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Eighth Geoffrey Sawer Lecture

Toward Global Democracy: A Plea for Moral Globalisation*

*Richard Falk***

I. Points of Departure

It is fair to ask at the outset, why discuss global democracy? My answer is that I believe global democracy is the only possible future for world order that avoids human disaster. The alternatives to global democracy are, in my view, some combination of global empire and perpetual warfare, in which the independence of states, the freedom of all peoples, and the very sustainability of life on earth is put in increasing jeopardy.

We have been given an understanding, particularly in the United States, of this emerging style of undesirable world order in the aftermath of the devastating September 11 (9/11) attacks. What we observe to be unfolding on the global stage since that transforming day is the futile struggle by the most powerful national government to restore its national security amid an unresolved and extremely violent competition between surveillance, intelligence, and aggressive state war-making on the one side and secrecy, concealment and terrorist violence on the other. Such an encounter exhibits a new calibration of power as between states and non-states in which the resources and destructive capabilities of the former are being neutralised by the tactics of surprise, extremism, and ingenuity of the latter.

Responding to the imperatives of surveillance and intelligence has encouraged a variety of illiberal practices: torture, racial profiling, unprecedented intrusions on privacy, arbitrary detentions, covert prison sites, and targeted assassinations. Governments manipulate the atmospherics of war to claim special, emergency powers. The result is a pervasive sense of insecurity throughout society. The advocates of global democracy reject this image of security and share the conviction of the World Social Forum and others that another world is possible. Achieving that better world must start with ideas, especially at this time, ideas about security and power that take account of changing modalities of conflict and a global setting that

* This article is based upon the Eighth Geoffrey Sawer Lecture, delivered 2 August 2005, Centre for International and Public Law, ANU College of Law, Australian National University.

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The Howard Doctrine: Australia and Anticipatory Self-Defence against Terrorist Attacks

Nicole Abadee* and Donald R Rothwell**

I. Introduction

Whilst there are numerous examples throughout the twentieth century of terrorist acts committed against states or state interests by non-state actors with little or no connection with any state,¹ the unprecedented scale of the September 2001 terrorist attacks on New York and Washington surprised not only the United States of America, but the whole international community. The attacks were met with swift international condemnation,² the commencement of a military campaign to rid Afghanistan of Al Qaeda, and an exhaustive debate over the causes behind the rise of international terrorism and how best to respond to the threat that it poses. However, tragically, the events of 2001 have proven not to be isolated and there have since been a number of other large-scale terrorist attacks. The threat of international terrorism has been particularly highlighted for Australia, whose nationals were injured or lost their lives in the 2002 and 2005 terrorist attacks in Bali³ and the 2005 London bombings. In addition, in 2004 the Australian Embassy in Jakarta was the subject of a terrorist attack.⁴

The terrorist attacks of the new millennium have utilised both conventional and non-conventional means, and since 2001 there has been a growing fear that international terrorist groups may gain access to more sophisticated weapons. There

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¹ See generally A Parry, *Terrorism: from Robespierre to Arafat* (1976).

² This is reflected in the wording of SC Res 1368 (2001) adopted on 12 September 2001, in which operative para 1 notes that the Security Council: '*Unequivocally condemns* in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and *regards* such acts, like any act of international terrorism, as a threat to international peace and security.'

³ In recent years Bali has been the target of two significant terrorist attacks, the first on 12 October 2002 when 202 people were killed (88 Australians) and the second on 1 October 2005 when 23 people were killed (4 Australians).

⁴ This attack took place on 9 September 2004 during the midst of a Federal election campaign in Australia. While no Australian nationals were injured or killed, the attack resulted in the death of 9 persons with 212 other persons injured, mostly all of Indonesian nationality, and property damage to the Australian Embassy.

are grave concerns that the widespread proliferation of nuclear materials and the increasing accessibility of chemical and biological weapons have dramatically increased the potential of international terrorist organisations to gain access to 'weapons of mass destruction' (WMD).⁵ In response to this threat the United States under President George W Bush has promulgated a new doctrine of 'pre-emptive self-defence',⁶ which asserts the right of the United States to launch pre-emptive military strikes against the territories of states that harbour terrorists: that is, where there are terrorist bases, training facilities, or camps engaged in preparations for an attack against the United States or its allies. The first full articulation of this so-called 'Bush doctrine' was published in September 2002 in a report to Congress entitled 'The National Security Strategy of the United States of America'.⁷ Debate over the legitimacy of such a doctrine quickly became entangled in wider debates at that time over the use of military force against Iraq arising from concerns over that country's assumed possession of WMD.

As a member of the United States alliance and a critical supporter of actions by the United States in Afghanistan, Iraq and more generally in the global campaign against international terrorism, Australia has been an active participant in some of the debates over the use of force against non-state actors, in particular, terrorists. In a series of speeches, media interviews, and comments made by senior Ministers, the Howard government has seemingly lent some support to the Bush doctrine of 'pre-emption' and articulated possible scenarios under which an Australian Prime Minister would seek to justify the use of such military force. In his most significant statement on the issue, the Prime Minister said that 'if you believe that someone was going to launch an attack against your country, and you had the capacity to stop it and there was no alternative other than to use that capacity then of course you would have to use it'.⁸ This of course raises a very real legal issue which this article seeks to explore: is the Howard government seeking to adopt the controversial and legally dubious Bush doctrine of pre-emptive self-defence? Or is its position closer to the doctrine of anticipatory self-defence (ASD) – a right which is not uncontroversial, but which has, as will be argued below, gained some acceptance provided that it is exercised within strict limits. Whichever is the case, Australia's position has been endorsed by the United States, but has been widely condemned by neighbouring states in Southeast Asia.

⁵ President of the United States, *The National Security Strategy of the United States of America* (2002) <<http://www.whitehouse.gov/nsc/nss.pdf>> ('NSS 2002') 14; Department of Defence (Australia), *Australia's National Security: A Defence Update 2005* (2005) ('Defence Update 2005') at <www.defence.gov.au/update2005/defence_update_2005> 4. This concern is reinforced in SC Res 1540 (2004) [1] in which the Security Council '[d]ecides that all States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer, or use nuclear, chemical or biological weapons and their means of delivery.'

⁶ Referred to by some as 'pre-emption', 'preventive self-defence' or 'preventive war'.

⁷ NSS 2002, above n 5.

⁸ Interview by the Prime Minister with Laurie Oakes, (1 December 2002). Transcript available at <www.pm.gov.au/news/interviews/2002/interview2015.htm>.

Unlike the United States, the Howard government has not prepared any official documentation that articulates its position in relation to the use of force to forestall or prevent a terrorist attack.⁹ This article seeks to ascertain from the material publicly available, especially speeches and media interviews, exactly what the Howard government's position is, and whether that position is consistent with existing international law. In so doing, the article will consider the legality of the Bush doctrine of pre-emptive self-defence, and the extent to which the so-called Howard doctrine mirrors or departs from it. Parts II and III provide the legal background, by reference to relevant principles of existing international law. Part II begins with a summary of the development of the law of self-defence under customary international law and the United Nations Charter (the Charter),¹⁰ including a discussion on the legality of ASD. Part III considers whether there is a right of self-defence against non-state actors, in particular, terrorists, and grapples with difficult issues concerning state responsibility and failed states, a phenomenon of particular relevance to Australia, given its geography. Part IV outlines the Bush doctrine, and traces the development of the so-called Howard doctrine, as it emerges from the material available. Part V contains a legal critique of first the Bush doctrine, and then the Howard doctrine, drawing on the principles outlined in Parts II and III. Finally, Part VI draws conclusions as to what the Howard doctrine actually entails, and whether it is legal under existing international law on the use of force. It will be argued that despite the political rhetoric of the Howard government, apparently seeking to align Australia's position with the Bush doctrine, a close analysis of the language used by the Prime Minister and other members of his government reveals a doctrine that is far less controversial, at least in legal terms.

II. The Right of Self-Defence

A proper understanding of the nature of the right of self-defence – and, most pertinently, the possible existence of a post-Charter right of anticipatory self-defence – is essential to any consideration of whether there is a proper basis in existing international law for either the Bush doctrine or the Howard doctrine. What follows is a summary of the relevant principles of international law on the use of force.

(a) Right of self-defence under customary international law

Classical self-defence can be characterised as arising when one state launches an unprovoked attack against another, and the victim state seeks to respond with the use of armed force to repel the aggressor state.¹¹ The International Court of Justice

⁹ See however *Defence Update 2005*, above n 5, which, while falling short of being a 'national security' doctrine, makes important statements regarding the strategic environment and how Australia should be responding to that environment in the national interest. On the need for a 'National Security' doctrine in Australia, see A Dupont, *Grand Strategy, National Security and the Australian Defence Force* (2005).

¹⁰ United Nations Charter (26 June 1945) [1945] ATS 1.

¹¹ Britain's 1982 response to the Argentinean invasion of the Falkland Islands is often cited as a contemporary example of classical self-defence. See K R Simmonds, 'The

(ICJ) 'has described the right at customary international law as 'natural or inherent'.¹² Bowett asserts the right is a 'basic, fundamental right' of every state.¹³ What then is the nature of the right?¹⁴ Self-defence is, essentially, the lawful use of counterforce. It is an exceptional right, justifying the use of force that would otherwise be unlawful. An essential pre-condition is fault by the state against which the force is directed, and it is this that distinguishes self-defence from the more general right of self-preservation with which it was frequently confused in the nineteenth century. The function of self-defence is 'to protect essential rights from irreparable harm ... to preserve or restore the legal *status quo*'.¹⁵ Its purpose is thus protective, and not punitive.

Most writers agree that at customary international law, prior to the Charter, the right included ASD: a right to use force against an imminent attack.¹⁶ Although the origin of the right of ASD may be traced to the writings of some of the early scholars of international law, including Vitoria and Grotius,¹⁷ the nature and extent of ASD was first properly considered in the famous incident of the *Caroline* in 1837.¹⁸ It has been said that in this case 'the conception (of self-defence) was rescued from the Naturalist notions of an absolute primordial right of self-preservation'.¹⁹ To this day, debates concerning the legality of anticipatory or pre-emptive self-defence usually begin with a discussion of this incident.²⁰ It is thus timely to revisit the facts of the case.

Struggle for the Falkland Islands' (1983) 32 *International and Comparative Law Quarterly* 262; F Hassan, 'The Sovereignty Dispute Over the Falkland Islands' (1982) 23 *Virginia Journal of International Law* 53.

¹² *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (Merits) (Nicaragua Case)* [1986] ICJ Rep 14, [176].

¹³ D W Bowett, *Self-Defence in International Law* (1958) 4.

¹⁴ For a detailed consideration of the nature of the right, see S Alexandrov, *Self-Defence Against the Use of Force in International Law* (1996); T McCormack, *Self-Defence in International Law, The Israeli Raid on the Iraqi Nuclear Reactor* (1996); R Y Jennings and A Watts, *Oppenheim's International Law* (9th ed, vol 1, 1992), 416-27; Bowett, above n 13; I Brownlie, *International Law and the Use of Force* (1963); H M Waldock, 'The Regulation of the Use of Force by Individual States in International Law' (1952-II) 81 *Hague Recueil* 451, 461-67.

¹⁵ Bowett, above n 13, 11.

¹⁶ Eg, Bowett, above n 13, 6, citing Grotius *De Jure Belli et Pacis*, Bk II, ch 1, p 173; Pufendorf, *De Jure Naturae et Gentium* Bk II, ch V, pp 275-6; and Vattel, *Le Droit des Gens*, Bk II, ch III, p 244.

¹⁷ For a useful discussion of the evolution of the right of ASD prior to the *Caroline* incident, see M Totten, 'Using Force First: Moral Tradition and the Case For Revision' (2007) 43 *Stanford Journal of International Law* 95.

¹⁸ See R Y Jennings, 'The *Caroline* and McLeod Cases' (1938) 32 *American Journal of International Law* 82.

¹⁹ Ibid 92.

²⁰ See, eg, the debates in the Security Council as to the legality of Israel's airstrikes in 1981 on the Iraqi nuclear reactor in which several states refer specifically to the *Caroline* incident: UN Docs Nos.S/PV.2280-2285, discussed infra; W H Taft IV, 'Preemptive Action in Self-Defense' (2004) 98 *American Society of International Law Proceedings* 331; Senator Robert Hill discusses it in the John Bray Memorial Oration,

In 1837, the rebellion in Canada against British rule was receiving active support from American sympathisers, whose activities the United States government was unable effectively to control. On 13 December a group of these sympathisers took control of Navy Island in Canada, from where they committed 'repeated Acts of Warlike aggression on the Canadian shore, and also on British boats'.²¹ Reinforcements of men and supplies were shipped from New York to Navy Island, by merchant ships, including the *Caroline*. The Commander of the British forces ordered the destruction of the *Caroline*, apparently for the 'double purpose of preventing further reinforcements and supplies from reaching the island, and depriving the rebels of their means of access to the mainland of Canada'.²²

In the dead of night on 29 December, whilst docked in a United States port, the *Caroline* was boarded by British forces, set on fire and sent drifting over Niagara Falls. Two lives were lost. In response to a complaint by the American Secretary of State, the British Minister in Washington, Mr Fox, stated that the British in Canada 'had already suffered; and they were threatened with further injury and outrage'.²³ The *Caroline* incident was thus an instance of anticipatory, and not pre-emptive, self-defence.

Further correspondence ensued between the new American Secretary of State, Daniel Webster, and Mr Fox, including the famous letter of 24 April 1841, in which Webster set out what has aptly been described as the '*locus classicus of the law of self-defence*'.²⁴ He stipulated that for the lawful exercise of the right, two conditions must be satisfied. There must be a 'necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation'. In addition, the party asserting the right must show that it did 'nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it'.²⁵ Mr Fox did not disagree with this statement of the law: merely with the application of that law to the facts.

Thus the *Caroline* incident established that the lawful exercise of the right of self-defence depended upon satisfaction of the dual conditions of necessity and proportionality.²⁶ The ICJ has confirmed the essential nature of those conditions for the lawful exercise of the customary international law right today.²⁷ Relying largely

University of Adelaide, (28 November 2002). Transcript available at <www.minister.defence.gov.au/hillspeechtpl.cfm?CurrentId=2121>.

²¹ Jennings, above n 18, 83.

²² Ibid.

²³ Ibid 85.

²⁴ Ibid 92.

²⁵ Ibid 89.

²⁶ For a detailed consideration of these requirements, which had previously received little academic attention, see J Gardam, *Necessity, Proportionality and the Use of Force by States* (2004).

²⁷ *Nicaragua Case*, above n 12, 103 [194]; *Legality of the Threat or Use of Nuclear Weapons Case (Advisory Opinion)* [1996] ICJ Rep 226 (*Nuclear Weapons Opinion*) [41]; *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (Merits) 42 ILM 1334 (2003) (*Oil Platforms Case*) [51, 74, 76]; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* Judgment of 19 December 2005, General List No 116 (*Congo*

upon the *Caroline* precedent, many scholars²⁸ also agreed that ASD was permissible at customary international law prior to the advent of the UN Charter in 1945.

(b) Right of self-defence during the UN Charter era

Article 51 of the Charter seeks to enshrine the right of self-defence. Article 51 provides that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.²⁹

The meaning of article 51 has been described as 'deceptively complex'.³⁰ Thus, for example, debate continues to rage over the content of the core phrase, 'armed attack'.³¹ Whilst this is not the place to revisit that or other textual arguments in detail, there are, however, two important points to be made in relation to article 51, which are relevant to a consideration of the Bush and Howard doctrines. The first is that the 'inherent' right of self-defence referred to in article 51 includes not only individual self-defence, but also collective self-defence.³² A recent example of the exercise of a right of collective self-defence in response to a terrorist attack is of course Operation Enduring Freedom, launched in Afghanistan against Al Qaeda

Case) at [147]. The judgment is available at <www.icjci.org/icjwww/idoctet/ico/icoframe.htm>. For a consideration of the relationship between the *Caroline* formula and contemporary customary international law, see J A Green, 'Docking the *Caroline*: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defence' (2006) 14 *Cardozo Journal of International and Comparative Law Quarterly* 429.

²⁸ Eg, A C Arend and R Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (1993) 72; L Henkin, *How Nations Behave* (1979) 141; Bowett, above note 13, 6 citing Grotius; Pufendorf; and Vattel; above n 16. Cf Brownlie, above n 14, 258-61, 274 who questions whether this right still existed by 1945, in light of the dearth of state practice in support from 1920-1945.

²⁹ Above n 10.

³⁰ N M Feder, 'Reading the UN Charter Connotatively: Toward a New Definition of Armed Attack' (1986) 19 *New York University Journal of International Law and Politics* 395, 403.

³¹ Some writers have attempted to list (although not exhaustively) those uses of armed force that qualify as 'armed attacks': see, eg, A Randelzhofer 'Article 51' in B Simma (ed), *The Charter of the United Nations: a Commentary* (2nd ed, 2002) 788, 796-802; Y Dinstein, *War, Aggression and Self-Defence* (3rd ed, 2001), 169-83.

³² Gray has noted the controversy over the existence of a right to collective self-defence prior to the adoption of the UN Charter, and debate over its application since that time, see C Gray, *International Law and the Use of Force* (2nd ed, 2004) 135-38. This is not to suggest the individual aspects of particular military operations conducted under self-defence have not been controversial; see eg, Gray's assessment of the legitimacy of aspects of Operation Enduring Freedom in Afghanistan in 2001-02, *ibid* 168-70.

bases by a United States-led coalition of states in response to the 2001 terrorist attacks on the United States.³³

The second point is whether the customary international law right of ASD survived the Charter, or whether it has been superseded by article 51, which provides for an inherent right of individual or collective self-defence 'if an armed attack occurs'. The doctrine of ASD builds upon the principle of classical self-defence by asserting that a state, which believes it is about to suffer an armed attack, has a right to launch a defensive military strike against the aggressor state to thwart that attack. Thus a state need not wait and suffer the consequences of an actual armed attack before defending itself from further attack, but it may instead 'anticipate' an imminent attack and act to defuse the threat posed by the 'aggressor' state.

The question as to whether there is a post-Charter right to ASD has been the subject of heated academic debate for some decades, with leading scholars adopting diametrically opposed views. The competing arguments may be summarised as follows. Those who argue that article 51 limits the use of force in self-defence to a response to an armed attack which has already occurred (sometimes called 'restrictionists'³⁴) rely primarily on the Charter's text.³⁵ They point to the use of the phrase 'if an armed attack occurs', in contrast to the language of article 2(4), which prohibits both the use and the 'threat' of force, and article 39, which contemplates collective action by the Security Council in response to a mere 'threat to the peace'. They argue that, like all exceptions, article 51 must be narrowly construed, consistently with the overall purpose of the Charter to restrict as far as possible the use of force by states. They also emphasise the unambiguous nature of a requirement that an armed attack has actually occurred, in contrast to the ambiguity inherent in a requirement that such an attack be 'imminent'.³⁶

Those who maintain that the customary international law right of ASD did survive the Charter³⁷ (sometimes referred to as 'counter-restrictionists'³⁸) argue

³³ SC Res 1368 (12 September 2001) and SC Res 1373 (28 September 2001) adopted in the immediate aftermath of the 11 September 2001 terrorist attacks on the United States of America referred to the right of both individual and collective self-defence in response to those attacks. Australia's invocation of the 1951 ANZUS Treaty following what was judged to have been an 'armed attack' against the United States on September 11, 2001, and its subsequent support for and engagement in Operation Enduring Freedom illustrates Australian recent reliance upon collective self-defence in support of an ally; see Security Treaty between Australia, New Zealand and the United States of America [ANZUS] (1 September 1951) [1952] ATS No 2.

³⁴ Eg, by A C Arend, 'International Law and the Preemptive Use of Military Force' (2003) 26 *The Washington Quarterly* 89, 92.

³⁵ Eg, M Bothe, 'Terrorism and the Legality of Pre-emptive Force' (2003) 14 *European Journal of International Law* 227, 229-30; Randelzhofer, above n 31, 803; Dinstein, above n 31, 167-8; A Cassese, *International Law* (2nd, 2005) 361-2; Henkin, above n 28, 141-45; Brownlie, above n 14, 275-8.

³⁶ Henkin, above n 28, 142.

³⁷ Including, eg, J Yoo, 'International Law and the War in Iraq' (2003) 97 *American Journal of International Law* 563, 571; D Rothwell, 'Anticipatory Self-Defence in an Age of International Terrorism' (2005) 25 *University of Queensland Law Journal* 337-

first that there is nothing in the *travaux préparatoires* of the Charter, in particular, article 51, to suggest any intention to restrict the right of self-defence at customary international law. Rather, they assert, the *travaux* show that the clear intention of the drafters of article 51 was not to limit that right, but to protect existing regional security arrangements, such as those of the Latin American states, who had in 1945 signed the *Act of Chapultepec*.³⁹ They maintain that the use of the word 'inherent' in article 51 emphasises that the right of self-defence was an existing right, independent of the Charter.⁴⁰ Perhaps most powerful is the argument that 'the Charter is not a suicide pact'. It is said that, given the state of modern weaponry, a state cannot be expected to assume the position of a 'sitting duck'⁴¹ and that to compel it to 'allow its assailant to deliver the first and perhaps fatal blow' would be a 'travesty of the purposes of the Charter'.⁴² In the era of weapons of mass destruction and the heightened threat of global terrorism, this argument is all the more powerful.

Some writers propose a middle ground. Dinstein, for example, suggests that whilst ASD, which he calls 'preventive war',⁴³ is prohibited, 'interceptive' self-defence, which occurs 'after the other side has committed itself to an armed attack in an ostensibly irrevocable way' is not.⁴⁴ An alternative approach is that:

while anticipatory action in self-defence is normally unlawful, it is not necessarily unlawful in all circumstances ... depending on the facts ... in particular the seriousness of the threat and degree to which pre-emptive action is really necessary and is the only way of avoiding that serious threat.⁴⁵

Schachter has argued, to similar effect, that 'it makes sense to support a norm that opposes the pre-emptive resort to force but acknowledges its necessity when an attack is so immediate and massive as to make it absurd to demand that the target state await the actual attack before taking defensive action'.⁴⁶

The issue has not been thoroughly canvassed by either the ICJ or the Security Council. The ICJ in the *Nicaragua Case* 'express[ed] no view' on the 'lawfulness of a response to the imminent threat of armed attack' as it did not arise on the facts of

53; T M Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (2002) ch 7; McCormack, above n 14, chs 5, 6; C Greenwood, 'International Law and the United States Air Operation Against Libya' (1986) 89 *West Virginia Law Review* 933, 942-44; M S McDougall and F P Feliciano, *Law and Minimum World Public Order* (1961) 232-41; Waldock, above n 14, 496-99; Bowett, above n 13, 185-93.

38 Eg, by Arend, above n 34, 92.

39 Inter-American Reciprocal Assistance and Solidarity (Act of Chapultepec) 1945; Bowett, above n 13, 182; Waldock, above n 14, 497.

40 Bowett, above n 13, 187.

41 McDougall and Feliciano, above n 37, 236.

42 Waldock, above n 14, 498.

43 Dinstein, above n 30, 165-69. Some writers support this view, see, eg, M Shaw, *International Law* (5th ed, 2003) 1030; (possibly) Jennings and Watts, above n 14, vol 1, 421, fn 18.

44 Dinstein, above n 30, 172-73.

45 Jennings and Watts, above n 14, 421.

46 O Schachter, 'In Defence of International Rules on the Use of Force' (1986) 53 *University of Chicago Law Review* 113, 136.

that case.⁴⁷ The Court's emphasis there on the requirement of an actual armed attack as a *sine qua non* for the exercise of the right of self-defence⁴⁸ does, however, lend some support to the restrictionist argument.⁴⁹ Once again, in its recent decision in *Case Concerning Armed Activities on the Territory of the Congo* the Court expressly declined to rule on the lawfulness of ASD, it not being relied upon by Uganda.⁵⁰

State practice in the Security Council is also inconclusive. It is not proposed in this article to discuss that state practice at length, it having already been reviewed extensively.⁵¹ Suffice is to say, relevant state practice since 1945 is fairly limited, but includes the Cuban missile crisis (1962-1963), the Israeli-Arab six day war (1967) and the Israeli strikes on the Osirak nuclear reactor in Iraq (1981).⁵² Some counter-restrictionists rely on the debates in the Security Council following these incidents to support their argument.⁵³ Equally, some restrictionists argue that the very same debates point in the opposite direction, noting also that states have rarely invoked ASD explicitly to justify the use of force.⁵⁴

It is submitted that the intermediate approach advocated by Dinstein, Schachter and others,⁵⁵ according to which ASD is permissible in exceptional circumstances, provided that it meets strict requirements, is to be preferred. It is the most appropriate manner in which to balance the competing concerns of preserving the integrity of the prohibition on the use of force and permitting a state to defend itself *in extremis*. It is also consistent with the concern of the ICJ to protect 'the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with article 51 of the Charter, when its survival is at stake'.⁵⁶ Finally, it is a view shared by the Secretary-General's High-level Panel on Threats, Challenges and Change⁵⁷ and by the former Secretary-General, Kofi Annan.⁵⁸

47 *Nicaragua Case*, above n 12, [176], [194].

48 Ibid [176], [193]-[195], [211], [237].

49 However, Judge Schwebel in a powerful dissent advanced the counter-restrictionist view, noting, *inter alia*, that article 51 does not say 'if, and only if, an armed attack occurs': *Nicaragua Case*, above n 12, Dissenting Opinion of Judge Schwebel [46].

50 *Congo Case*, above n 27, [143].

51 See, eg, W C Bradford, "'The Duty to Defend Them': A Natural Law Justification For the Bush Doctrine of Preventive War" (2004) 79 *Notre Dame Law Review* 1365, 1400-422; J Yoo, 'Using Force' (2004) *University of Chicago Law Review* 729, 762-72; A Garwood-Gowers, 'Pre-Emptive Self-Defence: A Necessary Development or the Road to International Anarchy?' (2004) 23 *Aust YBIL* 51, 54-5; Gray, above n 32, 129-33; Yoo above n 37, 573; C Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida and Iraq' (2003) 4 *San Diego International Law Journal* 7, 13-14.

52 See discussion *infra* in Section V.

53 Eg, Arend, above, n 34, 93-6; Greenwood, above n 51, 13-14; Franck, above n 37, 104.

54 Gray, above n 32, 129-33; Randelzhofer, above n 31, 804.

55 See text above nn 43-46.

56 *Legality of the Threat or Use of Nuclear Weapons Case (Advisory Opinion)* [1996] ICJ Rep 226 (*Nuclear Weapons Opinion*) [96].

57 The Report of the Secretary-General's High-level Panel on Threats, Challenges, and

Accordingly, ASD may be justified in conformity with the Charter and customary international law if a defender state, seeking to rely upon the doctrine:⁵⁹

- has sought to use diplomatic mechanisms, both through the UN and through other international organisations, including relevant regional organisations, to settle the dispute peacefully with the aggressor state;⁶⁰
- has exhausted all available and practical legal means to settle the dispute with the aggressor state;⁶¹
- is responding to a clear, imminent and overwhelming threat and intention to use force by another state,⁶² or agent of the state;
- adheres to the principles of necessity and proportionality in its use of force,⁶³ and other relevant provisions of international law, including international humanitarian law;⁶⁴

Change, *A More Secure World: Our Shared Responsibility* (2004) (High Level Panel Report) 63, [188] acknowledges that 'a threatened State, according to long established international law, can take military action as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate'. The High Level Panel Report is available at <www.un.org/secureworld/>.

58 The Report of the Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights For All* (2005), states at [142] that 'imminent threats are fully covered by article 51'.

59 List adopted from Rothwell, above n 37. See also Sir F Berman QC and others, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence' (2006) 55 *International and Comparative Law Quarterly* 963, 964-68 (Chatham House Principles).

60 See *Naulilaa Case (Portugal v Germany)* (1928) 2 RIAA 1013, 1027; such a requirement being consistent with the general provisions of Chapter VI of the Charter, though as noted by Schachter, 'in some cases this does not make sense' where 'relations between the parties may be so implacably hostile as to render futile any attempt at peaceful settlement': O Schachter, 'The Lawful Use of Force by a State Against Terrorists in Another Country' (1989) 19 *Israel Yearbook on Human Rights* 209, 221-22.

61 This too is consistent with Chapter VI of the Charter, and in particular art 33 which expressly refers to 'judicial settlement' of a dispute, which would extend not only to reference of a dispute to the ICJ under art 36 of the Court's Statute, but to other judicial or quasi-judicial means of settlement established under other treaty frameworks such as the 1982 United Nations Convention on the Law of the Sea (10 December 1982) 1833 UNTS 397, [1994] ATS 31.

62 The acknowledgment in the High Level Panel Report, above n 57, [188], that a threatened state can take military action against a threatened attack which is imminent goes to the level and quality of the intelligence a state has available to it such that it is not contestable that an attack is about to take place.

63 These being fundamental principles of self-defence as considered in the *Caroline*; in this regard it is notable that the International Law Commission in its Commentary to the Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles) at <www.un.org/law/ilc/>; refers directly in its commentary on art 25, 'Necessity', to the precedent of the *Caroline* as an incident in which 'necessity' was claimed: J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002) 179-80.

64 Crawford, *ibid* 166, emphasises that the exercise of self-defence does not 'preclude the wrongfulness of conduct in all cases or with respect to all obligations' and directly

- immediately reports the matter to the UN Security Council for its further action;⁶⁵ and
- makes itself both politically accountable to the international community and is prepared to have the legality of its actions reviewed by the ICJ.⁶⁶

III. Self-Defence against Terrorists: Legal Issues

To properly assess the legality of the Howard doctrine it is necessary also to understand the current legal position in relation to the use of force in self-defence against terrorism. The following discussion considers whether there is a right to use force in the territory of a third state against non-state actors who have already committed an armed attack. It then considers the legality of the use of force in ASD in circumstances where an armed attack by non-state actors is imminent. Finally, it considers the issue of state responsibility and, most relevantly to the Howard doctrine, what the position is in relation to failed or failing states, of which there are several within Australia's regional neighbourhood.

(a) Terrorists and self-defence

There are numerous examples throughout state practice where defensive military force has been used by one state against non-state actors operating from or based in another state. The *Caroline* incident famously highlighted such practice and whilst the diplomatic exchanges between the United States and Britain differed over the manner in which force had been used in that instance, there was no dispute over the capacity of one state (Britain) to use force against non-state actors in another (American rebels based in New York).⁶⁷ State practice in the pre-Charter era therefore supported the right of self-defence by an aggrieved state against 'armed

refers to obligations under international humanitarian law treaties and relevant customary law.

65 The importance of which was emphasised in the *Nicaragua Case*, above n 12, [200]; Gray notes that 'it is clear that states have taken seriously the Court's message that failure to do this will weaken any claim to be acting in self-defence': above n 32, 101-2. Uganda, however, did not heed the warning – in the *Congo Case*, above n 27, the Court, in the course of rejecting Uganda's claim of self-defence, referred at [145] to its failure to make a report to the Security Council.

66 Such action would be consistent with the state seeking to justify its use of force being prepared to have its actions adjudged by the international community, which will 'eventually condone them or mete out lenient condemnation': Cassese, above n 35, 362. It would also acknowledge the importance of the claims asserted by the State claiming the right of self-defence being verified by the international community, see J Charney, 'The Use of Force Against Terrorism and International Law' (2001) 95 *American Journal of International Law* 835, 836 noting '[t]he use of force is irreversible and irreparable, the right should not depend merely on the credibility of conclusory statements by government officials ...'

67 See text above nn 18-28 for discussion of the *Caroline* incident. In addition to the *Caroline*, I Brownlie, 'International Law and the Activities of Armed Bands' (1958) 7 *International and Comparative Law Quarterly* 712, 732-3 points to the 1916 US military operation in Mexico in response to armed border attacks by Mexican armed bands; see also G A Finch, 'Mexico and the United States' (1917) 11 *American Journal of International Law* 399; Dinstein, above n 31, 218.

bands' conducting cross border raids from a neighbouring state, subject to principles of necessity and proportionality.⁶⁸ Reliance on pre-Charter practice should of course be tempered by the fact that in that era there was no outright prohibition on the use of force by states.

In reviewing this position in 1989, Schachter noted the impact of article 2(4) of the Charter and the limitations it placed upon the use of force, subject to the article 51 exception of self-defence.⁶⁹ Yet he saw no difficulty in a state responding to a terrorist attack directed against its essential interests when the attacks were 'part of a pattern of attacks accompanied by credible indications that future attacks are planned'.⁷⁰ He did, however, see some limitations:

Not every terrorist act can be said to necessitate an extraterritorial use of force, though each merits punitive and preventive action. From the standpoint of self-defence (in contrast to retribution) the use of force must have a defensive purpose; it must be intended to prevent and deter future attacks.⁷¹

The two states responsible for the most extensive state practice in this area in recent decades have been Israel and the United States. In the case of Israel, there are numerous instances of both armed raids and sustained military campaigns against terrorist forces based in the territory of adjoining states, in particular Lebanon and Syria, and even further afield in Tunisia. In addition, Israel has undertaken from time to time sustained military operations against terrorist organisations based in the Occupied Palestinian Territories, including against the Palestinian Liberation Organization (PLO) and Hamas. More recently, in 2006, Israel conducted a 33-day military operation against Hezbollah terrorist forces based in Lebanon, which only ended following the intervention of the Security Council.⁷² Whilst there was considerable debate over the conduct of that military operation and especially the actions of the Israeli Defence Force, there was little international debate over the legitimacy of Israel exercising the right of self-defence against terrorist attacks emanating from inside of Lebanon.

In the case of the United States, in the two decades preceding 2001, it undertook military action in response to terrorist attacks against its nationals and state interests by way of air strikes against Afghanistan, Libya, Iraq, and Sudan. These military operations have been subject to extensive scrutiny,⁷³ and an issue that has often

⁶⁸ Brownlie, above n 67, 782-83 placing particular reliance upon the *Caroline*.

⁶⁹ Schachter, above n 60, 212-14.

⁷⁰ Ibid 216.

⁷¹ Ibid 220.

⁷² SC Res 1701 (2006). For a discussion of some of the issues arising from this conflict, see J Somer, 'Acts of Non-state Armed Groups and the Law Governing Armed Conflict' *ASIL Insight* (24 August 2006), vol 10(21), <<http://www.asil.org/insights/2006/08/insights060824.html>>, and K Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors' (2007) 56 *International and Comparative Law Quarterly* 141, 153-55.

⁷³ See Greenwood, above n 37; D Kritsiotis, 'The Legality of the 1993 US Missile Strike on Iraq and the Right of Self-Defence in International Law' (1996) 45 *International and Comparative Law Quarterly* 162; J Lobel, 'The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan' (1999) 24 *Yale Journal of International Law* 537; R Wedgwood, 'Responding to Terrorism: The Strikes Against

arisen has been the ability of the United States to link the terrorist act to individual terrorist organisations and to individual states that were alleged to be supporting or effectively 'sponsoring' the terrorists. For example, in 1998 the United States launched missile strikes against paramilitary training camps in Afghanistan and a pharmaceutical plant in Sudan that was claimed to be used for the production of chemical weapons. These strikes came 13 days after the bombing of the United States embassies in Nairobi and Dar es Salaam.⁷⁴ The United States action elicited a mixed response from the international community ranging from support from United States allies to condemnation from the Non-Aligned Movement. Although there was no extensive debate within the Security Council, Sudan did lodge a complaint and called for a full investigation.⁷⁵ Whilst some publicists cast doubt over the legitimacy of the attacks on Sudan, because of the lack of verifiable intelligence linking the activities of the pharmaceutical plant with the terrorist activities of Osama bin Laden,⁷⁶ others were clear that the United States action could be explained within the framework of self-defence.⁷⁷

Importantly, for both the United States and Israel, whilst their military operations against terrorist forces have often been the subject of extensive debate within the Security Council, principally due to concerns over the nature of the targets and the proportionality of the responses, rarely has the *prima facie* capacity to respond to the attacks of a non-state actor been challenged. In particular, the emerging silence from states as to Israel's ability to rely upon a right of self-defence in the face of ongoing terrorist attacks launched from neighbouring states is instructive as to how state practice in this area may be developing.⁷⁸

Recent decisions of the ICJ have also seen some discussion of self-defence against terrorists. In its 2004 Advisory Opinion on the *Legal Consequences of the*

bin Laden' (1999) 24 *Yale Journal of International Law* 559; Gray, above n 32, 160-64.

⁷⁴ For an outline of the US military action see S D Murphy, 'Contemporary Practice of the United States Relating to International Law' (1999) 93 *American Journal of International Law* 161-67.

⁷⁵ See discussion in Lobel, above n 73, 538.

⁷⁶ M E O'Connell, 'Lawful Self-Defense to Terrorism' (2001-2002) 63 *University of Pittsburgh Law Review* 889, 897-98 noting that '[i]n the days that followed, however, several governments and arms control experts questioned the evidence linking the factory to bin Laden and to the production of chemical weapons. It became a case where international society judged the evidence insufficient: it was not clear and convincing.' See generally Lobel, above n 73, 537-57.

⁷⁷ See Wedgwood, above n 73, 575 who clearly states that '[t]he military strikes of August, 1998 can be justified within a classical framework of armed attack and proportionate self-defense'; also see W M Reisman, 'International Legal Responses to Terrorism' (1999-2000) 22 *Houston Journal of International Law* 3, 47-49 who linked the United States justification for the attacks to the *Caroline* doctrine.

⁷⁸ C J Tams, 'Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case' (2006) 16 *European Journal of International Law* 963, 972; cf Lobel, above n 73, 556-57 who cautions against giving too much weight to the silence of the UN following the 1998 US strike upon Sudan and suggests that distaste for the Sudanese government and the capacity of the US to block debate within the Security Council are significant factors to take into account.

Construction of a Wall by Israel within the Occupied Palestinian Territory,⁷⁹ the Court had occasion to review the significance of Security Council Resolutions 1368 (2001) and 1373 (2001) adopted in the immediate aftermath of the September 2001 terrorist attacks against the United States. However, notwithstanding Israel's argument that the construction of the Wall was in exercise of the right to self-defence, including by reference to those and other relevant Security Council Resolutions, the Court distinguished this case from one of traditional self-defence because of Israel's control over the Occupied Palestinian Territory and because 'the threat which it regards as justifying the construction of a wall originates within, and not outside, that territory'.⁸⁰ Accordingly, the Court was of the view that article 51 of the Charter and the Resolutions did not apply in this instance.⁸¹

Likewise, in the Court's 2005 decision in the *Congo Case*,⁸² consideration was given to self-defence following armed attacks and raids against Uganda from within the territory of the Democratic Republic of the Congo (DRC). However the Court ruled that the legal and factual circumstances for the exercise of the right of self-defence were not present because there was no proof of direct or indirect involvement in the attacks by the DRC government and accordingly gave no consideration to the contemporary law addressing attacks from non-state actors such as armed bands.⁸³

Notwithstanding the relatively light treatment given to questions of self-defence against non-state actors by the Court in both cases, important Separate Opinions and Declarations were appended to the judgments and these offer more developed perspectives. In a direct reference to the distinction between armed attack from a state and a non-state actor, Judge Kooijmans noted in his Separate Opinion in the *Separation Barrier Advisory Opinion* that:

Resolutions 1368 and 1373 recognize the inherent right of individual or collective self-defence without making any reference to an armed attack by a State. The Security Council called acts of international terrorism, without any further qualification, a threat to international peace and security which authorizes it to act under Chapter VII of the Charter. And it actually did so in resolution 1373 without ascribing these acts of terrorism to a particular State. This is the completely new element in these resolutions. This new element is not excluded by the terms of Article 51 since this conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years.⁸⁴

To similar effect was the Separate Opinion of Judge Buergenthal, who stated that:

the United Nations, in affirming the inherent right of self-defence, does not make its exercise dependent upon an armed attack by another State ... In its resolution 1368 (2001), adopted only one day after the September 11, 2001 attacks on the United States, the Security Council invokes the right of self-defence in calling on the international community to combat terrorism. In neither of these resolutions (the Court had also referred to Resolution 1371) did the Security Council limit their application to terrorist attacks by State actors only, nor was the assumption to that effect implicit in these resolutions. In fact, the contrary appears to have been the case.⁸⁵

In the later *Congo Case*, Judge Kooijmans returned to this theme in another Separate Opinion, in which he questioned the need to establish a link between a state acting as 'host' to non-state actors engaging in terrorist acts and the exercise of self-defence:

If the activities of armed bands present on a State's territory cannot be attributed to that State, the victim State is not the object of an armed attack by it. But if the attacks by the irregulars would, because of their scale and effects, have had to be classified as an armed attack had they been carried out by regular armed forces, there is nothing in the language of Article 51 of the Charter that prevents the victim State from exercising its inherent right of self-defence.⁸⁶

As noted above by some of the judges, strong support for the right to use force in self-defence against non-state actors who have committed a terrorist attack is to be found in the two Security Council Resolutions passed in the aftermath of the attacks of September 11.⁸⁷ The fact that Security Council Resolution 1368, passed the day after the attacks, 'recognised' and Security Council Resolution 1373, passed 17 days later, 'reaffirmed' 'the inherent right of individual and collective self-defence' arising from those attacks, suggests that at least from that date there was international recognition of a right to exercise self-defence against non-state actors who have launched an armed attack. More controversial is the extension of that right to include also a right to use force against the states that assist or harbour such terrorists. The United States and its coalition partners apparently asserted such a right in Operation Enduring Freedom when they undertook military action not only against the terrorist bases in Afghanistan but also against the Taliban government, on the basis that it had not only harboured the terrorists, but had also failed to meet its international obligation to assist states who had suffered a terrorist attack by handing over those responsible for such attacks.⁸⁸

⁷⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (Advisory Opinion) Judgment of 9 July 2004, General List No 131 (*Separation Barrier Advisory Opinion*), <www.icj-cij.org/icjwww/idocket/imwp/imwp/frame.htm>.

⁸⁰ Ibid [139].

⁸¹ For a critique of this aspect of the decision see Tams, above n 78, 972-73.

⁸² Above n 27.

⁸³ *Congo Case* above n 27, [146]-[147].

⁸⁴ *Separation Barrier Advisory Opinion*, above n 79, Separate Opinion of Judge Kooijmans [35]; for a similar perspective see Separate Opinion of Judge Higgins [33]. This interpretation of SC Res 1368 (2001) accords with that of publicists, see eg,

T M Franck, 'Terrorism and the Right of Self-Defense' (2001) 95 *American Journal of International Law* 839, 840.

⁸⁵ *Separation Barrier Advisory Opinion*, above n 79, Declaration of Judge Buergenthal, [6].

⁸⁶ *Congo Case* above n 27, Separate Opinion of Judge Kooijmans [29]; endorsed in the Separate Opinion of Judge Simma [11]-[12].

⁸⁷ SC Res 1368 (12 September 2001) and SC Res 1373 (28 September 2001).

⁸⁸ Notwithstanding the apparent legitimacy of the 2001 US-led coalition military campaign in Afghanistan, there has been considerable academic comment on some of the issues arising from reliance upon self-defence in that instance, in particular the use of force to bring down the Taliban government itself; see eg, G Guillaume, 'Terrorism

It is thus strongly arguable that at least since 2001, the right of self-defence extends to the use of force against terrorist bases in third states in response to a terrorist attack, which is at the level of intensity of an 'armed attack'. Whether the permissible use of force extends to a state that has harboured or assisted the terrorists is far more controversial. Further, any response by a state to a terrorist attack on its territory must also be measured against the same criteria as that required for self-defence generally: necessity and proportionality.⁸⁹ In addition, any state responding in this manner to a terrorist attack should be able to provide clear, convincing and timely justification of the connection between the terrorists responsible for the attack and the state or states within which they enjoy safe haven.⁹⁰ Consistent with the Charter, such justification should be provided to the Security Council for its scrutiny and review.⁹¹

(b) Terrorists and anticipatory self-defence

Whilst the above analysis has sought to demonstrate that contemporary international law as reflected in both interpretations of the Charter and state practice accepts that the right of self-defence may at times be exercised against non-state actors such as terrorists who have already launched an armed attack, is it possible to extend the application of self-defence to those instances where terrorists are planning an attack upon a state so that such an attack may be said to be imminent?

Setting aside for the time being the issue of the imminence and the scale of the attack, can a legal argument be mounted in support of ASD against a terrorist organisation based in another state? The legal foundation for such a claim is inevitably the *Caroline* incident, in which British forces engaged American armed bands who were preparing to make cross-border raids into Canada. Relying upon the doctrine that emerged from the diplomatic exchanges, Brownlie was of the view that: '[f]rom its very origins this doctrine would permit preventive action where an armed band is mounting an attack from territory in immediate proximity to that of the intended victim.'⁹² American commentators have recently revisited the *Caroline* to find support for anticipatory force being used against terrorist forces,⁹³ however,

and International Law' (2004) 53 *International and Comparative Law Quarterly* 537, 546; G K Walker, 'The Lawfulness of Operation Enduring Freedom's Self-defense Responses' (2003) 37 *Valparaiso University Law Review*; J J Paust, 'Use of Armed Force Against Terrorists in Afghanistan, Iraq and Beyond' (2002) 35 *Cornell International Law Journal* 533; O'Connell, above n 76; Franck, above n 84.

⁸⁹ This aspect has been emphasised in the International Court by Judge Buergenthal in the *Separation Barrier Advisory Opinion*, above n 79, Declaration of Judge Buergenthal [6]; and by Judges Kooijmans and Simma in the *Congo Case*, above n 27, Separate Opinion of Judge Kooijmans [31]; Separate Opinion of Judge Simma [13].

⁹⁰ O'Connell, above n 76, 899-901; Schachter, above n 60, 221.

⁹¹ An example of which was the United Kingdom justification for joining the United States in Operation Enduring Freedom, see 'Responsibility for the Terrorist Atrocities in the United States, 11 September 2001 – An Updated Account' (31 October 2005) <www.number-10.gov.uk/output/page3682.asp>; see comment in O'Connell, above n 76, 901; Schachter, above n 60, 221; Charney, above n 66, 836.

⁹² Brownlie, above n 67, 782.

⁹³ O'Connell, above n 76, 894; Reisman, above n 77, 46-47.

care must be taken not to overstate its precedential value due to the fact that the American members of the armed bands, which were assembling on the United States side of the Niagara River, had already taken possession of and were continuing to hold Navy Island at the time the British forces seized the *Caroline*.⁹⁴

Even if the *Caroline* precedent needs then to be narrowed to instances when terrorists (armed bands) have already launched an armed cross-border raid or attack, it would seem that there exist two possible bases on which the anticipatory use of force against foreign terrorist forces in another state could be founded. The first involves an extension of the doctrine of ASD, and the second involves the defence of necessity. As to the first basis, if, as has been asserted above, there exists under contemporary international law a limited right of ASD, which permits a state that anticipates an imminent armed attack from another state to launch an anticipatory strike, is there anything in principle that would bar the extension of that doctrine to an imminent attack by non-state actors, such as terrorists? Given pre-Charter and post-Charter state practice, and the acceptance by the ICJ in *Nicaragua* that self-defence can extend to the actions of armed bands, it is submitted that it does not represent a significant development to extend the doctrine to such non-state actors. If, therefore, a terrorist organisation has sufficient capability and intent to launch the equivalent of an 'armed attack' from a base inside a host state, then, providing that the defending state has 'clear and convincing evidence of an incipient attack' it has the power to act.⁹⁵

Because any reliance upon ASD will always invite, and properly so, intense international scrutiny, any state seeking to rely upon ASD in response to a foreign terrorist threat will, in addition to the factors noted above, have an additional evidentiary burden to address. Whilst any resort to ASD must demand that the defending state is acting in response to a clear, imminent, and overwhelming threat and intention to use force, the exceptional nature of the asserted right against foreign terrorists requires an even higher evidentiary standard. This is because unlike state actors, who due to the nature of their operations are subject to a high level of scrutiny so that foreign states are able to gain considerable covert and overt intelligence on their military strength, capacity, and intentions, terrorist organisations are not as easily susceptible to such analysis. What, then, is the applicable evidentiary standard in such cases? O'Connell has argued that:

sufficient authority exists to support an argument that any state engaging in self-defense [sic] in such circumstances must show by clear and convincing evidence that future attacks are planned. The clear and convincing standard is also the best standard from a policy standpoint to promote the objectives of international society

⁹⁴ See Jennings, above n 18, 83 who quotes from a Law Officers of the Crown (Foreign Office) Report: 'It appears that on the 13th of December last, a numerous Armed Body, composed chiefly of American Citizens, had openly invaded and taken possession of Navy Island, a Part of the British Possessions.' The British forces seized the *Caroline* on 30 December 1837, 17 days after Navy Island had been taken by the American rebels.

⁹⁵ O'Connell, above n 76, 893; Reisman, above n 77, 19; O Schachter, 'The Extraterritorial Use of Force Against Terrorist Bases' (1988-1989) 11 *Houston Journal of International Law* 309, 312.

in regulating the use of force between states, that objective being to drastically limit the use of force.⁹⁶

Clear and convincing evidence of what, however? It is suggested that the evidence would need to extend to demonstrating that the international terrorist organisation:

- intended to launch a strike against the defender state, such intention to be ascertained from past practice, public statements of the organisation directed towards the defender state or its religious, cultural, or political traditions, or from verifiable intelligence sources;⁹⁷
- had a capacity to launch a strike of such potentially devastating effect that the defender state was left with no other option but to anticipate that strike by way of a military attack upon the terrorist organisation.

As noted above, it would be an essential element of such reliance upon a right of ASD that the defender state make available for international scrutiny the intelligence it possessed regarding the intent of the international terrorist organisation, lest the state be left open to the charge that it was not the subject of any threat and that no attack was imminent.⁹⁸

The second possible basis upon which a defender state, unable to rely upon self-defence in its various guises, could seek to justify an anticipatory strike against a foreign terrorist organisation might be on the ground of necessity. Article 25 of the International Law Commission's (ILC) Draft Articles on State Responsibility recognises necessity as a ground for precluding the wrongfulness of an act not in conformity with an international obligation, and this could, in principle, extend to a breach of article 2(4) of the Charter. A state of necessity may only be claimed where:

- the act is the only means for the state to safeguard an essential interest against a grave and imminent peril;
- the act does not seriously impair an essential interest of the state towards which the obligation exists, or the international community as a whole.⁹⁹

In addition, necessity may not be invoked if the international obligation is one that excludes the possibility of invoking necessity, or the state has contributed to the situation of necessity.¹⁰⁰ The ILC Commentary to article 25 highlights the exceptional nature of a plea of necessity and that it only arises where 'the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency'.¹⁰¹ Whilst article 25 makes no express reference to necessity

being claimed in response to what otherwise would be an improper use of force, the ILC Commentary directly refers to the *Caroline* precedent commenting that 'although frequently referred to as an instance of self-defence, really involved the plea of necessity'.¹⁰²

The potential for a defender state to invoke a plea of necessity if compelled to use anticipatory force against a foreign terrorist organisation raises additional issues of state responsibility, which are too numerous to explore in detail here.¹⁰³ Two, however, demand some mention. The first is that whilst necessity provides a possible legal basis to exculpate a defender state, it would only apply in very narrowly defined circumstances. As noted by Schachter, the conditions for invoking necessity:

are broadly similar to the requirements of necessity and proportionality ... in regard to self-defence. However the conditions are more restrictive in that action against an "imminent peril" from armed bands would be limited in duration and would not be directed against the authority structures of the intruded state.¹⁰⁴

The 'clear and compelling' evidence of an imminent attack from the foreign terrorist organisation would therefore need to be incontrovertible and, similarly to the *Caroline* language, create a necessity for a military response that was 'instant, overwhelming, leaving no choice of means, and no moment for deliberation'. The second substantive issue is that the plea of necessity cannot be relied upon where the international obligation in question excludes the possibility of invoking necessity. This directly raises the issue of whether the article 2(4) Charter obligation is of this character. Aside from noting the 'particular importance' the plea of necessity may have with respect to the use of force, the ILC Commentary provides no guidance on this point.¹⁰⁵ Earlier versions of the ILC articles did, however, distinguish between acts of aggression and other acts of armed force that may not result in violation of a peremptory norm, leading Schachter to conclude:

The rule against aggression in the broad sense is generally regarded as *jus cogens*. A limited intervention against outlaws, though an illegal use of force, would fall short of aggression. This would seem reasonable when the motivation of the intervention is to capture or destroy terrorists ... and the military action is brief and circumscribed.¹⁰⁶

The fact that the ILC Commentary quotes with apparent approval the Webster/Fox exchange in the *Caroline* as a legitimate instance of where necessity

⁹⁶ O'Connell above n 76, 895.

⁹⁷ Schachter, above n 95, 314 cautions however that 'it is rare that foreknowledge can be so certain and precise'.

⁹⁸ See Lobel, above n 73, 547, who cautions '[i]f nations are permitted to launch unilateral attacks based on secret information gained largely by inference, processed by and known only to a few individuals and not subject to international review, then Article 2(4) of the U.N. Charter is rendered virtually meaningless.'

⁹⁹ ILC Articles, art 25(1), reproduced in Crawford, above n 63, 66.

¹⁰⁰ ILC Articles, art 25(2), reproduced in Crawford, *ibid*.

¹⁰¹ *Ibid* 178.

¹⁰² *Ibid* 179.

¹⁰³ The most basic of which is the international responsibility the state bears for its internationally wrongful acts, which clearly extends to the unlawful use of force; see ILC Articles, arts 1-2, reproduced in Crawford, *ibid* 61, and is a principle applied on a number of occasions by the ICJ in cases ranging from the *Corfu Channel Case (Albania v United Kingdom) (Merits)* [1949] ICJ Rep 24 to *Nicaragua Case*, above n 12; see Crawford, above n 63, 77.

¹⁰⁴ Schachter, above n 60, 228.

¹⁰⁵ Crawford, above n 63, 185.

¹⁰⁶ Schachter, above n 60, 228.

was claimed,¹⁰⁷ does suggest that within the limited confines of that precedent the use of force may be permissible on the grounds of necessity.

(c) State responsibility, failed states and terrorism

The discussion above of the doctrine of necessity directly links to issues of state responsibility and whether so-called 'host' states are under an international legal obligation to control and eliminate international terrorist organisations operating from within their territory, and what the situation is when the state in question is a 'collapsed' or 'failed' state and unable to fulfil these obligations. These are matters that demand some consideration in the context of the anticipatory use of force against international terrorist organisations.

International law imposes a range of obligations upon states with respect to activities taking place within their territory and under their control. In the case of international terrorist organisations operating within the territory of a 'host' state this raises particular issues as to the responsibility of the state to counter terrorism generally and, in particular, to prevent terrorist activities from occurring or being planned on a state's territory. Setting aside the instances where terrorist acts are properly characterised as state-sponsored or where they have been subsequently endorsed and adopted by a state so as to incur responsibility,¹⁰⁸ what responsibility does a state owe to the international community and other states to combat terrorist operations within its own territory?

Here two scenarios arise. The first is where the state has knowledge or suspicions of the operations of the terrorist organisation and has knowledge of an attack having taken place against a foreign state. In light of the decisions of the ICJ,¹⁰⁹ the ILC's work on State Responsibility,¹¹⁰ and a raft of resolutions by the General Assembly¹¹¹ and, more recently, the Security Council,¹¹² it is now clear that states are under an international obligation to take action to suppress terrorist activities on their territory. To that end, states that are facing this scenario on their territory may either individually take up that responsibility to confront the terrorist organisation,¹¹³ or they may work with the international community to combat the problem.¹¹⁴ Here state practice would suggest that if the 'host' state is unwilling or

unable to counter the terrorists then it may face the prospect of an armed intervention by the defender state or states seeking to exercise a right of self-defence after a terrorist attack has taken place. This certainly was the case with Afghanistan in 2001 and Lebanon in 2006.

The second scenario arises where a state suspects or is aware of the activities of terrorist organisations within its territory, but does not have precise knowledge of planned terrorist attacks against foreign states. In this instance, the key issue is whether failure by a state to confront the activities of a terrorist organisation within its territory is an internationally wrongful act. This requires an assessment as to the content of the obligations upon states to combat terrorism prior to a terrorist act having been committed. Whilst the obligation will vary from state to state,¹¹⁵ multilateral treaties and General Assembly and Security Council Resolutions make clear that states are under obligations to prevent terrorism.¹¹⁶ The extent of that obligation will vary depending on its precise content and the particular activity in question, however, at a minimum an obligation of due diligence would apply.¹¹⁷ Such a standard would take into account the individual capacity of the 'host' state in question, and as conceded by Franck and Niedermeyer:

Hostile activity by individuals in one State directed at another State is usually wrapped in secrecy and often takes place at a remote, sparsely populated border. It is often difficult to police. Consequently a neutral State's duty to prevent such activity emanating from its territory is not absolute. What is required is that the neutral State make a good faith effort.¹¹⁸

1563 (2004) in permitting ongoing military operations to combat the activities of Al Qaeda within Afghanistan; illustrative of bilateral cooperation to confront international terrorist threats is Australia's support for counter terrorism operations in The Philippines; see Robert Hill (Minister for Defence), 'Counter Terrorism Initiatives to Target Southern Philippines' (Media Release 172/2005) (31 October 2005) <www.minister.defence.gov.au/2005/ACF_25D3.doc>.

¹¹⁵ Eg, whether the state in question was a party to the International Convention for the Suppression of the Financing of Terrorism (9 December 1999) [2002] ATS 23; the International Convention for the Suppression of Terrorist Bombings (15 December 1997) [2002] ATS 17 and other related international instruments dealing with the suppression of terrorist activities, and whether it was also a member of the UN and subject to relevant SC Resolutions.

¹¹⁶ For a discussion of the nature of this obligation see eg, S M Malzahn, 'State Sponsorship and Support of International Terrorism: Customary Norms of State Responsibility' (2002) 26 *Hastings International & Comparative Law Review* 83, 103-4; Schachter, above n 60, 211; R B Lillich and J M Paxman, 'State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities' (1977) 26 *American University Law Review* 217, 246, 275. As to General Assembly Resolutions, see above n 111, and as to Security Council Resolutions, see above n 112.

¹¹⁷ For an exhaustive discussion, see Lillich and Paxman, above n 116, who at 275 outline the following four elements as constituting a breach of the duty to prevent terrorists planning activities within the territory of the state; 1) knowledge or notice that the territory is being used as a base for terrorist operations; 2) failure to exercise due diligence in curbing those activities once knowledge is acquired; 3) omission in the exercise of the duty or inaction on the part of the state; 4) injury suffered by persons in another state.

¹¹⁸ Franck and Niedermeyer, above n 113, 114; who also note the terminology employed

¹⁰⁷ Crawford, above n 63, 179-80.

¹⁰⁸ The ILC Articles address the issue of attribution in arts 4-11; see Crawford, above n 63, 91-123 and generally I Brownlie *State Responsibility* (Part I, 1983) 132-58.

¹⁰⁹ *Corfu Channel (UK v Albania) (Merits)* [1949] ICJ Rep 4.

¹¹⁰ See ILC Articles, above n 63, and Crawford, above n 63.

¹¹¹ See, eg, GA Res 2625 (1970), GA Res 3314 (1974), GA Res 49/60 (1994), GA Res 51/210 (1996), GA Res 59/46 (2004), GA Res 59/195 (2005).

¹¹² See, eg, SC Res 1368 (2001), SC Res 1373 (2001), SC Res 1540 (2004), SC Res 1566 (2004), SC Res 1617 (2005), SC Res 1624 (2005).

¹¹³ This is reflective of what has been called the 'Duty to Prevent': T M Franck and D Niedermeyer, 'Accommodating Terrorism: An Offence Against the Law of Nations' (1989) 19 *Israel Yearbook of Human Rights* 75, 106-8; an illustration of how a state has responded to this duty would be Indonesian's actions to confront the operations of Jemaah Islamiyah following the October 2002 terrorist bombings in Bali.

¹¹⁴ This can be illustrated by the ongoing cooperation of the Afghanistan government with the United States and several other states under SC Res 1386 (2001), 1510 (2003),

If, notwithstanding the 'good faith effort' of the host state, it remains unable to counter the terrorist threat within its own territory, it is arguable that in these circumstances the host state should be prepared to call upon either a defender state, regional neighbours or the wider international community for assistance.

What is the standard in the case of the so-called 'failed' state, and the situation where a defender state exercises ASD against a foreign terrorist organisation that the failed state is completely unable to counter? The answer to this very much depends on how a 'failed state' is defined. Here a distinction needs to be made between a 'failing state' and a 'failed state'. The first is in the process of disintegrating such that government functions are under strain, there is a breakdown of law and order within its territory, and border, economic and security controls are becoming difficult to enforce.¹¹⁹ The second is a state where the process of failure is complete and all of these criteria are met with the result that the government is no longer able to govern effectively and there is no guarantee of internal security.¹²⁰ A failing state would therefore possess a diminishing capacity to control foreign terrorists, while a failed state would have no formal capacity whatsoever.

Do such states have a different (lesser) duty to deal with international terrorists based in their territory? One argument is that as only states incur international legal responsibility under the principles of state responsibility, the answer will depend on whether a 'state' is still considered to exist. Whilst membership and recognition by the UN will be a factor to be taken into account, the other traditional requirements for the existence of a state must also be considered.¹²¹ If the state retains its recognition and legal personality, then it also retains its international legal obligations to confront terrorism. This would certainly be the case with a failing state. Whilst the content of that obligation may be variable, it has been argued that:

the duty to prevent acts of terrorism naturally must be measured against the circumstances of each individual case. Where states do not have the means available to suppress such acts, it is difficult to establish that they have breached their duty.¹²²

in the 1907 Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War (1907) 205 Consolidated Treaty Series 395, art 8 of which provides that a neutral government is to employ 'means at its disposal' to prevent the fitting out of vessels within its jurisdiction that 'it has reason to believe' are intending to engage in hostile operations against a government with which it is at peace.

¹¹⁹ *Defence Update 2005*, above n 5, 4, says of failing states and terrorists: 'Failing states may provide the opportunity for recruiting, training and deploying terrorists. A vacuum of governance and law and order creates an environment within which these groups can flourish.'

¹²⁰ See the discussion in G B Helman and S R Ratner, 'Saving Failed States' (December 1992) *Foreign Policy* 1; R Wilde, 'The Skewed Responsibility Narrative of the 'Failed States' Concept' (2003) 9 *ILSA Journal of International and Comparative Law* 425.

¹²¹ The traditional criteria are those referred to in the 1933 Montevideo Convention on the Rights and Duties of States 165 LNTS 19, art I, which refers to the state possessing a permanent population, defined territory, a government, and the capacity to enter into relations with other states.

¹²² Lillich and Paxman, above n 116, 242, who refer to the *Home Missionary Society Case* [1930] 4 RIAA 637 as illustrative of this proposition. To similar effect, see Dinstein, above n 31, 215.

Accordingly, given the varying capacity of some fully functioning states within the Asia Pacific to confront terrorist threats, a lesser standard would apply to 'failing states'. However, whilst this may go ultimately to issues of state responsibility, it does not directly address the issue of whether such states are more susceptible to legitimate acts of ASD by defender states. Bothe, on the other hand, has argued that where there has been an omission on the part of such states to act to counter terrorism, then:

it is possible to argue that indeed an omission is equivalent to an action where there is a legal duty to act that is violated by the omission. On the basis of the assumption that there is a legal duty of care of every state to prevent transborder activities of terrorism originating from its territory, that construction may be considered valid.¹²³

Much may therefore turn on whether the state has in good faith within the constraints of its capacities sought to meet its international obligation to counter terrorism, or whether there has been a complete omission to do so.

A failed state, on the other hand, may arguably have no legal obligation to counter terrorism because it has no capacity to do so. In these instances, it is arguable that, in the absence of collective action by the international community to provide aid and assistance to restore the failed state,¹²⁴ a defender state has an even greater legal capacity to seek to intervene militarily to neutralise an imminent terrorist threat: not on the basis that the traditional constraints of article 2(4) of the Charter are not applicable, but rather on grounds of self-defence as discussed above.¹²⁵

IV. Self-Defence against Terrorists: Political Justifications by the United States and Australia

Having considered the position at international law in relation to self-defence generally and, more specifically, the right of self-defence against non-state actors, in particular terrorists, a review will be now undertaken of the political standpoints adopted by the United States and Australia. It is perhaps inevitable, given the closeness of the Bush and Howard administrations, that there have been attempts to link pronouncements by members of the Howard government with the Bush doctrine of pre-emption. But is there perhaps a subtle difference between the two? Could it be that Mr Howard, with his customary political nous, has sought to convey to his friend and political ally, President Bush, the impression that his government's position is as one with that of the United States, when in fact there are

¹²³ Bothe, above n 35, 233.

¹²⁴ Whilst it is arguable that this is the process which occurred following the 2001 toppling of the Taliban regime in Afghanistan and in 2003 following the removal of the Saddam Hussein regime in Iraq, the international community has had a mixed record in assisting failed states. See Hans-Henrik Holm, 'Failing Failed States: Who Forgets the Forgotten?' (2002) 33 *Security Dialogue* 457.

¹²⁵ Reisman, above n 77, 54, who cautions that while unilateral action would appear justified, it would 'as anywhere else, have to meet the conditions of any lawful use of force. In particular, any action would be required to be conducted in a way that demonstrated efforts to protect the international rights of the injured state.'

important differences? It is instructive to look first at what the Bush doctrine actually is, before turning to consider the Howard government's position.

(a) The Bush doctrine

'We cannot let our enemies strike first.'¹²⁶

President Bush gave the first intimation of his Administration's new doctrine of pre-emptive self-defence in a June 2002 speech delivered at a West Point graduation ceremony. The President argued 'We cannot defend America and our friends by hoping for the best. ... if we wait for threats to fully materialise, we will have waited too long ... We must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge ... [and] be ready for pre-emptive action when necessary to defend our liberty and to defend our lives.'¹²⁷ The United States position on the use of force against terrorist threats was given full expression in September 2002 in the *National Security Strategy* (NSS 2002). In his introduction, President Bush stated, in unambiguous terms, the basis for his administration's new security strategy. He asserted that the gravest danger faced by the United States 'lies at the crossroads of radicalism and technology', and stated that, 'as a matter of commonsense and self-defence, America will act against such emerging threats before they are fully formed'.¹²⁸ This was the philosophy that underpinned the so-called 'Bush doctrine'.¹²⁹

The core rationale and philosophy of the Bush doctrine were contained in Section V of the NSS 2002, which, in an apparent attempt to reconcile the doctrine with the existing law of self-defence, stated that:

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of pre-emption on the existence of an imminent threat – most often a visible mobilisation of armies, navies, and air forces preparing to attack.¹³⁰

Whilst this apparent reference to ASD is reassuring, the NSS 2002 goes beyond what may have at the time been considered within the bounds of legitimate ASD. It states:

We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. ... The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attacks. To forestall or

¹²⁶ NSS 2002, above n 5, 15.

¹²⁷ President George W Bush, speech delivered at graduation ceremony at United States Military Academy, West Point, New York (1 June 2002) <<http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>> (West Point Speech).

¹²⁸ NSS 2002, above n 5.

¹²⁹ This phrase is used by many commentators writing on the NSS 2002, see eg, Arend, above n 34.

¹³⁰ NSS 2002, above n 5, 15.

prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively.¹³¹

Notwithstanding some qualifications as to exactly when pre-emptive force would be used,¹³² it was clear that what the United States announced in 2002 sought to extend considerably the doctrine of ASD and to reinterpret radically the right of self-defence under contemporary international law. It was no longer necessary for the threat to be imminent: it need only be incipient.

Despite the efforts of some within the United States administration to qualify the Bush doctrine,¹³³ it was apparent from the President's own speeches, especially in the period immediately prior to the 2003 military action in Iraq, that he did not intend to limit the doctrine. For example, in his State of the Union address in January 2003, President Bush, having outlined Iraq's failure to comply with Security Council resolutions and referred to Saddam Hussein's alleged links with terrorists noted that:

Some have said we must not act until the threat is imminent. Since when have terrorists and tyrants announced their intentions, politely putting us on notice before they strike?¹³⁴

The President's position, at least with respect to the threat posed by Iraq, could not have been clearer. He has steadfastly maintained that the decision to use force in Iraq, arguably the first application of the Bush doctrine, was correct.¹³⁵

In March 2006 the United States released a new *National Security Strategy* (NSS 2006). The Bush doctrine of pre-emption remained a key element. In his introduction President Bush described his administration's response to terrorism in the following terms:

We choose to deal with challenges now, rather than leaving them for future generations. We fight our enemies abroad instead of waiting for them to arrive in our country. ... To follow this path we must maintain and expand our national strength so we can deal with threats and challenges before they can damage our people or our interests.¹³⁶

¹³¹ Ibid.

¹³² Ibid; where the NSS 2002 states: 'The United States will not use force in all cases to pre-empt emerging threats, nor should nations use pre-emption as a pretext for aggression.' See also the comments by Dr Condoleezza Rice, Wriston Lecture to the Manhattan Institute for Policy Research (1 October 2002) <<http://www.whitehouse.gov/news/releases/2002/10/20021001-6.html>>. She noted that the approach must be treated 'with great caution' and that 'the number of cases in which it might be justified will always be small'.

¹³³ Rice, *ibid*.

¹³⁴ President Bush's State of the Union address (28 January 2003) <www.whitehouse.gov/news/releases/2003/01/print/20030128-19.html>.

¹³⁵ Eg, 'President Bush Addresses Military Families, Discusses War on Terror', Idaho Center, Idaho (24 August 2005) <<http://www.whitehouse.gov/news/releases/2005/08/print/20050824.html>>.

¹³⁶ President of the United States, *The National Security Strategy of the United States of America* (2006) (NSS 2006), released on 16 March 2006 <<http://www.whitehouse.gov/nsc/nss/2006/>>.

NSS 2006 explored in greater depth the link between WMD and pre-emption, notwithstanding the apparent intelligence failure over Iraq's assumed possession of WMD in the period immediately prior to the March 2003 United States-led military intervention. Section V, entitled 'Prevent Our Enemies from Threatening Us, Our Allies, and Our Friends With Weapons of Mass Destruction', contained the following statement:

If necessary ... we do not rule out the use of force before attacks occur, even if uncertainty exists as to the time and place of the enemy's attack. When the consequences of an attack with WMD are potentially so devastating, we cannot afford to stand idly by as grave dangers materialise. This is the principle and logic of preemption. The place of preemption in our national security strategy remains the same ...¹³⁷

Despite these strong words and the political rhetoric of the administration, the United States has up until the time of writing restrained itself from any further application of the Bush doctrine of pre-emptive use of force other than, arguably, military intervention in Iraq.¹³⁸

(b) The Howard doctrine

Following on from the very strong military and political support offered by the Howard government to the Bush administration after the 2001 terrorist attacks on New York and Washington, the approach of the Howard government to the so-called 'war on terror' took on a new dimension. From 2002 onwards various senior members of the government began to advocate not only the possibility of military intervention in Iraq, but also a reassessment of the right of self-defence under international law and in state practice. Unlike the Bush government, the Howard government has not produced any document in which it clearly articulates its position in relation to the use of pre-emptive force to prevent terrorism. That position must be gleaned from material publicly available.

Accordingly, what follows is an analysis of public statements made by the Prime Minister, Mr Howard, the Minister for Foreign Affairs, Mr Downer, and the former Minister for Defence, Senator Hill, on the matter,¹³⁹ and, where available, official government publications, in particular by the Department of Defence (Defence).¹⁴⁰ In reviewing this material, it should be borne in mind that a possible discrepancy

¹³⁷ Ibid.

¹³⁸ Eg, in July 2006, shortly after North Korea conducted long-range missile tests, a White House spokesman responded as follows to questions about the doctrine of pre-emption: 'I think there's a misconception that preemption means war. It doesn't. Preemption means stopping somebody before they can do you harm. There are diplomatic ways to do that, and that is always preferable to using major force ...'; see Press Briefing by Tony Snow, the White House, 10 July 2006 <<http://www.whitehouse.gov/news/releases/2006/07/print/20060710-6.html>>.

¹³⁹ Policy statements and press releases are evidence of state practice, see, eg, I Brownlie, *Principles of Public International Law* (6th ed, 2003) 5.

¹⁴⁰ Official manuals on military law and executive decisions and practices are also evidence of state practice, *ibid* 5.

exists between what states say, and what they do, especially in the context of such a politically charged subject as the use of force.¹⁴¹

(i) Development of the Howard doctrine (2002-2004)

The first hints of support by Australia for the Bush doctrine emerged a mere fortnight after President Bush's 2002 West Point speech. In June 2002, Senator Hill said, referring to the Bush doctrine of pre-emption, that it was 'a position which we share, in principle'.¹⁴²

In a press conference at Parliament House a few days later, the Prime Minister endorsed Senator Hill's comments. In response to a query as to when the Australian government had decided to support the Bush doctrine, he said:

the principle that a country which believes it is likely to be attacked is entitled to take pre-emptive action is a self-evidently defensible and valid principle ... if I were presented with evidence that Australia was about to be attacked and I was told by our military people that by launching a pre-emptive hit we could prevent that attack occurring I would authorise that pre-emptive hit and expect the Opposition to support me in the process.¹⁴³

The Prime Minister's careful choice of words is illuminating. Although he begins with a reference to 'pre-emptive action', the illustration he uses of Australia being 'about to be attacked' is, on its face, more akin to the traditional ASD concept of imminence. For the reasons given above,¹⁴⁴ provided that certain conditions are satisfied, it is submitted that ASD is lawful. On that view, the Prime Minister is not supporting the Bush doctrine of pre-emption at all, but rather ASD.

In November 2002, Senator Hill advanced the Australian debate on pre-emption in a speech delivered at the University of Adelaide.¹⁴⁵ After questioning the relevance of the conventional doctrine of self-defence, he stated that 'international law cannot sit still, and the *Caroline* principles ... must be adapted to the threat environment that exists today'. He continued: 'Some would argue that it's time for a new and distinct doctrine of pre-emptive action to avert a threat. A better outcome might be for the international community and the international lawyers to seek an agreement on the ambit of the right to self-defence better suited to contemporary realities.'

The next day, the Prime Minister endorsed that view as 'both interesting and right' noting that international law needed to adapt to current circumstances.¹⁴⁶

¹⁴¹ See, as to the need for caution in ascertaining state practice from public statements of state officials, J L Brierly, *The Law of Nations* (6th ed, 1963) 4.

¹⁴² Address by Senator Robert Hill, 'Beyond the White Paper: Strategic Directions For Defence' (18 June 2002). The speech was delivered to Defence and Strategic Studies Course at the Australian Defence College, Canberra <www.minister.defence.gov.au/HillSpeechtpl.cfm?CurrentId=1605>.

¹⁴³ Prime Minister's press conference, Parliament House, Canberra (20 June 2002) <www.pm.gov.au/news/interviews/2002/interview1709.htm>.

¹⁴⁴ See text above nn 59-66.

¹⁴⁵ John Bray Memorial Oration, above n 20.

¹⁴⁶ Interview by the Prime Minister with Neil Mitchell, Radio 3AW (29 November 2002) <www.pm.gov.au/news/interviews/2002/interview2013.htm>.

Ultimately, when it joined with the United States and the United Kingdom in *Operation Iraqi Freedom*, the published legal basis for Australia's use of force was relevant Security Council Resolutions.¹⁵⁹ No attempt was made by Australia to rely on the doctrine of pre-emption. Accordingly, that military action cannot be seen as an example of the Howard doctrine in action.

The Australian government's position on pre-emption was once again a source of public debate during the 2004 election campaign, in the context of a contest between the leaders as to who was the stronger on issues of national security. In an interview on 19 September 2004, the Prime Minister, responding to comments by the then Opposition Leader, reaffirmed the Howard doctrine, as articulated by him in 2002.¹⁶⁰ He said:

when I was asked that question ... I made it very plain of course that we would continue to act in co-operation with our neighbours ... But faced with a simple question, if you had no alternative would you act to prevent an attack I said yes.¹⁶¹

That evening the Prime Minister repeated the position he had put earlier in the day: 'I would always collaborate and operate in collaboration with neighbouring countries but ... I repeat ... if it were necessary to stop an attack on Australia and there were no alternative, I would act in the manner I have said.'¹⁶² In response to a query as to whether that included countries in Southeast Asia, the Prime Minister responded '[o]f course it does'.¹⁶³ Mr Downer was, again, more circumspect. Interviewed on the same program, he said:

First of all, you would do it with – cooperate with the country involved ... But imagine a situation – it's not likely to be Indonesia or a country which has a strong counter-terrorism capability, but a failed state in the South Pacific, as the Solomons once was and is not now, and a situation where a terrorist was about to attack and the country involved either didn't want to or in their case, couldn't do anything to stop it, we would have to go and do it ourselves.¹⁶⁴

Again, it should be noted that he spoke of a terrorist 'about to attack': the language of ASD. This was also the first explicit suggestion that force would be used against non-state actors without the host state's consent only where the host state was a failed state. Notwithstanding Mr Downer's qualifications, the Prime Minister's comments once again caused alarm in the region. The Malaysian Deputy

¹⁵⁹ See the formal legal advice tendered to the Australian government on this matter by lawyers from the Attorney-General's Department and Department of Foreign Affairs and Trade: B Campbell and C Moraitis, 'Memorandum of Advice to the Commonwealth Government on the Use of Force against Iraq' (2003) 4 *Melbourne Journal of International Law* 178.

¹⁶⁰ See text above, n 147.

¹⁶¹ Doorstop interview by the Prime Minister, (19 September 2004) <www.liberal.org.au/documents/Sept19_Doorstop_-_Penrith,_Sydney.pdf>.

¹⁶² Interview with the Prime Minister on the 7.30 Report, ABC TV (21 September 2004) <www.abc.net.au/7.30/content/2004/s1204162.htm>.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

Prime Minister, for example, said 'We won't allow any pre-emptive strike when it comes to our national territory'.¹⁶⁵

Shortly after the re-election of his government in October 2004, the Prime Minister reiterated the Howard doctrine. When asked about the circumstances in which he contemplated that pre-emptive action would be taken he said:

All we've ever said is that if a situation arose where another country were unwilling or unable, as a last resort, we would take action to save Australian lives and protect Australian assets ... I just don't see these issues arising but I was asked to state a principle and I stated it and I think it's a very unexceptionable principle.¹⁶⁶

A few days later the Prime Minister was interviewed on Indonesian television just after arriving in Jakarta to meet the then Indonesian President-Elect, Susilo Yudhoyono. When pressed by journalists with respect to his comments on the use of force within the region he sought to exclude Indonesia as being a country in which Australia would seek to apply the doctrine because of the strength of the bilateral relationship between the two countries. The Prime Minister did, however, reiterate the nuance that had begun to develop in the language used to describe the doctrine by noting: 'I was simply stating a principle ... that if you ever have ... the situation in the future where a country were unable or unwilling and the only way to protect Australia was to take action, that that action would be taken'.¹⁶⁷ This was the beginning in a shift in language that further developed over the next two years.

Parallel to the political statements articulating these views on Australia's use of force to confront terrorist threats, there was also a development taking place in official thinking within government agencies. Whilst by no means as comprehensive as the United States version, 'Australia's National Security – A Defence Update 2003' published by the Department of Defence, contained a section entitled 'The Threat of Weapons of Mass Destruction'.¹⁶⁸ Therein it was stated: 'But diplomacy and international cooperation will not always succeed: the Australian Government may need to consider future requests to support coalition military operations to prevent the proliferation of WMD, including to rogue states or terrorists, where peaceful efforts have failed ...'

Subsequently, in 2004 the government released a report, 'Protecting Australia Against Terrorism: Australia's National Counter-Terrorism Arrangements'. A section entitled 'Australia's future capability' concluded that:

¹⁶⁵ M Forbes and M Grattan, 'Howard, Downer Divided on Terror' *The Age* (22 September, 2004) <www.theage.com.au/articles/2004/09/21/1095651324466.html>.

¹⁶⁶ Interview by the Prime Minister with Stan Grant, CNN Television, (13 October 2004) <www.pm.gov.au/news/interviews/Interview1126.html>.

¹⁶⁷ Interview by the Prime Minister on Metro TV, Jakarta, (19 October 2004) <www.pm.gov.au/news/interviews/Interview1130.html>. For some analysis of the 2004 position of the Australian government on this matter see Michael O'Connor, 'Terrorism and National Security' (July-August 2005) *Quadrant* 26.

¹⁶⁸ Defence Update 2003, Section 5, at <www.defence.gov.au/ans2003/section5.htm>.

Implicit of course in the comments of both is the acknowledgment that pre-emption did not fit within the existing right of self-defence. In an interview on 1 December 2002, the Prime Minister elaborated on the theme, articulating what may loosely be referred to as the 'Howard doctrine':

INTERVIEWER: You have been arguing for a new approach to pre-emptive defence ... Does that mean that ... if you knew that ... If people in another neighbouring country were planning an attack on Australia that you would be prepared to act?

PRIME MINISTER: Oh yes, I think any Australian Prime Minister would. I mean, it stands to reason that if you believe that somebody was going to launch an attack against your country, either of a conventional kind or of a terrorist kind, and you had a capacity to stop it and there was no alternative other than to use that capacity then of course you would have to use it ... when the United Nations Charter was written the idea of attack was defined by the history that had gone before ... that's different now ... what you're getting is non-state terrorism ... And all I'm saying ... is that maybe the body of international law has to catch up with that new reality.¹⁴⁷

The response to Mr Howard's December 2002 comments from Southeast Asia was prompt and condemnatory. Representatives of the Indonesian, Thai, Philippine and Malaysian governments expressly rejected the assertion of a right to launch counter-terrorist pre-emptive action in their territories.¹⁴⁸ The Indonesian Foreign Minister stated that the Prime Minister's comments were 'not helpful',¹⁴⁹ the Foreign Minister of The Philippines labelled them 'exuberant', and a spokesman for the Thai government said that '[n]obody does anything like this. Each country has its own sovereignty that must be protected'.¹⁵⁰ The Prime Minister's statements were, however, warmly endorsed by the White House.¹⁵¹

In light of the heat generated in the region by the Prime Minister's comments, the Leader of the Opposition asked the Prime Minister to apologise. He declined, stating in Parliament that '[s]elf-evidently, those remarks were not meant in any belligerent sense towards our friends in Asia ...'.¹⁵² Nevertheless, Mr Downer did

¹⁴⁷ Interview by the Prime Minister with Laurie Oakes (1 December 2002) <www.pm.gov.au/news/interviews/2002/interview2015.htm>; see also Interview by the Prime Minister with Neil Mitchell, Radio 3AW (29 November 2002) <www.pm.gov.au/news/interviews/2002/interview2013.htm>.

¹⁴⁸ 'Australia ready to strike abroad' (1 December 2002) <news.bbc.co.uk/2/hi/asia-pacific/2532443.stm>; 'Malaysia, Philippines Slam Howard's Preemptive Strike Talk', *Sydney Morning Herald* (2 December 2002) <www.smh.com.au/articles/2002/12/02/1038712877384.html>.

¹⁴⁹ 'Howard Sticks to "Pre-emptive" Stance' (2 December 2002) <cnn.worldnews.printthis.clickability.com/pt/cpt?action=cpt&title=CNN.com>.

¹⁵⁰ Above n 148.

¹⁵¹ Press briefing by White House spokesperson Ari Fleischer (2 December 2002) <www.whitehouse.gov/news/releases/2002/12/print20021202-6.html> where it was noted: 'The President of course supports pre-emptive action ... September 11 changed everything, and nations must respond and change their doctrines to face new and different threats ... that is why the President did announce a new doctrine ... it requires a fresh approach to protect the country. Other nations think it through, as well, and come to similar conclusions. Australia has been a stalwart ally of the United States in the war on terror.'

¹⁵² House of Representatives, *Debates*, Vol XX (2002) 9747, 5 December 2002.

attempt to allay the concerns of Australia's neighbours. He said that Australia would only use pre-emptive force to defend itself from a terrorist attack in a neighbouring country if that country was 'aiding and abetting' terrorists, noting that '[o]bviously in the Asia-Pacific region that's improbable in the extreme'.¹⁵³ In the same interview, he said that '[t]he Government doesn't have a policy to change the UN Charter and realistically I don't think changing the UN Charter is something that's realistically achievable'.¹⁵⁴ That was clearly a retreat from the statements made by Senator Hill and apparently endorsed by the Prime Minister as to the need for such changes.

The next time he was asked to explain the Prime Minister's comments, Mr Downer sought to qualify further the government's position. In a clear attempt to bring the Howard doctrine within accepted legal parameters, he said that all that Mr Howard had done was to 'reassert a well-worn international principle, that if our people were about to be attacked we'd obviously endeavour to stop that if we knew the attack was about to take place'.¹⁵⁵ This is clearly the language of ASD, rather than that of pre-emption. An attack 'about to take place' is imminent.

In early 2003, much of the debate in Australia was focused on whether there was a basis for the use of force against Iraq because of its alleged possession of WMD. Senior members of the Australian government actively canvassed a number of possible justifications for military intervention, and the issue of pre-emption once again became a matter of public concern and comment.¹⁵⁶ This, of course, would suggest that the government was keen to be perceived as acting in a way consistent with international law. In March 2003, Senator Hill was asked in Parliament what the Australian government's policy on pre-emption was. He said:

What we were saying last year ... is that, in this new environment of terrorist acts by non-state players ... the doctrine surrounding self-defence as it applies to the right to pre-empt the attack may need further consideration.¹⁵⁷

When pressed about the right to launch a pre-emptive military strike, Senator Hill maintained:

This is not a new doctrine ... in a world of terrorism, where the attacks are not advertised, where they are carried out by non-state players and where they use asymmetric means such as flying aircraft into buildings, this jurisprudence needs revision.¹⁵⁸

¹⁵³ Interview by Mr Downer with Channel 10, reported by ABC Online (3 December, 2002) <www.abc.net.au/cgi-bin/common/printfriendly.pl?news/politics/2002/12/item2>.

¹⁵⁴ Ibid.

¹⁵⁵ Interview by Mr Downer on 'The World Today', ABC Radio (2 December 2002). Transcript <www.dfat.gov.au/media/transcripts/2002/021202_fa_terprevent.html>.

¹⁵⁶ See the following speeches delivered by Prime Minister Howard: 'Address to the National Press Club, The Great Hall, Parliament House' (14 March 2003) <www.pm.gov.au/media/Speech/2003/speech74.cfm>; 'Address to the House of Representatives, Parliament House, Canberra' (18 March 2003) <www.pm.gov.au/media/Speech/2003/speech78.cfm>.

¹⁵⁷ Senate, *Debates*, Vol XX (2003) 9948 (24 March 2003).

¹⁵⁸ Ibid.

We must be ready to detect and prevent any imminent threats to our security. This means ensuring we have a national counter-terrorism framework that allows us to take action, whenever possible, to lawfully prevent terrorist activity.¹⁶⁹

The careful use of the word 'imminent' is significant, linking Australia's policy with the doctrine of ASD, which, as noted above, although controversial, is less so than the Bush doctrine of pure pre-emption. This is reinforced by the reference to 'lawfully' preventing terrorist activity.

(ii) Refinement of the Howard doctrine (2005-2006)

In 2005 the question of the Howard government's position on the use of force within the region arose during political debate as to whether Australia should become a party to the Treaty of Amity and Cooperation in Southeast Asia (TAC).¹⁷⁰ Whilst a Treaty of some longstanding amongst Southeast Asian members of the Association of Southeast Asian Nations (ASEAN), Australia had not been an original party and was only now actively considering accession as a means of gaining access to various ASEAN political forums, including a proposed East Asian Summit scheduled for late 2005. The government (like others before it) had been reluctant to accede to the Treaty, one suggested reason being concern as to the effect of the TAC on the Howard doctrine given its obligations on parties to refrain from the threat or use of force.¹⁷¹ In April 2005, just as the government was deciding its position on the TAC, the Malaysian Prime Minister, Abdullah Badawi, visited Australia. In response to reports that he was concerned about the threat of a pre-emptive strike by Australia on neighbouring states, Mr Howard responded:

My view simply is that as a last resort this country has the right to take action to defend itself ... if we thought this country was going to be attacked and the source country were not willing to do anything about it, then we'd have a right to defend ourselves ... but in practical terms it's not going to arise with a country like Malaysia, particularly as we have very strong defence ties with it.¹⁷²

By late June 2005, when Australia was negotiating with ASEAN countries about acceding to the TAC, Mr Downer was asked whether that would affect the government's position on pre-emptive strikes. Mr Downer responded as follows:

No. Actually under the Treaty ... all of those signatories are entitled to implement the provisions of the United Nations Charter and one of the provisions of the United Nations Charter is a right to self-defence ... If you're about to be attacked and killed, under the United Nations Charter you're entitled to stop people killing you.¹⁷³

When Australia ultimately acceded to the TAC, it sought subtly to reserve its position in relation to the use of force. In a letter to ASEAN advising of Australia's

¹⁶⁹ The report is available online at <www.dpmc.gov.au/publications/protecting_australia>.

¹⁷⁰ Treaty of Amity and Cooperation in Southeast Asia (24 February 1976) [2005] ATS 30.

¹⁷¹ Ibid, arts 2(e), 13.

¹⁷² Interview by the Prime Minister with Neil Mitchell, Radio 3AW Melbourne, (8 April 2005) <www.pm.gov.au/news/interviews/Interview1314.html>.

¹⁷³ Doorstop interview with Mr Downer, Adelaide (27 June 2005). Transcript available at <www.foreignminister.gov.au/transcripts/2005/050627_ds.html>.

decision, Mr Downer recorded three 'understandings', one of which was that 'the Treaty is to be interpreted in conformity with the United Nations Charter, and Australia's accession [would] not affect Australia's rights and obligations arising from the Charter of the United Nations'.¹⁷⁴ Given Mr Downer's earlier explanations that the Howard doctrine was included in those rights, the position was clear: that doctrine was not to be affected by Australia's accession to the TAC.

On 26 July 2005, following an announcement that Australia had secured an invitation to be an inaugural participant in the East Asia Summit,¹⁷⁵ Mr Downer responded as follows to a question as to whether ASEAN countries had asked Australia to give up the Howard doctrine of pre-emption:

MR DOWNER: ... we have a commitment in the Treaty ... to abide by the United Nations Charter and under the United Nations Charter we have a right to self-defence. So obviously we maintain that right to self-defence. But I think the ASEAN countries know that this is not a very profound debate because we're not planning to launch an attack on any of the ASEAN countries any time in the future that I could envisage.

INTERVIEWER: But if there is a doctrine of pre-emption ... it is still in effect, is it?

MR DOWNER: Well, we don't, we've never had a doctrine of anything. We've just made the point ... that we would obviously do what we could to defend Australians or Australia if ever we were to come under attack. Now, in practical terms, if we were to be ... attacked by some group which happened to be based in an ASEAN country, we would expect that ASEAN country to deal with that situation immediately.¹⁷⁶

These comments by Mr Downer could be seen to represent a further qualification of the Howard doctrine.

Also in 2005, the Department of Defence released a further report, '*Australia's National Security – A Defence Update 2005*'. Under the heading 'Defence Policy' the report states that:

Decisions about the use and development of defence capability are concerned as much with forestalling future threats ... as they are with responding to specific contingencies.¹⁷⁷

¹⁷⁴ See Treaty of Amity and Cooperation in Southeast Asia: National Interest Analysis [2005] ATNIF 13 [30] where in reference to the 'second understanding' reached regarding Australia's accession it is noted that 'Australia's rights and obligations under the Charter of the United Nations in respect of the use of force remain unaffected, including the provisions of Article 51 of the Charter of the United Nations permitting the use of force by a State in self-defence.'

¹⁷⁵ 'East Asia Summit and Treaty of Amity and Co-Operation', Media release by Mr Downer (26 July 2005) <www.foreignminister.gov.au/releases/2005/fa096_05.html>.

¹⁷⁶ Interview with Mr Downer, ABC Lateline (26 July 2005) <www.foreignminister.gov.au/transcripts/2005/050726_abc_lateline.html>. See also comments made by Mr Downer on ABC AM (27 July 2005) <www.foreignminister.gov.au/transcripts/2005/050727_abc_am.html>, and Doorstop interview with Mr Downer, Vientiane, Laos (27 July 2005) <www.foreignminister.gov.au/transcripts/2005/050727_ds_vientiane_laos.html>.

¹⁷⁷ Defence Update 2005, above n 5, 12.

That seemed to hint, in contrast to the 2004 Defence report, at the use of pre-emptive force without limiting it to circumstances of an 'imminent' threat. Additional support for 'pre-emptive' use of force by the Australian military can be found in the official Royal Australian Airforce (RAAF) website. There, a section entitled 'Air Force During Military Operations' under the sub-heading 'Strike', states:

Strike may also take the form of a pre-emptive strike, aimed at deterring an aggressor before a major conflict erupts. While there would always be significant political and diplomatic consideration of any pre-emptive strike, confronted by irrefutable intelligence of impending hostilities, the Government may exercise a pre-emptive strike option to remove the immediate threat and demonstrate national resolve.¹⁷⁸

Albeit short, this represents one of the few official statements by an arm of Australian government that addresses directly the policy on pre-emption. Interestingly, it refers to the 'political and diplomatic' considerations, but not the legal ones.

During 2006, there was little public discussion of the Australian government's position on pre-emption. Much of the political heat within the region had gone from the debate partly due to Australia's accession of the TAC and acceptance by ASEAN states of Australia's 'understandings', but also because of Australia's active engagement in bilateral and regional cooperation on terrorism and counter-terrorism measures. In October 2006, however, in the immediate aftermath of North Korea's nuclear tests, Mr Downer was asked what had happened to the 'doctrine of pre-emption'. He responded as follows:

I could never quite understand this debate ... about so-called pre-emption ... you absolutely have a right of self-defence ... Imagine ... what the media would say if we knew the attack was going to ... take place, and we went to Ruritania and asked their permission to do something and they refused that permission. We did nothing and the terrorist groups attacked and they killed 500 Australians ...¹⁷⁹

It is significant that Mr Downer emphasised Australia would only use force to prevent a terrorist attack after a request of the host country for consent had been declined.

V. A Legal Critique of the Bush and Howard Doctrines

Having reviewed first the customary and contemporary international law of self-defence, including against terrorists, and then the Bush and Howard doctrines, a critique of those doctrines against existing international law will now be undertaken. Whilst it is acknowledged that there has already been exhaustive analysis and commentary on the legality of the Bush doctrine, that critique is here revisited, albeit in abbreviated form, because of the apparent influence of the Bush doctrine on the development of the Howard doctrine. Thus the review that follows of that

¹⁷⁸ <www.defence.gov.au/RAAF/organisation/info_on/operations/strike.htm>.

¹⁷⁹ Question and Answer Session with Mr Downer, Menzies Research Centre Function, 10 October 2006 <www.foreignminister.gov.au/transcripts/2006/061010_menzies-qa.html>.

scholarship is ultimately directed towards providing a firm foundation for a critique of the Howard doctrine.

(a) The Bush doctrine

There is no publicly available document that outlines the legal basis for the Bush doctrine. It appears, however, that the United States relies upon ASD for its legal justification.¹⁸⁰ All that was needed, it was argued in NSS 2002, was to 'adapt the concept of imminent threat to the capabilities and objectives of today's adversaries'.¹⁸¹ Support for this approach can also be found in the published views of the Legal Adviser to the Department of State, William H Taft IV. In November 2002, he wrote that '[t]he United States has long held that, consistent with article 51 and customary international law, a state may use force in self-defense: 1. if it has been attacked, or 2. if an armed attack is legitimately deemed to be imminent.' He continued:

The concept of armed attack and imminent threat must now take into account the capacity of today's weapons ... The inherent right of self-defense embodied in the UN Charter must include the right to take preemptive action; otherwise the original purpose is frustrated ... the definition of imminent must recognize the threat posed by weapons of mass destruction and the intentions of those who possess them ...¹⁸²

In 2004, in comments made to the American Society of International Law, Taft argued that '[i]n the traditional framework of self-defense, preemptive use of force is justified only out of necessity, which requires both a credible, imminent threat and the exhaustion of peaceful remedies'.¹⁸³ Noting that the international security environment had changed due to the proliferation of WMD he then asserted that:

The doctrine of preemption to prevent a catastrophe resulting from an attack by weapons of mass destruction is, however, a natural extension of – and fully consistent with – the traditional right of individual self-defense to ensure that the right of self-defense attaches early enough to be meaningful and effective.¹⁸⁴

These comments suggest that official justification for the Bush doctrine is the unprecedented nature of the threat posed by non-state actors and WMD.

There has been, not surprisingly, considerable academic debate as to the legality of the Bush doctrine. Those in favour argue that the requirement of 'imminence' must be relaxed to accommodate the unprecedented gravity and nature of the threat posed by non-state actors with access to WMD.¹⁸⁵ They accept the argument¹⁸⁶

¹⁸⁰ See text above nn 130-131.

¹⁸¹ NSS 2002, above n 5, 15.

¹⁸² W H Taft IV, *The Legal Basis for Preemption* (2002); Memorandum to members of the American Society of International Law – Council on Foreign Relations Roundtable <www.cfr.org/publication.htm?id=5250>

¹⁸³ Taft, above n 20, 332.

¹⁸⁴ Ibid, 333.

¹⁸⁵ Eg, Arend, above n 34; Greenwood, above n 51; M Schmitt, 'Preemptive Strategies in International Law' (2003) 24 *Michigan Journal of International Law* 513; A Sofaer, 'On the Necessity of Pre-emption' (2003) 14 *European Journal of International Law* 209; W Taft IV and T F Buchwald, 'Preemption, Iraq and International Law' (2003) 97 *American Journal of International Law* 557, 563; R Wedgwood, 'The Fall of

that traditional Cold War strategies of containment and deterrence are ineffective to deal with this threat. Some suggest that there is a lacuna in the Charter, in that its drafters simply did not contemplate a threat of this nature.¹⁸⁷ Others argue that to prevent 'rogue nations' from transferring WMD to terrorists, the United States and its allies must take advantage of a 'window of opportunity' in which to use pre-emptive force.¹⁸⁸

Those who oppose the Bush doctrine point to its inherent uncertainty and consequent potential for abuse, not to mention its dangerous precedential value.¹⁸⁹ They argue that it is, by definition, impossible to apply the criteria of necessity and proportionality to a threat which has not yet materialised. They warn that the acceptance of the doctrine would not only be generally destabilising, but also the last nail in the coffin for the article 2(4) prohibition on the use of force.¹⁹⁰ They maintain that the doctrine is unnecessary because of the power of the Security Council to take pre-emptive action against both states and non-state actors under Chapter VII of the Charter. Finally, they argue that the doctrine flies in the face of the fundamental principle of the sovereign equality of all states, in that the United States clearly intends the right to be exercisable by itself and its allies only.

What is significant, from the perspective of international law, is that even those who in principle support the Bush doctrine as *de lege ferenda* generally do not maintain that it has a basis under existing international law.¹⁹¹ Nor, it is suggested, could they do so. They argue instead that international law must yield to accommodate the doctrine. Proceeding from the premise that ASD is legal, they argue that the concept of imminence must be 'relaxed' to take into account the

Saddam Hussein: Security Council Mandates and Preemptive Self-Defence' (2003) 97 *American Journal of International Law* 576; Yoo above n 37, 573-4.

¹⁸⁶ NSS 2002, above, n 5, 15.

¹⁸⁷ Arend, above n 34, 97-8.

¹⁸⁸ Yoo above n 37, 575; Schmitt above n 185, 547.

¹⁸⁹ Eg, W M Reisman and A Armstrong, 'The Past and Future of the Claim of Preemptive Self-Defence' (2006) 100 *American Journal of International Law* 525; 'Chatham House Principles', above n 67, 968; M Byers, *Warlaw* (2005) 72-81; J T Gathy, 'Assessing Claims of a New Doctrine of Pre-emptive War under the Doctrine of Sources' (2005) 43 *Osgoode Hall Law Journal* 67; A Anghie, 'The Bush Administration Preemption Doctrine and the United Nations' (2004) 98 *American Society of International Law Proceedings* 326; Garwood-Gowers, above n 51; Bothe, above n 35, 232-33; G Travalio and J Altenburg, 'Terrorism, State Responsibility, and the Use of Military Force' (Spring 2003) 4 *Chicago Journal of International Law* 97, 117-19; T Franck, 'What Happens Now? The United Nations After Iraq' (2003) 97 *American Journal of International Law* 607; T Farer, 'Beyond the Charter Frame: Unilateralism or Condominium?' (2002) 96 *American Journal of International Law* 359; C Gray, 'The US National Security Strategy and the New "Bush Doctrine" on Preemptive Self-defence' (2002) 1 *Chinese Journal of International Law* 437; M E O'Connell, 'The Myth of Preemptive Self-Defence' The American Society of International Law Task Force on Terrorism (August 2002) <www.asil.org>.

¹⁹⁰ See, eg, Farer, above n 189, 364; and Franck, above n 189, 620; who observes in despair, 'This is not system transformation but system abrogation'.

¹⁹¹ Such as Greenwood, eg, above n 51, 15.

nature and magnitude of the threat, the probability of it occurring and the availability of alternatives.¹⁹²

Even following the 2003 Iraq War, contemporary examples of pre-emptive use of force in state practice are rare. What state practice that does exist is found in related incidences involving military interdiction and ASD. Two incidents in particular are worthy of some consideration: the 1962-63 Cuban Missile Crisis, and Israel's 1981 attack on Iraq's nuclear reactor at Osirak. The Cuban Missile Crisis evolved in response to the discovery by the United States in 1962 that the Soviet Union had been secretly constructing medium-range ballistic missile sites in Cuba, and installing its nuclear missiles at those sites.¹⁹³ When the Soviet Union refused to comply with a request to withdraw all missiles, President Kennedy proclaimed a naval quarantine, pursuant to which he ordered United States forces to 'interdict' the delivery of offensive weapons and associated material to Cuba. He threatened that any vessel proceeding towards Cuba could be intercepted, then subjected to visit and search, and warned that any vessel carrying prohibited military material would be ordered to change direction. He authorised the use of force 'to the extent necessary' in the case of 'failure or refusal to comply with directions'.¹⁹⁴ The Council of the Organisation of American States (OAS) voted to endorse the quarantine, enabling the United States to justify it officially as regional action under Chapter VIII of the Charter.¹⁹⁵ In the event, the United States did not need to resort to lethal armed force as those Soviet ships closest to the quarantine line stopped or changed course.¹⁹⁶ Two ships were stopped but none were sunk.¹⁹⁷ The matter was debated before the Security Council, but no resolution was passed, and the dispute was resolved by negotiation between United States and the Soviet Union – the missiles were withdrawn and the quarantine was lifted.

Supporters of the Bush doctrine seek to rely on the Cuban Missile Crisis as a precedent of sorts for the legality of pre-emptive self-defence.¹⁹⁸ The so-called 'quarantine' (a blockade by any other name) clearly involved the use, or, at the very least, the threat of force, but did not fall within the traditional parameters of

¹⁹² See eg Greenwood, *ibid*, 36-7; Yoo, above n 37, 574.

¹⁹³ There is considerable academic literature on the Cuban Missile Crisis. For competing views as to the legality of the United States action, compare eg, Q Wright, 'The Cuban Quarantine' (1963) 57 *American Journal of International Law* 546 (not lawful) and M S McDougall, 'The Soviet-Cuban Quarantine and Self-Defence' (1963) 57 *American Journal of International Law* 597, 603 (lawful self-defence).

¹⁹⁴ President of the United States of America, Proclamation No 3504, Interdiction of the Delivery of Offensive Weapons to Cuba, 27 Fed Reg 10,401, reprinted in (1963) 57 *American Journal of International Law* 512, 513.

¹⁹⁵ Art 53 of the Charter permits enforcement action by regional agencies (of which OAS was one) under the authority of the Security Council. In fact the action had not been authorised by the Security Council: R N Gardner, 'Neither Bush Nor the "Jurisprudes"' (2003) 97 *American Journal of International Law* 585, 587-8.

¹⁹⁶ R Sadurska, 'Threats of Force' (1988) 82 *American Journal of International Law* 239, 255.

¹⁹⁷ Wright, above n 193, 564.

¹⁹⁸ See, eg, Arend, above n 33; Yoo, above n 51, 762-64.

(b) The Howard doctrine

What then of the so-called Howard doctrine? Is it legal under existing international law? Any review of the public statements and political posturing of the Howard government between 2002-2006 must take account of events at the time. The world, let alone the United States, was coming to grips with the threat of international terrorism on an unprecedented scale. Australia was confronted with significant terrorist attacks in Indonesia, which sought to target Australian citizens. Terrorist organisations had found a base in states that actively provided them with sanctuary or that were incapable of controlling their activities due to unstable internal security regimes and poor governance structures. Added to this, was the risk of the terrorists gaining access to WMD through sympathetic states operating outside of non-proliferation frameworks. As emphasised in the NSS²¹⁴ the threat posed by both the links between or the safe haven provided to terrorists by 'collapsed' or 'failed' states was of growing international concern.²¹⁵ Al Qaeda's ability to find safe haven in Afghanistan and the support provided to it by the Taliban regime even following the 2001 attacks on the United States highlighted this fear.

These developments had particular resonance in Australia and were part of a continuing theme in statements by the Howard government from 2002 onwards. For example, the government's 2005 *Defence Update* made clear that '[t]he risk of convergence between failing states, terrorism and the proliferation of WMD remains a major and continuing threat to international security.'²¹⁶ With respect to countering the potential terrorist threat within Australia's region, the emergence of these new international security concerns had particular significance. A feature of Australia's immediate region stretching from Southeast Asia to the Southwest Pacific has been not only the emergence of a large number of new independent states, but also a number of unstable states facing significant political, economic, and social challenges. There has been a record of insurgency and locally-based terror attacks in Indonesia, Thailand and The Philippines. Indonesia has also faced long-standing disputes with groups seeking self-determination and autonomy, including in East Timor, West Papua, and Aceh. Similar issues have arisen in the Solomon Islands, while both Papua New Guinea and Fiji have faced major constitutional and internal disturbances during the past decade. When all of these factors are considered in combination, it is little wonder that Australia's region to

²¹⁴ NSS 2002, where it was asserted 'America is now threatened less by conquering states than we are by failing ones', above n 5, 1.

²¹⁵ See discussion in B N Dunlap, 'State Failure and the Use of Force in the Age of Global Terror' (2004) 27 *Boston College International and Comparative Law Review* 453, 460, who notes three points why failed states pose such a challenge: 1) their lawlessness allows terrorist organisations to conduct activities without fear of capture or punishment; 2) within failed states terrorist organisations can gain access to the resources they need to conduct their activities; 3) failed states offer terrorist organisations the 'cover' of state sovereignty.

²¹⁶ Defence Update 2005, above n 5, 4; these concerns were restated in a 2006 speech by the Foreign Minister, Mr Downer: A Downer, 'Deadly Connections: Terrorists and Weapons of Mass Destruction' (Speech to the Australian Strategic Policy Institute, Canberra, 7 February 2006) <www.foreignminister.gov.au/speeches/2006/060207_aspi_seminar.html>.

the north and east was tagged an 'Arc of Instability'.²¹⁷ It was against this Asia-Pacific backdrop driven by global events that the Howard doctrine was crafted. Ultimately this is an important qualifier, and very much reflects how over time the rhetoric of the Australian government shifted from a broad discussion of the global threat posed by terrorism to the potential operationalisation of the use of force against terrorist threats within Australia's immediate region.

Unlike the Bush doctrine, which advocates pure pre-emption against a threat that is not yet imminent, the Howard doctrine is much closer to the doctrine of ASD against an imminent terrorist attack. In June 2002, for example, Prime Minister Howard stated that 'a country which believes it is likely to be attacked' was permitted to take pre-emptive action.²¹⁸ On 1 December 2002, he spoke of circumstances where 'you believed that somebody was going to launch an attack against your country ...'²¹⁹ In April 2005, he referred to circumstances where 'we thought this country was going to be attacked ...'²²⁰ These statements place an emphasis on the existence of intelligence that sustains a conclusion that an attack is on the very brink of being launched. The language is much closer to the concept of imminence than to the Bush doctrine concept of confronting 'emerging threats before they are fully formed'.²²¹ The qualifications added by the Foreign Minister, Mr Downer in 2005, are also illuminating, especially as they relate to the activities of terrorists in neighbouring states and the obligations and capacity of those states to respond to those threats.²²²

Whilst the Howard doctrine may have been born out of the debate generated by the United States with respect to pre-emption, a careful review of how the Australian government over time shifted its rhetoric leads to the conclusion that what the Howard doctrine advocates is the exercise of a right of ASD in extreme circumstances in response to clear and convincing evidence of an imminent threat of a terrorist attack. Subject to the strict qualifications on the right of ASD noted previously, such a doctrine is consistent with contemporary international law. Further, insofar as the Howard doctrine seeks to address the problem of failing and

²¹⁷ R Hill, 'Regional Terrorism, Global Security and the Defence of Australia' (9 October 2003) <www.defence.gov.au/HillSpeech.html?CurrentId=3174> referred in a speech to the Royal United Services Institute to the 'arc of instability stretching from the South West Pacific through eastern Indonesia to the southern Philippines'.

²¹⁸ See text above n 143.

²¹⁹ See text above n 147.

²²⁰ See text above n 172.

²²¹ See text above n 128.

²²² Interview with Mr Downer, ABC AM (27 July 2005), <www.foreignminister.gov.au/transcripts/2005/050727_abc_am.html> in which it was stated 'we're not planning to launch attacks against any of our neighbours, obviously, and if there were to be an attack planned by ... some terrorist group, in one of our neighbouring countries we'd obviously expect that country to deal with that attack and make sure that it didn't take place'. See also, Doorstop interview with Mr Downer, Vientiane, Laos (27 July 2005), <www.foreignminister.gov.au/transcripts/2005/050727_ds_vientiane_laos.html>.

self-defence. There had been no actual 'armed attack' by the Soviet Union,¹⁹⁹ and, although the construction of missile sites so close to the United States was clearly threatening, it could not be said that the threat was 'imminent' so as to justify ASD.²⁰⁰ Yet there was a lack of widespread international condemnation of the United States, and outright support by many states. Thus, it is argued, there exists some state support for the use of pre-emptive self-defence against an incipient threat. There are, however, two reasons why the Cuban Missile Crisis does not indicate state support for pre-emption. First, the Security Council debates indicate that the main issue on which states differed was whether the threat was sufficiently 'imminent' as to activate the right of ASD.²⁰¹ There does not appear to have been any debate as to the lawfulness of pre-emptive self-defence in response to a non-imminent threat. Second, the argument ignores the fact that the United States explicitly refused to rely on self-defence of any kind as a legal justification, because of the view of its legal advisers that 'self-defence would not hold water as a legal argument'.²⁰² That view prevailed in the face of the persistent urging of many in the Kennedy administration to rely upon ASD.²⁰³

In the case of the 1981 Israeli air strike upon the Iraqi nuclear reactor at Osirak, which was targeted prior to it becoming operational, the international response is a significant indicator of the attitude of states to pre-emptive self-defence at that time. In its letter to the Security Council, Israel asserted that the reactor was to be used to produce atomic bombs, whose target would be Israel,²⁰⁴ and sought to justify its actions based on self-defence.²⁰⁵ However, the Council rejected Israel's arguments. Some states were opposed in principle to ASD, while others argued that the test of imminence had not been satisfied, given that the International Atomic Energy Agency had found no evidence that Iraq was planning to use the reactor for anything but peaceful purposes. Sir Anthony Parsons of the United Kingdom rejected Israel's argument in the following terms during Security Council debate:

¹⁹⁹ For a contrary view, see C G Fenwick, 'The Quarantine Against Cuba: Legal or Illegal?' (1963) 57 *American Journal of International Law* 588, 589.

²⁰⁰ Yoo, above n 51, argues at 763 that during the crisis, the United States adopted a 'more elastic concept of imminence', conceding that the traditional test of imminence was not satisfied, as 'there was no indication that the Soviet Union was planning to use [the missiles] immediately, or even in the near term' and the United States did not claim that the missiles had been completed or fitted with nuclear warheads.

²⁰¹ See discussion in Bradford, above n 51, 1405; Arend, above n 34, 94; Franck, above n 37, 100.

²⁰² Gardner, above n 195, 587. Gardner was, at the time, Deputy Assistant Secretary of State for International Organisation Affairs, and was actively involved in the resolution of the Cuban Missile Crisis. He refers here to legal advice obtained by him, at the request of Secretary of State Dean Rusk, from Abram Chayes, the State Department's Legal Adviser, and Stephen Schwebel, Assistant Legal Adviser for UN Affairs.

²⁰³ Gardner, above n 195, 158; Bradford above n 51, 1403-05; Schmitt, above n 185, 545.

²⁰⁴ Letter dated 8 June 1981, from Yehuda Blum to the President of the Security Council, Security Council Official Records, 36th Year, UNSC Doc S/14510.

²⁰⁵ UN Doc No.S/PV.2280 (12 June 1981) [58]: In destroying Osirak, Israel performed an elementary act of self-preservation ... In so doing, Israel was exercising its inherent right of self-defence as understood in general international law and as preserved in art 51 of the Charter.

But it was not a response to an armed attack on Israel by Iraq. There was no instant or overwhelming necessity for self-defence ... The Israeli intervention amounted to a use of force which cannot find a place in international law or in the Charter and which violated the sovereignty of Iraq.²⁰⁶

Unusually, even the United States criticised Israel, though its criticism centred on Israel's failure to exhaust diplomatic alternatives.²⁰⁷ In its response, the Security Council unanimously passed Resolution 487,²⁰⁸ 'strongly condemn[ing] the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct'.²⁰⁹ The General Assembly later adopted a similar Resolution.²¹⁰ During debates the issue of pre-emption was explicitly raised, and a number of states took the opportunity to reject it as being incompatible with the Charter.²¹¹

On the basis of these two examples of state practice and the response by the international community, there existed no grounds to justify a doctrine of pre-emptive use of force prior to 2002.²¹² Whilst the United States did seek to rely upon the doctrine as a basis for its 2003 invasion of Iraq, other legal arguments were also made. Neither Australia nor the United Kingdom formally sought to rely upon pre-emption as grounds for joining the United States in Operation Iraqi Freedom. Even setting aside whether one instance of state practice in this area would suffice to create customary international law, even 'instant' custom,²¹³ it seems clear that the minimum levels of threshold support for reliance upon the doctrine were not met in this instance. Military pre-emption as articulated in the Bush doctrine cannot be said to represent existing customary international law or reflect article 51 of the UN Charter.

²⁰⁶ UN Doc No.S/PV. 2282, [106].

²⁰⁷ Representative of the United States, Ms Jeanne Kirkpatrick, UN Doc No.S/PV. 2288 (19 June 1981) [30].

²⁰⁸ SC Res 487 (1981).

²⁰⁹ Ibid [1].

²¹⁰ GA Res 36/27 (13 November 1981) 56th Plenary Meeting (109-2-34).

²¹¹ See, eg, Algeria (UN Doc No.S/PV. 2280 [159]-[63]); Brazil (UN Doc No.S/PV.2281 [39]); Pakistan (UN Doc No.S/PV. 2281 [70]); China (UN Doc No.S/PV.2282 [87]); Mexico (UN Doc No. 2288 [113]). See in particular Algeria (UN Doc No.S/PV. 2280 [159]-[163]); China (UN Doc No.S/PV. 2282 [87]).

²¹² For a thorough evaluation of state practice since 2002, see Gathy, above n 191, 82-99. He concludes (at 101) that there has been no change to the customary international law position prior to 2002, namely that the Bush doctrine of pre-emptive self-defence is unlawful.

²¹³ A doctrine introduced in Bin Cheng, 'Custom: The Future of State Practice In a Divided World' in R St J MacDonald and D M Johnston (eds), *The Structure and Process of International Law: Essays and Legal Philosophy Doctrine and Theory* (1983) 513, 532, and recently given some currency in the context of discussions of state responses to the attacks of September 11, see eg, B Langille, 'It's "Instant Custom": How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001' (2003) *Boston College International and Comparative Law Review* 145.

failed states,²²³ it is probably a reasonable and lawful response, again provided that it is applied with extreme caution.

VI. Concluding Remarks

The events following September 11, 2001, have posed multiple challenges for international law, not the least of which has been the maintenance of international and national security in the face of the threats posed by international terrorism. One of those challenges has been determining whether the existing law is sufficiently robust and capable of responding to these threats or whether there is a need for new doctrine and perhaps even new norms and principles. As Judge Guillaume argued in 2003, '[s]tates which are potential targets of murderous attacks can no longer remain indifferent to such dangers. In this respect the events of 11 September 2001 have opened their eyes.'²²⁴ The United States clearly has not remained indifferent to these threats and has adopted a robust response, some of which has been the subject of wide-ranging critique,²²⁵ in particular the Bush doctrine of pre-emption. There has been no carefully argued legal case put forward by the United States government in support of the Bush doctrine, nor has the doctrine been endorsed by the Security Council or General Assembly, and it has been challenged by the former UN Secretary-General, Kofi Annan,²²⁶ and the Secretary-General's 2004 High Level Panel on Threats, Challenges and Change (High-Level Panel Report).²²⁷ The Bush doctrine has little foundation in contemporary international law and almost no support amongst the members of the international community.

The United States promotion of the doctrine of pre-emption may reflect the inadequacy of the current law on use of force. But is that really the case? The High-Level Panel Report firmly took the view that existing international law on the use of force was adequate to deal with the contemporary challenges. It noted that:

The short answer is that if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorise such action if it chooses to ... in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention ... is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one so to act is to allow all.²²⁸

²²³ For an analysis of Australia policy towards 'failed states' in the context of the Howard doctrine, see the paper by Minh Nguyen, 'The Question of 'Failed States': Australia and the Notion of State Failure' (March 2005) <http://www.uniya.org/research/state_failure.pdf>.

²²⁴ Guillaume, above n 88, 548.

²²⁵ See in particular P Sands, *Lawless World: America and the Making and Breaking of Global Rules* (2005).

²²⁶ See the Secretary-General's address to the General Assembly, New York, 23 September 2003, <www.un.org/webcast/ga/58/statements/sg2eng030923.htm>, where he expressed concern that, if adopted, the doctrine 'could set precedents that resulted in a proliferation of the unilateral and lawless use of force, with or without justification'.

²²⁷ High-level Panel Report above n 57, [188]-[192].

²²⁸ Ibid [190]-[191].

Likewise, in his 2005 response to the High-Level Panel Report, then UN Secretary-General, Kofi Annan, endorsed this analysis, stating that imminent threats were 'fully covered' by article 51, whilst threats that were 'not imminent but latent' should be dealt with by the Security Council.²²⁹ Any doubts as to the capacity of the UN Charter to respond to the threats posed by international terrorism, especially with respect to the interpretation of article 51, seems to have been dispelled at the very highest political levels within the UN.

What then of the Australian response to the events of 2001 and the development of the so-called 'Howard doctrine'? It is noteworthy that the Howard government initially sought to promote a debate over the adequacy of the UN Charter to deal with contemporary threats, thereby paralleling the United States position and the promotion of a new doctrine to respond to new challenges. Over time, however, the Howard government retreated on the need for Charter reform and argued that existing international law was adequate to respond to the threats that Australia may have been facing. As has been suggested, ultimately, without ever actually using the terms, what the Howard government was suggesting and has continued to suggest is that states possess a right of ASD and that right adequately allows Australia to defend itself against any regional terrorist threat it may face. Whilst acceptance of such a right is far from universal, a strong legal argument can be mounted in support of ASD consistent with the terms of the Charter with an emphasis upon the exhaustion of all possible peaceful means of dispute settlement, limited use of force consistent with principles of *jus ad bellum* and international humanitarian law, and a willingness by the state launching such an armed response to account for its actions and be judged if necessary before the Security Council and the ICJ. The doctrine also relies upon the extension of self-defence to attacks by non-state actors such as international terrorist organisations, which has been confirmed in state practice following September 2001. The use of anticipatory force against an attack from a terrorist base located in another state is arguably also supportable under international law as it has evolved since September 2001. Justification for such a military response would need to be provided immediately to the UN and the international community. In the event that doubt remained over the legitimacy of such a military operation, it remains open to the defender states to invoke the plea of necessity.

A feature of the Howard government has been its ambivalence towards multilateral institutions, especially the UN. It is therefore unsurprising that no attempt was ever made to develop fully a position on Charter reform that sought to carry through on some of the proposals contained within Senator Hill's 2002 University of Adelaide speech. There has not, however, been any ambivalence

²²⁹ K. Annan, *In Larger Freedom: Towards Security, Development, and Human Rights For All* (2005) [124]-[126] <www.un.org/largerfreedom/>; at the subsequent 2005 World Summit of the General Assembly, there was no direct reference made in the outcomes document to this issue other than an observation that '[w]e affirm that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security: UNGA A/60/L.1 '2005 World Summit Outcome' (20 September 2005) [79].

towards regional institutions and the ability of bilateral relationships to prove pivotal in countering regional terrorist threats. This is best illustrated by the strength of the Australia/Indonesia relationship in countering terrorism forged in the immediate aftermath of the 2002 Bali bombings and most recently evidenced in the signing of the 2006 Lombok Security Agreement.²³⁰ Ultimately, it has been the impact of Australia's regional relationships, especially in Southeast Asia, which most impacted upon the articulation and shaping of the Howard doctrine. Both the Foreign Minister and Prime Minister were careful over time to qualify their statements on pre-emption by noting that any anticipatory use of force to prevent a terrorist attack on Australia or Australians would ideally be taken in cooperation with other countries (presumably including the host country from which the terrorists were planning the attack).²³¹ They both made it clear that anticipatory force would be used without consent to prevent a terrorist attack only in the case of a 'failed state'²³² or a state that was 'unwilling or unable'²³³ to prevent such an attack. As has been discussed above, it is strongly arguable that such action would be permissible in the case of a failed state, and probably even of a failing state. That said, there is clearly still an argument that the wanton use of force against peoples within any territory would fundamentally contravene the Charter's principles. Accordingly, even in the case of failed or failing states, the Howard doctrine would need to be exercised with restraint and within the parameters noted above.

International terrorism has posed and will no doubt continue to pose significant challenges for the international community and international law. It is possible to construct legitimate legal responses to these challenges. However, where the use of force is involved it is incumbent upon governments to explain fully their position and articulate why there is a need either for a new doctrine or revision of the law. The Howard doctrine is in essence based around principles of self-defence, in particular ASD and a right of self-defence against non-state actors. The law in this highly contentious area continues to evolve. If Australia values the multilateral system with the UN at its centre, and places particular value on its regional and bilateral relations especially in the Asia-Pacific, it is essential that it continue to act within the Charter framework. Self-defence has proven itself capable of responding to new threats. It can now address threats posed by both state and non-state actors. It can be used to respond to threats that are actual and imminent. For a middle power such as Australia, this unilateral right to use armed force in strictly limited circumstances to maintain its national security, when combined with the capacity of the Security Council to exercise collective security, is more than adequate legal cover to combat any threat of a terrorist attack.

²³⁰ Agreement between Australia and the Republic of Indonesia on the Framework for Security Cooperation (13 November 2006) [2006] ATNIF No 25.

²³¹ See text above nn 153-164.

²³² Mr Downer, see text above n 164.

²³³ Prime Minister, see text above nn 166-167.