Comment: John Howard's "Pre-emptive Strike Thesis"

By: Myint Zan[*]

Australian Prime Minister John Howard has provoked some uproar in a few South-east Asian capitals with his recent remarks that Australia should arguably have the right to attack terrorist groups or bases in neighbouring countries when there is credible evidence that these groups are planning to attack Australia or Australians.[1] While there is understandable – if at times and in a few cases somewhat "overblown"- outrage over the Prime Minister's remarks from the leaders and elites of the South-east Asian countries mainly of Malaysia[2] The Philippines[3] and Thailand[4] a legalistic analysis of Howard's comments were sparse in the newspaper reports.

Before briefly analyzing the substance of John Howard's pronouncements his "preliminary" statements deserve mention and comment. Howard appeared to have prefaced or -to use a term which was once employed by Ronald Reagan's first Secretary of State Alexander Haigh- "caveated" his comments with the observation that the United Nations Charter provisions concerning the use of force were drafted and adopted during a time when the major if not exclusive arena of military conflicts was between nation-States. The drafters of the UN Charter could not have envisaged the trans-national nature of terrorism and how terrorist networks operate across borders nowadays. Therefore, the Prime Minister of Australia opined that the UN Charter's provisions concerning the use of force should be amended in order to effectively deal with the trans-national nature of the terrorist threat.

Without commenting for the time being on the merits or demerits of Howard's "thesis", the writer would express his view that, in a historical perspective, what Howard said is essentially correct. The Devil, however, is in the details and regardless of the tenability or otherwise of Howard's views one can with almost total confidence state that it will be very difficult if not close to impossible to *formally* amend the United Nations Charter along the lines suggested by the Prime Minister.

Since the United Nations Charter came into force in 1945 there has only been one major amendment: that was in 1965 when membership of the UN Security Council (UNSC) was expanded from 11 to 15 members.[5] For the past ten to fifteen years there has been sporadic "mooting" of the idea that the Permanent Membership of the UNSC should be expanded to include Germany and Japan[6] but nothing so far has come of these and other proposals for UN reform.

What is the current position in international law as far as "striking" at alleged terrorist bases in neighbouring countries – without the consent of the "territorial government"- is concerned? The UN Charter currently allows "trans-boundary" use of force only in two situations:

- when there is an "armed attack" on a country, that country has the right to respond in individual and collective self-defence[7] and

• Members of the UN can take enforcement action when authorised by the UNSC under Chapter VII
of the UN Charter. [8]

Howard's proposal (or was it an assertion?) concerning the "option" of striking at terrorist targets in neighbouring countries would *prima facie* fall outside these stipulations of the UN Charter.

Still, it should be added that since Federation in the year 1901 – and as far as this writer is aware- Australia has *not* launched any pre-emptive strikes across or in neighbouring countries. The presence of Australian troops in East Timor in 1999 was arranged in the context of United Nations peacekeeping forces and with the authority of the United Nations Security Council itself.[9] The presence of Australian troops in (then) Malaya in the 1950s to help fight the communist insurgency in the British colony was done with the invitation and consent of the authorities administering the country at that time.[10] Also, Australian troops fought along with South Vietnamese, American, South Korean and other troops against the "Vietcong" in the 1960s with the consent and invitation of the then government of South Vietnam.[11]

The nature of Howard's definition or proposal for "pre-emptive strikes" would preclude the consent, far less the invitation, of the "territorial" government. That is why there has been uproar in some South-east Asian capitals over Howard's comments. Malaysia's Prime Minister Mahathir Mohammad has stated that any encroachment or attack on persons or bases –terrorist or otherwise- in Malaysia would be treated by Malaysia as a "war".[12] Again, in part Mahathir is right.*The Consensus Definition of Aggression*[13] adopted by the UN General Assembly in November 1974 states in effect that "the first use of force armed force by a State, in contravention of the [UN] Charter shall constitute *prima facie* evidence of aggression though the UNSC (may decide that in the light of all the circumstances) such a conclusion is not justified".[14]

The fact that Australia has hitherto not "taken" "pre-emptive" strikes against its neighbouring countries is to Australia's credit as a "middling" power in the Asian-Pacific region. Australia also generally abides by the provisions of international law and respect its neighbours' territorial integrity and sovereignty. In stark contrast, the United States -for which Howard has been accused by some of playing "Deputy Sheriff" to in parts of the Asia-Pacific region[15]- have a "solid" list or precedents of instances of "pre-emptive" strikes against neighbouring countries. At the very least, massive encroachment of American soldiers in the territories of its neighbouring countries have taken place quite a few times in the past few decades. An incomplete list would include various United States administrations' military interventions in the Dominican Republic (April 1965)[16], Grenada (October 1983)[17], Panama (December 1989).[18]

In this regard, the United States was "legally defeated" in a landmark case decided by the International Court of Justice (ICJ) on 27 June 1986. In the case of *Nicaragua v The United States*, the ICJ, by a solid majority of 12 votes to 3, rejected the United States contention that it was acting in "collective self-defence" when it mined Nicaraguan harbours and trained the anti-government Contra rebels.[19]The ICJ ruled that just because Nicaragua *allegedly* (according to the United States) trained or supported the leftist rebels that were fighting the government of El Salvador, the US did not have the right under the pretext of "collective self-defence" to engage in acts which clearly violate Nicaragua's sovereignty and also the fundamental norms of international law. [20]

We can perhaps "extrapolate" the (actual) 1986 ICJ ruling in the *Nicaragua* case to that of the "Howard *hypothetical*" of Australia launching "pre-emptive" strikes against ostensible terrorist bases in neighbouring countries. Just as the US "excuse" or "justification" of its significant breaches of international law vis-à-vis Nicaragua was juridically rejected by the ICJ, Howard's "pre-emptive" strike proposal would not 'pass' the test of international legality at least as far as prevailing notions and

interpretations of international law are concerned. This much is clear in– and can be construed to have been implicitly admitted by – Howard's statement that the UN Charter should be amended.

Still, support from Howard has come from Washington: a totally expected source and apparently the only government to explicitly come out in support of the Australian Prime Minister. A spokesperson of the Bush administration have said that Washington has upheld the right of "pre-emptive" strikes[21] and thereby in effect it explicitly asserts -in words as much as in actions- their legality in international law.

"One swallow does not make a summer" but the "American eagle's" sharp beaks and intrusive surgical (and non- surgical) military strikes (including "collateral damage") have been and are such that the notion of adherence to international law becomes a pious irrelevancy when talking about at least some if not many of the actions of the United States administration, pre-and post- "September 11". Needless to say Australia certainly is not, globally and regionally, in the same (privileged) position as the United States on the issue of pre-emptive strikes. This is so especially in the context of its relations and interaction with countries in the Asia-Pacific region.

The protests from some Southeast Asian capitals and later – equivocations or "explanations" by Prime Minister John Howard himself[22]- have, one hopes, make this issue to be not much more than a storm in a tea-cup. As political scientists and international relations scholars are fond of pointing out –and which we students of international law so readily acknowledge- international law plays only a part – some times a significant part at other times of limited significance or relevance- in the realities of international relations imbued as they are by power and regional politics as well as other factors.[23] Though a possibility of unilateral pre-emptive strikes against neighbouring countries by Australia cannot be absolutely and "forever" ruled out –death and taxes being the only certainties in life as per the Benjamin Franklin quip- on both international relations and international law grounds such a scenario seems remote.

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[1] See for e.g. http://onenews.nzoom.com/onenews_detail (accessed 1 February 2003) for a contemporaneous reportage of John Howard's comments and some reactions from Southeast Asian capitals. See also http://www.english.peopledaily.com.cm/200212/03/eng20021103-107860.html (accessed 1 February 2003) for an analysis and comment from China's *People's Daily* newspaper on John Howard's statement.

[2] See "Fighting words from Malaysian PM" http://www.onenews.nzcom./onenews_detail /012271,153151-1-9,00.html (accessed 1 February 2003).

[3] See for e.g. "Manila warns terror cooperation hurt by Howard's Comments" www.khallejtimes.co.ae/ktarchives/02102/the world.htm (accessed 1Feburary 2003).

[4] See for e.g. "Thailand Expresses Outrage at Howard's Comments" http://www. abc.net.au/pm /S739211.htm (accessed 1 February 2003).

[5] Amendments were made to Article 23 (1) and 23 (2) of the UN Charter concerning the increase of non-permanent members of the UN Security Council from six to ten.

[6] See for e.g. M. Smith "Expanding Permanent Membership in the UN Security Council: Opening a Pandora's Box or Needed Change?" (1993) 12 *Dickinson Journal of International Law* 173.

[7] Under Article 51 of the United Nations Charter. See UN web site. www.un.org/charter.

[8] Under Articles 39, 41 and 42 of the United Nations Charter. See UN web site www.un.org/charter.

[9] See United Nations Security Council Resolution 1264 (1999). Ingrid Detter writes that "[t]he International Force for East Timor (INTERFET) is placed under Australian command, seeks to prevent further genocide [sic] of civilians, most of them Christians by the 'integrist' militia". Ingrid Detter *The Law of War* (2000) 388. For an argument that the killings that occurred in Dili and elsewhere in East Timor on the immediate aftermath of the August 1999 referendum did *not* amount to genocide see Ben Saul "Was the Conflict in East Timor 'Genocide' and Why Does it Matter" (2001) 2 (2) *Melbourne Journal of International Law* 477.

[10] For a list of British, Commonwealth (including that from Australia) and Ghurkha regiments that were involved in the Malayan emergency (1948 to 1960) see http://www.geocities.com/Pentagon/7745/over/reg.html (accessed 1 February 2003).

[11] For a bibliographic references concerning Australia's involvement in the Vietnam war see http://www.uwip.org/articles/aw-bib.htm (accessed 1 February 2003).

[12] See "Fighting Words from Malaysian PM" above n 2.

[13] UNGA Resolution (XXIX) (1974).

[14] Article 2 of UNGA Resolution (XXIX) (1974). Detter is of the opinion that under this article "the first use of armed force by a State may be legitimised by the opinion of the Security Council , a method [sic for proviso or provision] which surely undermines the general prohibition of force under article 2 (4) of the Charter". Detter above n 9, 69.

[15] For such a recent description or 'indictment' against Australia see Munir Majid "Dark Clouds on the 2003 Crystal Ball" www.emedia.com.my/current_news/NST/columns/20021229095832/Article (accessed 1 February 2003). Majid wrote that "the US is dead set in closing out all resources of support for terrorism by .. claiming [the right to] pre-emptive action against terrorist targets in any country from where they may be planning acts of terror ,with self-appointed Deputy Sheriff Australia then joining the bandwagon".

[16] For a contemporaneous academic discussion of the 1965 United Nations intervention in the Dominican Republic see Ved P. Nanda "The United States Action in the 1965 Dominican Impact on World Order – Part I" (1966) 43 *Denver Law Journal* 439.

[17] See for e.g. William C. Gilmore *The Grenada Intervention* (1984).

[18] For an academic discussion with differing viewpoints on the (il)legality of the United States invasion (intervention) in Panama see "Agora: United States Forces in Panama: Defenders, Aggressors or Human Rights Activists?" (1990) *American Journal of International Law* 494.

[19] *Nicaragua v The United States* (Merits) 1986 *ICJ Reports* 14.

[20] Ibid 94, 122-23. A summary of the judgment in the *Nicaragua* case can be found in the web site of the International Court of Justice at http://www.icjcij.org/icjwww/icases/inus/inus_isummaries/inus_isummary_19860627.htm (accessed 1 February 2003).

[21] See "Bush Backs Howard on Preemptive Strikes" in 3 December 2002 issue of *The Age* newspaper (Australia) in http://www.theage.com.au/articles/2002/12/03/1038712918330.html (accessed 1 February 2003).

[22] "Nothing that I said ... was in any way directed against the countries of our region," Howard said today. "It was not in any way directed against the governments of the countries of our region". *Ibid*

[23] Compare "It is true that the impact of power and politics is much more immediately recognizable and directly relevant in international law than in national law", Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (Seventh Revised Edition) (2002) 5.