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The American Strategy of Preemptive War and International Law

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The American Strategy of Preemptive War and International Law

I. Introduction

The government of the United States has proven its determination to embark on a war against Iraq. U.S. officials, citing United Nations Security Council resolutions, insisted that the United States had the authority for the contemplated attack. While it might have preferred to do so on the basis of an authorization by the United Nations Security Council, it emphasized from the outset that it would also act without consent of the Security Council.[1] Representatives of other permanent members of the Security Council believed otherwise; that no resolution of the Security Council authorized U.S. armed action without its approval and that acting without consent of the Security Council constitutes a breach of international law.[2] In its National Security Strategy, for instance, the United States declared, that it was prepared to engage in a preemptive war without Security Council authorization both during the current Iraq crisis and as a general rule.[3]

This paper addresses issues of international law raised by this unilateral approach. It concludes that a unilateral war of preemption poses a violation of international law and that its legalization would not be desirable.

The regulation of international relations stands at a crossroad: as American and British bombers fly against Baghdad, the fate of being reduced to debris and ashes is not merely faced by a single state under tyrannical rule; it may also threaten the international legal system as we have known it since Second World War. The United States is not only challenging the Arab dictator Saddam Hussein,

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[1] See, e.g., Secretary of State Powell, 9 February 2003, quoted in the FRANKFURTER ALLGEMEINE ZEITUNG (F.A.Z.), February 10, 2003, at 2.
[2] Christopher Wren, *Standoff With Iraq: The Law; UN Resolution Allow Attack on the Likes of Iraq*, N.Y. TIMES February 5, 1998, at 6.
[3] The National Security Strategy (N.S.S.) of the United States of America, September 2002 (http://www.whitehouse.gov/nsc/nss.pdf).

but also valid international law – and apparently with no regard for the potential consequences.[4]

In this paper, first the current situation under international law and the basic peacekeeping system of the United Nations is described. Then the grounds for admissible use of force and specifically the conditions under which a preemptive military strike might occur in accordance with the law are presented. The second part deals with the consequences which might ensue from the American strategy of preemptive war for the future development of international law.

II. The use of force in international law and the war against Iraq

1. The maintenance of peace under current international law

The maintenance of peace under international law is based on a doctrine from which all other pertinent rules are derived: the general prohibition of the use of force contained in Article 2 (4) of the U.N. Charter.[5] Because Article 2 (4) links force to territorial integrity and political independence, it suggests that force is illegal if it is aimed at occupation of land or control of a state's political institutions. As a rule, the use of military force between states is prohibited. International law sanctions warfare; it follows that war is not permissible as an instrument for the enforcement of political interests. Of course, this principle of international law does not in itself guarantee peace. Laws can be broken, and clearly, many wars have been fought since his prohibition of the use of force became a part of international law. If peace is to be ensured with the means of law, however, then the prohibition of war becomes a necessary condition. That, at least, is the basic idea reflected in the Charter of the United Nations.

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[4] Dietrich Murswiek, *Die amerikanische Präventivkriegsstrategie und das Völkerrecht*, NJW 2003, 1015.

[5] Article 2 (4): All Members shall 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 other manner inconsistent with the Purpose of the United Nations.

Peace can be understood, first and foremost, as an absence of war. Pax est absentia belli. Coupled with the guarantee of territorial integrity and the political independence of states, the prohibition of the use of force safeguards the international status quo, regardless of how inadequate or unjust the latter may appear. Admittedly, the Charter of the United Nations has also embraced the assumption that only a just peace can become a lasting peace, [6] and that unjust circumstances such as a consistent violation of human rights or the denial of self determination pose a source of conflict which can, in turn, breed war. Still, achieving a "just peace" in the sense defined by Immanuel Kant,[7] that is: an international state of affairs in which the very reason for war is lacking, is not an objective which can stand as an alternative to the prohibition of the use of force. Instead, it relies on that prohibition for its very foundation. This remains valid even when the conflict originates in a serious violation of international law by one of the parties to the conflict. In principle, even valid international law may not be enforced by means of force.

The U.N. Charter contains only two exceptions to the general prohibition of the use of force: the right to self defence contained in Article 51, on the one hand and collective action initiated by the Security Council within the framework of Chapter VII, on the other. That chapter provides for "Action with respect to threats to the peace, breaches of the peace, and acts of aggression." The basis for military sanctions is outlined in Article 42, which authorizes the Security Council to use air, sea, or land forces to "maintain or restore international peace and security". Furthermore, Article 42 requires that, for military action to become possible, the Security Council must consider non-military enforcement measures to be, or to have been, inadequate. As the formulation indicates, it is not necessary that non-military measures have previously been ordered and implemented.[8] Rather it is possible that the Security Council immediately opts for Article 42 on the basis of a prognosis of the ineffectiveness of measures under Article 41.

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[6] Dietrich Murswiek, *Offensives und defensives Selbstbestimmungsrecht. Zum Subjekt des Selbstbestimmungsrechts der Völker*, 23 DER STAAT 5223, 537 (1984).
[7] Immanuel Kant, *Zum ewigen Frieden* (first published in 1795), in WERKE IN ZEHN BÄNDEN 196 et sqq. (Wilhelm Weischedel ed. 1964).
[8] See the Report of the Committee III/3, UNCIO XII, p. 507, Doc. 881 III/3/46.

Since Article 39 contains the legal basis for the application of measures under article 41 and 42, military action under Article 42 always requires the determination of a threat to the peace, a breach of peace, or an act of aggression. While, as in the case of a decision under Article 39, no express mention of Articles 41 and 42 is required, it must clearly follow from the respective resolution that the Security Council is acting on the basis of these provisions. Such clarity can only be achieved if at least Chapter VII is mentioned, as it usually done in practice. Under United Nations practice, the Security Council may delegate the implementation of such measures to member states.[9]

The prohibition of the use of force and the rules authorizing it follow a pattern of rule and exception. If a state purposes to use military force against another state, it must be able to draw on some form of justification, which, in turn, can only be derived from the right to self-defence or an authorization granted by the Security Council.

The war waged by the United States against Iraq without an additional resolution of the Security Council would thus only be legitimate if the U.S. had been entitled to exercise its right of self-defence or if the Security Council had already given a prior mandate for such military action. As the Bush-Administration argues, both conditions have been met: it contends that the existing resolutions already contain an authorization of the use of force, while it also believes itself entitled to an act in legitimate self-defence.

2. The General Principles underlying UN authorization of force

Under the scheme of the UN Charter it was always intended that any military enforcement measures designed to maintain or restore international peace would depend on forces supplied by UN member states. Article 43 of the UN Charter contains a provision for UN Members to contribute forces to the Security Council

[9] Jochen Frowein & Nico Krisch, in THE CHARTER OF THE UNITED NATIONS Article 42 annot. 19 et ssq. (Bruno Simma ed., 2nd ed. 2002).

by way of formal agreement. These forces would be used for such military enforcement action as the Security Council deemed necessary and they were to be under the overall authority and control of the Security Council.[10] Due, however to political considerations no agreements under Article 43 have ever been concluded.

The question of who is to carry out military enforcement action is very different from who is to exercise command and control over such action. It was the Military Staff Committee that was to be responsible for the strategic direction and control of state's forces that were carrying out military enforcement action. The intention was that national contingents would continue to remain subject to their own regulations and obey their own national commander who would take commands from a UN Force Commander who was to be under the control of the Military Staff Committee.[11] The Council would exercise its overall command authority and control through the Military Staff Committee.

The lack of effective functioning of the Military Staff Committee has seen the Security Council delegate the power of command and control to UN member states that have volunteered their forces to carry out military enforcement action. That is, the Security Council has delegated to member states the competence to carry out military enforcement action under their own command and control. In other words, the Security Council has the possibility to authorize individual member states or regional organizations to use force on behalf of the United Nations. This so called "contracting out" mode leaves individual states with wide discretion to use ambiguous or open textured resolutions to exercise control over the initiation, conduct and also termination of hostilities.

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[10] Article 43 (1) UN Charter reads: "All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or arrangements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security".

[11] See the *"Report of the Military Staff Committee to the Security Council"*, S/336, SCOR, Special Supplement (1947), No. 1., Articles 36-40.

There is no express provision in the Charter for such a process. This does not mean, however, that the Security Council does not possess the competence to delegate such powers to member states or that there is no legal framework which governs this process of delegation or authorization. There has been a consistent practice of the Council delegating its Chapter VII powers to UN member states. Interestingly, although the first few instances of Korea and Southern Rhodesia were seen at the same time as being exceptional sui generis cases, they only now, however, appear as part of a continuum in this practice. The Security Council has delegated its Chapter VII powers to member states for the attainment of the following five objectives: to counter a use of force by a state or entities within a state; to carry out a naval interdiction; to achieve humanitarian objectives; to enforce a Council declared no-fly zone; and to ensure implementation by parties of an agreement which the Security Council has deemed is necessary for the maintenance or restoration of peace.[12]

The UN Charter does not in express terms give the Security Council the competence to delegate its Chapter VII powers to member states. Accordingly, any such competence must be implied from the terms of the Charter; in particular from Chapter VII. The two main sources of this competence are, first, the subsequent practice of the UN Security Council and other UN organs, and, second, an interpretation of Articles 42 and 53 of the UN Charter.

A variety of UN organs have certainly treated the Security Council as having the competence to delegate its Chapter VII powers to member states. The Collective Measures Committee, established by the Uniting for Peace resolution of the General Assembly, envisaged that a delegation of powers by the Security Council to UN member states might prove useful as a means of enhancing the role of the UN in the area of international peace and security.[13] Just as the Collective Measures Committee the Secretary-General considers that the Security Council possesses the competence to delegate certain powers to UN member states,

[12] Danesh Sarooshi, THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY, 167 (1999).
[13] Danesh Sarooshi, THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY, 147 (1999).

including powers of control and command over a force carrying out military enforcement action. In fact, the Secretary-General has stated that a delegation by the Council of its Chapter VII powers "would conform with the Charter, with past practice and with established principles".[14] Moreover, the Security Council possessing the competence to delegate Chapter VII powers is in accord with the object and purpose of Article 42 and 53 of the Charter. The object and purpose of Article 42 is that the Security Council be empowered to take action, also military action if necessary, to ensure the restoration or maintenance of international peace and security.[15] The second provision which supports the view that the Council possesses the competence to delegate its Chapter VII powers to member states is Article 53. This provision gives the Council an express competence to delegate Chapter VII powers to regional arrangements. In fact, there is no qualitative difference in the nature of a delegation of powers to member states as opposed to a regional arrangement. The express competence of the Security Council in Article 53 to be able to delegate Chapter VII powers to regional arrangements provides cogent support for the view that the Council possesses such a competence vis-à-vis member states acting individually or jointly.

Another issue which remains is whether there is a certain form which such a delegation of powers must take. The question is whether a non-binding "recommendation" is sufficient for the Security Council to be able to delegate its Chapter VII enforcement powers to member states or whether a "decision" of the Council is required. A delegation of powers to member states does not impose on those states an obligation to exercise the powers in question. It provides a mandate for, but does not necessitate, military enforcement action because under international law states are under no positive obligation to take action to restore and maintain international peace and security.[16] The non-implementation of Article 43 agreements means that the Security Council cannot require states to contribute

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[14] S/1994/828, p. 6.

[15] Article 42 is the source of the power of the Security Council to ensure that such action is taken "by air, sea, or land forces as may be necessary to maintain or restore international peace and security".

[16] L. Gross, *States as Organs of International Law and the Problem of Autointerpretation*, in LAW AND POLITICS IN THE WORLD COMMUNITY, p. 63 (1953).

troops to a force that is to carry out military enforcement action. Thus whether the delegation takes place by a non-binding recommendation or by a decision of the Security Council is of no legal consequence.[17]

Nevertheless, there are inherent dangers in the practice of the Security Council delegating Chapter VII powers to member states. These have been alluded to by the Secretary-General in the *Supplement to An Agenda for Peace*: "The experience of the last few years has demonstrated both the value that can be gained and the difficulties that can arise when the Security Council entrusts enforcement tasks to groups of Member States. On the positive side, this arrangement provides the Organization with an enforcement capacity it would not otherwise have and is greatly preferable to the unilateral use of force by Member States without reference to the United Nations. On the other hand, the arrangement can have a negative impact on the Organization's stature and credibility. There is also the danger that the States concerned may claim international legitimacy and approval for forceful actions that were not in fact envisaged by the Security Council when it gave its authorization to them."[18] The main danger is that those member states will exercise the delegated powers to achieve their own self-interest and not that of the UN.

The issue of self-interest is not always adversative to the collective security purpose for which a Chapter VII power is delegated to member states. In many cases there may be a convergence of a State's political interests and the interests of the UN in maintaining and restoring international peace and security. A problem arises, however, when the interests of a state are in conflict with those of the UN, as defined by the Security Council. The existence of limitations on the competence of the Security Council to delegate Chapter VII powers to member states provides a safeguard against such a potentially negative consequence of a delegation of Chapter VII powers.

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[17] Dinstein, WAR, AGGRESSION AND SELF-DEFENCE (1994), p.274.
[18] Boutros Boutros-Ghali, *Supplement to An Agenda for Peace* (1995), para. 80.

There are two types of limitations on the competence of the Council to delegate Chapter VII powers to UN member states. The first involves a limitation on the competence of the Council to be able to delegate certain of its Chapter VII powers to member states. The second only regulate the way in which the Security Council should delegate its powers and do not as such prohibit the delegation of a particular power. These conditions flow from the requirement that the exercise of delegated Chapter VII powers must always remain under the overall control and authority of the Security Council. The obligation to ensure that these conditions are imposed on the delegate rests with the Security Council as delegator.

The delegation of powers is considered to be lawful if several conditions are met. Problems with the authorization method surface in several related areas. First, there must be a certain minimum degree of clarity in the resolution which delegates the power. States might use force on the basis of actions by the Security Council that could impliedly be interpreted to authorize force, but where its intent to do so was unclear.[19] Articles 33 and 42 support the Charter requirement of explicit authorization by the Security Council for the use of force. The provision in Article 42 that the Council may authorize force only after determining that non-military sanctions under Article 41 would be or are inadequate suggests that open-ended or vague delegations of authority are inappropriate.[20] A rule that the Security Council must determine that non military measures are inadequate would also mean that it must clearly determine that military measures are necessary. These two rules flow from the principle underlying Article 42: that armed force be used only as a last resort. So a procedural requirement would be that the deliberative body authorizing force do so clearly and specifically.

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[19] For example in 1991 the United Kingdom, the United States and France used force to provide humanitarian aid to the Kurds and to establish save havens and no-fly zones in northern Iraq partly on the basis of ambiguous authority in Resolution 688. That resolution made no mention of military force, nor was it intended to authorize such force.

[20] Frowein & Krisch in THE CAHRTER OF THE UNITED NATIONS: A COMMENTARY; (Bruno Simma ed., 2nd ed. 2002) Art. 42, annot. 7-11.

The requirement of explicit authorization can be met by language evincing a clear intent on the part of the Security Council. But possibly, diplomatic considerations may require that the text of a resolution not use the term "force" explicitly. In the 1990 Iraq crisis the United States wanted to use an explicit reference to the use of military force against Iraq, but after objections the Security Council substituted the language to "all necessary means".[21] In that case it was clear that the Security Council's intent was to authorize the use of force although the Council's language and intent often seem to be ambiguous.

The setting by the Security Council of detailed objectives of the military operation and the capacity to change these objectives at any time enables the Council to exercise in an effective fashion its overall control and authority over an operation. This position has been reflected in numerous statements by members of the Security Council[22] and the Secretary-General.[23] Furthermore, the Security Council must conduct a continuous review of the enforcement action. The obligation to undertake supervision rests primarily on the Security Council, but there is a concomitant obligation on member states to submit themselves to such supervision. This obligation is of fundamental importance to the Security Council being able to ensure that it can exercise its overall control and authority over the exercise of its delegated powers. Moreover, it is necessary for the Security Council to be able to make, if it so wishes, the decision when its stated objective has been achieved and thus when the delegation of powers ceases to exist.[24] UN supervision is also necessary to ensure a degree of transparency in the way that the delegated Chapter VII powers are being exercised. This is important for the legitimacy of any such operation.

Accordingly, the aim of supervision of the Security Council is twofold: to determine when the Council's stated objective has been attained and to ensure the delegated

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[21] Frederic L. Kirgis, *The Security Council's First Fifty Years*, 89 AJIL 506, 522 (1995).
[22] See, for example, the statements in the Security Council by the representatives of New Zealand (S/PV.3413, p.22); and the Czech republic (S/PV.3413, p. 24).
[23] See, for example, the Report of the Secretary-General to the Security Council, S/24868, p. 6.
[24] A. Borg Olivier, *The United Nations in a Changing World Order: Expectations and Realities*, in PEACEMAKING; PEACEKEEPING AND COALITION WARFARE: THE FUTURE ROLE OF THE UNITED NATIONS, (F. Mokhtari, ed.) (1994), p.25.

powers are being exercised in an appropriate manner, that is for the attainment of the Council's stated objective. If the Security Council wishes to delegate this supervisory function to another entity there are certain limitations it must observe. The Security Council could not purport to delegate its responsibility to exercise overall control and authority over a force carrying out military enforcement action to another entity. The Security Council could delegate a limited form of supervision to another entity. For example, such supervision may consist of the review of reports submitted by states in the exercise of their delegated powers. The Secretary-General could carry out this supervisory function or a subsidiary organ which could be delegated this function.

Furthermore, the Security Council should impose on UN members which are exercising delegated Chapter VII powers the requirement to report on a regular basis back to the Council on the progress of the operation. There are two reasons why the Security Council should impose such an obligation on member states exercising delegated Chapter VII powers. First, it is necessary for the Security Council to be able to exercise its supervisory function which in turn is a necessary prerequisite for he Council to be able to fulfil its obligation under the Charter to exercise overall control and authority over an authorized enforcement action. The second reason for the existence of such a reporting obligation follows from Articles 51 and 54 of the UN Charter. Article 54 requires a regional organization to report to the Council when it has used force in order to maintain international peace and security.[25] The purpose of this provision is to ensure that the Security Council has the information that it requires to be able to exercise overall control and authority over enforcement action by the regional arrangement or agency.[26] The purpose of Article 54 is applicable to the exercise of delegated Chapter VII powers since the action taken is for the same objective: the restoration or maintenance of international peace and security.

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[25] Article 54 of the UN Charter states: „The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agnecies for teh maintenance of international peace and security".

[26] Bruno Simma in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (1994), p. 775.

Second, states that are acting under the authorization of the Security Council might interpret their mandate to be broader than it had intended. The potential for conflict is most pronounced where the Security Council has delegated wide authority to a coalition of states to address a major problem. For example as the Iraq invaded Kuwait the Security Council passed Resolution 678 which was motivated by the goal of expelling Iraq's forces from Kuwait. This resolution contains broad language authorizing force "to restore international peace and security in this area."[27] That wording could mean virtually anything, depending on how the "peace and security" and "area" are defined. In February 1998, the United States and the United Kingdom interpreted the wording "to restore international peace and security" as authorizing the use of force to ensure that Iraq destroyed its biological and chemical weapons.

Although the Charter empowers the Security Council to employ force to combat threats to or breaches of peace, Security Council authorizations of force must be interpreted in the light of the UN Charter's goal of minimizing violence in the international community. Therefore it should not be presumed that the Security Council has authorized the greatest amount of violence that might be inferred from a broad authorization. While force can be used to carry out the specific objectives in the authorizing resolution, ambiguous or broad language in the resolution should be interpreted narrowly.

Furthermore, when the authorizations are not temporally limited, questions arise about their termination. The Iraqi inspection crisis shows, the states acting under Security Council authorization might want to continue to use force even after the basic goal of the mission has been achieved. Often, conflicts continue to simmer after hostilities have ended. So the question is, whether a permanent cease-fire or other definitive end to hostilities terminates Security Council authorization to use force.

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[27] Christian Schaller, *Massenvernichtungswaffen und Präventivkrieg – Möglichkeiten der Rechtfertigung einer militärischen Intervention im Irak aus völkerrechtlicher Sicht*, ZaöRV 62, 641, 645 (2002).

The Charter's preference for settling disputes by peaceful means and the Article 2 (4) prohibition on the use of non-defensive force require that a UN authorization of force terminate when a permanent cease-fire is negotiated. Armed responses to breaches of cease-fire agreements cannot be made by individual states because a new Security Council authorization must be adopted.

Two fundamental values underpinning the United Nations Charter – that peaceful means have to be used to resolve disputes and that force only can be used in the interest and under the control of the international community and not individual countries – require that the UN Security Council retains strict control over the initiation, duration and objectives of the use of force in international conflicts and relations. [28] To ensure that UN-authorized uses of force comport with these two fundamental values three rules can be derived from Article 2 (4) of the U.N. Charter. Firstly, only explicit and not implicit Security Council authorization is necessary before a nation may use force that does not derive from the right of self-defence under Article 51. Secondly, authorization should clearly articulate and limit the objectives for which force may be employed, and ambiguous authorizations should be narrowly construed. Finally, the authorization to use force should cease with the establishment of a permanent cease-fire unless explicitly extended by the Security Council.[29]

3. Has the Security Council issued an authorization?

a) Resolution 1441

A good starting point for any answer to this question are the actual resolutions adopted by the Security Council. The resolution around which the inspection regime is built is resolution 1441 of 8 November 2002. The Security Council declared that false statements on the possession of weapons of mass destruction and failure by Iraq to cooperate fully with weapons inspectors would constitute a

[28] Jules Lobel&Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraq Inspection Regime*, 93 Am. J. INT'L. L. 124, 125 (1999).
[29] Jules Lobel&Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraq Inspection Regime*, 93 Am. J. INT'L. L. 124, 125 (1999).

material breach of the obligations imposed on it (Para. 4), particularly since Iraq had been and remained in material breach of its obligations under relevant resolutions since 1991 (Para. 1). The resolution does not, however, state that its non-observance by Iraq will automatically result in military sanctions under Article 42 of the UN Charter. By no means does it contain an authorization for the United States or other member state to carry out such sanctions. Instead, the Security Council merely agreed to convene upon receipt of a report in order to consider the situation (Para. 12). It also recalled how it has repeatedly warned Iraq that it would face serious consequences as a result of its continued violations of its obligations (Para 13). But such consequences have not been decided upon. A silent or implied resolution on the use of military force is not permissible under Article 42 due to the exceptional character of both the use of force and the delegations of authority relating to its use.[30] Contrary to an opinion voiced occasionally in the press and by the American Administration, resolution 1441 leaves no room for an interpretation that the Security Council authorized the United States to carry out a military strike.

b) Resolution 678 (1990) and the liberation of Kuwait

When Iraq invaded Kuwait on 2 August 1990 the Security Council passed resolution 660 condemning the invasion as a breach of world peace and international security and demanding the immediate withdrawal of the Iraqi troops. When Iraq did not follow those orders, on August 6 the Security Council passed resolution 661 to impose first non-military sanctions on Iraq to force them to comply with resolution 660. But neither the following decisions dealing with settling the hostilities nor the sanctions imposed on Iraq show the effect desired.

The collective response to the Iraqi invasion of Kuwait was multifaceted and comprehensive. It involved the use of the full panoply of measures under Chapter VII of the UN Charter. Finally the Security Council passed resolution 678. The relevant sections of resolution 678 read as follows:

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[30] Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to use force, Cease- Fires and the Iraqi Inspection Regime*, 93 AM J. INT´L L. 124, 127, 130 (1999).

Acting under Chapter VII of the Charter [the Security Council],

1. *Demands* that Iraq comply fully with resolution 660 (1990) and all subsequent relevant resolutions, and decides, while maintaining all its decisions, to allow Iraq one final opportunity, as pause of goodwill, to do so;
2. *Authorizes* Member States co-operation with the government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the foregoing resolutions, 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;...
4. *Requests* the States concerned to keep the Security Council regularly informed on the progress of action undertaken pursuant to paragraphs 2 and 3 of the present resolution;...

The gulf war mandate of Resolution 678 authorized states to use all necessary means to "restore international peace and security in the area". After the deadline had expired on 17 January 1991 the so-called operation "desert storm" began. It ended on 28 February 1991 when Iraq was defeated and withdrew all its troops from Kuwait.

It is clear that resolution 678 involved some kind of authorization by the Security Council of the use of force by states against Iraq. Assuming, then, that the action taken pursuant to resolution 678 was Security Council authorized action the issue becomes a question of the character of the Council's authorization: was it authorized by military enforcement action or authorized self-defence measures?

The debate over the characterization of the authorized measures is of some importance, since this will determine whether there has been a delegation of powers. If the Security Council is only authorizing measures to be taken in self-defence then it is in fact not delegating any powers at all to member states since they already have the right to use such measures under Article 51 of the UN

Charter. Once the nature of the power being exercised by member states is ascertaining this will allow the determination of how far states may go when acting pursuant to their authorization.[31]

The first view is that the action taken to repel Iraq's invasion was, in legal terms, justifiable under the law of collective self-defence. It is clear that the attack by Iraq against Kuwait constituted an armed attack sufficient to invoke Article 51 self-defence exception to the proscription of the use of force contained in Article 2(4) of the UN Charter. Accordingly, the argument runs, Kuwait and member states acting pursuant to Kuwait´s right to individual and collective self-defence could use force to ensure the withdrawal of Iraqi troops and the return to power of the legitimate government in Kuwait. The Security Council can decide to authorize states to use force in self-defence as an exercise of its collective security response in a case. However, this authorized collective self-defence will only occur when the Security Council expressly states that it is limiting its authorization to such measures. This did not occur in the case of resolution 678 and thus the better legal view is that the passage of resolution 678 is an exercise by the Security Council of its collective security function.

Moreover, it is contended that resolution 678 was a delegation by the Security Council of certain of its Chapter VII powers to member states, since the objectives specified in 678 the use of "all necessary means to uphold and implement resolution 660 (1990) and all subsequent resolutions and to restore international peace and security in the region", are considerably broader than the objectives which would be allowed by reference to the law of self-defence under international law.[32] The military action taken should thus be characterized as an exercise of Chapter VII powers delegated by the Security Council to member states.

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[31] C. Greenwood, *New World Order or Old? The Invasion of Kuwait and the Rule of Law*, THE MODERN LAW REVIEW, 55(2) (1992), p. 152.

[32] D. Penna, *The Right to Self-Defence in the Post Cold-War Era: The Role of the United Nations*, DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY; 20 (1991), p. 41 at p. 50; C. Greenwood, *New World Order or Old? The Invasion of Kuwait and the Rule of Law*, THE MODERN LAW REVIEW, 55(2) (1992), p. 169.

This type of approach has been the subject of criticism by some commentators who argue that the armed forces of the coalition did not constitute a United Nations force predicated on genuine collective security but was authorized self-defence. The leading proponents of the self-defence view, contend that the lack of a legally binding obligation on states to carry out action, the fact that the "command was American", and that the financing of the operation formed no part of the UN budget, meant that in legal terms the military action was based on collective self-defence induced by the Security Council as distinct from collective security.[33] However, the Security Council can carry out military enforcement measures by means other than by binding decision. Moreover, the Security Council can delegate operational command and control to member states. In addition the argument that since the operation was not financed from the UN budget it was not a UN authorized military enforcement measure can be dismissed. The force carrying out the military enforcement measures was not a UN force per se and thus did not require funding from the UN budget. It is a concomitant of forces being supplied by member states on a voluntary basis. In general the costs of these forces will be paid by the states in question and not by the UN budget.[34] This position does not prevent the force from being able to exercise delegated Chapter VII powers. In summary there are no valid arguments against characterizing military action in Iraq as an exercise of delegated Chapter VII powers. Accordingly, a number of writers conclude that the action in Iraq was military enforcement action authorized by the UN Security Council pursuant to Article 42 of the UN Charter.[35]

The legal basis and the legal justification for the action of the international coalition of states and the character of resolution 678 are issues discussed with controversial opinions in international law. Most international lawyers argue that

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[33] E. Rostow, *Until What? Enforcement Action or Collective Self-Defence?,* AJIL, 85 (1991), p. 506 at p.508.

[34] In the case of Rwanda, the Security Council made express reference in resolution 929 to the costs being borne by the member states that take up the delegation of Chapter VII power.

[35] C. Warbrick, *The Invasion of Kuwait by Iraq*, ICLQ, 40 (1991), p. 965; I. Shearer, *International Law and the Gulf War*, in WHOSE NEW WORLD ORDER: WHAT ROLE FOR THE UNITED NATIONS? (P. Alston and M. Bustelo eds.) (1991), p. 73; M. Weller, *The Kuwait Crisis: A Survey of Some Legal Issues*, AFRICAN JOURNAL OF INTERNATIONAL AND COMPERATIVE LAW 3 (1991), 1, 25.

the military intervention was a measure within the framework of the system of collective security on the basis of Chapter VII of the UN Charter.[36] Only when the Security Council issued the mandate in resolution 678 the UN member states were authorized to use military force against Iraq. Therefore the exact content and temporary limitations of the mandate of 29 November 1990 have to be discussed.

Conclusions can be drawn from the fact that the resolution was issued by the Security Council for certain purposes. The first purpose of the resolution is "to uphold and implement resolution 660 and all subsequent and relevant resolutions". The meaning of this formulation is clear because of the wording of the preamble of resolution 678. In the first paragraph of the preamble all resolutions dealing with the Iraqi invasion of Kuwait are mentioned.[37] Thus the mandate in paragraph 2 of resolution 678 only is issued for the accomplishment of the eleven resolutions listed in the first paragraph of the preamble.

The second purpose of the resolution is "to restore international peace and security in the area". From a purely textual perspective, that authorization seems to have few, if any, limits. "Area" is undefined and could mean Iraq or the entire Middle East.[38] "Restoring international peace and security" could mean occupying Iraq, removing Saddam Hussein from power, or bombing Iraq's military and industrial capacity.[39] Officially, the United States never made those broad claims during the war. Indeed, shortly after the war ended, U.S. officials testified that Resolution 678 had not granted open-ended authority to occupy Iraq, and that the

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[36] M. Weller, *The Kuwait Crisis: A Survey of Some Legal Issues*, AFRICAN JOURNAL OF INTERNATIONAL AND COMPERATIVE LAW 3 (1991), 1, 23; C. Greenwood, *New World Order or Old? The Invasion of Kuwait and the Rule of Law*, THE MODERN LAW REVIEW 55 (19912), 2, 153; H. Freudenschuß, *Between Unilateralism and Collective Security: Authorizations of the Use of Force by the UN Security Council*, EUROPEAN JOURNAL OF INTERNATIONAL LAW 5 (1994), 492,496; D. Sarooshi, THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY (1999), 175.

[37] "Recalling and reaffirming its resolutions 660 of 2 August 1990, 661 of 6 August 1990, 662 of 9 August 1990, 664 of 18 August 1990, 665 of 25 August 1990, 666 of 13 September 1990, 667 of 16 September 1990, 669 of 24 September 1990, 670 of 25 September 1990, 674 of 29 October 1990 and 677 of 28 November 1990".

[38] A legal opinion of the UN Deputy Legal Counsel, UN Doc. S/AC.25/1991/Note15 (1991), held that the word "area" in the prior resolution 665 on Iraq was not defined geographically and that it was therefore necessary to interpret it in accordance with the context and the object and purpose of the text.

[39] Eugene V. Rostow, *United What? Enforcement Action or Collective Self-Defence?*, 85 AJIL 506, 516 (1991).

military incursions into Iraq during the war were authorized only because they were "pursuant to the liberation of Kuwait, which was called for in the UN resolution".[40] Moreover, in response to accusations that the coalition's bombing campaign stretched the boundaries of the Security Council's authorization, many states declared that their sole purpose was to liberate Kuwait.

Some lawyers even argued that the Security Council is purporting to delegate to member states the competence to decide and judge on their own when world peace and international security in the region has been restored.[41] However, the Security Council does not possess the competence to delegate to member states the power to decide that a threat to, or breach of international peace and security has either started or has cease to exist. The decision whether a particular matter constitutes a threat to the peace and the decision when to terminate military enforcement action must always rest with the Security Council. This is an important safeguard for ensuring that states exercise delegated Chapter VII powers only in order to achieve the objectives of the United Nations and not solely their own self-interest in a particular situation.

If states are given the competence to determine when a threat to, or breach of, international peace and security has ceased to exist they are being delegated the power to determine when the delegation of Chapter VII powers is to be terminated. The purported delegation by the Security Council of this broad power to member states is unlawful. It is on this basis of this unrestricted character of the power delegated by resolution 678 that one could question the lawfulness of the resolution. However, this does not render the whole of resolution 678 unlawful, but only the delegation of powers to member states for the objective of restoring peace and security in the region.

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[40] Testimony of Assistant Secretary of State John Kelly and Assistant Secretary of Defence Henry Rowen before the Europe and Middle Eats Sub commission of the House Commission on Foreign Affairs, Federal News Service, June 26, 1991, at 151, available in LEXIS, News Library, Fednew File.

[41] Sarooshi, THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY (1999), 179.

Most commentators support a narrow interpretation of resolution 678 and its mandate. Thus resolution 678 is not the basis for occupying Baghdad and removing Saddam Hussein's regime.[42] The statements of the members of the Security Council at that time support this point of view. The delegate of the United States for example said that "[t]he objectives of the United States and the coalition effort are clear and limited and are set out in the Security Council resolution.[...] Our aims are no broader than to compel Iraq's compliance with the resolutions".[43]

Moreover, the clear intent of the Security Council in 1990 was to provide authority to oust Iraq from Kuwait, not grant a blanket license for any member state to attack Iraq to enforce inspections mandated after the war. The use of the term "restore" is further textual evidence of this specific intent because restoration means returning to the status quo prior to the Iraqi invasion of Kuwait.[44] The wording "to restore" is linked to a breach of peace – the Iraqi invasion of Kuwait – that already occurred. If the Security Council wanted to issue an authorization for the use of force for future situations of threats of peace and international security it would have chosen the wording "to maintain" instead of "to restore".

The consequence of broad authorizations would be considerable legal uncertainty. That is the reason why the Security Council has to issue the authorization to use force as precisely as possible and why resolution 678 should be interpreted narrowly and consistently with its object and purpose.

c) Resolution 678 after the coming into effect of the cease-fire

As American and British commentators have also argued, however, an authorization of military intervention might result from the Gulf War resolution 678

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[42] G. den Decker & R.A. Wessel, *Military Enforcement of Arms Control in Iraq*, LEIDEN LOURNAL OF INTERNATIONAL LAW, 11 (1998), 497, 502; Schaller, *Massenvernichtungswaffen und Präventivkrieg– Möglichkeiten der Rechtfertigung einer militärischen Intervention im Irak aus völkerrechtlicher Sicht*, ZaöRV 62, 647 (2002).

[43] UN Doc. S/PV.2977, Part I, 43.

[44] Virtually all of the Security Council members stated in voting for Resolution 678 that they were doing so, in the words of Mr. Hurd, the UK representative, to demand "the reversal of the aggression – namely full compliance with previous resolutions". UN Doc. S/PV.2963, at 82 (1990).

(1990) in connection with the Cease-Fire resolution 687 (1991).[45] In resolution 678, the Security Council had authorized member states cooperating with the government of Kuwait to end the Iraqi occupation of Kuwait with military means and enforce all pertinent resolutions of the Council. When the international community liberated Kuwait the purpose of resolution 678 was met. The Iraqi invasion was terminated; sovereignty, independence and territorial integrity were restored. Thus on 3 April 1991 the Security Council passed the cease-fire resolution 687. Resolution 687 determined the conditions for a formal cease-fire. The Iraqi government accepted the conditions lay down in the resolution and the cease-fire entered into force on 11 April 1991.

The permanent cease-fire that ended the 1991 Persian Gulf War supports, although not completely without doubt, the general rule that Security Council authorizations of force expire with a cease-fire. Resolution 687 is a detailed resolution that sets terms for a formal cease-fire. It includes provisions on settling the boundary dispute between Iraq and Kuwait; establishing a demilitarised zone; eliminating Iraq's chemical, biological and nuclear weapons capability; continuing economic sanctions; and setting up a compensation fund. The terms of the resolution do not state that force can be employed unilaterally by UN member states to enforce its mandates. Its paragraph 1, however, does affirm that all thirteen prior Security Council resolutions, to the extent not modified by resolution 687, survived the cease-fire, and Secretary Boutros Boutros Ghali believed that Resolution 678 "remained in force" even after the cease-fire.[46] Despite the general terms of paragraph 1, the history and text of the cease-fire resolutions clearly show that the Resolution 678 authorization to use force expired with the conclusion of the permanent cease-fire.

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[45] Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law* (1998), 93 AM. J. Int'L L. 470, 471 (1999); Geoffrey Marston, *United Kingdom Materials on International Law* (1998), 69 BRIT. Y.B. INT'L. L. 433, 586 (1998).

[46] UN DEP'T OF PUBLIC INFORMATION, THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT; 1990-1996, UN Sales No. E.96.I.3. It is unclear what "remained in force" meant, because he could not have meant that any member state could continue to attack Iraq despite the formal cease-fire.

After the suspension of hostilities, a provisional cease-fire, Resolution 686 was adopted. The distinction between a temporary cease-fire that does not terminate an authorization and a permanent one that does is illustrated by these Iraqi resolutions. Resolution 686 explicitly refers to paragraph 2 of Resolution 678, the "all necessary means" authorization, and "recognizes" that it "remain[s] valid" "during the period required for Iraq to comply with" the terms of the provisional cease-fire. Thus the unilateral use of force provision of Resolution 678 would remain "valid" only temporarily, pending Iraqi compliance with the provisional cease-fire. Moreover, the Security Council rejected a U.S. effort to authorize force if Iraq failed to comply with all the provisions of the cease-fire.

Resolution 687, in contrast to Resolution 686, did not explicitly state that resolution 678 would remain valid until Iraq complied with its detailed terms. The crux of resolution 687 was the transformation of the temporary cessation of the hostilities into a permanent cease-fire upon Iraq's acceptance of its terms. Of all detailed provisions in the cease-fire, only paragraph 4 guaranteeing the inviolability of the Kuwait-Iraq border contains language authorizing the use of force, and only by the UN Security Council and not by individual states. That the Security Council decided to guarantee Kuwait's boundary by force if necessary excludes an interpretation of resolution 687 as continuing the resolution 678 authorization so as to allow individual states to use force to rectify other, less central violations. It would be illogical for resolution 687 to require Security Council action to authorize force against threatened boundary violations, yet dispense with such action if Iraq violated another provision of the resolution.

The basic Charter principles – peaceful resolution of disputes and Security Council control over the use of force – require that, even where there is no termination provision in the authorization to use force, that authority expires with a permanent cease-fire unless explicitly continued. The contractors cannot revive such authorization unilaterally. It is for the UN Security Council to consider whether a breach of that cease-fire justifies a reauthorisation of force.

Furthermore it must be borne in mind that the Gulf War mandate was limited to a concrete situation, the occupation of Kuwait, and thus expired with the complete withdrawal of Iraqi troops from Kuwait and the entry into force of the cease-fire.

The Cease-Fire resolution implicitly revoked the validity of the mandate. It also transferred the authority to take decisions under Chapter VII back to the Security Council. If the Council considers further military measures necessary because of an Iraqi threat to world peace, it must decide so itself. The 1990 resolution can no longer serve to authorize such measures.

d) Resolution 678 and the problem with weapons of mass destruction

When the Security Council passed the cease-fire resolution 687 it dealt for the first time with the problem of weapons of mass destruction in Iraq in public. Part C of resolution 687 requires Iraq to disarm unconditionally under international surveillance and subject itself to continuous monitoring with regard to all atomic, biological and chemical weapons.

Iraq has violated this obligation time and again. Right after the coming into effect of the cease-fire resolution the Iraqi government showed its disapproving attitude towards the system of surveillance and continuous monitoring. The Iraqi government regularly refused to cooperate with with the Special Commission and the International Atomic Energy Agency and the information given by Iraq to the UN were incomplete and misleading. During numerous instances Iraqi officials tried to make controls more difficult and sometimes they even prevented the inspectors from doing their work.[47] In October 1998 the Iraqi government officially terminated the cooperation with the arms inspectors.[48] Only after mediations and concessions of the UN Secretary-General Iraq was willing to cooperate temporarily. But in December 1998 the UN withdrew its complete personnel because of Iraq's uncooperative attitude.

In November 1997, the Security Council found Iraq's behaviour to constitute a threat to world peace and international security and passed resolution 1137.[49] But this threat is not to be mingled with the breach of peace of 2 August 1990. And the

[47] UN Doc. S/24985; UN Doc. S.25620; UN Doc. S/25960.
[48] UN Doc. S/1998/1023 ; UN Doc. S/1998/1032.
[49] S.C. Res. 1137; the preamble of S.C. Res. 1441 (2002) confirms this.

authorization to use force in resolution 678 cannot be extended to this new threat because the mandate was limited to a concrete situation, the liberation of Kuwait. Thus the mandate ended when the cease-fire entered into force.

Nevertheless one could argue either that these serious violations of the cease-fire resolution restore the mandate for a use of force contained in the Gulf War resolution of 1990 or that a military intervention could be justified because of an implicit authorization or an indirect application of resolution 678. Especially British and American commentators argued that the Security Council implicitly authorized the use of military force because of the ongoing violations of the cease-fire resolution and because of the fact that the Security Council condemned Iraq's behaviour as a serious violation and announced to take appropriate steps.[50] A violation of the cease-fire, even a material breach, is not a ground for the other party to revive hostilities.[51]But this claim of implied authorization has to be contested.

4. The right to self-defence

It still remains to be seen whether the United States government is entitled to self-defence under Article 51 of the UN Charter, as it has previously maintained.

On September 11, 2001, the United States was attacked. Hijackers turned passenger planes into missiles and used them to destroy the World Trade Centre and to damage the Pentagon. President Bush made clear the United States would respond forcefully against those responsible.[52] At least one high-ranking member of the Administration urged the use of force against any states known to have links to terrorist groups.[53] But in a move for which the Administration has received the

[50] Schaller, *Massenvernichtungswaffen und Präventivkrieg - Möglichkeiten der Rechtfertigung einer militärischen Intervention im Irak aus völkerrechtlicher Sicht*, ZaöRV 62, 652 (2002).
[51] Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraq Inspection Regime*, 93 Am. J. INT'L. L. 124, 144 (1999).
[52] Serge Schmemann, *U.S. Attacked, Hijacked Jets Destroy Twin Towers and Hit Pentagon in Day of Terror, President Vows for Exact Punishment for "Evil"*. N.Y. TIMES, September 12, 2001at A1.
[53] Deputy Secretary of Defence Paul Wolfowitz argued for "ending" states that support terrorism. Brian Toohey, *Questions for Howard and Beazley on How to Wage War*, AUSTR. FIN. REV., September 29, 2001, at 28.

greatest international praise with respect to any action following September 11, it waited. In the days following the attacks, the Administration established that the perpetrators were all members of the as Qaeda terrorist organization. On October 4, the British government released a study showing the close ties between al Qaeda and the Afghan de facto government. On October 7, 2001, "Operation Enduring Freedom", a massive air operation, including some ground forces, was launched against Afghanistan. Both the United States and the United Kingdom notified the United Nations Security Council that Enduring Freedom was an exercise of individual and collective self-defence in compliance with the terms of Article 51 of the UN Charter, which permits the use of force in self-defence against an armed attack.

In the immediate response to the first armed attack on United States territory since the adoption of the Charter, the United States and the British thus complied with the rules of international law. But less restrained action has also been urged in the weeks and months following the launch of "Enduring Freedom", including a proposal to invade Iraq.[54] One plan to take action against Iraq envisioned a force of more than 200,000 troops to invade and take control of the country. Supporters argued that Iraq's leadership must be eliminated because the regime of Saddam Hussein has continued the development of weapons of mass destruction, and might again use those weapons against an opponent, or supply the weapons to terrorist networks.[55] The invasion plan sought to preempt any danger by eliminating the leaders who might authorize such attacks or assist others to do so.

a) The exception of self-defence

Article 51 of the UN Charter sets out one clear exception to the general prohibition on the unilateral use of force. States may use force in self-defence against an

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[54] In addition to the Deputy Secretary of Defence, several former Republican Administration officials have favoured military action, especially against Iraq. Former Secretary of State Lawrence Eagleburger said, "You have to kill some of these people; even if they were not directly involved, they need to be hit".

[55] Carla Anne Robbins & Jeanne Cummings, *New Doctrine: How Bush Decided that Iraq's Hussein Must Be Ousted, Chilling Warnings in October Sparked Internal Debate on Preemptive Strategy, A "Dirt Bomb" Scare in D.C.*, WALL ST. J., June 14, 2002, at A1.

armed attack. This reading is consistent with the plain words of Article 51, with the drafting history, and official government positions. It is also consistent with authoritative interpretation of Article 51 by the International Court of Justice. There are still questions concerning when an armed attack "begins" for purposes of self-defence, but the Security Council and governments have clarified some issues since September 11. An attack must be underway or must have already occurred in order to trigger the right of unilateral self-defence. Any earlier response requires the approval of the Security Council. There is no self-appointed right to attack another state because of fear that he state is making plans or developing weapons in a hypothetical campaign.

The express terms of Article 51 refer to the right of self-defence in an armed attack occurs. On several occasions the International Court of Justice has interpreted the text.[56] The Court held in the *Nicaragua* case that the right of individual or collective self-defence is triggered only by acts grave enough to amount to an armed attack.[57] The Court relied in part on the UN General Assembly's Definition of Aggression[58] to conclude that an "armed attack" triggering unilateral self-defence may include "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to [...] an actual attack conducted by regular forces".[59]

The Court was assessing the U.S claim that its use of force was a lawful act of collective self-defence of El Salvador. The U.S. argued that Nicaragua had used unlawful force in the first instance by providing weapons and supplies to El Salvador rebels. But the Court held that Nicaragua was not shown to be responsible for providing weapons and supplies to Salvadorian rebels, and further

[56] Corfu Channel Case (UK v.Albania), 1949 I.C.J. 4 (April 9); Military and Paramiltary Activities in and against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14 (June 27) [hereinafter Nicaragua]. In the Nicaragua case, the Court interpreted the limits on the use of force under customary international law, rather than as a Charter provision, but found no difference in content between Article 51 and customary law.

[57] Nicaragua, at paras. 194-95, 211.

[58] Definition of Aggression, G.A. Resolution 3314, U.N. GAOR, 29th Session, Supp. No. 31, U.N. Doc. A/9631 (1974).

[59] Nicaragua, at paras 194-95.

that even if it had done so, the supply of weapons was not the same as an armed attack. Moreover, El Salvador had not reported to the Security Council, nor had it invited the U.S. to assist in its self-defence.[60] With the Nicaragua judgement in mind, one could conclude that where a state is threatened by force not amounting to an armed attack, it must resort to measures less than armed self-defence, or it must seek Security Council authorization to do more.

Further, states are limited by the principles of state responsibility, and the prohibition on armed reprisals. An armed reprisal is the use of force for revenge, punishment or general deterrence. The UN General Assembly has resolved that armed reprisals are unlawful and that states have a duty to refrain from using them.[61] The right of self-defence is limited to the right to use force to repel an attack in progress, to prevent future enemy attacks following an initial attack, or to reverse the consequences of any enemy attack, such as ending an occupation.[62] The state acting in self-defence may seek the destruction of an attacking enemy force if that is necessary and proportional to its own defence. The right also includes taking the defence to the territory of the enemy attacker, if that is necessary and proportional.[63] The defensive use of force can be delayed, after an unlawful armed attack, depending on the circumstances. Taking a reasonable amount of time to organize the defence is permissible.[64]

Force can be used in self-defence only against a state legally responsible for the armed attack. It is generally not enough that the enemy attack originated from the territory of a state. Rather, legal responsibility follows if a state used its own agents to carry out the attack;[65] if it controlled or supported the attackers;[66] possibly where

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[60] Nicaragua, at paras 194-98, 233.

[61] The Declaration on Friendly Relations provides that "[s]tates have a duty to refrain from acts of reprisal involving the use of force", G.A. Resolution 2625, U.N. GAOR, 25th Session, Supp. No. 28, U.N. Doc. A/8028 (1970).

[62] Note the example of Kuwait´s liberation following Iraq´s occupation in 1990, described in Mary Ellen O´Connell, *Enforcing the Prohibition on thr Use of Force: The U.N.´s Response to Iraq´s Invasion of Kuwait*, 15 S. ILL. U.L.J. 453 (1991).

[63] Nicaragua, at paras 35, 194.

[64] Belatchew Asrat, *Prohibition of Force under the U.N. Charter, A Study of Article 2 (4)* (1991) at 199.

[65] See *Responsibility of States for Internationally Wrongful Acts*, Articles 4-11, UN G.A. Resolution 56/83 (2000).

it failed to control the attacks; or where it subsequently adopted the acts of the attackers as its own.[67]

Any use of force in self-defence must respect the principles of necessity and proportionality. Necessity restricts the use of military force to the attainment of legitimate military objectives.[68] Proportionality requires that possible civilian causalities must be weighed in the balance. If the loss of innocent life or destruction of civilian property is out of proportion to the importance of the objective, the attack must be abandoned.

b) Anticipatory Self-Defence

The facts of the Nicaragua case did not invite the Court to consider the problem of when self-defence may actually begin.[69] Nor has any other international court settled the matter. But based on the practice of states and perhaps on general principles of law, as well as simple logic, international lawyers generally agree that a state need not wait to suffer the actual blow before defending itself, so long as it is certain the blow is coming.[70] This is the standard in most domestic legal systems as well.

Thus, to a limited degree a state may "anticipate" self-defence in the sense described by Sir Humphrey Waldock: "where there is convincing evidence not merely of threats and potential danger but of an armed attack being actually

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[66] See Definition of Aggression, G.A. Resolution 3314, U.N. GAOR, 29th Session, Supp. No. 31, U.N. Doc. A/9631 (1974).

[67] In the Iran Hostages case, the International Court of Justice found that Iran was responsible for the hostage taking at the United States Embassy because of the "failure on the part of the Iranian authorities to oppose the armed attack by militants" and "the almost immediate endorsement by those authorities of the situation thus created." Case Concerning United States Diplomatic and Consular Staff in Teheran (U.S. v. Iran), 1980 I.C.J. Report 3, 42.

[68] Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 266, para. 41. The Court stated that both necessity and proportionality must be respected in any decision to use armed force.

[69] Nicaragua, at para. 194; "[T]he issue of the lawfulness of a response to the imminent threat of an armed attack has not been raised".

[70] But see Randelzhofer, Artciel 51 in THE CHARTER OF THE UNITED NATIONS; A COMMENTARY 675 (Bruno Simma et al. eds., 1995) [hereinafter Simma´s commentary). "There is no consensus in international legal doctrine over the point in time from which measures of self-defense against an armed attack may be taken.".

mounted, then an armed attack may be said to have begun to occur, though it has not passed the frontier."[71]

Also the widely cited *Caroline* doctrine of 1842 supports this view. The Caroline case represents the agreement of British and American officials at the time that the use of force is permitted when the "[t]he necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[72] The formula represents common sense and fits the letter and spirit of the Charter when used to determine when an armed attack has begun. An attack must be in evidence.

It is also the case that a victim of an attack may use force based on clear and convincing evidence that the enemy is preparing to attack again. In other words, the victim need not wait for new attacks to be mounted. The defence must be carried out within a reasonable time from the initial attack in order to fit the characterization of defence during ongoing armed attacks.[73] 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.[74] In the absence of convincing evidence of future attacks, however, responsive force could amount to unlawful reprisals or punishment.[75] But the enemy's intention to continue means that even armed force in self-defence is lawful. The world response to September 11 confirms this.

The Security Council referred in two resolutions to the right to resort to self-defence in the face of the September 11 attacks.[76] NATO´s nineteen members, too, found the attacks triggered the North Atlantic Treaty's provisions on collective

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[71] C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 HAGUE RECUEIL 451, 498.
[72] John B. Moore, 2 A DIGEST OF INTERNATIONAL LAW 412 (1906).
[73] The UK used force against Yemen following rebel attacks from its territory on the colony of South Arabia in 1964. The use was condemned as a reprisal because of the delay and the disproportionate use of force. UN SC Resolution 188 (1964).
[74] Louis Henkin, INTERNATIONAL LAW: POLITICS; VALUES AND FUNCTIONS 142-62 (1990).
[75] Mary Ellen O´Connell, *Evidence of Terror*, 7 J. CONFLICT&SECURITY L. 19,30 (2002).
[76] UN S.C. Resolution 1368 (2001); UN S.C. Resolution 1373 (2001).

self-defence.[77] The United States and the United Kingdom took action against Afghanistan on the strength of the evidence more attacks would be forthcoming.

In "Operation Enduring Freedom" mounted against Afghanistan, the allies have argued that September 11 attacks were part of a series of attacks on the United States which began in 1993 and that more attacks in the same series were planned.[78] The United States has produced evidence tying bin Laden to the 1993 attack on the World Trade Centre, the 1998 embassy bombing in Nairobi, the attack on the USS Cole in Yemen in 2000, and the attacks on the Pentagon and the World Trade Centre on September 11, 2001.[79]

Almost immediately following September 11, the United States and several European states apprehended individuals who indicated that more attacks were planned.[80] The evidence was presented to NATO members and was deemed "compelling".[81] Thus, based on publicly available material, the United States and Britain appear to have had clear and convincing evidence that America faced ongoing attacks. As the allied operation continued in 2002, the main criticism has concerned the extent of collateral damage to civilians killed in aerial bombing.[82]

The Security Council action after September 11 can be cited to support anticipatory self-defence in cases where an armed attack has occurred and convincing evidence exists that more attacks are planned, though not yet underway. By contrast, international law continues to prohibit preemptive self-defence or even anticipatory self-defence, if that is understood to be different from

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[77] Keith B. Richburg, Bin Laden´s Culpability „Clearer", NATO Chief Says: Military Action Is Not Requested as U.S. Shares More Evidence, WASH. POST, September 27, 2001 at A14.
[78] Jack M. Beard, *America´s New War on Terror:The Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. Pol´Y 559 (2002); Thomas Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT´L L. 839 (2001); Mary Ellen O´Connell, *Terrorism and Self-Defense*, JURIST, September 18, 2001 (available at www.jurist.law.pit.edu/forum).
[79] John Kelly, The Man Behind the Terror, WASH. POST, SEPT. 27, 2001, at C12.
[80] Peter Finn, *Germans Identify More Terror Suspects; Police Watch Five People Who May Have Provided Support to Sept. 11 Hijacker*, WASH. POST, Nov. 17, 2001, at A21.
[81] William Drozdiak and Rajiv Chandrasekaran, *NATO: U.S. Evidence on Bin Laden "Compelling"; Allies Give Unconditional Support for Retalitory Strikes; Taliban Official Asks To See Proof*, WASH. POST, Oct. 3, 2001, WL 28361574.
[82] David Osborne, *UN Raps US Military, After Afghan Wedding "Cover Up"*, INDEPENDENT, July 30, 2002, at 9.

responding to incipient attacks or ongoing campaigns. In other words, a state may not take military action against another state when an attack is only a hypothetical possibility, and not yet in progress – even in the case of weapons of mass destruction.

Quite obviously, the military strike launched by the United States against Iraq cannot be based on the foregoing criteria of anticipatory self-defence. While Iraq might still be in possession of biological and chemical weapons of mass destruction, the mere possession of such weapons does not amount to an attack for the purposes of Article 51. In order to invoke the right to self-defence, the United States would not only have to submit evidence on the possession of weapons of mass destruction by Iraq, but also on the intention of that state to use theses weapons against the United Sates or to pass them on to terrorists which, in turn, would use them against the United States. The mere possibility that Saddam Hussein might do so at some point does not suffice to establish an "imminent threat" and thereby satisfy the criterion of immediacy. There is, of course, little doubt that Saddam can be considered a vile dictator, a man capable of all sorts of evil deeds. Article 51 does not, however, entitle to military crusades against dictators and "rogue states", but merely to defensive measures against current or evidently imminent attacks. Even the consistent violation by Iraq of obligations set out in various Security Council resolutions does not give rise to an attack situation. While many circumstances may suggest a threat to world peace, this alone cannot confer the authority to measures of self-defence. Instead, any measures would have to be decided upon by the Security Council on the basis of its powers under Chapter VII.

The law is perfectly clear about this. All experts, who have commented on the current Iraq-crisis, deny the United States a right to self-defence.[83]

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[83] Pierre-Marie Dupuy & Christian Tomuschat, F.A.Z., July 31, 2002 at 10; Andreas Paulus, *Die Büchse der Pandora. Deutschland und der Irak-Konflikt aus der Sicht eines Völkerrechtlers*, AI-Journal (Jan./Feb. 203); Schaller, Massenvernichtungswaffen und Präventivkrieg – Möglichkeiten einer militärischen Intervention im Irak aus völkerrechtlicher Sicht, 62 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT, 641 et sqq. (2002); O'Connel, *The myth of preemptive self-defense, ASIL Task Force on Terrorism* 8 (2002) *at* www.asil.org/taskforce/index.htm.

By way of an interim conclusion, it can be affirmed that barring a Security Council resolution on military sanctions against Iraq, the military strike against Iraq is in clear violation of international law. It amounts to an illegal act of war, which does not merely entail a minor infringement of international law, but violates one of the fundamental norms of current international law. It is so serious that it constitutes an International crime.[84]

c) Preemptive Self-Defence

Under Article 51, the right to self-defence arises "if an armed attack occurs". It cannot currently be claimed that Iraq has been attacking the United States or any other state. The question can therefore only centre on whether Article 51 also grants a right to self-defence against a future attack. In other words, is there a right to "preemptive self-defence"?

The United States is justifiably worried about states that possess weapons of mass destruction, especially when their rulers are of the ilk of Saddam Hussein. But mere possession of such weapons without more does not amount to an armed attack. To be sure, 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 suspending the allied campaign against Iraq in "Desert Storm".[85] But the violation of the disarmament requirement does not itself amount to an armed attack. As a more general matter, the International Court of Justice held in an advisory opinion that for ordinary states, the mere possession of nuclear weapons is not illegal in customary international law. As the Court held, "in view of the current state of international law, and the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or the use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a state would be at

[84] Rome Statute of the International Criminal Court, Art. 5 (1) (d); Charter of the International Military Tribunal, Art. 6 (2) (a).
[85] SC Resolution 687.

stake."[86] The mere possession without even a threat of use does not amount to an unlawful armed attack.

International legal scholarship has essentially embraced two main points of view. As one group of authors maintains, Article 51 should be interpreted narrowly, being, as it is, an exception from the general prohibition of the use of force. A more extensive interpretation would be too prone to abuse. Consequently, strict adherence to the wording of this provision is called for, with self-defence clearly dependent on a prior attack. An attack must, therefore, already have begun.[87]

As the other view contends, reflecting what is probably a majority opinion, such an interpretation would be too formalistic and hard to reconcile with reality. Whoever fires the first shot is not always the aggressor. No state can be expected to stand by and idly watch until the preparations for an attack finally result in an actual strike, preventing an effective defence. The right of states to self-defence is based on their right to existence, sovereignty and territorial integrity. Article 51 presupposes and recognizes it as an "inherent right". It may not be interpreted in such a manner that self-defence would be rendered useless in a given case, forcing a state to effectively surrender its integrity without being able to launch a defence.[88]

If self-defence can thus, under certain circumstances, become admissible even before an enemy has fired the first shot or sent his troops across the border, those circumstances have to be understood narrowly. Otherwise, the right to self-defence might grow to become a general authorization of the use of force.

The boundaries of preemptive self-defence have been elaborated in international legal scholarship with a view both to customary law and contextual interpretation

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[86] Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 266 (July 8).

[87] Bruno Randelzhofer, in The Charter of the United Nations Article 51 annnot. 39 (Bruno Simma ed., 2nd ed. 2002); Antonio Casse, International Law 310 (2001).

[88] Kay Hailbronner, Die Grenzen des völkerrechtlichen Gewaltverbots, 26 Berichte d. ges. VölkerR. 49, 80 et sqq. (1986).

Apparently, international custom allows preemptive self-defence if – and only when – the state invoking it can demonstrate that the threat of a hostile attack is both immediate and overwhelming, ruling out a lengthy search for peaceful means of resolution, provided no defence other than military force is available. This rule can be traces back to the *Caroline*-case. The Caroline was a steamer used in 1837 by a private militia from the United States to bring arms and men to an island on the Canadian side of the Niagara River so as to support a rebellion in what was that time still a British colony. The British captured the steamer while it was still moored on the American side, put it on fire and let it drift downstream past the Niagara Falls. In a diplomatic note issued in 1841,[89] the American Secretary of State Daniel Webster established a set of criteria on preemptive self-defence agreed upon by the British negotiator: "it will be for that government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[90] One might ask whether this doctrine, formulated in the 19th century, when states where still entitled to engage warfare by virtue of their sovereignty, still holds any value nowadays. It was, however, applied by the Nuremberg Military Tribunal after Second World War,[91] and has frequently been cited ever since. As a customary rule, it might therefore affect the interpretation of Article 51.

But the "inherent right" theory has numerous weaknesses, starting with its interpretation of customary international law before the adoption of the Charter. At time of the *Caroline* case, the use of force was generally lawful as an instrument of national policy. The UN Charter was adopted for the very purpose of creating a far wider prohibition on force than existed under treaty or custom in 1945, let alone in 1842. Even if earlier custom allowed preemptive self-defence, arguing that it persisted after 1945 for UN members requires privileging the word "inherent" over the plain terms of Article 2(4) and the words "armed attack" in Article 51. Indeed, it requires privileging one word over the whole structure and purpose of the UN Charter. The drafters specifically designed the Security Council to meet threats to

[89] Reprinted in John B. Moore, A DIGEST OF INTERNATIONAL LAW II 409, 412 (1906).
[90] John B. Moore 24-30, 409-14.
[91] Der Prozess gegen die Hauptkriegsverbrecher vor dem internationalen Militärgerichtshof 230 (1947).

the peace, preserving the right of a state to act unilaterally only in cases of armed attack. In cases lacking objective evidence of an armed attack, the Charter requires multilateral decision-making. Permitting preemptive self-defence at the sole discretion of a state is fundamentally at odds with the Charter's design. It is an exception that would overthrow the prohibition on the use of force in Article 2 (4) and thus the very purposes of the UN. The International Court of Justice in the Nicaragua Case rejected the right to use force in the absence of an armed attack, as have most governments.

Some writers promoting the "inherent right" theory argue that the parameters of the right of self-defence are unchangeable by the Charter text and subsequent sate practice. Indeed some principles of international law are unchangeable, even by subsequent agreement or practice. These are the so-called jus cogens principles. But no authority has ever identified a unilateral right of anticipatory self-defence as a jus cogens principle. The Charter's expectation was that states would rely on the decision of the Security Council to deal with early concerns about international security. Indeed, the International Court of Justice has identified the Charter prohibition on the use of force, Article 2 (4) as jus cogens, not self-defence.[92] He great weight of scholarly opinion rejects the "inherent right" theory.[93]

A contextual interpretation of Article 51 arrives at essentially the same outcome. As an exception from the general prohibition of the use of force, the right of self-defence must be limited to such cases involving an armed attack that has either begun or is about to begin. Article 51 does not entitle to measures for the general avoidance of danger. A distinction must be made between the avoidance of danger or of a threat and the defence against an imminent attack. The avoidance of danger – of a threat to peace – rests within the exclusive competence of the Security Council (Articles 39-42). The Charter does not even place self-defence

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[92] Nicaragua, para. 190.

[93] Henkin has said with regard to the „inherent right" theory that it is „unfounded, ist reasoning is fallacious, ist doctrine pernicious." Louis Henkin, HOW NATIONS BEHAVE 141 (2nd ed. 1979); Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. Rev. 113, 135 (1986).

within the sole responsibility of an attacked state and its allies. Instead, the right to self-defence contained in Article 51 exists only until the Security Council has adopted the measures required to safeguard peace.

With regard to preemptive measures, the following conclusion ensues: a state that feels threatened by an imminent attack may only carry out measures of self-defence if it no longer has sufficient time to wait for the adoption of requires measures by the Security Council. Furthermore, the burden of evidence rests with the defending state, which must provide compelling evidence for an imminent attack by the hostile state. The existence of an attack situation must be evident.[94] Mere assumptions or circumstantial evidence, however plausible, are not sufficient. If no evidence can be presented, the situation must be considered a mere threat, not an attack as demanded by Article 51. Only the Security Council may then decide whether world peace is threatened, and whether military measures should be adopted. Leaving this determination to any state that may feel threatened would severely undermine the peacekeeping system of the UN Charter. Many states have reason to feel threatened by a number of other states. In an era of globalisation, moreover, the threat of terrorism is universal. If every state were entitled to engage in self-defence as a response to such threats, the Security Council prerogative to adopt sanctions against threats to peace would gradually erode. By the same token, the prohibition of the use of force would become dependent on the subjective assessment of a threat by individual states, which, in practice, would mean that it ceases to exist.

A consensus therefore exists among international lawyers that preemptive or, more accurately, anticipatory self-defence – if it is to be accepted at all – needs to be strictly limited to cases involving an obvious and imminent attack which cannot be otherwise averted.[95]

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[94] Georg Nolte, *Weg in eine andere Rechtsordnung. Vorbeugende Gewaltanwendung und gezielte Tötungen*, F.A.Z., January 10, 2003, at 8.

[95] Yoram Dinstein, WAR; AGGRESSION AND SELF-DEFENCE, 190 et sqq. 2nd ed. 1994; O'Connell, *The myth of preemptive self-defense, ASIL Task Force on Terrorism* 8 (2002) *at* www.asil.org/taskforce/index.htm.

5. A right to a preemptive war?

a) The American Policy against preemptive self-defence

The United States has consistently rejected preemptive self-defence for reasons of sound policy. This is not a right that the United States wants other states to have. Yet as the examples of state practice show, international society and even the United States have found the standing rules adequate for dealing with the problem of terrorism, weapons of mass destruction and regimes such as that controlled by Saddam Hussein. That is why the United States historically has argued against a right of preemptive self-defence because it has found the UN Charter riles to be in its interest as a matter of policy and prudence.

American security and American values are supported by clear rules limiting force. The United States played a leading role in the adoption of the UN Charter, and since that time, the United States has been careful to make only those legal arguments relative to the use of force that it could accept in the hands of other states.[96] Charter rules may restrain the United States from time to time, but the benefit of restraining others, too, has been worth the cost.[97] The United States can hardly wish to see an anarchy regime in which every state is entitled to initiate the use of force against its adversaries in preemptive self-defence. Nor can the United States honour its fundamental values if it acts in disregard of prevailing legal principle.

Christian Schaller, *Massenvernichtungswaffen und Präventivkrieg – Möglichkeiten einer militärischen Intervention im Iraq aus völkerrechtlicher Sicht*, 62 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 641, 654 (2002).

[96] During the Kosovo intervention, the Clinton Administration simply issued no official legal position. Once the conflict was over, the Administration took the position that humanitarian intervention, without more, was not lawful. See O´ Connell, *Authority to Intervene*, INTERNATIONAL LEGAL CHALLENGES FOR THE TWENTYFIRST CENTURY; PROCEEDINGS OF A JOINT MEETING OF THE AUSTRALIA AND NEW ZEALAND SOCIETY OF INTERNATIONAL LAW 303 (June 26-29, 2000).

[97] Henry Kissinger, *Beyond Baghdad*, NEW YORK POST, August 11, 2002, at 24.

The United States has consistently opposed any general rule permitting unilateral armed force to remove threatening or unfriendly regimes. The Reagan Doctrine suggested in political argument that the United States should consider the use of force to install prodemocratic regimes. President George Bush led the United States in the Gulf War coalition proclaiming at the end of the war a "new world order under the rule of law". The Clinton Administration issued no legal justification for using force in Kosovo, but it also did not argue for changing the law or institutions of the Charter. Rather, State Department officials made clear as soon as hostilities ended that the United States did not support a general right of humanitarian intervention.[98] The United States has proceeded with business as usual at the Security Council.

b) The American claim of preemptive action

The current Bush Administration began the war on terrorism after September 11, 2001, invoking Article 51 of the UN Charter. It called in the Security Council and other governments around the world, building a consensus around the view that what it was doing was not only lawful, but also righteous. It even has supported other states right to do the same.

The plan to invade Iraq is in stark contrast. The British promised to find evidence that Iraq was involved in past terrorist attacks or was planning future ones. By the summer of 2002, the British Press reported that the Blair government was no longer looking: "Tony Blair promised earlier this year that he planned shortly to publish a damning dossier detailing Saddam Hussein's nuclear capabilities and terrorist links. A number of MPs, shown an outline last March, were unimpressed. The plans have been quickly shelved."[99]

The Bush Administration would stand a good chance of getting Security Council authorization to use force, if it has convincing evidence of any serious threat to it.

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[98] O´ Connell, *Authority to Intervene*, INTERNATIONAL LEGAL CHALLENGES FOR THE TWENTYFIRST CENTURY; PROCEEDINGS OF A JOINT MEETING OF THE AUSTRALIA AND NEW ZEALAND SOCIETY OF INTERNATIONAL LAW 303 (June 26-29, 2000).

[99] *What Would We Be Fighting For?,* OBSERVER, July 14, 2002, at 28.

from Iraq. But the Administration gave no indication that it has this evidence, or that it will go to the Council. Rather, amidst the multitude of press details on the invasion, the only indications of its legal basis have been brief references to preemptive self-defence.

At the West Point military academy Commencement in June 2002, Bush indicated "that not only will the United States impose preemptive, unilateral military force when and where it chooses, but the nation will also punish those who engage in terror and aggression and will work to impose a universal moral clarity between good and evil."[100] According to one journalist, the Secretary of Defence Donald Rumsfeld said that "Iraq has given the United States every reason to attack under the UN Charter, which allows preemptive action by nations facing an imminent threat, which Saddam Hussein clearly does".[101] This is a mischaracterization of the law, and no other justification has been suggested. Neither the argument that the Gulf War is still continuing, the even less tenable argument that the Gulf War resolutions imply authority for an invasion, or humanitarian intervention.[102]

The Bush-Administration is aware of the fact that a preemptive war launched against Iraq without a U.N. mandate is illegal. As it has nonetheless decided to embark on this course of action, it is not only willing to take a violation of international law for granted. Adding to that, however, it has also ventured an attack against the validity of central norms within the current peacekeeping system. The United States is seeking to amend these norms so that preemptive wars become legal. This no longer affects the current Iraq-conflict only. As the American president declared openly, instead, the United States is determined to wage preventive wars if these appear necessary for its own safety. This "Bush Doctrine" was initially presented in a presidential speech at the West Point military

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[100] Mike Allen & Karen DeYoung, Bush: *U.S. Will Strike First at Enemies; In West Point Speech, President Lays Out Broader U.S. Policy,* WASH. POST, June 2, 2002, at A01.

[101] Jason Burke & Ed Vulliamy, *War Clouds Gather as Hawks Lay Their Plans*, OBSERVER, July 14, 2002, at 14.

[102] The British have apparently argued that some of their uses of force against Iraq following the Gulf War are justified as humanitarian intervention. Gray, From Unity to Polarization: International Law and the Use of Force Against Iraq, 13 EUR. J. INT'L L. 1, 10, 15 (2002).

academy on 1 June 2002[103] and later reflected in the National Security Strategy of September 2002.[104] It cannot be reduced to a mere statement made spontaneously and without deliberation. The National security Strategy outlines a set of basic principles, and it will determine the guidelines of American security policy for many years to come.

The new strategy departs from previous means of peacekeeping, which used to be based on Containment and deterrence. According to the new strategy, the events of September 11 showed that containment and deterrence no longer sufficed to address international terrorism. A terrorist determined to commit suicide cannot be deterred by threats of massive retaliation. And containment cannot be applied against dictators who own weapons of mass destruction and might use them in missile warheads or secretly provide them to terrorist allies. The battle must therefore be taken to the enemy. An attack is the best defence.[105] If necessary, liberty and life of Americans would have to be defended against "rogue states" by the way of preemptive action. Against such states, mere reaction is no longer a viable strategy. "We cannot let our enemies strike first", as the National Security Strategy puts it.

But then, that document explicitly makes reference to international law: it correctly states, for one, that states threatened with an immediate attack are not held to suffer the attack before they may act against hostile armed forces in legitimate defence. That statement is followed by a decisive passage: "We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries." In the case of "rogue states", the criterion of an imminent threat is now supposedly to be understood as the mere possibility that these might use weapons of mass destruction at some future point. In other words, the requirement of immediacy is purged: the intention of an actual attack no longer needs to be established.

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[103] Graduation Speech at West Point, at www.whitehouse.gov./news/releases/2002/06/20020601-3.html.

[104] *National Security Strategy of the United States of America* ("N.S.S.", September 2002) at www.whitehouse.gov./nsc/nss.pdf.

[105] „Our best defense is a good offense", N.S.S. (supra, note 19), 6.

The Bush Doctrine violates international law. It is, however, meant to create new international law. Against the background of the National Security Strategy, the current war against Iraq could be a first step. New international law arises from a state practice coupled with opinio iuris, the acceptance of such a practice as reflecting the law.[106] The National Security Strategy contains a statement about the law. In essence, what the U.S. government is claiming is that, given novel types of threats to peace, the conditions for an invocation of the right to self-defence have to be reinterpreted so as to allow preemptive action. Accordingly, the United States clam they have acted in accordance with the law by attacking Iraq. If the U.S. managed to convince other states of the legitimacy of its preemptive strikes, new international custom would arise – provided, of course, that such practice continued with the approval of most states. Even the failure of other states to object to an American attack may suffice, as their behaviour could then be interpreted as an implied consent to the American interpretation of the law.[107] States that whish to prevent an expansion of the right to self-defence towards a right to preemptive war should voice their protests loud and clear, and expressly label the American attack a violation of international law.

6. Anarchy instead of a prohibition of the use of force?

What would support such changes in international law? Is George W. Bush wrong with his contention that international terrorism and weapons of mass destruction at the disposal of dictators determined to violate the law are threats which cannot be addressed with conventional means of self-defence? Should international law not be adapted to the capabilities and objectives of today's adversaries? Would otherwise international law fail vis-à-vis these new challenges?

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[106] New customary law can revoke prior custom and treaty las, see e.g. ALFRED VERDOSS & BRUNO SIMMA, UNIVERSELLLES VÖLKERRECHT § 573 et ssq. (3rd ed. 1984).

[107] On acquiescence, see Iain MacGibbon, *Customary International Law and Acquiescence*, 33 BRIT. Y.B. INT'L L. 115 (1957).

There is no denying that law will lose its capacity to secure peace and order if it fails to provide effective protection against existential threats. But is a legalization of preemptive war the only viable solution?

Strategic and political alternatives to a preemptive military strike, its negative consequences and counter veiling effects, the political and military pros and cons are not to be discussed in this paper. From a legal point of view, the only question that may be addressed here is whether the authority to launch preemptive strikes should remain a prerogative of the Security Council, or whether it is preferable to confer such authority on every state that feels threatened as part of the right to self-defence.

The very existence of these two alternatives already makes it obvious that the current legal system is not powerless against threats emanating from "rogue states". It does, however, require a Security Council decision, which – as experience has thought us – is not always easy to come by, particularly due to the veto capacity of its five permanent members. One way of adapting the current regime to new challenges would certainly lie in improving the decision structures of the Security Council and its available courses of action, rather than expanding the unilateral powers of individual states.

An expedient and necessary approach to evaluating the desirability of a legal rule lies in the generalization of the concrete case at hand. The question, thus, should not be whether we can approve the preemptive strike launched by the United States against Iraq, from which an uncontrollable threat may originate and which is governed by a villain such as Saddam Hussein, but rather whether we can approve each and every state being entitled to launch a preemptive military strike against any other state whenever it concludes that the other possesses weapons of mass destruction and might one day use them against it. If this solution might appear compelling, the following should be kept in mind: weapons of mass destruction can be found in many countries of the world. Biological and chemical weapons of mass destruction might emerge or be suspected virtually anywhere.

Moreover, dictators which might rightfully be described as „rogues" govern a number of states. Generalizing the Bush Doctrine might result in almost any state being able to find reason to engage in war against several other states. India against Pakistan. Pakistan against India. Japan against Northern Korea, Turkey against Iran. The stability of the state system would suffer a severe blow, and the general prohibition of the use of force would practically make way for a general entitlement to preemptive use of force. The legal relations between states would essentially come down to anarchy, suffering a relapse to an age when the general prohibition of the use of force had not yet entered into force, in other words: annulling the very doctrine which has been hailed as the greatest achievement of international law in the 20th century. The only difference to that earlier period would essentially lie in the need of labelling the enemy a "rogue state" before attacking it. It should be obvious that nobody can desire the emergence of such general rule in international law – not even the United States.[108]

7. A right to preemptive war for the United States only?

Probably the Bush Administration sought to avoid setting a dangerous precedent by taking the position that the U.S. has a special legal status, in which it has rights not available to others. At the West Point Commencement in June 2002, President Bush intimated that the United States could make choices unavailable to other states. Yet, the United States is equal before the law with all other sovereign states.[109] If America creates a precedent through its practice, that precedent will be available, like a loaded gun, for other states to use as well. The preemptive use of military force would establish a precedent that the United States has worked against since 1945. Preemptive self-defence would provide legal justification for Pakistan to attack India, for Iran to attack Iraq, for Russia to attack Georgia, for Azerbaijan to attack Armenia and so on. Any state that believes another regime poses a possible future threat, regardless of the evidence, could cite the United States invasion of Iraq.

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[108] See Henry Kissinger, *Beyond Baghdad*, NEW YORK POST, August 11, 2002 at 24.
[109] United Nations Charter, Article 2 (1): "The Organization is based on the principle of the sovereign equality of all its Members.".

Preemptive self-defence not only undermines the restraint on when states may use force, it also undermines the restraints on how states may use force. Today states measure proportionality against attacks that have occurred or are planned. What measures can be used to assess proportionality against a possible attack? The state acting preemptively is making a subjective determination about future events and will need to make a subjective determination about how much force is needed for preemption. In the case of Iraq, the U.S. plan calls for massive force to take over the whole country and eliminate its government. Presumably, most states claiming the right to use force preemptively will cite the Iraqi invasion to argue they have the right to do the same. Only by eliminating an unfriendly foreign regime entirely can a state defend itself from all possible future attacks. Even states responding to actual armed attack could use this precedent to justify disproportionate responses that seek to overthrow foreign regimes.

Of course, the United States government does not want to see Russia, China or Pakistan embarking on preemptive wars whenever they choose. And the National Security Strategy expressly warns them: "Nations should not use preemption as a pretext for aggression." The U.S. itself on the other hand will only engage in just wars: "The reasons for our actions will be clear, the force measured, and the cause just.", as the same document explains. Other states, however, are likely to abuse such action – with the preemptive defence perhaps being used as a pretext for resource interests, just to name one example?

That is why the Bush-Doctrine can only be understood as formulating a right to preemptive military strikes not for all states, but for the United States only; this is not explicitly stated in the National Security Strategy, but can be inferred from the constellation of interests under which it was formulated.[110] The United States has become aware of its capacity as the sole remaining superpower. And the U.S. government is determined to use the historical moment of opportunity. If the authority to lead preemptive wars is granted only the United States, good will

[110] Oscar Schachter, *Self-defense and the rule of law*, 83 AM. INT'L L: 259, 262 et seq. (1989)

prevail against evil, as will democracy and freedom against oppression and tyranny.[111] Security will be the outcome, and the insecurity and anarchy resulting from all other states enjoying the same right avoided.

Is that the solution to all problems of international security and world peace we are currently facing? Should we not accept the United States as a "benign hegemon", as the only power with an ability to secure peace and resolve conflicts? And is not the United States, at the same time the only power we might somehow trust not to abuse its role as a global policeman? Is a *Pax Americana* not preferable to the insecurities of a multipolar world? And yet, would the safety provided by the power and privileged legal status of the sole superpower outweigh the ensuing loss of political freedom by all other states? Could it outweigh the danger of abuse? Would we ultimately benefit from increased security, or would American unilateralism provoke new conflicts?[112]

III. Conclusion

The numerous political problems these questions entail cannot be dealt with here. Nevertheless, a fundamental legal problem should be pointed out: were the international community grants the United States an exclusive authority to lead preemptive wars against "rogue states", the sovereign equality of states – a further core principle of the current international law (Article 1(2), 2(1) of the UN Charter) – would be attenuated in favour of a privileged status of the United States. The legitimising principle of equality before the law would be breached what would be a step backwards. Inequality of power would be rewarded and sustained by inequality before the law. That might even result in an erosion of the very notion of equality before the law. What no longer applies between states – could it still be upheld within states as a legitimising principle?

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[111] N.S.S. preface and 1.

[112] Paul W. Schroeder, *What would Kant say? Iraq: The Case Against Preemptive War*, THE AMERICAN CONSERVATIVE, Oct. 21, 2002.

Against the background of the National Security Strategy, a preemptive war of the United States against Iraq possesses revolutionary character at least if a majority of states tolerate it without objecting. It can unravel the current peacekeeping system in international law and replace a proven, if admittedly flawed, system with one which would not yet permit an assessment of whether it might develop towards international anarchy or towards a global American hegemony. Considering the current allocation of power, the latter appears more likely, at least for now. But the hegemonic position requested by the United States, and its observance by the community of states, would disavow the principle of equality before the law, a precept which has been the basis of law since the Age of Enlightenment. If that outcome is to be avoided, a multilateral approach involving a stronger position of the United Nations Security Council will be called for.