Article 51 of the UN Charter contains a limited exception to the prohibition against the use of force, whereby force may be employed by a State in response to an armed attack by another State. Consider the extent to which Article 51 applies pre-emptively, drawing on recent world events including the situation between North Korea and the USA'

Introduction

In considering the extent to which Article 51 of the UN Charter applies pre-emptively, so that States may employ force against another State in anticipation of an armed attack without being in contravention of the prohibition on the use of force in Article 2(4), this work will begin by outlining the prohibition itself and the exception in Article 51. It will then consider the historic position under which it did not appear that the right to anticipatory self defence was lawful. It will be shown however that in more recent times such a right has developed, although the mere existence of such a right cannot alone be considered sufficient to justify all military action ostensibly used in self defence, such as in the situation between North Korea and the USA.

The Prohibition on the Use of Force and the Right to Self Defence

As noted above, Article 2(4) UN Charter prohibits the use of force in international relations: it provides that States must refrain from 'the threat or use of force against the territorial integrity or political independence of any State'. Whilst what is required in order for force to fall under the prohibition is beyond the scope of this work, it should be observed that Article 2(4) has been described in both the scholarly literature, and the International Court of Justice as constituting the very foundation of international law. It is not surprising therefore that some commentators, such as Corten, propose that a restrictive approach should be taken towards the Article, so that exceptions to it are limited in their scope; in contrast to this, expansionist commentators suggest, as Martineau explains, that the law should adapt to the 'necessities of social life,' that is, rather than resting on pure interpretations of the text of the relevant Treaty provisions, the understanding of the operation of the exceptions to the use of force should be capable of applying in the changing political arena, and in order to allow States to respond satisfactorily to threats from other States.

In this regard, it should be observed that Article 51 UN Charter provides that there is an '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'. The remainder of the discussion will consider whether there is consensus in the interpretation of Article 51, and the extent to which this envisages a right to pre-emptory self defence.

The Historic Position

Whilst it is clear from the above discussion that the right to use force in response to an armed attack is the foundation of the right to self defence, Gray has observed that during the drafting of Article 51, 'the divisions between States as to the scope of the right of self defence meant that no detailed provisions on self defence could be included in General Assembly Resolutions'. In this regard, Gray does claim that States have generally been slow, at least historically, to recognise that Article 51 could apply in anticipation of an attack. This will be discussed further below; here, one is simply inclined to agree with Andreias that were States too ready to accept that self defence could apply pre-emptively, there would be a danger that the aims of the UN Charter to 'save succeeding generations from the scourge of war', would be undermined. This notwithstanding, it is argued that the drafting of Article 51 is unclear, particularly in the extent to which the phrase 'if an armed attack occurs' should be interpreted to mean 'only if'. It is argued that this lack of certainty in the scope of the Article during the drafting, notwithstanding the limited historic use of the right, has created the possibility of a right to anticipatory self defence, depending on the interpretation of the Article.

Such confusion about the possibility of the Article applying pre-emptively seems also to exist based on the lack of judicial dicta on the matter. Indeed, as Mook has noted, 'no international court has ever settled the matter as to when self defence actually begins'. It is true of course that the Caroline Incident has been used as the basis for arguments that anticipatory self defence exists in customary international law and may be employed in situations where the need to act is 'instant, overwhelming and leaving no choice or means or moment for deliberation'. However, as commentators such as Sofaer have observed, these words cannot be 'applied as a general rule for all pre-emptive actions' and indeed, support for this assertion may be taken from the fact that historically, it seems that States have been reluctant to rely on the existence of an expansionist interpretation of Article 51, which envisages a right to anticipatory self defence. As Gray observes, and as noted above, historically it is only 'very occasionally' that States have sought to rely explicitly on an ostensible right of anticipatory self defence, notwithstanding the fact that this appears to be their alleged justification for their actions in practice. The commentator goes further, arguing that whilst such reluctance to categorise their actions as being in anticipatory self defence cannot be considered in itself to offer compelling evidence that no such right exists, it does rather suggest that the legal and indeed political support for such a right is dubious.

A similar view is developed by Mook, who argues that States have instead preferred to develop an expansionist interpretation on the meaning of the term force in Article 2(4) of the Charter, rather than of Article 51, because she argues, they have sought to avoid 'the doctrinal divide of anticipatory self defence'. Again, it seems clear that whilst these arguments do not themselves demonstrate that the right to anticipatory self defence cannot exist, they certainly show a lack of State practice sufficient to argue that anticipatory self defence exists in customary international law, itself the foundation of Article 51, notwithstanding the apparent recognition of the right in the Caroline Incident. This author would argue however that rather than showing that the historic position on the interpretation of Article 51 is restrictive, this simply shows the controversial nature of the debate surrounding the possibility of the existence of a right to pre-

emptive self defence. Thus, whilst this does fall short of agreement with Corten that 'the only genuine restrictive conception of self defence confines it to a riposte to an effective armed attack, as can be deduced from the ordinary meaning of Article 51', it certainly seems to be the case that historically at least, Article 51 has not been applied pre-emptively in a wide range of circumstances, regardless of whether such an application would have been considered lawful.

A New Climate: An Emerging Right?

Notwithstanding the above, it appears that in recent times, some evidence exists that Article 51 may indeed be relied upon in anticipation of an armed attack. Support for such a proposition may be found in the assertions of the UN High Level Panel on Threats, Challenges and Change, which in 2004 reported that '[l]ong established customary international law makes it clear that States can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate'; this author submits that acceptance of such a right by the UN High Level Panel would appear to be a direct recognition of the customary right apparently established after the Caroline Incident, and also offers confirmation that the right to self defence as a Treaty right enshrined in the UN Charter may indeed be employed pre-emptively. Arend, writing in 2003, may have been correct in his assertions that the Charter may have historically been interpreted to prevent self defence being employed in anticipation of an armed attack, as discussed above in terms of the interpretation of the word 'if' in Article 51, but as the commentator concedes, such a formulation may 'no longer accurately reflect' international law, particularly, it is argued here, in light of the comments of the High Level Panel.

However, the mere fact that such a right does exist does not of itself justify recourse to it in recent world events. It is clear from the Panel's assertions that anticipatory self defence exists under the operation of clearly defined criteria as envisaged in Article 51, which is that action must be proportionate and in response to an imminent attack, and this will be considered below. In terms of imminence, as the Panel itself noted, 'the problem arises where the threat in question is not imminent but claimed to be real: for example, the acquisition, with allegedly hostile intent, of nuclear weapons making capability'. This difficulty is recognised by Santora, who argues that it is something of a 'stretch' to argue that the acquisition of nuclear weapons of itself constitutes an imminent attack, drawing a distinction between preventative action to apparently stop an attack becoming imminent, and action which is itself in response to an already imminent attack; it seems therefore that the development of a nuclear weapons programme by North Korea cannot be considered to constitute evidence of an imminent attack. That such preventative action cannot be in line with Article 51 seems to be confirmed by the High Level Panel, who note that whilst the Security Council may authorise such action where it considered it appropriate and necessary, it may do so, but that its failure to take such action should simply be considered as confirmation that unilateral action on the part of a State would not meet the imminence criteria. Thus, it is argued, preventative action does not, by its very definition, incorporate situations where the threat of force is imminent, and thus can never be used to justify anticipatory action. As Waxman explains, 'imminence derives from the principle of necessity' and to be considered necessary, self defence must be employed in response to an imminent attack. Again, it is difficult

to accept that armed action by the USA in response to North Korea's apparent development of nuclear weapons falls within this scope.

Indeed, it does seem that in practice, State interpretation not only of imminence, but of what is required for an act to be considered armed under Article 51, appears to show a low threshold triggering self defence; it is suggested that this goes beyond a mere recognition of a right to use self defence pre-emptively, but may simply constitute the use of force against another State. Thus, as Banks and Criddle argue, 'few international lawyers in the United States today endorse the kinds of limits on the use of force that continental scholars would recognise as restrictive' in response to apparent threats from other States, and thus, it is suggested that whilst the language used in relation to Article 51 has not changed, the interpretation of that language may be considered to demonstrate an expansionist view of anticipatory self defence, going far beyond that envisaged by the High Level Panel. Indeed, this author would therefore submit that it appears that if self defence is truly to be considered proportionate, it must be in response to an attack or only constitute action which is necessary to prevent an imminent attack.

Conclusion

It has been shown that the scope of the prohibition on the use of force and the exception under Article 51 has been the subject of much debate, with discourses resting on restrictive and expansionist views of the provision. Whilst it has been argued that recent developments do appear to support a right to anticipatory self defence, notwithstanding the traditional reluctance of States to rely on such a right, the current situation between North Korea and the USA cannot be considered to constitute the exercise of this right. Rather, it has been submitted that the proposed military action by the USA should be viewed simply as a willingness of that State to ignore its obligations under international law.