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Pre-emptive – Preventive War

International Law after Iraqi War 2003

M.A. Thesis in International Law

By:

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To the people who most believed in me and who provided me with

proper guidance & support,

My Beloved Parents

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Abstract

The norm of self-defense in international law is so determinedly an inherent right that its precise meaning and justifications are rarely examined. Whatever the general merits of the norm, its retention seems fairly open to question when one sovereign state appears supremely unsecured facing a threat in terms of actual armed attack or imminent threat.

This thesis studies the term and the case of a theoretical defense of the norm within the context of the state's use of force in pre-emptive self-defense – anticipatory self-defense. If a defense can be made when the supreme state's self-preservation is at stake, then it is hard to see how any case can be made against it. For the purposes of this thesis, I took the Iraqi war of March 2003 as a case study.

Arguments about self-defense and the legitimate and legal uses of force are more difficult than one would expect since they are based on history, on the inherent right of states to preserve their security and peace. But a defense can be made successfully on pragmatic grounds relating to the nature of the principal threat to the state. In the case of the United States, the threat was the use of weapons of mass destruction (WMD). From the perspective of the United States Administration, American action whether preemptive or anticipatory self-defense is justified since it was defending its existence. The consequences of such pre-emptive war created fear that this invasion of Iraq will create a new precedent or a new standard that might undermine international law.

This thesis explores the manipulation of the American – Iraqi war of March 2003 through an examination of *pre-emption* and *prevention* concepts. It begins by defining pre-emption in general terms through the works of selected authors, international law, and the Charter of the United Nations. To further assist in understanding pre-emption as a national security strategy, the paper looks at selected historical examples where pre-emption was used or considered for use in differing environments as a security strategy. It provides a comprehensive definition of *pre-emption* and *prevention* and discusses hidden consequences associated with a policy or employment of pre-emptive force. The National Security Strategy asserts that imminence extends beyond immediate threats to include more distant and uncertain challenges; hence the solution is to forestall the threat before its realization. This thesis closes with thoughts relative to the future of pre-emption as a national security strategy for the United States and whether the National Security Strategy is a pre-emptive or preventive course of action, whether the war on Iraq is a justified war and on what legal basis it was waged.

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Chapter One:

Introduction

I. Objectives:

1.Purpose of the Research:

This thesis discusses the concept of pre-emption under international law. The purpose is to offer scholars sufficient knowledge about the concept of use of force in the realm of pre-emptive war and its legality with respect to International Law. This study does include a distinction between pre-emptive and preventive war, for there is a tendency to confuse the two concepts in the manner that actions done are for prevention, but instead of the term prevention, 'pre-emptive actions' are used to legitimize the act.[1] Such attitude is critical if countries adopt a principle of preventive war, this may have catastrophic global consequences. After the American pre-emptive strike over Iraq in March 2003, it is necessary to make this study although a number of scholars and analysts have already dealt with it in different directions. Analysts argue about the legality of the American attack and are divided mainly into two groups: one supporting that the National Security Strategy (NSS) issued by US President George W. Bush as a standard doctrine of anticipatory self-defense[2], on the contrary, the other group believes that the course defined by the White House is not pre-emption or what is called anticipatory self-defense, but prevention, and that no one has the right to take such an action. [3]

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[1] Krning Volker, Prevention or Pre-emption? Cambridge, 2003. Available at: www.comw.org/pda/0303kroening.html

[2] Steven Welsh, Pre-emptive War and International Law: 2003. Available at: http://www.cdi.org/news/law/preemptive-war.cfm

[3] Volker, 2003.

2. Scope of the Research:

The concept of pre-emptive war is not a new concept. Under International Law, it is acceptable to conduct a pre-emptive war when there is a direct evidence of an imminent attack. To defend oneself is an established right in customary international law and is reaffirmed in the UN Charter[4]. The right to pre-empt is an extension of self-defense, if and only if it is indisputable that there is an imminent threat.

On the other hand, any attack against another nation in the absence of an immediate threat amounts to a preventive war and as such violates International law.[5] For this reason a distinction between short-term and long-term threats has to be established. Almost all nations and even the whole global order are affected by this concept. In this context, scholars and statesmen fear that the invasion of Iraq will create a precedent or a new international norm, a new standard that may undermine international law. [6]

It is necessary to clarify with objectivity for the reader to decide for himself whether the American attack against Iraq was justified or not.

3. Background & Significance of the Problem:

The significance of this study is that it reveals on what grounds military intervention is justified. In fact, military intervention or use of force is authorized according to articles in the UN Charter. Chapter VII; Article 51 states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if

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[4] Michael Walzer, Just and Unjust Wars, 3rd edition. New York: 2000, 52.

[5] Chris Brown, Self-defense in an Imperfect World. 2003 Available at: http://www.ccei.org/viewmedia.php/prmTemplateID/8/prmID/851

[6] Neta Crawford, The Best Defense. 2003. Available at: www.bostonreview.net/BR28.1/crawford.html#3

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." [7]

In addition, Chapter VII Article 42 states: "Should the Security Council consider that measures provided for in Article 41 would be inadequate or had proven to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea or land forces of Members of the United Nations."[8]

Moreover, a Security Council resolution gives the right for a state to defend itself in the event of imminent threat. Just after the 11 September terrorist attacks, the Bush Administration published its new security strategy. According to the Americans, the purpose of this strategy was to fight and beat the enemy: "We must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge."[9]

In another speech, President George Bush reaffirmed his position: "America must act against these threats before they are fully formed."[10] It was stated repeatedly that the US would exercise the right to act pre-emptively against threats. Moreover, President Bush stated his intention to act and implement his strategy independently of UN consent.[11] President Bush in his approach was advocating a precautionary rather

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[7] UN Charter, Chapter VII -Article 51: Self-defense. Available at: www.un.org

[8] Ibid, Chapter VII -Article 42

[9] "Remarks by President George W. Bush at 2002 Graduation Exercise of the United States Military Academy," West Point, New York, June 1, 2002. Available at: www.whitehouse.gov/news/releases/2002/06/20020601-3.html

[10] "Remarks by President George W. Bush to Troops and Families of the 10th Mountain Division," Fort Drum, New York, 2002. Available at: www.whitehouse.gov/news/releases/2002/07/20020719.html.

[11] Knight Ridder, Bush's New Strategy Based on Illegal Preventive War, Montana Forum Magazine September 22, 2002: Available at: www.montanaforum.com/rednews/2002/09/23/build/safety/q-internationallaw.php?nnn=2

than a pre-emptive self-defense.[12] This new strategy created confusion between what is pre-emptive and what is preventive; if what is meant is that the strike is preventive, but the term used instead is pre-emptive action, then the question is what is the political rationale for this course taken by the US administration?

This thesis examines historical events and international legal standards in the perspectives of pre-emptive and preventive wars. Historical references will present past situations in which the US used pre-emptive military force against other states. The study comments on the military actions which were taken by the United States and which could reasonably be interpreted as pre-emptive in nature. In this context, the Cuban Missile Crisis of 1962 is taken by the Bush Administration as a significant example of pre-emption. [13] However, contrary to what President Bush and his Administration perceive, pre-emption in the Cuban Missile Crisis was seriously contemplated by the US but not ultimately used.[14] This is to be extensively examined in Chapter four. This study is to analyze whether an action said to be pre-emptive is an act of aggression or one of legitimate self-defense, or whether no law can answer this.

II. Conceptual/ theoretical framework:

This study is based on a conceptual framework focusing on the pre-emptive war; this concept is analyzed in the light of the Western perspective with respect to just war theory, the UN Charter, and international law. Within this perspective, there are different attitudes and judgments representing a diversity of opinions about this concept.

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[12] Michael Byers, Customs, Power and the Power of Rules: International Relations and Customary International Law: Cambridge University Press, 2003. 2. Available at: www.cceia.org/viewMedia.php/prmTemplateID/8/prmID/867

[13] Joe Hendren, The Fog of Iraq. 2004 Available at: http://homepages.paradise.net.nz/joe.hendren/html/articles/fogofiraq.htm

[14] Samuel Bemis, A Diplomatic History of the United States: New York, 1965. 519.

Thomas Nichols supports the American pre-emptive strike on Iraq. "An attack on Iraq would represent a legitimate recourse to war by coalition powers exercising their collective right to engage in the last resort in violence against a regime whose actions have finally rendered any other course impossible," said Nichols.[15] He affirms that such an act against Saddam Hussein and his regime would not be prevention.

John Moore has affirmed that the US is simply exercising the right to individual and collective defense, and it is the phrasing of the doctrine to pre-emptive action that made critics and certain states claim that the United States was justified in acting unilaterally and without the approval of the United Nations.[16]

On the other hand, Noam Chomsky perceives the national security strategy as a grand imperialist strategy to authorize the USA to carry out preventive war. For him, whatever the justifications for pre-emptive war might be, they do not hold for preventive war, particularly the use of military force to eliminate an invented or imagined threat. For Chomsky, preventive war is the supreme crime and was condemned at Nuremberg.[17]

From the UN Charter and international law perspective, force is authorized in essentially two or, at most, three circumstances. First, Chapter VII: Articles 39 and 42 of the UN Charter permit the Security Council to determine the existence of any threat to the peace, breach of the peace, or act of aggression and to authorize the use of force to maintain or restore international peace and security.

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[15] Thomas Nichols, Just War, not Prevention, 2004, 1. Available at: www.cceia.org/ viewmedia.php

[16] John Norton Moore, the director of the Center of National Security law, Comments on the US National Security Strategy, on Feb. 23, 2003. Available at: http://www.law.virginia.edu/lawweb/Faculty.nsf/FHPbI/1359

[17] Noam Chomsky. "Preventive War: the Supreme Crime." New York Times 18 March 2003.

Second, Article 51 of the UN Charter recognizes the inherent right of individual or collective self-defense against an armed attack.[18] Does either of the first two grounds justify the war against Iraq?

Third, an international norm may be emerging that would permit nations to use military force to prevent genocide or other humanitarian catastrophes.[19] However, while Saddam Hussein has, in the past, committed horrific acts against his own people, the U.S. has not argued that intervention is necessary to address ongoing crimes against humanity.

III. Research Questions:

This research is a conceptually-oriented analysis. States, academic and legal scholars, international institutions and the person in the street are all engaged in a debate about both the legal status and the ethical legitimacy of the right of self-defense. The research is based on one basic question that the study highlights: How far can we stretch the legal grounds for a military intervention? To answer it, I have to answer some other major questions related to the concepts used in this research. Among these questions are the following: What is the difference between pre-emptive attacks and preventive ones? What are the main conditions in international law under which states can exercise the use of force? When and under what circumstances can preemptive war be legitimate? If the US strike was not pre-emptive, can the Bush Administration extend the right of self-defense to preventive offensive war?

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[18] UN Charter, Chapter VII.

[19] Humanitarian Intervention, Journal of International Affairs,. 2001, Vol. VI – No. 2.

IV. Definitions:

Pre-emption and prevention are two contingent concepts defined in different ways according to distinct opinions and perspectives. Whether pre-emptive or preventive, the excuse is anticipatory self-defense. Anticipatory self-defense covers a wide range of both pre-emptive and preventive uses of force. A state does not need to be attacked to defend itself; a state can anticipate an attack, make the first strike, and still call it legitimate self-defense or anticipatory self-defense. So, what, if any, difference is there between pre-emption and prevention?

Michael Walzer, one of the most eminent contemporary writers on the theory of just war, argues that preventive wars are fought for reasons that fall outside the circle of immediate security concerns. For him, preventive wars are attacks that respond to a distant danger, a matter of foresight and choice. Pre-emptive use of force is an attack against real danger that will materialize a war. Pre-emptive war breaks out primarily because the attacked feels that it will itself be the target of a military attack in the short term.[20]

In this perspective, a distinction between short term threats and long term threats is to be illustrated. Such a distinction is made by characterizing a threat. Characterization of emerging threats will be conditional and circumstantial based on the nature of potential and actual conflict, and the dimensions of it.

Walzer believes that pre-emptive wars are fought due to fear and contends that preventive wars are fought to maintain the balance of power. For Walzer, there is a fundamental difference in the perceived threat. The threat behind preventive wars exists

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[20] Michael Walzer, 2000, 75.

in the mind's eye, but force is pre-emptive when an actual threat has presented itself. The difference between legitimate and illegitimate use of pre-emptive force lies in the matter of sufficient threat, which Walzer defines as including "a manifest desire to injure, a degree of active preparation that makes that intent a positive danger, and a general situation in which waiting or doing anything other than fighting greatly magnifies the risk."[21]

Pre-emptive war and Preventive war differ in the degree of certainty of an attack. In my thesis, I adopt the following definitions in order to proceed with this study: A pre-emptive attack or pre-emptive war is launched in an attempt to repel or defeat an imminent offensive or invasion, or to gain a strategic advantage in an imminent, usually unavoidable, war.[22] However, a preventive war is a war in which one state attacks another under the pretense of preventive self-defense where there is no military provocation and therefore it is considered a war of aggression which is forbidden by international law. The justification often used by states engaging in preventive war is that another state may attack them in the future, so they attempt to forestall it.[23]

V. Literature Review:

This subject was reviewed and studied over a period of time by several scholars, legal experts and analysts, and particularly after the recent war in Iraq. Some scholars have done studies that are very closely related to what I am contributing, but are of different scopes and directions. However, reading these articles and in terms of what the

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[21] Ibid, 76- 81.

[22] Encyclopedia of international law, Definitions of Pre-emptive war. Available at: http://en.wikipedia.org

[23] Ibid, Definition of Preventive war.

authors actually examined in their researches, their findings, viewpoints, they can be helpful guides for me to proceed in my study.

Some tried to support the concept of pre-emptive war and tried to support their points of view by referring to historical events and asserting the need for having such an option available. However, others have tried to reject the case for pre-emption with specific reference to the case of Iraq. Other arguments have stressed principles of international law, articles of the UN Charter, and the long-term effects rather than short-term results. Most of scholars did not try to criticize the proposed pre-emptive war on Iraq but rather opposed it. Moreover, they made a distinction between *pre-emptive* and *preventive*, to clarify the problem of whether a first strike can be considered a defensive act rather than an act of aggression. The prominent analysts contributing in this field have been Michael Walzer, Daniel Webster (States Secretary 1842), and Neta Crawford. Based on their findings in the field, I am able to distinguish between what is relevant in analyzing my subject and what isn't. Daniel Webster's notification presents a historic source, Michael Walzer works present both historic and current source, whereas Neta Crawford's work presents current source.

Further, the literature review included a historical review of the American use of force based in which one can make relevance in the American foreign policy. Literature reviews provided me a framework according to which I can counter-argue the legality of *pre-emptive/preventive* war in general and the war against Iraq in particular, and debate the future of the UN Charter on this area of international law, to define whether the new situation requires a change in international law.

VI. Methodology:

This study is based on definitions, historic events, political opinions, legal analysis, UN Charter and notions under international law. It has a conceptual framework as it depends on basic concepts, theories, and notions. Hence, the methodology used is a content analysis to present distinct definitions, analyze different approaches made in this field and reveal significant differences. Content analysis is used to support the thesis of this research.

VII. Organization of Chapters:

This thesis is organized in six chapters. Chapter one is an introductory chapter that explains the purpose, the direction of this study and the methodolgy used. In the introduction, I shall inculde the motives, reasons and factors that stimulated my intellect to write about this topic.

The second chapter discusses the use of force and the pre-emptive use of military forces under customary international law and the UN Charter. The right of use of force is authorized in self-defense and may be extended to pre-emption in cases of an imminent threat. Pre-emption has existed since 1837, the time a notification was articulated by the US Secretary of State Daniel Webster. Then, it discusses the different debates related to self-defense as an inherent right, self-defense with respect to threats of non-state actors, and anticipatory self-defense. It analyzes whether the right of self-defense contained in Article 51 of the UN Charter extends to the right of anticipatory self-defense.

Chapter three identifies Just War, its criteria, and its two basic components under international law: *jus ad bellum* and *jus in bello*. This chapter defines both *pre-emptive* war and *preventive* war, creating a distinction between both on the basis of the imminence of the threat, i.e., long-term threats versus short-term threats.

The fourth chapter presents a preview of the American use of military force, focusing on the Cuban Missile Crisis with respect to the Iraq war. Further, it includes an analysis of the National Security Strategy in a way to highlight the major concepts and themes in the National Security Strategy (NSS). Following this analysis, the NSS is analyzed through the international theories of realism, pluralism and globalism, to end up asking whether the Strategy is a preemptive or preventive strategy.

The fifth chapter will include the US defense and its legal justification for the Iraq war. A counter-argument for the US claims from different perspectives and points mainly is made based on the UN Charter, and the Humanitarian Intervention Act. Finally, it attempts to judge whether the war was legal or not.

The last chapter concludes the thesis by summing up what was discussed in each chapter and commenting on the legality of the Iraqi war, the UN status, and the doubt of having a new precedent.

Chapter Two:

Use of Force and Pre-emptive Military Attacks in International Law

International law is composed of two distinct but equally important components: black-letter law, protected in the United Nations Charter and treaties, and customary international law.[24] The use of force frequently takes the form and the excuse of self-defense or anticipatory self-defense. Although the right to self-defense is formally incorporated and protected by the United Nations, it is much more difficult to argue that the right to anticipatory self-defense is granted similar Charter protection.

I. Pre-emptive Military Attacks under Customary International Law:

Until recent decades, the right to use force and even to go to war was an essential attribute of every state under customary international law. It always lies within the power of a state to endeavor to obtain redress for wrongs, or to gain political or other advantages over another, not merely by the employment of force, but also by direct recourse to war.[25] Within that framework, customary international law recognized self-defense as a legitimate basis for the use of force:

> *An act of self-defense is that form of self-protection which is directed against an aggressor or contemplated aggressor. No act can be so described which is not occasioned by attack or fear of attack. When acts of self-preservation on the part of a State are strictly acts of self-defense, they are permitted by the law of nations, and are justified on principle, even though they may conflict with the ... rights of other states.*[26]

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[24] H. Charles Cheney, International Law Chiefly As Interpreted and Applied by the United States, (Vol.1 1945), 122.
[25] Ibid, Vol 3, 168.
[26] Ibid. Vol. 1, 237.

Moreover, the recognized right of a state to use force for purposes of self-defense has traditionally included the pre-emptive use of force, i.e., the use of force in anticipation of an attack. Hugo Grotius, the father of international law, stated: "It be lawful to kill him who is preparing to kill."[27] A century later, Emmerich de Vattel similarly asserted:

> *The safest plan is to prevent evil, where it is possible. A Nation has the right to resist the injury another seeks to inflict upon it, and to use force ... against the aggressor. It may even anticipate the other's design, being careful, however, not to act upon vague and doubtful suspicions, lest it should run the risk of becoming itself the aggressor.*[28]

The classic formulation of the right of pre-emptive attack was given by Secretary of State Daniel Webster in connection with the famous *Caroline* incident. In 1837 British troops attacked and sank an American ship, the *Caroline*, in U.S. waters because the ship was being used to provide supplies to insurrectionists revolting against British rule in Canada headquartered on an island on the Canadian side of the Niagara River. As a result of this incident, Daniel Webster articulated a notification essential to the legitimacy of the pre-emptive use of force under customary international law. He asserted that an intrusion into the territory of another state can be justified as an act of self-defense only in those "cases in which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means and no moment for deliberation."[29]

II. Effect of the United Nations Charter

The legitimacy of the use of force by individual states under international law as recognized with the founding of the United Nations Charter has been significantly discussed within the Charter itself. The Charter of the UN states in its Preamble that the

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[27] Hugo Grotius. The Law of War and Peace, (Cambridge: 1814) 1625.

[28] Emmerich De Vattel. The Law of Nations, (Philadelphia: 1883), Vol. IV, 3.

[29] Daniel Webster. "Letter from Secretary of States Daniel Webster to Lord Ashburton" (August 6, 1842), 412.

UN is established to save succeeding generations from the scourge of war[30] and its substantive provisions obligate the member states of the UN to settle their international disputes by peaceful means and to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the purposes of the United Nations (Article 2).[31] The Charter creates a system of collective security in which the Security Council is authorized to determine the existence of any threat to the peace, breach of the peace, or act of aggression, and to decide what measures should be taken to maintain international peace and security (Article 39).

The Charter authorizes the use of force in the situations set out in Chapter VII. Article 42 states that, if peaceful means have not succeeded in obtaining adherence to Security Council decisions, the Security Council may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. In effect, this means that a state requires a UN Security Council resolution before using force against another state.[32]

The UN Charter recognizes the right of nations to use force for the purpose of self-defense. There are different debates about the nature and scope of the right to self-defense: is the right of self-defense a "natural" right or one granted and/or governed by the Charter? Does this right extend to non-state actors? And finally, does the right of self-defense, as contained in the Charter, extend to the right of anticipatory self-defense?

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[30] UN Charter "Preamble", available at: http://www.un.org/aboutun/charter

[31] Ibid, Chapter I.

[32] Ibid, Chapter VII.

1. Right of self-defense: is it an "inherent" right?

Although it can be legitimately claimed that the right of self-defense is a "natural right", it is more difficult to argue that the Charter did not intend to restrain this right in some form. Article 51 states:

> *Nothing in the present Charter shall impair the inherent right of individual or collective self-defense 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-defense 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.*[33]

Article 51's articulation of the right of self-defense seems to preclude the pre-emptive use of force by individual states or groupings of states and to reserve such uses of force exclusively to the Security Council. Measures in self-defense are legitimate only after an armed attack has already occurred.[34] Article 51 can be understood as protecting the state's right to the first strike, and recognizing the inherent right of individual or collective self-defense as it was found under customary international law and developed with the adoption of the Charter to preserve it. Others argue that Article 51 should not be interpreted in this manner and that it would be a misinterpretation of the purposes of the Charter to compel a defending state to allow its assailant to deliver the first attack. [35]

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[33] UN Charter, Chapter VII.

[34] "Nicaragua v. United States of America" ICJ Reports: (1986). 14.

[35] Humphrey Waldock,"The Counter proliferation Self-Help Paradigm:" Journal of International Law & Policy, 1999.

"Inherent" means natural as innate. Can the right of self-defense be termed a "natural" or "inherent" right? John Locke, in his book *The Two Treatise of Government,* argues that people lived in a state of nature before the formation of civil society and civil government. In this state of nature, power and jurisdiction were reciprocal and everybody was equal; thus, it was simultaneously a state of perfect freedom and a state of equality. However, even in this state of nature, there were definite limits on the freedoms that could be exercised by people: "Though this be a state of liberty, yet it is not a state of license." Locke further argues that there are two rights that stem from the right of self-defense. The first right gives all people the right to punish the offender because of the need to deter other people from committing crimes. The second right is the right to reparation and applies only to the victim.[36] Realists such as Locke and Hedley Bull, argue that having nations so entirely sovereign and free with no higher authority would lead to international anarchy. In modern international society, as in Locke's state of nature, there is no central authority able to interpret and enforce the law, and thus individual members of society must themselves judge and enforce it.[37]

If this analogy is true, then the law of nature is somehow applicable to states in the international system. Therefore, countries would be authorized, under the law of nature, to use both individual and collective self-defense. However, it can also be legitimately argued that the United Nations was created and empowered in an attempt to create a society and to leave behind the state of nature. The United Nations was formed after the Second World War with the purpose of maintaining international peace and security. The United Nations is a social contract involving states to act the role of an impartial third party.

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[36] John Locke, Two Treatises of Government. (Cambridge, U.K.: University Press, 1980), 5-10.

[37] Hedley Bull. The Anarchical Society: A Study of Order in World Politics. (New York: Columbia University Press, 1977), 48.

Although the right of self-defense is a natural right that existed before the formation of the United Nations, this does not imply that the United Nations Charter has not restricted this right. The United Nations has not established a world government and has not managed to create a third-party impartial system. It can be argued that the International Criminal Court is attempting to fill this void, at least in principle, by applying international law objectively and consistently to all nations of the world regardless of their relative power in the international system. In theory, the closest to the third-party impartial judge system in contemporary international law is supposed to be the Security Council; however, in practice it is not. Article 51 states "nothing shall impair the inherent right....until the Security Council has taken measures." This implies that the exercise of the right of self-defense by states is protected in its original form only until the third party judge, the Security Council, has taken charge of the situation and has decided whether or not to act.

Is the right to self-defense inherent right and thus only recognized, but not granted, by the Charter? Or is this right a Charter-derived right? If the right to self-defense is "inherent" then states that choose to exercise this right do not need permission from the Security Council or the world community to do so. On the other hand, if the right to self-defense is Charter-based, then the Security Council has a responsibility in supervising the exercise of this right.

2. Self-defense and the Threat of Non-State Actors:

Does the right of self-defense extend to defense against threats from non-state actors? This question is studied with respect to the September 11 attacks on the United States and the war on terrorism. President Bush's Administration believes that the primary threat faced by the world is one of terrorism. However, terrorists are non-state

actors and international law usually confines its jurisdiction to state actors. So, the question arises: does Article 51 restrict the scope of the right of self-defense to state actors?

Robert Keohane argues that Article 51 expressly states that the right of self-defense can be invoked against armed attacks, and does not restrict this right to armed attacks by state parties.[38] Keohane contends that this action establishes the right of the Security Council to take action against non-state actors and maintains that the same rule of jurisdiction that gives the Security Council the right to respond to terrorist attacks also extends to the state attacked.

In this context, defining the term "armed attack" becomes crucial for setting limits to the right of self-defense. The International Court of Justice in *Nicaragua v. United States of America* in this perspective rejected the inclusion of state or non-state support to armed groups, including the supply of arms within the boundary of armed attack:

> *While the concept of an armed attack includes the dispatch by one State of armed bands into the territory of another State, the supply of arms and other support to such bands cannot be equated with armed attack. Assistance to rebels in the form of the provision of weapons or logistical or other support does not constitute an armed attack. Active, not passive, support...is necessary to meet the armed attack requirement.*[39]

Terrorist acts have been controversial mostly since September 11. Under the United Nations Charter, the Security Council is the main organ with the power to pass resolutions that are legally binding on all states.[40] Security Council Resolution 1368

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[38] Robert Keohane, Interpretation and Change in the Law of Humanitarian Intervention.(Cambridge, UK: Cambridge University Press, 2003) 52.

[39] Michael Glennon. "The Fog of Law: Self-defense, inherence, and incoherence in Article 51 of the United Nations Charter": Harvard Journal of Law and Public Policy, Spring 2002.

[40] UN Charter, Chapter V Article 25.

classified the September 11 attacks as a threat to international peace and security, and invoked Articles 41 and 42 (Chapter VII) to take measures to restore international peace and security. [41]

Consequently, a new Security Council resolution was passed. Security Council Resolution 1373 states that all states shall refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members to terrorist groups and eliminating the supply of weapons to terrorists. [42]

Some scholars claim that Resolution 1373 gives military authority to the accuser state and does not require the state to get Security Council authorization; however, neither the resolution nor Article 51 of the Charter confirms this claim. One of the main problems in dealing with non-state actors is that, while they are not formally associated with a state, they often have strongholds in a particular country. [43]

The September 11 attacks provide an excellent example of this problem. Al-Qaeda terrorists operated in many countries, including Spain, Germany, and the United States, but Afghanistan was their stronghold. Al-Qaeda was not officially part of Afghanistan or the Taliban regime, but the military response to the September 11 targeted Afghanistan. The resolution did not make it clear about who was to decide the compliance or the non-compliance of a state. Does the accuser need to go to the Security Council to get permission to attack the accused or does this resolution

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[41] UNSC Resolution 1368, Threats to international peace and security caused by terrorist acts, 2001, available at: http://www.un.org/Docs/scres/2001/sc2001.htm

[42] UNSC Resolution 1373, Threats to international peace and security caused by terrorist acts, 2001, available at: http://www.un.org/Docs/scres/2001/sc2001.htm

[43] Richard Grimmett, "CRS Report for Congress: Code RS21311." U.S. Embassy of Beirut, (April 11/2003), 4.

automatically give military authority to states? What is the proof required? How much effort does a state need to comply with the terms of the Resolution?

Although Resolution 1373 makes it clear that states are not allowed to harbor terrorists, some terrorist groups have strongholds in more than one country, and are also capable of operating without the support, active or passive, or knowledge of the government. Resolution 1373 does not provide solutions to the problems that arise from such issues.

3. Article 51 and Anticipatory Self-Defense:

One of the most debatable issues arising from Article 51 is whether the right of self-defense extends to anticipatory self-defense. Do states have a right to defend themselves pre-emptively against a threatened attack before it is actually launched?

Article 2(4) of the Charter prohibits force and even the threat of force in international relations.[44] Therefore, it restricts the range of actions that a state may undertake in its dealings with another state. However, Article 51 deals with the appropriate response of a state if another state has violated Article 2(4). The United Nations Charter was drawn up to minimize the chance of war and aggression in the international community, and this intent was understood to include the threat of use of force, stating some actions defining a threat. Therefore, while Article 2(4) includes the prohibition of the threat, Article 51 gives the right of self-defense only to states who have been subjected to actual armed attack.

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[44] UN Charter, Chapter I Article 2(4).

The principle of anticipatory self-defense is when a nation defending itself before an attack takes place where the threat is "instant, overwhelming, leaving no choice of means and no moment of deliberation." Walzer asserts that the UN Charter forbids wars of anticipation or security as stated in Article 51 "if an attack occurs"; nevertheless, for him the use of anticipatory force for self-defense by a state appears to have been customarily accepted by the international community, but is severely restricted. [45]

The defense must be carried out within a reasonable time from the initial attack in order to fit the characterization of defense during ongoing armed attacks. If terrorists are planning a series of attacks in a terror campaign, the state may respond to prevent future attacks about which it has evidence. In the absence of convincing evidence of future attacks, responsive force could amount to unlawful reprisals or punishment; however, the enemy's intention to continue means that even armed force in self-defense is lawful.[46]

Given this interpretation, it is extremely unlikely that the drafters of the Charter would have intended to include pre-emptive attacks within Article 51. Yoram Dinstein notes that even the critical powers granted to the Security Council are restricted to the exclusive setting of counter-force employed in response to an armed attack.[47] This is clear and confirmed with two Security Council resolutions related to the right to resort to self-defense in the face of the September 11 attacks.[48] Resolution 1368 calls on the international community to redouble their efforts to prevent and suppress terrorist acts;

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[45] Walzer, The Definition of Aggression. (1974), 74.

[46] UN SC Res. 183 (1964). The Exception of Self-Defense in U.N. Practice, in Legal Regulation of the Use of Force

[47] Mary O'Connell. Evidence of Terror: Conflict and Security: (2002) 30.

[48] Yoram Dinstein. War, Aggression and Self-Defense: (Cambridge, Grotius Publications Limited, 1988), 175.

Resolution 1373 reaffirms the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts. Dinstein argues that if pre-emptive wars were intended to be allowed under Article 51, the Security Council would have been granted even greater power and mechanism to employ its own decisions with out the support of states.

Self-defense within the context of Article 51 implies resort to counter-force; self-defense comes in reaction to the use of force by the other party. Article 51 clearly requires an armed attack to occur before the right of self-defense can be invoked. Therefore, it is very difficult to argue that the right of self-defense, as articulated in Article 51, extends to the right of anticipatory self-defense.

Chapter Three:

Distinction between Pre-emptive and Preventive

Pacifism says that all war is morally prohibited. Realism says that war is about power and self-interest.[49] In contrast to both of these perspectives, the just war tradition, developed over a period of 1500 years, says that ethical standards can and should be applied to the activity of war. Here come the two important aspects of international law dealing with the law of force: *jus ad bellum* or the rules relevant to the use of force, and *jus in bello* or the rules regulating the conduct of hostilities. *Jus ad bellum* is about the legality of the attack, while *jus in bello* is about the obligations of belligerent occupants in the attacked territory.[50]

There are six criteria identified that must be met in order to justify war:

1. The cause must be just. Just cause is classically understood to refer to self-defense. The use of military force is justified when it is used to repel an unjust aggressor and to retake what the unjust aggressor has taken. It is generally acknowledged that a nation may use force to protect a neighboring state from attack from an outside hostile power. Thus, self-defense is a legitimate reason for nation state to resort to military force.

2. The war must be undertaken by a legitimate authority. If an illegal authority within a nation made the decision to go to war, such a decision would be unjust for it would violate the basic principles of how a given society is governed. [51]

3. War must be a last resort, undertaken only after all other reasonable measures short of war have proved inadequate.

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[49] Viotti and Kauppi, International Relations Theory: (Vaicom Company, 1999) 55.

[50] Christine Gray, International Law and the Use of Force: (Oxford University Press, 2000) 25.

[51] William O'Brien. The Conduct of Just and Limited War: (New York, 1981) 181-198

4. War should be fought with right intention, meaning that the motives for the war must not be to inflict undue suffering on the enemy state; the defending must use only the amount of force which is necessary to achieve its just cause. The goal of war is to obtain a just and durable peace. [52]

5. The predictable consequences of going to war must be foreseen as better than the consequences of not going to war. There must be a reasonable expectation of victory.

6. There can be no injury directly intended to non-combatants. [53]

Pre-emption and prevention doctrines are very decisive concepts when it comes to waging war. Whether pre-emptive or preventive, the pretext proclaimed by a state is anticipatory self-defense. Anticipatory self-defense has a broad scope that covers both pre-emptive and preventive uses of force. A state does not need to be attacked to defend itself; a state can anticipate an attack, use the first strike, and still call it legitimate self-defense or anticipatory self-defense. So, what is the difference between pre-emption and prevention?

I. Definition of Pre-emption v. Definition of Prevention.

To proceed in this study, I adopt the following definitions stated in the *Encyclopedia of International Law*.

A *pre-emptive* war is waged in an attempt to repel or defeat an imminent offensive or invasion, or to gain a strategic advantage in an imminent, usually unavoidable war. However, a *preventive* war is a war in which one state attacks another on the pretext of preventive self-defense where there is no military provocation and

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[52] O'Brien, 1981, 200-201.

[53] James Johnson, Just War Tradition and Low Intensity Conflict: (Alberto R. Coll. 1995) 149-150.

therefore it is considered a war of aggression which is forbidden by international law. The justification often used by states engaging in preventive war is that another state may attack them in the future, so they attempt to forestall it.[54] *Preventive* war and *pre-emptive* war differ in the certainty of an attack. The justification often used by states when engaging in preventive war is that another state may attack them in the future, for which reason there is an attempt to prevent it.

In addition to the above definitions, I have relied to a great extent on Daniel Webster's notification on pre-emptive self-defense and the concept of just war theory in order to proceed in my analysis.

The difference between pre-emption and prevention is that pre-emption is in response to an imminent threat, and thus is considered a legitimate use of force in international law. This immediate threat does not exist in the case of prevention, which is an illegitimate use of force.

The distinction between immediate threats and long-term potential threats makes the distinction between pre-emption and preventive war. Such a distinction is done through characterizing a threat. Characterization of emerging threats will be conditional and circumstantial based on the nature of potential and actual conflict, and the dimensions of it. Characterization will vary broadly based on location and circumstance along the range of potential threats and the wide variety of emerging trends of military significance. Conditions perceived as threats can be generally related to ideology difference, denial of access to resources and markets, regional instability, military threats/weapons proliferation, and could be a combination of all. Most importantly in

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[54] Encyclopedia of International Law, Definitions of Pre-emptive war and Preventive war. Available at: http://en.wikipedia.org

determining the difference between short-term threats versus long-term threats is the period for a threat to develop: days, months versus years, future.[55]

II. Legitimate Pre-emptive Use of Force:

When it comes to international law, the question of whether starting a pre-emptive war is justified or not is not as critical as to that of whether the action is an act of aggression or of legitimate self-defense. The criteria for judging the action are ones derived from international politics and specific laws. These laws are the unwritten understandings of international actors, and these understandings change with time and circumstances according to world politics.

Pre-emptive war is directed against an opponent who has not yet attacked anyone. It is a critical step and should only be undertaken if it is both necessary and morally justified. Building on the Webster notification of the *Caroline* incident and just war theory, I argue that a legitimate pre-emptive use of force must meet four conditions:

1. Self-defense:

The party considering pre-emption should have a strict and narrow definition of self-defense, meaning only military targets to maintain peace and security are allowed. On the other hand, when our lives are threatened we must be able to defend ourselves, using force if necessary. Moreover, self-defense may cover not only one's life or mere existence but also one's freedom and property, in other words one's interests. But when it comes to a political or social entity, the question of what degree of independent existence or what particular interests one may legitimately use force to defend is not

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[55] Patrick M. Hughes, USA General Director, Defense Intelligence Agency. Congressional Hearing: (1996). Available at: http://www.fas.org/irp/congress/1996_hr/s960222h.htm

always clear. A broad conception of self is not obviously legitimate, nor are the values to be defended apparent. When the self is defined too extensively, too many interests become vital, hence self-defense is not lawful anymore. War itself and pre-emption are not justified to protect imperial interests or assets taken in a war of aggression. [56] Thus, pre-emption is certainly legitimate if it is to defend the simple existence, but not necessarily legal if it is to defend certain interests, strategic interests.

2. Justified Fear of Imminent Attack

To justify pre-emption there must be strong evidence that war is inevitable and likely to happen in the immediate future. Immediate threats are those which are obvious within hours or weeks unless action is taken to prevent an attack.[57] This requires clear intelligence showing that the potential aggressor has both the capability and intention to do harm in the near future. Capability alone is not a justification.

Fear in the presence of an imminent attack causes government and people to be alert. But fear may be an exaggerated reaction to threats that imply no more than a risk to the territorial integrity or political independence of a state. This uncertainty may cause pre-emptive attacks when there is no immediate threat.

Aggressive intent accompanied with a capacity to do immediate harm is the right justification for legitimate pre-emption. Here come two questions: Has the aggressor harmed us in the past or claimed to attack us in the near future? And is the aggressor moving his forces into a position to do significant harm? At this point secrecy is a sure sign full of meaning for adversaries. Hence, there must be a direct threat by the aggressor leading to a threshold of fear justifying a pre-emptive action.

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[56] Richard K. Betts, Surprise Attack: Lessons for Defense Planning, Brookings Institution: (1982), 142- 143.
[57] NSS, Strategy I.

The threshold for credible fear in a normal war or attempt of war is necessarily lower than that of counter-terrorism war, where terrorists adopt surprise attacks. But the consequences of lowering the threshold of fear may be increased instability and premature use of force. If simple fear justifies pre-emption, then pre-emption will have no limitations since, according to the Bush Administration's arguments, they cannot always know with certainty what the other side has and where its weapons might be located or when they might be used. [58]

3. Success of the Pre-emption:

The justified pre-emption must be likely to succeed in reducing or eliminating the threat.[59] Specifically, the damage should be greatly reduced or eliminated by a pre-emptive attack. In this case, pre-emption is justified as it reduces the threat. If pre-emption is likely to fail in its purpose, i.e. elimination or reduction of danger, then it should not be undertaken. Pre-emption may be easier against states simply because the preparations of governments, even for surprise attacks, tend to involve larger-scale mobilizations that are often clearly visible, unlike the preparations of terrorist groups. Evidence justifying a pre-emptive attack on terrorists is difficult to find since terrorists have no specific headquarters, being lost in the civilian population.

4. The Need for Immediate Military Force:

For military pre-emption to be justified, then there must be no time for other measures to work. [60] In other words, force is chosen as a last resort where there are no other measures that are likely to prevent a devastating attack. If an attack can be avoided

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[58] National Strategy to Combat Weapons of Mass Destruction, December 2002, available at: www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf.

[59] Paul Schroeder. The Case Against Preemptive War, 2004. Available at: www.amcinmag.com

[60] Schroeder, 2004.

by arresting a potential terrorist, for example, then military strikes should not be used even if they also would be effective. If military force is not absolutely necessary then it is the responsibility of the party threatened to try to work out other means to resolve conflicts with the potential adversaries.

If these four conditions for undertaking a justified pre-emptive strike are met, then the use of pre-emptive force is legitimate. Moreover, the use of pre-emptive force must also meet *jus in bello* criteria of proportionality and discrimination. In other words, the damage caused by the pre-emptive strikes should not exceed what was put at risk by the attack which is pre-empted. Pre-emptive actions must have limited military objectives to maintain security with no interests, and the pre-emptive action should cease when the threat is eliminated or significantly reduced. A legitimate pre-emptive strike should not go beyond reducing or eliminating an immediate threat.[61]

III. Pre-emption v. Prevention:

Although pre-emption is not mentioned in the United Nations Charter, where only self-defense in the case of attack is allowed under Article 51, pre-emption has historically been considered a specific kind of self-defense against immediate threats. Various scholars and legal analysts have defined the two concepts differently. Some define pre-emptive attack as a last resort, in an extremely dangerous and unique situation where all other options appear to be ineffective, and where the conditions favor success.[62]

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[61] Schroeder, 2004.

[62] B. Schneider, Evaluating preemptive counter-proliferation, Washington (1995) 6. Available at: www.comw.org/pda/fulltext/95schneider.pdf

According to a Brooking Institute report, the concept of pre-emption is not limited to the traditional definition of pre-emption, but also includes prevention as striking an enemy even in the absence of specific evidence of a coming attack." [63]

About just war theory, Walzer defines pre-emptive use of force as an attack to counter real danger where the party acting pre-emptively feels that it will itself be the target of a military attack in the short term. [64]

Prevention or what is called preventive war does not exist in international law. There is no precedent in international law for use of force as a preventive measure when there has been no actual or imminent attack by the offending State. Some scholars envision preventive war as an attack on an enemy based on a relationship of power that favors the attacker, in a situation where the initiator must act or lose. It is fought for the balance of power. [65]

In just war theory, similarly just as Walzer defined pre-emptive use of force, he also defines preventive wars as attacks that respond to a distant danger, a matter of foresight and choice. He argues that preventive wars are fought for reasons that extend beyond immediate security concerns. [66]

For Walzer, pre-emptive wars are fought due to fear in order to maintain security; however, preventive wars are fought in order to maintain the balance of power and even supremacy. Walzer considers that there is a fundamental difference in the threat perceived in the two cases. War is pre-emptive when there is a threat openly

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[63] Michael E. O'Hanlon, "The New National Security Strategy and Pre-emption" (2003). Available at: http://www.brook.edu/comm/policybriefs/pb113.htm

[64] Walzer, 2000, 75.

[65] Thomas Nichols, Just War, not Prevention, (2004) 1. Available at: www.cceia.org/ viewmedia.php

[66] Walzer, 2000, 75.

proclaimed, whereas war is preventive when the threat is perceived only by the mind of the party resorting to it. The difference between legitimate and illegitimate use of pre-emptive force lies in the presence or absence of sufficient threat. Walzer defines a sufficient threat as a counter attack with the use of force coupled with a manifest desire to injure and a degree of active preparation that makes the intent a source of positive danger, and accompanied by a general situation in which waiting or doing anything other than fighting greatly magnifies the risk. [67]

If pre-emption may be legitimate, is it the right of the state to extend the plea of justified pre-emption to a preventive war? If all threats are considered imminent and unavoidable without the use of force, then the state has the right. For example, the threat posed by terrorism is significant. Unconventional adversaries prepared to wage unconventional war can conceal their movements, weapons, and immediate intentions and may conduct devastating surprise attacks.

A policy of prevention focuses more on a rival state's capacity rather than on an actual threat posed by that state. Israel's strike against Iraq's Osirak nuclear reactor in 1981 is probably one of the best examples of an illegal preventive attack. In that case there was no clear threat of imminent attack from Iraq, but the Iraqis were about to turn this reactor on and the Israelis decided to confront the problem earlier sooner than later. The entire Security Council, including the United States, subsequently condemned the attack. [68]

The Security Council has never authorized force based on a potential, non-imminent threat of violence. All past authorizations have been in response to actual

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[67] Walzer, 2000, 76-81.

[68] Stephen Murdoch, Preemptive War: Is It Legal? Available at: www.dcbar.org/for_lawyers/index.cfm

invasion, large scale violence or humanitarian emergency. If the Security Council, for the first time, were to authorize preventive war, it would undermine the UN Charter's restraints on the use of force and provide a dangerous precedent for states to consider the *preventive* use of force in numerous situations making war once again a tool of international politics rather than a prohibited action.

As said above, pre-emption is legal only if it is limited to countering clear and immediate dangers and if there are limitations on its conduct, namely proportionality, discrimination, and limited aims. If pre-emption becomes a strategy, then it is extended beyond mere defense against immediate threats; it becomes the cover for a preventive offensive war. A legitimate pre-emptive war requires the states resorting to it to show that the potential aggressors have both the capability and the intention of doing great harm.

A doctrine justifying preventive-war undermines international law and diplomacy. Nowadays, nuclear, chemical, and biological weapons, though not widely held, are more readily available than they were in the past. Unlike conventional military forces, terrorists can use their means with immediate effect.

If all states reacted to potential adversaries as if they faced a clear and present danger of imminent attack, tensions would escalate along already tense borders and regions. Consequently, Article 51 of the U.N. Charter would lose much of its force. In short, pre-emptive and preventive-war doctrines move us closer to a state of nature than a state of international law. A doctrine justifying preventive war undermines international law and diplomacy.

Chapter Four:

The American National Security Strategy after September 11 2001

This chapter proposes a study of the American National Security Strategy 2002 issued by the Bush Administration. International terrorism has long been recognized as both a foreign and a domestic security threat. The tragic events of September 11 in New York and Washington changed the nation's focus in the United States. In a sense, the National Security Strategy reflects a grand global shift in which all nations have an opportunity to redefine their priorities. In redefining US priorities, the strategy focuses on international partnerships, winning the war against terrorism, and meeting all transnational challenges to states. The doctrine focused on two titles: homeland security versus alliance-building, and isolationism versus internationalism.

At first the Bush National Security Strategy proclaimed its aim of maintaining peace and democracy in the globe. After September 11, while enjoying a position of military strength and economic development as well as political influence, the US changed its national security strategy to one of defending itself against its enemies. The US seems to say it has a duty to act as the world's sole super power.

The aim of this chapter is to analyze the American National Security Strategy. Such analysis will be in correlation with the historical record of the American use of force, a comparative study between Cuban Missile Crisis and the case of Iraq, and an analysis of the doctrine in the light of the three international theories: realist, pluralist, and globalist.

I. American Use of Pre-emptive Military Force

The first part of this chapter will review the historical record of the uses of US military force as pre-emptive. It examines and comments on military actions taken by the United States that could be reasonably interpreted as pre-emptive in nature. For purposes of this analysis a pre-emptive use of military force is considered to be the taking of military action by the United States against another nation so as to prevent a presumed imminent military attack against the United States.

Such a review is necessary after the war against Iraq, whereby the United States claimed its right to use pre-emptive military force to defend its security. In September 2002, the Bush Administration published the National Security Strategy of the United States, which overtly states that the United States is prepared to use pre-emptive military force to prevent America's enemies from using weapons of mass destruction (WMD) against the States or against its friends or allies. [69]

1. Historical record:

Based on the pre-emptive war definition followed in this study, the historical record of the United States indicates that the U.S. has never so far engaged in a pre-emptive military attack against another nation, except once where the United States unilaterally attacked another nation militarily after being attacked. That was on the occasion of the Spanish-American War of 1898. In that military conflict, the principal goal of United States military action was to compel Spain to grant Cuba its political independence.[70] During the period prior to the US declaration of war against Spain, an

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[69] Speeches of President George W. Bush at West Point. June 1, 2002. Available at: http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html

[70] Grimmett, 2003, 3.

act of Congress passed in April 1898 declared Cuba to be independent of Spain, demanded that Spain withdraw its military forces from the island, and authorized the President to use US military force to achieve these ends, if necessary. [71] Spain rejected these demands, and an exchange of declarations of war by both countries took place.

The circumstances surrounding the origins of the Mexican War were somewhat controversial in nature but the use of pre-emptive attack by the United States does not apply to this conflict. As for the military operations in Russia in 1918, during and after WWI, the United States, as part of allied military operations, sent military forces into parts of Russia to protect its interests, and to render limited aid to anti-Bolshevik forces involved in the Russian civil war. In major military actions since the Second World War, the President has either obtained Congressional authorization in advance for use of military force against other nations, or has directed military actions abroad on his own initiative in support of multinational operations such as those of the United Nations or of mutual security arrangements such as those of the North Atlantic Treaty Organization (NATO). Examples of these actions include participation in the Korean War, the 1990-1991 Persian Gulf War, and the Bosnian and Kosovo operations in the 1990s. Yet in all of these varied instances of the use of military force by the United States, such military action was a response after some fact and was not pre-emptive in nature. [72]

The US military interventions, particularly the unilateral uses of force in the Central America and Caribbean areas throughout the 20th century, were not pre-emptive in nature.[73] What led the United States to intervene militarily in nations in these areas

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[71] Joint Resolution of April 20, 1898, [Res. 24] 30 Stat. 738

[72] Grimmett, 2003, 3.

[73] Grimmett, 2003, 3.

was not the view that the individual nations were likely to attack the United States militarily. Rather, these US military interventions were grounded on the view that they would support the Monroe Doctrine, which opposed interference in the Western hemisphere by outside nations. US policy was driven by the belief that if unstable governments existed in the Caribbean and Central America states, then it was more likely that foreign countries would attempt to protect their nationals or their economic interests through their use of military force against one or more of these nations. [74]

Consequently, the United States, in the early part of the 20th century, established through treaties with the Dominican Republic in 1907,[75] and with Haiti in 1915,[76] the right for the United States to collect Customs duties received by these nations. This effectively created US provinces in these countries which lasted until the Administration of President Franklin D. Roosevelt.

Intermittent domestic revolutions against the national governments in both countries led the US to utilize American military forces to restore order in Haiti from 1915 to 1934 and in the Dominican Republic from 1916 to 1924. But the purpose of these interventions, justified by the treaties with the United States, was to help maintain political stability, and thus eliminate the potential for foreign military intervention infringing on the principles of the Monroe Doctrine. [77]

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[74] J.D. Richardson. Compilation of the Messages and Papers of the Presidents, vol. 2 (1907), 287.
[75] Samuel Flagg Bemis, A Diplomatic History of the United States (1965) 519-538.
[76] Ibid, 578
[77] Grimmett, 2003, 4.

The same can be said about foreign intervention in Nicaragua. The United States in 1912 accepted the request of its President Adolfo Diaz to intervene militarily in order to restore political order.[78] Through the Bryan-Chamorro treaty with Nicaragua in 1914, the United States obtained the right to protect the Panama Canal and its proprietary rights to any future canal through Nicaragua, as well as islands leased from Nicaragua for use as military installations. This treaty also granted to the United States the right to take any measure needed to carry out the treaty's purposes.[79]

This treaty had the effect of making Nicaragua a quasi-province of the United States. Since political chaos in the country might threaten the Panama Canal or U.S. proprietary rights to build another canal, the U.S. could justify the intervention and long-term presence of American military forces in Nicaragua to maintain political stability in the country. US military forces were permanently withdrawn from Nicaragua in 1933. Apart from the above cases, US military interventions such as these in the Dominican Republic in 1965, Grenada in 1983, and in Panama in 1989 were based upon concern that U.S. citizens or various US interests were being endangered by the political instability in these countries. While U.S. military interventions in Central America and Caribbean nations were controversial, after reviewing the context in which they occurred it is fair to say that none of them involved the use of pre-emptive military force by the United States. [80]

Although the use of pre-emptive force by the United States is generally associated with the overt use of U.S. military forces, it is important to note that the United States has also utilized covert operations. As stated in Samuel Bemis book, *A*

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[78] Grimmett, 2003, 3.
[79] Bemis, 1965, 560.
[80] Ibid, 566.

Diplomatic History of the United States, the United States has used this form of intervention to prevent some groups from maintaining political power affecting negatively US interests. For example, the use of covert action was successfully employed to change the governments of Iran in 1953 and in Guatemala in 1954. US covert action failed in the case of Cuba in 1961. [81]

The general approach in the use of covert action is to support local political and military forces in gaining or maintaining political control in a nation, so that US or its allies interests will not be threatened. None of these activities has reportedly involved significant numbers of US military forces because by their very nature covert actions are efforts to advance an outcome without drawing direct attention to the United States in the process of doing so.[82] The United States, given a presumptive limited scale compared to those of major conventional military operations, perceived covert operations as more appropriate to have extensive US military actions. US covert operations do not appear to be true case examples of the use of pre-emptive military force by the United State. [83]

2. Cuban Missile Crisis of 1962

The Cuban Missile Crisis of October 1962 is a significant and notable case to be compared with the Iraqi war. It was a quarantine. The United States learned from spy-plane photographs that the Soviet Union was secretly introducing nuclear-capable intermediate-range ballistic missiles into Cuba, missiles that could threaten a large area of the Eastern United States. President John F. Kennedy had to determine if the best

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[81] Bemis, 1965, 570-572.

[82] Section 503(e) of the National Security Act of 1947, defines covert action as "An activity or activities of the United States Government to influence political, economic or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly."
Available at: http://thomas.loc.gov/cgi-bin/cpquery/?&db_id=cp107&r_n=sr063.107&sel=TOC_16633&

[83] Bemis, 1965, 572.

course of US action was to use military air strikes in an effort to destroy the missile sites before they became operational, and before the Soviets or the Cubans became aware that the U.S. knew they were being installed. President Kennedy undertook a military quarantine of the island of Cuba to prevent further shipments from the Soviet Union of military supplies and material for the missile sites. The crisis was resolved without actual military engagement.[84] Although President Kennedy said that the purpose of the quarantine was to defend the security of the United States, the US did not rely on the legal concept of self-defense as articulated in Article 51 as a justification for its actions.

Abram Chayes, the Legal Adviser to the State Department at that time, explained the decision not to rely on that justification as follows: "In retrospect ... I think the central difficulty with the Article 51 argument was that it seemed to trivialize the whole effort as legal justification. No doubt the phrase 'armed attack' must be construed broadly enough to permit some anticipatory response."[85] In Other words, what Chayes refers to is similar to what was discussed in the first chapter, namely the importance of interpreting the concept of anticipatory self-defense with respect to Article 51 as well as the term armed attack. He added:

> *But it is a very different matter to expand it to include threatening deployments or demonstrations that do not have imminent attack as their purpose or probable outcome. To accept that reading is to make the occasion for forceful response essentially a question for unilateral national decision that would not only be formally unreviewable, but not subject to intelligent criticism, either .... Whenever a nation believed that interests, which in the heat and pressure of a crisis it was prepared to characterize as vital, were threatened, its use of force in response would become permissible .... In this sense, I believe that an Article 51 defense would have signaled that the United States did not take the legal issues*

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[84] Brenner & Allison. Cuban Missile Crisis: A Historical Perspective (2003) Available at: http://www.jfklibrary.org/forum_cmc_021006.html

[85] Abram Chayes, The Cuban Missile Crisis. (Oxford University Press, 1974) 63–64.

involved very seriously, that in its view the situation was to be governed by national discretion, not international law. [86]

If one is comparing the Cuban Missile case and the Iraqi case, they are seen to differ, although many consider that the Cuban missile crisis is relevant to the Iraqi case. The difference is in the course of action. The Cuban missile crisis seems to be a favorite reference for justifying the Iraqi case on account of the following similarities:

1. Just as President Kennedy saw the Soviet missiles in Cuba as a menace, President Bush perceived Iraq's efforts to obtain weapons of mass destruction as an imminent threat to U.S. security.

2. Both presidents used diplomatic means. The United Nations and satellite photos were used to unite world opinion. Kennedy showed photographs of the missile sites. Similarly, President Bush used satellite photos to document Iraq's efforts to rebuild its nuclear facilities.

3. Kennedy used the threat of war to secure the removal of weapons of mass destruction from Cuba; similarly Bush mobilized military forces against Iraq.

Documentary evidence compelled Kennedy to act in the form of quarantine although his advisers went beyond recommending air strikes on the missile installations and insisted on a follow-up invasion of Cuba by U.S. ground forces. [87] However, the Bush Administration's description of the threat posed by Iraq was always featured with conditional words like "could" and "might" because the administration lacked the kind of documentary evidence.

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[86] Ibid, 1974, 65.

[87] Brenner & Allison, 2003.

President Kennedy's action was a quarantine to avoid blockade which under international law is an act of war. Kennedy kept the possibility for peaceful means. Nikita Khrushchev extracted a promise from Kennedy, which was never put in writing, that the United States would not invade Cuba; for his part, Khrushchev agreed to withdraw the missiles. [88] On the other hand, President Bush doubted the diplomatic possibilities, arguing that Saddam Hussein of Iraq was untrustworthy.

President Bush related the Iraqi case to the Cuban missile crisis, and so countered the reservations of the military leadership and State Department. Bush's comparison with 1962 was an effort to legitimize a pre-emptive action against a nation that had not attacked the United States. Throughout the NSS, President Bush defined the threat to be based on the combination of radicalism and technology joined by the availability of weapons of mass destruction (WMD). He made it clear that with today's threat containment and deterrence don't work. [89] The military leadership was set to launch a unilateral war to eliminate an imminent threat, to initiate a pre-emptive war.

The NSS Doctrine identifies three threat agents: terrorist organizations with global reach, weak states that harbor and assist such terrorist organizations, and rogue states, defined as states that:

> *. . . brutalize their own people and squander their national resources for the personal gain of the rulers; display no regard for international law, threaten their neighbors, and callously violate international treaties to which they are party; are determined to acquire weapons of mass destruction, along with other advanced military technology, to be used as threats or offensively to achieve the aggressive designs of these regimes; sponsor terrorism around the globe; and reject human values and hate the United States and everything it stands for.* [90]

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[88] Brenner & Allison., 2003.

[89] NSS, Introduction.

[90] Ibid, Strategy V.

The Bush Doctrine assumed the threat as an imminent, undeterrable, and potential one to the United States. It is a threat that combines destructiveness and invulnerability to deterrence, and has no precedent in American history. As a result the American administration believed that such a threat demanded an unprecedented response.

If an Iraqi attack is not imminent, and is deterrable in any event, then doesn't a US attack on Iraq become a preventive war based on an assumption of the inevitability of hostilities and the desire to strike before the military balance becomes less favorable i.e., before Saddam gets nuclear weapons? According to the United States, war was inevitable based on the Administration's stated judgment that time is not on the American side.[91]

In this perspective, Defense Secretary Donald H. Rumsfeld was asked at a Congressional hearing "What would you call the action of President Kennedy in the case of the Cuban Missile Crisis?" His answer was that, establishing what Kennedy called a quarantine and what the world thought of as a blockade, and preventing, the Soviet Union from placing nuclear missiles in Cuba, all of which was certainly anticipatory self-defense, was certainly preventive action, and with respect to Iraq they were very close to a crisis of historic proportion.[92] However, the records of Kennedy in the White House are abundantly clear: JFK imposed the naval blockade as a way of buying time to pursue a peaceful solution and refusing the demands of Pentagon advisors that he take pre-emptive military action.[93]

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[91] NSS, Strategy V.

[92] Donald H. Rumsfeld, "Congressional Speech" Sep 26, 2002. Available at: www.washingtonpost.com

[93] Morely, 2002, 4.

Washington argues that just as America faced a significant threat with Cuba having nuclear missiles on its territory, so it was facing a significant threat with the possibility of Iraq acquiring nuclear weapons.

The Cuban Missile Crisis was countered by deterrence. The Soviets knew that war with the U.S. could lead to a full exchange of nuclear weapons and total mutual destruction. For Americans, this maybe more than anything else what helped to resolve the Cuban Missile Crisis. However, faced with the Iraqi supposed threat, Washington believed that deterrence was not possible since Saddam Hussein was not necessarily concerned about the fate of Iraq in the event of his failure. In addition, Iraq could acquire a nuclear weapon and pass it on to some terrorist organization. With this perception of the situation, the United States could not wait until it exploded. Broadly speaking, the reaction depends on the nature of the threat.

II. The National Security Strategy 2002:

The NSS document represents a broad collection of different concepts and beliefs. The document is composed of diverse views expressed by several departments within the American Administration. The NSS is not merely a formal exercise; in practice it serves as a reference and justification for actual policy choices. It emphasizes three main objectives:

a. To defend peace by fighting terrorists.

b. To preserve peace by building good relations among the Great Powers.

c. To extend peace by encouraging free and open societies in every continent.

The NSS doctrine calls for the United States to use its military strength and great economic and political influence to establish a balance of power that favors human freedom.[94] The identified threat lies in the combination of terrorism, tyranny and technology, i.e. weapons of mass destruction (WMD). The combination of these three "T's" makes the security environment more complex and dangerous.

Underlying the above three objectives were two factors:

1. A Vulnerable Hegemony: Before September 11, 2002, United States enjoyed a position of incomparable hegemony. The NSS document expresses a need to restore that position to discourage other nations from acquiring weapons to challenge US power.[95]

2. A Grand Strategy: This is a strategy directed towards imperialism, the new "imperial grand strategy" as it is termed by John Ikenberry, whereby the US is like a revisionist state seeking to parlay its momentary advantages into a world order in which it runs the show, a unipolar world in which no state or coalition can ever challenge the USA as global leader, protector, and enforcer. [96]The fight against terrorism is expressed as a straight-forward dichotomy, "good versus evil" and "with us or against us".[97] What is to be protected is US power, and the interests it represents, not the world which has ultimately strongly opposed the concept.[98] Washington told the United Nations that it could be engaged by endorsing US plans, or it could be a mere debating society. The US had the sovereign right to take military action, and would act satisfied that the

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[94] George W. Bush, The National Security Strategy of the United States of America:(White House, 2002) Introduction, available at: www.whitehouse.gov/nsc/nssall.html

[95] Donald Rumsfeld, Speech at the National Defense University (NDU) January (2002). Available at: http://www.defenselink.mil/speeches/2002/

[96] John Ikenberry, Foreign Affairs, Sept.-Oct. 2002. Available at: http://www.foreignaffairs.org/20020901faessay9732/g-john-ikenberry/america-s-imperial-ambition.html

[97] NSS, Introduction.

[98] Chomsky, 2003.

conditions for a just war were fulfilled. [99] Simply, the USA was determined to wage war and this was asserted during the World Economic Forum, when Colin Powell declared: "When we feel strongly about something we will lead, even if no one is following us." [100]

To achieve both hegemony and unipolarity, the USA adopted the following techniques:

1. Use of force: Throughout the NSS, the emphasis was projected on using force in the clear sense of acting against any emerging threat. America will act against emerging threats before they are fully formed. Furthermore, Bush declares that the objective of his strategy is to combat weapons of mass destruction (WMD). He stresses the word *combat* since deterrence is not likely to work with present day threats. [101]

2. Coalitions of the willing: The main vehicle for cooperation is to be through coalitions of the willing. For Washington, the EU is an economic partner to be used as a potential strategic associate. Through NATO, Europe remains a natural key ally in the fight against the new threats. Traditional adversaries such as Russia and China are welcomed as strategic partners.[102]

The strategy options of the 2002 U.S. National Security Strategy, to defend, preserve, and promote freedom are prevention, pre-emption, and defense.

American preoccupations are now focused on defense. How is America to defend itself? Pre-emption as a form of self-defense adopted by the United States contradicts with the classic definition of pre-emption under international law, based on the right to anticipatory action to defend oneself against imminent danger of an attack,

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[99] Wall Street Journal, (2003). Available at: http://www.fourthfreedom.org/pdf/Unproven.pdf
[100] Wall Street Journal, 2003.
[101] NSS, Strategy V.
[102] Ibid, Introduction.

even if uncertainty remains concerning the time and place of the enemy's attack. When Israel pre-emptively destroyed the Osiraq nuclear power plant in Iraq on June 7, 1981, the UN Security Council, including the USA, unanimously condemned the act as clear violation of the Charter of the United Nations and the norms of international conduct.[103]

Although, there is a clear difference between pre-emption as a practice and pre-emption as a doctrine, the NSS document ignores such a distinction. It should be noted that the possible use of pre-emptive strikes is not new to U.S. foreign policy, even though previous notions of pre-emptive strikes have been typically associated with covert operations in the sense of supporting other governments.[104]

The NSS expressed clearly the belief that they are facing a new threat which is weapons of mass destruction "Today, our enemies see weapons of mass destruction as weapons of choice. We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends." [105] To face such a threat, the Administration adopts a policy whereby it will destroy the threat before it emerges: "Will disrupt and destroy terrorist organizations by...identifying and destroying the threats before they reach our borders." [106]

Behind this strategy of pre-emption, containment and deterrence is the idea that the strategic methods of the Cold War are less likely to work against rogue states. [107]The argument however shifts the emphasis from the weapons involved to the

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[103] UNSC Resolution 487, (1981).

[104] Daalder Ivo H., James M. Lindsay and James B. Steinberg, The Bush National Security Strategy: An Evaluation, Brookings Policy Paper, 2002, p. 7.

[105] NSS, Strategy V.

[106] Ibid, Strategy III.

[107] Ibid, Strategy V.

personality of the leaders that may possess them, as in the case of Saddam Hussein as the leader of Iraq. This kind of interpretation known as *intuitu personae* of nuclear deterrence is clearly new, which raises questions for the relationship between NATO's Strategic Concept and the use of preemptive strikes. In other words, pre-emption would be related to the personality of the leader instead of the imminence of the threat. [108]

The National Security Strategy confuses pre-emption and prevention. The way the doctrine presents its strategy of implementation is rightly regarded as prevention. The NSS stresses the fact that "America is threatened less by conquering states than by failing ones," and that prevention requires greater efforts to deny countries and terrorists access to the technologies of mass destruction. Tools identified as appropriate for prevention include the use of diplomacy, arms control, multilateral export controls, and threat-reduction assistance. It is a question of how to forestall the threat since deterrence is not effective with present-day threats. Leaders of rogue states are ready to take risks. The concept of imminent threat must be adapted to the capabilities and the objectives of today's adversaries. [109]

III. The National Security Strategy Analysis with Respect to International Relations:

This National Security Strategy reflects ideologies, since it is to spell out national interests, threats to these interests, and the allocation of natural resources to pursue and defend these interests. "The U.S. national security strategy will be based on a distinctly American internationalism that reflects the union of our values and our

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[108] Haine, Jean-Yves & Lindström, Gustav. An analysis of the National Security Strategy of the United States of America (2002) 12.

[109] NSS, Strategy V.

national interests. The aim of this strategy is to help make the world not just safer but better." [110]

The first priority emphasized in the US national strategy is security. In this context, Bush Administration differentiated between global and national security as though there were little correlation between the two. In reality, measuring American national interests in the global security arena should provide a crucial standard for assessing what national security actually means. For example, dealing with terrorists abroad in places such as Afghanistan is a matter of global security ensuring homeland security-national security outcome, and both of them are being linked. Bush in his speech in 2002 focused on national security and how to protect the nation. To maintain national security, the USA stressed the importance of alliance and balance of power. This reflects a realist thinking whereby national security is considered as a question of high politics.[111] George Bush states: Defending our Nation against its enemies is the first and fundamental commitment of the Federal Government...To defeat this threat we must make use of every tool in our arsenal military power, better homeland defenses, law enforcement, intelligence, and vigorous efforts to cut off terrorist financing.[112]

From the above quotation, it is obvious that President Bush's new National Security Strategy offers a bold vision for protecting his nation. Machiavelli and Thucydides, as realists, both focused on the national security.[113] They wrote about power, balance of power, alliances and counter-alliances as means to maintain national security. "As a matter of common sense and self-defense, America will act against such

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[110] Ibid, Strategy I.
[111] Viotti & Kauppi, 1999, 7.
[112] NSS, Introduction.
[113] Viotti & Kauppi, 1999, 56.

emerging threats before they are fully formed." "The United States will build on these common interests to promote global security." [114]

Bush said that the administration would do whatever was possible to secure and protect their nation. Similarly, Machiavelli argues that to achieve national security one must consider it as an end, and so use all means to reach such an end. "The end justifies the means." [115] Bush stressed having alliances to achieve the aims of the United States "Today, the world's great powers find themselves on the same side united by common dangers of terrorist violence and chaos." [116]

Bush's way of presenting how the USA is going to work with friends and states to alleviate suffering and restore stability is a realist one. The British Prime Minister, Tony Blair, confirmed the alliance between the United States and his country, and affirmed the importance of the US-Europe alliance to defeat terrorism "I believe any alliance must start with America and Europe. Europe must take on and defeat anti-Americanism. ..And what America must do is to show that this is a partnership built on persuasion, not command." [117]

President Bush also talked about alliances and how cooperation with the US allies would help in facing any threat. "NATO must build a capability to field, at short notice, highly mobile, specially- trained forces whenever they are needed to respond to a threat against any member of the alliance." [118]

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[114] NSS, Introduction

[115] Viotti & Kauppi, 1999, 59.

[116] NSS, Strategy IV.

[117] Tony Blair, Blair's Speech to the Congress: Washington CNN,(2003) available at: www.cnn.com

[118] NSS, Strategy I.

The alliance must be able to act whenever its interests are threatened, creating coalitions under NATO's own mandate. For such a purpose, Bush set a number of conditions to be implemented so as to maintain the ability to work and fight together as allies.

During the Cold War, the United States emphasized deterrence against the enemy's use of force. Deterrence is a realistic concept advocated to forestall war and so to maintain nation's security. However, today's situation is different and deterrence does not apply. Extremists who seem to view suicide as a religious sacrament are unlikely ever to be deterred. Further, new technology requires new thinking about when a threat actually becomes imminent. So as a matter of common sense, the United States must be prepared to take action, when necessary, before threats have fully materialized, in other words take a preemptive action. [119]

In his doctrine, Bush emphasized the role played by international organizations to attain their objectives. This is a pluralist attitude, whereby non-state-actors are important entities, and instead of security, which is high politics for realists, the hierarchy of world concerns in pluralism is devoted to all matters and not only to military security. [120]

In his pluralist thinking, Bush believes that associating with international organizations as well as regional ones will lead to beneficial results and development.

> *No nation can build a safer, better world alone. Alliances and multinational institutions can multiply the strength of freedom-loving nations. The US is committed to lasting institutions like the United*

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[119] NSS, Strategy VIII.

[120] Viotti & kauppi, 1999, 21.

> *Nations, the World Trade Organization, the Organization of America States, and NATO as well as other long-standing alliances.* [121]

Pluralists such as Rosenau have emphasized the role of state and non-state actors. Rosenau believes that transnationalism in world politics can be understood as an extension of pluralist politics beyond the borders of the state. For Rosenau: "Trasnationalism is processes whereby international relations conducted by governments have been supplemented by relations among private individuals, groups, and societies that can be and do have important consequences for the course of events." [122]

Bush gave importance to non-state actors; they are important entities in world politics. They have great power in agenda-settings and in providing information.

> *Whenever possible, the United States will rely on regional organizations and state powers to meet their obligations to fight terrorism. We will continue to work with international organizations such as the United Nations, as well as non-governmental organizations.* [123]

As a consequence of transnationalism, we have integration. Integration is the lessening of extreme nationalism and may increase the chances for a stable international peace. Such a concept was defended by Mitrany, an idealist scholar, who believed that more transnational and international ties would lead to economic unification which would contribute to political integration.[124] Bush talked about the integration in Europe, Eurasia, East Asia, the Pacific, the Western Hemisphere, the Middle East, South and South-West Asia, and Africa. [125]

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[121] NSS, Introduction.
[122] Viotti & Kauppi, 1999, 211.
[123] NSS, Strategy III.
[124] Viotti & Kauppi, 1999, 212
[125] NSS, Strategy IV.

The Bush doctrine does not express one theory only but is a combination of different theories. From their perception, globalists recognize the role of states as actors, international organizations, transnational actors and coalitions in supporting a capitalist system. [126] Liberal capitalism has to emerge as a uniting system by encouraging free trade and services.

In this way, Bush would ensure having a strong world economy that enhances the US national security, thus advancing prosperity and freedom in the rest of the world. "The United States will work with friends and partners to alleviate suffering and restore stability. He adds: We will promote economic growth and economic freedom beyond America's shores.[127] International flows of investment capital are needed to expand the productive potentials of these economies." [128]

As for cooperation with regional institutions as well as international organizations, the National Security Strategy recognizes the importance of strengthening American economic security, expanding trade and investment, and promoting economic development. To achieve this, President Bush has affirmed his intention of working with major trading partners to encourage growth and opportunity worldwide. For such an end, they have to solidify the economic gains made under the North American Free Trade Agreement (NAFTA), implementing the new World Trade Organization (WTO), the Doha Development Agenda, and the International Monetary Fund (IMF). [129]

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[126] Viotti & Kauppi, 1999, 9.
[127] NSS, Strategy IV.
[128] Ibid, Strategy VI.
[129] Viotti & Kauppi, 1999, 385.

For Americans, what makes the National Security Strategy distinct is that it is a global strategy. Whereas most countries address mainly their own regions, the U.S. strategy covers virtually the entire world. The Bush NSS commits the United States to spreading democracy worldwide and promoting its development; it presents commitments to many nations, widespread economic involvements, and membership in a host of global and regional organizations. "We wage war today to keep the world safer from terror, and we must also work to make the world a better place for all citizens." [130]

Globalization does not mean an ideology or a policy, but instead a trend including the process of growing international activity in trade, finance, investment, technology, the arms trade, communications, ideas, values, and other areas. Some perceive the concept of globalization as a process of world-wide colonization, particularly widespread economic strategies aiming for immediate gain. The term globalism defines a vision of the world interconnected, where the action of a few people can influence the life of all the others. It stands for a world economy and universalism, where we recognize the common origins of all the peoples on the earth and cooperate, as justly as possible, all together in order to reach global common goals. [131]

For Bush, the U.S. commitment to international cooperation will serve not just the American people, but the cause of human dignity on every continent, for his strategy addresses countries and regions and in fact the entire world. American internationalism is to be achieved through aspirations for human dignity; strengthening alliances to defeat global terrorism and work to prevent attacks against the United States and its friends and working with others to defuse regional conflicts such as the Arab-Israeli

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[130] NSS, Strategy VII.

[131] Kenneth Waltz, Globalization and Governance: Columbia University, (1999). Available at: http://www.mtholyoke.edu/acad/intrel/walglob.htm

conflict and India-Pakistan conflict, creating a new era of global economic growth through free markets and free trade; building the infrastructure of democracy; and developing agendas for cooperative action.

> *America will implement its strategies by organizing coalitions--as broad as practicable- of states able and willing to promote a balance of power that favors freedom. Internationalism means fighting for peace that favors liberty.* [132]

> *The US National Security Strategy will be based on a distinctly American internationalism that reflects the union of our values and our national interests. The aim of this strategy is to help make the world not just safer but better. Our goals on the path to progress are clear: political, economic freedom, peaceful relations with other states, and respect for human dignity.* [133]

In this context, Farid Zakaria from an academic perspective sees the global world as one with information and global cooperation and one where people can share information and adopt same standards. To achieve such a stage there must be cooperation between states, peoples, and organizations. Zakaria considers that security cannot be provided unless there are certain measures taken; however, what is important is to undertake them with globalization. [134]

In short, from the above analysis, we can conclude that the United States National Security Strategy is a combination of realism, pluralism, and globalism. The Bush Administration was selective in creating the US National Security Strategy instead of advocating one theory alone. The purpose is to meet peace, global needs, prosperity and internationalism. The Bush administration took the balance of power and alliance concerning security from the realists, alliance with international and regional organizations from the liberals, and world economy-cooperation and universalism from

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[132] NSS, Strategy VIII.

[133] NSS, Strategy I.

[134] Farid Zakaria, "A Plan for Global Security": News Week, (2002) 17.

the globalists. But soon, we are likely to live in a system of disorder. The mix of global political, economic, social, technological, and military conditions will continue to bring great stress to the international order. For Bush and his allies, the global presence of the United States-power, influence, and willingness to remain engaged are the key factors affecting the future shape of the international security environment.

IV. Pre-emptive Self-Defense

Bush Doctrine: A Pre-emptive or Preventive Strategy

While a pre-emptive war requires the fulfillment of the immediate threat criteria, some critics believe that what the American Administration is proposing in its doctrine is really threat prevention. When Bush talked about the pre-emption war, it appeared to most people that what is really meant is preventive war.[135] Here, comes the question of what is the political rational for this course taken by the US administration.

This doctrine is supported by some scholars and political analysts and rejected by others. Those who supported such an action believe that what the United States is doing in regard to the war on terrorism and the war on Iraq, does not violate the principles of the United Nations Charter. John Moore argues that the action led by the United Stats in Afghanistan is not pre-emptive or preventive, but a lawful defense in the face of armed aggression. Also, he perceives targeting terrorist cells around the world as a lawful defense. Moreover, he affirms that the US is simply exercising the right to individual and collective defense, and it is the phrasing of the doctrine to act pre-emptively that has made certain governments and other critics claim that the United States is acting unilaterally and without the approval of the United Nations. [136]

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[135] Volker, 2003.
[136] Moore, 2003.

Thomas Nichols believes that the attack on Iraq would represent a legitimate recourse to war by coalition powers exercising their collective right to engage in the last resort to violence against a regime whose actions had finally rendered any other course impossible.

Nichols considers that an act against Saddam Hussein and his regime should not be considered as prevention. Preventive war envisions an attack on an enemy based on a calculation of power that favors the attacker, a situation where the initiator must act or lose, [137]but this is not the case with Iraq. Nichols believes that Saddam Hussein's record provides ample evidence of the justice of a war against Saddam Hussein's regime.

Nichols believes that the UN Security Council resolutions themselves are perhaps the weakest justification for war. They are the political product of varying political situations. Saddam pretended to accept these resolutions and then broke them. Nichols gave the noncompliance with weapons inspections as the most obvious example. Nichols believed that there was more than enough justification for the removing of the Iraqi regime and Saddam personally. He concluded that if we were to believe that an invasion of Iraq would create a precedent or a new international norm, then this meant that states, leaders, and societies were incapable of elementary moral reasoning, and that they cannot draw even basic distinctions between nations acting to defend the global peace and rogues who engaged in vicious wars of conquest. [138]

Duncan Currie claimed that the Bush doctrine was not totally defined on the basis of self-defense against an actual imminent attack. The United States did not base its justification for its attack on Iraq on a claim of preventive war but rather on a fake

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[137] Nichols, 2004, 1.
[138] Ibid, 2004, 2.

reliance on the Security Council resolutions which were passed following the invasion of Kuwait, which demonstrated that even the United States did not have confidence in its own doctrine. The doctrine departs from the principle of international law prohibiting the use of force which underlies the Nuremberg Charter, the United Nations Charter and the International Criminal Court. This departure marks a return to the willingness to use force in international relations. [139] Currie believes that the framework of international law is now under threat by the determination of the US to redraw international law in a way that allows it to act according to its strategic imperatives.

Noam Chomsky perceives the US national security strategy as a strategy aimed at maintaining global hegemony permanently. He adds that any challenge will be blocked by force, in order to keep the US as the supreme power. For him, this doctrine seems nothing other than having been an attempt to mobilize the USA and possible allies for a campaign war against Iraq. Chomsky confirms John Ikenberry's opinion that the NSS is a new imperial grand strategy presenting the US as a revisionist state seeking to parlay its momentary advantages into a world order in which it runs the show, a unipolar world in which no state or coalition could ever challenge the USA as global leader, protector, and enforcer. [140]

What is the political rationale for this course taken by the US Administration? This is a question that is repeated every time it is argued concerning the US National Security Strategy. Chomsky seems to answer this question directly, saying that what is

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[139] Duncan E. J. Currie, Preventive War and International Law after Iraq, (2003) 3. Available at: www.globelaw.org

[140] Ikenberry, 2002.

to be protected is the US power and the interests it represents, not the world, which vigorously opposed the concept. [141]

Chomsky believes that in the intention of the administration the grand strategy authorizes the US to carry out preventive war and not merely a pre-emptive one. He adds that whatever the justifications for preemptive war might be, they do not hold for preventive war.

The use of military force to eliminate an invented or imagined threat is a preventive war is and it is a supreme crime that was condemned at Nuremberg.[142] Chomsky affirms that the phrase "new imperial grand strategy" is not of his own making. It was written in the Foreign Affairs Journal, the journal of the Council on Foreign Relations. Furthermore, Chomsky claims that the invasion of Iraq was announced in September 2002, along with the Bush Administration's National Security Strategy, which declared openly the intention to dominate the world and to destroy any potential challenge to US domination. [143]

Revolutionary doctrine denying and violating the international order established since the 17th century Westphalia system, the UN Charter and international law. Kissinger believes that the doctrine as a revolutionary approach is not wrong but he has reservations about the style and implementation, and most crucially he stresses the idea that its application should not be universalized.[144] Chomsky says that a state never needs an argument against the use of violence; but often needs an argument for it, and

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[141] Chomsky, 2003.

[142] Nuremberg Principles. Principle VI: Crimes Against Peace (1950). Available at: http://www.nuclearfiles.org/etinternationallaw/nurembergprinciples.html

[143] Chomsky, 2003.

[144] Brenner & Allison, 2003.

the arguments that have been given in the case of Iraq are not convincing.[145] There is no doubt about the importance of disarming Iraq and other countries which may possibly have the capacity to use weapons of mass destruction, as everyone agrees.

On the other hand, from a legal side, a number of international lawyers stated that it would be a violation of international law if the United States were to use military force against Iraq without specific new Security Council authorization.[146] The International Commission of Jurists denounced the attack as an illegal invasion which amounted to a war of aggression. [147] Thirty-one Canadian law professors said that the US attack "would be a fundamental breach of international law and would seriously threaten the integrity of the international legal order that has been in place since the end of the Second World War."[148] Forty-three Australian legal experts claimed that the initiation of a war against Iraq in the form of a coalition of the willing would be a fundamental violation of international law. They stated that the United States doctrine of pre-emptive self-defense contradicted the basic principle of the modern international legal order and the primary rationale for the founding of the UN after World War II, which was the prohibition of the unilateral use of force to settle disputes. Their argument was unanimously criticizing any attempt to the use of force. They believe that the development of weapons of mass destruction any where in the world is contrary to universal norms against the acquisition, possession and threat or use of force of such weapons. They assert that preventive use of force currently being considered

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[145] Chomsky, Who Is to Run the World, and How? (2004). Available at: www.countercurrents.org/us-chomsky080604.html.

[146] Chomsky, "War would be Insane". BBC News: 2003. Available at: http://news.bbc.co.uk/2/hi/middle_east/2677131.stm

[147] Singh, R. International Appeal by Lawyers and Jurists against the Preventive Use of force, (2003), available at: www.lcnp.org/global/LawyersandJuristsAppeal.htm

[148] International Commission of Jurists: (18 March 2003). Available at: www.icj.org/news.php

against Iraq is both illegal and unnecessary and should not be authorized by the United Nations or undertaken by any state. [149]

They affirm that consistency under international law should be always maintained. In this context, they state that Security Council Resolution 687 acknowledges that the elimination of Iraq's weapons of mass destruction is not an end in itself but represents steps towards the goal of establishing in the Middle East a zone free from WMD. Cooperating with the stipulations of this resolution, and enhancing international relations war should not be a choice.

Action to ensure the elimination of Iraq's weapons of mass destruction should be done in conjunction to alternative mechanisms established by the UN Security Council to address the concerns regarding Iraqi weapons of mass destruction. These include diplomatic pressure, negotiations, sanctions on certain goods with military application, destruction of stockpiles of weapons of mass destruction and inspections of facilities with capabilities to assist in production of weapons of mass destruction. Evidence to date is that these mechanisms are not perfect, but are working effectively enough to have led to the destruction and curtailment of most of the Iraqi weapons of mass destruction capability.

In United States perspective, US was in a vulnerable situation, that vulnerability was due to the American claimed threat by Iraq. Such vulnerability and fear led the United States to react the way it did as first strike.

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[149] "Attack illegal" Sydney Morning Herald, (20 March 2003). Available at: http://www.globeandmail.com/servlet/story/RTGAM.20030320.ulaww0320/BNStory/International

Indeed, just after the September 11, 2001 attacks, it happened that the Bush Administration began to equate self-defense with pre-emption and later on to act preventively.

> *There is no question but that the United States of America has every right, as every country does, of self-defense, and the problem with terrorism is that there is no way to defend against the terrorists at every place and every time against every conceivable technique. Therefore, the only way to deal with the terrorist network is to take the battle to them. That is in fact what we're doing. That is in effect self-defense of a preemptive nature.* [150]

The nature of potential threats is extremely important for evaluating the legitimacy of the new pre-emption doctrine as previously discussed in a former chapter, and in the case of the Iraq war the conditions making it necessary for the USA to act pre-emptively were not present according to just war theory.

The United States is worried about states that possess weapons of mass destruction, and this worry is justified and it is a concern of all states. However, the mere possession of such weapons does not amount to an armed attack, and cannot be considered as an imminent threat.

The International Court of Justice held during an advisory opinion that the mere possession of nuclear weapons is not illegal in customary international law. Moreover, the Court cannot conclude whether the threat or the use of nuclear weapons would be lawful or unlawful in extreme circumstances of self-defense where the security of the

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[150] Rumsfeld, Remarks at Stakeout Outside ABC TV Studio, (October 28, 2001). Available at: www.defenselink.mil/news/Oct2001/t10292001_t102 8sd3.html

state is threatened. [151] In other words, mere possession without a threat of use does not amount to an unlawful armed attack.

The United States role in the Nuclear Non Proliferation Treaty NPT is of particular concern in the current context. There are two issues to include:

1. Article VI of the NPT requires each of the parties to pursue negotiations in good faith on effective measures relating to termination of the nuclear arms at an early date and to nuclear disarmament, and on a treaty of general and complete disarmament under strict and effective international control. This is an ongoing obligation that was further described at the 2000 NPT Review Conference. [152]

2. The United States agreed to conclude the Comprehensive Test Ban Treaty CTBT by the end of 1996 and the extension was linked with an unspecified later date on the determined pursuit by the nuclear-weapon States of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goals of eliminating those weapons, and by all States of general and complete disarmament under strict and effective international control. The failure of the United States to ratify the CTBT or enter into substantive disarmament negotiations as it has agreed, the acknowledgement by North Korea that it possesses nuclear weapons, the declaration by the United States of its willingness to enter into preventive war and the subsequent decision by the United States supported by the coalition of the willing to use military force against Iraq are all threatening developments for nonproliferation, the NPT and the rule of law. [153]

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151 . ICJ Reports, 1986, 16.

152 2000 NPT Review Conference: Available at http://usinfo.state.gov/topical/pol/arms/stories/finaldoc.htm

153 Principles And Objectives For Nuclear Non-Proliferation And Disarmament, NPT/CONF.1995/32/DEC.2. Available at: http://www.fas.org/nuke/control/npt/text/prin_obj.htm

Iraq has been prohibited by the Security Council from any development of nuclear weapons, following its defeat in the Persian Gulf War. This prohibition is embodied in the 1991 Resolution 687.[154] But the violation of a disarmament requirement does not itself amount to an armed attack.

The United States has always rejected preemptive self-defense previously as it had the UN Charter rules in its favor. Even the United States has opposed any general rule permitting unilateral armed force to remove threatening regimes.[155] The Administration of George W. Bush began the war on terrorism after the events of 11 September, invoking Article 51 and going to the Security Council in hopes of building consensus that what it was doing was lawful. If the Bush Administration had had a convincing evidence of any serious threat posed from Iraq, it would have been much easier to get Security Council authorization to use force.

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154 UNSC Res 687 (1991).

155 Michael Glennon. "The New Interventionism: The Search for a Just International Law": Foreign Affairs, (1999), 71.

Chapter Five

Iraqi War of 2003

Let us assume that what the National Security Strategy and what the United States aimed at was pre-emption. Is this pre-emptive strategy a legal one and on what legal basis did it undertake the use of force?

I. US Claims for War against Iraq:

Although the US gave a legal basis for the use of force against Iraq, yet we may doubt whether the war against Iraq without a second resolution of the UN was compatible with international law. It was clearly affirmed by Kofi Annan that if the US and others initiated any military action against Iraq, it would not be in accordance with the UN Charter.

When the US failed to gain Security Council approval for its attack on Iraq, it argued that Resolution 1441 supported its case for the invasion.[156] This UN Security Council resolution threatened Iraq with "serious consequences" if it did not get rid of its weapons of mass destruction. On the other hand, France, Germany, Russia, China and other members of the Security Council thought that Resolution 1441 did not authorize the use of military action by individual states against Iraq. They stated that waging war against Iraq would be unlawful. [157]

The US claimed to be using force on the basis of Resolution 678, which was passed to liberate Kuwait. This is because the provisions of the second Resolution 687, which governed the settlement of the Gulf War and the destruction of weapons of mass

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[156] "Legal Basis for the Use of Force against Iraq," Government Releases (2003). Available at: http://www.number-10.gov.uk/output/page3287.asp

[157] Rashid, Barrister. Former Ambassador to the UN. War against Iraq, (2003). Available at: www.weeklyholiday.net

destruction, were not met by Iraq; consequently, Washington believed that the initial authority of Resolution 678 remained effective. Furthermore, the US claimed that Resolution1441 found Iraq to be in material breach of the Gulf War settlement and this was a last chance for compliance. Basing itself on these three resolutions, the US claimed that it was legally empowered to use force against Iraq. [158]

Mr. Ari Fleischer, White House Press Spokesman, in his formal statement setting out the administration's formal legal position, stated that the United Nations Security Council Resolution 678 authorized use of all necessary means to uphold United Nations Security Council Resolution 660, and subsequent resolutions and to restore international peace and security in the area. That was the basis for the use of force against Iraq during the Gulf War. Thereafter, United Nations Security Council Resolution 687 declared a cease-fire, but imposed several conditions, including extensive WMD related conditions. Those conditions provided the conditions essential to the restoration of peace and security in the area. A material breach of those conditions removes the basis for the cease-fire and provides legal grounds for the use of force. [159]

Another pretext for waging war against Iraq was Article 51 of the UN Charter (self-defense). The US claimed that although Iraq had not attacked the US, yet it posed an imminent threat. In the National Security Strategy, President Bush called for a redefinition of international law to adapt the idea of anticipatory self-defense to the new reality of terrorist attacks so as to empower a state to act if it perceives a threat. [160]

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[158] Barrister, 2003.

[159] Ari Fleischer, Press Briefing: (March 13, 2003). Available at: http://www.whitehouse.gov/news/releases/2003/03/20030313-13.html

[160] NSS, Introduction.

Humanitarian justification was given by the US. According to the international public policy which was the result of the UN failure to maintain human rights in Rwanda in 1994 and in Kosovo in 1999, it is stated that if a country fails to protect its own people, the international community may intervene to remedy the situation. However, such an intervention cannot take place unless there is one of two conditions: large-scale of serious loss of life in the form of genocide, or ethnic cleaning in the form of killing or committing terrorist acts.[161] The primary motive for humanitarian intervention is to lessen human suffering. Humanitarian intervention is allowed and justified if non-military options are exhausted.

II. Legal Basis for Counter argument:

1. The United Nations Charter and the Use of Force:

Under the UN Charter, there are only two circumstances in which the use of force is permissible: collective or individual self-defense against an actual or imminent armed attack, or an authorization given by the Security Council to use force to maintain or restore international peace and security.

- Self-Defense:

Article 51 of the UN Charter recognizes the inherent right of self-defense. It states:

> *Nothing in the present Charter shall impair the inherent right of individual or collective self-defense 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-defense 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*

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[161] "Humanitarian Intervention", Journal of International Affairs, (2001), Vol. VI – Number 2.

necessary in order to maintain or restore international peace and security. [162]

Under Article 51, the condition for the exercise of self-defense is the occurrence of an armed attack. Notwithstanding the literal meaning of the article, which was previously discussed in Chapter One, Article 51 permits anticipatory self-defense in response to an imminent threat. The most recognized guide to the conditions for anticipatory self-defense is Daniel Webster's statement regarding the *Caroline* incident of 1837: Self-defense is justified only when the necessity for action is instant, overwhelming, and leaving no choice of means, and no moment for deliberation. [163]

The development of the law after the *Caroline* incident, justified the use of armed force against the territory of another state as self-defense under the following conditions:

1. If an armed attack is launched, or is immediately threatening a state's territory, forces or nationals.
2. If there is an urgent necessity for defensive action against that attack.
3. If there is no practicable alternative to armed action in self-defense, and in particular appeal to another state or other authority which has the legal power to stop or prevent the infringement by the aggressor.
4. If the action of self-defense is limited to what is necessary to stop the infringement.

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[162] UN Charter, Chapter VII, Article 51.
[163] Webster, 1842, 412.

Iraq had not attacked any state, nor was an attack by Iraq imminent. Therefore, there was no justification of self-defense for the use of force against Iraq by the United States or any other state.

The Security Council authorized an armed response to Iraq's invasion of Kuwait in 1990, and then after the termination of hostilities required Iraq to end its missile and chemical, biological, and nuclear weapons programs. Thus, under Article 51 the Security Council took measures necessary to maintain international peace and security, and the right of self-defense against an armed attack since the intervention of the Security Council was no longer in effect. It is argued by some that the Security Council's resolution covered self-defense in response to failure by Iraq to comply with the resolution. Such an argument extends the boundaries of self-defense to justify the use of force by the United States and selected other states.

There is nothing said by international law for such an extension of the principle of self-defense. Such an expansion would destabilize the present system of UN Charter restraints on the use of force. The US National Security Strategy states that potential threats arising from possession or development of chemical, biological, or nuclear weapons and links to terrorism are to be encountered pre-emptively, meaning preventively. But there is no publicly disclosed evidence that Iraq was supplying weapons of mass destruction to terrorists. The Bush Administration's reliance on the need for regime change in Iraq as a basis for use of force is banned by Article 2(4) of the UN Charter, which prohibits the threat or use of force against the territorial integrity or political independence of any state.

➢ Security Council Authorization for Use of Force:

There is only one legal basis for the use of force other than self-defense, namely the Security Council's authorization of use of force to restore or maintain international peace and security pursuant to its responsibilities under Article 42 of the UN Charter. Article 42 provides:

> *Should the Security Council consider that measures [not involving the use of force] provided for in Article 41 would be inadequate or had proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.* [164]

The Security Council Resolution 678 passed in 1990 approved all means necessary to eject Iraq from Kuwait and to restore international peace and security in the area. The second paragraph of Resolution 678 states that the Security Council authorizes member states cooperating with the government of Kuwait to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area, unless Iraq before 15 January 1991 fully implements the disarmament of weapons. [165]

The final paragraph of resolution 687 (1991) states that the Security Council decides to take further steps as may be required for the implementation of the present resolution and to secure peace and security in the area. Even if Iraq had committed a material breach of the cease-fire resolution 687, it does not follow that a member state such as the United States or any other state was authorised to use force.[166] The

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[164] UN Charter, Chapter VII, Article 42.
[165] UNSC RES 678 (1990).
[166] UNSC RES 687 (1991).

authorization to use all necessary means was made in resolution 678 (1990), not 687 (1991).

It is clear from resolution 687 (1991) that it is the Security Council, and not individual Member States, that were to take further steps as may be required. This is entirely consistent with the prohibition on the use of force under Article 2(4) of the UN Charter, and the provision that enforcement action is to be taken 'by the Security Council' under Article 42 of the Charter.

Resolution 1441(2002) was passed by the Security Council to address the issue of weapons of mass destruction, which was the principal justification for the invasion. The content of this resolution and the fact that the United States sought and failed to gain Security Council authorization for the use of force in Iraq following resolution 1441 (2002) in fact imply that the United States implicitly accepted that further authorization of the Security Council was required for the use of force.

The United States cannot ignore Resolution 1441 and return to the earlier resolutions 687, 678 and 660 to justify its own use of force against Iraq. There is no clear Security Council authorization of use of force by member states relating to weapons of mass destruction.

The argument used by the United States Administration does not stand and the attack on Iraq constituted an unlawful use of force under international law. Members of the coalition of the willing which assisted in the invasion of Iraq could also be held responsible under international law. Article 16 of the International Law Commission's Articles on State Responsibility recognize that a state which aids or assists another state in the commission of an internationally wrongful act is internationally responsible for

doing so if it does so with knowledge of the circumstances of the internationally wrongful act and the act would be internationally wrongful if committed by that state.[167] The obligation not to use force may be breached by permitting another state to use its territory to carry out an armed attack against a third state such as Iraq.

Any claim that there is a material breach of cease-fire obligations by Iraq does not justify use of force by the United States. The Gulf War was an action authorized by the Security Council;[168] so, it is for the Security Council to determine whether there has been a material breach and whether such a breach requires renewed use of force.

- Humanitarian Cause:

War may be waged on the plea of humanitarian needs. In the case of Iraq, would humanitarian reasons justify the US military use of force? The need for humanitarian intervention was used by the United States to justify its strike on Iraq. However, if we are to consider the humanitarian cause as justifying the American war on Iraq, it could have been used in 1988 after the Halabja massacre when Saddam's regime used lethal chemicals against civilians in Kurdish areas.[169] Humanitarian intervention would also have been justified after the repression of Shiite rebellion in 1991,[170] to prevent further loss of life. It is illogical to use it as an excuse when humanitarian violations were taking place many years in view of the world and no action was taken.

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[167] Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/83 (18 January 2002). At http://www.un.org/documents

[168] "The Use of Force against Iraq," Lawyers Committee on Nuclear Policy. Available at: http://www.wslfweb.org/docs/sclet.htm

[169] "Saddam's Chemical Weapons Campaign: Halabja, March 16, 1988" Bureau of Public Affairs, Washington, DC March 14, 2003. Available at: http://www.state.gov/r/pa/ei/rls/18714.htm

[170] Peter W. Galbraith, The Ghosts of 1991, 2003. Available at: http://www.washingtonpost.com/ac2/wp-dyn/A10874-2003Apr11?language=printer

The crucial question under international law is whether the action of pre-emption is one of aggression or of legitimate self-defense. As was previously demonstrated in Chapter Two, a legitimate pre-emptive use of force is justified according to four criteria.

The first is the existence of clear imminent threat. The second is the existence of a threat that demands a pre-emptive action of self-defense. The third is the importance of securing vital interests while initiating a pre-emptive action in order not to increase danger and harm. Finally there is the use of proportionate power and the use of force only as a last resort after exhausting all diplomatic means to solve the conflict.

In fact, the US Administration was aware of these criteria when it urged pre-emptive war against Iraq, for it used them to justify its action. President Bush and his Administration repeatedly insisted that Saddam Hussein wanted to possess weapons of mass destruction and was trying to develop them. They declared that since 1998 and Saddam Hussein had been preventing the UN international inspectors from returning to Iraq. Thus, he might be already acquiring such weapons. If seriously examined, this argument proved that the threat was not clear and imminent. Up to the present time there has been no evidence that Iraq possessed weapons of mass destruction.[171] The US Administration did not know whether there was a clear and imminent threat posed by Iraq; it did not have any material proof or any findings which justified the planning for war.

[171] Penketh, Anne & Andrew Grice. Iraq War was Illegal: (2004). Available at: http://www.globalpolicy.org/security/issues/iraq/justify/2004/0305blixillegalwar.htm

The Administration's pretexts for imminent threat were based on Saddam Hussein's criminal record and evil character, especially on the fact that he used poison gas in his war against Iran and on his people in the 1980's. If this is the proof, one can only consider that the US ignored certain facts when it generally supported Iraq in its war against Iran and turned a blind eye to the Iraqi use of chemical weapons. These facts could stand as evidence that Saddam Hussein is a ruthless dictator who would do anything to stay in power. He might use weapons of mass destruction against anyone for his political survival. But this does not prove what he might do so under other circumstances and that he would use such weapons particularly against the US or any of its allies.

Chapter Six

Conclusion

The war on Iraq March 2003 revealed the flaws in the international system. It is undeniable that the United Nations is a unique institution in terms of both mandate and membership. The United Nations was set up in the wake of the Second World War and its Charter was drafted with the purpose of preventing another world war. It was the first time, at least theoretically, that state sovereignty was handed to a sort of world government.

The United Nations in general and the Security Council in particular have the responsibility for ensuring and maintaining international peace and security. To this end, as was mentioned in Chapter One, the UN drafters issued articles to preserve its goals. Article 2(4) clearly prohibits the use of force and the only exceptions to this prohibition are found in Article 42, which gives the Security Council the right to take military action to ensure international peace and security, and in Article 51, the right to self-defense, which allows the use of force, including anticipatory uses of force, against non-state actors.

With respect to the right to self-defense as embodied in Article 51, it is debatable since there is no authoritative body to adjudicate and enforce a particular interpretation of this article. So, states are left to themselves to decide what are the limits of this right. Every phrase of the article is debated because different interpretations can alter the limits placed on the right and thus effectively extend the exercise of this right with respect to different situations. If the right of self-defense is an "inherent" right, then states can claim that the United Nations has no right to restrain the

exercise of this right, thus ensuring the extension of the right of self-defense to anticipatory uses of force. However, the phrasing of Article 51 clarifies that states must present to the Security Council the reasons for the exercise of force. The Security Council ultimately has the power and responsibility to maintain international peace and security. If the drafters of the United Nations Charter had meant to include the right of anticipatory self-defense, then they would have mentioned it in the Charter with certain controls and limits placed on the right.

Following the conditions under which use of force is permitted, come two terms that are engaged with the use of force *pre-emptive* and *preventive* uses of force. As previously demonstrated in Chapter Two, after a broad distinction between *pre-emption* and *prevention,* accompanied with a clear analysis of the American National Security Strategy presented in Chapter Three, the United States has made it clear that it considers military action as an option even in the absence of Security Council authorization. The US Ambassador to the UN, John Negroponte, in a statement to the UNSC, said:

> *If the Security Council fails to act decisively in the event of further Iraqi violations, this resolution does not restrain any member state from acting to defend itself against the threat posed by Iraq or to enforce relevant United Nations resolutions and protect world peace and security.* [172]

Negroponte implied that in the absence of further UNSC resolutions, military force could be employed either for self-defense or for the enforcement UNSC resolutions, including 1441. President Bush himself affirmed his right to act and implement his strategy with or without the UN consent. [173]

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[172] John Negroponte, "U.S. Wants Peaceful Disarmament of Iraq," Information release, US Department of State, (8 November 2002). Available at: http://www.usembassy.it/file2002_11/alia/a2110808.htm

[173] Ridder, 1.

Moreover, this intention was revealed also at the Azores summit meeting on the day of the invasion, when both President George Bush and British Prime Minister Tony Blair underscored their contempt for international law and institutions by calling a challenge, not for Iraq, but for the Security Council to capitulate, or else they would invade without the Security Council's approval and they would do so whether or not Saddam Hussein and his family left the country. [174]

Kofi Annan, in a talk on the BBC, assured that the decision to take action in Iraq was in breach of the UN Charter. Such a decision should have been made after the approval of the Security Council, and not unilaterally. [175]

Kofi Annan declared several times that the US action against Iraq was not in conformity with the UN Security Council. However, it was the first time he declared it to be actually illegal:

> *"I have indicated that it was not in conformity with the UN Charter from our point of view; from the Charter point of view, it was illegal." "From our point of view and from the Charter point of view, the war was illegal."* [176]

Hence, we find that the NSS doctrine does not meet the demands of international law. In other words, this doctrine seeks to equate self-defense or anticipatory self-defense with acting pre-emptively. Moreover, it acts according to the manner of prevention and not of pre-emption. It exploits under the pretext of pre-emption to get legitimacy since international law does not allow prevention.

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[174] Michael Gordon. "Military Options." The New York Times. (18 March 2003).

[175] "US says Iraq Invasion was Legal" BBC News (2004). Available at: http://news.bbc.co.uk/2/hi/middle_east/3664234.stm

[176] "Excerpts: Annan interview" BBC News (16 September 2004). Available at: http://news.bbc.co.uk/2/hi/middle_east/3661640.stm

In the case of Iraq, there was no mandate from the UN Security Council. The war can not be based on the pretext of the right of self-defense, since there was no attack by Iraq and no immediate threat. Neither, can the war be justified as a humanitarian action to liberate the Iraqi people. If this interpretation applied, then it would give free reign worldwide to wars of liberation to assert human rights and democracy. In view of this clear legal finding, the old question of the relationship of power and law in international relations arises under a new threat. The war against Iraq is not the normal case of a breach of international law. Rather, it stands for a new hegemonic claim by the USA, to safeguard its national security interests in advance of possible threats.

I. United Nations Status:

War on Iraq led to criticism of the Security Council and to denunciation of the United Nations as a system that fails to maintain world order. There is no doubt that the United Nations and the international system are in a state of instability. This means that although the Security Council has the authority to demand compliance with its resolutions and has the ultimate authority to maintain international peace and security, it depends on states to enforce its regulations. The United Nations has no independent enforcement mechanism whereby countries that are part of the Security Council often refusing to support resolutions on the basis of political realities and alliances. The veto power over resolutions used only by five permanent members is also another problem.

There is a lack of fairness and reciprocity in the Security Council, with a small number of nations holding a disproportionately high percentage of power. As a result there is inconsistent condemnation undertaken by the Security Council, for example, while the Security Council denounced the Israeli bombing of the Iraqi nuclear reactor, it

did not issue any resolution against the United States when it bombed Libya. This problem is related to the lack of an impartial third-party system that can evaluate the actions of a state without being subject to political manipulation.

These are only a few of the problems found in the United Nations in general and the Security Council in particular. The Iraqi war, as stated earlier, is a reflection of this tension. While both President Bush and Prime Minister Tony Blair wanted Security Council authorization for the use of force against Iraq, US Administration denied it and finally waged the war without the United Nations' approval.

The United Nations is supposed to represent the international community and thus the resolutions are supposed to represent international opinion. One could argue that the United Nations is supposed to be, at least in principle, a world government. But this system is not legitimate, according to the current standards of legitimacy. The Security Council acts as both the legislative body and as the enforcement mechanism of the United Nations, which creates an overlapping problem between the two functions. Secondly, the members with the most of power in the Security Council are unelected representatives of the international community. How can the United Nations have moral legitimacy and claim that the resolutions represent the international consensus? Although practically speaking it is true that the permanent members are a diverse group with often opposing viewpoints according to power politics; hence, almost all sections of the international community will end up being represented in the Council, in principle this is not ethically legitimate.

II. War Against Iraq Reaffirms Principles of Use of Force under International:

The Bush administration has taken the concept of pre-emption to be the basis of its doctrine. Such an attitude was supported by some and opposed by others, as previously discussed in Chapter Three. However, justifying preventive war in this way would represent a sharp departure from norms of just war. The Bush administration has taken the concept of pre-emption as an option in exceptional cases and turned it into a new doctrine affirming the legitimacy of the unilateral use of preventive war to deal not just with imminent threats, but with merely potential or threatening dangers.

Although the American war on Iraq represents a departure from the norms of Just War Theory, yet if the United States creates a precedent through its practice, then such a precedent will be a means available for other states to use as well. Pre-emptive self-defense would provide legal justification for Pakistan to attack India, for Iran to attack Iraq, for Russia to attack Georgia, for Azerbaijan to attack Armenia, for North Korea to attack South Korea, and so on. Any state that believes another regime poses a possible future threat, regardless of the evidence, could take the United States invasion of Iraq as an excuse.

Let us suppose pre-emption is to be authorized, and now that military action has removed Saddam Hussein; let the debate begin over the new rules of pre-emption. Who decides when pre-emption is legitimate and on what basis? How do we prevent aggressors from adopting pre-emption to cover aggression? Is it in the UN through the Security Council? And if yes, it is enough and appropriate? Certainly, for this idea to be accepted it has to be under the cover of international law. Collective security agreements and the UN Charter are capable of interpreting and authorizing such a concept and its procedure.

International law supported the American use of force in Afghanistan. After the attacks of September 11, the US had the right to defend itself against terrorist attacks mounted from Afghan territory. However, the US had no right to invade another state because of uncertain concerns about that state's possible future actions. The current international order does not support a special status for the United States or a unique right for it to exempt itself from the law. To maintain a legal order that restrains other states and upholds the rule of law, the United States should continue its conservative commitment related to limits on the unilateral use of force, and reject a doctrine of pre-emptive self-defense.

Finally, in the light of facts and allegations existing at that time till the right moment, recourse to war against Iraq in March 2003 is regarded around the world as not in compliance with international law and the UN Charter and should have no weight to be a legal precedent. It is better for it to be understood as a prominent instance of a violation of the core obligation of the UN Charter, as embodied in Article 2(4); consequently, it is considered as a potential Crime against Peace in the Nuremberg sense. It reaffirms the idea embodied in international law that force can legally be used only under conditions of obvious defensive necessity or possibly on the basis of an explicit mandate from the Security Council. [177] Note that defensive necessity is broader than self-defense, and could validate pre-emptive uses of force under exceptional conditions of demonstrated threat. The Afghanistan War might qualify under such legal reasoning as a valid claim of defensive necessity.

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[177] Nuremberg Principles. Principle VI: Crimes against Peace (1950).

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