

THE WAR ON TERROR AND IRAQ IN HISTORICAL PERSPECTIVE[©]

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This article critically examines the doctrine of pre-emption articulated in the National Security Strategy and the arguments made in favour of the proposition that it represents an emerging norm of international law and is compatible with the UN Charter. It focuses in particular on the possible implications with the UN Charter. It focuses in particular on the possible implications of this doctrine for Third-World states. It also examines the war in Iraq and pre-emption may be seen as replicating, in certain respects, a much earlier colonial history.

Cet article critique la doctrine de la guerre préventive qui fut élaborée dans le cadre de la Stratégie américaine de sécurité nationale, ainsi que les arguments qui défendent la proposition selon laquelle cette doctrine représente une norme naissante du droit international, et qu'elle est compatible avec la Charte de l'ONU. En particulier, il s'intéresse aux implications possibles envers la Charte de l'ONU, ainsi qu'aux implications possibles de cette doctrine pour les États du Tiers-monde. De plus, il analyse la guerre en Irak ; la prévention peut être vue comme une réplique, sous certains angles, d'une histoire coloniale bien antérieure.

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I.	INTRODUCTION	

The War on Terror inaugurated by the Bush administration has profoundly challenged the system of international law and relations created by the United Nations (UN). The concept of pre-emptive self-defence, articulated by President George W. Bush in his 2002 *National Security Strategy*,¹ is a central component of this war. The *National Security Strategy* generated an ongoing controversy that has not only preoccupied international lawyers, but has further extended into various other areas of scholarship, including the realm of political theory; the doctrine of pre-emption has inevitably challenged existing understandings of the ethics of

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¹ U.S., National Security Council, *The National Security Strategy of the United States* (17 September 2002), online: White House <<http://www.whitehouse.gov/nsc/nss.html>> [*National Security Strategy*].

self-defence and “just war” theory, for example.² The basic elements of pre-emptive self-defence have also been reiterated and elaborated upon in the 2004 U.S. Presidential Debates.

Pre-emption, however, while it most directly and immediately questions the law relating to the use of force, has far wider ramifications because, as the *National Security Strategy* makes clear, it is but one aspect of a broader policy that also involves transforming “rogue states” into democratic polities. The ongoing war in Iraq, then, provides us with an example of this aspect of the policy in action.

This article examines some of the legal arguments that surround the legitimacy of the doctrine of pre-emption. While many critics of pre-emption have asserted that it is illegal, others have suggested that pre-emption is permitted by existing international law—an international law that is suitably adapted to take into account the contemporary realities of terrorism. The argument that pre-emption is necessary or desirable or legal is largely based on the view that the challenges and dangers that confront the international community are unprecedented, and require a new system of international order and a revision of existing international law. This article studies the doctrine of pre-emption from a historical perspective or, more particularly, a perspective suggested by an examination of the relationship between international law and imperialism. I take the war in Iraq to be an example of what the pre-emption doctrine involves, and what consequences might follow from its implementation. My basic argument is that pre-emption, as articulated and acted upon by the Bush doctrine and the example of Iraq, resurrects a very old set of ideas that were articulated at the beginning of the modern discipline of international law. The re-emergence of these themes disturbingly illuminates the imperial dimensions of international law, and the enduring impact of imperialism in the international system.

II. PRE-EMPTIVE SELF-DEFENCE

The basic elements of pre-emption were articulated by President Bush in the *National Security Strategy*:

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 condition 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.

² See e.g. “Symposium: War and Self-Defense” (2004) *Ethics & Int’l Aff.* 63.

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 its adversaries, the State 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 of 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.³

This argument regarding pre-emption appears to be contrary to the restrictions imposed on the use of force by article 2(4) of the *Charter of the United Nations*, which reads in part that “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.”⁴ Self-defence is premised on the previous occurrence of an “armed attack.” It is this fundamental premise of the system of the UN *Charter* that is being challenged by what might be termed the “Bush doctrine.” Despite this, various arguments have been made to the effect that the Bush doctrine is consistent with the law of the UN *Charter* and with international law more generally or, at the very least, that the UN *Charter* should be read in such a manner to permit the doctrine.⁵ William H. Taft IV, the Legal Adviser to the Department of State, has offered a more restrained version of pre-emption doctrine which focuses on the concept of an “imminent threat”: “after the exhaustion of peaceful remedies and a careful, deliberate consideration of the consequences, in the face of overwhelming evidence of an imminent threat, a nation may take preemptive action to defend its nationals from unimaginable harm.”⁶

Pre-emptive self-defence, or anticipatory self-defence, to use a term

³ *Supra* note 1 at part V.

⁴ 26 June 1945, Can. T.S. 1945 No. 7, art. 51 [UN *Charter*].

⁵ See e.g. Elizabeth Zoller, “The Law Applicable to the Pre-emption Doctrine” (2004) 98 Am. Soc. Int'l Rev. 333; Abraham D. Sofaer, “On the Necessity of Pre-emption” 14 E.J.I.L. 209 [Sofaer]. For arguments against pre-emption, see e.g. Mary Ellen O'Connell, “The Myth of Pre-emptive Self-Defence” American Society of International Law Task Force on Terrorism, online: American Society of International Law <<http://www.asil.org/taskforce/oconnell.pdf>>; Michael Bothe, “Terrorism and the Legality of Pre-emptive Self-defence” (2003) 14 E.J.I.L. 227.

⁶ William H. Taft IV, “The Legal Basis for Preemption” (18 November 2002), online: Council on Foreign Relations <<http://www.cfr.org/publication.php?id=5250>>.

that is more common in the earlier literature on this perennial subject,⁷ has always posed a difficult problem to both “just war” theory and to international lawyers. As Richard Tuck argues, the doctrine of pre-emption is “clearly a morally fraught matter, as by definition the aggressor has not been harmed, and his judgment about the necessity of his action might well be called into question both by the victim and the neutral observer.”⁸ Nevertheless, international lawyers have argued that this form of self-defence should be permitted as a state cannot wait until it is actually attacked before taking action.⁹ Consequently, the famous words of Daniel Webster have been invoked to argue that pre-emptive self-defence is permissible in the narrow circumstance where there is a “necessity of self-defence instant, overwhelming, leaving no choice of means and no moment of deliberation.”¹⁰

It is clear that the Bush doctrine expands the right to anticipatory self-defence well beyond the circumstances identified in *Caroline*. President Bush, by asserting that “[t]he United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression,”¹¹ raises the very difficult question of how pre-emption is to be distinguished from aggression.¹² Further, equally significantly, the statement makes it clear, if only by implication, that not only imminent threats, but *emerging* threats may be a justifiable reason to resort to pre-emption. Both the UN *Charter* and *Caroline*, as they have been traditionally understood, cannot support the Bush doctrine.

Arguments asserting that the Bush doctrine is consistent with international law rely, then, on the view that both the UN *Charter* and *Caroline* should be interpreted in a manner consistent with contemporary realities—“the capabilities and objectives of today’s adversaries,” terrorists and rogue regimes that seek to use Weapons of Mass Destruction (WMD). These arguments are problematic for several reasons. Who is to decide that this is the authoritative interpretation of the UN *Charter*? Many states,

⁷ See e.g. Thomas Franck, *Recourse to Force, State Action Against Threats and Armed Attacks* (New York: Cambridge University Press, 2002) at 97-109; Christine Gray, *International Law and the Use of Force* (New York: Oxford University Press, 2000) at 111-15 [*International Law*].

⁸ *The Rights of War and Peace: Political Thought and the International Order From Grotius to Kant* (New York: Oxford University Press, 1999) [*Rights of War and Peace*].

⁹ For a discussion of these authorities, see *International Law*, *supra* note 7 at 86.

¹⁰ *The Caroline Case* (1837), 29 Brit. & For. St. Papers 1137 [*Caroline*].

¹¹ *National Security Strategy*, *supra* note 1.

¹² See e.g. *Definition of Aggression Resolution*, GA Res. 3314 (XXIX), UNGAOR, 1974, Supp. No. 31, UN Doc. A/9631. art. 2 states in part that “The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression”

including many non-aligned states, have resisted the policies articulated in the *National Security Strategy*, and, indeed, Secretary-General Kofi Annan himself has asserted that the doctrine of pre-emption “represents a fundamental challenge to the principles on which, however imperfectly, world peace and stability have rested for the last 58 years.”¹³ These responses scarcely support the view that pre-emption has become a part of the accepted system of international law.

Despite this, a number of arguments have been made to the effect that the Bush doctrine simply represents current realities, and if the UN failed to recognize these realities, it would simply lapse into irrelevance—if it has not already done so.¹⁴ What are the consequences that might follow if indeed pre-emption did become a part of international law? What is the scope of the doctrine, and in what circumstances does it come into operation? What effect will the instantiation of pre-emption within the framework of international law have on some of the most fundamental tenets of international law?

All sovereign states are equal. Given that self-defence is arguably the central and most fundamental right of the sovereign, it would follow that the right of pre-emptive self-defence will be enjoyed by all states. Such a doctrine would surely contribute to enormous instability, given the various tensions that exist between states. Equally, it might be argued that if the right to pre-emptive self-defence is a part of existing international law, then both North Korea and Iran have a legal right to attack the United States. After all, both of those states were included with Iraq in the notorious “Axis of Evil” identified by President Bush. Given the ongoing tensions between the United States and Iran, and the fact that the first member of that axis, Iraq, has already been attacked, it would seem perfectly permissible for Iran to argue that it is justified in attacking pre-emptively. But the very invocation of this example suggests that even though self-defence is the most basic of sovereign rights, *pre-emptive* self-defence is a right that the United States intends to be confined only to itself and its allies. How then, is an ostensibly universal right to be confined only to a selected number of states, and on what basis is that selection to be made?

One approach is for the U.S. to accept that the right of pre-emption

¹³ Press Release SG/SM/8891 “Address to the General Assembly” (23 September 2003), online: United Nations <<http://www.un.org/News/Press/docs/2003/sgsm8891.doc.htm>>.

¹⁴ See e.g. Michael Glennon, “Why the Security Council Failed” 82 *Foreign Aff.* 16 (May/June 2003). But see David M. Malone, “The Effective Role of the UN Security Council in International Law: Diminishing Returns?” in Canadian Council on International Law, ed., *Reconciling Law, Justice and Politics in the International Arena: Proceedings of the 32nd Annual Conference of the Canadian Council of International Law, Ottawa, October 16-18 2003* (Ottawa: Canadian Council on International Law, 2004) 1.

is indeed universal, knowing full well that no rational state would dare to openly and directly even attempt to attack it as the global superpower. Within this framework, the idea of sovereign equality that continues to compel the imagination of the international community may be preserved in a formal sense only, because the realities of international relations will ensure that powerful states—those that have the capacity to inflict massive destruction on any opponent, through the use of nuclear weapons if necessary—enjoy a special status even within an ostensibly egalitarian system.¹⁵ If, then, pre-emption does somehow become an accepted part of international law as a result of the Bush doctrine, then the international order will come to somewhat resemble the system that existed among European states in the late nineteenth century.

Under the positivist law of the nineteenth century, it was completely legal for states to go to war, as doing so was the ultimate prerogative of the sovereign. Some semblance of order was preserved among European states during this period, despite this lack of legal constraint, because of the existence of a balance of power.¹⁶ The use of force becomes legally permissible in an expanded range of circumstances, but states do not resort to force because of deterrence and because of the uncertain consequences that would follow. It is discouraging to note, however, that the balance of power system not only failed to prevent, but indeed, may have contributed to the conflagration of the Great War. In addition, the danger that has prompted contemporary action is not so much a direct attack by a state, but by a terrorist organization, and a balance among states may not have any limiting effect on a non-state actor.¹⁷

But another aspect of the late nineteenth-century parallel suggests a further line of argument that is being advanced in a more general way, and that may be applied to the doctrine of pre-emptive self-defence. This argument asserts that the world may be divided into law abiding states and “rogue states,” pre-modern and postmodern states, non-democratic and democratic states, and that only members belonging to the former categories of these dichotomies are proper members of the international

¹⁵ For an illuminating analysis of the doctrine of sovereign equality and the United States, see Nico Krisch, “More equal than the rest? Hierarchy, equality and US predominance in international law” in Michael Byers & Georg Nolte, eds., *United States Hegemony and the Foundations of International Law* (New York: Cambridge University Press, 2003) 135.

¹⁶ See Philip Bobbitt, *The Shield of Achilles: War, Peace and the Course of History* (New York: Anchor Books, 2003) at 550ff; Alexander George, *Force and Statecraft* (New York: Oxford University Press, 1995).

¹⁷ See Eyal Benvenisti, “The US and the Use of Force: Double-Edged Hegemony and the Management of Global Emergencies” (2004) 15 E.J.I.L. 677 at 688.

community and can therefore exercise certain fundamental rights—including, presumably, a right to pre-emptive self-defence.

The lineage of this sort of argument may be traced back at least to the work of Immanuel Kant, whose idea of world peace is based on a distinction between liberal and non-liberal states.¹⁸ The basic idea is that international law provides a very weak system of law and enforcement, and the most effective constraints on a state's exercise of power derives from its internal political order. The liberal-democratic state, with all the systems of accountability that it institutionalizes, provides an effective check on government, and will ensure that governments do not resort to war without proper deliberation and a just cause. In non-civilized, non-democratic states, however, no such constraint exists, and authoritarian rulers may condemn their own people to wars of aggression and expansion. It follows then, that only liberal-democratic states should have a right to pre-emption because only they are subject to the mechanisms of accountability that ensure that this powerful right is exercised responsibly. This distinction between pre-modern and post-modern, democratic and non-democratic states resembles in important ways the distinctions made in nineteenth-century international law between civilized states, which were members of the family of nations and enjoyed the comprehensive rights of sovereignty, and uncivilized states that were excluded from the family of nations and were only partially sovereign at best.¹⁹

Contemporary international law, however, has abolished the distinction between civilized and uncivilized states. And while the international community values democracy and has sought in various ways to promote it, the alleged distinction between democratic states and non-democratic states is not recognized in international law. Furthermore, of course, there is a problem, which was evident in the nineteenth century, of how these distinctions are to be made and applied. Nineteenth-century international lawyers found it difficult to distinguish between civilized and non-civilized states, and distinguishing between democratic and non-democratic states could prove to be equally problematic.

Given the threats that pre-emption presents to the international system—and all the ways in which pre-emption can disadvantage third-world states, which will be the inevitable object of the exercise of the doctrine—it is hardly surprising that the vast majority of third-world states have responded to the threats made by the United States to attack pre-

¹⁸ For an examination of the implications of Kant's system to international law, see Anne-Marie Slaughter, "International Law in a World of Liberal States" (1995) 6 *E.J.I.L.* 504.

¹⁹ See Antony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law" (1999) 40 *Harv. Int'l L.J.* 1.

emptively when necessary.

The Non-Aligned Movement (NAM) stated:

The Heads of State or Government rejected the use, or the threat of the use of armed forces against any NAM country under the pretext of combating terrorism, and rejected all attempts by certain countries to use the issue of combating terrorism as a pretext to pursue their political aims against non-aligned and other developing countries and underscored the need to exercise solidarity with those affected. They affirmed the pivotal role of the United Nations in the international campaign against terrorism. They totally rejected the term “axis of evil” voiced by a certain State to target other countries under the pretext of combating terrorism, as well as its unilateral preparation of lists accusing countries of allegedly supporting terrorism, which are inconsistent with international law and the purposes and principles of the United Nations Charter. These actions constitute, on their part, a form of psychological and political terrorism.²⁰

This emphasis on the use of the UN in the War on Terrorism is reiterated by the Chinese Foreign Ministry, which asserted that “[t]he fight against terrorism should be conducted in accordance with the purposes and principles of the Charter of the United Nations and other established norms of international law.”²¹

Powerful states have almost invariably attempted to expand the circumstances in which they may use force.²² The Bush doctrine of pre-emption, then, represents yet another attempt to do so in the context of the new realities of terrorism. Even as it is vital to examine the elements of this doctrine and the attempts to establish it as a part of international law, what is equally important is the attempt to understand its impact on the Third World, and the different legal, conceptual, and political mechanisms by which the Third World will be both excluded from the doctrine, and become the subject of its application and elaboration. My argument up to now has been that even while the United States has been seeking to expand its own authority, this development must also be seen in context of the arguments that might be made to diminish the rights of third-world states, those who would be excluded from the new right of pre-emption.

These debates cannot be seen in isolation from the major threat that the West perceives from terrorism and, more particularly, the threat of WMD and their use by terrorists. The right to self-defence is so fundamental that it precedes all law. According to the sixteenth-century

²⁰ Final Document, *XIII Conference of Heads of State or Government of the Non Aligned Movement Held 24-25 February 2003*, online: <<http://www.nam.gov.za/media/030227e.htm>> at para. 119.

²¹ “China’s Position Paper against International Terrorism,” online: Permanent Mission of the People’s Republic of China in the UN <<http://un.fmprc.gov.cn/eng/18635.html>>.

²² For the attempts of the U.S. in this respect, see Marcelo G. Kohen, “The use of force by the United States after the end of the Cold War, and its impact on international law,” in Michael Byers & Georg Nolte, eds., *supra* note 15, 197.

jurist, Francisco de Vitoria: “In war everything is lawful which the defense of the common weal requires. This is notorious, for the end and aim of war is the defense and preservation of the State.”²³ Seen in this way, not only is self-defence fundamental but whatever self-defence requires is legal. The primordial and foundational significance of self-defence is suggested not only by the work of earlier jurists,²⁴ but also by the fact that the UN *Charter* itself refers to self-defence as an “inherent right.” It is a right, then, that precedes the *Charter*. However, significantly, as discussed, the *Charter* limits the exercise of self-defence to situations where a state has suffered an armed attack.

Of course, the right of self-defence necessarily implies the right of a state to arm itself. And strong arguments might be made that, given the capabilities of modern weaponry, and the fact that certain states already possess nuclear weapons, that nuclear weapons—or other WMD—are essential for the defence of a state. Thus it is not difficult to understand why so many states are intent on acquiring nuclear weapons, whatever the effects such a pursuit may have on international stability. Indeed, ironically, the alacrity with which the United States attacked Iraq, which was suspected of having WMD but not, as yet, actual nuclear weapons, when contrasted with the cautious U.S. approach towards North Korea, which is suspected of having nuclear weapons, may suggest that the acquisition or development of nuclear weapons is essential for the deterrence of the United States.

Non-proliferation, then, is a major issue confronting the international community. Yet here too, the asymmetries between the nuclear powers and the Third World become evident. The *Non-Proliferation Treaty*,²⁵ which has been the most important mechanism for preventing the spread of nuclear weapons, has, with some justification, been criticized as establishing a system of nuclear apartheid; it essentially permits established nuclear states to maintain their weapons,²⁶ while preventing non-nuclear states from developing a nuclear armory. Given the constraints imposed on non-nuclear states, it is understandable that the treaty includes a provision

²³ Francisco de Vitoria, *De Indis et de Ivre Belli Relectiones*, ed. by Ernest Nys, trans. by John Pawley Bate (New York: Oceana, 1917) at 171 [Vitoria].

²⁴ See generally *Rights of War and Peace*, *supra* note 8.

²⁵ *Treaty on the Non-Proliferation of Nuclear Weapons*, 5 March 1970, 729 U.N.T.S. 161 [*Non-Proliferation Treaty*].

²⁶ Article VI of the *Non-Proliferation Treaty*, *ibid.*, requires states to negotiate in good faith to cease the nuclear arms race, and to negotiate a treaty “on general and complete disarmament under strict and effective international control.” Such a treaty does not seem an immediate prospect.

within it that entitles states to withdraw from it.²⁷ The debate surrounding non-proliferation has now acquired a very different complexion as a consequence of the fact that the danger being confronted is not a nuclear war between the Communist and Western world, but the possibility of terrorists acquiring and using nuclear or other WMD.

Nuclear weapons have the potential to cause catastrophic and irremediable damage. It is surely sensible, then, to promote effective and global nuclear disarmament, the abolition of all nuclear weapons. It is in this context that the General Assembly and the World Health Organization (WHO) attempted to clarify the legal issues surrounding the possible use of Nuclear Weapons by requesting an Advisory Opinion from the International Court of Justice (ICJ) regarding the legality of the use, or the threat of the use, of nuclear weapons.²⁸ What is ironic about that case in the light of current circumstances, however, is that it was the U.S. and the United Kingdom WHO argued most vehemently, before the ICJ, that it was legal to use nuclear weapons in “self-defence.” These arguments were so persuasive that the Court held, as a result of the decisive vote of President Mohammed Bedjaoui, that it could not definitively rule that the use of nuclear weapons was illegal in all circumstances.²⁹ Thus, it could be legal to use nuclear weapons in self-defence in certain cases. Some of the minority judges such as Judges Higgins³⁰ and Schwebel³¹ went further in asserting that nuclear weapons could be used in self-defence in extraordinary circumstances. Therefore, it seems entirely inconsistent and self-serving for the United States to decree that states should not develop nuclear weapons and WMD in a situation where the U.S. and other Western nuclear states have vehemently asserted their own right to possess and use such weapons. Indeed, there are reports that the Bush administration is intent on developing new types of nuclear weapons even as it seeks to bring about disarmament more generally. It is doubtless the privilege of powerful states to act inconsistently, convinced of their own virtue and rectitude. However, it is hardly likely that other states will be impervious to these inconsistencies, particularly with regard to a matter as crucial as self-defence. In that case, however, the doctrine of pre-emption may serve the

²⁷ *Ibid.*, art. X. North Korea withdrew from the *Non-Proliferation Treaty* through this mechanism, although it did not provide the three-months notice stipulated in the provision.

²⁸ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] I.C.J. Rep. 226.

²⁹ Jeffrey L. Dunoff, Steven R. Ratner & David Wippman, *International Law: Norms, Actors, Process* (New York: Aspen Law & Business, 2002) at 518.

³⁰ *Supra* note 28 at 583.

³¹ *Ibid.* at 311.

purpose of warning other states that any attempt by them to arm themselves could be interpreted by the U.S. as a threat which could then result in the U.S. exercising its right of pre-emptive self-defence. Starkly presented, pre-emption in effect purports to create a system whereby states can arm themselves only if they are permitted to do so by the United States. The recent example of Libya might provide one example of the sort of world that the United States and the West would seek to achieve, one in which only certain civilized states have an effective right of self-defence.

III. PRE-EMPTION AND IMPERIALISM

The *National Security Strategy*, however, does not focus only on pre-emption, even though pre-emption is a crucial part of the whole structure. Pre-emption is connected, on one hand, with the concept of “rogue states”—the most prominent of which constitute the Axis of Evil.³² These are the states that are most likely to be the subject of pre-emptive attack. In addition, President Bush has made it clear, both in the *National Security Strategy* and subsequent speeches, including his speech at the Republican National Convention in 2004, that the most effective way to combat terrorism is to transform rogue states into democratic ones. Thus the *National Security Strategy* seeks to promote “moderate and modern government, especially in the Muslim world to ensure that the conditions and ideologies that promote terrorism do not find fertile ground in any nation.”³³

Iraq presents a concrete example, in all its complexities, of the *National Security Strategy* in action. In strictly legal terms, the United States has not as yet invoked or justified any of its actions by resorting to the doctrine of pre-emption. The invasion of Iraq has been explained instead as action taken pursuant to the Security Council decisions relating to Iraq.³⁴ This argument has been resisted by many prominent international lawyers

³² See President George W. Bush, “State of the Union Speech: the Axis of Evil” in Micah L. Sifry & Christopher Cerf, eds., *The Iraq War Reader: History, Documents, Opinions* (New York: Touchstone Books, 2003) at 251.

³³ *Supra* note 1 at part III.

³⁴ But see also John Yoo, “International Law and the War in Iraq” (2003) 97 A.J.I.L. 563, who suggests that anticipatory self-defence pre-emption provided an independent legal basis for the war against Iraq. Many other scholars, even those appearing to favour pre-emption, carefully tie pre-emption to Security Council resolutions: see e.g. William H. Taft IV & Todd F. Buchwald, “Pre-emption, Iraq and International Law” (2003) 97 A.J.I.L. 557.

who continue to argue that the U.S. invasion of Iraq was illegal.³⁵ Moreover, Secretary-General Annan himself recently asserted that the Iraq war was illegal. Whatever the official rationale for the action, however, the Bush administration's extraordinary and undeniable emphasis on the threat posed by the alleged Iraqi WMD to American security makes it impossible to exclude Iraq from any discussion on pre-emption.

The invasion of Iraq all too graphically illustrates the security concerns and policies of the United States, and the many problems associated with the Bush doctrine. For example, pre-emption must be based on sound, if not overwhelming evidence, for it is only such a threshold that could justify the extraordinary measure of the pre-emptive use of force. The then-U.S. Secretary of State, Colin Powell purported to present such overwhelming evidence when appearing before the UN and urging the international community to join in and support the invasion of Iraq. But the absence of WMD and the complete failure of intelligence suggest the many problems associated with this policy, and the international credibility of the United States has suffered considerably as a result of this failure. Quite apart from that, the Iraq example raises the question: if pre-emption is now a part of international law, what are the legal consequences of a pre-emptive attack that is subsequently proved to be based on the invader country's completely mistaken belief that it was being threatened?

The idea that dangerous states, particularly in the Middle East, can be invaded and then liberated raises a complex set of issues. Apart from the question of whether the intended transformations can be readily effected, questions arise as to what sort of democracy this will be, and what roles international law and institutions are supposed to play in bringing it about. President Bush has consistently argued that the goal of the U.S. action in the Iraq is to promote democracy and self-government in that country. In his presentation to the UN General Assembly, in September 2003, President Bush asserted:

The primary goal of our coalition in Iraq is self-government for the people of Iraq, reached by orderly and democratic process. This process must unfold according to the needs of Iraqis, neither hurried, nor delayed by the wishes of other parties. And the United Nations can contribute greatly to the cause of Iraq self-government.³⁶

³⁵ Sixteen prominent international law teachers in the U.K. asserted that the use of force by the U.S. against Iraq, in the absence of Security Council authorization, was a violation of international law: See Ulf Bernitz *et al.*, Letter to the Editor, *The Guardian* (7 March 2003) 29.

³⁶ "Speech to the United Nations General Assembly" (23 September 2003), online: White House <<http://www.whitehouse.gov/news/releases/2003/09/20030923-4.html>>. The escalating violence in Iraq subsequently persuaded the U.S. administration to establish a program for a swifter transfer of power.

President Bush, at least at that stage, forcefully opposed any attempts on the part of the UN to quickly transfer power to the Iraqi people. However, the deteriorating security situation caused the United States to change this policy and to accelerate the transfer of power, asking for the support of the UN in enabling this to occur. Thus, in June 2004, the Security Council, acting under its Chapter VII powers, stated that it

Welcome[d] that ... by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty

Reaffirm[ed] the right of the Iraqi people freely to determine their own political future and to exercise full authority and control over their financial and natural resources.³⁷

Thus, the sovereignty of Iraq has been restored, at least in legal terms. The resolution also calls for international financial assistance to be given to Iraq in terms of forgiveness of its sovereign debt.³⁸ The resolution also provides for arrangements regarding a security partnership between Iraq and the “multinational force” that essentially consisted of the United States and its allies in Iraq. The task of promoting democracy and transforming the Middle East remains, however, largely incomplete and problematic.

This, of course, is the second occasion on which Western powers have attempted to promote self-government in Iraq. Iraq had been placed under the trusteeship of Britain as a mandate of the League of Nations. The Mandate system had been inspired by President Woodrow Wilson of the United States who successfully opposed the attempts of the European powers to colonize the territories that had previously belonged to the defeated powers of Germany and Turkey.³⁹ The purpose of the Mandate system was to promote the “well-being and development” of the peoples of the mandate territories.⁴⁰ The various mandate territories—which had been previously under the sovereignty of the Ottoman and German Empires that had been defeated in the Great War—were divided into three categories, A, B, and C, based on their degree of “civilization.” Iraq was regarded as belonging to the most advanced class of territories, those that had “reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative

³⁷ *Resolution 1546*, SCOR, 2004, S/RES/1546 (2004).

³⁸ *Ibid.*, para. 28.

³⁹ See Quincy Wright, *Mandates Under the League of Nations* (New York: Greenwood Press, 1930) at 24-25 [Wright].

⁴⁰ *League of Nations Covenant*, art. 22 [Covenant].

advice and assistance by a Mandatory until such time as they are able to stand alone.”⁴¹ The precise legal status of Iraq posed ongoing problems to the League. On the one hand, Iraq was supposedly a mandate territory, but the Iraqis themselves were not particularly happy with the prospect of being ruled by the British, albeit as representatives of the League. Iraqi discontent with British rule finally culminated in an uprising that began in 1920 and continued for several years, and led to punitive action being taken against the local populations.⁴² In time, these measures included the use of poison gas and aerial bombardment, this at the instigation of Winston Churchill.⁴³

The oil resources of Iraq were a continuous preoccupation of the British administrators. Complicated negotiations took place between Britain and the United States on the exploitation of the oil fields; Wilson had been insistent on the application of the “open door” policy to all the mandate territories, and U.S. access to the oil fields of Iraq was to occur through this mechanism.⁴⁴ Instability in Iraq, the colonial administrators recognized, would prevent any access to the oilfields. Sir Arthur Hirtzel of the India Office, drawing upon considerable colonial experience, and mindful of the need to placate public opinion in England, advised that

What we want to have in existence, what we ought to have been creating in this time, is some administration with Arab institutions which we can safely leave while pulling the strings ourselves; something that won't cost very much, which Labour can swallow consistent with its principles, but under which our economic and political interests will be secure.⁴⁵

In keeping with this policy, the British then proceeded to appoint Faisal Ibn Hussein, whose family was famous throughout the Arab world, and who had previously been ruler of Syria, as King of Iraq. Great care was taken to create the appearance that Faisal had been elected by the people.⁴⁶ King Faisal was faced with the daunting task of appearing to be, simultaneously, both an Arab nationalist and responsive to British interests. Faisal was not willing to acquiesce, however, to all the British demands.

Confronted with numerous pressures, Faisal finally entered into a

⁴¹ *Ibid.*

⁴² Peter Sluglett, *Britain in Iraq, 1914-1932* (London: Ithaca Press, 1976) at 40-41 [Sluglett].

⁴³ *Ibid.* at 263ff.

⁴⁴ Wright, *supra* note 39 at 60.

⁴⁵ Cited in Sluglett, *supra* note 42 at 37.

⁴⁶ *Ibid.* at 67-68. The British had arranged for the disappearance of a major rival candidate, Saiyid Talib.

treaty with the British in 1922.⁴⁷ The treaty dealt with matters ranging from British supervision of the judicial system necessary to protect the interests of foreigners, to financial and military matters: Britain, for instance, undertook to provide “such support and assistance to the armed forces of his Majesty the King of Irak as may from time to time be agreed by the High Contracting Parties.” This arrangement was presented as a mechanism by which Britain could fulfil its obligations under the Mandate.⁴⁸ The mandate territories in general raised difficult problems in relation to where sovereignty over the mandate territory was to be located. But the situation in Iraq and the Anglo-Iraki treaty generated particularly difficult and unresolved questions because of the complex issue of how sovereignty in Iraq was divided among the three central parties: King Faisal, who, after all, had been declared the proper sovereign King of Irak; Britain, still nominally the mandatory power; and the League itself.⁴⁹ While the treaty provisions continuously reaffirmed the sovereignty of Iraq, the British were to “provide the State of Irak with such advice and assistance as may be required during the period of the present treaty, without prejudice to her national sovereignty.”⁵⁰

Britain nevertheless proceeded to assume control, through the treaty over most of the issues central to Iraq’s sovereignty, including financial and military affairs and indeed, the constitution of Iraq itself. The treaty required the King of Irak to “frame an Organic Law for Presentation to the Constituent Assembly”⁵¹; the basic character of that law was stipulated by the treaty, and was to include provisions ensuring freedom of worship and prohibiting discrimination. Significantly, it was expressly provided that the organic law “shall contain nothing contrary to the provisions of the present treaty.”⁵² Legal complexities notwithstanding, the reality, however, was that Faisal was heavily dependent on British support. American oil companies had acquired interests in various oil developments in Baghdad and Mosul in 1925.⁵³

Even this very brief sketch of the history of the relationship between Iraq and the West suggests several reasons why Iraqis, fearful of terrorists

⁴⁷ See *Treaty Between His Britannic Majesty and His Majesty the King of Irak*, 10 October 1922 in Wright, *supra* note 39 at 595-600 [*Irak Treaty*].

⁴⁸ Wright, *ibid.* at 60-61.

⁴⁹ *Ibid.* at 330.

⁵⁰ *Irak Treaty*, *supra* note 47, art. 2.

⁵¹ *Ibid.*, art. 3.

⁵² *Ibid.*

⁵³ Wright, *supra* note 39 at 61.

and insurgents, may also be suspicious of Western proclamations of concern for the well-being and advancement of the Iraqi people. Several of the same concerns and issues that arose in the 1920s have curiously re-emerged. And it is unhelpful that many important economic decisions were made by the American occupying authority well before any democratic government has been established in Iraq. For instance, as *The Economist* notes in an article blithely entitled “Let’s all go to the yard sale,” all Iraqi industries, except for the oil industry, have been privatized.⁵⁴ This is only one aspect of far-reaching changes that have already been made to Iraq that could result in Iraq becoming economically dependent on various external forces. Political independence and democracy will lack real substance unless Iraqis can hope to exert real control over their economy. Iraqi sovereignty has, however, already been undermined by the widespread changes instituted by the Coalition Provisional Authority, which have been “widely criticized for being thinly veiled plans to give multinational corporations access to Iraqi assets.”⁵⁵ This is not the first time, then, that a major Western power, vehemently proclaiming its concern for the well-being of the Iraqi people, has attempted to establish a new system of government for Iraq while also making various arrangements for the management of the oil resources of the country. The granting of formal sovereignty to the people of Iraq is not incompatible with continuing Western control of the country. This attempt by the West to control an ostensibly sovereign Iraq occurred once before, during the League period, and, given the evidence emerging from the United States occupation of Iraq, is being attempted again. Only time will reveal whether a truly independent and democratic Iraq will emerge from these difficult circumstances.

IV. PRE-EMPTION AND THE CIVILIZING MISSION

Terrorism on the scale indicated by the tragedy of 9/11, it is argued, is an unprecedented phenomenon, and a new type of international law and new doctrines are required to address these new threats. The international community thus is confronted with a “constitutional moment” or a “transitional moment.” Indeed, the Bush doctrine and the War Against Terror in general have resulted in significant challenges to the existing law,

⁵⁴ (27 September 2003) 44.

⁵⁵ For a searching examination of the changes made to the Iraqi economy and the applicable law after the occupation began, see James Thuo Gathii, “Foreign and Economic Right Upon Conquest and Under Occupation: Iraq in Comparative and Historical Context” 25 U. Pa. J. Int’l Econ. L. 491 at 540 [Gathii]. (See especially *ibid.* at 536-39).

not only of force, but human rights and international humanitarian law.⁵⁶ Novel situations require novel remedies. My basic argument here is that the Bush doctrine—which consists basically of pre-emption, the identification and then transformation of rogue states—is essentially imperial in character. It is yet another version of the civilizing mission that, I have argued, has animated the international system from its very beginnings.

The basic structures of this argument are evident in the writings of the sixteenth-century Spanish jurist, Francisco de Vitoria. Vitoria's work, "On the Indians Lately Discovered," takes the form of an inquiry into the manner in which the Spanish acquired sovereignty over the Indians of the Americas.⁵⁷ What is especially striking about Vitoria's work is his careful elaboration of the relationship between humanitarianism, intervention, war, and transformation. Unlike many of his contemporaries, who characterized the Indians as animals and less than human, Vitoria argued for the human character of the Indians. However, it was precisely because they were human, and therefore possessed the universal characteristic of reason that they were bound by a universal natural law. This natural law, on closer inspection, corresponds with idealized Spanish forms of behaviour. The problem was that although the Indian had the inherent capacity to reason, and therefore to enter the realm of the universal, the actual social, historical Indian who had developed certain forms of government and other social institutions, was nevertheless imprisoned in "the particular." The task of the Spanish, the administrators of universal natural law, was to transform the Indians and liberate them in such a manner as to enable them to enter the realm of the universal. This was essentially to be achieved by waging war on them.

Most significantly, the "natural law" enunciated by Vitoria includes the right to travel and trade. Indeed, these rights are of such importance that "to keep certain people out of the city or province as being enemies, or to expel them when they are already there, are acts of war."⁵⁸ As a consequence of this, any Indian resistance to Spanish incursions amount to an act of war which can then give rise to self-defence. Once the Indians violate the universal natural laws that give the Spanish the right to occupy Indian lands, the Spanish

can make war on the Indians, no longer as on innocent folk, but as against forsworn enemies, and may enforce against them all the rights of war, despoiling them of their goods, reducing them to captivity, deposing their former lords and setting up new ones, yet withal with

⁵⁶ See e.g. Vaughan Lowe, "The Iraq Crisis: What Now?" (2003) 52 I.C.L.Q. 859.

⁵⁷ *Supra* note 23.

⁵⁸ *Ibid.* at 151.

observance of proportion as regards the nature of the circumstances and of the wrongs done to them.⁵⁹

It is clear that the war waged by the Spanish against the Indians has a special character, a range and intensity that would not occur in wars between European states. War against the Indians was “perpetual and ... they can never make amends for the wrongs and damages they have wrought.”⁶⁰ Furthermore, in the case of the unbelievers, “it is useless to hope for a just peace on any terms. And as the only remedy is to destroy all of them who can bear arms against us,[p]rovided they have already been in fault.”⁶¹ Given the fact that any Indian resistance to the Spanish incurs “fault,” war against the Indians becomes endless, and nothing short of the complete subjugation of the Indians can ensure the safety of the Spanish.

One of the more interesting aspects of Vitoria’s work is his contrasting characterization of the Indians. On the one hand, the Indian is formidably dangerous. On the other, the Indian must be liberated, and Spanish sovereignty over the Indians can be founded on “the tyranny of those who bear rule among the aborigines of America or on the tyrannical laws which work wrong to the innocent folk there.”⁶² As we see here, competing justifications for the conquest of the Indians exist: one based on war as self-defence, and the other on humanitarian intervention. It is not difficult, of course, to discern the resemblances between Vitoria’s justification for war on the Indians and President Bush’s varying justifications for attacking Iraq—where Iraq has not purported to attack the United States. President Bush’s further claim, that freedom is a gift that God has given to all people, including Iraqis, and that it is the task of the United States to make this gift a reality—thereby making the United States the agent of God—also replicates Vitoria’s argument that the Indians are human, but it is only through the intervention of the Spanish that this humanity can be realized. In the doctrine’s more secular form, President Bush relies on international human rights law to justify this whole exercise: international human rights norms represent the “universal” into which the Iraqis must be transformed through the cleansing mechanism of U.S. intervention.

“Just war” doctrine is a major aspect of Vitoria’s argument, and he raises the question of whether subjective belief in the justness of a war

⁵⁹ *Ibid.* at 155.

⁶⁰ *Ibid.* at 181.

⁶¹ *Ibid.* at 183.

⁶² *Ibid.*

makes it truly just because “were it otherwise, even Turks and Saracens might wage just wars against Christians, for they think they are thus rendering God service.”⁶³ Crucially, then, just war cannot be defined in a manner that would enable the non-Christian to engage in a just war; pagans are inherently incapable of engaging in a just war. And when we examine pre-emption doctrine, we might see a similar structure of ideas emerging once again: that is, the right of self-defence is posited as a fundamental right that precedes international law. Yet, when this right is extended to include pre-emptive self-defence, the right in question is to be limited to the United States and its allies, much as the right to wage “just war” is restricted to Christian states.

The war in Iraq, then, replicates many of these ancient structures of ideas that link together trade, human rights, intervention, and liberation. The U.S. has been intent on acquiring interests in the Middle Eastern oilfields since at least the League period. And since that time, the U.S. has asserted an absolute right to maintain those interests, intervening when necessary in the political affairs of states such as Iran and Saudi Arabia. The right to trade asserted by Vitoria is an absolute right, and any violation of this right is a cause for war. What is also illuminating about Vitoria’s arguments is his deployment of what we might term “humanitarian” or “human rights” arguments for imperial purposes. The effectiveness of the Bush strategy of using human rights to justify the invasion of Iraq is suggested by the number of human rights advocates who supported the US actions as a result.⁶⁴ Whatever these resemblances, however, it is equally clear that the whole imperial project, as articulated by the Bush administration, has taken on a new urgency because the transformation of the world is connected to self-defence. Thus, the whole discourse of human rights now become connected to this larger goal. As President Bush has put it:

Our security is not merely founded in spheres of influence, or some balance of power. The security of the world is found in advancing the rights of mankind.

These rights are advancing across the world—and across the world, the enemies of human rights are responding with violence. Terrorists and their allies believe the Universal Declaration of Human Rights and the American Bill of Rights, and every charter of liberty ever written, are lies, to be burned and destroyed.⁶⁵

⁶³ *Ibid.* at 173.

⁶⁴ See Jose E. Alvarez, “The Closing of the American Mind” in *Proceedings of the 32d Meeting of the Canadian Council of International Law. Held 14–16 October 2004* (Canadian Council of International Law, 2004).

⁶⁵ President George W. Bush, “Address to the United Nations General Assembly” (21 September 2004), online: White House <<http://www.whitehouse.gov/news/releases/2004/09/20040921-3.html>>.

Terrorists undoubtedly pose an enormous threat to human rights. But human rights advocates and scholars must surely be wary of a version of human rights that is profoundly shaped by the security interests of the United States. What this and the Iraq example suggest is that human rights have been transformed into a vehicle of imperialism. Thus, it is not only the law relating to the use of force, but also international human rights law that may be transformed by the Bush doctrine: imperialism presents itself as self-defence.

V. CONCLUSION

The international system has suffered a number of traumas since 9/11, and it is perhaps too early to assess the lasting impact of these events on international law and organization. Clearly, however, the doctrine of pre-emption and the war in Iraq suggest some of the major issues that must be addressed. Proponents of the U.S. position on pre-emption have forcefully argued that if the UN itself does not adapt to meet new realities of terrorism and, in effect, institutionalize and support the U.S. position on the use of force, then the UN would render itself irrelevant and “go the way of the League of Nations.”⁶⁶ Indeed, some have gone further and argued that pre-emption and all it involves in fact advances the causes that the United Nations is concerned about.⁶⁷

For scholars interested in the relationship between the Third World and international law, what is evident is the resemblance between the new initiatives that are being proposed by the pre-emption doctrine and much earlier imperial themes. A UN that is transformed to accommodate pre-emption doctrine will simply become a vehicle of this “new” imperialism,⁶⁸ and third-world countries have not been slow to recognize this reality. All this will have serious consequences for the legitimacy of the UN—and this at a time when the UN is arguably more important than ever because the international community must respond to the threats posed by terrorism. These threats can only be addressed on a multilateral basis. Many third-world states suffered terrorist attacks, long before 9/11, and are seeking to address the dangers of terrorism in concert with other nations. But the U.S. approach has divided the international community that had previously been far more unified with regard to this issue. It seems unlikely that the Bush

⁶⁶ Charles Hill, “The Bush Administration Doctrine of Pre-emption” in *Proceedings of the 98th Annual Meeting of the American Society of International Law. Conference Held 31 March–4 April 2004* (American Society of International Law, 2004) at 331.

⁶⁷ Sofaer, *supra* note 5 at 225.

⁶⁸ See Jose Alvarez, “Hegemonic International Law Revisited” (2003) 97 A.J.I.L. 873.

doctrine of pre-emption will subside, for pre-emption now has become an issue that will remain on the international agenda. It is notable, for example, that Prime Minister Howard of Australia has also formulated a version of pre-emption that has now apparently become a part of Australian policy.

The argument that all these developments represent an attempt to reinstate an imperial order and are therefore against all the principles of modern international law—the law of the UN that was developed in part to negate the old imperial international law of the nineteenth century—is not in itself decisive. For what we now face is the argument made by influential academics and diplomats such as Niall Ferguson and Robert Cooper, that what this disorderly and unstable world requires is in fact a return to an imperial system. This imperialism, in the words of Cooper, is “a new kind of imperialism, one acceptable to human rights and cosmopolitan values.”⁶⁹ This statement in itself suggests that human rights law is compatible with imperialism rather than somehow inherently opposed to it. But more than that, these arguments assume that imperialism in its most explicit forms, can be a viable and sustainable policy in the twenty-first century. The U.S. forces were touted to be the most powerful that have existed in the history of the world, but the difficulties that the United States and its allies are now confronting in Iraq may give pause to the assumption that imperial will can simply assert itself and rule the world. Gone are the simpler and happier days when the rioting natives could be quelled with a combination of British pluck and a Gatling gun. Instead, we have a globalized world in which suicide bombings and various new technologies have multiplied the ways of causing massive destruction, and the battlefield extends well beyond the peripheral territory to the very heart of the imperial centre. The costs and risks of this modern imperialism are very great. In addition, imperialism inevitably distorts the internal politics of the imperial power. Surely the lack of accountability and transparency that have marked the Bush and Blair administrations, despite the massive mistakes they made in the lead up to and conduct of the Iraq war, suggest this possibility. At this point in time, the war appears to have undermined democracy in the United States rather than strengthened it in the Middle East.

Finally, third-world states and peoples, whatever the difficulties they suffer from, are not likely to acquiesce readily to the return of explicit imperialism. It is disconcerting that western attempts to create a new international law should so unerringly return to the colonial origins of the discipline. And the question remains open as to whether international law,

⁶⁹ “The New Liberal Imperialism” *The Observer* (7 April 2002), online: <<http://observer.guardian.co.uk/worldview/story/0,11581,680095,00.html>>

an international law that has ostensibly repudiated the imperialism of the past, will now resist these attempts to reinstate this new imperial order.

VI. POSTSCRIPT

Subsequent to the completion of this article, the UN released the *Report of the High-Level Panel on Threats, Challenges and Change*.⁷⁰ The *Report* asserted, in effect, that while it may be legal for a state to act unilaterally against an “imminent threat,” it cannot so respond to a more remote “emerging threat.” In the case of such emerging threats, which give rise to what the *Report* terms “preventive military action,” it is the Security Council that should decide the matter. In two of the most crucial paragraphs addressing these issues, the *Report* states:

190. ... if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment—and to visit again the military option.

191. For those impatient with such a response the answer must be that, in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all.⁷¹

While the *Report* reaffirms the continuing validity of the UN *Charter*, it remains to be seen whether this response will be persuasive to states that are skeptical about the effectiveness of the UN *Charter* and the role of the Security Council in maintaining international peace.

⁷⁰ “A More Secure World: Our Shared Responsibility” *Report of the High-Level Panel on Threats, Challenges and Change*, UN GAOR, 2004, UN Doc. A/59/565, online: United Nations <<http://www.un.org/secureworld/>> .

⁷¹ *Ibid.* at 55.