

PREEMPTIVE WAR AND INTERNATIONAL LAW

The doctrine of “preventive war” announced and practised by the United States, the attack on Iraq by the United States supported by a number of countries described as the “coalition of the willing”, and unilateral actions taken with respect to a number of international conventions such as the NPT, the ABM Treaty, the CTBT and the Kyoto Protocol have given rise to concern about the current state of international law and in particular whether the prohibitions against the use of force on which the United Nations Charter is founded are still respected by Member States and whether multilateralism and the rule of law is to be superseded by unilateralism and a return to reliance on the use of military and economic force instead of law and diplomacy.

In the recent development of the prohibition of the use of force and proscriptions in the UN Charter, the legal position with respect to Iraq and developments following the invasion on Iraq, it would be beneficial to ascertain the position of States which are described as being members of the “coalition of the willing” in order to fully describe the current position of States with respect to the doctrine of “preventive war”.

The Kellogg-Briand Pact condemned recourse to war and renounced war as an instrument of national policy, and that the United Nations Charter, which was concluded “*to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind*”, requires that 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.

The new Bush doctrine of ‘preventive war’ which was published in the National Security Strategy in September 2002 contemplates attacking a state in the absence of specific evidence of a pending attack. This doctrine marks a departure from the prohibition of the use of force under international law, starting from the Kellogg-Briand pact, the establishment of the Nuremberg Charter, the conclusion of the United Nations Charter and the establishment of the International Criminal Court, and marks a return to a readiness to use force in international relations.

Following the publication of that doctrine, the United States, together with United Kingdom, Australia and other States, launched an attack on Iraq, having failed to gain approval of the Security Council under Chapter VII. Many international lawyers believe that attack was illegal and amounted to a war of aggression.

A number of breaches of international law have already been reported following the occupation of Iraq, including failure to prevent looting and allowing breakdown of law and order to take place in Baghdad, failure to provide humanitarian assistance and shooting of civilians during protest. Members of the “coalition of the willing” that go to Iraq under Security Council resolution 1483 (year 2003) would go as belligerent occupants and would be subject to the requirements of international law accordingly, and may themselves incur responsibility or individual liability for actions which have or which will place in Iraq.

In consequence, any members of the “coalition of the willing” may be responsible for compensation, including direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations.

Under Security Council resolution 1483 (2003), no protection is given to Member States or their officials from liability under the Geneva Conventions, Hague Regulations or other provisions of international or national law including the Rome Statute of the International Criminal Court.

The Proscription of the Use of Force

There are two aspects of international law dealing with the law of force: *jus ad bellum*, or the rules relating the use of force, and *jus in bello*, or the rules regulating the conduct of hostilities. This paper primarily addresses the *jus ad bellum*, or the legality of the attack on Iraq, and the consequences of that, as well as aspects of *jus in bello*, in particular the obligations of belligerent occupants of attacked territories.

Following World War I, sixty-three nations renounced war as an instrument of foreign policy in the Kellogg-Briand Pact of 1928. The United States, Australia, Great Britain, Italy and Japan were among the countries that signed that treaty, which provided that the Parties "*solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.*"

That Pact failed to prevent World War II, but in condemning recourse to war and renouncing war as an instrument of national policy it formed the basis for "*crimes against peace*", which were described in the Charter of the Nuremberg tribunal as those crimes aimed at the planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties.

The Nuremberg Tribunal observed that "*war is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.*"

The crime against peace under international common law was recognised by the Nuremberg Tribunal following World War II, noting that the Pact was evidence of a sufficient crystallization of world opinion to authorise a judicial finding in favour of the existence of a "*crime against peace*".

The International Criminal Court does potentially have jurisdiction over crimes of aggression, and the Court can exercise jurisdiction over the crime of aggression once a provision is adopted defining the crime and setting out the conditions under which the Court shall exercise jurisdiction. The legal position as stated by the Nuremberg Tribunal is that those who perpetrate crimes of aggression commit not only a crime under international law but commit the supreme international crime. The inability of the ICC to take jurisdiction at this stage does not negate the nature of the crime but merely the ICC's ability to hold perpetrators accountable.

The United Nations Charter was concluded "*to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind*" and the United Nations was established with the purposes :

1. *To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;*

2. *To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;*

Article 2(3) requires that all members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not

endangered and Article 2(4) requires that 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.

The ICJ in the *Nicaragua* case was in no doubt as to the status of the prohibition on the use of force: "The Court finds that both Parties take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law.... They therefore accept a treaty-law obligation to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations..."

The general rule prohibiting force established in customary law allows for certain exceptions... [Resolution 2625 (XXV)] demonstrates that the States represented in the General Assembly regard the exception to the prohibition of the use of force constituted by the right of individual or collective self-defence as already a matter of customary international law.

The only stated exceptions in the Charter lie in article 51, which preserves the "*inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security,*" and collective actions under Chapter VII, and in particular article 42.

The often cited legal test for necessity and proportionality in self-defence relates to a dispute between Britain and the United States. In the winter of 1837, British and Canadian forces believed that an American flagged ship, the *Caroline*, was ferrying arms, recruits, and supplies from the American side of the border to anti-British rebels on the Canadian side of the border during an anti-British insurrection. While most of the crew slept, British and Canadian troops boarded the ship, attacked the crew and passengers, set her on fire, and towed her into the river toward Niagara Falls, killing two.

In a formulation which has been widely cited as the standard test for necessity in self defence, American Secretary of State Daniel Webster responded to a British claim of self defence by saying that "*it will be for that [British] Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation*".

So, the most widely accepted modern standard for anticipatory self-defence was articulated by U.S. Secretary of State Daniel Webster in diplomatic correspondence with his British counterpart over the *Caroline* incident (often mischaracterized as the *Caroline* "case") and consisted of two prongs. One was that the need to use force in anticipatory self-defence must first rise to the level of being a necessity, and one that is instant, overwhelming, and leaving no choice of means and no moment for deliberation. The other requirement was that the action taken must be proportionate to the threat and not be excessive.

While the *Caroline* case concerned a case of anticipatory self-defence, it pre-dated the Kellogg-Briand Pact and the United Nations Charter prohibitions on the use of force and does not necessarily stand as a contemporary justification for pre-emptive force or anticipatory self-defence. It is to be noted that even anticipatory self defence as a doubtful justification for the use of force. Christine Gray notes that the actual invocation of the right to anticipatory self-defence is rare and that states prefer to take a wide view of armed attack rather than openly claim anticipatory self-defence: "*It is only where no conceivable case can be made for this that they resort to anticipatory self-defence. This reluctance expressly to invoke anticipatory self-defence is in itself a clear indication of the doubtful status of this justification for the use of force.*"

This may be another reason the United States and United Kingdom sought to justify their use of force against Iraq by reference to resolutions 678 (1990) and 687 (1991) rather than attempt to justify them on a basis of anticipatory self-defence of the Bush doctrine of preventive war.

The Bush Doctrine of “Preventive War”.

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.

In a need of adaptation, the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack United States 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.

Thus the statement implied that the United States in this new posture is willing to act beyond the constraints of international law and even beyond limits it has observed in the past. The distinction between “preventive war” and preemption in the new Bush doctrine was described in a Brookings Institute report as follows:

“The concept is not limited to the traditional definition of pre-emption striking an enemy as it prepares an attack but also includes prevention striking an enemy even in the absence of specific evidence of a coming attack”. The idea principally appears to be directed at terrorist groups as well as extremist or “rogue” nation states; the two are linked, according to the strategy, by a combination of “radicalism and technology.”

The administration of President George W. Bush on March 16, 2006, unveiled its second “National Security Strategy of the United States of America” (NSS). While the NSS states a preference for non-military measures, like the September 2002 version, the new NSS explicitly includes a preemptive war doctrine.

It is set out within a section addressing weapons of mass destruction (WMD), specifically the danger of WMD falling into the hands of terrorists.

A preemptive war doctrine heightens the need for accurate threat assessment, which in turn heightens the need for accurate intelligence, which in turn requires multilateral information-sharing. Moreover, while the NSS cautions potential adversaries not to use fear of a preemptive attack as a pretext to launch their own preemptive attack, the NSS needs to spell out with greater clarity what U.S. policies actually are.

The UN Charter does envision the possibility of preemptive action by the UN Security Council, as opposed to member states, and not as an option of first resort.

Traditional concepts of anticipatory self-defense, arguably retained by the UN Charter for states acting unilaterally or multilaterally outside the UN framework, involve strikes aimed at forestalling an imminent attack, not simply generalized dangers.

The NSS borrows language from UN Charter Article 51 relating to an inherent right of self-defense outside the UN framework, but arguably pushes the boundaries of what self-defense means.

It further borrows a UN Charter concept by suggesting that non-military means are preferred even for non-UN-authorized action, although in the UNSC (United Nations Security Council) framework it is the UNSC the Charter envisions taking preventive measures.

The NSS embraces a concept of preemption that incorporates a broader calculus more reminiscent of civilian tort law or tactical military planning, such as taking into account the scope of harm resulting from a worst-case scenario, and analyzing degrees of risk as a broader concept, as opposed to considering whether an actual attack by an adversary is about to occur.

The NSS presents the doctrine within a section entitled “*Prevent our Enemies from Threatening Us, our Allies, and Our Friends with Weapons of Mass Destruction*” but it does not necessarily indicate whether the doctrine is limited to cases of suspected weapons of mass destruction (WMD). Instead, the document simply states that that the dangers posed by the prospect of an WMD attacks affects the calculus of decision-making, as described below.

The NSS summarizes the 2002 policy and sets out the current strategy, indicating “*the place of preemption in our national security strategy remains the same.*” As a result, its benchmark seems to be that the 2002 policy essentially is incorporated within the 2006 NSS.

Summary of 2002 Strategy

The NSS summarized the 2002 preemptive strategy as embracing the following:

- a government's duty to defend its citizens
- that defense including anticipating and countering threats
- under the rubric of self-defense, acting preemptively
- taking action even if uncertainty remains as to the time and place of an enemy attacking the United States
- a calculus that includes not simply the likelihood that an attack will occur against the United States, or its timing, but the *degree of harm* resulting if a hypothetical attack came about

The 2006 NSS states, describing the 2002 strategy:

A. Summary of National Security Strategy 2002

... The first duty of the United States Government remains what it always has been to protect the American people and American interests ... this duty obligates the government to **anticipate and counter threats, using all elements of national power, before the threats can do grave damage.**

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. There are few greater threats than a terrorist attack with WMD.

To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively in exercising our inherent right of self-defense. The United States will not resort to force in all cases to preempt emerging threats. Our preference is that nonmilitary actions succeed. And no country should ever use preemption as a pretext for aggression.

Countering proliferation of WMD requires a comprehensive strategy involving strengthened non proliferation efforts to deny these weapons of terror and related expertise to those seeking them; proactive counter proliferation efforts to defend against and defeat WMD and missile threats before they are unleashed; and improved protection to mitigate the consequences of WMD use. We aim to convince our adversaries that they cannot achieve their goals with WMD, and thus deter and dissuade them from attempting to use or even acquire these weapons in the first place.

Factors apparently entering the administration's judgment under the NSS appear to be:

- the risk of a (potential) adversary's ability to carry out an attack (its capacity to attack, e.g., the existence of a WMD program or actual WMD)
- the likelihood of attack
- the lack of deterrence (more relevant in the case of suicidal terrorists than a traditional sovereign state)
- the scope of harm if risk materializes into an attack (argued to be enormous in the case of WMD)
- the exhaustion of other remedies, such as diplomacy
- the right of preemptive self-defense includes collective self-defense, acting on behalf of an ally

The Bush National Security Strategy has prompted continuing discussion over the legal and policy implications of preemptive military action and its impact on the future of the global security system.

A strategy of addressing an emerging threat with a range of options including force was envisioned by the UN Charter. While traditional international law emphasized respect for state sovereignty by placing greater restrictions on the use of force, the literal language of the UN Charter has a more liberal standard when force is used under the auspices of the Security Council. For cases where force is used outside of the Security Council framework, it is not definitively clear whether under the UN Charter a state retains a traditional right of self-defense, including a right of anticipatory self-defense against an imminent threat, or if that right is curtailed to not include anticipatory self-defense. Some commentators argue that the UN Charter itself is no longer a valid source of international law, in which case a right of anticipatory self-defense would exist regardless and traditionally be limited to cases in which there is a threat of imminent attack.

Given the UN Charter's authorization of preemptive acts by the Security Council, ultimately the real division over preemption is not necessarily over preemption itself but over the multilateral framework under which it is carried out, who holds decision-making authority, and the extent to which those arrangements are codified and therefore rendered more stable and predictable.

If the original concept of the Security Council was that the ad hoc coalition which won World War II would remain intact to stamp out future Hitler before they reached a critical level of strength, historical changes such as the Cold War may have altered the course of that plan.

The right and obligation of a governing authority to use force to defend its citizens against an aggressor predates by centuries modern nation-states and modern international law. Christian just war theory, upon which the modern laws of armed conflict are based, recognized such a duty as early as the 4th Century. Since their emergence in the 16th Century, modern nation-states have been believed to hold such a right. While aggression is traditionally considered unlawful, and self-defense lawful, more problematic is the question of whether a first-strike could ever be considered a defensive act rather than an act of aggression. The right of anticipatory self-defense assumes that an aggressor is poised to strike, and that one acts defensively in anticipation of the attack rather than waiting for the attack to occur. Traditionally, it was deemed theoretically possible that even a first-strike could be deemed defensive in nature, and lawful, if it was to forestall an attack that was imminent.

Debate continues over the impact of the UN Charter on this area of international law. The UN Charter has a general prohibition against the use of force, but authorizes the Security Council to use force even in the absence of an act of aggression by the target, and permits unilateral and non-UN multilateral acts of self-defense under certain constraints.

With respect to the Security Council, the literal language of the UN Charter, in Articles 39, 41, and 42, envision the use of a range of options, such as economic sanctions and varying degrees of force (e.g., blockades as well as all-out war) in response to acts of aggression, breaches of the peace, and threats to the peace. As a result, under the Charter force may be used against even a mere threat when authorized by the Security Council.

For unilateral acts and the multilateral use of force outside of the UN framework, Article 51 of the UN Charter refers to an inherent right of self-defense against armed attack, permitting defensive actions until the Security Council addresses the matter, and requires that such a defensive use of force be reported to the Security Council. The literal language of Article 51 seems to roll back the traditional right of self-defense, requiring that an armed attack have occurred before self-defense can be exercised, and implying that unilateral self-defense is an interim measure until the Security Council addresses the situation. Some commentators argue, however, that by referring to an "*inherent*" right of self-defense the UN Charter simply retains pre-existing international law regarding self-defense, including anticipatory self-defense. While it is not necessarily clear what role he plays in the matter, it appears that Secretary General Koffi Annan might hold the latter view, referring to states "retain[ing]" the inherent right of self-defense under the Charter.

To the extent the UN Charter can be deemed a relevant source of international law then some right of self-defense remains, which very well may include a right of anticipatory self-defense. At the same time, in international law, if a consistent pattern of state practice demonstrates a departure from preexisting norms, it can be argued that international law has changed. Some commentators suggest that state practice has indicated that with respect to the use of force the UN Charter no longer is a part of international law. If that is the case, then presumably international law would revert to the standard of anticipatory self-defense articulated by Webster.

The bottom line, then, is that with respect to anticipatory force exercised without Security Council authorization, either the UN Charter is essentially defunct with respect to the laws of armed conflict and the Webster standard continues, or the UN Charter is not defunct but retains the Webster standard, or that the Webster standard is displaced by a stricter standard requiring an armed attack to have occurred before one may invoke a right of self-defense. The prevailing view probably is that, one way or another, anticipatory self-defense is permissible but traditionally has required the existence of an imminent threat.

Another aspect of the UN framework, emphasized during the Cuban missile crisis, is that the UN Charter does permit regional security arrangements as long as they are consistent with the purposes and principles of the United Nations. However, the literal language of Article 53 requires that enforcement actions taken under regional arrangements not be initiated without Security Council authorization.

With respect to preemption, the National Security Strategy (NSS) issued by U.S. President George W. Bush itself could significantly challenge prevailing international law. But it rests upon a standard doctrine of anticipatory self-defense, and explores the question of when an attack is imminent. On its face it does not seek to overturn the rule, but to explore how the rule and its underlying purpose could be applied in particular situations not existing in the past.

One could argue that the rule does not actually require an attack to be imminent to act, but rather permits defensive measures to be taken before one passes a point in time when it is too late to prevent catastrophe. The NSS focuses on several major considerations, one being that the imminence of a terrorist attack is much harder to detect, another being the fact that innocents are often targeted, and the third being the devastating impact of weapons of mass destruction (WMD.) While the text in the NSS relating to preemption does not necessarily limit its scope to WMD, it comes in a section dedicated to WMD.

Some commentators have suggested that WMD, and WMD proliferation, might be carved out as a special category under anticipatory self-defense. They argue that the right implied by anticipatory self-defense to act against a threat before it is "too late" may require setting a threshold in the context of WMD at some earlier point in the proliferation process, with that earlier point serving as the equivalent of the imminence of a threat. Such a point, it is argued, could represent the presence of a danger justifying a "defensive" first-strike, perhaps when accompanied by other factors such as a history of aggression, ties to terrorism, or certain criminal activities by the target regime.

Even if an exception were limited to WMD, or rogue state WMD, however, there still would remain the problem of setting a new and potentially destabilizing precedent, with the U.S. preemption policy serving as a basis for other countries initiating or threatening conflicts they might not otherwise have been emboldened to undertake.

Concerns over precedent highlight the fact that international law does in fact mean something, and serves more than simply a cosmetic role providing a rhetorical backdrop for actions taken for entirely different reasons. Whether in a local domestic context or the international arena, law and security go hand-in-hand to the extent that assumptions about reliable rules limit and guide conduct, if only by making more predictable its consequences.

Countries do seem to care about what kind of reaction a particular course of conduct will bring. In two major wars, Korea and Gulf War I, the United States in hindsight was accused of having overlooked hints by the aggressors of their intentions, failing to respond strongly enough to the hints. International law can help serve to warn state actors what other states would think of particular courses of action, by clearly articulating norms of conduct and by drawing up more clearly defined parameters for joint action in response to unlawful or otherwise dangerous situations.

The Bush administration therefore faces an important challenge to articulate its own policies clearly and carefully, determine the extent to which the United States is willing to help contribute to the establishment of clear international norms, and explain whether and in what manner an international framework for decision-making will be honored. Concerns expressed by allies over the shaping of preemption do not necessarily evidence an unwillingness to adapt shared understandings of law and security to changing circumstances. Rather, they reflect a fundamental appreciation for the prospect of a stable, effective and sustainable global security system in which the sole superpower ideally provides leadership that is clearly articulated, predictable, reasonable and promotes respect for the law.

The National Security Strategy calls for accurate, honest, and timely threat-assessments and coordination with allies, wisdom reinforced by the Iraq war. One of the biggest lessons from the Iraq conflict might not center around what to call it (*i.e.*, preemption or something else) but rather the weaknesses inherent in relying on potentially flawed intelligence and the difficulties that could be posed in the future if a U.S. administration once again seeks to convince the citizenry and the world community to trust undisclosed information, or disclosed allegations resting on similar intelligence-gathering. Another lesson is that even the United States needs help dealing with a large and complicated problem, whether it is before, during, or after a conflict addressing what the Bush administration deems a grave and gathering threat.

In the past, President Bush has been somewhat reserved with respect to his own presentation of a preemption doctrine, and his decision to lead a multilateral coalition against Saddam Hussein was presented with a tapestry of arguments among which were references to Security Council resolutions, the ongoing situation since the previous Gulf War, Saddam's ties to terrorists, and humanitarian concerns. Secretary of State Colin Powell also has adopted a multifaceted and internationalist approach, and recently articulated a view of preemption that was closely akin to traditional anticipatory self-defense, referring to taking action when "see[ing] ... a danger coming at you" Vice President Dick Cheney until recently adopted a more aggressive posture reminiscent of a Cold War ideology -- "us good, them bad" --

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and the United States needing an unfettered capacity to take action anywhere at any time. Publicly, Cheney's focus seems to have shifted away from open support for preemption to the engagement of terrorists in an ongoing series of hostilities, the need to appraise the future of the system of global security, and the importance of democracy.

Important questions that must be answered include whether the world is safer with or without a strengthening of international law and carefully crafted international institutions restricting the use of force, and whether the United States is willing to provide the leadership it has demonstrated in the past in these areas.

At the same time, an examination of the global system of sovereign states might not be complete without a consideration of the rightful purpose of sovereignty itself, taken together with the more broad-based views of security expressed by the National Security Strategy, and Bush's decision to draw greater attention to the need to create a safer and more just world by promoting freedom and democracy.

Sovereignty was never appropriately meant to sanctify the frontiers of tyrants and prevent outside intervention against their crimes, but truly *is* meant to serve the cause of peace. The theoretical basis for having nation-states in the first place was the idea that power would be concentrated in the hands of the sovereign, rather than private armies, local warlords, and armed bands, and that sovereigns themselves would be limited with respect to the instances in which they would attack each other, with the overall effect of reducing the incidence of war and violence and thereby protecting innocent lives. (see e.g., *Cusimano Love, "09.11.01: Globalization, Ethics, and the War on Terrorism," Notre Dame Journal of Ethics & Public Policy, Vol. 16, 2002, pp. 65-80*). This system has been challenged by the nexus of modern technology with the reemergence of warlords and private armies, but it also has been challenged wherever sovereignty rests on oppression rather than democratic legitimacy.

Security and the diverse realities impacting it encompass a growing range of concerns. May that the National Security Strategy with its consideration of the importance of development and trade relationships, the president's renewed focus on democratization, and an appraisal of the forces of globalization and the connection between terrorism and poverty all point to a new direction in security that is not simply based on force but most definitely is based on prevention. The key, however, will be to not simply be preventive, but to be proactive. To not simply put out fires and react to events, but to invest in human potential and human freedom, to promote respect for human life and the dignity of the human person, and to sign on for the long haul to create a world that is more free, more just, and therefore decidedly more secure.

But, in fact, by using arms in place of diplomacy and dialogue, the Bush administration and its doctrine are on the face of it far removed from 'preemptive' war, which is narrowly defined on the basis of self defence against an actual imminent attack.

That the United States did not base its claimed justification for its attack on Iraq on a claim of "preventive war" but rather on a spurious reliance on the Security Council resolutions which were passed following the invasion of Kuwait, demonstrates that even the United States does not have confidence on its own doctrine. And this is not surprising. The doctrine departs from the development of international law prohibiting the use of force from the Kellogg-Briand pact, the establishment of the Nuremberg Charter, the conclusion of the United Nations Charter and the establishment of the International Criminal Court and marks a return to a readiness to use force in international relations.

The framework of international law is currently under threat by the determination of the United States to redraw international law to allow its strategic imperatives. The unilateralist "unsigned" by the United States of the Rome Statute of the International Criminal Court, its withdrawal from the Antiballistic Missile (ABM) Treaty, its failure to ratify the Comprehensive Test Ban Treaty thus ensuring that it will not enter into force, and its decision not to ratify the Kyoto Protocol all represent significant departures from multilateralism and the rule of law.

The international community finds itself in at a critical juncture. The guarantees of international peace and security and the determination to avoid the scourge of war put in place following World War II have been undermined and even imperilled by the use of military force under the doctrine of “preventive war” and the invasion of Iraq. It is critical that member States following the attack on Iraq re-acknowledge their commitment to avoiding war and to the principles and purposes of the United Nations Charter, in order that the role of the rule of law in avoiding future wars may prevail.

In its National Security Strategy, the United States described the utility of “coalitions of the willing” as standing outside the current institutions, saying that “ *The United States are committed to lasting institutions like the United Nations, the World Trade Organization, the Organization of American States, and NATO as well as other long-standing alliances. Coalitions of the willing can augment these permanent institutions.*” Thus the United States has put itself and, by extension, the “coalition of the willing”, apart from the permanent institutions and international law, and is setting its own law and policy unilaterally.

States in the “coalition of the willing” have aligned themselves with the policy of “preventive war” and with the legal position of the United States in the Iraqi war, a war described by the UN Secretary-General as not in conformity with the Charter, and a war which still continues. This position also aligns States with a strategy which espouses a unilateralist approach to international problems and thus threatens a rift with other institutions which underpin the international system.

Nations have a stark choice: they can choose multilateralism, the rule of law, and respect for international law, treaties and institutions; or, they can choose a unilateralist approach in which States pursue their own interests, irrespective of the will of the world community, and accept the rule of economic and military power.

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