



# Law and Practice of Anticipatory Self-Defence

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**Session 2**  
**International Law – Pre-emptive strikes**



# Framework of Analysis

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- UN Charter
- Self Defence
- Anticipatory Self-Defence
- State Practice
- Views of the ICJ



# UN Charter

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- Article 2 (4)
- Article 51

“Nothing in the present Charter shall impair the inherent right of individual ... self-defence if an armed attack occurs against a Member of the United Nations”



# UN Charter – Issues Arising


- Is the Charter exhaustive on the limits of the use of force?
- What is the inherent right of self-defence?
- Is this a right which pre-existed the Charter?
- How should such a right be exercised?



# Self Defence

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- Right of customary international law
- Right of treaty law
- Recognised by International Court of Justice
- What is the content of the right?



# Self Defence - Caroline case (1837)

- US rebels massing on Niagara River preparing for attack upon Canada
- Caroline used by rebels used to prepare for the attack
- Caroline seized by British forces, set on fire and sent over Niagara Falls

Caroline destroyed plus loss of two lives

# Self-Defence - Caroline case

The Webster/Fox Diplomatic Exchange

There is a need to show

## 1. Necessity

"a necessity of self-defence, instant, overwhelming, leaving no choice of means, no moment of deliberation"

# Self-Defence - Caroline test

There is a need to show

## 2. Proportionality

“It will be for it [Great Britain] to show show also, that the local authorities...did nothing unreasonable or excessive...”



# Self-Defence and Terrorist Acts

- 2001 Terrorist Attacks on US
  - UNSC Res 1363 & UNSC Res 1373
- 2002 Bali Bombing
- 2004 Madrid Bombing
- Terrorist Attacks upon Israel

In all cases an 'attack' has taken place

# Anticipatory Self Defence

- ASD existed pre UN Charter
  - Officers refer to self-preservation during Caroline exchanges
  - “There can be little doubt that the right of self-preservation and the doctrine of necessity comprehended anticipatory action” per Brownlie (1963)

Did ASD survive the Charter?



# ASD Practice: Iraq 1981

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- Israel launch attack on Iraqi nuclear reactor
- Iraqi reactor under construction
- Was it nuclear capable at the time?
- Was the strike premature?

**General condemnation by international community including within the UNSC**

# ASD Practice: Iraq 2003

- No clear reliance upon ASD but Australia or UK
- Focus primarily upon UNSC Resolutions
- US National Security Doctrine suggests pre-emption as a variant upon ASD
  - BUT did Iraq possess any strike capacity against Australia?
  - What of collective ASD?



# Views of the ICJ

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No clear analysis on point

- Nicaragua Case [1986]
- Legality of the Threat or Use of Nuclear Weapons [1996]
- Israeli Security Barrier [2004]



# Concluding Comments

- No conclusive state practice or opinio juris on ASD
- Mostly a concept discussed by publicists
- No assessment by the ICJ
- But what of interceptive self-defence?
- Distinction between foreseeable and imminent
- How good is the intelligence?