

**THE BUSH DOCTRINE, COLLECTIVE SECURITY
AND THE UN: LEGAL AND INSTITUTIONAL
CONTEXTS FOR PRE-EMPTION**

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ABSTRACT

This project examines whether the right of self-defence under the U.N. Charter now has a wider application due to a doctrine of 'pre-emption.' This project evaluates the right of self-defence within an institutional context in order to assess critically the rationale for the *Bush Doctrine* and the justifications for the war on Iraq (2003). The *Bush Doctrine* can be understood as the dominant response to the challenges of 9/11, and forces us to examine terrorism and collective security when the use of force in an arena of sovereign nations is highly contested. The objective is to show that the *Bush Doctrine* has demonstrated a gap between the principles of the UN Collective Security system and the Charter governing the right of self-defence, and actual practice. This project also argues that in assessing the legitimacy of US actions, it is important to distinguish principle from practice.

*In loving memory of my mum Annatasia Sergiou
who instilled in me the drive and
determination to follow my dreams.*

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INTRODUCTION

Research Problem & Objectives

The Bush Administration's global 'war on terror' has created a quagmire for the interpretation of a state's right to use force under customary practices of international law. This crisis of interpretation results from the events of September 11th 2001, and the subsequent U.S. led military actions against both Afghanistan and Iraq. Given this context, the United Nations Collective Security (UNCS) system is challenged in two fundamental ways. First, the events of 9/11 and beyond have illuminated a gap between the principles and practices of the UNCS model.¹ Specifically, a re-examination of the right of self-defence under the United Nations (UN) Charter² is required. The research problem is whether the right of self-defence under the Charter now has wider application due to a doctrine of 'pre-emption.'

Prior to the U.S. invasion of Iraq in 2003 many state leaders argued that any American-led military action would be illegitimate, and would undermine both the Charter and future campaigns on the 'war on terror', thus creating new threats to international peace and security. Using this rationale, many states argued that they could not justify the new doctrine of 'pre-emption' in the name of self-defence under the existing framework of the Charter without re-writing the principles of sovereignty and

¹ The importance between the principle and practice discussed in this project are limited to the legal context and arguments and events prior to Gulf War II 2003. The legality of the context is therefore limited to the events, and information prior to the conflict, not after the fact.

² Hereafter referred to as the Charter.

self-determination,³ as well the principles of Humanitarian law and intervention. Simply put, ‘pre-emptive’ actions under the Bush Doctrine, along with the actions of transnational terrorists and networks, has intensified the debates regarding the scope and domain of international collective security. This project evaluates the right of self-defence within an institutional context in order to assess critically the rationale for the Bush Doctrine and justifications for the war against Iraq (2003). The purpose is to understand the relationship between ideas and power, and how power affects international security and interpretations of the right of self-defense. It is important to note here, that the motivation for U.S. actions are not a part of the arguments put forth in this project. The emphasis of the project is limited to the evidence of the time therefore motivation will not be discussed. The traditional scholarship of International Relations (hereafter referred to as IR) still narrowly defines security threats as state-based and driven; 9/11 challenges this orthodox view and the capacity of states to protect their own citizens.

The Bush Doctrine can be understood as the dominant response to the challenges of 9/11, and forces us to examine a series of issues: How do we link terrorism to collective security when the use of force in an arena of sovereign nations is highly contested? Are doctrines of ‘pre-emption’ congruent with the UNCS model, or justifiable in the name of self-defence? Within the international community, there is no consensus about whether, how, or when ‘pre-emptive’ actions are acceptable as embodied in the

³ UN Charter articles 1(2), 2(1), 2(4), 2(7) and Chapter VI & VII under the provisions of Articles 31-51. The UNCS system is the Institutionalization of the rules of conduct to deter threats to international peace and security under Chapter VII. The key objectives are one of compellence. In other words the UNSC will undertake measures – collective responsibility to ensure international peace – security. Articles that outlaw the use of force except in cases of self-defence or for the purpose of collective security fall under Articles 39-46 of the U.N. Charter.

Charter. This raises several further questions: How do we understand and explain the criteria and objectives that state leaders use and pursue in order to combat security threats? What are the contributing factors that precipitate instability because of terrorism? What are sources of insecurity – for instance, economic, social, political, and religious? In addition, what are the methods employed for achieving security and is it achievable?

The main objective of this project is to demonstrate that the concept of ‘security’ must be revisited and redefined, and, in light of current international political realities, a broader definition of self-defence is warranted. During the Cold War (1945-1990), security concerns primarily dealt with intra-state matters and in the immediate post-Cold-War period, the issues were intra-state security associated with internal civil strife. In the new millennium, the focus has shifted to transnational terrorism and the proliferation of weapons of mass destruction (WMD).⁴

⁴ This project recognizes that the Bush Administration advocated arguments predicated upon biological agents and identifying specific weapons, given the salience posed by such weapons, not WMDs.

Central Thesis

As a foreign policy tool, the Bush doctrine aimed at securing the USA from the perceived threat posed by transnational terrorism and the proliferation of WMD.⁵ The project argues that the Bush Doctrine has demonstrated a gap between the principles of the UNCS system and the Charter governing the right of self-defence, and actual practice. The Charter embodies a state-centric conception of security that appears increasingly discordant with contemporary security challenges. A realignment of the Charter is needed to better manage current and future security challenges. This project also argues that in assessing the legitimacy of US actions, it is important to distinguish principle from practice. The Bush Doctrine may indeed be justified in principle, but the actual implementation of the doctrine that was flawed. Furthermore, although the Bush Doctrine is highly controversial, the fact is that 'anticipatory', 'preventive' or 'pre-emptive' actions have been justified pre- and post- 9/11 and are, in fact, not new. By assessing and situating the recent debates about the use of force and self-defence within an institutional framework, this project intends to demonstrate that the Bush Doctrine has challenged the

⁵ This project will not discuss the distinctions between biological, chemical or nuclear weapons, but it recognizes the importance of the issues regarding the contentions towards the Bush administrations claims regarding Iraq's weapons program. The point here is that the potential use and or the threat of biological weapons (BW) and their use against the U.S. garnered a sharper focus after 9/11. However, the production and or the use of BW are not a simple undertaking for, non-state actors and terrorist organizations even though the Bush Administration focused on terrorist groups that could in theory obtain training, technical assistance or direct transfer of BW agents from rogue state's that have BW capability. The distinctions to be made are that pathogens are often equated with nuclear weapons. Milton Leitenberg in his article "Assessment of the Biological Weapons and Bioterrorism Threat," Center for International Strategic Studies Institute, December 2005 states that, "the fundamental difference between the latter, are that pathogens are alive whereas nuclear and chemical weapons cannot reproduce themselves and do not independently engage in adaptive behaviour; pathogens do both." This simple observation has immense implications for how one understands the development, use and deployment of such weapons. Also See Gavin Cameron, The Likelihood of Nuclear Terrorism, The Journal of Conflict Studies, Vol. XVII NO: 2 Fall 1998, Ron Purver, Chemical and Biological Terrorism, Canadian Security Intelligence Service Commentary NO: 60 1995, James, P. Pfiffner, "Did President Bush Mislead the Country in His arguments for War with Iraq?" Presidential Studies Quarterly 34:1 (2004).

prevailing conventional models of state security as embodied in key sections of the Charter. Arguably, the Bush Doctrine has re-opened a Pandora's Box of seemingly long-settled questions of international politics including: When do states have the right to use force? What threats can be justified by the use of pre-emptive action? Under what context can a state use force without UNSC authorization?⁶

Conceptual and Analytical Framework

Conceptually, this project employs constructivist insights to better understand the relationship between institutions, power and security, and illustrate the challenges of introducing new ideas and practices into pre-existing institutional contexts. Institutions are not simply regulative mechanisms that employ incentives and constraints external to actors. Institutions are inter-subjective phenomena that are constitutive of certain identities, interests and behaviours – enabling or making possible certain behaviours in the first place. Institutions furnish the “rules of the game”. They define the range of meaningful behaviour within a particular context of social interaction (e.g., what security is and whose security) and pre/proscribe the types of appropriate or legitimate behaviour that can be performed in that particular context (e.g., defining what actions can be taken to achieve security and when the use of force is justified).⁷ This draws attention to the significance of state interactions that “occur in the context of various institutional arrangements surrounding the policy process affecting how actors pursue their interests and ideas and the extent to which their efforts succeed.”⁸ The concern here is with the

⁶ These are rhetorical questions that are outside the scope of this project, yet this project recognizes their importance.

⁷ James Busumtwi-Sam and Ted Cohen, International Organization and Global Governance (forthcoming) Chapter six.

⁸ Micheal Howlett & M. Ramesh, Studying Public Policy: Policy Cycles and Policy Subsystems, (Oxford: Oxford University Press, 1995), p. 52.

way in which states and institutions “are organized and their relation to each other – their membership, rules, and operating procedures – [because] we need to know the principles, [practices], and ideas they embody. Institutions shape actors’ behaviour by conditioning the latter’s perception of their interests and affecting the probability of realizing them by constraining some choices while facilitating others.”⁹ Understanding how states define a problem, propose a solution, and their choice of instruments for a solution to the problem matters. The goals and choices of actors are therefore contingent upon interpretation, or, put another way, their construction of the problem gives rise to the implementation of policy.

By placing the concept of security into an institutional context, we can gain an understanding of the challenges to the traditional consensus following the events of 9/11. Traditionally security meant freedom from threats, danger, anxiety, and fear; the defence and preservation of certain core values from the threat of disruption or harm. The traditional consensus of security in IR has been state-centric. The domain of security has been defined as protecting the sovereignty of the nation-state (i.e., national security) – protecting states’ political independence and territorial integrity. The sources of insecurity entailed threats of armed attack by one state against another (i.e., external aggression). The method of achieving security involved the manipulation of credible threats (deterrent and compellent treat-based strategies) to manage threats of external aggression. These threat-based strategies could be implemented by states unilaterally (i.e., through ‘balancing’ power) or multilaterally (i.e., through collective security measures such as those institutionalized in the UN Charter).

⁹ Ibid.

Viewing security through this analytical lens provides certain advantages. First, it allows for a better understanding of how (realist) balance of power theories and (liberal) theories of collective security influenced the dominant consensus of security institutionalized in the Charter after WWII. Second, it allows us to gauge more accurately the impact of the end of the Cold war, the events of 9/11, and the Bush Doctrine on the traditional UN security consensus. Third, it also allows us to show how these events have produced serious gaps in the Charter provisions for collective security and make the case for a revision of the Charter to reflect contemporary security realities.

The study will compare U.S.-led military actions against Iraq in 1991 (Gulf War I) and in 2003 (Gulf War II) to illustrate empirically the changes and challenges to the traditional UN consensus of security, and the relative strengths and weaknesses of the Charter.¹⁰ Gulf War I and Gulf War II were chosen because of the opportunity to observe variation in the perceived legitimacy of the concept of self-defence in the time period between the two wars, and assess the impact on Gulf War II of the new variables ‘transnational terrorism’ and the Bush Doctrine that were not present during Gulf War I. In the first Gulf War, self-defence within the context of collective security was widely accepted as a rationale for the war against Iraq. The second Gulf War lacked such widespread consensus. By comparing the two Gulf Wars, and examining the debates and rationales, we obtain a clearer picture of the change in the interpretation of self-defence.

The analysis shows that the wide-ranging international consensus on actions against Iraq in Gulf War I was achieved in large part because that conflict more closely matched the traditional consensus of security institutionalized in the Charter. Gulf War II

¹⁰ Afghanistan was not included as a case study because the international community was largely in agreement that the U.S. had the right of self-defence against actors that supported terrorism. The U.S. response to the Taliban in Afghanistan largely fit the model of security as defined by the Charter.

in contrast was problematic precisely because it challenged the domain, scope and method of this traditional paradigm. The findings suggest that the UN Charter risks becoming anachronistic unless the threats posed by transnational terrorism and the proliferation of WMD are recognized as necessitating a redefinition of security primarily in terms of its scope, and method – and more effective measures including an expanded right to self-defence to counter these threats are institutionalized.

CHAPTER 1

THE TRADITIONAL CONSENSUS ON SECURITY

The traditional consensus of security is based on two major assumptions: first threats to security arise outside of a state's borders, and second, these threats are primarily, if not exclusively, military in nature and usually require a military response if the security of the target state is to be preserved. As Walter Lippman observes "a nation is secure to the extent to which it is not in danger of having to sacrifice core values, if it wishes to avoid war, and is able, if challenged, to maintain them by victory in such a war."¹¹ Lippman's definition "implies that security rises and falls with the ability of a nation to deter an attack, or defeat it. This is in accord with the common usage of the term."¹² This traditional focus, however, has paid scant attention to non-conventional approaches that argue for a broader conceptualization of security.¹³ The repercussions of such a limited definition influences the way in which states frame their understandings of

¹¹ Walter Lippman, US Foreign Policy: Shield the Republic, (Boston: Little, Brown, 1943), p. 51.

¹² Arnold Wolfers, Discord and Collaboration: Essays on International Politics, (Baltimore: John Hopkins University Press, 1962), p. 150.

¹³ For a condensed review regarding constructivists literature see, Karin M. Fierke & Knud Erik Jorgensen, Constructing International Relations: the next generation, (New York: M.E. Sharpe, Inc, 2001), and Ralph Pettman, Commonsense Constructivism or the making of world affairs, (New York: M.E. Sharpe, Inc, 2000). Maja Zehfuss, Constructivism in International Relations: The Politics of reality, (Cambridge: Cambridge University, Press, 2002). Also see Steve Smith, International Relations and international relations: The Links Between Theory and Practice in World Politics. *JIRD* 2003 6 (3), pp. 233-239. Smith outlines three problems with positivism notions concerning IR. First, problem relates to time posed after the Iraq war, second relates to the contextual concerns regarding space, and the third relates to culture after 9/11 regarding the existence of different subjectivities in world politics. It is important to note that constructivism also suffers, in that the impact of identities on decision-making is, as a rule poorly specified. Identities as a focus, makes it very difficult to predict, for example, foreign policy choices made by state actors.

security concerns, and impacts thinking about security approaches “in the context of a wider security agenda.”¹⁴

Collective Security in Theory

Collective security is a defensive arrangement where members agree to participate collectively in suppressing the offensive/aggressive use of force against any other member. The objectives of collective security are to de-legitimize aggression by institutionalizing deterrence on a collective basis. As such, member-states in a collective security arrangement are obligated to defend other member states. Members pledge to take unified action against any state that commits unlawful aggression. If deterrence fails, members would resort to compellence by imposing diplomatic, economic, and military sanctions against aggressor states to restore peace.

Although the basic ideas of collective security have a lengthy history, it was not until the end of World War I that the collective security term came into general use.¹⁵ US President Woodrow Wilson argued that collective security would unite all major states against aggression, and by confronting possible aggressors with a preponderance of power, provide more effective deterrence than the realist balance of power system. The premise was that making a preponderance of power available to all states for *defensive* purposes, but to no states for *offensive* purposes, collective security arrangements will overcome the security dilemma – i.e., the insecurity that arises when offensive and defensive military postures are indistinguishable.

¹⁴ Barry Buzan, Security: A Framework for Analysis; Peter, J. Katzenstein, Editor. The Culture of National Security: Norms and Identity in World Politics. (New York: Columbia University Press, 1996), pp. 1-72.

¹⁵ Andrew Hurrell, “Collective Security and International Order Revisited,” *International Relations* 11-1 (April 1992), p. 38.

Hence, a key difference between an alliance in a (realist) balance of power system and a (liberal) collective security arrangement is that the latter is primarily defensive whereas an alliance is both defensive and offensive. The balance of power and collective security are both designed to achieve the same goal (i.e., maintain peace and security by managing security dilemmas, restraining power, and deterring the use of force). There are differences, however, in the attainment of this goal. In the balance of power, restraints on power arise primarily from the logic of the system itself; although each state tries to maximize its power (relative to others) each fails because of similar actions of other states (i.e., power balancing). In a collective security arrangement, in contrast, restraints on power stem primarily from institutionalized norms and rules internalized by actors.

Thus, collective security imposes obligations on states based on principles, norms and rules, and has a number of requirements for its successful implementation.¹⁶ First, collective security requires that member states agree to settle disputes peacefully, and renounce the (unilateral and offensive) use of military force to alter the (political/territorial) status quo. Second, collective security requires that members accept the principle “peace is indivisible” — that a threat to the security of a member state anywhere is a threat to the security of all states. In this way, collective security assumes that member states will place their international obligations (to come to the defence of another state) ahead of their own national interests. Third, collective security assumes clear-cut distinctions between offensive and defensive military actions, and thereby assumes that member states will agree upon the identity of the “aggressor” and the “victim.” Fourth, collective security requires partial disarmament (i.e., removal of certain

¹⁶ Mohammed Ayoob, “Squaring the Circle: Collective Security in a System of States,” in Thomas G. Weiss, ed., *Collective Security in a Changing World* (Boulder: Lynne Rienner, 1993)

classes of offensive weapons, such as weapons of mass destruction). The reason is that for collective security to work, (military) power must be diffused throughout the system such that no single state is dominant, making it possible to marshal preponderant force against any state that acts offensively and commits aggression. Finally, collective security assumes a high degree of interdependence among states on the premise that if deterrence fails, aggression can be reversed through measures that need not entail the wholesale use of military force (e.g., through the use of economic and other sanctions).¹⁷

These requirements are so stringent that some critics argue that collective security in an anarchic international system is unrealistic and unachievable.¹⁸ This project will not enter into a full discussion of the debate on whether collective security is achievable in practice, but will focus on those aspects of collective security that are central to understanding the challenges posed by the events of 9-11 and the *Bush Doctrine* to the scope and method of security institutionalized in the UN Charter. The questionable assumptions of collective security include the notion that threats to security always emanate from the use of force by *states*. It also assumes that the distinction between illegitimate offensive actions (i.e., aggression), and legitimate defensive actions (individual and /or collective self-defence) is always clear-cut, and that member states will always agree on what constitutes aggression and on the identity of the aggressor. The ambiguities created by these assumptions go to the core of contemporary debates over the use of force and self-defence in an era of transnational terrorism. Here, the primary sources of insecurity are not necessarily states but amorphous transnational terrorist

¹⁷ Charles A. Kupchan and Clifford A. Kupchan, "The Promise of Collective Security," *International Security* 20-1 (Summer 1995), pp. 52-53;

¹⁸ George W. Downs and Keisuke Iida, "Assessing the Theoretical Case against Collective Security," in George W. Downs, ed., *Collective Security Beyond the Cold War* (Ann Arbor: University of Michigan Press, 1994), pp. 17-20.

groups, and the threat of WMD proliferation to such groups as well as to other states challenges the traditional distinction between offence and defence. Before elaborating on these observations, we turn to an overview of collective security in practice.

Collective Security in Practice: The UN Charter

The League of Nations, established in 1924 after WWI, was the first attempt to institutionalize collective security. Although it had some early successes in resolving disputes, the real test of the League came in the 1930s. The League failed to take decisive actions when Italy invaded Ethiopia in 1935, and its subsequent failure to deal with aggression by the Axis powers (Germany, Japan, and Italy) in the 1930s led to the demise of the organization and World War II. At the conclusion of WWII, the founders of the U.N. identified conflict prevention as one of its primary purposes, given the failure of the League to prevent the chain of events that led to World War II. Prevention as a tool was embedded in key principles of the U.N. Charter: Articles 2(4) and 2(7) are specifically designed to prevent armed conflicts. Article 2(4) is the norm against acts of aggression and creates an obligation on U.N. members to refrain from using force against another sovereign state. Article 2(7) is the non-intervention norm prohibiting UN members' from intervening in states' domestic jurisdiction. However, Article 2(7) encompasses one exception to non-intervention, namely enforcement measures by the UNSC under Chapter VII.

The UN Charter and the Use of Force: Article 2(4) and Article 51

The key principles governing the use of force in the Charter are found in Article 2(4) and Article 51. Article 2(4) of the UN Charter states:

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 Purposes of the United Nations.

Article 2(4) does not use the term ‘war’, however the use of force that is proscribed in the article includes war. One legal scholar suggests that, “the expression ‘force’ in Article 2(4) is not preceded by the adjective ‘armed,’ whereas the full phrase ‘armed force’ and “armed attack” appears elsewhere in the Charter (in Articles 41, 46, and 51). As a result, over the years, there have been many ‘acrimonious’ debates.”¹⁹ Another legal scholar argues that, “the obligations contained in Article 2(4) are widely believed to have evolved into a *jus cogens* rule, which is a peremptory norm of general international law from which no derogation is permitted and which can only be modified by subsequent norm of general international law having the same character.”²⁰ However, the scope of Article 2(4) is open to wide interpretation and contestation. A key issue has been the distinction between offensive and defensive uses of force. Article 2(4) prohibits offensive (i.e., aggressive) use of force. Self-defence is supposed to be defensive use of force and thus is not in violation of Article 2(4). However, what constitutes aggression? Are there exceptions to Article 2(4)?

¹⁹ Yoram Dinstein, War Aggression and Self-Defense, p. 84. Also see Ademola Abass, Regional Organizations and the Development of Collective Security, (Oxford: Hart Publishing, 2004), p. 183.

²⁰ Ibid., p. 184.

Some analysts argue that article 2(4) permits the use of force in ways that are not “inconsistent with the Purposes of the U.N”.²¹ This issue, for example, has arisen in the context of humanitarian intervention where force is used to stop or prevent the widespread abuse of human rights. The argument here is that since the promotion of human rights is one of the key purposes of the UN, then humanitarian intervention is consistent with the UN Charter.²² However, whether humanitarian intervention constitutes a legitimate exception to the Article 2(4) is debatable. For example, during the Kosovo crisis in the former Yugoslavia, “NATO collectively claimed it acted in order to halt the violence and bring an end to the humanitarian catastrophe unfolding in Kosovo.”²³

The debate over humanitarian intervention, coupled with the phrase “in any other manner inconsistent with the Purposes of the United Nations” in Article 2(4) has created disagreements on what type of force is consistent with the purposes of the U.N. This debate intensified following the 9/11 terrorist attacks in the USA with some writers suggesting that Article 2(4) should be expanded to include the use of force by non-state actors, which currently appear to be outside the scope of the article.²⁴ Article 51 of the UN Charter states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security...

²¹ *Ibid.*, pp.184-85.

²² *Ibid.*, pp.184-85.

²³ Ademola Abass, Regional Organizations and the Development of Collective Security, p. 185. Also see NATO Press release 1990 (040) cited by Christine Gray, International law and the Use of Force, (Oxford: Oxford University Press, 2000), p. 32.

²⁴ UN Doc S/RES 1373 (2001), 28 September, S/RES/(2002), 1438 (2002), 14 October, S/RES/1440 (2002), 24 October, S/RES/1441 (2002) 14 November.

The meaning of self-defence is important first for understanding aggression under Article 2(4).²⁵ Article 51 must be read in conjunction with Article 2(4) because Article 51 introduces an exception to the latter allowing a state that has been subjected to an *armed attack* the ‘right’ to legally resort to counter measures, that is, the inherent right to use force. This distinction between an ‘armed-attack’ and a ‘threat or use of force’ is significant, as not every use of force constitutes an armed attack.

Antonio Cassese, for example, argues that, “the attack must be of such magnitude that one cannot repel it otherwise. Contrary to what the ICJ ruled in the Nicaragua case the aggression need not come from a state; it can also emanate from a terrorist organization or even from insurgents (aggressing a state other than the one on whose territory they operate).”²⁶ Dinstein argues that the ICJ in the Nicaragua case “based its decision on the norms of customary international law concerning self-defence as a sequel to an armed attack. [The] Court stressed that this was due to the circumstances of the case, and it passed no judgment on the ‘issue of the lawfulness of a response to the imminent threat of an armed attack.’”²⁷

A number of issues are at stake here: an armed attack gives rise to the right to self-defence under Article 51, yet while an armed attack and an act of aggression are related, it is not self-evident how each concept is applied to a specific case. With reference to the *Nicaragua* case, Judge Schwebel of the ICJ (Dissenting Opinion) *rejected* a reading of Article 51 that the right of self-defence applies “if, and only if, an armed attack occurs.”²⁸ If Article 51 is only applicable in the event of an armed attack

²⁵ Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2005), pp. 354-55.

²⁶ *Ibid.*, p. 171.

²⁷ Dinstein, p. 173.

²⁸ *Ibid.*, p. 174.

that violates the political independence and internal integrity of a State then Article 51 makes no sense (i.e., the right to self-defence is obvious).²⁹ The core problem regarding Article 51 is not the *declaratory nature* regarding self-defence, nor the regulation as stated within the text. The problem concerns *proportional* and *anticipatory* self-defence, discussed in a subsequent section. Preventive war “in self-defence (if legitimate under the Charter) would require regulation by ‘*lex scripta*’ more acutely than a response to armed attack, since the opportunities for abuse are incomparably greater.”³⁰ Article 51 fails to close this gap between preventive war and counter-force in response to an armed attack. Dinstein correctly argues that “surely, if preventive war in self-defense is justified (on the basis of ‘probable cause’ rather than an actual use of force), it ought to be exposed to no less – if possible, even closer – supervision by the Council. In all, is this not an appropriate case for the application of the maxim of interpretation?”³¹

Key Charter Provisions for Collective Security

The UN Charter also set out to institutionalize a system of collective security that would be more effective than that of the defunct League of Nations. The key provisions for collective security are in Chapters VI, VII and VIII, with Chapter VII forming the centrepiece of the UNCS.³² The enforcement measures under Chapter VII (Articles 39-51) envisage a series of steps in an escalating ladder of force to maintain international security. Under Article 39 the UNSC is authorized to determine if there is a threat to, a breach of international peace and security, or more seriously, if an act of aggression has

²⁹ *Ibid.*.

³⁰ *Ibid.*, p. 175

³¹ *Ibid.*

³² Chapter VI (articles 33-38) is entitled “Pacific Settlement of Disputes”, Chapter VII (articles 39-51) is “Actions with respect to Threats to the Peace, Breaches of the peace and Acts of Aggression,” and Chapter VIII (articles 52-54) is “Regional Arrangements”.

occurred. The implication is that an action deemed “aggression” is more serious than one deemed a “threat” or a “breach”. Under Article 40, the UNSC is to facilitate negotiations to end the conflict. Article 41 authorizes the UNSC to invoke economic sanctions and other non-forceful measures it deems necessary to end the dispute, and under Article 42, the UNSC may use military force to end the dispute. Once Article 42 is invoked, Articles 43 - 47, should be automatically initiated. Here, member states contribute military forces that are to be UN forces under the command of a Military Staff Committee selected by the five permanent members of the UNSC. Articles 48 – 50 deal with members assisting the UNSC, and compensation for members that suffer losses because of enforcement actions. The last clause in Chapter VII is Article 51, which grants UN members the right to individual and collective self-defence.

The U.N. collective security system requires a 9/15 vote in the SC including all five permanent members. The granting of the veto to the five permanent members represented a realization that consensus and unanimity among the major powers was essential to effective collective security. In practice, the Cold War rivalry between the US and USSR, which was not anticipated when the Charter was drafted, made achieving such consensus difficult, and the use of the veto nearly paralyzed the UNSC.³³

The period between 1945 and the end of the Cold War in the early 1990s saw other major difficulties with the UNCS system. One of these dealt with identifying “aggression”. As noted, Article 39 authorizes the UNSC to determine threats to security, breaches of security, or acts of aggression. The UNSC has never used “aggression” to describe an international dispute, not even in the context of the Korea War (1950-53) and

³³ Johan Kaufmann, etl al, *The World in Turmoil: Testing the UN's Capacity* (NY: ACUNS, 1991) pp.127-132.

Gulf War I. Furthermore, the core provisions for collective security in Chapter VII (specifically articles 42-47) have never been fully implemented in the history of the organization. In the few examples where the UN did authorize the use of force, such as in the Korean conflict and Gulf War I, the authorization to use of force did not come from Article 42, but instead from Article 51.³⁴ In Korea the authorization for the use of force was based on two resolutions (82 and 83, June 1950) passed by the UNSC, which took advantage of the USSR's boycott of SC proceedings in its protest against the refusal the seat the communist government of China in the SC. These two resolutions recommended that members states: a) furnish assistance to the Republic of Korea (ROK) to enable it repel the armed attack; and b) recommended that they place their forces in Korea under a Unified command appointed by the USA. It is arguable whether this force was a true UN force. For some, it should be described more accurately as a US-led force given legitimacy by the UN. The same was true for Gulf War I.

Case Study I. Gulf War I

An examination of the text of the UNSC resolutions leading up Gulf War I reveals that the resolution (SC resolution 678) which authorized armed intervention did not invoke art 42. On August 2, 1990, The Kuwaiti UN Ambassador informed the UNSC that Iraqi forces had invaded Kuwait. The SC passed Resolution 660 on 2 August 1990, which determined that, a "breach to international peace and security had occurred" and invoked the provisions of Chapter VII. Under the provisions of Articles 39 and 40, resolution 660 urged both parties to the dispute to use negotiations to settle their differences. On 6 August 1990, the UNSC passed resolution 661, which invoked the provisions of Article

³⁴ Ibid, pp. 20-23.

41, and imposed mandatory economic sanctions on Iraq. A Sanctions Committee was established to monitor the sanctions regime, which was modified and extended in subsequent resolutions (Res. 665 and 670: these provided for enforcement of the trade embargo at sea and in the air). With resolution 662, the UNSC declared Iraq's annexation of Kuwait "null and void" (Iraq had announced that Kuwait was now a province). Between 13 September and November 1990, intense diplomatic efforts were made to find a negotiated settlement.

On 29 November 1990, the UNSC adopted Resolution 678 by vote of 12 to 2 (Cuba and Yemen voted against, China abstained), which noted that Iraq had refused to implement the previous SC resolutions. As a result of pressure from China (and other third world states on the council), the UNSC decided to allow Iraq one "final chance" by giving it 45 days (up to January 15, 1991) to comply with all SC resolutions. The Resolution went on to say that if Iraq failed to comply by the Jan 15 deadline, then the Council authorized UN member states to use "all necessary means" to uphold and implement resolution 660 and all subsequent resolutions, and to restore international peace & security in the area.³⁵ On Jan 18, a coalition of military forces contributed by UN members and led by the US attacked Iraqi forces in Kuwait. The war ended on February 28 1991 with the defeat of Iraqi forces. Resolution 686 (March 2 1991) and 687 (April 3 1991) imposed a number of conditions on Iraq for maintaining the ceasefire, including that it rescind annexation of Kuwait, and destroy its stockpiles of chemical and other WMD under UN supervision. Most importantly, the resolutions stipulated that until such time that Iraq met all the conditions, the authorization to use force granted by resolution 678 would remain in effect, and hostilities could resume to enforce compliance. This

³⁵ *Ibid.*, p. 6

provision goes to the core of the *revival* argument used by the US to justify its invasion of Iraq in 2003 as discussed in the case study of Gulf War II.

It is important to note that the UNSC did not explicitly indicate the legal foundations of its actions in Resolution 678. The provisions of article 42 were not invoked to authorize the use of force in resolution 678. Previous SC resolutions 660-677 did follow the graduated steps of Chapter VII, from Articles arts 39-41. However, the UN Charter stipulates that before military enforcement under Article 42 can be invoked, the UNSC has to make a determination that the economic sanctions (and other non-forceful compellent measures) under Article 41 had failed.³⁶ This was not done prior to authorizing force in resolution 678. Also, the provisions of articles 43-47 were not invoked. No Military Staff Committee was established. The military forces assembled against Iraq were not under the command of the UNSC. The forces were under direct command of the USA. Military actions against Iraq in Gulf War I were invoked under the provisions of Article 51. The phrase “all necessary means” in resolution 678 was based on the right to “individual and collective self-defence.” This raises the question: if self-defence under Article 51 is the only Article needed for collective security then why have Articles 40 – 50?

³⁶ Johan Kaufmann etl al, *The World in Turmoil: Testing the UN's Capacity*, pp. 6-20. Some critics of the US actions in Gulf War I have argued that sanctions imposed by resolution 661, should have been given more time to work.

CHAPTER 2 CHALLENGES TO THE TRADITIONAL CONSENSUS ON SECURITY

In September 2001, in the wake of the attacks in New York and Washington DC, U.S. President George Bush stated that, “Americans should not expect one battle, but a lengthy campaign unlike any other we have ever seen-.”³⁷ The Bush Administration’s post hoc assessment came in the form of a new National Security Strategy (NSS) for the U.S.³⁸ that had “one critical element... the concept of preemption—the use of military force in advance of a first use of force by the enemy.”³⁹ Anthony Clark Arend suggests that preemptive force “has been taken to an even more controversial level by the [Bush] administration.”⁴⁰ That is, while conventional notions regarding international law “require there to be ‘an imminent danger of attack’ before preemption would be permissible, the administration argues that the U.S. must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.”⁴¹ The Bush Administration contends that, “[t]he greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack.”⁴² .

³⁷ President George Walker Bush, ‘Address to a Joint Session of Congress and the American people,’ 20 September 2001, <http://www.whitehouse.gov/news/releases/2001>.

³⁸ The National Security Strategy of the United States, September 2002, www.whitehouse.gov/nsc/nss.html

³⁹ Anthony Clark Arend, *International Law and the Preemptive Use of Military force*, *The Washington Quarterly*: NO: 26: 2 pp. 89-103.

⁴⁰ Arend, p. 89

⁴¹ *Ibid.*, p. 89.

⁴² NSS

In this sense, the *Bush Doctrine*, with its emphasis on pre-emption, directly confronts head-on the legal mechanisms of international law governing the use of force and self-defence outlined in the previous chapter. This section of the project will be in two parts. The first section will discuss the principles and the theory behind the *Bush Doctrine*, followed by an analysis of how the *Bush Doctrine* challenges the traditional approach of the UNCS system.

The Principles and Theory behind the Bush Doctrine

American Presidents past and present have created their own doctrines outlining key objectives for U.S. foreign policy strategies. Each Presidential doctrine has been specific in its response to political events and the *Bush Doctrine* is no exception. Colin Powell suggests that the *Bush Doctrine* is “attuned as much to the opportunities for the United States as to the dangers it faces.”⁴³ Powell further asserts that the NSS strategy has only broken with international tradition insofar as it determines how the U.S. will react to terrorist’s actions that affect its national and/or international interests.⁴⁴

Powell links institutional liberal philosophies and the protection of those ideals to the justification for going to war. In contrast, some commentators perceive the Bush Presidency as a neo-conservative administration. John Simpson argues that Gulf War II is the product of a new reality – uncontested American power, coupled with an Executive

⁴³ Colin Powell, *A Strategy of Partnerships*, Foreign Affairs, January 2004, pp. 22-34.

⁴⁴ *Ibid.*, Powell argues that, “Some at home have distorted the NSS for partisan reasons, attempting to make the Bush Administration look bad by turning fear of preemption into an early twenty-first-century equivalent of the Cold War era’s ‘rocket rattle’. Some abroad, meanwhile, have distorted U.S. intentions through an apparent exercise in mirror imaging. Using their own mottled political histories as a reference point, they have asked what they would do with the power that the United States possesses and have mistakenly projected their own Hobbesian intentions onto our rather more Lockean sensibilities.” pp. 22-34.

driven by a strong religious ideology.⁴⁵ Paul O'Neill, a former Treasury Secretary in the Bush Administration, suggests that neo-conservatives in the administration had an agenda to attack Iraq from the beginning of January 2001. O'Neill also claimed that there was no evidence of weapons of mass destruction,⁴⁶ and that the events of 9/11 were used as a justification for implementing an already determined response.⁴⁷ Simpson adds that Gulf War II may best be understood through attention to U.S. domestic politics rather than its foreign policy, and that Iraq was a test case for demonstrating U.S. military superiority. The war against Saddam in 2003 was President Bush's way of assuring U.S. citizens that everything was 'still all right.'⁴⁸

Others have stated that many members of the Bush Administration were a part of a project referred to as the '*New American Century Project*,'⁴⁹ which is predicated upon the '*War on Terrorism*'. Whether this is a case for the argument of American imperialism has yet to be seen. U.S. domestic opinion and culture, regardless of the events of 9/11, are against such hegemonic notions. Many of the countervailing opinions have still to understand that the "anti-imperial critique fails to recognize that any U.S. imperialist military designs are limited by its own political culture of being formed out of anti-imperialist engagements."⁵⁰ Gulf War II is a political statement to combat any threat to U.S. values. The opening paragraph of the NSS conveys this assessment:

⁴⁵ Dominic McGoldrick, *From '9-11' to the Iraq war 2003: International law in an Age of Complexity*, (Oxford & Portland Oregon, Hart Publishing, 2004), p. 193.

⁴⁶ See CNN.com (Wednesday, January 14, 2004, posted 2:12am) Politics, [O'Neill: Bush planned Iraq invasion before 9/11.](#)

⁴⁷ [Ibid.](#), CNN.com

⁴⁸ See John Simpson, *The Wars against Saddam: Taking the Hard Road to Baghdad* (London: McMillan, 2003) pp. 252-54. Cited in McGoldrick, p. 181.

⁴⁹ See <http://www.newamericancentury.org> for their particular views regarding Gulf War II.

⁵⁰ See Joseph Nye, 'The American National Interest and Global Public Goods,' *International Affairs* Vol. 78, pp. 233-244.

The great struggles of the twentieth century between liberty and totalitarianism ended with a decisive victory for the forces of freedom—and a single sustainable model for national success: freedom, democracy, and free enterprise. In the twenty-first century, only nations that share a commitment to protecting basic human rights and guaranteeing political and economic freedom will be able to unleash the potential of their people and assure their future prosperity...⁵¹

Two linked propositions of the *Bush Doctrine* are the right to use pre-emptive force and the position that the U.S. makes no distinction between those (agents) who undertake terrorism and those that support and harbour terrorists. The first proposition applies to trans-national actors that are outside of international law. The second proposition links trans-national actors to state sponsors of terrorism, thereby holding each accountable for their actions. By forging these two propositions together, the Bush Administration has effectively broken with precepts governing the use of force internationally to effectively deal with terrorists' organizations.

It is argued here that most observers have missed the point by either focusing upon previous U.S. policies towards WMD, proliferation and terrorism, or sidestepped the issues altogether and concentrated solely upon the Bush Administration's policy towards pre-emption. This is precisely where contentions and confusions arise. Colin Powell argues that "... observers have exaggerated both the scope of pre-emption in foreign policy and the centrality of pre-emption in U.S. strategy as whole,"⁵² as "the sharp focus on the front lines of the war against terrorism, (have) made it harder than usual for people to grasp what American strategy is really all about."⁵³

⁵¹ Opening paragraph of NSS.

⁵² Powell, pp. 22-34.

⁵³ *Ibid*,

The *Bush Doctrine* challenges traditional notions of international security by questioning the applicability of the entire UNCS model and in particular Articles 2(4) and 51. The U.S. NSS is therefore a foreign policy instrument that deals with non-state actors that threaten the political independence and integrity of the U.S. The question for many observers is, has the *Bush Doctrine* gone beyond the customary practices of international law by asserting a right to wage war pre-emptively? One response is that it is legal under Chapter VII of the UN Charter to respond to threats to international security and peace. The Bush Administration argues that the UNSC gives ‘implied authorization’ for the use of force if resolutions under Chapter VII are passed declaring a state to be in violation of international norms. Thus, the U.S. claims to have the right to enforce UNSC resolutions even if the Security Council itself does not explicitly authorize the use of force. Counter arguments suggest such an interpretation would allow countries like China to utilize this definition to invade Taiwan on the pretext of prevention – an act of aggression to which the U.S. would surely object. This project argues that international events have overtaken past practices and new criteria are needed in order to combat threats to international peace and security including the use of pre-emptive force. Gulf War II illustrates this point.

Case Study: Gulf War II

Throughout the 1990s, a succession of terrorist attacks occurred on American forces, ships and embassies outside the United States. There were attacks “on U.S. marines in Mogadishu in 1993, a truck bombing in Riyadh in 1995, the bombing of the Khobar Towers in Dhahran in 1996, the bombing of U.S. embassies in East Africa in 1998

and the attack on the U.S.S. Cole in 2000.”⁵⁴ The attacks on the twin towers and the Pentagon by the terrorist network AL-Qaeda,⁵⁵ led by Osama Bin Laden constituted the first assault on U.S. home territory (there were also earlier attempts to bomb the WTC).⁵⁶ The U.S. response to the attacks started with ‘Operation Enduring Freedom’ with military action against Afghanistan, which was the base for AL-Qaeda. Under Article 51, the U.S. claimed the right of self-defence. “Other states did not challenge the US’s right of self-defence but questioned its tactics and targeting.”⁵⁷ President Bush declared the attacks by AL-Qaeda a declaration of war. The rationale behind the President’s speech was not just to define the ‘War on Terrorism,’ but also to shift the focus of the U.S. Administration to Iraq and its alleged possession of WMD. This led to a call for a ‘Regime and leadership change’ that was openly discussed in the U.S. by the neo-conservative wing of U.S. political thought.⁵⁸

Speaking before a Joint Session of Congress on 20 September 2001, and during the State of the Union Address on 29 January 2002 President Bush made the argument for the use of force against trans-national actors belonging to terrorist organizations. The content of the speeches hit their mark when President Bush addressed the U.N. General Assembly on 12 September 2002. “The speech clearly turned attention to the UN

⁵⁴ *Ibid.*,

⁵⁵ R Gunaratna, *Inside AL Qaeda: Global Network of Terror*, (London: Hurst, 2002).

⁵⁶ PL Bergen, *Holy War Inc: The Secret World of Osama Bin Laden*, (New York: Free Press, 2001). In a video, Osama Bin Laden described the U.S. as ‘modern world’s symbol of paganism’ cited in P Bergen, *Terror and Liberalism* (London: Norton, 2003), p. 117.

⁵⁷ M Byers, ‘International Law, Terrorism, the Use of Force and International law after 11 September,’ (2002) 51 ICLQ 401; UNSC Resolution 1267 (1999), and UNSC 1333 (2000). Also see the Afghanistan ‘Report of the Security Council Mission to Afghanistan, 31 October to 7 November 2003’ S/2003/1074.

⁵⁸ See R Kagan & W Kristol, ‘What to Do about Iraq’ in Iraq war reader, Also see J Urry, *Global Complexity* (Cambridge: Polity, 2003) pp. 7-8.

Security Council and how it would deal with Iraq.”⁵⁹ The Bush Administration argued that the spread of WMD to terrorists presented a grave and imminent danger,⁶⁰ and that the rogue states of the Axis of Evil (Iraq, Iran and North Korea) comprised a significant threat to international peace and security.

The Bush Administration also argued that deterrence and containment policies no longer applied if WMD are in the hands of terrorist organizations. President Bush iterated this theme during a speech at West Point. He argued that with the collapse of the Soviet Union and the end of the Cold War the international security environment had undergone a profound transformation. President Bush also stated that during the Gulf War there was “irrefutable proof that Iraq’s designs were not limited to the chemical weapons it had used against Iran and its own people, but also extended to the acquisition of nuclear weapons and biological agents”.⁶¹ The Bush Administration used the spectre of Iraqi WMDs to advocate the use of proactive military measures as warranted to defend the U.S. against any further attacks.⁶² The problem, however, with respect to Iraq was that doubts surrounding the validity of the WMD argument and the alleged links between Iraq and Al Qaeda bitterly divided the diplomatic corps.

The Security Council Resolutions

A series of UNSC Resolutions, including resolution 678 (adopted November 1990), 687 (adopted 3 April 1991) and 1441 (adopted 8 November 2002) speak to authorization for the use of force against Iraq in 2003. UNSC resolution 1441 was a

⁵⁹ Dominic McGoldrick, p. 12.

⁶⁰ NSS of the United States of America (Washington: White House, September 2002), p.13.

⁶¹ See President Bush West Point Speech June 1, 2002.

⁶² President Bush West Point Speech June 1, 2002.

reflection of resolve and unity amongst UNSC members,⁶³ requiring the Iraqi government to account for all of its WMD and cooperate fully with UN International Atomic Energy Agency (IAEA) weapons inspectors.⁶⁴ The UNSC stated that if Iraq was in ‘material breach’ of the previous resolutions, or failed to comply with the IAEA inspectors ‘serious consequences’ would result. Resolution 1441, however, produced divisions amongst UNSC members who were primarily concerned with determining whether the resolution authorized the ‘use of force’. Both the U.S. and UK governments advocated that action was authorized by resolution 1441 if Iraq was in non-compliance with prior UNSC resolutions.⁶⁵ The Attorney General for the UK Lord Goldsmith gave this assessment to Prime Minister Tony Blair regarding resolution 1441:

1. The use of force must be necessary to avert an armed attack, first to avert an imminent threat; and force must be a proportionate response...
2. The concept of what is imminent may depend on the circumstances.
3. In my opinion, there must be some degree of imminence. I am aware that the USA has been arguing for recognition of a broad doctrine of a right to use force to pre-empt danger in the future. If this means more than a right to respond proportionately to an imminent attack (and I understand that the doctrine is intended to carry that connotation) this is not a doctrine, which in my opinion, exists or is recognized in international law.
4. Force may be used where authorized by the UN Security Council acting under Chapter VII of the UN Charter. The key question is whether resolution 1441 has the effect of providing such authorization.⁶⁶

⁶³ See for example, Jeffrey Fleishman, “World Sees Unanimous U.N. Vote as Triumph of Diplomacy,” *Los Angeles Times*, 10 November 2002, p. 19.

⁶⁴ SC Res, 1441, UN Doc.S/Res/1441 www.un.org

⁶⁵ See James Traub, ‘The Next Resolution,’ *New York Times*, 13 April 2003, sec. 6, p. 50. Also see Michael J. Glennon, *Why the Security Council Failed*, *Foreign Affairs* Vol: 82, NO: 3 (May-June 2003), p. 16.

⁶⁶ Lord Goldsmith memo March 7 2003 presented to PM Blair on the legal basis of military action against Iraq. The memo released by the UK government on 28 April 2005. See, <http://www.pm.gov.uk/files/pdf/Iraq%20Resolution%201441.pdf>. The scanned version of the original memo as released by the Prime Minister's office on 28 April 2005 is available at <http://www.comw.org/warreport/fulltext/0303goldsmith1441.pdf>.

The framework that Lord Goldsmith is concerned with relates to resolutions 678 (1990) which authorized the use of force against Iraq and 687 (1991) which suspended hostilities with a ceasefire and imposed conditions on Iraq. Resolution 687 did not terminate the use of force (as specified in the text of resolution 678) if Iraq was in violation of its provisions. Resolution 1441 determined whether Iraq remained in violation of the above resolutions and thus gave Iraq a final opportunity to comply with previous resolutions invoked by the UNSC or face 'serious consequences.' The crux of the argument concerns whether resolution 1441 was sufficient to revive the authorization to use force provided by resolution 678. Resolution 687 gave the authorization for the coalition forces to use "all necessary means" to restore international peace and security and relied upon the US and UK to enforce the no-fly zones in Northern and Southern Iraq. McGoldrick argues, "the actions of US and the UK were not opposed by other states."⁶⁷ Post-Gulf War I no subsequent resolutions terminated the authorization to use force present in resolution 678.

The UK Attorney General suggested that the *revival* argument justified the use of force under resolution 678, i.e., a material breach of the conditions imposed under the ceasefire authorized the use of force. The Attorney General stated that, "It has been the UK's view that a violation of Iraq's obligations under resolution 687 which is sufficiently serious to undermine the basis of the ceasefire can revive the authorization to use force in resolution 678." The logic that underpins the revival argument relies upon the violations

⁶⁷ McGoldrick also suggests that 'other members of the SC rejected the legality of the sanctions by the US and the UK in the no-fly zones, see C. Gray, 'After the Ceasefire: Iraq, the Security Council and the Use of Force' (1994) BYIL 135; C Gray, 'From Unity to Polarization: International Law and the Use of Force against Iraq (2002) 13 EJIL 1,' p. 56 When the first Gulf War ended the conditions for the ceasefire were imposed thereby obligating Iraq to comply with SC resolutions for the dismantling and the elimination of WMD under UN inspectors and monitoring obligations. Under the general guidelines resolution 687 was suspended, but the authority to use force was not terminated.

by Iraq after Gulf War I.⁶⁸ The U.S. therefore argued that Iraqi breaches of international resolutions may be ‘assessed by individual Member States’. Resolution 1441 provides a basis for revival but the legal basis for the authorization to use force requires that UNSC members determine whether to invoke the mandate set in the provisions of the prior resolutions.⁶⁹ Resolution 1441 thus created deep divisions over the interpretation of international law authorizing the use of force, evident when both the U.S. and U.K. governments claimed the above authorization, while France and Russia maintained that no such authorization existed. Michael Byers argues that resolution 1441 “contains intentional ambiguities--in other words, that the Council members negotiated and agreed to language that they knew could be used to support arguments on both sides.”⁷⁰ Byers adds that:

The intentional ambiguity in international lawmaking and the unintentional ambiguity in international legal documents is an almost inevitable consequence of the character of negotiations, where delegates frequently have to resolve complex issues and widely divergent interests under severe time constraints. But one should not underestimate the frequency with which inconsistencies and ambiguities are intentionally included. States that are unable to secure their desired outcome on a particular negotiating issue may push for ambiguous language so as to reduce the impact of their loss.⁷¹

⁶⁸ The revival argument was also the basis for the use of force in December 1998 by the US and UK (Operation Desert Fox). This followed a series of Security Council resolutions, notably resolution 1205 (1998). Yet, the “...revival argument does provide a sufficient justification in international law for the use of force against Iraq. That view is supported by an opinion given in August 1992, by the then UN legal Council, Carl-August Fleischauer. However, the UK has consistently taken the view (as did the Fleischauer opinion) that, as the ceasefire conditions were set by the Security Council in resolution 687, it is for the Council to assess whether any such breach of those obligations has occurred.”

⁶⁹ See Attorney General, Lord Goldsmith, in Answer to a Parliamentary Question, Tuesday, 18 March 2003, www.fcogov.uk Times (London), 18 March 2003, p. 2.

⁷⁰ Michael Byers,

⁷¹ Ibid.,

Byers further states that, “the intentional character of the ambiguities appeared after the Iraq war began... [when] Jean-David Levitte, the French ambassador to Washington, met with U.S. deputy national advisor Stephen Hadley to discuss British and U.S. efforts to secure a second resolution.”⁷² According to the Financial Times, “Mr. Levitte urged Mr. Hadley to drop the second resolution. It would, he warned, cause unnecessary diplomatic damage. If they went to war without another resolution, its legality would be hazy, whereas if they went for it and failed, the legality would be in doubt.”⁷³ Levitte was reportedly acting on direct instructions from President Jacques Chirac.⁷⁴ James P. Rubin has reported that Levitte also met with Vice-President Richard Cheney, in February 2003 to pass the message on that Washington and Paris should simply, ‘agree to disagree.’ Through diplomatic channels, the French advised the U.S. to bypass the UNSC. “Your interpretation [of 1441] is sufficient [to justify war],” they counselled Washington, and “you should rely on your interpretation.”⁷⁵

It has also been argued that both Paris and Moscow had significant financial incentives for preventing war, given the substantial debts owed to them by Iraq.⁷⁶ But as Byers points out both Paris and Moscow realized that the war may have effects on the existing international order.⁷⁷ This was especially when President Bush claimed an extended right of pre-emptive self-defence,⁷⁸ and this message was explicitly stated in the President’s address to the UN General Assembly on September 12, when he asserted that

⁷² *Ibid.*,

⁷³ Gerard Baker et al, “Blairs Mission Impossible: The Doomed Effort to Win a Second UN Resolution,” *Financial Times*, 29 May 2003, p. 17.

⁷⁴ *Ibid.*,

⁷⁵ James P. Rubin, “Stumbling into War,” *Foreign Affairs* Vol. 82, NO: 5 (September 2003).

⁷⁶ William Boston, “Europe Shifts to Post-War Focus” *Christian Science Monitor*, (20 March 2003), p. 3.

⁷⁷ Francis Fukuyama, “End of the Post-war Alliance Pact,” *Yomiuri Shim-bun*, (16 March 2003), p. 8.

⁷⁸ Remarks by President George W. Bush at the 2002 graduation exercises of the United States military Academy, West Point, New York, 1 June, www.whitehouse.gov/news/releases

the world organization would be rendered irrelevant if no SC resolution was achieved.⁷⁹ The political rifts caused by the Iraq crisis were clear, distinct and divisive. The U.K. led by Prime Minister Tony Blair, sided with the U.S. rather than the Europeans. Blair argued that, “There cannot be a continual power struggle between Europe and the United States. If that is what others want, we will not be part of it.”⁸⁰

The division among members of the European Union over the Iraqi crisis was demonstrated when the Prime Ministers of Spain, Italy, Portugal, Denmark (existing members), and those of the Czech Republic Hungary and Poland (applicant members) “published an ‘open letter’ on 30 January 2003 supporting the US and UK for their leadership on Iraq”.⁸¹ France and Germany by contrast were bitterly opposed to the war. McGoldrick points out that the 10 States that were due to become members of the EU in 2003 “were broadly supportive of the ‘New Europe’ rather than the ‘old’ Europe of France and Germany.”⁸² This characterization of new versus old Europe, initially stated by the US Secretary of Defence Donald Rumsfeld, hit a raw nerve. Simpson suggests that, “‘Old Europe’, in American parlance, meant the Europe which appeased and eventually capitulated to Hitler. Maybe there was a faint accusation of anti-Semitism about it, too.”⁸³ To add to already strained diplomatic relations “France berated the EU applicant states for siding with the US.”⁸⁴ On such a major matter of foreign and security

⁷⁹ President Bush UN General Assembly September 12, 2002, www.whitehouse.gov/news/releases

⁸⁰ P. Stothard, *30 Days: A Month at the Heart of Blair's War* (London: HarperCollins, 2003); W Shawcross, *Allies: The United States, Britain, Europe and the War in Iraq* (London: Atlantic, 2003). Cited in Dominic McGoldrick, p. 12.

⁸¹ See <http://news.bbc.co.uk/1/hi/world/Europe/2708877.stm>.

⁸² McGoldrick, p. 14.

⁸³ John Simpson, *The Wars against Saddam: Taking the Hard Road to Baghdad*, (London: MacMillan, 2003) p. 283.

⁸⁴ *Ibid.*,

policy, 'the EU could only maintain the barest figment of formal unity.'⁸⁵ What was to follow from these political divisions were similarly reflected in NATO.⁸⁶

The crisis in NATO occurred in January 2003 and resulted when the U.S. asked NATO to provide military support. France, Germany and Belgium vetoed the request in the North Atlantic Council based on their opposition to any war against Iraq. They argued that accommodating the American request would lock NATO into a, 'logic of war' at a time when the UN was still seeking a peaceful resolution to the crisis. However, the objections caused what the US described as a 'crisis of confidence' in NATO as the idea of imposing conditions on a request for military assistance from a NATO member struck at the very heart of the key debates regarding security. The crisis was eventually resolved when the wording of the resolution was slightly amended and NATO's Military Planning Committee, of which France was not a member adopted the decision.⁸⁷ The controversy over the Iraq crisis was vigorously debated, and international lawyers questioned the legality of utilizing military action against Iraq, focusing upon the credibility of the international system as a whole under the UN Charter and the authorization by the SC of the use of force. The onus was upon the U.S. to make the link between terrorism and Iraq.

⁸⁵ See the Conclusion of the General Affairs and External Relations, 27 January 2003; Extraordinary European Council Conclusions, 17 February 2003, Doc 6466/03 "We are committed to the United Nations remaining at the center of international order... Force should only be used as a last resort" <http://europa.eu.int>

⁸⁶ McGoldrick, p. 14. Also see UK Foreign Affairs Committee, *Foreign Policy Aspects of the War against Terrorism*, Tenth Report, Session 2002-03, Hansard HC 405, paras 107-12 (31 July 2003).

⁸⁷ McGoldrick, p. 14. Crisis in NATO.

CHAPTER 3

ANALYSIS OF THE LEGAL AND INSTITUTIONAL CONTEXTS

McGoldrick argues that, “no laws in any legal system are applied in the abstract. They are always context dependent. Arguing for a certain context can thus be an important part of a particular legal argument.”⁸⁸ The context surrounding Gulf War II is central to the debates concerning the legitimacy and legality of the war. The legal argument was framed in the following manner:

The naked aggression by Iraq against its neighbors, its efforts to obtain weapons of mass destruction, its record of having used such weapons, Security Council action under Chapter VII of the United Nations Charter, and continuing Iraqi defiance of the Council’s requirements. On August 2, 1990, Iraq invaded Kuwait. It is easy to forget the wantonness of Iraq’s invasion, which was unprovoked and carried out with particular cruelty, and the horror with which the world received news of it. The invasion rightly shaped, forever after, the way the world would look at Saddam Hussein’s Iraq.⁸⁹

Two key legal principles that stand out and are central to understanding the justification for an extended right of self-defence: proportionality and anticipatory self-defence.

⁸⁸ *Ibid.*, p. 52.

⁸⁹ McGoldrick, p. 52. McGoldrick cites WH Taft and TF Buchwald, ‘Preemption, Iraq, and International Law’ (2003) 97 *AJIL* 557 at pp. 557-58.

Proportionality & Anticipatory Self-Defence

The right of self-defense and the use of (counter) force to an armed attack express the views of the framers of the text of Article 51 at the time the Charter was drafted. However, when WMD and terrorism are taken into account, acts of aggression and responses to an armed attack can no longer be thought of just in conventional terms. In this sense, do Articles 2(4) and 51 presume conditions of conventional warfare fought by conventional state armies that no longer apply in the contemporary period? If this is the case, the two Articles can no longer be sustained unless there are specific changes that address the definitions of “aggression” and “armed attack.” Gulf War II gives rise to this question because it is not altogether clear how concepts such as proportionality and anticipatory self-defense are understood under international law with regards to an *imminent threat*. 9/11 and the subsequent military campaigns in Afghanistan and Iraq have identified a need to widen the scope of both Articles 2(4) and 51 due to exceptional circumstances, to ensure that the right of self-defense is not open to abuse. If proportionality and anticipatory self-defense are the guidelines for legitimation, how do they apply to pre-emption and prevention when we take into consideration transnational actors and WMD?

Proportionality

The principle of proportionality as embodied in various international conventions and customary practices generally has two interrelated components both designed to limit the harm caused by military force.⁹⁰ The use of counter-force in self-defence must be in

⁹⁰ These include the Geneva Conventions on the Laws of War and customary practices regarding *retorsions* and *reprisals*.

proportion to the original threat/offence and to the (military) objectives sought, and carried out in such a way as not to cause undue harm to civilian populations. Proportionality is utilized as a measure of fairness that has moral implications. For instance, how do state actors determine proportionality in response to a terrorist attack? Is proportionality an instrumental calculation? And how do state actors actually weigh the significance of their military actions against the inevitable civilian casualties?⁹¹

The obvious tensions arise in terms of the “scale and effects between unlawful force and the lawful counter-force.”⁹² One legal scholar argues that, “Post-Charter state practice shows that self-defense, individual and collective, may carry the combat to the source of the aggression.”⁹³ In other words, State A does not have to stop “when the aggressor is driven back, and (force) may be carried on by the defending State until final victory.”⁹⁴ This type of response to conventional invasion by military forces when viewed in conjunction with terrorism, illustrates the problems with Article 51. For if excessive force is forbidden, then how do states realistically take measures that are proportional to an armed attack? Second, if proportionality involves force to repel an armed attack then the underlying principles become unrealistic, not only in terms of the different causes for an armed attack, but also the counter-force utilized to repel an armed attack. The point here is that if war is legitimised as a response to an armed attack and

⁹¹ Again this project recognizes the arguments regarding the moral and philosophical concerns that underpin proportionality. Yet the latter will not be discussed given that it is beyond the scope of this project.

⁹² Dinstein, p. 216.

⁹³ *Ibid.*, p. 219

⁹⁴ *Ibid.*, p. 219.

can be carried on by the defending state⁹⁵ then anticipatory self-defence under Article 51 is open to self-serving interpretations and/or abuse.

Many have charged that the Bush Administration lied about the threat posed by Saddam's regime given the failure to find or discover WMD and that the Bush administration had manipulated intelligence in order to justify U.S. military actions against Iraq.⁹⁶ In terms of the first charge, the Bush Administration's claims about the nature of the threat posed by Saddam were not substantially different from that put forward by the Clinton administration. For instance, the "Iraq Liberation Act" October 31st, 1998, states that, "It should be the policy of the United States to support efforts to remove the regime headed by Saddam Hussein from power in Iraq and to promote the emergence of a democratic government to replace."⁹⁷ Regime change thus became a stated goal of U.S. foreign policy emphasizing a containment policy that consisted of UNSC authorized weapons inspections and an economic embargo, in addition to the enforcement of the 'no-fly zones' over Northern and Southern Iraq.

Enforcement measures were necessary due to Saddam's non-compliance and flagrant abuses of UNSC sanctioned resolutions and to combat the violent persecution of Iraqi citizens by Saddam's regime. The Iraqi regime's human rights record was abysmal given the documented use of sarin, mustard gas and nerve agents, in addition to murder,

⁹⁵ Ibid.,

⁹⁶ See "Downing Street Revelations." The New American 25 July: 2005: 8., Fazio, Daniel. "Geoffrey Barker, Sexing It Up: Iraq, Intelligence and Australia." Journal of Australian Studies (2004), Pfiffner, James P. "Did President Bush Mislead the Country in His Arguments for War with Iraq?." Presidential Studies Quarterly 34.1 (2004):

⁹⁷ See Public Law 105-338 The "Iraq Liberation Act."

torture, and mass rape that were all sanctioned under Saddam's regime.⁹⁸ Thomas M. Nichols argues that,

To claim that the United States (or any other nation, for that matter) is leading a change in international norms is to confuse cause and effect. Analyses that trace these developments to U.S. policies after 2001 cannot explain striking changes in beliefs about the use of force on the part of other actors in the international community over the past decade. These changes are characterized by the rejection of traditional notions of absolute state sovereignty, a steep erosion of faith in the concept of deterrence, and the growing concerns over the spread of weapons of mass destruction, and the demonstrated potential of catastrophic terrorism.⁹⁹

Thus it can be argued that the use of force was proportional to the threat posed by the Iraqi regime; "in other words, it was limited to that which is needed to eliminate the threat, including the destruction of Iraq's WMD capability and removing the source of Iraq's hostile intentions and actions, Saddam Hussein."¹⁰⁰ The significance of this line of thought is not new given in view of "the belief that the international community could resort to force even if it meant breaching the sovereignty of a state did not originate as a response to terrorists or proliferators after September 2001,"¹⁰¹ and as such, cases such as Rwanda raised serious questions not only about the international community's capacity to deal with such challenges, but rather their failure to act under existing Charter provisions. It was not until the Kosovo crisis that the United States and its NATO allies acted without

⁹⁸ See Amnesty International report on Torture in Iraq 2001 15/08/2001. Amnesty documented crimes against Iraqi civilians under Saddam's regime that was in violation of every conceivable human rights protocol. Also see U.S. State Dept report 'Iraq' Crimes Against Humanity May 7th (2002), and Human Rights Watch, documented human rights violations under Saddam Hussein 1979-2003.

⁹⁹ Thomas M. Nichols, cites Peter Dombrowski and Rodger A. Payne, "Preemptive War: Crafting a New Norm," paper presented at the International Studies Association Annual Meeting, Honolulu, Hawaii, March 1-5 2005, p. 2.

¹⁰⁰ Yoo, p. 574.

¹⁰¹ Nichols, cites Peter Dombrowski and Rodger A. Payne, p. 3.

UNSC approval.¹⁰² This developing *norm* of intervention emphasized preventative measures which could serve as a deterrent. As The UN Secretary-General noted: “If States bent on criminal behavior know that frontiers are not the absolute defense and if know that the Security Council will take action to halt crimes against humanity, they will not embark on such a course of action in expectation of sovereign impunity.”¹⁰³

(ii) Anticipatory Self-Defence

Regarding the current conflict in Iraq both the U.S. and the U.K. have stated that pre-emptive action was a necessary condition to prevent the use and/or transfer of WMD, to terrorist actors and/or organizations. Those opposed to pre-emptive action have substantially made two points relating to the relationship between customary law and treaty law. First, the “alleged customary rule did not envisage a right of anticipatory self-defence proper, but a right of self-defence and self-preservation. Second, when the UN Charter came into effect, Art 51 wiped out all pre-existing law, and did not leave any room for self-defence except in the form it explicitly authorized.”¹⁰⁴ The argument is that treaty law supersedes customary law, and any right of anticipatory self-defence that may have existed prior to 1945 were extinguished when the UN Charter came into effect. State actors that reject pre-emptive actions rely upon rules for the interpretation of treaties specified Articles 31-33 of the Vienna Convention on the Law of Treaties.¹⁰⁵ Yet views differ in terms of specifying how the framers intended the Articles to be read and their application to cases that arise.¹⁰⁶

¹⁰² *Ibid.*, p. 4.

¹⁰³ *Ibid.*, p. 4.

¹⁰⁴ *Ibid.*, p. 359.

¹⁰⁵ *Ibid.*, p. 178.

¹⁰⁶ *Ibid.*

The Vienna Convention stipulates that treaties are interpreted in good faith “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of their object and purpose.”¹⁰⁷ The Vienna Convention places importance “on the principle of effectiveness (*ut res magis valeat quam pereat*), whereby a treaty must be given an interpretation that enables its provisions to be effective and useful, that is, to have appropriate effect.”¹⁰⁸ The flaw within the Vienna Conventions “is somewhat mitigated by (i) the customary rules on invalidity of treaties, whose content has gradually evolved following the adoption of the Vienna Convention ... [and] (ii) the gradual emergence of a customary rule on preemptory law.”¹⁰⁹ In state practice post-Charter, the right of anticipatory self-defence has not been considered legal under Article 51. However, “on many occasions states have used anticipatory self-defense, without formally invoking it, but rather on other legal justification.”¹¹⁰ States are bound by international law, and must adhere to customary and treaty-based obligations. A state must prove a grave peril as a reason for violating international customs and treaty law, better understood as a ‘plea for necessity.’ The criteria for invoking necessity can be asserted against what would otherwise be a violation of international obligations. Thus, in principle, the U.S. can concede to violating international norms by invading Iraq, yet claim justification on the basis of necessity. The prerequisites for the concept of

¹⁰⁷ *Ibid.*, p. 179.

¹⁰⁸ *Ibid.*, p. 179.

¹⁰⁹ *Ibid.*, p.204.

¹¹⁰ Cassese also argues that, “in 1962 the USA instituted a ‘naval quarantine’ forcibly to intercept on the high seas ships carrying missiles to Cuba; however, it relied on the legal endorsement by a regional organization, the OAS. In 1967 Israel launched a pre-emptive strike against Egypt (the United Arab Republic), Jordan, Syria, but claimed that it was a reaction to the ‘act of war’ constituted by Egypt’s preventing the passage of Israeli vessels through the Straits of Tiran. In 1988 the US military ship USS Vincennes shot down an Iranian civilian aircraft during the Iran-Iraq war; the US authorities justified the downing of that aircraft by claiming that, as Iranian aircraft and patrol boats had previously fired on American helicopters and ships, the Americans had simply reacted to those attacks.” p. 204.

'necessity' are found in the law of State Responsibility, a body of international law codified by the International Law Commission (ILC).¹¹¹

The ILC consists of a body of experts in international law and diplomacy who have drafted treaties that have received approval by the General Assembly (GA).¹¹² Under Article 25 the ILC puts forth four criteria that must be met to place limitations on the invocation of necessity in an attempt to avoid abuse of this concept by states. Robert Ago has argued in relation to state responsibility that "it must be impossible for the peril to be averted by any other means, even one which is much more onerous but which can be adopted without a breach of international obligations."¹¹³ Under Article 43 this obligation is one that excludes the possibility of invoking necessity, which the ILC states may be precluded either explicitly or implicitly in relation to a particular obligation.¹¹⁴ Further, necessity may not be invoked if the state by its own action contributed to creating the peril. According to the ILC commentary, the act of the state need not have been the cause of the peril. Necessity is excluded if the action contributed in more than an incidental or peripheral way.¹¹⁵

In addition to necessity, two other principles are central to the justification of anticipatory self-defence: *imminence* and *salience*. The notion of imminence focuses on the *temporal proximity* of a threat. An imminent threat must have a high probability of occurring.¹¹⁶ Salience draws attention to the magnitude of the harm posed by the

¹¹¹ *Ibid.*,

¹¹² Cassese, p. 335.

¹¹³ ILC Yearbook 1980 Vol: 2., Part 1, p. 20.

¹¹⁴ ILC commentary, p. 204.

¹¹⁵ ILC commentary. p. 205.

¹¹⁶ Yoo cites Webster's Third New International Dictionary (unabridged) 1130 (1993).

imminent threat and its relevance.¹¹⁷ As the subsequent discussion shows, the US action against Iraq was justified as anticipatory self-defence based on *necessity*, *imminence* and *salience*.

Is the Bush Doctrine Compatible with the UN Charter?

The foreign policy approach undertaken by the Bush Administration argues that the US “must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.”¹¹⁸ The declaratory nature regarding the use of force as outlined in Chapter V of the NSS, advocates that political and religious extremism in the form of terrorist networks and terrorism have no regard for the *principles* of international law. The key criteria attributed to the latter are ‘radicalism and technology’ and deterrence and containment. Essentially the Bush Administration is arguing that Cold-war policies are irrelevant when rogue states and terrorist organizations intend to acquire and use WMD’s. Deterrence and containment are therefore no longer applicable given that WMD’s in the hands of extremists pose a grave and ‘imminent threat’ to the U.S. Pre-emptive action is therefore both justified and legitimate.

The Bush Administration also adds that ‘anticipatory self-defence,’ allows for pre-emptive action as stated in the NSS.¹¹⁹ The US has long maintained the option of actions to counter a sufficient threat to American national security, and given the risk of inaction against enemies the US will act pre-emptively. The NSS further adds that, “legal scholars and international jurists often conditioned the legitimacy of pre-emption on the

¹¹⁷ See Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), 1996 ICJ Rep. 95 at 36 (July 8).

¹¹⁸ See the National Security Strategy of the United States, September 2002 at www.whitehouse.gov/nsc/nss.html

¹¹⁹ *Ibid.*,

existence of an imminent threat--most often a visible mobilization of armies, navies, and air forces preparing for attack.”¹²⁰

The problem that arises is whether pre-emptive action as a foreign policy tool meets the criteria of an, ‘imminent threat.’ For the Bush Administration in the “regime of customary international law...it was generally accepted that pre-emptive force was permissible in self-defense. The classic case that articulated this doctrine is the oft cited Caroline incident.”¹²¹ Without reiterating the whole case, the “Caroline incident” determined two criteria must be met in order for a state to justify pre-emptive action. Arend puts it rather well in that “if a state could demonstrate necessity that another state was about to engage in an armed attack – and act proportionately, pre-emptive self-defense would be legal.”¹²² From the Caroline case, historically the emphasis has been that necessity and imminence must coincide in order for pre-emptive actions to be justified in the name of self-defence. The Bush administration argues that imminence has been complicated by terrorism and WMD due to the dual requirements of the above that are not in line with the current security concerns. The U.S. does not need to accept the Caroline norms governing pre-emptive self-defence, given that there were numerous terrorists attacks prior to 9/11 on U.S. embassies, ships etc. Thus, there was a history and pattern in which the US was attacked.

The argument here is terrorism and WMD have blurred the lines for preventive action thereby making indistinguishable the threat of force and that of an imminent attack. An examination of post-UN Charter practice regarding pre-emption is needed

¹²⁰ Ibid.,

¹²¹ Anthony Clark Arend, International law and Preemptive use of Military Force, The Washington Quarterly (Spring 2003) 26:2 p. 90.

¹²² Ibid., p. 91.

since the Charter is sufficiently ambiguous on this question and that there was a pre-existing rule of customary international law allowing for anticipatory self-defence. It is not necessary to establish that a new customary rule has emerged to permit states to use force pre-emptively in order for such use of force to be lawful. On the contrary, it is necessary rather to establish that there is no rule prohibiting states from using force pre-emptively. If states are sovereign, under the logic of the Lotus case (which established the distinction between obligatory and permissive rules), they have a right to act in particular ways (permissive rules) unless they have consented to a rule restricting their behaviour.¹²³

While the Bush Administration's unilateral action against Iraq demonstrates the current debate over pre-emptive actions, there are other cases that have raised the same issues. These include The Cuban Missile Crisis (1962), The Six-Day War (1967), and the attack on the Osirak Reactor (1981). In each of these cases, there was no clear consensus on anticipatory self-defence. In light of the above, the *Bush Doctrine* of pre-emption "is unremarkable."¹²⁴ While arguments have been made that the *Bush Doctrine* is at odds with the U.N. Charter, this is not necessarily the case. The *Bush Doctrine* is only at odds with the UN Charter as far as addressing conventional threats. However, given that WMD and terrorism were not envisioned within the framework of the Charter at its inception, a strict and narrow interpretation of Articles 2(4) and 51 is at odds with a Charter that has no clear legal standard to determine whether pre-emptive force is justified in such cases.

¹²³ Arend cites, 'The S.S. Lotus, Permanent Court of International; Justice (1927), P.C.I.J. Ser. A, NO: 10, reprinted in Damrosch et al., *International Law: Cases and Materials* (2001), pp. 68-69.' Arend p. 93.

¹²⁴ *Ibid.*, p. 96.

The difficulty here lies with how the international community will deal with the use of force and how this will affect states in determining what is appropriate in the name of self-defence. This in turn brings forth questions about the future of US-UN relations and may entail redefining their role[s] in order to make the relationship more effective in light of the Iraq conflict. The U.N. since its inception shared a vision based upon the notion that deviant states could be checked by a collective effort. The U.N. Charter thus reflects a conception of security predicated on the consensus of the permanent five (P-5) and the expectations of those powers invested in the UNSC.

The intent of a collective security system in dealing with rogue states under Article 51 seems to suggest that state actors cannot base their security needs on the U.N. strictly in conventional collective terms. Anticipatory self-defence has never been resolved, because what is 'imminent', 'overwhelming,' 'necessary' and 'leaving no choice for deliberation' are based upon the perception of threat by the states involved. The *Bush Doctrine* in the case of Gulf war II has demonstrated the gap between the principles and practice of collective security. Simply stated, the contradiction between national sovereignty and the principles of international law are at the heart of the debates concerning the efficiency and effectiveness of the UN, which is contingent upon the UNSC members ability to meet their respective obligations and accept their responsibilities to adhere to the principles of the UN Charter.

UNSC members do not talk with one voice on matters of international peace and security. Members are often divided over issues from sanctions to military action, due to national interests and geo-politics. The UNSC was also ineffective during the Cold War due to the East-West divide, which made it impossible to achieve consensus on major

issues. Western powers created organizations such as NATO because they realized they could not rely on the UNSC to protect either their interests or their security. After 1989, with the collapse of the former Soviet Union, the UNSC came together briefly and through a series of resolutions marshalled military force to evict Iraq from Kuwait. Following Gulf War I the UNSC only engaged periodically on major issues such as the Balkans, and Somalia etc. The UNSC is not an exclusive forum for settling all international disputes that involve conflict and security. The UNSC was set-up to mitigate the balance of power against those who would fundamentally challenge the vital interests of the great powers.

The arguments put forth took a position that called into question the existing international legal regime as it directly relates to the use of force. Both the U.S. and the U.K. had lawyers examine the relevant resolutions to clarify the legal basis for use of force before the decision was made to go to war. Existing UNSC resolutions were already in place against Iraq that provided *sufficient* legal basis for military action against Iraq without further resolutions. Many of the states such as France and the USSR that opposed US actions did so more for domestic calculations and perceived national interests. Whether the U.S. and the U.K. were acting consistently with international law is one of interpretation that must be based on an examination of the contexts. The Bush Administration defined the problem then implemented its resolution to that problem based upon perceived imminent and salient threats from extremism and terrorism.

CONCLUSION: REALIGNING THE U.N. CHARTER

This project has examined the legal context leading up to the Gulf War II, and has demonstrated that there was *sufficient* legal authority for the U.S military actions against Iraq in 2003. The factual and legal evidence shows that international law permitted the use of force against Iraq on two grounds. The first was the UNSC authorized military action against Iraq under the terms of the cease-fire that suspended the hostilities of Gulf War I. The US, in response to Iraq's continual violations and material breaches of the 1991 cease-fire, had the right under the principles of international law both treaty and armistice law to suspend the 1991 cease-fire and to use force to compel Iraqi compliance.¹²⁵ The second lies in the customary law practices regarding pre-emptive self-defence. This conclusion is therefore divided into three brief parts. The first part will discuss UNSC authorization for the use of force. Part II will explain why the use of force was justified as an exercise in self-defence. Part III will discuss why a regime change in Iraq was justified in an exercise of anticipatory self-defence, in addition to the implications for UN Charter specifically Article 2(4), and Article 51, which need to be realigned when taking into consideration a nation's right of pre-emption and self-defence.

¹²⁵ John Yoo, International Law and the War in Iraq, The American Journal of International law, Vol. 97, NO: 3 (July., 2003), pp. 563-576.

Part 1

UNSC Resolutions 660 and 678 provided the U.S. with “two independent sources of law for the authority to use force in Iraq.”¹²⁶ Resolution 687 established the ceasefire conditions in which Iraq was to destroy, not to use, develop or construct biological, chemical and ballistic missiles or acquire WMD. Iraq was to accept on site UNSC inspections and to destroy nuclear-related weapons and materials. Resolutions 660 and 678 gave the U.S. the right of self-defence. Resolution 678 authorized member states, “to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions to restore international peace and security.”¹²⁷ Resolution 678 also stated that if Iraq failed to comply with UNSC resolutions member states are to use “all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions to restore international peace & security in the area.”¹²⁸ Iraq agreed to all the conditions under the cease-fire agreement on April 6, 1991. Resolution 687 established that the International Atomic Energy Agency (IAEA) and the United Nations Special Commission (UNSCOM) were to oversee the implementation of the cease-fire agreement. The interaction between Resolutions 678 and 687 is therefore consistent with the use of force when considering that both the U.S. and U.K governments in 1993 and 1998, ordered air attacks for Iraq’s violations of the cease-fire agreement and for its violations of the southern no-fly zones. These actions received “... a mandate from the Security Council, according to Resolution 687 and the cause of the

¹²⁶ *Ibid.*, pp. 563-576.

¹²⁷ UNSC Res. 678 (November 29th, 1990), paragraph 2.

¹²⁸ Yoo, p. 565.

raid was the violation by Iraq of Resolution 687 concerning the cease-fire... [T]his action . . . conformed to the Charter of the United Nations.”¹²⁹

Part II

Iraq’s repeated violations and non-compliance with its obligations specified in the cease-fire agreements narrowed the options for the U.S government to ensure compliance. Yoo contends that even though representatives of France, Germany and Russia took the position that the use of force via Resolution 678’s authorization had extinguished, this interpretation is inaccurate as a matter of UN practice and as a matter of law.¹³⁰ The termination of the authorization for the use of force by the UNSC can only be made in two ways: “either by expressly terminating the prior authorization or by setting an up-front time limit on the authorization.”¹³¹ For example, in the case of Bosnia the UNSC terminated the previous authorization in a separate resolution ending the legal authorization for the use of force. With respect to Somalia, the UNSC established a *sunset date* when it extended the authorization to use force.¹³² The UNSC in these instances specified the conditions for termination for the authorization to use force it had explicitly given.¹³³

The U.S. attack on Iraq in March 2003 is also justified under the law governing armistices. Under UNSC Resolution 687 there was no legal termination, only a suspension of hostilities by the parties to the cease-fire agreement (U.S., Iraq, Kuwait). Under the Hague Regulations, “any serious violation of the armistice by one of the

¹²⁹ Yoo cites Letter to Congressional Leaders reporting on Iraq’s compliance with UNSC Resolutions (Jan 19, 1993), p. 563.

¹³⁰ *Ibid.*, p. 567.

¹³¹ *Ibid.*, p. 567.

¹³² *Ibid.*, p. 567

¹³³ *Ibid.*,

parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommending hostilities immediately.”¹³⁴ With Iraq’s continual violations of UNSC sanctioned resolutions, resolution 678 was still in force, given that Resolution 1441 “neither revoked Resolution 678’s language concerning the use of “all necessary means” against Iraq, nor terminated its effect in any way.”¹³⁵

The question today is whether the UN Charter outlaws customary international law regarding the use of force. Under the Charter, Article 51 recognizes and affirms an “inherent” right to self-defense under international law. Recognizing a State’s right to self-defense cannot be only in response to an actual “armed attack,” i.e., an army crossing national boundaries.¹³⁶ Although some take the position that Article 51 only permits states to repel an armed attack, the actual practice suggests that the traditional (i.e., pre-UN Charter) customary notions of self-defense, including the right of anticipatory self-defense, survived very much intact. Cases that illustrate this include the Cuban Missile Crisis and the Six Day War.

During the Cuban Missile Crisis the U.S. justified the 1962 blockade of Cuba to prevent the delivery of Russian nuclear weapons to the island, on the grounds of self-defense.¹³⁷ The U.S. position was justified on the grounds that the threat was *imminent* and that alternative means to end the standoff with the former Soviet Union were not an option. The response by the U.S government was perceived as proportionate to the threat. As for Six Day War, Israeli forces struck preemptively against Syrian, Jordanian, and

¹³⁴ *Ibid.*, Yoo cites Hague Regulations, Art. 40, “Hostilities may be resumed only with ‘convincing proof of international and serious violation of the [armistice’s] terms by the other party.’”

¹³⁵ Yoo, p. 571.

¹³⁶ Thomas M. Franck, What Happens Now? The United Nations after Iraq, *The American Journal of International Law*, Vol. 97, NO. 3 (July., 2003), pp. 607-620.

¹³⁷ In 1986, the U.S. invoked anticipatory self-defense to protect U.S. nationals from potential harm as a justification for the U.S. military action against terrorist targets in Libya.

Egyptian forces that were armed ready for an attack against Israel. These cases show that there is neither a consensus nor a precise or detailed definition of what it means for a threat to be sufficiently 'imminent' to justify the use of force in self-defence under international law. Although the definition of 'imminent' focuses on the *temporal*,¹³⁸ "the concept of *imminence* must encompass an analysis that goes beyond the temporal proximity of a threat to include the probability that the threat will occur."¹³⁹ In addition, the threat has to have *salience* in relation to the magnitude of harm and must be *relevant*. Iraq was given ample opportunity to 'come clean' with the UNSC, but instead Saddam chose not to play by the rules of the game.

Part III

The Post-war conception of temporal imminence, as reflected in a narrow reading of Article 51, is no longer a position on which to base a nation's strategic responsibilities. In this sense future cases must deal with the possession of WMD technology and signs of hostile intent must be taken into account when deciding whether to use force preemptively. The project thus concludes that Article 2(4) must be realigned in conjunction with Article 51 thereby broadening the Charter provisions for self-defence. Essentially, in an age of terrorism and the proliferation of WMD a state should not have to endure an actual armed attack before it may strike back in self-defence. Instead, the customary law principles guiding anticipatory self-defence should be read into Article 51, thereby forcing State leaders to show evidence of not only necessity, but also of imminence and salience. That acceptance of anticipatory self-defence will rely, in part,

¹³⁸ Yoo cites Webster's Third New International Dictionary (unabridged) 1130 (1993).

¹³⁹ See Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), 1996 ICJ Rep. 95 at 36 (July 8).

on *accurate* intelligence about WMD programs. The issue of inaccurate intelligence has clouded judgments about the legality of US actions. Critics have claimed that US actions were unjustified because no WMD were found in Iraq. This argument misses the point. The real issue is whether *at the time* the decision was made to go to war the US had very good reasons to believe that Iraq did have a WMD program that represented an imminent and salient threat to US interests. The fact that no WMD were found *after the fact* has no bearing on the case and again as stated earlier the importance between the principle and practice discussed in this project was limited to the legal context and arguments and events prior to Gulf War II 2003. The legality of the context is therefore limited to the events, and information prior to the conflict, not after the fact.

Lastly, the issue of how 'regime change' fits into the institutional arguments outlined earlier needs to be addressed. In raising the issue of regime change, the Bush Administration is seeking to combat what it perceives as the 'root causes' of the spread of terrorism. I argue that the Bush Administration correctly points to political repression where societies that are subjected to various forms of absolutism are incubators for extremism. In this, regime change illustrates the brute facts that international law is unable to deal with authoritarian governments. The irony is that during the Cold war the U.S. allied itself with many authoritarian regimes to combat communism.

This project set out to provide some explanation of the conditions that gave rise to the U.S. position on an expanded right of self-defence, thereby considering whether or not constructivist's insights can contribute to further research. Traditional views have disregarded the domestic and international institutional contexts that influence problem definitions, and the formation of policies, and thus have failed to recognize that

international politics cannot be separated from the interpretation of context.¹⁴⁰ By articulating normative institutional considerations constructivists illustrate how expectations about appropriate behaviour shapes an actor's identity and interests. For constructivists this must include the convergence of the material and inter-subjective spheres to gain greater insights into how state leaders define a problem, propose a solution, and their choice of instruments for a solution to the problem matters. The goals and choices of actors are therefore contingent upon interpretation, and their construction of the problem gives rise to the implementation of policy.

¹⁴⁰ See John Hobson, The State and International Relations (Cambridge: Cambridge University Press, 2000), pp. 17-64.

Appendix

Security Council Resolution 1441 (2002)

20 December 2002

The Security Council,

Recalling all its previous relevant resolutions, in particular its resolutions 661 (1990) of 6 August 1990, 678 (1990) of 29 November 1990, 686 (1991) of 2 March 1991 of 3 April 1991, 688 (1991) of 5 April, 707 (1991) of 15 August 1991, 715 (1991) of 11 October 1991, 986 (1995) of 14 April 1995, and 1284 (1999) of 17 December 1999, and all the relevant statements of its President,

Recalling also its resolution 1382 (2001) of 29 November 2001 and its intention to implement it fully,

Recognizing the threat Iraq's noncompliance with Council resolutions and proliferation of weapons of mass destruction and long-range missiles poses to international peace and security,

Recalling that its resolution 678 (1990) authorized Member States to use all necessary means to uphold and implement its resolution 660 (1990) of 2 August 1990 and all relevant resolutions subsequent to Resolution 660 (1990) and to restore international peace and security in the area,

Further recalling that its resolution 687 (1991) imposed obligations on Iraq as necessary step for achievement of its stated objective of restoring international peace and security in the area,

Deploring the fact that Iraq has not provided an accurate, full, final, and complete disclosure, as required by resolution 687 (1991), of all aspects of its programmes to develop weapons of mass destruction and ballistic missiles with a range greater than one hundred and fifty kilometres, and of all holdings of such weapons, their components and production facilities and locations, as well as all other nuclear programmes, including any which it claims are for purposes not related to nuclear-weapons-usable material,

Deploring further that Iraq repeatedly obstructed immediate, unconditional, and unrestricted access to sites designated by the United Nations Special Commission (UNSCOM) and the International Atomic Energy Agency (IAEA), failed to cooperate fully unconditionally with UNSCOM and IAEA weapons inspectors, as required by resolution 698 (1991), and ultimately ceased all cooperation with UNSCOM and the IAEA in 1998,

Deploring the absence, since December 1998, in Iraq of international monitoring, inspections, and verification, as required by relevant resolutions, of weapons of mass destruction and ballistic missiles, in spite of the Council's repeated demands that Iraq provide immediate, unconditional, and unrestricted access to the United Nations

Monitoring, Verification and Inspection Commission (UNMOVIC), established in resolution 12 84 (1999) as the successor organization to UNSCOM, and IAEA; and regretting the consequent prolonging of the crisis in the region and the suffering of the Iraqi people,

Deploring also that the Government of Iraq has failed to comply with its commitments pursuant to resolution 687 (1991) with regard to terrorism, pursuant to resolution 688 (1991) to end repression of its civilian population and to provide access by international humanitarian organizations to all those in need of assistance in Iraq, and pursuant to resolutions 686 (1991), 687 (1991), and 1284 (1999) to return or cooperate in accounting for Kuwaiti and third country nationals wrongfully detained by Iraq, or to return Kuwaiti property wrongfully seized by Iraq,

Recalling that in its resolution 687 (1991) the Council declared that a ceasefire would be based on acceptance by Iraq of the provisions of that resolution, including the obligations on Iraq contained therein,

Determined to ensure full and immediate compliance by Iraq without conditions or restrictions with its obligations under resolution 687 (1991) and other relevant resolutions and recalling that the resolutions of the Council constitute the governing standard of Iraqi compliance,

Recalling that the effective operation of UNMOVIC, as the successor organization to the Special Commission, and IAEA, is essential for the implementation of resolution 687 (1991) and other relevant resolutions,

Noting the letter dated 16 September 2002 from the Minister for Foreign Affairs of Iraq addressed to the Secretary-General is a necessary first step toward rectifying Iraq's continued failure to comply with relevant Council resolutions,

Noting further the letter dated 8 October 2002 from the Executive Chairman of UNMOVIC and the Director-General of IAEA to General Al-Saadi of the Government of Iraq laying out the practical arrangements, as follow-up to their meeting in Vienna, that are prerequisites for the resumption of inspections in Iraq by UNMOVIC and the IAEA, and expressing the gravest concern at the continued failure by the Government of Iraq to provide confirmation of the arrangements as laid out in that letter,

Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of Iraq, Kuwait, and the neighbouring States,

Commending the Secretary General and members of the League of Arab States and its Secretary General for their efforts in this regard,

Determined to secure full compliance with its decision,
Acting under Chapter VI of the Charter of the United Nations,

1. Decides that Iraq has been and remains in material breach of its obligation under relevant resolutions, including resolution 687 (1991), in particular through Iraq's failure to cooperate with United Nations inspectors and the IAEA, and to complete the actions required under paragraphs 8 to 13 of resolution 687 (1991);
2. Decides, while acknowledging paragraph 1 above, to afford Iraq, by this resolution, a final opportunity to comply with its disarmament obligations under relevant resolutions of the Council; and accordingly decides to set up an enhanced inspection regime with the aim of bringing to full and verified completion the disarmament process established by resolution 687 (1991) and subsequent resolutions of the Council;
3. Decides that, in order to begin to comply with its disarmament obligations, in addition to submitting the required biannual declarations, the Government of Iraq shall provide to UNMOVIC, the IAEA, and the Council, not later than 30 days from the date of this resolution, a currently accurate, full, and complete declaration of all aspects of its programmes to develop chemical, biological, and nuclear, weapons, ballistic missiles, and other delivery systems such as unmanned aerial vehicles and dispersal systems designed for use on aircraft, including any holdings and precise locations of such weapons, components, sub-components, stocks of agents, and related material and equipment, the locations and work of its research, development and production facilities, as well as all other chemical, biological, and nuclear programmes, including any which it claims are for purposes not related to weapon production or material;
4. Decides that false statements or omissions in the declarations submitted by Iraq pursuant to this resolution and failure by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution shall constitute a further material breach of Iraq's obligations and will be reported to the Council for assessment in accordance with paragraph 11 and 12 below;
5. Decides that Iraq shall provide UNMOVIC and the IAEA immediate, unimpeded, unconditional, and unrestricted access to any and all, including underground, areas, facilities, buildings, equipments, records, and means of transport which they wish to inspect, as well as immediate, unimpeded, unrestricted, and private access to all officials and other persons who UNMOVIC or the IAEA wish to interview in the mode or location of UNMOVIC's or the IAEA's choice pursuant to any aspect of their mandates; further decides that UNMOVIC and the IAEA may at their discretion conduct interviews inside or outside of Iraq, may facilitate the travel of those interviewed and family members outside of Iraq, and that, at the sole discretion of UNMOVIC and the IAEA, such interviews may occur without the presence of observers from the Iraqi government; and instructs UNMOVIC and requests the IAEA to resume inspections no later than 45 days following adoption of this resolution and to update the Council 60 days thereafter;
6. Endorses the 8 October 2002 letter from the Executive Chairman of UNMOVIC and the Director-General of the IAEA to General Al-Saadi of the

Government of Iraq, which is annexed hereto, and decides that the contents of the letter shall be binding upon Iraq;

7. Decides further that, in view of the prolonged interruption by Iraq of the presence of UNMOVIC and IAEA and in order for them to accomplish the task set forth in this resolution and all previous relevant resolutions and notwithstanding prior understanding, the Council hereby establishes the following revised or additional authorities, which shall be binding upon Iraq, to facilitate their work in Iraq;

- UNMOVIC and the IAEA shall determine the composition of their inspection teams and ensure that these teams are composed of the most qualified and experienced experts available;
- All UNMOVIC and IAEA personnel shall enjoy the privileges and immunities, corresponding to those of experts on mission, provided in the Convention on Privileges and Immunities of the United Nations and the Agreements on the Privileges and Immunities of the IAEA;
- UNMOVIC and the IAEA shall have unrestricted rights of entry into and out of Iraq, the right to free, unrestricted, and immediate movement to and from inspection sites, and the right to inspect and sites and buildings, including immediate, unimpeded, unconditional, and unrestricted access to Presidential Sites equal to that at other sites, notwithstanding any provisions of resolution 1154 (1998);
- UNMOVIC and the IAEA shall have the right to be provided by Iraq the names of all personnel currently and formerly associated with Iraq's chemical, biological, nuclear, and ballistic missile programmes and the associated research, development, and production facilities;
- Security of UNMOVIC and IAEA facilities shall be ensured by sufficient UN security guards;
- UNMOVIC and the IAEA shall have the right to declare, for the purposes of freezing, a site to be inspected, exclusion zones, including surrounding areas and transit corridors, in which Iraq will suspend ground and aerial movement so that nothing is changed in or taken out of a site being inspected;
- UNMOVIC and the IAEA shall have the free and unrestricted use and landing of fixed- and rotary-winged aircraft, including manned and unmanned reconnaissance vehicles;
- UNMOVIC and the IAEA shall have the right at their sole discretion verifiably to remove, destroy, or render harmless all prohibited weapons, subsystems, components, records, materials, and other related items, and the right to impound or close any facilities or equipment for the production thereof; and
- UNMOVIC and the IAEA shall have the right to free import and use of equipment or materials for inspections and to seize and export any equipment, materials, or documents taken during inspections, without search of UNMOVIC or IAEA personnel or official or personal baggage;

8. Decides further that Iraq shall not take or threaten hostile acts directed against any representative or personnel of the United Nations or the IAEA or of any Member State taking action to uphold any Council resolution;
9. Requests the Secretary General immediately to notify Iraq of this resolution, which is binding on Iraq; demands that Iraq confirm with seven days of that notification its intention to comply fully with this resolution; and demands further that Iraq cooperate immediately, unconditionally, and actively with UNMOVIC and IAEA;
10. Requests all Member States to give full support to UNMOVIC and the IAEA in the discharge of their mandates, including by providing any information related to prohibited programmes or other aspects of their mandates, including on Iraqi attempts since 1998 to acquire prohibited items, and by recommending sites to be inspected, persons to be interviewed, conditions of such interview, and data to be collected, the results of which shall be reported to the Council by UNMOVIC and the IAEA;
11. Directs the Executive Chairman of UNMOVIC and the Director-General of the IAEA to report immediately to the Council any interference by Iraq with inspection activities, as well as any failure by Iraq to comply with its disarmament obligations, including its obligations regarding inspections under this resolution;
12. Decides to convene immediately upon receipt of a report in accordance with paragraphs 4 or 11 above, in order to consider the situation and the need for full compliance with all the relevant Council resolutions in order to secure international peace and security;
13. Recalls, in that context, that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations;
14. Decides to remain seized of the matter.

This is a reformatted exact copy of the "**Goldsmith Memo**" (dated 7 March 2003) on the legal basis of military action against Iraq. Released by the government of the U.K. on 28 April 2005 and accessed on that date at <http://www.pm.gov.uk/files/pdf/Iraq%20Resolution%201441.pdf>. The scanned version of the original memo as released by the Prime Minister's office on 28 April 2005 is available at <http://www.comw.org/warreport/fulltext/0303goldsmith1441.pdf>.

PRIME MINISTER

IRAQ: RESOLUTION 1441

1. You have asked me for advice on the legality of military action against Iraq without a further resolution of the Security Council. This is, of course, a matter we have discussed before. Since then I have had the benefit of discussions with the Foreign Secretary and Sir Jeremy Greenstock, who have given me valuable background information on the negotiating history of resolution 1441. In addition, I have also had the opportunity to hear the views of the US Administration from their perspective as co-sponsors of the resolution. This note considers the issues in detail in order that you are in a position to understand the legal reasoning. My conclusions are summarized at paragraphs 26 to 31 below.

Possible legal basis for the use of force

2. As I have previously advised, there are generally three possible bases for the use of force:

- (a) self-defence (which may include collective self-defence);
- (b) *exceptionally*, to avert overwhelming humanitarian catastrophe; and
- (c) authorisation by the Security Council acting under Chapter VII of the UN Charter.

3. Force may be used in **self-defence** if there is an actual or imminent threat of an armed attack; the use of force must be necessary, ie the only means of averting an attack; and the force used must be a proportionate response. It is now widely accepted that an imminent armed attack will justify the use of force if the other conditions are met. The concept of what is imminent may depend on the circumstances. Different considerations may apply, for example, where the risk is of attack from terrorists sponsored or harboured by a particular State, or where there is a threat of an attack by nuclear weapons. However, in my opinion there must be some degree of immanence. I am aware that the USA has been arguing for recognition of a broad doctrine of a right to use force to pre-empt danger in the future. If this means more than a right to respond proportionately to an imminent attack (and I understand that the doctrine is intended to carry that connotation) this is not a doctrine, which in my opinion, exists or is recognised in international law.

4. The use of force to avert **overwhelming humanitarian catastrophe** has been emerging as a further, and exceptional, basis for the use of force. It was relied on by the UK in the Kosovo crisis and is the underlying justification for the No-Fly Zones. The doctrine remains controversial, however. I know of no reason why it would be an appropriate basis for action in present circumstances.

5. Force may be used where this **authorised by the UN Security Council** acting under Chapter VII of the UN Charter. The key question is whether resolution 1441 has the effect of providing such authorisation.

Resolution 1441

6. As you are aware, the argument that resolution 1441 itself provides the authorisation to use force depends on the revival of the express authorisation to use force given in 1990 by Security Council resolution 678. This in turn gives rise to two questions:

(a) is the so-called "revival argument" a sound legal basis in principle?

(b) is resolution 1441 sufficient to revive the authorisation in resolution 678?

I deal with these questions in turn. It is a trite, but nonetheless relevant observation given what some commentators have been saying, that if the answer to these two questions is "yes", the use of force will have been authorised by the United Nations and not in defiance of it.

The revival argument

7. Following its invasion and annexation of Kuwait, the Security Council authorised the use of force against Iraq in resolution 678 (1990). This resolution authorised coalition forces to use all necessary means to force Iraq to withdraw from Kuwait and to restore international peace and security in the area. The resolution gave a legal basis for Operation Desert Storm, which was brought to an end by the cease-fire set out by the Council in resolution 687 (1991). The conditions for the cease-fire in that resolution (and subsequent resolutions) imposed obligations on Iraq with regard to the elimination of WMD and monitoring of its obligations. Resolution 687 suspended, but did not terminate, the authority to use force in resolution 678. Nor has any subsequent resolution terminated the authorisation to use force in resolution 678. It has been the UK's view that a violation of Iraq's obligations under resolution 687 which is sufficiently serious to undermine the basis of the ceasefire can revive the authorisation to use force in resolution 678.

8. In reliance on this argument, force has been used on certain occasions. I am advised by the Foreign Office Legal Advisers that this was the basis for the use of force between 13 3 and 18 January 1993 following UN Presidential Statements on 8 and 11 January 1993 condemning particular failures by Iraq to observe the terms of the cease-fire resolution. The revival argument was also the basis for the use of force in December 1998 by the US and UK (Operation Desert Fox). This followed a series of Security Council resolutions, notably, resolution 1205 (1998).

9. Law Officers have advised in the past that, provided the conditions are made out, the revival argument does provide a sufficient justification in international law for the use of force against Iraq. That view is supported by an opinion given in August 1992 by the then UN Legal Counsel, Carl-August Fleischauer. However, the UK has consistently taken the view (as did the Fleischauer opinion) that, as the cease-fire conditions were set by the Security Council in resolution 687, it is for the Council to assess whether any such breach of those obligations has occurred. The US have a rather different view: they maintain that the fact of whether Iraq is in breach is a matter of objective fact which may therefore be assessed by individual Member States. I am not aware of any other state which supports this view. This is an issue of critical importance when considering the effect of resolution 1441.

10. The revival argument is controversial. It is not widely accepted among academic commentators. However, I agree with my predecessors' advice on this issue. Further, I believe that the arguments in support of the revival argument are stronger following adoption of resolution 1441. That is because of the terms of the resolution and the course

of the negotiations which led to its adoption. Thus, preambular paragraphs 4, 5 and 10 recall the authorization to use force in resolution 678 and that resolution 687 imposed obligations on Iraq as a necessary condition of the cease-fire. Operative paragraph (OP) 1 provides that Iraq has been and remains in material breach of its obligations under relevant resolutions, including the resolution 687. OP13 recalls that Iraq has been warned repeatedly that "serious consequences" will result from continued violations of its obligations. The previous practice of the Council and statements made by Council members during the negotiation of resolution 1441 demonstrate that the phrase "material breach" signifies a finding by the Council of a sufficiently serious breach of the cease-fire conditions to revive the authorisation in resolution 678 and that "serious consequences" is accepted as indicating the use of force.

11. I disagree, therefore, with those commentators and lawyers, who assert that nothing less than an explicit authorisation to use force in a Security Council resolution will be sufficient.

Sufficiency of resolution 1441

12. In order for the authorisation to use force in resolution 678 to be revived, there needs to be a determination by the Security Council that there is a violation of the conditions of the cease-fire and that the Security Council considers it sufficiently serious to destroy the basis of the cease-fire. Revival will not, however, take place, notwithstanding a finding of violation, if the Security Council has made it clear either that action short of the use of force should be taken to ensure compliance with the terms of the cease-fire, or that it 4 intends to decide subsequently what action is required to ensure compliance.

Notwithstanding the determination of material breach in OP1 of resolution 1441, it is clear that the Council did not intend that the authorisation in resolution 678 should revive immediately following the adoption of resolution 1441, since OP2 of the resolution affords Iraq a "final opportunity" to comply with its disarmament obligations under previous resolutions by cooperating with the enhanced inspection regime described in OPs 3 and 5-9. But OP2 also states that the Council has determined that compliance with resolution 1441 is Iraq's last chance before the cease-fire resolution will be enforced. OP2 has the effect therefore of suspending the legal consequences of the OP1 determination of material breach which would otherwise have triggered the revival of the authorisation in resolution 678. The narrow but key question is: on the true interpretation of resolution 1441, what has the Security Council decided will be the consequences of Iraq's failure to comply with the enhanced regime.

13. The provisions relevant to determining whether or not Iraq has taken the final opportunity given by the Security Council are contained in OPs 4, 11 and 12 of the resolution.

- OP4 provides that false statements or omissions in the declaration to be submitted by Iraq under OPS and failure by Iraq at any time to comply with and cooperate fully in the implementation of resolution 1441 will constitute a further material breach of Iraq's obligations and will be reported to the Council for assessment under paragraphs 11 and 12 of the resolution.

- OP11 directs the Executive Chairman of UNMOVIC and the Director-General of the IAEA to report immediately to the Council any interference by Iraq with inspection activities, as well as any failure by Iraq to comply with its disarmament obligations, including the obligations regarding inspections under resolution 1441.

- OP12 provides that the Council will convene immediately on receipt of a report in accordance with paragraphs 4 or 11 "in order to consider the situation and the need for compliance with all of the relevant Council resolutions in order to secure international peace and security".

It is clear from the text of the resolution, and is apparent from the negotiating history, that if Iraq fails to comply, there will be a further Security Council discussion. The text is, however, ambiguous and unclear on what happens next.

14. There are two competing arguments:

(i) that provided there is a Council discussion, if it does not reach a conclusion, there remains an authorisation to use force;

(ii) that nothing short of a further Council decision will be a legitimate basis for the use of force.

5 The first argument

15. The first argument is based on the following steps:

(a) OP1, by stating that Iraq "has been and remains in material breach" of its obligations under relevant resolutions, including resolution 687 amounts to a determination by the Council that Iraq's violations of resolution 687 are sufficiently serious to destroy the basis of the cease-fire and therefore, in principle, to revive the authorisation to use force in resolution 678;

(b) the Council decided, however, to give Iraq "a final opportunity" (OP 2) but because of the clear warning that it faced "serious consequences as a result of its continued violations" (OP 13) was warning that a failure to take that "final opportunity" would lead to such consequences;

(c) further, by OP 4, the Council decided in advance that false statements or omissions in its declaration and "failure by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution" would constitute "a further material breach"; the argument is that the Council's determination in advance that particular conduct would constitute a material breach (thus reviving the authorisation to use force) is as good as its determination after the event;

(d) in either event, the Council must meet (OP 12) "to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security"; but the resolution singularly does not say that the Council must decide what action to take. The Council knew full well, it is argued, the difference between "consider" and "decide" and so the omission is highly significant. Indeed, the omission is especially important as the French and Russians made proposals to include an express requirement for a further decision, but these were rejected precisely to avoid being tied to the need to obtain a second resolution. On this view, therefore, while the Council has the opportunity to take a further decision, the determinations of material breach in OPs 1 and 4 remain valid even if the Council does not act.

The second argument

16. The second argument focuses, by contrast, on two provisions in particular of the resolution: first, the final words in OP 4 ("and will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below") and, second,, the requirement in OP 12 for the Council to "consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security". Taken together, it is argued, these provisions indicate that the

Council decided in resolution 1441 that in the event of continued Iraqi non-compliance, the issue should return to the Council for a further decision on what action should be taken at that stage.

6 Discussion

17. So far as OP4 of the resolution is concerned, one view is that the words at the end of this paragraph indicate the need for an assessment by the Security Council of how serious any Iraqi breaches really are and whether they are sufficiently serious to destroy the basis of the cease-fire. This argument is supported by public statements to the effect that only serious cases of noncompliance will constitute a further material breach. Thus, the Foreign Secretary stated in Parliament on 25 November that "material breach means something significant; some behaviour or pattern of behaviour that is serious. Among such breaches could be action by the Government of Iraq seriously to obstruct or impede the inspectors, to intimidate witnesses, or a pattern of behaviour where any single action appears relatively minor but the action as a whole add up to something deliberate and more significant: something that shows Iraq's intention not to comply". If that is right, then the question is who makes the assessment of what constitutes a sufficiently serious breach. On the UK view of the revival argument (though not the US view) that can only be the Council, because only the Council can decide if a violation is sufficiently serious to revive the authorisation to use force.

18. It is right to say, however, that such an argument has less force if OP 4 operates automatically. Thus, the wording of OP4 indicates that any failure by Iraq to comply with and cooperate fully in the implementation of the resolution will constitute a further material breach (leaving aside the question of whether false statements or omissions in the OPS declaration is an additional requirement). If OP4 means what it says: the words "cooperate fully" were included specifically to ensure that any instances of non-cooperation would amount to a further material breach. This is the US analysis of OP4 and is undoubtedly more consistent with the view that no further decision of the Council is necessary to authorise force, because it can be argued that the Council has determined in advance that any failure will be a material breach.

19. It has been suggested that it is possible to establish that Iraq has failed to take its final opportunity through the procedures in OPs 11 and 12 without regard to OP4, in which case it is unnecessary to consider the effect of the words "for assessment". I do not consider that this argument really assists. First, the resolution must be read as a whole. Second, I accept that it is possible that a Council discussion under OP12 may be triggered by a report from Blix and El-Baradei under OP11 and that this may have the effect of establishing that Iraq has failed to take the final opportunity granted by OP2. But I do not consider that it can be argued seriously that OP4 does not apply in these circumstances. It is clear from a comparison of the wording of paragraphs 4 and 11 that any Iraqi conduct which would be sufficient to trigger a report from the inspectors under OP11 would also amount to a failure to comply with and cooperate fully in the implementation of the resolution and would thus also be covered by OP4. In addition, the reference to paragraph 11 in OP4 cannot be ignored. It is not entirely clear what this means, but the most convincing explanation seems to be that it is a recognition that an OP11 inspectors' report would also constitute a report of further material breach within the meaning of OP4 and would thus be assessed by the Council under OP12. Moreover, the US see OP4 as an

7 essential part of the mechanism for establishing that Iraq has failed to take its final opportunity.

20. It has also been suggested that the final words of OP4 were chosen carefully to avoid the implication that it was for the Security Council to assess whether Iraqi conduct constituted a further material breach. The French proposed to amend OP4 so that Iraqi conduct would only amount to a further material breach "when assessed" as such by the Council, but this amendment was not accepted. I am not wholly convinced by this argument: if, for the reasons discussed in paragraph 17 above, OP4 requires an assessment of Iraq's conduct by the Council, the alternative language makes little difference. However, I do accept that the negotiating history indicates that the words at the end of OP4 "and shall be reported to the Council for assessment in accordance with paragraphs 11 and 12" were added at a late stage, but in substitution for other language which would clearly have had the effect of making any finding of further material breach subject to a further Council decision.

21. Whether a report comes to the Council under OP4 or OP11, the critical issue is what action the Council is required to take at that point. In other words, what does OP12 require. It is clear that the language of OP12 was a compromise by the US from their starting position that the Council should authorise in advance the use of all necessary means to enforce the cease-fire resolution in the event of continued violations by Iraq. It is equally clear, however, that the language does not expressly provide that a further Council decision is necessary to authorise the use of force. The paragraph indicates that in the event of a report of a further material breach (whether under OP4 or OP11) there will be a meeting of the Council to consider the situation and the need for compliance in order to secure international peace and security. The Council thus has the opportunity to take a further decision expressly authorising the use of force or, conceivably, to decide that other enforcement means should be used. But the Council might fail to act. The resolution does not state what is to happen in those circumstances. The clear US view is that, whatever the reason for the Council's failure to act, the determination of material breach in OPs 1 and 4 would remain valid, thus authorising the use of force without a further decision. My view is that different considerations apply in different circumstances. The OP12 discussion might make clear that the Council's view is that military action is appropriate but that no further decision is required because of the terms of resolution 1441. In such a case, there would be good grounds for relying on the existing resolution as the legal basis for any subsequent military action. The more difficult scenario is if the views of Council members are divided and a further resolution is not adopted either because it fails to attract 9 votes or because it is vetoed.

22. The principal argument in favour of the view that no further decision is required to authorise force in these circumstances is that the language of OP12 (ie "consider") was chosen deliberately to indicate the need for a further discussion, but not a decision. As I have indicated, it is contended that this interpretation is supported by the negotiating history. The French and Russians both made proposals to amend OP12 to include an express requirement for a further decision, but these proposals were not accepted. The US Administration insist that they made clear throughout that they would not accept a text which subjected the use of force to a further Council decision. The French (and others) therefore knew what they were voting for. The US are confident that in accepting OPs 4 and 12, they were conceding a Council discussion and no more. The US, of course,

approached the negotiation of resolution 1441 from a different starting point because, as I explained in paragraph 9 above, they have always taken the view that "material breach" is a matter of objective fact and does not require a Security Council determination.

(By contrast, the UK position taken on the advice of successive Law Officers, has been that it is for the Security Council to determine the existence of a material breach of the cease-fire.) Therefore, while the US objective was to ensure that the resolution did not constrain the right of action which they believed they already had, our objective was to secure a sufficient authorisation from the Council in the absence of which we would have had no right to act. I have considered whether this difference in the underlying legal view means that the effect of the resolution might be different for the US than for the UK, but I have concluded that it does not affect the position. If OP12 of the resolution, properly interpreted, were to mean that a further Council decision was required before force was authorised, this would constrain the US just as much as the UK. It was therefore an essential negotiating point for the US that the resolution should not concede the need for a second resolution. They are convinced that they succeeded.

23. I was impressed by the strength and sincerity of the views of the US Administration which I heard in Washington on this point. However, the difficulty is that we are reliant on their assertions for the view that the French (and others) knew and accepted that they were voting for a further discussion and no more. We have very little hard evidence of this beyond a couple of telegrams recording admissions by French negotiators that they knew the US would not accept a resolution which required a further Council decision. The possibility remains that the French and others accepted OP 12 because in their view it gave them a sufficient basis on which to argue that a second resolution was required (even if that was not made expressly clear). A further difficulty is that, if the matter ever came before a court, it is very uncertain to what extent the court would accept evidence of the negotiating history to support a particular interpretation of the resolution, given that most of the negotiations were conducted in private and there are no agreed or official records.

24. The counter view of OP 12 is that this paragraph must imply a decision by the Council. Three particular arguments support that approach:

(i) when taken with the word "assessment" in OP 4, the language of OP 12 indicates that the Council will be assessing the seriousness of any Iraqi breach; this is especially powerful if in truth some assessment is necessary;

(ii) there is a special significance in the words "in order to secure international peace and security". They reflect not only the special responsibility of the Security Council under Article 39 of the UN Charter ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or acts of aggression and shall make recommendations, or decide what measures shall be taken to maintain or restore international peace and security"), but also pick up the language of both resolution 678 (which authorised the use of force "to restore international peace and security in the area") and resolution 687 (which referred to the objective of "restoring international peace and

security in the area as set out in its recent resolutions"). The clear inference, it will be argued, is that this shows the Council was to exercise a deliberative role on that issue, ie to determine what it is necessary to secure international peace and security;

(iii) any other construction reduces the role of the Council discussion under OP12 to a

procedural formality. Others have jibbed at this categorisation, but I remain of the opinion that this would be the effect in legal terms of the view that no further resolution is required. The Council would be required to meet, and all members of the Council would be under an obligation to participate in the discussion in good faith, but even if an overwhelming majority of the Council were opposed to the use of force, military action could proceed regardless.

25. Where the meaning of a resolution is unclear from the text, the statements made by members of the Council at the time of its adoption may be taken into account in order to ascertain the Council's intentions. The statements made during the debate on 8 November 2002 are not, however, conclusive. The US and UK stated that further breaches would be reported to the Council "for discussion". Jeremy Greenstock then added that we would then expect the Council to "meet its responsibilities", although (implicitly) we would be prepared to act without Council backing to ensure that the task of disarmament is completed. Only the US explicitly stated that it believed that the resolution did not constrain the use of force by States "to enforce relevant United Nations resolutions and protect world peace and security" regardless of whether there was a further Council decision. Conversely, two other Council members, Mexico and Ireland, made clear that in their view a further decision of the Council was required before the use of force would be authorised. Syria also stated that "the resolution should not be interpreted, through certain paragraphs, as authorising any State to use force". Most other Council members were less clear in their comments. The joint statement of France, Russia and China is somewhat opaque, but seems to imply that a further decision is required. Many delegations welcomed the fact that there was "no automaticity" in the resolution with regard to the use of force. But it is not clear what they meant by this. It could indicate that they did not consider that the resolution authorised the use of force in any circumstances by means of the revival argument. On the other hand there is some evidence from the negotiating history that their main concern was that the resolution should not authorise force immediately following its adoption on the basis of "material breach" in OP1 plus "serious consequences" in OP13. The UK and US indicated that "no automaticity" meant that there would be a Council discussion before force was used.

Summary

26. To sum up, the language of resolution 1441 leaves the position unclear and the statements made on adoption of the resolution suggest that there were differences of view within the Council as to the legal effect of the resolution. Arguments can be made on both sides. A key question is whether there is in truth a need for an assessment of whether Iraq's conduct constitutes a failure to take the final opportunity or has constituted a failure fully to cooperate within the meaning of OP 4 such that the basis of the cease-fire is destroyed. If an assessment is needed of that sort, it would be for the Council to make it. A narrow textual reading of the resolution suggests that sort of assessment is not needed, because the Council has pre-determined the issue. Public statements, on the other hand, say otherwise.

27. In these circumstances, I remain of the opinion that the safest legal course would be to secure the adoption of a further resolution to authorise the use of force. I have already advised that I do not believe that such a resolution need be explicit in its terms. The key point is that it should establish that the Council has concluded that Iraq has failed to take the final opportunity offered by resolution 1441, as in the

draft which has already been tabled.

28. Nevertheless, having regard to the information on the negotiating history which I have been given and to the arguments of the US Administration which I heard in Washington, I accept that a reasonable case can be made that resolution 1441 is capable in principle of reviving the authorisation in 678 without a further resolution.

29. However, the argument that resolution 1441 alone has revived the authorisation to use force in resolution 678 will only be sustainable if there are strong factual grounds for concluding that Iraq has failed to take the final opportunity. In other words, we would need to be able to demonstrate hard evidence of non-compliance and non-cooperation. Given the structure of the resolution as a whole, the views of UNMOVIC and the IAEA will be highly significant in this respect. In the light of the latest reporting by UNMOVIC, you will need to consider extremely carefully whether the evidence of non-cooperation and non-compliance by Iraq is sufficiently compelling to justify the conclusion that Iraq has failed to take its final opportunity.

30. In reaching my conclusions, I have taken account of the fact that on a number of previous occasions, including in relation to Operation Desert Fox in December 1998 and Kosovo in 1999, UK forces have participated in military action on the basis of advice from my predecessors that the legality of the action under international law was no more than reasonably arguable. But a "reasonable case" does not mean that if the matter ever came before a court I would be confident that the court would agree with this view. I judge that, having regard to the arguments on both sides, and considering the resolution as a whole in the light of the statements made on adoption and subsequently, a court might well conclude that OPs 4 and 12 do require a further Council decision in order to revive the authorisation in resolution 678. But equally I consider that the counter view can be reasonably maintained. However, it must be recognised that on previous occasions when military action was taken on the basis of a reasonably arguable case, the degree of public and Parliamentary scrutiny of the legal issue was nothing like as great as it is today.

31. The analysis set out above applies whether a second resolution fails to be adopted because of a lack of votes or because it is vetoed. As I have said before, I do not believe that there is any basis in law for arguing that there is an implied condition of reasonableness which can be read into the power of veto conferred on the permanent members of the Security Council by the UN Charter. So there are no grounds for arguing that an "unreasonable veto" would entitle us to proceed on the basis of a presumed Security Council authorisation. In any event, if the majority of world opinion remains opposed to military action, it is likely to be difficult on the facts to categorise a French veto as "unreasonable". The legal analysis may, however, be affected by the course of events over the next week or so, eg the discussions on the draft second resolution. If we fail to achieve the adoption of a second resolution, we would need to consider urgently at that stage the strength of our legal case in the light of circumstances at that time.

Possible consequences of acting without a second resolution

32. In assessing the risks of acting on the basis of a reasonably arguable case, you will wish to take account of the ways in which the matter might be brought before a court. There are a number of possibilities. First, the General Assembly could request an

advisory opinion on the legality of the military action from the International Court of Justice (ICJ). A request for such an opinion could be made at the request of a simple majority of the States within the GA, so the UK and US could not block such action. Second, given that the United Kingdom has accepted the compulsory jurisdiction of the ICJ, it is possible that another State which has also accepted the Court's jurisdiction might seek to bring a case against us. This, however, seems a less likely option since Iraq itself could not bring a case and it is not easy to see on what basis any other State could establish that it had a dispute with the UK. But we cannot absolutely rule out that some State strongly opposed to military action might try to bring such a case. If it did, an application for interim measures to stop the campaign could be brought quite quickly (as it was in the case of Kosovo).

33. The International Criminal Court at present has no jurisdiction over the crime of aggression and could therefore not entertain a case concerning the lawfulness of any military action. The ICC will however have jurisdiction to examine whether any military campaign has been conducted in accordance with international humanitarian law. Given the controversy surrounding the legal basis for action, it is likely that the Court will scrutinise any allegations of war crimes by UK forces very closely. The Government has already been put on notice by CND that they intend to report to the ICC Prosecutor any incidents which their lawyers assess to have contravened the Geneva Conventions. The ICC would only be able to exercise jurisdiction over UK personnel if it considered that the UK prosecuting authorities were unable or unwilling to investigate and, if appropriate, prosecute the suspects themselves.

34. It is also possible that CND may try to bring further action to stop military action in the domestic courts, but I am confident that the courts would decline jurisdiction as they did in the case brought by CND last November. Two further, though probably more remote possibilities, are an attempted prosecution for murder on the grounds that the military action is unlawful and an attempted prosecution for the crime of aggression. Aggression is a crime under customary international law which automatically forms part of domestic law. It might therefore be argued that international aggression is a crime recognised by the common law which can be prosecuted in the UK courts.

35. In short, there are a number of ways in which the opponents of military action might seek to bring a legal case, internationally or domestically, against the UK, members of the Government or UK military personnel. Some of these seem fairly remote possibilities, but given the strength of opposition to military action against Iraq, it would not be surprising if some attempts were made to get a case of some sort off the ground. We cannot be certain that they would not succeed. The GA route may be the most likely, but you are in a better position than me to judge whether there are likely to be enough States in the GA who would be willing to vote for such a course of action in present circumstances.

Proportionality

36. Finally, I must stress that the lawfulness of military action depends not only on the existence of a legal basis, but also on the question of proportionality. Any force used pursuant to the authorisation in resolution 678 (whether or not there is a second resolution):

-- must have as its objective the enforcement the terms of the cease-fire contained in resolution 687 (1990) and subsequent relevant resolutions;

-- be limited to what is necessary to achieve that objective; and
-- must be a proportionate response to that objective, ie securing compliance with Iraq's disarmament obligations.

That is not to say that action may not be taken to remove Saddam Hussein from power if it can be demonstrated that such action is a necessary and proportionate measure to secure the disarmament of Iraq. But regime change cannot be the objective of military action. This should be borne in mind in considering the list of military targets and in making public statements about any campaign.

Signed:

Lord [Peter] Goldsmith
ATTORNEY GENERAL

7 March 2003

**v. Prevent Our Enemies from Threatening Us,
Our Allies, and Our Friends
with Weapons of Mass Destruction**

“The gravest danger to freedom lies at the crossroads of radicalism and technology.

*When the spread of chemical and biological and nuclear weapons,
along with ballistic missile technology—when that occurs, even weak states
and small groups could attain a catastrophic power to strike great nations.
Our enemies have declared this very intention, and have been caught seeking
these terrible weapons. They want the capability to blackmail us, or to harm us,
or to harm our friends—and we will oppose them with all our power.”*

President Bush

West Point, New York

June 1, 2002

The nature of the Cold War threat required the United States—with our allies and friends—to emphasize deterrence of the enemy’s use of force, producing a grim strategy of mutual assured destruction. With the collapse of the Soviet Union and the end of the Cold War, our security environment has undergone profound transformation. Having moved from confrontation to cooperation as the hallmark of our relationship with Russia, the dividends are evident: an end to the balance of terror that divided us; an historic reduction in the nuclear arsenals on both sides; and cooperation in areas such as counterterrorism and missile defense that until recently were inconceivable. But new deadly challenges have emerged from rogue states and terrorists. None of these contemporary threats rival the sheer destructive power that was arrayed against us by the Soviet Union. However, the nature and motivations of these new adversaries, their determination to obtain destructive powers hitherto available only to the world’s strongest states, and the greater likelihood that they will use weapons of mass destruction against us, make today’s security environment more complex and dangerous. In the 1990s we witnessed the emergence of a small number of rogue states that, while different in important ways, share a number of attributes.

These states:

brutalize their own people and squander their national resources for the personal gain of the rulers;

- display no regard for international law, threaten their neighbors, and callously violate international treaties to which they are party;
- are determined to acquire weapons of mass destruction, along with other advanced military technology, to be used as threats or offensively to achieve the aggressive designs of these regimes;
- sponsor terrorism around the globe; and

• reject basic human values and hate the United States and everything for which it stands. At the time of the Gulf War, we acquired irrefutable proof that Iraq's designs were not limited to the chemical weapons it had used against Iran and its own people, but also extended to the acquisition of nuclear weapons and biological agents. In the past decade North Korea has become the world's principal purveyor of ballistic missiles, and has tested increasingly capable missiles while developing its own WMD arsenal. Other rogue regimes seek nuclear, biological, and chemical weapons as well. These states' pursuit of, and global trade in, such weapons has become a looming threat to all nations. We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends. Our response must take full advantage of strengthened alliances, the establishment of new partnerships with former adversaries, innovation in the use of military forces, modern technologies, including the development of an effective missile defense system, and increased emphasis on intelligence collection and analysis.

Our comprehensive strategy to combat

WMD includes:

- *Proactive counterproliferation efforts.* We must deter and defend against the threat before it is unleashed. We must ensure that key capabilities—detection, active and passive defenses, and counterforce capabilities—are integrated into our defense transformation and our homeland security systems. Counterproliferation must also be integrated into the doctrine, training, and equipping of our forces and those of our allies to ensure that we can prevail in any conflict with WMD-armed adversaries.
- *Strengthened nonproliferation efforts to prevent rogue states and terrorists from acquiring the materials, technologies, and expertise necessary for weapons of mass destruction.* We will enhance diplomacy, arms control, multilateral export controls, and threat reduction assistance that impede states and terrorists seeking WMD, and when necessary, interdict enabling technologies and materials. We will continue to build coalitions to support these efforts, encouraging their increased political and financial support for nonproliferation and threat reduction programs. The recent G-8 agreement to commit up to \$20 billion to a global partnership against proliferation marks a major step forward.
- *Effective consequence management to respond to the effects of WMD use, whether by terrorists or hostile states.* Minimizing the effects of WMD use against our people will help deter those who possess such weapons and dissuade those who seek to acquire them by persuading enemies that they cannot attain their desired ends. The United States must also be prepared to respond to the effects of WMD use against our forces abroad, and to help friends and allies if they are attacked.

14 National Security Strategy

It has taken almost a decade for us to comprehend the true nature of this new threat.

Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first.

- In the Cold War, especially following the Cuban missile crisis, we faced a generally status quo, risk-averse adversary. Deterrence was an effective defense. But deterrence based only upon the threat of retaliation is less likely to work against leaders of rogue states more willing to take risks, gambling with the lives of their people, and the wealth of their nations.
- In the Cold War, weapons of mass destruction were considered weapons of last resort whose use risked the destruction of those who used them. Today, our enemies see weapons of mass destruction as weapons of choice. For rogue states these weapons are tools of intimidation and military aggression against their neighbors. These weapons may also allow these states to attempt to blackmail the United States and our allies to prevent us from deterring or repelling the

aggressive behavior of rogue states. Such states also see these weapons as their best means of overcoming the conventional superiority of the United States.

- Traditional concepts of deterrence will not work against a terrorist enemy whose avowed tactics are wanton destruction and the targeting of innocents; whose so-called soldiers seek martyrdom in death and whose most potent protection is statelessness. The overlap between states that sponsor terror and those that pursue WMD compels us to action. For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists do not seek to attack us using conventional means.

They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning. The targets of these attacks are our military forces and our civilian population, in direct violation of one of the principal norms of the law of warfare. As was demonstrated by the losses on September 11, 2001, mass civilian casualties is the specific objective of terrorists and these losses would be exponentially more severe if terrorists acquired and used weapons of mass destruction. The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction— and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.

The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world’s most destructive technologies, the United States cannot remain idle while dangers gather.

National Security Strategy 15

We will always proceed deliberately, weighing the consequences of our actions. To support preemptive options, we will:

- build better, more integrated intelligence capabilities to provide timely, accurate information on threats, wherever they may emerge;
- coordinate closely with allies to form a common assessment of the most dangerous threats; and continue to transform our military forces to ensure our ability to conduct rapid and precise operations to achieve decisive results.

The purpose of our actions will always be to eliminate a specific threat to the United States or our allies and friends. The reasons for our actions will be clear, the force measured, and the cause just.

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