn 98.

PROPORTIONALITY

Throughout this discussion the terms 'large scale' and 'ongoing' have been used because they tie in with other established precepts of international law. Customary international law has long recognised the concept of proportionality.[70] For example, a cross border bombardment has to reach a level of intensity before it may be deemed an 'armed attack' justifying resort to the right of self-defence.

Likewise, proportionality is recognised relating to an attack on another State's armed forces *wherever they may be.* Because a military unit is deemed part of the States' capacity to remain independent, the gravity of an attack is deemed worse and the legal threshold to constitute an 'armed attack' correspondingly lower. Thus, in context the 2001 al-Qaeda attack on *USS Cole* in the Yemen that killed 17 sailors and disabled the warship was an 'armed attack' justifying proportional response. With respect to attacks against civilian targets, international law has given greater emphasis to attacks on military units wherever located than attacks on diplomatic missions or the nationals of the State abroad – tourists for instance.

THE AUSTRALIAN RESPONSE TO THE BALI ATTACK

The 12 October 2002 bombings in Bali, Indonesia, killed close to 200 persons, including 89 Australians. Some of the perpetrators say they intended to target US citizens. Despite the ingenuity of several legal commentators the settled legal position is that this alone did not constitute an 'armed attack' for Art 51 purposes. Nevertheless, if the Bali bombing was a continuation of post-September 11 al-Qaeda operations it could have been termed an 'armed attack' and any US or Australian response may have come within the UN endorsed collective response. Significantly, the Australian government did not take steps at the UN to formally link October 12 to SCR 1368 and its ongoing collective support of the UN endorsed US led 'war on terrorism'.[71]

It is a curiosity of law that, if the anti-US strike at Bali (about which prior non-target specific information had been received from Singaporean authorities and a captured al-Qaeda operative) had occurred against the *USS Cowpen* or crew as it anchored *with counter terrorist measures* deployed at Bali for the US Independence Day on 4 July 2002, this may have constituted an 'armed attack' on the United States by al-Qaeda and its surrogates. The Australian government could have exercised with its US ANZUS Treaty ally a collective right to participate in the US response.

Although Australia in law was a collective respondent to the September 11 attack, international law does not permit mere reprisals[72]. Unless there is

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[70] *Nicaragua Judgement ICJ Reports* 1986 p94:176

[71] More particularly in the light of SCR 1373 of 28 September 2001, which reaffirmed SC support for self-defence measures. See also Simma above 754.

[72] The *Corfu Bombardment Case* LNOJ (1924) 523-4 arising from the Italian bombardment of Corfu following the assassination of an Italian General. Also the *Corfu Channel Case* ICJR

credible evidence of an al-Qaeda continuum with respect to the Bali bombings, Australia would not be justified in launching military action in State havens. The Australian Prime Minister's assertion of the Australian Government's right to pursue the Bali terrorists in any haven State may have reflected SCR 1368 if the Australian Government had evidence that the terrorism was a continuum from September 11 and the al-Qaeda declaration of hostilities against *inter alia* Australia.

THE UN RESPONSE TO SEPTEMBER 11, 2001 – A TURNING POINT IN INTERNATIONAL LAW

Arguably, SCR 1368 represents a turning point in modern international law. We should be mindful that by this legally binding Resolution the Security Council recognised the September 11, 2001 attacks as a threat to the international peace and security engaging '... the inherent right of individual or collective self-defence in accordance with the Charter'. Although the attacks occurred on the US mainland the Security Council clearly agreed that the US and the United Kingdom were acting in self-defence. Australia's long-standing bond with the United States and the United Kingdom justified in international law its collective involvement in post September 11 operations in Afghanistan and elsewhere against active al-Qaeda elements.

As a non-attacked State Australia can lend assistance collectively to the attacked State and in support of UN Resolutions like SCR 1368, which characterise terrorist activity as a threat to international peace and security. Until the SC itself can keep the peace Australia can build a plausible legal case for joining collective measures against al-Qaeda wherever al-Qaeda is and wherever affiliates receive safe haven and/or material support.

Pre-Emptive Self Defence

The enhanced capacity of some States to identify threats and respond pre-emptively has influenced the move away from customary precepts that ban pre-emptive strikes. In a world with Rogue States and potential affiliate terrorist access to Weapons of Mass Destruction (WMD) satellite/electronic intelligence gives new potency to customary law approving pre-emptive strikes, namely, when '... the necessity of that self-defence is instant, overwhelming and leaving no choice of means, and no moment for deliberation'.[73]

While traditionalists still argue that pre-emptive 'self defence' is only allowable after there are, in effect, incoming missiles, the balance of legal opinion and emerging States practice now favours a realistic approach based on objective assessment of the threat, the lack of alternative measures and imminency. Such

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(1949); Prof Randelzhofer observes that opinion is divided on the legality of the 26 June 1993 US cruise missile attack on Iraqi Intelligence HQ following the alleged Iraqi attempt to assassinate former President George Bush. Above Simma 794 and fn 40. The State of Israel is in constant breach of norms of international law that ban mere reprisals.

[73] 'The Caroline' (1837) a diplomatic exchange reported in 2 *Moore's Digest of International Law* (1906) 409.

an assessment, necessarily, would have to be put with candour to the Security Council in compliance with Art 51, albeit after the resort to pre-emptive strike.

Since Art 51 expressly embraces customary international law Art 51 is not a static instrument. Accordingly, if Art 51 is to remain workable, the widened concept of pre-emptive 'self- defence' is likely to be found compatible with Art 51.[74] This appears to be the view taken by the Government of Japan in its Defence Minister's announcement on 16 February 2003 that it would regard the fuelling of nuclear strike capable North Korean rockets targeted towards Japan as justifying a pre-emptive strike. Japan's subsequent launch of military surveillance satellites appears consistent with this strategy.

Against the disastrous history of the UN Security Council the US laid its cards face up in the September 2002 *National Security Strategy Declaration.* While scholars may cavil with the language of the strategic declaration, it is apparent that the US Administration now asserts the broadened concept of 'armed attack' in Art 51 and the right in international law for States to rely on that widened concept. Not spelt out in explicit terms is the grey area where 'pre-emptive attack' embraces 'preventive self-defence'. On close reading the US Strategy *Document* locates 'pre-emptive self-defence' in a world-policing role outside of Security Council processes – *Pax Washington* ...?[75]

Preventive self-defence

There is now a live debate as to whether customary international law, built around the Art 51 recognition of the inherent right of 'self-defence', will evolve further to embrace the actions of States that seek to exercise a form of 'preventive self-defence' in situations where, for example, a threatening Rogue State and/or its terrorist affiliates have, or have potential access to, Weapons of Mass Destruction (WMD).

In a majority decision in 1996 on the *Legality of the Threat or Use of Nuclear Weapons* the ICJ could not

> ... conclude definitively whether the threat or use of nuclear weapons will be lawful or unlawful in extreme circumstance of self-defence in which the very survival of the State would be at stake.[76]

In this context threatened States and their allies have to weigh their inherent right of (pre-emptive) 'self-defence' in any nuclear stand-off. As the chances of the SC quickly defusing a fuelling situation are not enhanced by a study of UN history 'preventive self-defence' measures may be a safer option. One can

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[74] A statement by Professor Hilary Charlesworth on ABC Radio National, 10 March 2003, that the UN Charter does not permit a pre-emptive strike seems to overlook the terms of Art 51 which expressly embrace customary law, *i.e.* the Caroline Doctrine.

[75] For another view on reducing conflict see George Soros 'America's Role in the World', 7 March 2003, text of a lecture at John Hopkins University, where a view contrary to world policing is advanced in favour of positive economic inducements.

[76] *ICJ Reports* (1996) 266.

predict other States' defence strategies also re-defining this area of States practice and thus customary law.

Preventive self-defence must still evolve as a doctrine consistent with other precepts of law such as proportionality. How a proportional response can be achieved so as to ensure the complete neutralisation of WMD *in threatening hands* without civilian loss of life is a humanitarian issue of great moment.

THE INTERNATIONAL CRIMINAL COURT

Recently it was suggested by a number of Australian academics[77] that Australia's involvement with the US in a 'unilateral' strike on Iraq may attract the sanctions of the 1998 Rome Statute of the International Criminal Court that has now been signed by more than 120 States. Briefly, the presumption in the letter from the 43 'experts on international law and human rights' is that Australia would be participating as a Member of the 'coalition of the willing' in 'an invasion of Iraq'[78]. The Rome Statute reaffirms the Charter of the United Nations including, of course, its peacekeeping role. If military operations against Iraq are properly a continuation of Charter obligations and lawful self-defence and its corollary of disarmament, the use of the emotive term 'invasion' has no place in the debate.

There is an alarming simplicity in the experts' claim that

> ...the use of nuclear weapons in a pre-emptive attack would seem to fall squarely within the definition of a war crime.

There are isolated areas of the world (including Iraq) where WMD could be secreted. In law any State threatened with immediate annihilation may well be able to justify without criminal sanction the necessary use of a tactical nuclear weapon in a proportionate way to neutralise a potentially genocidal WMD that a rogue regime *on objective evidence* is about to deploy. We should recall that the ICJ was evenly divided on this point in its 1996 Advisory Opinion.

The learned experts also go on to suggest a second footing for their reference to the potential of those in and serving the Australian Executive to attract criminal sanctions in international law; namely, any breach of the Geneva Conventions of 1949 and their 1977 protocols. One cannot cavil with this latter comment.

The level of training given military forces in relation to humanitarian conventions leaves little doubt as to the duties of those conducting operations, irrespective of the views or directions of the Executive. This was exemplified on 8 October 2001 when the Australian Defence Chiefs made clear to the Executive that the Commander of HMAS Adelaide would observe International

[77] *Sydney Morning Herald*, 26 February 2003.
[78] Above fn 42.

Conventions relating to the rescue of boat-people including some Iraqi refugees from the sea near Christmas Island[79].

It may have been more helpful for the experts to challenge, if they can, the lawful basis of the Coalition operations against Iraq and to issue the enjoiner with respect to humanitarian principles on the use of force. Arguably, a use of force against Iraq that exceeds the consequences envisaged by the SC Resolutions and the doctrine of proportionality in customary international law could convert plausibly legal operations to a 'war of aggression'.

The Definition of Aggression makes clear in Art 5 that a 'war of aggression' '... is a crime against international peace'. The Rome Statute includes within the compendium of crimes defined the 'crime of aggression'. Although the Statute entered into force on 1 July 2002 and is not retrospective the Court has no jurisdiction over the crime of aggression until the States Party agree on a definition of the crime and resolve upon jurisdiction[80]. Warning the US and its Allies to exercise moderation is appropriate; describing elected politicians who for better or worse struggled genuinely to make the right decisions over how to end the tyrannical rule in Baghdad (and finish the UN task) as potential war criminals was a cheap shot.

STATE SOVEREIGNTY

Art 2(4) of the Charter guaranteed State sovereignty in these terms:

> 4. ... 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.

Great controversy surrounded the use of the veto by Russia when it stymied a 1990 draft SC Resolution aimed *inter alia* at disarming the combatants in Kosovo. The *sovereignty* of Yugoslavia was one Russian concern. Some argued that the use of the veto in face of the appalling situation in Kosovo was itself an abuse of rights and somehow a breach of international law.

In another example of how State's practice is moulded by practical realities, a majority of Member States expressly or tacitly accepted a unilateral move by NATO States to go with a majority SC vote (and a deal for a future referendum worked out with the Kosovo Liberation Army) and commence peacekeeping operations in Kosovo. In this way the so-called *Kosovo* Option has entered into the language of international law. Strident anti-war criticism of the US, UK and Australia, alleging unprecedented unilateralism on Iraq threatening the UN's future, tends to overlook the unimpeachably humane motives involved in the

[79] Transcript of Australian Parliament Senate Committee Hearing – Sinking of SIEV 4. See also *Sydney Morning Herald* Good Weekend, 'The Cruel Sea', 8 March 2003.
[80] Rome Statute of the International Criminal Court, Art 5(2). For a brief discussion of individual responsibility and Art 2(4) see Simma 135.

Kosovo Option, and the UN's humanitarian mission in support of the Iraqi Kurds[81].

Some argue that there is no place at the SC for a majority jury verdict and that the *'one off' Kosovo Option* has a tenuous hold and cannot be subscribed to as either reflecting a development in international law or a refinement of the voting rights in Art 27 of the UN Charter. Lawyers argue that adherence to Arts 2(4) (no wars) and 51 (self-defence only) precludes States from unilateral humanitarian intervention in the affairs of another State. This is best illustrated by the Russian view during the 1990 Kosovo Crisis. This tragic collision between law and morality produced the *'Kosovo Option'*.

Others argue that practical diplomacy has not so much as put a nail in the Charter coffin but evolved a 'safety valve'. The Kosovo imbroglio was solved when Russia tacitly agreed that force had to be used but made clear that it could not lift its veto and would not intervene – an attitude devoid of moral legitimacy.

As Professor Stone lamented way back in 1954[82] and for years afterwards to his students, including this writer, at Sydney University Law School, the SC as structured may never work. International crises have required diplomatic improvisation on many occasions. The call in February 2003 by the Governments of Mexico and Chile for the SC Permanent Members to act in the wider interest echoes similar exasperated sentiment in 1950 following North Korea's invasion of South Korea. Obstruction by the Soviet Union and lack of Permanent Member unanimity resulted in that issue going to the General Assembly which by Resolution 377 of 3 November 1950 resolved *inter alia*:

> ... if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace and security in any case where there appears to be a threat to peace, breach of the peace or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Member for collective measures, including ... the use of armed force.[83]

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[81] Self determination is likely to be fuelled by the allegedly humanitarian motivated *'cordon sanitaire'* placed around 'Kurdish Iraq' by the Coalition and Turkey. Observers are now addressing the next likely phase, namely, the claimed right to self-determination. As to that impending struggle Prof Randelzhofer says in his introduction to Article 2, '...if one agrees that the right of self-determination is a pre-emptory norm of international law, its bearer must be entitled to defend it, and corresponding external assistance cannot be unlawful' (Simma above p63:61). However the pre-conditions to secession require any new Iraqi Administration to first declare its policy towards ethnic and religious minorities. By ending repression the Coalition may weaken the basis in law for Kurdish secession.

[82] Above fn 48 and 49.

[83] Simma above 127:46 and as to the legal basis of SC decisions when a Permanent Member abstains from the vote, see Simma 498-9. The 'United for Peace Resolution 377 of 3 November 1950 may have been a 'one off' event. Legal commentators say that no General Assembly practice of authorising the use of force has emerged from the Korean experience – above 16 fn 21 and 707:16

There is a glib saying that in certain circumstances some States may forfeit the protection of sovereignty. Looked at closely there is a clear incompatibility between notions of State sovereignty and non-Security Council authorised 'preventive self-defence'. Whilst it is easy to depict Dictator States such as Iraq and North Korea as of suspect sovereign integrity it is more difficult to keep the pandora in the box. For example, may this imply a lesser sovereign status to States like Malaysia that have been held together from inception by emergency and special power legislation.

The line between the widened meaning of 'pre-emptive self-defence' and the emerging '*Post-Kosovo*' world policing role of 'preventive self defence' is difficult to draw. Compare the wide condemnation of Israel by UN Members, including France (as technology supplier) and the US, of the 1981 Israeli 'preventive self defence' strike on Iraqi nuclear facilities with the divided response to Israel's 1967 'pre-emptive' strike against the Egyptian Air Force.

The alternative of waiting or encouraging regime change has its own dangers. Civil strife in a country with stores of WMD may provide a repository from which rogue/ terrorist elements might arm themselves. Successive United States 'regime change' policies have a lamentable record of arming dissident groups that have become threats to peace.

The issue does not finish there of course. Is there a duty that transcends notions of sovereign inviolability to protect the weak from dictators? Is there an overriding duty to remove WMD from dictatorial and unstable regimes? Does the possession of WMD by a threatening rogue State reinforce notions of *preventive self-defence*?

UN intervention and the 'domestic' exception in Article 2(7)

Relevantly, Art 2(7) says:

> Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State ... but this principle shall not prejudice the application of enforcement measures under Chapter VII.

This 'domestic jurisdiction reservation' reflects concepts of State Sovereignty that Member States were anxious to preserve. Nevertheless, it was recognised that 'enforcement measures' under Chapter VII made Member States subject to the peace and security powers conferred upon the SC. Art 39 empowers the SC to determine 'the existence of any threat to the peace, breach of the peace, or act of aggression' and to make recommendations and take measures to 'maintain or restore international peace and security'.[84]

[84] 'The Security Council shall determine the existence of any threat to peace, breach of peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.'

The 17 SC Resolutions affecting Iraq since SCR 660 of 2 August 1990 are replete with determinations by the SC within the terms of Art 39 with SCR678 of 29 November 1990, the first formal measure under Chapter VII. With respect to the Kurdish minority, SCR 688 of 5 April 1991 resolved *inter alia* that Iraqi persecution of the Kurds 'threatened international peace and security in the region' – thus followed the Coalition declared no-fly zones and, some argue, the effective partition of Kurdish Iraq, itself containing other minorities[85]. Despite this affront to Iraqi sovereignty the UN endorsed peace and security measures in Northern Iraq were within the exception to Art 2(7). While humanitarian measures are consistent with this intervention, critics saw the humanitarian catastrophe in Iraq, especially Northern Iraq, as being aggravated by UN military and economic sanctions and the humanitarian mission is self-perpetuating.

Of this apparent contradiction, Dr Krisch and Professor Frowein say:

> Therefore, when acting under Chapter VII, the SC is not bound to respect international law apart from the Charter itself; in particular, it need not delve into lengthy discussions on the position of the parties under general international law. Only 'when the Organisation has used the power given to it and the force at is disposal to stop war, then it can find the latitude to apply the principles of justice and international law'. This decision by the Charter to allow the SC to disregard international law when taking enforcement action cannot be set aside simply by reference to ideas such as the rule of law or the notion of a legal community. The latter concepts are external to the Charter, which relies on procedural rather than substantive limits and is based on a political, not a legal approach to peace maintenance – under the Charter, *peace takes precedence over justice.*
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> Thus especially humanitarian law and human rights norms, rather than establishing precise limits to Chapter VII powers, form guidelines in the exercise of those powers. Since they form part of the Purposes of the Organisation as set out in Article. 1(3) of the Charter, the SC's complete disregard for them would violate the Charter. However, it is up to the SC to strike the concrete balance between humanitarian and human rights concerns and *the goal of maintaining peace, and during the 1990s, the latter have acquired significantly more weight in the process.* Practice has begun to shape requirements for future action especially in the field of economic sanctions: the SC has now expressed its readiness, when adopting measures under Art 41, to 'give consideration to their potential impact on the civilian population', and it has recognised the 'necessity' to avoid adverse humanitarian consequences.[86] [emphasis added]

Duties of the Occupying Powers

While international law supported the actions of the Coalition of the Willing in entering Iraq, the manner in which US Forces prosecuted the war has not always complied with international law. The duties of the occupying forces in Iraq are clearly set in customary law and the various provisions of the Hague

[85] Shi'ite minorities themselves host to the al-Qaeda connected Ansar al-Islam terrorist organisation.
[86] Simma above p711.

Regulations on Land Warfare as established by the 18 October 1907 Convention concerning the Laws and Customs of War on Land, and the Geneva Convention of 12 August 1949 relative to the Protection of Victims of War. Other duties are implied by State adherence to other Conventions and Treaties such as those relative to human rights, anti-discrimination, torture and the protection of historic monuments.

The degree of actual control exercised by the occupying forces is of primary concern in attracting the obligations of an occupying power. The ability to deliver humanitarian assistance is directly relevant to the obligation to provide such assistance. For example, a state of siege attracts clear obligations towards non-combatants. Likewise, by-passing centres of population still under enemy control may not relieve the occupying power of humanitarian concern for inhabitants who may lack means of sustaining the necessaries of life.

Commanders of flying columns must be mindful of the effect isolation may have upon non-combatant centres of population by-passed by Military forces. The 1949 Geneva Convention affecting civilians in war applies to '... all cases of partial or total occupation of the territory' of a Convention Party. While Iraq is a contracting State to the 1949 Convention the obligation to apply in effect Convention values, nevertheless, arises in customary law[87].

International law imposes a lesser burden upon a mere invader. The threshold is set by Reg 42 of the Hague Regulations: 'Territory is considered to be occupied when it is placed as a matter of fact under the authority of the hostile army.' In context, the word 'hostile' has no pejorative meaning as the principal duties of an occupier are the same in law irrespective of, as Professor Stone says, the justness or morality or the occupation.[88] Once effectively in control the Coalition parties were obliged to ensure 'public order and safety' (Reg 43) and to respect the laws in force unless 'absolutely prevented' by, for example, Iraqi laws that may give rise to a breach of substantive rights that accrue under other international instruments.

In Professor Stone's view a SC 'recommendation' for enforcement action by armed forces (not being a UN Military Mission) provided by Member States hangs 'unattached' to the Charter.[89] If one accepts that the Coalition of the

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[87] Some universal values transcend questions of Treaty accession. See Weetamangramy J on the relevance of whether Bosnia-Herzegovina and the Federal Republic of Yugoslavia were parties to the Genocide Convention ICJ reports (1996) 595 at 645.

[88] Stone above 695.

[89] Stone above 230: 'When an "international force" enters upon, or intervenes in an armed struggle. As in Korea 1950, is it engaged in war? Has it the duties and rights of a belligerent State under international war-law?...

... Insofar as military action by international forces stricto sensu might thus be involved, and as this was not formally designated as "war", and, in fact, seems to be otherwise designated as "enforcement action" or the like, the question was squarely raised how far it was governed by the generally accepted rules of war.

The question is the more pointed since a substantial part of these rules is embodied in treat law, much of which is limited even further in its force by "general participation clauses" to wars in which all belligerents are bound thereby. The difficultly is somewhat eased in relation to conventions like those signed at Geneva in 1949, on prisoners, sick and wounded, and civilian person whose rules

Willing entered Iraq in furtherance of SC resolutions Coalition forces, in law, remain engaged in enforcement action as individual States. Arguably, enforcement action is not war and the 20 March 2003 operations within the territory of Iraq were not an 'invasion' as a prelude to war.

On the other hand, if one accepts that continued collective self-defence motivated the Coalition of the Willing's resumption of hostilities after a failed ceasefire then the hostilities may properly be designated as 'war' attracting the rules of war.

As for Guantanamo Bay detentions Art 49 of the 1949 Geneva Convention bans forcible transfer of Iraqi civilians unless '... imperative reasons of security require internment'. If internment is justified it must whenever possible be within the occupied territory. Appeal and review rights must be allowed as well as support for the detainees' dependents.

Arts 55 and 56 of the 1949 Convention also impose detailed duties with respect to matters such as essential welfare services, public health, continued services of ministers of religion and education. State assets may be used for these purposes.

Significantly the 1949 Convention also permits the occupying power to collect, '... taxes, dues and tolls' and to defray, the expenses of administration.[90] Use of petroleum resources for the benefit of the population and to defray the cost of administration is permissible. While Iraqi petroleum resources could have been exploited to pay the costs of the military occupation as distinct from the costs of the administering power modern logistics have probably put an end to the concept of the army of occupation expecting the land to yield the necessaries of life for the troops.

In conclusion, this brief overview demonstrates the flexibility available in law to the Coalition forces. This flexibility may allow for rapid capacity building and sustainability. Any witness to the hesitant and often disjointed attempt by the UN to set up the functions of Government in East Timor in 1999-2001 may agree that a UN that lacks a Military Mission also lacks appropriate on-ground organisational skills.[91] The gross violations of international law by occupying US troops in Iraq including civilian 'collateral' deaths and the maltreatment of prisoners illustrate not only what is wrong in United States leadership but the need for urgent revalidation of Chapter VII of the UN Charter.

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are expressed to be binding even between Parties and non-Parties, provided the latter in fact observe them. Still even then it is probably that in the technical legal sense United Nations forces stricto sensu would not be bound by treat rules of war, even if it could be argued that (on the analogy of newly created States) they were bound by customary rules. Rules for such forces were simply not created by the treaties concerned.

This technical legal position does not, of course, mean that international forces should (or that they will in practice) disregard the rules of war. The very nature of such forces suggests that they should and will have a regard for them even more scrupulous than that of States.'

[90] Article 48.

[91] For a wider perspective see Professor Helen Hughes, 'More Harm Than Good' in the April-May 2003 issue of *The Diploma.*

CONCLUSION

So where are we going? Certainly, customary international law at the time of the Pearl Harbour attack on 7 December 1941, prohibited pre-emptive strikes. International law was jolted forward after 7 December 1941, again by the Cold War nuclear stand off and again after 11 September 2001.

If terrorist access to WMD is a clear and present danger those who try to lead public opinion by denying the emergence of a State practice of 'pre-emptive self-defence' or 'preventive self-defence' may live in a League of Nations time warp. In a lesson from history the relevance of the United Nations is now challenged by those who fear the phoenix of appeasement. Since we know what a disaster the head in the sand pre-World War II epoch produced, perhaps it is now time for Member States to restructure the whole of Chapter V of the UN Charter relating to the SC and subsequent Chapters dealing with peacekeeping and the prevention of breaches of the peace.

In his dissertation on Art 2(4) of the Charter and the doubtful legality of NATO's Kosovo rescue Professor Randelzhofer used these prophetic words:

> ... As a consequence military actions taken by NATO forces against Yugoslavia from March 24 until the beginning of June 1990 because of atrocities committed by Yugoslav army and police against the Albanian population in Kosovo were not compatible with public international law. On the other hand one cannot deny that this means that there is a split between law and morality. It becomes more and more intolerable to see grave violations of human rights within a State and to see other States being banned by public international law from intervening. If the SC does not act on the basis of Arts. 39 and 42 of the Charter to stop the violations of humanitarian law, as occurred in the Kosovo Case, States will be tempted to intervene more and more often. Thus, eventually a rule of customary international law might develop, making humanitarian intervention lawful. It would be preferable that the practice of the SC makes the development of such a rule unnecessary.[92]

The decision by France and Russia to veto any resolution to forcibly disarm Iraq may fulfil Professor Randelzhofer's prophecy. US led intervention in Panama, the 1991 Gulf War, Somalia, Haiti, Bosnia, Kosovo and now Iraq has shown the UN to be indecisive and weak – not to speak of Rwanda. While humanitarian motives influence US foreign policy, US strategy now has an announced primary focus on preventive self-defence. The irony of this doctrine being advanced as a counter weight to those who may support the same type of isolationism that dominated the discredited pre WWII years when those suffering in Europe were largely abandoned to Hitler by the US is surely not lost on students of modern history.

Pressure upon Indonesia, Australia and the UN in August/September 1999 by the Clinton Administration came too late to stop the post ballot humanitarian disaster in East Timor but intervention was motivated, as in Kosovo, primarily

[92] Simma above 131:56.

by humanitarian considerations. For an emerging non-aligned country East Timor's approach to the Iraqi imbroglio through its Foreign Minister Co-Nobel Laureat José Ramos Horta is instructive. As one of the world's most experienced envoys Horta understands the humanitarian imperative of dealing with a dictatorial regime. Those who have shared suffering yield to a simple plea for deliverance. Unworldly, impoverished but highly attuned to basic human rights there can be no doubt that the poor of this world freed from the incitement of demagogues would support a new Order based on humanitarian intervention. But, as we have seen the moral aridity of the SC is a fundamental problem.[93]

Many, who like Professor Randelzhofer support the Charter find it 'intolerable' to be forced to a choice between international law that respects State sovereignty and inaction over humanitarian catastrophe. When, as occurred in Kosovo, indecision has gone on long enough many would turn to those who with due reverence for human life restore peace and security and deliver humanitarian aid. So far as the 20 March 2003 intervention in Iraq is concerned the existing legal authority to continue collective self-defence allowed the delivery of long suffering Iraqi people from oppression but the further human suffering inflicted by failed US ground strategy is a grotesque paradox. Until the moral challenge is resolved within UN processes customary international law, when available, is likely to become the residual justification for humanitarian intervention.

In the event that democracy does emerge in Iraq, the SC by its inaction may have transferred moral legitimacy to the US led 'humanitarian intervention in Iraq'. While Bismark may have described this as the moral legitimacy of might when the dust settles the poor and oppressed of Iraq may, like the East Timorese before them, have had a clearer view of the moral imperative than did many at the United Nations.

The law relating to international terrorism has evolved with much more precision. State sovereignty may yield to lawful hot pursuit when there is State complicity or inactivity. The successive UNGA and SC resolutions[94] establishing terrorism as a threat to international peace and security mean that the right of extra-territorial pursuit when characterised as self-defence to 'armed attack' may have expanded customary international law relating to self-defence[95]. Whether this may extend to 'preventive self-defence' from rogue State possession of WMD is a real question of law. Certainly, such a doctrine without an established line of descent in international law will be properly

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[93] See Cassese EX INIURIA us ORITUR. 'Are we moving towards International Legitimation of forcible Humanitarian Counter Measures in the community', 10 EJIL 1999; R Lapidoth, 'Sovereignty in Transition' (1992) 45 JIA 325, 327; for a legal view Mr Hans Correll, Canadian Council of International Law 29 Oct 1999 Annual Conference, 'From Territorial Sovereignty to Human Security', www.un.ord/law/counsel/octowa.htm.

[94] SCR 1368, 12 September 2001; SCR 1873, 28 September 2001; UNGAR A/RES/49/60, 17 February 1995; A/57/273 S/2002/875.

[95] Simma above p271 and the discussion of general principles and the 1996 ICJ *Advisory Opinion on the Legality of the threat or use of Nuclear Weapon,* above fn75, recognising that '... resolutions can in certain circumstances, provide evidence important for establishing the existence of a rule or emergence of an opinio juris'.

challenged by scholars. Political leaders making the practical assessment may need to secure support within the world community before such a doctrine can acquire legitimacy as a States practice.