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The American Strategy of Preemptive War and International Law

Professor Dr. Dietrich Murswiek

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Dietrich Murswiek

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The government of the United States has now proven its determination to embark on a war against Iraq. While it might have preferred to do so on the basis of an authorization by the United Nations Security Council, it emphasized from the outset that it would also act without the consent of the Security Council.[1] In its National Security Strategy, for instance, the United States declared that it was prepared to engage in a preemptive war without Security Council authorization both during the current Iraq crisis and as a general rule. The following article addresses issues of international law raised by this unilateral approach. It concludes that a unilateral war of pre-emption poses a violation of international law and that its legalization would not be desirable.

I. Introduction

The regulation of international relations stands at a crossroad: as American and British bombers fly against Baghdad, the fate of being reduced to debris and ashes is not merely faced by a single state under tyrannical rule; it may also threaten the international legal system as we have known it since the end of the Second World War. The United States are not only challenging an Arab dictator, but also valid international law – and apparently with no regard for the potential consequences.

In my article, I first intend to describe the current situation under international law. To this end, I outline the basic peacekeeping system of the United Nations. I then present the grounds for admissible use of force and specifically address the conditions under which a preemptive military strike might occur in accordance with the law. In a second part I draw attention to the consequences which might ensue from the American strategy of preemptive war for the future development of international law.

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II. The Use of Force in International Law and the War Against Iraq

1. The Maintenance of Peace under Current International Law

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

Peace can be understood, first and foremost, as an absence of war. *Pax est absentia belli*. Coupled with the guarantee of territorial integrity and the political independence of states, the prohibition of the use of force safeguards the international status quo, regardless of how inadequate or unjust the latter may appear. Admittedly, the Charter of the United Nations has also embraced the assumption that only a *just* peace can become a lasting peace,[2] and that unjust circumstances such as a consistent violation of human rights or the denial of self-determination pose a source of conflict which can, in turn, breed wars. Still, achieving a "just peace" in the sense defined by Immanuel Kant,[3] that is: an international state of affairs in which the very reason for war is lacking, is not an objective which can stand as an alternative to the prohibition of the use of force. Instead, it relies on that prohibition for its very foundation. Potential sources of conflict between states should be resolved, but by peaceful means only. This remains valid even when the conflict originates in a serious violation of international law by one of the parties to the conflict. In principle, even valid international law may not be enforced by means of force.

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1 See, *e.g.*, Secretary of State Powell, 9 February 2003, quoted in the FRANKFURTER ALLGEMEINE ZEITUNG (F.A.Z.), February 10, 2003, at 2.

2 For further details, see Dietrich Murswiek, *Offensives und defensives Selbstbestimmungsrecht. Zum Subjekt des Selbstbestimmungsrechts der Völker*, 23 DER STAAT 523, 537 (1984).

3 IMMANUEL KANT, *Zum ewigen Frieden* (first published in 1795), in 9 WERKE IN ZEHN BÄNDEN 196 *et sqq*. (Wilhelm Weischedel ed., 1964).

The U.N. Charter contains only two exceptions to the general prohibition of the use of force: the right to self-defense contained in Article 51, on the one hand, and collective action initiated by the Security Council within the framework Chapter VII, on the other. That Chapter provides for "Action with respect to threats to the peace, breaches of the peace, and acts of aggression." The basis for military sanctions is outlined in Article 42, which authorizes the Security Council to use air, sea, or land forces to "maintain or restore international peace and security" once it has established a threat to or breach of the peace pursuant to Article 39. Under United Nations practice, the Security Council may delegate the implementation of such measures to Member States.[4]

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

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

2. Has the Security Council Issued an Authorization?

A good starting point for any answer to this question are the actual resolutions adopted by the Security Council. The resolution around which the current inspection regime is built is resolution 1441 of 8 November 2002.[5] The Security Council declared that false statements on the possession of mass destruction weapons and failure by Iraq to cooperate fully with weapons inspectors would constitute a material breach of the obligations imposed on it (para, 4), particularly since Iraq had been and remained in material breach of its obligations under

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4 Cf. FRIEDERIKE BOEHMER, DIE ERMÄCHTIGUNG ZU MILITÄRISCHER GEWALTANWENDUNG DURCH DEN SICHERHEITSRAT: RESOLUTION 678 UND DIE PRAXIS DES SICHERHEITSRATS SEIT 1990 (1997); Jochen Frowein & Nico Krisch, *in* THE CHARTER OF THE UNITED NATIONS Article 42 annot. 19 *et sqq*. (Bruno Simma ed., 2nd ed. 2002).

5 All resolutions of the Security Council cited here are available in the Internet under www.un.org/documents.

relevant resolutions since 1991 (para. 1). The resolution does not, however, state that its non-observance by Iraq will automatically result in military sanctions under Article 42. By no means does it contain an authorization for the United States or other Member States to carry out such sanctions. Instead, the Security Council merely agreed to convene upon receipt of a report in order to consider the situation (para. 12). It also recalled how it had repeatedly warned Iraq that it would face serious consequences as a result of its continued violations of its obligations (para. 13). But such consequences have not yet been decided upon.[6] A silent or implied resolution on the use of military force is not permissible under Article 42 due to the exceptional character of both the use of force and the delegation of authority relating to its use.[7] Contrary to an opinion voiced occasionally in the press and by the American administration, resolution 1441 leaves no room for an interpretation that the Security Council authorized the United States to carry out a military strike.

As American and British commentators have also argued, however, an authorization of military intervention might result from the Gulf War resolution 678 (1990) in connection with the Cease-Fire resolution 687 (1991).[8] In resolution 678, the Security Council had authorized Member States cooperating with the government of Kuwait to end the Iraqi occupation of Kuwait with military means and enforce all pertinent resolutions of the Council. Resolution 687 determined the conditions for a formal cease-fire, which entered into force on 11 April 1991. This resolution requires Iraq to disarm unconditionally under international surveillance and subject itself to continuous monitoring with regard to all atomic, biological and chemical weapons. Iraq has violated this obligation time and again. In 1997, the Security Council found this behavior to constitute a threat to world peace and international security.[9] As the foregoing argument would have it now, these serious violations of the Cease-Fire resolution restore the mandate for a use of force contained in the Gulf War resolution of 1990.

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6 See Christian Tomuschat, *The Safety Advice is increased*, TELERECORD, November 11, 2002, at 12.

7 More extensively on this issue, Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AM. J. INT'L. L. 124, 127, 130 (1999); see also Christian Schaller, *Massenvernichtungswaffen und Präventivkrieg – Möglichkeiten einer militärischen Intervention im Irak aus völkerrechtlicher Sicht*, 62 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 641, 654 (2002); Frowein & Krisch (*supra*, note 4), annot. 25 *et seq*.

8 Sources provided by Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L. L. 470, 471 (1999), und Geoffrey Marston, *United Kingdom Materials on International Law 1998*, 69 BRIT. Y.B. INT'L. L. 433, 586 (1998); see also Schaller (*supra*, note 7), 652 *et seq*.; Michael Byers, *The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq*, 13 EUR. J. INT'L. L. 21, 23 *et sqq*. (2002).

9 S.C. Res. 1137; the preamble of S.C. Res. 1441 (2002) confirms this.

Against this view, however, it must be borne in mind that the Gulf War mandate was limited to a concrete situation, the occupation of Kuwait, and thus expired with the complete withdrawal of Iraqi troops from Kuwait and the entry into force of the cease-fire. The Cease-Fire resolution implicitly revoked the validity of the mandate. It also transferred the authority to take decisions under Chapter VII back to the Security Council. If the Council considers further military measures necessary because of an Iraqi threat to world peace, it must decide so itself. The 1990 resolution can no longer serve to authorize such measures.[10]

3. The Right to Self-Defense

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

a) Does a Right to Preemptive Self-Defense Exist?

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

International legal scholarship has essentially embraced two main points of view. As one group of authors maintains, Article 51 should be interpreted narrowly, being, as it is, an exception from the general prohibition of the use of force. A more extensive interpretation would be too prone to abuse. Consequently, strict adherence to the wording of this provision is called for, with self-defense clearly dependent on a prior attack. An attack must, therefore, already have begun.[11]

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10 For further details, consult Schaller (*supra*, note 7), 645-656, who provides a thorough analysis of the individual resolutions with convincing arguments. Schaller also demonstrates that later resolutions provides no implied authorization, and that the Security Council always assumed the continued existence of the cease-fire regime. This situation has not been changed by S.C. Res. 1441 (2002). While it may refer to S.C. Res. 678 (1990) and 687 (1991), and again affirm a material breach of Res. 687 fest, it does not lift the cease-fire, but rather provides Iraq with a renewed opportunity to comply with its disarmament obligations (paras 2, 3). The same opinion is held by Dieter Deiseroth, *Am Abgrund des Verfassungsbruchs. Dürfte die Bundesregierung es dulden, dass die USA im Falle eines Kriegs gegen Irak die deutschen Militärstützpunkte nutzen?*, II (September 12, 2002), *at* www.uni-kassel.de/fb10/frieden/regionen/Irak/deiseroth.html.

11 Bruno Randelzhofer, *in* THE CHARTER OF THE UNITED NATIONS Article 51 annot. 39 (Bruno Simma ed., 2nd ed. 2002); ANTONIO CASSESE, INTERNATIONAL LAW 310 (2001).

As the other view contends, reflecting what is probably a majority opinion, such an interpretation would be too formalistic and hard to reconcile with reality. Whoever fires the first shot is not always the aggressor. No state can be expected to stand by and idly watch until the preparations for an attack finally result in an actual strike, preventing an effective defense. The right of states to self-defense is based on their right to existence, sovereignty and territorial integrity. Article 51 presupposes and recognizes it as an "inherent right." It may not be interpreted in such a manner that self-defense would be rendered useless in a given case, forcing a state to effectively surrender its integrity without being able to launch a defense.[12]

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

The boundaries of preemptive self-defense have been elaborated in international legal scholarship with a view both to customary law and contextual interpretation. Apparently, international custom allows preemptive self-defense if – and only when – the state invoking it can demonstrate that the threat of a hostile attack is both immediate and overwhelming, ruling out a lengthy search for peaceful means of resolution, provided no defense other than military force is available. This rule can be traced back to the *Caroline*-case. The *Caroline* was a steamer used in 1837 by a private militia from the United States to bring arms and men to an island on the Canadian side of the Niagara river so as to support a rebellion in what was at that time still a British colony. The British captured the steamer while it was still moored on the American side, put it on fire and let it drift downstream past the Niagara Falls. In a diplomatic note issued in 1841,[13] the American Secretary of State Daniel Webster established a set of criteria on preemptive self-defense agreed upon by the British negotiator: "It will be for that Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[14] One might ask whether this doctrine, formulated in the 19th century, when states where still entitled to engage in warfare by virtue

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12 See, *e.g.*, Claude H. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 455, 498 (1952); Kay Hailbronner, *Die Grenzen des völkerrechtlichen Gewaltverbots*, 26 BERICHTE D. GES. VÖLKERR. 49, 80 *et sqq.* (1986).

13 Reprinted in JOHN B. MOORE, A DIGEST OF INTERNATIONAL LAW II 409, 412 (1906); also at www.yale.edu/lawweb/avalon/diplomacy/britian/br-1842d.htm.

14 Regarding the Caroline-case, see Moore (*supra*, note 13), 24-30, 409-14; see also Michael Byers, *Der Irak und der Fall Caroline*, TAZ – LE MONDE DIPLOMATIQUE Nr. 6852, September 13, 2002.

of their sovereignty, still holds any value nowadays. It was, however, applied by the Nuremberg Military Tribunal after the Second World War,[15] and has frequently been cited ever since. As a customary rule, it might therefore affect the interpretation of Article 51.[16]

A contextual interpretation of Article 51 arrives at essentially the same outcome: as an exception from the general prohibition of the use of force, the right of self-defense must be limited to such cases involving an armed attack that has either begun or is about to begin. Article 51 does not entitle to measures for the general avoidance of danger. A distinction must be made between the avoidance of danger or of a threat and the defense against an imminent attack. The avoidance of danger – of a threat to peace – rests within the exclusive competence of the Security Council (Articles 39-42). The Charter does not even place self-defense within the sole responsibility of an attacked state and its allies. Instead, the right to self-defense contained in Article 51 exists only until the Security Council has adopted the measures required to safeguard peace.

With regard to preemptive measures, the following conclusion ensues: a state that feels threatened by an imminent attack may only carry out measures of self-defense if it no longer has sufficient time to wait for the adoption of required measures by the Security Council. Furthermore, the burden of evidence rests with the defending state, which must provide compelling evidence for an imminent attack by the hostile state. The existence of an attack situation must be evident.[17] Mere assumptions or circumstantial evidence, however plausible, are not sufficient. If no evidence can be presented, the situation must be considered a mere threat, not an attack as demanded by Article 51. Only the Security Council may then decide whether world peace is threatened, and whether military measures should be adopted. Leaving this determination to any state that may feel threatened would severely undermine the peacekeeping system of the U.N. Charter. Many states have reason to feel threatened by a number of other states. In an era of globalization, moreover, the threat of terrorism is

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15 I DER PROZEß GEGEN DIE HAUPTKRIEGSVERBRECHER VOR DEM INTERNATIONALEN MILITÄRGERICHTSHOF 230 (1947).

16 Customary validity is supported by, *e.g.*, Byers (*supra*, note 14); Schaller (*supra*, note 7), 658; the disputed relationship between a right to self-defense based on custom and on treaty-law need not be addressed here, as the point in time when self-defense may legitimately occur, which is the sole issue of relevance here, does not receive any wider application in custom than in the interpretation of Art. 51 of the U.N. Charter favored here; see Randelzhofer (*supra*, note 11), Art. 51 annot. 9-15, 39.

17 Similarly Mary Ellen O'Connel, *The Myth of Preemptive Self-Defense, ASIL Task Force on Terrorism* 8 (2002), *at* www.asil.org/taskforce/index.htm; Georg Nolte, *Weg in eine andere Rechtsordnung. Vorbeugende Gewaltanwendung und gezielte Tötungen*, F.A.Z., January 10, 2003, at 8.

universal. If every state were entitled to engage in self-defense as a response to such threats, the Security Council prerogative to adopt sanctions against threats to peace would gradually erode. By the same token, the prohibition of the use of force would become dependent on the subjective assessment of a threat by individual states, which, in practice, would mean that it ceases to exist.

A consensus therefore exists among international lawyers that preemptive[18] or, more accurately, anticipatory self-defense[19] – if it is to be accepted at all[20] – needs to be strictly limited to cases involving an obvious and imminent attack which cannot be otherwise averted.[21]

b) Anticipatory Self-defense by the United States Against Iraq?

Quite obviously, the military strike launched by the United States against Iraq cannot be based on the foregoing criteria of anticipatory self-defense. While Iraq might still be in possession of biological and chemical weapons of mass destruction, the mere possession of such weapons does not amount to an attack for the purposes of Article 51. In order to invoke the right to self-defense, the United States would not only have to submit evidence on the possession of weapons of mass destruction by Iraq, but also on the intention of that state to use these weapons against the United States or to pass them on to terrorists which, in turn,

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18 In ordinary language, a distinction is often made between "preventive" and "preemptive" self-defense. In the foregoing defense situation, "preemptive self-defense" would be legitimate self-defense, while "preventive self-defense" would denote a form of defense against threats which are neither imminent nor can be proved, see, *e.g.*, Senator Edward Kennedy, 148 Cong. Rec. S10001, S10002 (October 7, 2002).

19 Some authors suggest not using "preventive", but rather "anticipatory" self-defense when referring to cases of legitimate and preemptive self-defense, so as to distinguish these from the area of general threats dealt with by the Security Council, see, *e.g.*, O'Connell (*supra*, note 17), 2, at note 10.

20 See *supra*, note 11, for sources denying such self-defense in the first place.

21 See, *e.g.*, YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 190 *et sqq.* (2nd ed. 1994); O'Connell (*supra*, note 17), 5 *et sqq.*; Schaller (*supra*, note 7), 660; Waldock (*supra*, note 12); Hailbronner (*supra*, note 12), 81; AHMED M. RIFAAT, INTERNATIONAL AGGRESSION 126 *et seq.* (1979); Mark M. Baker, *Terrorism and the Inherent Right of Self-Defense*, 10 HOUST. J. INTL. L. 25, 45 (1987); PETER MANLANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 312 *et sqq.* (7th ed. 1997). Because of the rule-exception character of the relationship between the prohibition of the use of force and the right to self-defense, a presumption arises against the legitimacy of preventive self-defense, see Richard Falk, *Einer flog über das Völkerrecht. Der mögliche Irakkrieg und die Charta der Vereinten Nationen*, TAZ - LE MONDE DIPLOMATIQUE, December 2002. Occasionally, the evidently erroneous view is submitted that rules on the prohibition of the use of force or the restriction of the right to self-defense have lost their validity as a result of persistent state practice to the contrary, see, *e.g.*, Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J. L. PUB. POL. 539, 540 *et sqq.* (2002). With compelling arguments against this view, O'Connell (*supra*, note 17), 14 *et seq.* See also Military and Paramilitary Activities (Nicaragua v. U.S.), 1986 I.C.J. 14, 98 para. 186.

would use them against the U.S. The mere possibility that Saddam Hussein might do so at some point does not suffice to establish an "imminent threat" and thereby satisfy the criterion of immediacy. There is, of course, little doubt that Saddam can be considered a vile dictator, a "rogue" capable of all sorts of evil deeds. Article 51 does not, however, entitle to military crusades against dictators and "rogue states", but merely to defensive measures against current or evidently imminent attacks. Even the consistent violation by Iraq of obligations set out in various Security Council resolutions does not give rise to an attack situation. While many circumstances may suggest a threat to world peace, this alone cannot confer the authority to measures of self-defense. Instead, any measures would have to be decided upon by the Security Council on the basis of its powers under Chapter VII.

The law is perfectly clear about this. All experts, which have commented on the current Iraq-crisis, deny the United States a right to self-defense.[22]

c) Interim Conclusion

By way of an interim conclusion, it can be affirmed that, barring a Security Council resolution on military sanctions against Iraq, the military strike against Iraq is in clear violation of international law. It amounts to an illegal act of war, which does not merely entail a minor infringement of international law, but violates one of the fundamental norms of current international law. It is so serious that it constitutes an international crime.[23]

III. A New Right to a Preemptive War?

1. The American Claim of *Preemptive Action*

The Bush-Administration is aware of the fact that a preemptive war launched against Iraq without a U.N. mandate is illegal. As it has nonetheless decided to embark on this course of

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22 See Pierre-Marie Dupuy & Christian Tomuschat, F.A.Z., July 31, 2002, at 10; Andreas Paulus, *Die Büchse der Pandora. Deutschland und der Irak-Konflikt aus der Sicht eines Völkerrechtlers*, AI-JOURNAL (Jan./Feb. 2003); Schaller (*supra*, note 8), 661 *et sqq.*; O'Connel (*supra*, note 19); Falk (*supra*, note 21); Nolte (*supra*, note 17); Deiseroth (*supra*, note 10), III.; Byers (*supra*, note 14); Christian Tomuschat, F.A.Z., November 11, 2002, at 12; *Idem.*, DER SPIEGEL, January 20, 2003; Bruno Simma, SÜDDEUTSCHE ZEITUNG, FEBRUARY 1, 2003, S.11; William Galston, *Perils of Preemptive War*, 13 THE AMERICAN PROSPECT, Sept. 23, 2002; see also the position of the historian Paul W. Schroeder, *What would Kant say? Iraq: The Case Against Preemptive War*, THE AMERICAN CONSERVATIVE, Oct. 21, 2002.

23 Rome Statute of the International Criminal Court, Art. 5 (1) (d); Charter of the International Military Tribunal, Art. 6 (2) (a); see also Art. 26 (1) of the German Basic Law (GG), and Section 80 of the German Criminal Code (StGB).

action, it is not only willing to take a violation of international law for granted. Adding to that, however, it has also ventured an attack against the validity of central norms within the current peacekeeping system. The United States is seeking to amend these norms so that preemptive wars become legal. This no longer affects the current Iraq-conflict only. As the American president declared openly, instead, the United States is determined to wage preventive wars if these appear necessary for its own safety. This "Bush Doctrine" was initially presented in a presidential speech at the West Point military academy on 1 June 2002[24] and later reflected in the National Security Strategy of September 2002.[25] It cannot be reduced to a mere statement made spontaneously and without deliberation. The National Security Strategy outlines a set of basic principles, and it will determine the guidelines of American security policy for many years to come.

The new strategy departs from previous means of peacekeeping, which used to be based on *containment* and *deterrence*. According to the new strategy, the events of September 11 showed that containment and deterrence no longer sufficed to address international terrorism. A terrorist determined to commit suicide cannot be deterred by threats of massive retaliation. And containment cannot be applied against dictators who own weapons of mass destruction and might use them in missile warheads or secretly provide them to terrorist allies. The battle must therefore be taken to the enemy. An attack is the best defense.[26] If necessary, liberty and life of Americans would have to be defended against "rogue states" by way of preemptive action.[27] Against such states, mere reaction is no longer a viable strategy. "We cannot let our enemies strike first", as the National Security Strategy puts it.

But then, that document explicitly makes reference to international law: it correctly states, for one, that states threatened with an immediate attack are not held to suffer the attack before they may act against hostile armed forces in legitimate defense. That statement is followed by a decisive passage: "We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries." In the case of "rogue states", the criterion of an *imminent threat* is now supposedly to be understood as the mere possibility that these might use

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24 Graduation Speech at West Point, *at* www.whitehouse.gov/news/releases/2002/06/20020601-3.html.

25 *National Security Strategy of the United States of America* ("N.S.S.", September 2002), *at* www.whitehouse.gov/nsc/nss.pdf. See, in particular, chapter V, 13 *et sqq*.

26 "Our best defense is a good offense", N.S.S. (*supra*, note 25), 6.

27 N.S.S. (*supra*, note 25), 15; President Bush (*supra*, note 24).

weapons of mass destruction at some future point. In other words, the requirement of immediacy is purged: the intention of an actual attack no longer needs to be established.

The Bush-Doctrine violates international law. It is, however, meant to create new international law. Against the background of the National Security Strategy, the current war against Iraq could be a first step. New international law arises from state practice coupled with *opinio iuris*, the acceptance of such practice as reflecting the law.[28] The National Security Strategy contains a statement about the law. In essence, what the U.S. government is claiming is that, given novel types of threats to peace, the conditions for an invocation of the right to self-defense have to be reinterpreted so as to allow preemptive action. Accordingly, the United States claim they have acted in accordance with the law by attacking Iraq. If the U.S. managed to convince other states of the legitimacy of its preemptive strikes, new international custom would arise – provided, of course, that such practice continued with the approval of most states. Even the failure of other states to object against an American attack may suffice, as their behavior could then be interpreted as an implied consent to the American interpretation of the law.[29] States that wish to prevent an expansions of the right to self-defense towards a right to preemptive war should voice their protest loud and clear, and expressly label the American attack a violation of international law.

2. Anarchy Instead of a Prohibition of the Use of Force?

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

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28 New customary law can revoke prior custom and treaty law (*desuetudo*), see, *e.g.*, ALFRED VERDROSS & BRUNO SIMMA, UNIVERSELLES VÖLKERRECHT § 573 *et sqq.* (3rd ed. 1984). Treaty law can be amended by subsequent practice, see, *e.g.*, GEORG DAHM *et al.*, I 3 VÖLKERRECHT I/3 673 *et sqq.* (2nd ed. 2002). It is therefore conceivable that the strict requirements placed on self-defense might be relaxed and result in preventive self-defense.

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

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

This is not the forum to discuss strategic and political alternatives to a preemptive military strike, its negative consequences and countervailing effects, the political and military pros and cons. From a legal point of view, the only question that may be addressed here is whether the authority to launch preemptive strikes should remain a prerogative of the Security Council, or whether it is preferable to confer such authority on every state that feels threatened as part of the right to self-defense.

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

An expedient and necessary approach to evaluating the desirability of a legal rule lies in the generalization of the concrete case at hand. The question, thus, should not be whether we can approve the preemptive strike launched by the United States against Iraq, from which an uncontrollable threat may originate and which is governed by a villain such as Saddam Hussein, but rather whether we can approve each and every state being entitled to launch a preemptive military strike against any other state whenever it concludes that the other possesses weapons of mass destruction and might one day use them against it. If this solution might appear compelling, the following should be kept in mind: weapons of mass destruction can be found in many countries of the world. Biological and chemical weapons of mass destruction might emerge or be suspected virtually anywhere. Moreover, a number of states is governed by dictators which might rightfully be described as "rogues." Generalizing the Bush-Doctrine might result in almost any state being able to find reasons to engage in war against several other states. India against Pakistan. Pakistan against India. Japan against Northern Korea, Turkey against Iran. The stability of the state system would suffer a severe blow, and the general prohibition of the use of force would practically make way for a general entitlement to preemptive use of force. The legal relations between states would essentially come down to anarchy, suffering a relapse to an age when the general prohibition of the use

of force had not yet entered into force, in other words: annulling the very doctrine which has been hailed as the greatest achievement of international law in the 20th century. The only difference to that earlier period would essentially lie in the need of labelling the enemy a "rogue state" before attacking it. It should be obvious that nobody can desire the emergence of such a general rule in international law – not even the United States.[30]

3. A Right to Preemptive War for the United States Only?

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

That is why the Bush-Doctrine can only be understood as formulating a right to preemptive military strikes not for all states, but for the United States only; this is not explicitly stated in the National Security Strategy, but can be inferred from the constellation of interests under which it was formulated.[31] The United States has become aware of its capacity as the sole remaining superpower. And the U.S. government is determined to use the historical moment of opportunity. If the authority to lead preemptive wars is granted only to the United States, good will prevail against evil, as will democracy and freedom against oppression and tyranny.[32] Security will be the outcome, and the insecurity and anarchy resulting from all other states enjoying the same right avoided.

Is that the solution to all problems of international security and world peace we are currently facing? Should we not accept the United States as a "benign hegemon", as the only power with an ability to secure peace and resolve conflicts? And is not the United States, at the same

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30 See Henry Kissinger, *Beyond Baghdad*, NEW YORK POST, August 11, 2002, at 24; O'Connell (*supra*, note 17), 16 *et seq*.; Schroeder (*supra*, note 22).

31 Byers even claims to have observed the rise of special rights in international law for the United States since 1990, that is: long before the Bush-Doctrine (*supra*, note 8), 38 *et seq*. Oscar Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT'L. L. 259, 262 *et seq.* (1989), reports that the U.S. had already begun claiming a right to decide on the conditions for self-defense – without conceding similar rights to other states – after receiving a negative decision of the ICJ in the Nicaragua case.

32 N.S.S. (*supra*, note 25), preface and 1; President Bush (*supra*, note 24).

time, the only power we might somehow trust not to abuse its role as a global policeman? Is a *Pax Americana* not preferable to the insecurities of a multipolar world? And yet, would the safety provided by the power and privileged legal status of the sole superpower outweigh the ensuing loss of political freedom by all other states? Could it outweigh the danger of abuse? Would we ultimately benefit from increased security, or would American unilateralism provoke new conflicts?[33]

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

IV. Summary

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

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33 At length Schroeder (*supra*, note 22).