

**TITLE**  
**US MILITARY INTERVENTIONS OF WEAKER STATES**

**THESIS STATEMENT**  
**THE BUSH DOCTRINE OF PRE-EMPTIVE STRIKE UNDER**  
**WHICH US ATTACKED ON IRAQ IS THE VIOLATION**  
**OF INTERNATIONAL LAW.**



A Thesis Submitted in Partial Fulfillment  
of the Requirement of the Degree of  
L.L.M. International Law  
(Faculty of Shariah and Law)

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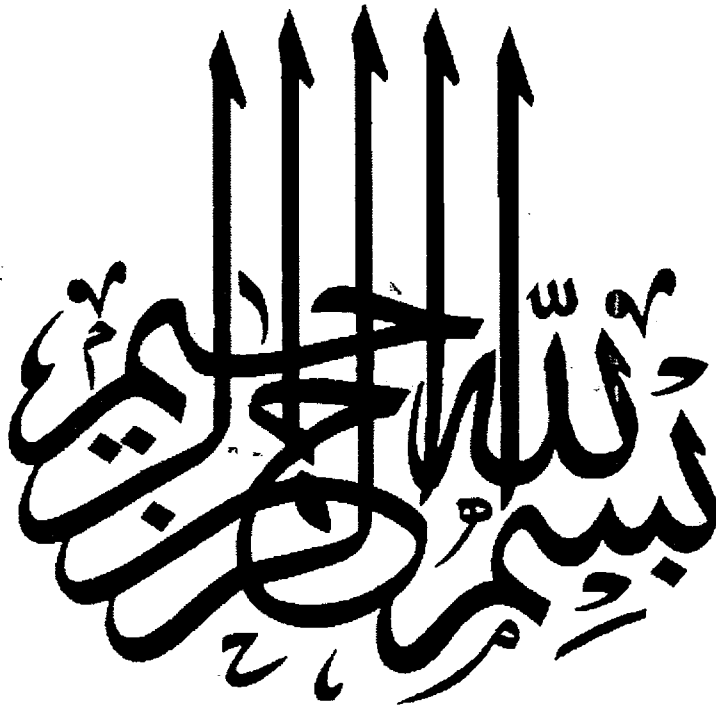
Accession No. TH 9355

MS  
341  
SHM

- 1- International Law
- 2- International relations

DATA ENTERED

Aug 17/06/13



*In The Name Of Allah  
The Most Gracious And Merciful.*



# THESIS VIVA-VOCE FINAL REPORT

INTERNATIONAL ISLAMIC UNIVERSITY

ISLAMABAD



It is certified that MEMBERS OF VIVA-VOCE EXAMINATION COMMITTEE have gone through the thesis titled, "*US Military Interventions on Weaker States*"..... Thesis Statement "*The Bush Doctrine of Preemptive Strike under which US attacked on Iraq is the Violation of International Law*" submitted by Shahbaz Ali, student of LLM (International Law) Registration No. 99-FSL/LLMIL/S08. It is reported that the student has incorporated all the amendments and modifications as directed by the viva-voce Examination Committee. The Examination Committee has come to the conclusion that the research work is up-to the mark and fulfills all requirements for the grant of Master Degree in Laws by the Faculty of Shariah and Law, International Islamic University, Islamabad.

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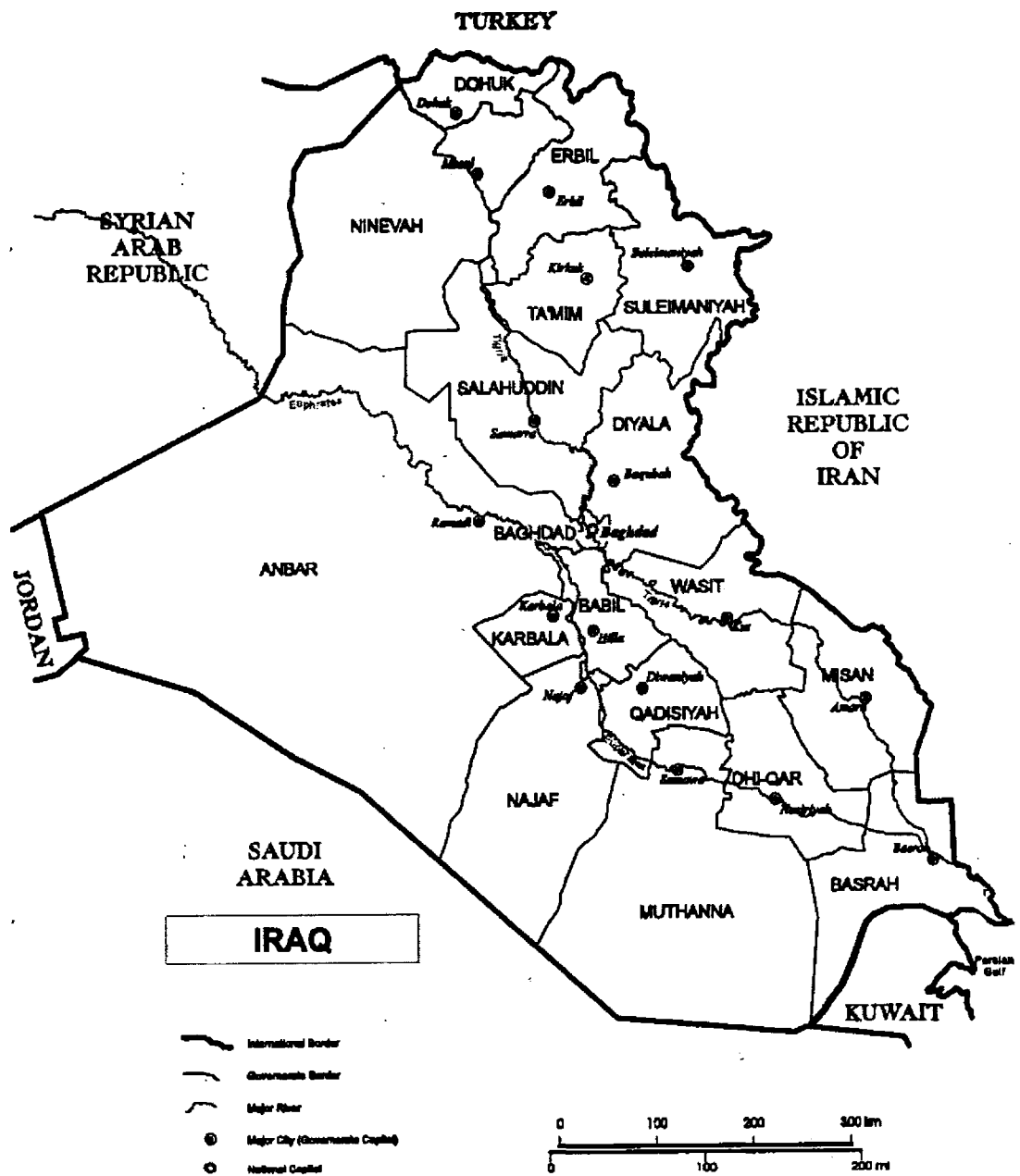
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# Map of IRAQ



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DEDICATION

*To my Late Mother and Father;*

*May!*

*they enjoy the bliss of paradise,*

*.....sepulchers ever lit, widen in size,*

*.....mere missing, no way demise,*

*..... its my glee, its my prize!!!*

*Sonny Yours,*

*Shahbaz Ali.*

## ACKNOWLEDGEMENT

US military attack on Iraq in March, 2003, and its missiles exploding and rattling is still resounding and echoing in my mind, as it just happened today. The live coverage of Iraq War by Pakistani digital television channel Geo and Aljazeera and the continuous commentary by Kamran Khan was heart rending. The thundering of cruise missile striking on the well lit city of Baghdad at night was under the hell bent order of President Bush to his armed forces. Muslim women from Pakistan remote areas and abroad were sobbing at the horrifying hue and cry of Iraqi children, old men and women. US named the initial operations as the "shock and awe" campaign. No doubt the whole Iraqis were under the danger of US modern technological weapons. This operation on Iraq cherished a grief and anger among the Muslims worldwide. This whole calamity, awe and fright inclined me to seek the real cause and the major pretext of US use of force against Saddam regime.

On the acceptance of my research proposal, by the International Islamic University, Research Committee of Faculty of Sharia and Law, I was little bit bothered about that how I would prove that "*Bush Doctrine of pre-emptive self-defence*" has no scope in international law. While consulting the International Islamic University Main Library and Pakistan National Library Islamabad I found a number of books on Iraq War, Mr. Bush's Administration and US National Security Strategy. One day I came by United States Director of Central Intelligence (DCI) Mr. George Tenet's book, "*At the Center of the Storm*" in which he has stated that Bush Administration's major allegations of Saddam's possession of Weapons of Mass Destruction and his ties to Al-Qaeda were baseless and without solid evidence. He specified in this context that "*it was made pursuant to a discussion about how to convince the American people to support Iraq invasion,*" While US and other international forces, "*yielded no significant WMDs.*" The chief UN Weapons inspector Mr. Scott Ritter in his book, "*Iraq Confidential*", the Untold Story of America's Intelligence Conspiracy" made my way too easy to come to the conclusion that Iraq had no weapons of mass murder. Ritter like Tenet exposed the secrets of Bush Administration. Both these officials had to resign their officers on account of opposing and exposing the lies and covert intention of Bush. Furthermore, I was stunned at finding

the time line of United States wars since 1775 to the present marked more than 400 US military interventions abroad.

I am glad on finding the worldwide online information given by a number of links and its easy access with genuine information. I collected countless information concerning my topic from Law Journals, articles and countless books which are more relevant and authoritative source of information. "The evaluation of bush doctrine" by Mr. Ijaz Ahmad Malik and the "Wars of Bushes" by Stephen Tanner were a source of bulk of information about the illegitimacy of pre-emptive strike and the lies coined and plans hatched by President Bush to invade Iraq. How I can thank and offer my regards to these writers! My humble prayers and best wishes for them are underway in their absence.

By the grace of God, the credit of the accomplishment of my thesis, extremely and extensively goes to my lively Supervisor *Sir Osman Karim Khan* who supervised and guided me at every hurdle I confronted. All sources of information I accessed were signified by him. He has command over his subject, especially the international law. His broader vision proved a great source of learning and inspiration for me. His humane hearted treatment to me and smiling appearance would ever unforgettable whenever I consulted him. His absolute endurance, frank propositions, competent and advance access, approach and devotion to supervision of research have not only indebted me but truly his assistance to achieve this research task in its accomplishment is splendid.

I am extremely grateful to all my affectionate and worthy teachers for their kindness and supportive attitude to facilitate, help and encourage me during my research. I would like to specially acknowledge Prof. Dr. Muhammad Munir the Chairman of the Department of Law and the Dean Faculty of Shariah and Law Dr. Zia-ul-Haq for guiding me whenever I required. I am really indebted to acknowledge my commendable teachers Dr. Muhammad Mushtaq Ahmad, Professor at Agriculture University Faisalabad, Sir Imran Ahsan Khan Nayyazi and Sir Muhammad Mushtaq Ahmad, who facilitated me in the early research-based task of creating thesis proposal.



The major assistance, the daily update, proceedings and ethical back-up of my comrades, Mr. Syed Mudassar Fida Gardezi LLM and Mr. Waqas Rehan Ph.D, in connection with my thesis accomplishment is remarkable,

I can never dare to pay no heed to my gratitude to my favourite school career coach *Mr. Raza Ahmad* who filled my soul with the spirit of sacrifice, meekness and humility, the adornment of humankind and moreover the dedication to assigned task accomplishment with patience. He has ever been glad about and appreciating and encouraging me since my earlier academic career. May Allah! bless him with everlasting joyous and glee.

I do salute to my real elder brother Mr. Muhammad Abdullah and my other kith and kin who have been affording my educational expenditures since my earlier career. I am just stepping ahead by the prayers of my mother Mrs. Nasreen Akhtar and my achievement covertly relies on whose best wishes.

The ideal epitome of true brotherhood and affection relies to Mr. Javed Iqbal Saqi, Mr. Muhammad Saleem Asim and Mr. Draz Hussain Jaafri, who performed their role of inspiring me to write on the pre-emptive system of US military intervention on Iraq. They have soft corner for Iraqis. Moreover I owe an enormous debt of gratitude to Madam Shena and my colleague Madam Bushra who led me through intricacies and this work could not have been undertaken without their extensive wishes, collaboration and assistance. I am really indebted to these social ladies for their encouragement. Madam Shena's conduct and impressive cordial treatment has been exceedingly qualitative and unforgettable for me. Her superb and broader vision on all features of human life is immensely estimable.

My last but not least thanks oblige to all my comrades and class mates particularly those who during the course work have been considerate and caring. All my fellows who were curious minded and researchers especially Mr. Ajab Hussain, Mr. Muhammad Amir Manj, Mr. Abdul-Jaleel Director Federal Board Revenue, Civil Judge Mr. Mukhtar Ahmad Ranjha, Abdul Waheed Khan, Zaigham Abbas Cheema, Shafqat Ullah Khan and Muhammad Saleem, they helped me every way in research. The standby services of my

roommate Mr. Muhammad Majid Sharif and his assistance in computer related software or hardware difficulty are unforgettable.

GOD bless us all, with His Clemency, Mercy and Graciousness.

*Shahbaz Ali*

## ***ABSTRACT***

By: Shahbaz Ali

Supervised by: Osman Karim Khan

The September 11, 2001, strike on the World Trade Centre (WTC) and Pentagon prompted President George W. Bush to alter U.S. national security strategy by stressing the doctrine of preemptive military strike against groups or countries that threaten the United States and its allies. This policy contains practical strategic objectives and US long term interests that is known as the Bush Doctrine of Preemptive Strike. The Bush Doctrine is a collection of strategy principles, practical policy decisions, and a set of rationales and ideas for guiding United States foreign policy. The two main pillars identified for the Bush Doctrine are: the "*preemptive strikes*" against potential enemies and promoting democratic regime change.

President Bush declared that three states; Iran, Iraq and North Korea are rogue states because they are not complying with the international treaties and are seeking access to manufacture the WMD. He stressed that among these states Iraq has been harbouring and financing terrorist group. He also articulated that Iraq is axis of evil and especially Saddam regime was a threat not for US, its allies but also for its neighbouring states.

The main allegations made by President Bush were that Hussein possessed or was attempting to produce WMD, which Saddam Hussein had used such as in Halabja, and had made efforts to acquire and that he had ties to terrorists, specifically al-Qaeda. After 11<sup>th</sup> September, 2001, Bush addressed a Joint Session of Congress, and announced his new "War on Terror". This announcement was accompanied by the doctrine of "pre-emptive" military action, later termed the Bush Doctrine. Allegations of a connection between Saddam Hussein and al-Qaeda were made by some US Government officials who asserted that a highly secretive relationship existed between Saddam and the radical Islamists militant organization al-Qaeda from 1992 to 2003, specifically through a series of meetings reportedly involving the Iraqi Intelligence Service (IIS). Some Key Bush advisors, including Vice President Dick Cheney, Secretary of Defense Donald Rumsfeld,

and Deputy Secretary of Defense Paul Wolfowitz, had long desired to invade Iraq. Bush eventually decided to seek UN authorization, while still reserving the option of invading without it.

To cope with the imminent threat posed by the Al-Qaeda and its networks and combat the terrorism worldwide, President Bush unveiled this strategy of Preemptive strike in September, 2002, that supports US right to preemptive strikes, he announced, *"America will not hesitate to act alone, if necessary to exercise our right of self-defence by acting preemptively."*

The US NSS, 2002, emphasizes preemption by stating: *"America is now threatened less by conquering states than we are by failing ones. We are menaced less by fleets and armies than by catastrophic technologies in the hands of the embittered few," and required "defending the United States, the American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our borders."*

The 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. US National Security Strategy (NSS), 2002, the document states, "We must adapt the concept of imminent threat and goes on to assert the right to strike first even if no imminent threat exists."

These grounds were sufficient to topple down Saddam regime and to disarm (WMD). To seek authorization to wage war against Iraq, from the United Nations Security Council the Secretary of the State Collin Powell presented his case and stressed that Saddam's regime is threat for the world peace and security and has connection with Al-Qaeda, but failed to convince the UNSC. Bush himself remarked to the UN General Assembly on September, 2002, that Saddam has been supporting and sheltering the terrorist groups and collecting information for nuclear programme. He stressed we must stand for our security and the dignity of the mankind. Then the Bush administration's decision to attack Iraq to crush the imminent and potential threat preemptively without seeking the authorization of UNSC, is the violation of international law.

The right of preemptive strike has no place in modern international law because Article 2(4) of UN Charter refrains from threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations. Although Article 51 of UN Charter allows right of individual or collective self-defence, but it requires the actual armed attack has when occurred. Further Article 39 of the UN Charter articulates that SC itself shall determine the existence of any threat to the peace, breach of the peace or the act of aggression and has authority to decide what measures should be taken to maintain international peace and security. In the light of all these grounds and the laws given by the international recognized organization, the US act of preemptive strike is the violation of international law. Even not any single UN Security Council Resolution was passed to attack Iraq But Bush had destined to attack Iraq by declaring Iraq one of the axis of evil states and to nip the evil in the bud was necessary for US and its coalition, which is apparently violation of international law.

## ***LIST OF ABBREVIATIONS AND ACRONYMS***

ABM	Anti Ballistic Missile
ABMT	Anti Ballistic Missile Treaty
AEA	Atomic Energy Agency
AEC	Atomic Energy Commission
ASIL	American Society of International Law
BW	Biological Weapons
BWC	Biological Weapons Convention
CBRN	Chemical, Biological, Radiological and Nuclear
CESR	Centre for Economic and Political Rights
CIA	Central Intelligence Agency
CTBT	Comprehensive Test Ban Treaty
CWC	Chemical Weapons Convention
DIS	Defence Intelligence Staff
DOD	Department Of Defence
EMI	Electromagnetic Isotope
ENDC	Eighteen Nations Disarmament Committee
FSI	Failed States Index
GC	Geneva Convention
GLCM	Ground-Launched Cruise Missiles
GWOT	Global War on Terrorism
HEU	Highly Enriched Uranium
IAEA	International Atomic Energy Agency
ICC	International Criminal Courts
ICCPR	International Convention on Civil and Political Rights
ICJ	International Courts of Justice
ICRC	International Committee of Red Cross
INF	Intermediate-Range Nuclear Forces
ISG	Iraqi Survey Group
KP	Kyoto Protocol
LON	League of Nations
MAD	Mutual Assured Destruction
NLF	National Liberation Front
NNPT	Nuclear Non-Proliferation Treaty
NNWS	Non-Nuclear Weapons States
NPT	Non-Proliferation Treaty
NSS	National Security Strategy
NVA	National Vietnam Army
NW	Nuclear Weapons
NWS	Nuclear Weapons States
ODS	Operation Desert Storm
OEF	Operation Enduring Freedom
OIF	Operation Iraqi Freedom
OIL	Operation Iraqi Liberation
PLO	Palestinian Liberation Organization

## US military presence overseas



● Country with US  
Military Base

● Country with Access  
Arrangement

● Country with other Forms  
of Military Cooperation

START	Strategic Arms Reduction Treaty
TTBT	Threshold Test Ban Treaty
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNMOVIC	United Nations Monitoring, Verification, Inspection Commission
UNO	United Nations Organizations
UNSC	United Nations Security Council
UNSCOM	United Nations Special Commission
US	United States
USA	United States of America
WMD	Weapons of Mass Destruction
WOT	War On Terror
WTC	World Trade Centre
WW	World War



## **CHAPTER I**

### **THE BUSH DOCTRINE OF PRE-EMPTIVE STRIKE**

#### **1. INTRODUCTION**

On 1st June, 2002, George W. Bush the President of United States (US) of America delivered his speech, in the wake of the September 11, 2001 attack, at West Point to articulate essentials of a post-Cold War foreign policy is generally known as the Bush Doctrine of pre-emptive strike. The Bush Doctrine of Pre-emptive Strike is a shift in US foreign policy and astray from the Cold War policies of containment as well as deterrence to exercise forcefully and to impose the pre-emptive military action on Iraq, which is the vital feature of Bush Doctrine. President Bush took no into consideration the international organizations or the international treaties. He violated the existing laws and expressed that,

*“we will not hesitate to act alone, if necessary, to exercise our right of self defense by acting preemptively. We recognize that our best defence is a good offence.”<sup>1</sup>*

He announced a policy of pre-emptive military action against those states which harbor terrorists and have ties with them and developing Weapons of Mass Destruction (WMD). President Bush remarked about his military to create psychological impression of its strength, *“Today the United States enjoys a position of unparalleled military strength and great economic and political influence.”<sup>2</sup>*

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<sup>1</sup> President Bush, *Washington, D.C.* (The National Cathedral) September 14, 2001, US NSS.2002, III

<sup>2</sup> President Bush, United States National Security Strategy, September 20, 2002, *Common Dreams.Org.*

Mr. Bush justified his military action pre-emptively without the prior authorization of United Nations Security Council (UNSC) only on the groundless propositions, he argued to the UN SC;<sup>3</sup>

The September 11, 2001 air attack on the US territory had a profound and thought provoking effect not only on its nation but also on the paradox president Bush who vitalized and stimulated the circumstances to justify the Iraq invasion, in March, 2003, declared, *"The terrorists attacked a symbol of American prosperity."*<sup>4</sup> Since the Global War on Terrorism Bush commenced to reformulate US foreign policy on craze and infatuation he added,

*"Today, the task has changed dramatically. Enemies in the past needed great armies and industrial capabilities to endanger America. Now shadowy networks of individuals can bring chaos and suffering to our shores."*<sup>5</sup>

President Bush further admitted that war is a necessary evil and nations have legitimate grievances and wrath but these grievances must be addressed within a political and diplomatic process. On the surprise attack of World Trade Centre (WTC) he quivered with wrath and anger while addressing to the US people, *"Our grief has turned to anger, and anger to resolution. Whether we bring our enemies to justice or bring justice to our enemies, justice will be done."* He further added that,

*"The United States of America is fighting a war against terrorists of global reach. The enemy is not a single political regime or person or religion or ideology. The enemy's terrorism is premeditated, politically motivated violence perpetrated against innocents."*<sup>6</sup>

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<sup>3</sup> President George W. Bush, *Remarks at the United Nations General Assembly*, New York, New York, September 12, 2002 "Above all, our principles and our security are challenged today by outlaw groups and regimes that accept no law of morality and have no limit to their violent ambitions. In the attack on America a year ago, we saw the destructive intentions of our enemies. This threat hides within many nations. In cells and camps terrorists are plotting further destruction, and building new bases for their war against civilization. Our greatest fear is that terrorists will find a shortcut to their mad ambitions when an outlaw regime supplies them with the technologies to kill on a massive scale."

<sup>4</sup> George W. Bush, *Address to a Joint Session of Congress Following 9/11 Attacks*, delivered 20 September, 2001

<sup>5</sup> US NSS, 2002, Introduction

<sup>6</sup> President Bush Washington, D.C. (*The National Cathedral*) September 14, 2001, US NSS.2002, III

In US National Security Strategy 2002, Mr. Bush demarcated that rogue states<sup>7</sup> and new challenges from these states and terrorists use of WMD against us have impaired our security environment to more dangerous. To strengthen his views about these rogue states Mr. Bush stressed that these states have brutalized their people they are strongly determined to seek WMD and showing no regard for international law.

President Bush's speech at West Point founded the groundwork for the militarization in Iraq which started in March 2003 and is still going on. He articulated a worldwide global mission of liberty, the promotion of democracy and the plan for non proliferation of weapons of mass destruction (WMD). To cope with the new circumstances of terrorism Mr. Bush formulated his own principles of his national security strategy which shows the radical departure from the existing international law relating to *jus ad bello*. As in Chapter V of US National Security Strategy (NSS), 2002, he describes,

*"For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack."*<sup>8</sup>

National Security Strategy, 2002, of the United States was a robust, aggressive, and highly controversial grand strategy that served as the starting point for the development of subordinate strategies, such as the US National Military Strategy. The major and particular issue is the embrace of preemptive approach to maintain security liberty and the spread democracy. Bush designed to remedy the shortfall of containment and deterrence in a twenty-first century threat environment characterized by transnational terrorists and WMD.

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<sup>7</sup> US National Security Strategy, 2002, Bush declared Iraq, North Korea and Iran the axis of evil

<sup>8</sup> President Bush West Point, New York, June 1, 2002, *United States National Security Strategy, 2002*, v

Bush through his doctrine unproductively tried to legitimize an illegitimate attack on a sovereignty of an independent state with express apparent intention of elimination of the internationally acknowledged leader and governmental infrastructure of Iraq.

Under the veil of dubious allegations President Bush constituted against President Saddam paved a way to attack preemptively. Although the Bush Administration had other options of diplomatic ways as negotiations, judicial settlement, settlement under the auspices of United Nations or any possible mode of termination of war or lastly by peaceful settlement of disputes to avoid the Iraq crisis,<sup>9</sup> yet he proved himself as stubborn to strike preemptively as he added in US National Security Strategy 2002,

*"The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively."*<sup>10</sup>

Actually President Bush employed the policy of preemptive strike only to counter the emerging threats of terrorism and the WMD. Bush administration deliberately decided to attack those states that are imposing threat to United States and allies, which in the preliminary step emerged as Global War on Terror (GWOT). The states which were open threats were the rogue states which declared as the axis of evil i.e. Iraq, Iran and North Korea. Among the three states Iraq was supposed to be attack on US within 45 minutes. Under this threat US gave ultimatum of 48 hours to the Iraqi president Saddam Hussein to leave Iraq. In this way US sought different grounds to justify the war against Iraq.

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<sup>9</sup> J.G. Starke *Introduction to International Law*, Tenth Edition, 1989, Printed in Great Britain by Biddles Ltd. Guildford and King's Lynn P.423

<sup>10</sup> Bush's *National Security Strategy*, 2002

## 1.1. WHAT IS PREEMPTIVE STRIKE?

A preemptive strike is a military action which is designed to neutralize a potential threat, or to gain a distinct advantage against an enemy.<sup>11</sup> In other words a pre-emptive strike is a war that is commenced in an attempt to repel or defeat a perceived inevitable offensive invasion, or to gain a strategic advantage in an impending (allegedly unavoidable) war before that threat materializes. In short it is a war which preemptively 'breaks the peace'.<sup>12</sup> The legality of preemptive strikes is questionable, as they are generally considered offensive actions except in very specific circumstances.

### 1.1.1. Phrasal Background of Pre-emptive Strike

The "Bush Doctrine of pre-emptive strike" is a phrase utilized to illustrate different correlated foreign strategy principles of United States by the President George W. Bush. This phrase was first employed by Charles Krauthammer<sup>13</sup> in June, 2001, to express the Bush Administration's unilateral withdrawals from the Anti-Ballistic Missile (ABM) treaty, International Criminal Court (ICC) and the Kyoto Protocol (KP). The phrase primarily articulates the policy that the United States had the right to protect itself against nations that harbor or finance terrorist factions, which was used to rationalize the invasion of Iraq 2003 pre-emptively.

The phrase "Bush Doctrine of pre-emptive strike" is a name given to a set actions first disclosed by President George W. Bush in an articulation given on June 1, 2002. The guidelines delineated extensive new segments in US defence policy that would largely emphasize on military pre-emption, military superiority, strength beyond challenge, unilateral action, and a commitment to "*extending democracy, liberty, and security to all*

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<sup>11</sup> S.E. Smith, Edited By: Bronwyn Harris; Wise Geek, *What is a Preemptive Strike?* Last Modified Date: 01 June 2011 Conjecture Corporation

<http://www.wisegeek.com/what-is-a-preemptive-strike.htm> (visited on 12-8-2010)

<sup>12</sup> Preemptive war; Wikipedia, the free encyclopedia;

[http://en.wikipedia.org/wiki/Preemptive\\_war](http://en.wikipedia.org/wiki/Preemptive_war)

<sup>13</sup> Columnist in Washington Post and Political commentator, Bush Doctrine of Preemptive Strike, the free Encyclopedia

[http://en.wikipedia.org/wiki/Bush\\_Doctrine](http://en.wikipedia.org/wiki/Bush_Doctrine) ( 25-6-2009)

regions"<sup>14</sup> The Bush Doctrine is a manifest departure and removal from the policies of deterrence and containment that in general differentiated American foreign policy for the duration of the Cold War and the decade between the downfall of the Soviet Union and the 9/11.

The term "Bush Doctrine" originally was referred to the plan formulation affirmed by President Bush instantly after the September 11, 2001 hits that the U.S. would "*make no distinction between the terrorists who committed these acts and those who harbor them.*"<sup>15</sup>

This strategy expresses openly that any nation that does not meet the terms with the US directives relating to their stance against terrorism would be seen as aiding it. On September 20, 2001, in an address to a joint session of Congress, Bush summed up his policy with these words, "*The only path to safety is the path of action.*"<sup>16</sup> *Every nation, in every region, now has a decision to make either you are with us, or you are with the terrorists.*"<sup>17</sup>

### **1.1.2. The Scope of Pre-emptive Strike**

US department of defence defines the term pre-emptive strike as "*an attack initiated on the basis of incontrovertible evidence that an enemy attack is imminent.*"<sup>18</sup> Generally a preemptive strike is a military action which is devised to counteract a potential threat, or to gain a distinctive benefit against an enemy. Karl P. Muller and other co writers of Article 'Striking First Pre-emptive and Preventive Attack in U.S. National Security Policy' stated that the pre-emptive strike can also be named as "*the striking first*"<sup>19</sup> carried out against the enemy in expectancy of an attack. This also consists of all those actions that are taken to

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<sup>14</sup> United States, *National Security Strategy*, 2002.

<sup>15</sup> US NSS President Bush Washington, D.C. (The National Cathedral), September 14, 2001, Part III

<sup>16</sup> US NSS *Introduction*

<sup>17</sup> Bush, George W. (September 20, 2001). "*Address to a Joint Session of Congress and the American People*". The White House.

<http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/print/20010920-8.html>. (Retrieved 2008-09-19)

<sup>18</sup> The US Department of Defense Dictionary of Military Terms (2003).

<sup>19</sup> Karl P. Mueller, Jasen J. Castillo, Forrest E. Morgan, Negeen Pegahi, Brian Rosen, *Striking First Preemptive and Preventive Attack in U.S. National Security Policy*  
[http://www.rand.org/pubs/monographs/2006/RAND\\_MG403.pdf](http://www.rand.org/pubs/monographs/2006/RAND_MG403.pdf)

diminish the risk of an enemy attack. These actions may be material or non-material. A pre-emptive war is a war that is launched an endeavor to resist a recognized predictable attack, or to increase a calculated improvement in an imminent war before that expected danger materializes. It is a kind of war which immediately 'breaks the peace'.<sup>20</sup>

### 1.1.3. Requirements for Pre-emptive Self-Defence

The terms "anticipatory self-defense", "pre-emptive self-defense" and "preemption" traditionally refers to a state's right to strike first in self-defense when faced with imminent attack.<sup>21</sup> In order to justify such an action, the *Caroline* test has two distinct requirements:

1. The use of force must be necessary because the threat is imminent and thus pursuing peaceful alternatives is not an option (necessity);
2. The response must be proportionate to the threat (proportionality).<sup>22</sup>

In Webster's original formulation, the necessity criterion is described as "*instant, overwhelming, leaving no choice of means, and no moment of deliberation*". This has later come to be referred to as "*instant and overwhelming necessity*".<sup>23</sup>

## 1.2. ELEMENTS OF BUSH DOCTRINE OF PREEMPTIVE STRIKE

The notion of preemptive strike has been created as a collective works of strategic ideology, practical policy decisions, a set of justifications for preemptive invasion and thoughts for guide lines of United States foreign policy. Two chief pillars acknowledged for the policy are: "the preemptive strikes" against (1) "potential enemies" and promotion of (2) "democratic regime change". Extracting from the strategy, four major elements are emphasized as the center to the Bush Doctrine which are;

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<sup>20</sup> *Preemptive War*, From Wikipedia, the free Encyclopedia  
[http://en.wikipedia.org/wiki/Preemptive\\_war](http://en.wikipedia.org/wiki/Preemptive_war)

<sup>21</sup> Charles Pierson; *Preemptive Self-Defense in an Age of Weapons of Mass Destruction: Operation Iraqi Freedom*; *Denver Journal of International Law and Policy* University of Denver; 2005, p. 33

<sup>22</sup> *The Legal War: A Justification for Military Action in Iraq*, *Gonzaga Journal of International Law*

<sup>23</sup> May, Larry; *War Crimes and Just War*. Cambridge University Press, 2007 p. 206.

(i) unilateralism, (ii) attacking countries that harbour terrorism, (iii) pre-emptive strike, and the (iv) spread of democracy through democratic regime change.

These elements have been mentioned in the manuscript of "The US National Security Strategy" published on September 17, 2002. The relevant portion frequently quoted is as under; also updated in 2006:<sup>24</sup>

*"The security environment confronting the United States today is radically different from what we have faced before. Yet the first duty of the United States Government remains what it always has been: to protect the American people and American interests. It is an enduring American principle that this duty obligates the government to anticipate and counter threats, using all elements of national power, before the threats can do grave damage. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. There are few greater threats than a terrorist attack with WMD."*

In the NSS Bush stressed that expected enemies either Saddam or other who are threat for US and its allies will be crushed and responded with iron hand. He argued US will continue this strategy till the end of terrorism. So Bush employed many tools to accomplish this goals. Some of his strategic elements are as under;

#### **1.2.1. Crushing the Potential Enemies**

The text of the policy stressed preemption by stating: "America is now threatened less by conquering states than we are by failing ones. We are menaced less by fleets and armies than by catastrophic technologies in the hands of the embittered few." and required

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<sup>24</sup> US National Security Council (March 2006). *The National Security Strategy of the United States*. <http://georgewbush-whitehouse.archives.gov/nsc/nss/2006/print/index.html>.



"defending the United States, the American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our borders."<sup>25</sup>

President Bush remarked in his NSS, 2002 that the embittered states are more dangerous for the peace and security of US and its allies and must be crushed the imposing threat and to defeat the enemies at every cost;

*"The United States will not resort to force in all cases to preempt emerging threats. Our preference is that nonmilitary actions succeed. And no country should ever use preemption as a pretext for aggression."*<sup>26</sup>

### 1.2.2. Unilateralism President Bush's Strategy to Strike

The elements of unilateralism of the Mr. Bush Doctrine is the essential element of which he expressed in the first months of Bush's presidency when the conservative observer Charles Krauthammer<sup>27</sup> used the word "unilateralism" in February 2001 to pass on to the president's improved unilateralism in foreign policy, particularly concerning the president's decision to withdraw from the UN Charter.

There is clear point which expresses Mr. Bush's eagerness for the United States to act unilaterally appeared in the policy,

*"While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country."*<sup>28</sup>

It implies either the world community is with US or not Bush administration is ready to strike Iraq.

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<sup>25</sup> Ibid

<sup>26</sup> US NSS

<sup>27</sup> William Berkney, *Bush Doctrine of Preemptive Strike*, V. ii P. 86

<sup>28</sup> US NSS Part III

### 1.2.3. Pursuing The Nations that Harbour Terrorism

The "Bush Doctrine" of preemptive strike embedded in the wake of the collapse of WTC and the attack on Pentagon. These attacks changed the US foreign-policy, since it was not Afghanistan that had commenced the attacks, and there was no proof that US had any foreknowledge of the attacks. In the same way Iraq never has any connection with the Al-Qaeda and did not manufacture WMD. But President Bush and his Administration was bent to attack on Iraq. Although on the incident of WTC the major allegation was coined against Osama Bin Ladin, that he had conspired the plan for the collapse of WTC. Without any solid evidence President Bush made allegation Afghanistan and Iraq have been the safe haven for terrorists. In an address to the nation on the evening of September 11, Bush affirmed his declaration that *"we will make no distinction between the terrorists who committed these acts and those who harbor them."* President Bush made even a more hostile wording of opinion in his September 20, 2001 address to a Joint Session Congress,

*"We will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists."*<sup>29</sup>

Giving his remarks to the General Assembly on September 12, 2002, he demanded that Iraq renounce all involvement with terrorism and permit no terrorists organizations to operate in Iraq. Iraq's regime agreed. It broke this promise. In violation of SC Resolution 1373, Iraq continued to shelter and support terrorists organizations. All these allegations were grounds for preemptive strike,

### 1.2.4. Action in Pre-emption

President Bush spoke to the cadets at the United States Military Academy (West Point) on June 1, 2002, and plainly said that the strategy of "Pre-emptive war" would be employed for the future of US national defense:<sup>30</sup>

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<sup>29</sup>Bush, George W. (September 20, 2001). "Address to a Joint Session of Congress and the American People". The White House. <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/print/20010920-8.html>. Retrieved (2008-09-19).

*"We cannot defend America and our friends by hoping for the best. We cannot put our faith in the world of tyrants, who solemnly sign non-proliferation treaties, and then systemically break them. If we wait for threats to fully materialize, we will have waited too long — Our security will require transforming the military you will lead — a military that must be ready to strike at a moment's notice in any dark corner of the world. And our security will require all Americans to be forward-looking and resolute, to be ready for preemptive action when necessary to defend our liberty and to defend our lives."*

MR. Bush further added that:

*"The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction -- and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively."<sup>31</sup>*

### **1.2.5. Democratic Regime Change**

The democratic regime change is one of the major elements of Bush NSS, 2002. In his sequence of speeches in late 2001 and 2002, President Bush extended on his view of American foreign policy and worldwide military intervention, declaring that the United States should dynamically hold up democratic governments around the world, especially in the Middle East, *"The US will use the moment of opportunity to extend the benefits of*

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<sup>30</sup>Bush, George W. (June 1, 2002). "President Bush Delivers Graduation Speech at West Point."The White House.

<http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/print/20020601-3.html>. Retrieved 2008-09-19

<sup>31</sup> US, National Security Strategy, 2002

*freedom across the globe. We will actively work to bring the hope of democracy ... to every corner of the world...America will encourage the advancement of democracy.”<sup>32</sup>*

Addressing the National Endowment of Democracy on November, 2003, President Bush declared “a forward strategy for freedom in the Middle East”; “in the long run stability cannot be purchased at the expense of liberty. As long as Middle East remains a place where freedom does not flourish, it will remain a place of stagnation resentment and violence ready for export.”<sup>33</sup> But the double standard in the same issue is obvious the Saudi Monarchy is not still in the stream line of US political and democratizing reforms in the Middle East. If Saddam was dictator then what is the status of Saudi autocratic regime. This argument is sufficient for the failure of US democratic regime change worldwide.

The American ideology to liberate and democratize the undemocratic states and to topple down disliked but democratic regime of Saddam to liberate the Iraqi people and democratize Iraq is not allowed in international law because it is against the territorial integrity and political independence of that state.

### **1.3. STRATEGIC OBJECTIVES OF BUSH DOCTRINE OF PREEMPTIVE STRIKE**

The shift in US defence and other foreign strategies from preventive strategy to preemptive strategy is a result of changes in strategic objectives. The basic idea here is to be more assertive in global politics. There were many factors responsible for providing motivation to US strategy in the 1990s which are varied from economic ascendancy and technical superiority to planning for new challenges. As Bush embodied in his NSS 2002.

*“we will not hesitate to act alone, today the US enjoys a position of unparalleled military strength, we will defeat the allies of terror.”<sup>34</sup>*

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<sup>32</sup> US National Security Strategy, 2002  
Introduction

<sup>33</sup> Larry Diamond, *The Spirit of Democracy, The Struggle to build free Societies throughout the World* p. 262

<sup>34</sup> US NSS Part III

Mr. Bush's strategy of preemption superseded the Cold War strategy, deterrence and containment. Preemption pertains to military action when actual WMD used by adversary is imminent. The strategic objectives of the preemptive strike are American military supremacy, crushing the terrorist networks and the WMD and to expand the potential areas of cooperation with other countries.<sup>35</sup>

### **1.3.1. Combating the Terrorism and Bush's Global War on Terror**

The primary objective of "Bush Doctrine" is to fight and crush terrorism. The risk of terrorist organizations, aggressive states, and technology are defined hazards for US security and interest. Hence, the states, "*that harbor terrorists or rogue states*" who might supply terrorists with "weapons of mass destruction" are targets for U.S. action.

The United States of America is fighting a war against terrorists of global reach,

*"The United States will make no concessions to terrorist demands and strike no deals with them. We make no distinction between terrorists and those who knowingly harbor or provide aid to them. The United States will continue to work with our allies to disrupt the financing of terrorism. We will identify and block the sources of funding for terrorism, freeze the assets of terrorists and those who support them. We will disrupt and destroy terrorist organizations by: direct and continuous action using all the elements of national and international power."*<sup>36</sup>

### **1.3.2. Removing the threats of the Precursor of the WMD**

The concept of crushing the WMD is not new in US history. As Clinton in his Presidential Directive expressed, "*Protection Against Unconventional Threats to the Homeland and Americans Overseas*," literally meant that: "If you think terrorists will get

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<sup>35</sup> United State National Security Strategy, 2002

<sup>36</sup> Ibid

access to WMD, there is an extremely low threshold that the United States should act" militarily.<sup>37</sup> Bush in his strategy mainly stressed on the issue of WMD as,<sup>38</sup>

*"Our immediate focus will be those terrorist organizations of global reach and any terrorist or state sponsor of terrorism which attempts to gain or use weapons of mass destruction (WMD) or their precursor; we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country; and While our focus is protecting America, we know that to defeat terrorism in today's globalized world we need support from our allies and friends."*

### **1.3.3. Liberating the Weaker States**

US considers its foremost duty to liberate the people of those countries who have been governed by the dictators e.g. Saddam and Taliban regime of Afghanistan and the people of Libya. As Bush stated in his policy, 2001;<sup>39</sup>

*"The aim of this strategy is to help make the world not just safer but better. Our goals on the path to progress are clear: political and economic freedom, peaceful relations with other states, and respect for human dignity." and "The United States must defend liberty and justice because these principles are right and true for all people everywhere."*

*"The United States will use this moment of opportunity to extend the benefits of freedom across the globe. We will actively work to bring the hope of democracy, development, free markets, and free trade to every corner of the world."*

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<sup>37</sup>Preemptive Strikes Part Of U.S. Strategic Doctrine 'All Options' Open for Countering Unconventional Arms by Mike Allen and Barton Gellman  
<http://www.commondreams.org/headlines02/1211-02.htm>

<sup>38</sup> Bush National Security Strategy 2002,

<sup>39</sup> Bush's NSS,2002, Introduction

After World War I and II, the various nations worldwide have tried to avoid the imminent war, so to deter such practice some new doctrines to prevent war existed which can be interpreted as follows; the Cold War and the Pre-emptive war.

#### **1.4. WAR STRATEGY BEFORE 9/11 ATTACK**

Under Cold War policy before September 11, attack on WTC Preventive war strategy was employed. Where preventive strike is a war that is commenced to put a stop to one party from invading, when an invasion by that party is not about to happen or imminent or known to be pre-planned. Preventive Strike is also known as Preventative war. Preventive Strike intends to prevent a shift in the sense of balance of power by purposefully attacking before the balance of power has an opportunity to shift in the direction of the opponent.<sup>40</sup> On the other hand Preemptive Strike is a first strike when an adversary attack is about to happen. If the Preventive War is undertaken without the prior authorization of the United Nations is prohibited under the modern framework of international law.<sup>41</sup> In the Cold War era this strategy was used to counter the adversary. During the preventive war strategy other doctrines like Cold War Doctrine established which were established only to check the prevailing influence of U.S.S.R. influence of communism.

The Cold War (1947–1991) was considered the long-term state of political inconsistency, military apprehension, tension and the proxy wars.<sup>42</sup> The Cold War was an economic contest after World War II between the Communism, primarily the Soviet Union and its satellite states and allies, and the powers of the Western World, the United States and its allies. Primarily in the Cold War the adverse parties' military forces never formally

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<sup>40</sup>Dan Reiter, Preventive War and its Alternatives: the Lessons of History, This publication is a work of the United States Government as defined in Title 17, United States Code, section 101. April 2006  
<http://www.StrategicStudiesInstitute.army.mil/>

<sup>41</sup>Dan Reiter, Preventive War and its Alternatives: the Lessons of History, This publication is a work of the United States Government as defined in Title 17, United States Code, section 101. April 2006  
<http://www.StrategicStudiesInstitute.army.mil/>

<sup>42</sup> Cold War, From Wikipedia, the free encyclopedia  
[http://en.wikipedia.org/wiki/Cold\\_War](http://en.wikipedia.org/wiki/Cold_War)

Weapons of mass destruction, power of conventional weapons, economic sanctions, or any combination of these can be used as tool of deterrence. Mutually Assured Destruction (MAD) is a form of this strategy, which came to prominence during the Cold War when it was used by the US to characterize relations between the United States and Soviet Union. Both nations were prepared to fight a full scale nuclear and conventional war, but were not willing to risk the carnage of a full scale nuclear war.

#### **1.4.1. Preemptive Strategy after WTC Incident---Best Defence a Good Offence:**

President Bush in his NSS, 2002 declared that if we wait for threats to fully materialize, then we will have waited too long. In case of any threats to US security our military must be ready to strike at a moment's notice in any dark corner of the world. He stressed that our security requires all Americans to be forward-looking and resolute, to be ready for preemptive action when necessary to defend our liberty and to defend our lives.<sup>46</sup>

This strategy was regarded as Bush Doctrine of Preemptive Strategy. This significant change in self-defence strategy was due to the insecurity in the hands of Al-Qaeda, particularly with regard to anticipating threats of terrorists and their supporters. Same views were reiterated by Buh that United States would not allow aggressors to strike first and necessarily adopted the policy best defence a good offence. He restated his case for preemption in a commencement address to the West Point Class of 2002. Finally, the National Security Strategy (NSS) of September 2002 included preemption as a course of action.

The President's new strategy is different because it explicitly declares that the United States will execute preemptive military operations when necessary. His strategy includes preventative actions to eliminate threats before they emerge.

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<sup>46</sup> Bush's National Security Strategy, 2002.



#### **1.4.2. EVOLUTION OF THE BUSH DOCTRINE OF PRE-EMPTIVE STRIKE**

The Bush Doctrine, which led directly to the war in Iraq, had its evolution in the administration of George H.W. Bush. Deputy Secretary of Defense, Mr. Paul Wolfowitz is said to be a key architect of Operation Iraqi Freedom. He is also a key collaborator of the Bush Doctrine of preemptive strike. From 1989 to 1993, Wolfowitz served as Under Secretary of Defense for Policy in charge of a 700-person team that had major responsibilities for reshaping military strategy and policy at the end of the Cold War. In this capacity, Wolfowitz co-wrote with Lewis "Scooter" Libby, the 1992 draft Defense Planning Guidance that called for United States military dominance over Eurasia and "preemptive strikes" against countries suspected of developing weapons of mass destruction (WMD). The draft argued against containment as a relic of the Cold War. "America should talk loudly, carry a big stick, and use its military power to preempt the proliferation of weapons of mass destruction."<sup>47</sup> According to the draft document, the United States' number one objective should be preventing the emergence of a rival superpower. Another objective should be to safeguard United States' interests and promote American values. The draft outlined several scenarios in which United States' interests were threatened by regional conflict such as access to vital raw materials, primarily Persian Gulf oil.

Seven case studies were focused primarily on Iraq and North Korea. There was no mention in the document of taking collective action through the United Nations. The draft also stated, "if necessary, the United States must be prepared to take unilateral action." When the 46-page classified document was leaked to the press, negative public reaction caused the White House to order then-Defense Secretary Dick Cheney to rewrite it.<sup>48</sup> The rewrite specifically eliminated any mention of preemption or unilateral action because both were considered un-thinkable in a post- Cold War era that emphasized

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<sup>47</sup> <http://www.pbs.org/wgbh/frontline/shows/iraq/etc/cron.html>, The Evolution of the Bush Doctrine. 8. Accessed on 26 Oct 2010.

<sup>48</sup>.Ibid

multi-lateralism and containment. A United Nations backed coalition defeated Saddam Hussein's attempt to take over Kuwait and containment of him would continue for the time being. A preemptive unilateral doctrine would not be publicly acceptable until after the attacks of September 11, 2001.

Containment of Iraq during the Clinton administration proved inadequate and caused a group of neo-conservatives to form "The Project for a New American Century." These "neoconservatives" argued for a much stronger United States global leadership exercised through "military strength and moral clarity." In an open letter to President William Clinton, the authors warned that containing Iraq was a "dangerously inadequate" policy. They wrote:

*"The only acceptable strategy is one that eliminates the possibility that Iraq will be able to use or threaten to use weapons of mass destruction. In the near term, this means a willingness to undertake military action as diplomacy is clearly failing. In the long term, it means removing Saddam Hussein and his regime from power. That now needs to become the aim of American foreign policy."*<sup>49</sup>

The letter's signatories included Donald Rumsfeld, Paul Wolfowitz, Richard Perle, William Kristol, and other current members of George W. Bush's administration, including Lewis Libby, Vice President Dick Cheney's chief of staff, Deputy Secretary of State Richard Armitage, and Under Secretary of State for Arms Control, John Bolton. It is speculated that President George W. Bush selected Colin Powell as Secretary of State to provide a counterweight to these hawks.

The events of September 11, 2001 provided a resurgence of Wolfowitz's recommendation of preemption. During a Pentagon briefing two days after that horrific day, Wolfowitz signaled that the United States would enlarge its campaign against terror to include Iraq. He stated: "I think one has to say it's not just a matter of capturing

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<sup>49</sup> Ibid

people and holding them accountable, but removing sanctuaries, removing support systems, and ending states who sponsor terrorism.”<sup>50</sup>

The last part of the statement alarmed Secretary of State Colin Powell, who quickly responded to press questions concerning “ending states” by emphasizing “the United States is fighting against terrorism and if there are states or regimes that support terrorism, the United States hopes to persuade these states that it is in their best interest to stop doing that.”<sup>51</sup> He emphasized that Mr. Wolfowitz did not speak for the State Department.

On September 15, 2001, the President held a National Security Council meeting at Camp David to discuss the Global War on Terrorism (GWOT). Wolfowitz argued that now was the perfect time to go after state sponsored terrorism, including Iraq. Secretary Powell however, convinced the council that an international coalition would not support an attack on Iraq, but may come together for an attack against Al Qaeda and the Taliban in Afghanistan. The question of Iraq would be discussed after measuring results in Afghanistan.

An attack on Iraq in late 2001 would seriously jeopardize, if not destroy, the global counter-terrorist campaign undertaken. But the central point was that any campaign against Iraq, whatever the strategy, cost and risks, was certain to divert the United States for some indefinite period from the war on terrorism. As Brent Scowcroft stated in an opinion editorial, “The most serious cost, however, would be to the war on terrorism. Ignoring that clear sentiment would result in a serious degradation in international cooperation with us against terrorism. And make no mistake, we simply cannot win that war without enthusiastic international cooperation, especially on intelligence.”<sup>52</sup> A successful regime change in Afghanistan backed by the international community combined with apparent emerging threats of weapons of mass destruction in the hands of Iraq, Iran and North Korea warranted the introduction of a new strategy. The once too-risky doctrine of preemption now seemed possible.

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<sup>50</sup> Ibid

<sup>51</sup> Ibid

<sup>52</sup> Brent Scowcroft, *The Wall Street Journal*, August 15, 2002.

President George W. Bush hinted of his new doctrine in the State of the Union address in January 2002, when he labeled Iraq, Iran and North Korea an "axis of evil" and warned he would not allow them to threaten the United States with weapons of mass destruction. The president articulated the doctrine for the first time June 1, 2002 in a commencement address at West Point. Vice President Dick Cheney began using its contents as a prelude to Iraq at the 103rd National VFW Convention speech at Memphis on 26 August 2002. Former Secretary of State Henry Kissinger also gave credence to preemption when he stated: "The imminence of proliferation of weapons of mass destruction, the huge dangers it involves, the rejection of a viable inspection system, and the demonstrated hostility of Saddam Hussein combine to produce an imperative for preemptive action."<sup>53</sup>

The written version of a preemptive strategy came to life with the publishing of The National Security Strategy (NSS) of the United States of America dated September 2002. Chapter three states: "The United States will make no concessions to terrorists demands and strike no deals with them. We make no distinction between terrorists and those who knowingly harbor and provide aid to them." In December 2002, the Bush administration published an additional National Strategy to Combat Weapons of Mass Destruction to amplify chapter five of the NSS without specifically using the preemptive verbiage. In February 2003, the Bush administration published the National Strategy for Combating Terrorism. All three strategies contain the policy of preemption. The NSS states a commitment to disrupt and destroy terrorist organizations by focusing on those organizations of global reach and any terrorist or state sponsor of terrorism that attempts to gain or use weapons of mass destructions (WMD) or their precursors. It also states that the United States will not hesitate to act alone, if necessary, to exercise the right of self-defense by acting preemptively against such terrorist, to prevent them doing harm against the United States, its people and its country.

Although United States policy objectives seem clear, they may be more difficult to measure, achieve, and sustain. Author Philip Zelikow argues that this new strategy

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<sup>53</sup> Richard Cheney, 103rd VFW National Convention Speech, 26 August 2002.

redefines what national security strategy means for the United States in the 21st century. In his view, a strategy of preemption redefines the geography of national security, multilateralism, and national security threats in the dimension of time.<sup>54</sup> The geography of a nation's security such as the United States includes the entire globe, not just its immediate borders. Threats are able to emerge more quickly than those of yesteryear.

#### **1.5.1. Preclude to US Invasion on Iraq**

In October 1998, removing the Hussein regime became official U.S. foreign policy with enactment of the Iraq Liberation Act. Enacted following the expulsion of UN weapons inspectors the preceding August (after some had been accused of spying for the U.S.), the act provided \$97 million for Iraqi "democratic opposition organizations" to "establish a program to support a transition to democracy in Iraq."<sup>55</sup> This legislation contrasted with the terms set out in United Nations Security Council Resolution 687, which focused on after the passage of the Iraq Liberation Act, the U.S. and UK launched a bombardment campaign of Iraq called Operation Desert Fox. The campaign's express rationale was to hamper Saddam Hussein's government's ability to produce chemical, biological, and nuclear weapons, but U.S. intelligence personnel also hoped it would help weaken Hussein's grip on power.<sup>56</sup>

#### **1.5.2. President Bush's hatches Grounds to Employ Preemptive Strike on Iraq**

With the election of George W. Bush as president in 2000, the U.S. moved towards a aggressive policy toward Iraq. Key Bush advisors, including Vice President Dick Cheney, Secretary of Defense Donald Rumsfeld, and Deputy Secretary of Defense Paul Wolfowitz, had long desired to invade Iraq.<sup>57</sup> After leaving the George W. Bush

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<sup>54</sup> Philip, Zelikow. *The Transformation of National Security*. National Interest, Spring 2003, No.71, 19.

<sup>55</sup> "Iraq Liberation Act of 1998 (Enrolled as Agreed to or Passed by Both House and Senate)". Library of Congress. Retrieved 25 May 2006.

<sup>56</sup> William, Arkin (17 January 1999). "The Difference Was in the Details". *The Washington Post*: p. B1. Archived from the original on 9 September 2006. Retrieved 23 April 2007.

<sup>57</sup> "REPUBLICAN PLATFORM 2000". CNN. Archived from the original on 21 April 2006. Retrieved 25 May 2006.

administration, Treasury Secretary Paul O'Neill said that an attack on Iraq had been planned since Bush's inauguration, and that the first United States National Security Council meeting involved discussion of an invasion. O'Neill later backtracked, saying that these discussions were part of a continuation of foreign policy first put into place by the Clinton administration.<sup>58</sup>

Shortly after 11 September 2001 (on 20 September), Bush addressed a joint session of Congress (simulcast live to the world), and announced his new "War on Terrorism". This announcement was accompanied by the doctrine of "pre-emptive" military action, later termed the Bush Doctrine. Allegations of a connection between Saddam Hussein and al-Qaeda were made by some U.S. Government officials who asserted that a highly secretive relationship existed between Saddam and the radical Islamist militant organization al-Qaeda from 1992 to 2003, specifically through a series of meetings reportedly involving the Iraqi Intelligence Service (IIS). Some Bush advisers favored an immediate invasion of Iraq, while others advocated building an international coalition and obtaining United Nations authorization. Bush eventually decided to seek UN authorization, while still reserving the option of invading without it.<sup>59</sup>

In the 2003 State of the Union address, President Bush said "we know that Iraq, in the late 1990s, had several mobile biological weapons labs".<sup>60</sup> On 5 February 2003, U.S. Secretary of State Colin Powell addressed the United Nations General Assembly, continuing U.S. efforts to gain UN authorization for an invasion. His presentation to the UN Security Council, which contained a computer generated image of a *mobile biological weapons laboratory*.

George Bush, speaking in October 2002, said that "The stated policy of the United States is regime change... However, if Hussein were to meet all the conditions of the United Nations, the conditions that I have described very clearly in terms that everybody can

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<sup>58</sup> "O'Neill: 'Frenzy' distorted war plans account". CNN. 14 January 2004. Retrieved 26 May 2006.

<sup>59</sup> "Chronology of the Bush Doctrine". *Frontline.org*. Retrieved on 23 April 2007.

<sup>60</sup> George W. Bush. "Third State of the Union Address". Archived from the original on 10 December 2008. "From three Iraqi defectors we know that Iraq, in the late 1990s, had several mobile biological weapons labs. These are designed to produce germ warfare agents, and can be moved from place to a place to evade inspectors. Saddam Hussein has not disclosed these facilities. He's given no evidence that he has destroyed them."

understand, that in itself will signal the regime has changed".<sup>61</sup> Citing reports from certain intelligence sources, Bush stated on 6 March 2003 that he believed that Hussein was not complying with UN Resolution 1441.<sup>62</sup>

At a press conference on 31 January 2003, Bush again reiterated that the single trigger for the invasion would be Iraq's failure to disarm, "Saddam Hussein must understand that if he does not disarm, for the sake of peace, we, along with others, will go disarm Saddam Hussein."<sup>63</sup> As late as 25 February 2003, it was still the official line that the only cause of invasion would be a failure to disarm. As Blair made clear in a statement to the House of Commons, "I detest his regime. But even now he can save it by complying with the UN's demand. Even now, we are prepared to go the extra step to achieve disarmament peacefully."<sup>64</sup>

Additional justifications used at various times included Iraqi violation of UN resolutions, the Iraqi government's repression of its citizens, and Iraqi violations of the 1991 cease-fire.<sup>65</sup> The main allegations made by President Bush were that Hussein possessed or was attempting to produce weapons of mass destruction which Saddam Hussein, had used such as in Halabja,<sup>66</sup> possessed, and made efforts to acquire. Particularly considering two previous attacks on Baghdad nuclear weapons production facilities by both Iran and Israel which was alleged to have postponed weapons development progress. And that he had ties to terrorists, specifically al-Qaeda.

Bush addressing to UN General Assembly stressed that twelve years ago, Iraq invaded Kuwait without provocation and the regime's forces were poised to continue their march to seize other countries and their resources. Had Saddam Hussein been appeased instead of stopped, he would have endangered the peace and stability of the world. Yet this

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<sup>61</sup> Bob Kemper (23 October 2002). "Saddam can keep rule if he complies: Bush". Daily Times. Retrieved 29 October 2011.

<sup>62</sup> "News Release". White House. Archived from the original on 8 July 2011. Retrieved 1 July 2011.

<sup>63</sup> "Bush, Blair: Time running out for Saddam". CNN. 31 January 2003. Retrieved 29 October 2011.

<sup>64</sup> "Tony Blair: Parliamentary Statement". Hansard. Retrieved 29 October 2011.

<sup>65</sup> "President Discusses Beginning of Operation Iraqi Freedom". Retrieved 29 October 2011. [http://en.wikipedia.org/wiki/2003\\_invasion\\_of\\_Iraq](http://en.wikipedia.org/wiki/2003_invasion_of_Iraq)

<sup>66</sup> "BBC ON THIS DAY | 16 | 1988: Thousands die in Halabja gas attack". BBC News. 16 March 1988. Retrieved 15 January 2011.

aggression was stopped by the might of coalition forces and the will of the United Nations. He further added that in 1991, the UN security council, through resolutions 686 and 687, demanded that Iraq return all prisoners from Kuwait and other lands. Iraq's regime agreed. It broke this promise. In 1991, the UN security council through resolution 687 demanded that Iraq renounce all involvement with terrorism and permit no terrorist organisations to operate in Iraq.<sup>67</sup>

Iraq's regime agreed. It broke its promise. In violation of security council resolution 1373, Iraq continues to shelter and support terrorist organisations that direct violence against Iran, Israel and western governments. Iraqi dissidents abroad are targeted for murder. In 1993, Iraq attempted to assassinate the Emir of Kuwait and a former American president. Iraq's government openly praised the attacks of September 11. And al-Qaida terrorists escaped from Afghanistan and are known to be in Iraq.

President Bush argued that in 1991, the Iraqi regime agreed to destroy and stop developing all weapons of mass destruction and long range missiles and to prove to the world it has done so by complying with rigorous inspections. Iraq has broken every aspect of this fundamental pledge. From 1991 to 1995, the Iraqi regime said it had no biological weapons.

Bush further strengthened his view that United Nations inspections also revealed that Iraq likely maintains stockpiles of VX, mustard and other chemical agents, and that the regime is rebuilding and expanding facilities capable of producing chemical weapons. And in 1995, after four years of deception, Iraq finally admitted it had a crash nuclear weapons program prior to the Gulf war. We know now, were it not for that war, the regime in Iraq would likely have possessed a nuclear weapon no later than 1993.

The major allegation made by Bush on Iraq was, "Today, Iraq continues to withhold important information about its nuclear program, weapons design, procurement logs, experiment data, and accounting of nuclear materials and documentation of foreign

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<sup>67</sup> George Bush's speech to the UN general assembly, Thursday 12 September 2002 18.55 BST  
<http://www.guardian.co.uk/world/2002/sep/12/iraq.usa3>  
Retrieved on 12-6-2011



assistance. Iraq employs capable nuclear scientists and technicians. It retains physical infrastructure needed to build a nuclear weapon. Iraq has made several attempts to buy high-strength aluminium tubes used to enrich uranium for a nuclear weapon. Should Iraq acquire fissile material, it would be able to build a nuclear weapon within a year. Iraq also possesses a force of Scud-type missiles with ranges beyond the 94 miles permitted by the UN Work at testing and production facilities shows that Iraq is building more long range missiles that can inflict mass death throughout the region.<sup>68</sup>

In the 2003 State of the Union address, President Bush said "we know that Iraq, in the late 1990s, had several mobile biological weapons labs". On February 5, 2003, Secretary of State Colin Powell appeared before the UN to present American evidence that Iraq was hiding unconventional weapons.<sup>69</sup> The French government also believed that Saddam had stockpiles of anthrax and botulism toxin, and the ability to produce VX.<sup>70</sup> In March, Blix said progress had been made in inspections, and no evidence of WMD had been found. Iraqi scientist Rafid Ahmed Alwan al-Janabi codenamed "Curveball", admitted in February 2011, that he lied to the CIA about biological weapons in order to get the US to attack and remove Hussein from power.

## 1.6. CONCLUSION

During the period of just war, it was considered that recourse to war was permissible if there was just cause to resort war. The principle of sovereignty of states system articulated a belief that they had a sovereign right to go to war. The Covenant of League of Nations made restrictions on the right to resort to war by the complex series of check. In the system of League of Nations, some gaps and weak points were found; but to fill

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<sup>68</sup> George Bush's speech to the UN general assembly, Thursday 12 September 2002 18.55 BST  
<http://www.guardian.co.uk/world/2002/sep/12/iraq.usa3>  
Retrieved on 12-6-2011

<sup>69</sup> George W. Bush. "Third State of the Union Address". "From three Iraqi defectors we know that Iraq, in the late 1990s, had several mobile biological weapons labs. These are designed to produce germ warfare agents, and can be moved from place to a place to evade inspectors. Saddam Hussein has not disclosed these facilities. He's given no evidence that he has destroyed them."

<sup>70</sup> *American Unbound: The Bush Revolution in Foreign Policy* (Washington, D.C., 2003), 159-61.

these gaps subsequent efforts were exercised. The significant efforts were the emergence of the Kellogg Briand Pact.

The organization of the United Nations was planned to construct it more efficient than the League of Nations. The main objective behind the establishment of UN was to save the succeeding generation from the scourge of war. However requirement to use force is the occurrence of actual armed attack. But absence of any armed attack and the resort to war is against the soul objective of UN. UN Charter does not allow to resort to war without the prior permission preemptively on groundless allegations from the World organized institute.

US has been employing different strategies to control the world economy wherever it finds its corporate interest. To deter Russian influence of communism it exercised the policy of Cold War, Containment and deterrence and pre-emptive. Every former president of US gave his individual foreign policy to intervene militarily abroad. Most of them violated the international treaties, but the violation of international law made by President George W. Bush in US history is different and proof of US imperialistic role as a world policeman. US does not bother about the restrictions of international institution e.g. United Nation Charter.

The major causes of violation of UN Charter and other international by the US is that UN is funded by US and US influence the UN organs. Mainly UN does not have its own established military and depends on North Atlantic Treaty Organization (NATO) forces, which has created difficulties for UN to implement the international law. UN has been more flourishing than the League of Nations in exercising its worldwide accepted laws. The world remaining superpower US, did refuse to ratify the Covenant of League of Nations, also it always violated the UN Charter on the pursuits of its material motives.

**CHAPTER II**

**INTERNATIONAL LAW RELATING TO THE EXERCISE OF  
MILITARY FORCE — IN TERMS OF THE SCOPE OF PRE-  
EMPTIVE SELF DEFENSIVE STRIKE**

**2. INTRODUCTION**

It has been the international practice of the states that the exercise of force by one state against another state has been rationalized by the inherent right of the states but Art. 2 (4) of the United Nations (UN) Charter refrains from use of force against the territorial integrity of any state as, *"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."* But nevertheless the right of self-defense of states is impaired if an armed attack occurs against a member of the United Nations, as it is preserved in Art.51.<sup>1</sup>The provision of Article 51 reads as:

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

The right to self-defense is not merely existed in the United Nations Charter, but it is also identified as a standard of customary law, and has been considered as a right which is natural in the very conception of "statehood" or "state sovereignty."<sup>2</sup> According to Dr.

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<sup>1</sup>O Schachter, *In Defense of International Rules on the Use of Force*, 53 University of Chicago Law Review 113 (1986), at 131; Dinstein, p 178.

<sup>2</sup>D. R. Rothwell, *Anticipatory Self-Defense in the Age of International Terrorism*, in: 24 University Queensland Law Journal 337 (2005), at 353; van den Hole, p 79.

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Rothwell the actual need to add Article 51 in the UN Charter was the need of the hour but the founding fathers however realized a need for certain clarification, particularly with respect to collective security and the authenticity of regional security arrangements. Nevertheless, Article 51 neither affords a definition of the right of self defence, nor it establishes in detail its preconditions which establish the right of self defence. This ambiguity has made Article 51 and the right of self-defense in wide-range a controversial issue nowadays.<sup>3</sup>

Another considerable boundary with respect to the right of self-defense is not plainly described in the Charter, but is drawn from the common customary philosophy of "Just cause, necessity and proportionality".

The right of self-defense by preventing an invasion is well recognized in traditional international law. In 1625, Hugo Grotius in his book "The Law of War and Peace" signified that "self-defense is acceptable not only after an invasion has already been occurred, but also in advance, before the attack has actually been occurred where ... the deed may be anticipated." He further said: "It be lawful to kill him who is preparing to kill."<sup>4</sup> Likewise, Emmerich de Vattel in 1758 in his famous book "The Law of Nations" asserted that "the safest plan is to prevent evil," and that to do so a nation may even "anticipate the other's design."<sup>5</sup>

During the early period of conventional law relating to use of force in self-defence, the notion of self-defense was not only inseparable from the discernment of "necessity and self-preservation," but there was specifically wide-ranging prevention on the use of force as exists today to formulate self-defense.<sup>6</sup> In accordance with the wide-ranging use of force there are two categories of self-defence; the first category deals with "reactive" conception of self-defence where a state acts in response to an armed attack and the

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<sup>3</sup> ibid

<sup>4</sup> The Causes of War: Striking First, Self Defence and Property  
<http://www.lonang.com/exlibris/grotius/gro-201.htm>

<sup>5</sup> Jackson Maogoto, *Rushing to Break the Law? 'The Bush Doctrine' of Pre-Emptive Strikes and the UN Charter Regime on the Use of Force* University of Western Sydney Law Review, 2003  
[http://manchester.academia.edu/jmaogoto/Papers/158336/Rushing\\_to\\_Break\\_the\\_Law\\_The\\_Bush\\_Doctrine\\_of\\_Pre-Emptive\\_Strikes\\_and\\_the\\_UN\\_Charter\\_Regime\\_on\\_the\\_Use\\_of\\_Force](http://manchester.academia.edu/jmaogoto/Papers/158336/Rushing_to_Break_the_Law_The_Bush_Doctrine_of_Pre-Emptive_Strikes_and_the_UN_Charter_Regime_on_the_Use_of_Force)

<sup>6</sup> Stanimir A. Alexandrov, *Self-Defence against the use of Force in International Law*, Cambridge, USA, 1996. P. 20

second category is the non-reactive conception of self-defence where a state intervenes militarily, when before it is actually attacked by armed forces. There is no clear text which signifies which category is valid in international law and when and where the preventive, preemptive and anticipatory self-defensive can be lawful.

The Second World War identified the decisive factors to use force in terms of self-defence, when resultantly in 1945 the United Nations Charter was formulated. The United Nations Charter under Article 51 gives permission the collective or individual self-defence when actually an armed attack has occurred against the sovereignty of the member of United Nations. It has not been mentioned in Charter that this Article is not, however, definite for the right of "anticipatory self-defence." Two different groups of scholars of international law have attempted to define the Article 51. As Anthony Arend a famous Scholar of international law remarks these groups are, "restrictionists" and "counter-restrictionists."<sup>7</sup> Restrictionists maintain self-defence when an actual armed hit has occurred and thus no preemptive category of action is justified. This is a "retaliatory" notion. "Counter-restrictionists assert the pre-UN Charter customary right of anticipatory self-defence.

The Chapter VII of the UN Charter manages the exercise of military power, in accordance with the international law among the states. This international treaty institutes a scheme of collective security which is founded on the prohibition of the use of force.

The UN Charter affords for only two exceptions to the proscription on the exercise of military force, one of which is the intervention by the Security Council according to Article 39 "*the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security*", as a prerequisite for armed conflict.

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<sup>7</sup> Gray, citing, by way of example, S.C. Res. 661 in which the Council imposed economic sanctions on Iraq for its 1990 invasion of Kuwait and, at the same time, affirmed "the inherent right of individual or collective self-defence, in response to the armed attack ... in accordance with Article 51 of the Charter"; FRANCK, supra note 104, p. 49.

Secondly the Security Council is obliged to have formerly qualified and authorized the use of force, when the circumstances are as a threat to international peace and security.<sup>8</sup>

Other political analyst, on the other hand, eliminate this explanation and maintains that the intention of the Charter was not to confine the customary right of anticipatory self-defense. They disagree the reference in Article 51 to an "inherent right" legalizes a continuation of the broad pre-UN Charter law of use of force. They also criticize that Article 51 plainly limit self-defensive armed measures to state of affairs in which the defensive party has previously endured an attack. Smooth, Anthony Clark Arend emphasizes the words of the Charter is subject matter to contradictory explanation about the acceptability of preemptive use of force.<sup>9</sup> In United Nations Charter there is no Place of Pre-emptive use of force.

## **2.1. THE STARTEGY OF SELF-DEFENSE**

In fact the right of self-defence of States requires a standard, which deals with the security of states against the violent behaviour of powerful countries. However, the ironical point in the extremism is that after the existence of UN since 1945, only the countries which have veto power like US, Russia, UK, China and France deadly utilized this right of self-defence as justification for their uses of force.<sup>10</sup> To justify use of force, the powerful countries habitually referred to Article 51 of the UN Charter. If we look back to the pre September 11, 2001, circumstances, even though states rarely practiced anticipatory self-defence or pre-emptive self-defence, only considering that it would generate a hazardous and dangerous precedent.

However, after the September 11, 2001, incident of the collapse of WTC, there have been voices raised against the legality of anticipatory self-defence. But what composed the matter worst is the declaration of the doctrine of self-defence. Article 51 of the Charter is still a superior law to manage the standard inter-state use of force and that in spite of the

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<sup>8</sup> *Tearing up the Rules: The Illegality of Invading Iraq* March 2003 The Center for Economic and Social Rights Emergency Campaign on Iraq

[http://www.embargos.de/irak/irakkrieg2/vr/tearing\\_up\\_the\\_rules\\_cesr.htm](http://www.embargos.de/irak/irakkrieg2/vr/tearing_up_the_rules_cesr.htm)

<sup>9</sup> Anthony Clark Arend; *International Law and the Preemptive Use of Military Force*; THE Washington Quarterly \_ Spring 2003, p. 89-103

<sup>10</sup> Abdul Ghafur Hamid, *The Legality of Anticipatory Self-defence in the 21ST Century World Order: A Re-Appraisal*, Netherlands International Law Review (NILR), Vol. 54, Issue 3 (2007), 441-190, The Hague, the Netherlands

flaws of the United Nations and the Charter-based system of world order can very well serve the international community even in the context of the 21st century issues like WMD and international terrorism.<sup>11</sup>

The notion of self-defense can be recognized by its essential features. Firstly, self-defense under Article 51 of the U.N. Charter, is described as a "right" not as an obligatory duty therefore, when recommended condition permit, then a State in general has the liberty to pick whether to implement self-defense or not. Secondly, self-defense is well identified as a lawful form of "armed self-help" where, the States may officially use power on their own right. Thirdly, the concept of self-defense is presented on either an individual or collective basis, that leads to the view that it can be raised by only one State, by two States in cooperation, or under a multilateral agreement. Fourthly, the conception of self-defense under Article 51 is not restricted to circumstances in which State security is at risk. So, the option to self-defense may be legitimate under a scope of non disastrous situation.<sup>12</sup> As the International Court of Justice declared on Nicaragua v US Case (1986), although the Court adopted in general a restrictive view of the right to self-defense, including a clear denunciation of the US justification of collective self-defense in relationship with its different military and paramilitary activities directed against Nicaragua, it unambiguously declined to rule on whether a State may lawfully engage in anticipatory self-defense. The Court majority noted that,

*"In view of the circumstances in which the dispute has arisen, reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of an armed attack has not been raised. Accordingly, the Court expresses no view on this issue."*<sup>13</sup>

Quite incongruously, the Court then went on in the next paragraph to state: "In the case of individual self-defence, the exercise of this right is subject to the State concerned having

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<sup>11</sup> Ibid

<sup>12</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 263 (July 8) (characterizing State survival as "an extreme circumstance of self-defence").

<sup>13</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 103 (June 27). (Available in A question of determinacy: the legal status of anticipatory self-defense.)

been the victim of an armed attack."<sup>14</sup> In this author's judgment, that awkward choice of words simply reiterated the established requirement that to trigger self-defensive force, there must be an "armed attack" at issue (however defined) directed at the defending State.<sup>15</sup>

To appropriately recognize the nature, capacity and scope of self-defense, it is necessary to differentiate it from the interconnected doctrines of self-preservation and necessity.<sup>16</sup> Like self-defense, these doctrines could be called upon to rationalize the use of force against: "a grave threat to State security." As legal intellectual Derek Bowett examines, the doctrines of self-preservation and necessity would "make all obligation to observe the law merely conditional; and there is hardly any act of international lawlessness which, taken literally, they would not excuse."<sup>17</sup>

In the past, these doctrines were directly related with self-defense, but, the time, when the Charter was drafted and mutually accepted, their joint characteristics had worn away and self-defense was visualized as a separate and more confined theory. While some legal analysts suggest, dependence today on a extremely restricted version of the doctrine of necessity to rationalize a defensive first strike (pre-emptive strike) in the era of inter-state relationships, major restrictions keep up with the self-defense doctrine, together with the

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<sup>14</sup> *ibid*

<sup>15</sup> Several commentators have pointed to (American) Judge Schwebel's dissent as indicating support for a positive right to anticipatory self-defense. E.g., Van den Hole, *supra* note 69, at 94-95. This author would caution against such an interpretation. Although Judge Schwebel acknowledged the Court's abstention on the question of anticipatory self-defense, the clear thrust of his concern in the applicable portion of his opinion was not on whether a State might be entitled to use force before an armed attack occurred but rather whether a State could respond in self-defense to the unlawful use of force short of an "armed attack," Nicaragua, 1986 I.C.J. at 247-48 (dissenting opinion of Judge Schwebel) (the quoted Waldock text is particularly indicative) (Taken from; A question of determinacy: the legal status of anticipatory self-defense.)

<sup>16</sup> The state of necessity has been described as follows: "Where the protection of a certain value could not be effected except by the wilful breach of the prohibition of force, and where the worth of the infringed value is generally taken to rank much lower than that of the value sought to be protected." BELATCHEW ASRAT, PROHIBITION OF FORCE UNDER THE UN CHARTER: A STUDY OF ART. 2(4), (1991, p. 230.

<sup>17</sup> David A. Sadoff, Article: *A Question of Determinacy: the Legal Status of Anticipatory Self-defense* Winter, 2009 *Georgetown Journal of International Law*; 40 Geo. J. Int'l L. 523 Available at <https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=40+Geo.+J.+Int%27l+L.+523&srctype=smi&srcid=3B15&key=05e1c27f028dd4e40371874c89fa0d9>



obligation that the invoking state under the doctrine of necessity cannot have added contribution to the status of emergency.<sup>18</sup>

### **2.1.1. Classification of Self-Defense**

In this era, where the major threats the world confronting are like WMD and terrorism. So under the systematic analysis of defence system, the self defence can be classified in five categories, "reactive self-defence, non-reactive self-defence, interceptive self-defence, anticipatory self-defence and preemptive self-defence", which are blurry, shadowy in practice and overlapping in perceived timing of the hazard posed by an assailant state.

#### **2.1.1.A. Reactive Self-Defence and Non-Reactive Self-Defence**

The extensive range of use of force contains two categories of self-defense: the first category is the "reactive" notion of self-defense in which a State acts in response to an "armed attack" after it has actually occurred, and in the second category a State intervenes militarily before it is actually targeted with the armed weapons, this category is also known as "non-reactive" concept of self-defense.<sup>19</sup> In the legal sense both the categories are interpreted by the restrictionists and non-restrictionists. There is no clear and defined consistently adopted taxonomy to illustrate the different types of self-defensive strikes, where a state may launch pre-emptive, preventive or anticipatory self-defensive hit in the face of or in the absence of expected or abstract security threats, like potential threat of WMD in Iraq or the connection to Al-Qaeda.

The Article 51 of the UN Charter is ambiguous in this context. Some scholars of international law interpret it as right of self-defence arises only when armed attack has occurred, while others argue quite contrary to it, they are of the opinion that only latent potential threat is sufficient to use force.

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<sup>18</sup>The state of necessity has been described as follows: "Where the protection of a certain value could not be effected except by the wilful breach of the prohibition of force, and where the worth of the infringed value is generally taken to rank much lower than that of the value sought to be protected." Blatchew Asrat, *Prohibition of Force under the UN Charter: A Study of Art. 2(4)*, at 230 (1991).

<sup>19</sup>Sadoff, David A. *A question of determinacy: the legal status of anticipatory self-defense*. *Georgetown Journal of International Law* Jan 1, 2009

### 2.1.1.B. Interceptive Self-Defence

Interceptive self-defence is exemplified in reaction to an assault that has not in reality crossed the defensive State's sovereign borders, but however has initiated, i.e., and is being grown, has been commenced, or in any incident "ostensibly irrevocable" measures have been placed in action; This is an initiative to "intercept" or (cut off) an expected danger, it is considered a key tool of "nipping an attack in the bud."<sup>20</sup>

The UN Charter prohibits the use of force by states with only two exceptions: authorization by the Security Council and self-defence. The great disagreement on the definition and delimitation of self-defence, codified in article 51 of the UN Charter has lead to widely differing views on the subject. On the one hand, there is the preventive self-defence doctrine as proposed by the United States of America, and on the other, a very literal approach that would require a state to remain a 'sitting duck', waiting for an attack to impact before attempting to respond. When faced with the massive destructive power of today's weapons, waiting is not an option.<sup>21</sup>

Article 51 gives a state a right to use force to respond against an aggressive state "if an armed attack occurs". Interceptive self-defence stands for the interception of an armed attack before it impacts. It is legal, according to Professor Yoram Dinstein,<sup>22</sup> because it is a response to an armed attack that is in progress, i.e. when the trigger has been pulled. It stands to reason that an armed attack has begun at some point before it impacts. The real question is when has an armed attack begun? Dinstein's asserts that when a state has "committed itself to an armed attack in an ostensibly irrevocable way" the target state has the right to resort to forceful measures to defend itself. Examples of interceptive self-defence would be responding to a missile in flight or bombing a fleet en route towards it

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<sup>20</sup>Ruchi Anad, *Self-Defence in International Relations*, USA, Palgrave Mcmillan, 2009, P. 53

<sup>21</sup>Joakim Tegenfeldt Lund; *Interceptive Self-Defence - When the Trigger Has Been Pulled*; University essay from Lunds universitet/Juridiska institutionen, 2007  
<http://www.essays.se/essay/fb17407ce4/> (Accessed on 22-6-2010)

<sup>22</sup> Professor Dinstein is Professor Emeritus at Tel Aviv University where he formerly held the posts of President, Rector and Dean of Law. Professor Dinstein is a member of the Institute of International Law. He is President of Israel's national branch of the International Law Association and of the Israel United Nations Association. He has served as Chairman of the Israel national branch of Amnesty International and as a member of the Executive Council of the American Society of International Law. He is a member of the Council of the San Remo International Institute of Humanitarian Law.

target. In theory, interceptive self-defence poses no objections but in practice, it seems there are some contradictions. An armed attack is clearly underway when a missile is in flight, but when a fleet is on the high seas, no matter its intentions, it would be to stretch the concept to claim that an armed attack had begun. Neither the aggressive state's intention, nor its preparatory steps taken, is decisive. If there is still time to settle the conflict peacefully, which is the purpose of the prohibition of force, an armed attack has not yet begun. State practice shines little light on the subject. In some cases it seems states are ready to accept self-defence if the armed attack is imminent, but so far no armed attack has been found to be imminent. The answer to when an armed attack has begun lies in the combination of treaty law and customary law.<sup>23</sup>

Article 51 requires an armed attack, and customary international law in the form of the Caroline case, which is still applicable, can be used to determine when it has begun, i.e. when it is "overwhelming, leaving no choice of means, and no moment for deliberation". When waiting for the aggressor's next step would mean accepting the blow, regardless of it being the sinking of a ship or a nuclear explosion, an armed attack has begun. The perceived threats of rogue states, international terrorism and weapons of mass destruction, opinions are frequently uttered about the expansion of the right to take military action in order to eliminate these threats.<sup>24</sup> But such action is illegal without the prior authorization of the UNSC.

#### **2.1.1.C. Anticipatory Self-Defense**

Anticipatory self-defence is composed of the use of force in "anticipation" of an assault when a State has demonstrated or manifested its potential objective to attack imminently.<sup>25</sup> The identified invader state is inclined to be in the last measures for an assault through military exercises, deployments, or additional actions of readiness. The defensive State supposes that an armed action is about to be occurred with nearness,

<sup>23</sup> Joakim Tegenfeldt Lund; *Interceptive Self-Defence - When the Trigger Has Been Pulled*; University essay from Lunds universitet/Juridiska institutionen, 2007

<http://www.essays.se/essay/fb17407ce4/> (Accessed on 221-6-2010)

<sup>24</sup> *ibid*

<sup>25</sup> DEPT of the Navy, *The Commander's Handbook on the Law of Naval Operations* (NWP 1-14M) [section] 4.4.3.1 (July 2007), available at <http://www.nwc.navy.mil/GNWS/ild/documents/>

immediacy and prefers to prevent that assault before it really initiates by commencing one of its own. In idiomatic terms, the protecting State looks for to "*beat the enemy to the punch.*"

The right of anticipatory self-defense by forestalling an attack is well established in classical international law. In 1625, Hugo Grotius in *The Law of War and Peace* indicated that self-defense is to be permitted not only after an attack has already been suffered, but also in advance, where "... *the deed may be anticipated*". He further said: "*It be lawful to kill him who is preparing to kill...*" Similarly, in his famous text of 1758 known as *The Law of Nations*, Emmerich de Vattel affirms that "*the safest plan is to prevent evil,*" and that to do so a nation may even "*anticipate the other's design.*"<sup>26</sup>

#### **2.1.1.D. Pre-emptive Self-Defense**

Pre-emptive self-defense gets its roots from a fear that in the close future, though not in any instantaneous logic, a State may develop into an armed attack of an antagonist State. The conception is to "pre-empt" a potential, latent and probable growing military menace one that is not suspended to commence but remains only speculative and abstract. The defensive State looks for "forestall processes" that in a moment "may develop into highly intense coercion or violence" by striking "while these processes still embody only a low level of coercion." Such self-defense is not entirely defensive in character, as instigated by strategic, deliberate premeditated and tactical motives, such as corporate or other political interests as oil in that region.

Niaz A. Shah a Muslim scholar of international law makes the distinction between self-defence, anticipatory self-defence and pre-emption. He argues against pre-emption. In the presence of article 39 of the Charter the case for pre-emption is not convincing and the current international legal order can deal effectively with the threat of terrorism. The

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<sup>26</sup>Saurabh Mishra & Sarvesh Singh; *The Unlawful War Against Iraq — The Doctrine of Anticipatory Self-Defense Examined Under International Law*; PL Web Jour 7, (2003)

article argues that certain acts of terrorism may amount to an armed attack, hence necessary and proportionate force may be used after meeting the outlined criteria.<sup>27</sup>

## 2.2. PRE-CHARTER CUSTOMARY LAWS TO USE FORCE

Pre-Charter international laws to use force assess the legal status of anticipatory self-defense both prior to and immediately after the ratification of the U.N. Charter. This segment of my dissertation will first observe whether the doctrine of anticipatory self-defence was known before the establishment of Charter, then conclude what the Charter itself describes about this doctrine and search the long-disputed dimensions between pre-Charter customary rule and the Charter text with specific reference to anticipatory self-defense, and pre-emptive strike.

The position of anticipatory self-defense previous to UN Charter is noteworthy for two motives. Firstly, the Charter explicitly admits the "inherent right" of self-defense,<sup>28</sup> and that right has been drawn from the customary international law that was present in the pre-Charter time. Secondly, we can comprehend it through the notion of past events that took place previous to 1945 and went on to form the recognition of law of self defence today, that developed the characteristics of self defence.

As early as 1625, Hugo Grotius characterized a state's right of self-defense to include the right to forcibly forestall an attack.<sup>29</sup> In 1837 a certain legal precedent regarding preemptive wars was established in the *Caroline affair* when British forces in Canada crossed the United States border and killed several Canadian rebels and one American citizen who were preparing an offensive against the British in Canada. The United States rejected the legal ground of the Caroline case. In 1842, U.S. Secretary of State Daniel Webster pointed out that the necessity for forcible reaction must be "*instant, overwhelming, leaving no choice of means, and no moment for deliberation.*" This

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27 Niaz A. Shah; Self-defence, Anticipatory Self-defence and Pre-emption: International Law's Response to Terrorism; Oxford Journals of Conflict and Security Law

<http://jcsf.oxfordjournals.org/content/12/1/95.short> (Accessed on 25-5-2010)

<sup>28</sup> UN Charter Article 51

<sup>29</sup> Beres, Louis R., *Permissibility of State-Sponsored Assassination during Peace and War, The*, 5, Temp. Int'l & Comp. L.J., 1991; p. 231

formulation is part of the *Caroline* test, which "is broadly cited as enshrining the appropriate customary law standard".<sup>30</sup>

During the course of the destructive World War I, for the first time in history, the concept of the "War to end all wars,"<sup>31</sup> began to be seriously considered. As a further expression of this hope, upon the conclusion of the war, the League of Nations (LON) was formed. The primary aim of this organization was to prevent war, as all signatories were required to agree to desist from the initiation of all wars, (anticipatory, pre-emptive or otherwise). All of the victorious nations emerging out of World War I eventually signed this agreement, with the notable exception of the United States.<sup>32</sup>

During the 1920s, the LON peaceably settled numerous international disputes, and was generally perceived as succeeding in its primary purpose. It was only in the 1930s that its effectiveness in preventing wars began to come into question. Such questions began to arise when it first became apparent in 1931 that it was incapable of halting aggression by Japan in Manchuria, starting with the Mukden Incident. In the Mukden Incident, Japan claimed to be fighting a 'defensive war' in Manchuria, attempting to 'preempt' supposedly aggressive Chinese intentions towards the Japanese. According to the Japanese, the Chinese had started the war by blowing up a certain bridge near Mukden, China. Therefore clearly the Chinese were the aggressors, and the Japanese were merely 'defending themselves'. A predominance of evidence has since indicated that the bridge had in fact most probably been blown up by Japanese operatives.<sup>33</sup>

In 1933 the impotency of the LON became more pronounced when notices were provided by Japan and Germany that they would be terminating their memberships in the League of Nations. Italy shortly followed suit and exited the League in 1937.<sup>34</sup> Soon also Italy

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<sup>30</sup> Duffy, Helen *The 'War on Terror' and the Framework of International Law* Cambridge University Press.2005, p. 157.

<sup>31</sup>Discussion of Woodrow Wilson's desire to make World War I the 'War to End All Wars.' United States History: Woodrow Wilson  
<http://www.u-s-history.com/pages/h1108.html> (Retrieved on 14-6-2010)

<sup>32</sup>Eleanor Roosevelt National Historic Site: League of Nations article; Article summarizing the primary objective of the League of Nations. (Retrieved on 23-6-2010)

<sup>33</sup>Mukden Incident and Manchukuo: C. Peter Chen; Details of the Mukden Incident.  
[http://ww2db.com/battle\\_spec.php?battle\\_id=18](http://ww2db.com/battle_spec.php?battle_id=18) (Retrieved on 23-4-2010)

<sup>34</sup>League of Nations Timeline; A timeline of all major LON events.

and Germany began engaging in militaristic campaigns designed to either enlarge their borders or to expand their sphere of military control, and the League of Nations was shown to be powerless to stop them. This perceived impotency of the League of Nations was a contributing factor which eventually led to the full outbreak of World War II in 1939.<sup>35</sup> The start of World War II is generally dated from the event of Germany's invasion of Poland. It is noteworthy that Germany claimed at the time that its invasion of Poland was in fact a 'defensive war,' as it had allegedly been invaded by a group of Polish saboteurs, signaling a potentially larger invasion of Germany by Poland that was soon to be under way. Thus Germany was left with no option but to preemptively invade Poland, thereby halting the alleged Polish plans to invade Germany. It was later discovered that Germany had fabricated the evidence for the alleged Polish saboteurs as a part of the Gleiwitz Incident which outraged the United States, and prompted them to order the atomic bomb striking on Germany.

Much more normatively significant was the 1928 adoption of the Treaty for the Renunciation of War as an Instrument of National Policy (the Kellogg-Briand Pact).<sup>36</sup> By article I, the parties to the Pact "condemned recourse to war for the solution of international controversies, and renounced it as an instrument of national policy in their relations with one another." The prohibition was by no means absolute. Various reservations deposited by States party to the Pact made it plain that self-defence continued to be a legitimate use of force.<sup>37</sup> Additionally, as treaty law, the Pact bound neither non-parties nor parties who found themselves involved in a dispute with a non-party. Finally, by restricting the prohibition to the use of force in pursuit of national

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<http://worldatwar.net/timeline/other/league18-46.html>

<sup>35</sup> Factmonster Encyclopedia— League of Nations: Successes and Failures; Description of the demise of the League of Nations.

<http://www.factmonster.com/ce6/history/A0859217.html>

<sup>36</sup> Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57.

<sup>37</sup> As an example, when hostilities flared in 1929 between China and the Soviet Union, the United States sent both sides a diplomatic note reminding them of their obligations under the Pact. Documents on International Affairs 274 (John W. Wheeler-Bennett ed., 1929). The USSR replied that it was acting pursuant to its right of self-defense and was therefore not in breach. *Id.* at 279.

policy, it remained legitimate to use force pursuant to *international* policy, in particular when authorized by the League of Nations.<sup>38</sup>

The Kellogg-Briand Pact did affect State practice in the interwar years. For instance, it provided the legal basis for multiple bilateral and multilateral nonaggression pacts.<sup>39</sup> It was also regularly referenced when hostilities flared, such as those between China and the USSR, China and Japan, Peru and Colombia, and Italy and Ethiopia. Indeed, the Pact's prohibition on the use of force formed the legal basis for the offense of crimes against peace contained in the Charters of the International Military Tribunals at Nuremberg and Tokyo.<sup>40</sup>

What the Kellogg-Briand Pact did not do was supply an enforcement mechanism. That omission would be remedied with the next noteworthy attempt to prohibit resort to military force, the United Nations Charter. Drafted in 1945, the Charter imposed a near absolute prohibition on the use of force.

Once again, during the course of the even more widespread and lethal World War II the hope of somehow definitively ending all war (including preemptive war) was seriously discussed. This dialogue ultimately resulted in the re-establishment of the successor organization to the old LON, namely the United Nations (UN). As with the LON, the primary aim and hope of the new UN was the prevention of all wars (including

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<sup>38</sup> Both Professors Ian Brownlie and Yoram Dinstein have made this point in their seminal works on the *jus ad bellum*. Ian Brownlie, *International Law and the Use of Force by States* 89–90 (1963); Yoram Dinstein, *War, Aggression and Self-Defense* 79 (3d ed. 2001).

<sup>39</sup> Violation of a number of these agreements provided a basis for charges at the Nuremberg Trials: Treaty of Arbitration and Conciliation Between Germany and Luxemburg, Sept. 11, 1929, F.R.G.-Lux., 118 L.N.T.S. 104; Polish-German Declaration, Jan. 26, 1934, Pol.-F.R.G., in *Poland's International Affairs* 166 (Stephan Horak ed., 1964); Treaty of Non-Aggression Between German Reich and the Kingdom of Denmark, May 31, 1939, F.R.G.-Den., 197 L.N.T.S. 40; Treaty of Non-Aggression Between Germany and U.S.S.R., Aug. 23, 1939, F.R.G.-U.S.S.R., in 1 *Documents on Int'l Aff.* 408 (1939)..

<sup>40</sup> See, e.g., International Military Tribunal, *Indictment*, app. C, Charges and Particulars of Violations of International Treaties, Agreements and Assurances Caused by the Defendants in the Course of Planning, Preparing, and Initiating the Wars, Charge XIII, "Violation of Treaty between Germany and other Powers providing for Renunciation of War as an Instrument of National Policy, signed at Paris 27 August 1928, known as the Kellogg-Briand Pact,"

available at <http://www.yale.edu/lawweb/avalon/imt/proc/countc.htm>. Violations were charged as to German actions against Poland, Denmark, Norway, Belgium, the Netherlands, Luxembourg, Yugoslavia, Greece, the USSR, and the United States.



preemptive wars). Unlike the previous LON, the organization had the support of the United States.<sup>41</sup>

In analyzing the many components of World War II, if one might consider as separate individual wars, the various attacks on previously neutral countries, then one might consider the attacks against Iran and Norway to have been preemptive wars.

In the case of Norway, the 1940 German invasion of Norway in the 1946 Nuremberg trials the German defense argued that Germany was "compelled to attack Norway by the need to forestall an Allied invasion and that her action was therefore pre-emptive."<sup>42</sup>

### **2.3. SELF-DEFENCE AND CONVENTIONAL LAW**

During the premature conventional law era, the concept of self-defense not only was mainly inseparable from the perceptions of "necessity and self-preservation,"<sup>43</sup> but there was expressly not any general prevention on the use of force as prevails today to formulate self-defense as a partial exception in the form of pre-emptive invasion.

#### **2.3.1. The Caroline Formula and Self Defence**

The Caroline formula is a 19th century formulation of customary international law, reaffirmed by the Nuremberg Tribunal after World War II, which said that the necessity for pre-emptive self-defence must be "instant, overwhelming, and leaving no choice of means, and no moment for deliberation." The test takes its name from the Caroline affair.

In 1837, settlers in Canada rebelled against the British colonial government. The United States remained officially neutral about the rebellion, but American sympathizers assisted the rebels with men and supplies, transported by a steamboat named The Caroline. In response, a British force from Canada entered United States territory at night, seized The

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<sup>41</sup> Preemptive war, Wikipedia, the free encyclopedia  
[http://en.wikipedia.org/wiki/Preemptive\\_war](http://en.wikipedia.org/wiki/Preemptive_war)

<sup>42</sup> Myres Smith McDougal, Florentino P. Feliciano, *The international law of war: transnational coercion and world public order*; p 211, 212  
(Preemptive war)

<sup>43</sup> James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentary*; 2002, P.282

Caroline, set the ship on fire, and sent it over Niagara falls. At least one American was killed.<sup>44</sup> The British claimed that the attack was an act of self-defense. In a letter to the British Ambassador, Secretary of State Daniel Webster argued that a self-defense claimant would have to show that the:

*"Necessity of self-defense was instant, overwhelming, leaving no choice of means, and no moment of deliberation ..., and that the British force, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it".<sup>45</sup>*

## **2.4. ICJ'S VIEWS ON SELF-DEFENCE**

Over a period of decades, the ICJ has issued a number of judgments in contentious cases as well as advisory opinions that address issues of self-defense. Although the Court majority has not once directly opined on the legality of anticipatory self-defense<sup>46</sup> --and indeed never referenced the Caroline standard in any context<sup>47</sup> --some of its language may provide clues as to the Court's philosophical leaning with respect to the lawfulness of the doctrine. Let us look briefly at the four most pertinent cases for such insights into the Court's thinking.

### **2.4.1. Nicaragua Case (1986)**

Although the Court adopted a generally restrictive view of the right to self-defense,<sup>48</sup> including a sound rejection of the U.S. justification of collective self-defense<sup>49</sup> in

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<sup>44</sup> Nichols, Thomas (2008). *The Coming Age of Preventive War*. University of Pennsylvania Press. p. 2.

<sup>45</sup> Webster, Daniel. 'Letter to Henry Stephen Fox', in K.E Shewmaker (ed.). *The Papers of Daniel Webster*: Dartmouth College Press. *Diplomatic Papers*, vol. 1. 1841-1843; 1983; P 62

<sup>46</sup> In addition to the cases examined in the body of this article, see *Corfu Channel (Merits)* (U.K. v. Alb.), 1949 I.C.J. 4, 35 (Apr. 9) (taking no position on the legality of anticipatory self-defense or otherwise on the resort to non-reactive force when threatened; rather, the Court ruled that a State may make preparations to exercise force in self-defense when facing a threatening situation).

<sup>47</sup> See Green, *supra* note 63, at 448 (noting that this omission is particularly conspicuous in the Nicaragua Case in which the Court evaluated self-defense issues exclusively under customary law, given the jurisdictional posture of the case).

<sup>48</sup> Garwood-Gowers, *supra* note 89.

connection with its various military and paramilitary activities directed against Nicaragua, it explicitly declined to rule on whether a State may lawfully engage in anticipatory self-defense. The Court majority noted that;

*"In view of the circumstances in which the dispute has arisen, reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of an armed attack has not been raised. Accordingly, the Court expresses no view on this issue."*<sup>50</sup>

Quite incongruously, the Court then went on in the next paragraph to state: "In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack."<sup>51</sup> In this author's judgment, that inelegant phraseology merely reiterated the established requirement that to trigger self-defensive force, there must be an "armed attack" at issue (however defined) directed at the defending State.<sup>52</sup>

#### **2.4.2. Nuclear Weapons Advisory Opinion (1996)**

In this case the Court was asked for an advisory opinion as to whether there were any circumstances under international law in which the threat or use of nuclear weapons would be permitted.<sup>53</sup> The Court again took no position on the lawfulness of anticipatory self-defense; it was simply unable to conclude definitively whether a State may legally use nuclear weapons "in an extreme circumstance of self-defence, in which its very

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<sup>49</sup>"Although directly concerned with the right of collective self-defence rather than with the right of individual self-defence, much of the Court's conclusions apply to the latter as much as to the former." JENNINGS & WATTS, *supra* note 16, at 420.

<sup>50</sup>Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 103 (June 27).

<sup>51</sup>*Ibid.* (emphasis added).

<sup>52</sup>Several commentators have pointed to (American) Judge Schwebel's dissent as indicating support for a positive right to anticipatory self-defense. E.g., Van den Hole, *supra* note 69, at 94-95. This author would caution against such an interpretation. Although Judge Schwebel acknowledged the Court's abstention on the question of anticipatory self-defense, the clear thrust of his concern in the applicable portion of his opinion was not on whether a State might be entitled to use force before an armed attack occurred but rather whether a State could respond in self-defense to the unlawful use of force short of an "armed attack." Nicaragua, 1986 I.C.J. at 247-48 (dissenting opinion of Judge Schwebel) (the quoted Waldock text is particularly indicative).

<sup>53</sup>Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 227 (July 8).

survival would be at stake."<sup>54</sup> One could read this language as permitting States potential leeway with regard to the non-reactive use of defensive force in the face of an objectively existential threat.<sup>55</sup> However, as the Court: (i) did not actually reach a clear determination on the question posed, (ii) noted the caveat that it was relying only on those limited "fact[s] at its disposal," and (iii) failed to elaborate on the meaning of self-preservation, it would be prudent to adopt a neutral reading of this particular pronouncement with regard to anticipatory self-defense.

#### 2.4.3. Tokyo Tribunal

After World War II, the Tokyo Tribunal made regulation that the Netherlands' announcement of use of force on Japan in December 1941 was a lawful use of force in self-defense, in spite of the reality that Japan had not however announced war on the Netherlands or "attacked Dutch territories in the Far East. It sufficed that Japan had made its war aims, including seizure of those territories, known."<sup>56</sup>

#### 2.5. CHARTER'S LIMITATIONS ON PRE-EMPTIVE SELF-DEFENCE

Post UN Charter international laws ban the use of force directed at the territorial integrity or political independence of a state. The more widely held opinion is that these are merely intensifiers, and that the article 2(4) constitutes a general prohibition, subject only to the exceptions stated in the Charter (self-defence and Chapter VII action by the SC). The latter interpretation is also supported by the historic context in which the Charter was drafted, the preamble specifically states that "*to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind*"<sup>57</sup> is a

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<sup>54</sup>Idid

<sup>55</sup>See FRANCK, supra note 104, at 98 (per para. 105(2) (E) of the Opinion, "a majority of the [Court] could not concede that the first use of nuclear weapons would necessarily be unlawful if the very existence of a State were threatened."). Accord Ronzitti, supra note 116, at 356-57 (observing that this language "certainly contributes to build [sic] a broad construction of the right of self-defence").

(312.) Id. at 192 ("[e]ven taken cumulatively ... these incidents do not seem to the Court to constitute an armed attack"). Instances of Iranian military actions included: "the mining of the United States-flagged Bridgeton on 24 July 1987; the mining of the United States-owned Texaco Caribbean on 10 August 1987; and the firing on United States Navy helicopters by Iranian gunboats, and from the Reshadat oil platform, on 8 October 1987." Id. at 191.

<sup>56</sup>Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed. 1997. P.314

<sup>57</sup> Preamble of the United Nations Charter 1945

principal aim of the UN as such. This principle is now considered to be a part of customary international law, and has the effect of banning the use of armed force except for two situations authorized by the UN Charter. Firstly, the SC, under powers granted in articles 24 and 25, and Chapter VII of the Charter, may authorize collective action to maintain or enforce international peace and security. Secondly, Article 51 also states that: "*Nothing in the present Charter shall impair the inherent right to individual or collective self-defence if an armed attack occurs against a state.*" There are also more controversial claims by some states of a right of humanitarian intervention, reprisals and the protection of nationals abroad.

### **2.5.1. Limitations on Use of Force**

There is a limited right of pre-emptive self-defence under customary law. Its continuing permissibility under the Charter hinges on the interpretation of article 51. If it permits self-defence only when an armed attack has occurred, then there can be no right to pre-emptive self defence. However, few observers really think that a state must wait for an armed attack to actually *begin* before taking action. A distinction can be drawn between "preventive" self-defence, which takes place when an attack is merely possible or foreseeable, and a permitted "interventionary" or "anticipatory" self-defence, which takes place when an armed attack is imminent and inevitable. The right to use *interventionary*, pre-emptive armed force in the face of an imminent attack has not been ruled out by the ICJ. But state practice and opiniojuris overwhelmingly suggests that there is no right of *preventive* self-defence under international law.<sup>58</sup>

The Six-Day War, which began when Israel launched a successful attack on Egypt on June 5, 1967, has been widely described as a preemptive war<sup>5960</sup> and is, according to the United States State Department, "perhaps the most cited example (of pre-emption)."<sup>61</sup>

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<sup>58</sup> Use of force by states; Wikipedia, the free encyclopedia

<sup>59</sup> Henry Shue, David Rodin; Preemption: military action and moral justification; The Six Day War is, "A classic example of preemptive war."

[http://en.wikipedia.org/wiki/Controversies\\_relating\\_to\\_the\\_Six-Day\\_War](http://en.wikipedia.org/wiki/Controversies_relating_to_the_Six-Day_War)

<sup>60</sup> Charles W. Kegley, Gregory A. Raymond; The Six Day War between Israel and alliance of Egypt, Syria, Jordan and Iraq was an example of preemption." And, "It exemplifies preemption." The Global Future: A Brief Introduction to World Politics

<sup>61</sup> The United States has often walked a fine line between preemption and prevention. In fact there have only been a handful of clear-cut cases of military preemption by any states in the last 200 years. (Israeli

Others have alternatively referred to it as a preventive war. Some have referred to the war as an act of "interceptive self-defense."<sup>62</sup> According to this view, though no single Egyptian step may have qualified as an armed attack, Egypt's collective actions made clear that she was bent on armed attack against Israel. At least one source has suggested that it does not meet the *Caroline* test.

It was only in the wake of the 2001 terrorist attack on the World Trade Center in New York that the American Bush administration first claimed the right to declare a preemptive war.<sup>63</sup> This American claim was soon followed up with the American invasion of Iraq in the Iraq War for the purpose of preventing Iraq from developing nuclear, chemical, and biological warfare technologies.<sup>64</sup>

## 2.6. ARTICLES 2 (4), 51 AND THE USE OF FORCE

One of the prime goals for the creation of the United Nations was to limit the use of force by one nation against another nation was to ban the use of force and to save the coming generation from the destruction of war. However, the very first words of the UN Preamble state: "*We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind...*" This was a direct result of experiencing the unbounded horrors of World Wars I and II. Article 2 of the Charter states that "*all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.*" And again, Article 51 talks about the "*inherent right of individual or collective self-defense if an armed attack occurs...*" It is clear here that self-defense is to take place only in the event of an armed attack, and not otherwise.

One of the principal intentions of the constitution of UN Charter is the restraint of the operation of aggression or the other violations of the international peace and security. The

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preemption in the Six Day War of 1967 is perhaps the most cited example)" U.S. National Security Strategy: a New Era U.S. Department of State (2002)

<sup>62</sup>Dinstein, Yoram, War, aggression and self-defense, Cambridge University Press 2005; p. 192

<sup>63</sup>Kirgis, Frederic L. ;Pre-emptive Action to Forestall Terrorism". American Society of International Law. 2002.

<sup>64</sup> The White House, Operation Iraqi Freedom

Articles 1 and 2 of Chapter I bring about the key purposes of UN Charter. The essential compulsion imposed by the Charter is the general prevention on the unilateral use of force has been articulated in Article 2(4).

*"All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the international relations."*<sup>65</sup>

Article 2(4) obviously lays down entire stress on prohibition and standardized ban on the independent and one sided use of force, and that a right of unilateral use of force goes on only in the Charter explicitly on the one circumstances. In observation it means that one-sided use of force may be employed just for self-defence under Article 51. However, Article 2(4) emerges absolute and unconditional in its prohibition and prevention of the exercise of military power.<sup>66</sup>

Art. 2(4) appears absolute in its prohibition of the use of force against the territorial integrity or political independence of any state. Some scholars of international law are of the view that Art. 2(4) does not prohibit the unilateral use of force in general. They argue when the use of force against the territorial integrity of a state is not inconsistent with the purposes of the United Nations charter then the unilateral use of force is permissible. This rather elliptical phraseology has led to the argument that Art. 2(4) prohibits only that use of force which is in fact directed against territorial integrity or political independence or in fact contrary to the purposes of the United Nations.<sup>67</sup>

According to the restrictive view of the use of force the effect of Art. 2(4) is to prohibit totally a state's right to use force, unless some specific exception is made the Charter itself. Customary law rules in so far as they give a wider freedom of action are no longer relevant. In this sense the right of self-defence under Art. 51 and action against ex-enemy

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<sup>65</sup> UN Charter 1945

<sup>66</sup> Martin Dixon, *Textbook on International Law*. Edition 6<sup>th</sup> 2007.P. 312

<sup>67</sup> Martin Dixon, *Textbook on International Law*, 6<sup>th</sup> edition, Oxford University Press, 2007, p. 313,314

states (Art. 107) are the only permissible exception involving unilateral use of force to the general ban in Art. 2(4).<sup>68</sup>

The UN Charter, represents the major conventional law on the use of force in self-defense. Article 51 of the Charter, describes self-defence as follows:<sup>69</sup>

Article 51 is remarkable for the reason that it surrounds the only orientation to self-defense in the Charter, and recognizes argument for the legitimate exercise of force is self-defense. Article 51 has its limits on self-defence: It does not clearly define the original cause of the right and permissibility of self-defence. It was by no means determined to wholly codified self-defense law;<sup>70</sup> and its provisions are not properly identified the clear and precise meaning of self-defence.

Article 51 clearly states that the final authority for going to war lies with the Security Council, on whether a member state should proceed with the use of force against another state. If the Security Council votes against a particular nation going to war, it will become illegal as per the UN Charter and hence international law for that nation to proceed. The UN Security Council voted against the United States invasion of Iraq in March 2003. Hence, as per international law, it was an illegal invasion. Article 51 indicates clearly that the right of self-defence is born when an attack occurs. It says nothing about the right of self-defence in the absence of any attack.

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

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<sup>68</sup>Brownlie, *International Law and Use of Force by States*, 1963

<sup>69</sup> UN Charter Article 51 "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

<sup>70</sup>T.D. Gill, *The Temporal Dimension of Self-Defence: Anticipation, Preemption, Prevention and Immediacy*, 11 J. Conflict Sec. L. (2006) p 361,363 cited from A question of determinacy: the legal status of anticipatory self-defence.



*Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."*

In fact Art. 51 itself, in its own terms, does not say that an armed attack be made by another state before the right to self-defence can arise. It talks only to an armed attack against a state. However it is clear that Art. 51 is generally narrower than the right that some alleged to exist under customary law.

It is necessary to have thorough examination of the Article 51 to comprehend the possible acceptability of anticipatory self-defence, which includes: "armed attack," the "inherent right" of self-defence, and the "designated role of the Security Council".

#### **2.6.1. Security Council the Final Authority to Permit Use of Force**

In Article 51 of UN Charter one thing is clear that the final authority for going to war lies with the Security Council. If the SC votes against a particular nation going to war, it becomes illegal as per the UN Charter and international law. The UN Security Council voted against the United States invasion of Iraq in March 2003. Hence, as per international law, it was an illegal invasion. Art. 51 indicates clearly that the right of self-defence is exercised when an actual attack occurs. So Art. 51 says nothing about the right of self-defence in the absence of any attack. Additionally if one state claims that another state is a threat for peace and security then the UN SC has right to determine the existence of any threat to the peace, breach of the peace or act of aggression and SC itself shall make recommendations what measures shall be taken to maintain international peace and security. So, no one state has any authority to attack another state without the prior authority of UN SC.

##### **2.6.1.A. Occurrence of "Armed Attack"**

The phrase "armed attack" used in Article 51 has not been fully identified in the text, or in another place by any U.N. organ. We on the other hand may assemble interpretive

direction from the ICJ's Nicaragua Case, which identifies that an "armed attack" can encompass invasion by armed military or direct violence,<sup>71</sup> "the provision of weapons or logistical or other support" only did not qualify to an "armed attack."<sup>72</sup> In its place, the Court concluded that a "sufficient gravity" is required. Under this judgment, aggressive expression only, the simple "possession of weapons of mass destruction (WMD)," the "breach of a disarmament agreement by itself," or an "isolated and limited use of force" would not comprise any "armed attack."<sup>73</sup>

Article 51 supplies no direction concerning when an "armed attack" initiate, nor does any agreement be present on the accurate time.<sup>74</sup> Most of the experts of international law hold the view that it happens when on one occasion severe consequences, such as individuals victims or defensive attack, have resulted. Some others legal scholar say that an armed attack begins or the right of self-defense is started when military power has been exercised against it, without considering the level of gravity of threat or potential imminent danger.<sup>75</sup>

#### **2.6.1.B. Self-Defence as an Inherent Right**

General recognized view about the term "inherent right" of self defence in Article 51 is that it reveals the Charter's objective to defend the customary international law at the time when Charter was drafted, yet at least as it did not go beyond the limits put by the rationale and text of the Charter.<sup>76</sup> That perception was recognized by the ICJ in the Nicaragua Decision. Substitute principles comprise accepting the term as a suggestion to

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<sup>71</sup>International Court of Justice, Reports of judgments, Advisory Opinion and Orders, Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986, P 103, 104

<http://www.icj-cij.org/docket/files/70/6503.pdf>

<sup>72</sup> Ibid

<sup>73</sup>YoramDinstein, *War, Aggression and Self-Defence* (4th ed. 2005); p175-76 (cited from A question of determinacy: the legal status of anticipatory self-defense)

<sup>74</sup> Ibid

<sup>75</sup>Martin Dixon, *Textbook on International Law*; 6<sup>th</sup>edi. Oxford University Press; New York, 2007, P. 312

<sup>76</sup> Leo Van den Hole, *Anticipatory Self-Defence under International Law*, 19 AM. U. INT'L L. REV. (2003) p 69, 97 (cited from A question of determinacy: the legal status of anticipatory self-defense)

self-defense's natural law beginning or as treating the right of self-defense as inherent in State independence.<sup>77</sup>

United Nations Security Council and the UN itself as having the most crucial and central role in deciding where new interventions should take place; in giving them a clear international legal base, and ensuring their legitimacy as something more than the selfseeking adventures of some self-appointed 'international policeman'. Equally important, the UNSC has unique powers to try to avoid or limit open conflicts and to cut off non-conflict developments that are particularly dangerous for peace, by positive steps like mediation and peace talks or by the threat and imposition of various sanctions. This range of options are still highly relevant for today's conditions as seen by all the UN's recent activity on Iran, North Korea, Darfur and Kosovo among others. In the current global institutional framework, the UN Security Council is well positioned to act expeditiously and authoritatively to prevent proliferation and advance disarmament.

The UN SC can play the vital role in rectifying clash relating to armed force between States. Article 51 describes that the Security Council allows use of force in self-defense if the SC authorizes individually or collectively. States practice of self-defense, the Security Council has recognized the right of self-defence but with its prior authorization.<sup>78</sup> As the text clearly describes 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, until the Security Council has taken measures necessary to maintain international peace and security."*

The scholars of international law have interpreted the Article 51 in their own vision and have been divided into two factions as restrictionists and counter-restrictionists. It is clear that the selected phraseology in Article 51 does not give the impression as the drafters could have used the terms. The restrictionists greatly depend on the textual wording of Article 51. They mainly stress on the phrase "if an armed attack occurs," which they

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<sup>77</sup>Eli E. Hertz; *Article 51 - The Right to Self-Defence The International Court of Justice (ICJ) & the Goldstone Report [1]; the Myth and Facts*

<http://www.mythsandfacts.com/media/user/documents/Article-51-document.pdf> (Retrieved on 12-4-2010)

<sup>78</sup>Chrestine Gray, *International Law and the Use of Force*; 2d ed. 2004) p. 95 (cited from A question of determinacy: the legal status of anticipatory self-defense).

argue is simple and should be examined based on its bare meaning; the text does not lead to "anticipatory self-defense," the language does not include aggressive or possible actions but Article 51 can be evaluated by four grounds; the text, purpose, object and the intention of the drafter of the Article 51.<sup>79</sup>

According to restrictionists the foremost purpose of the UN Charter is to "save succeeding generations from the scourge of war" by preventing the unilateral use of military power. That purpose would not be consistent with a liberal right to commence action as anticipatory self defence. The Charter is prepared to restrict openly the exercise of force unless clearly exception provided by the Security Council a collective security measures and authorized by UN SC.<sup>80</sup>

The restrictionists are of the view that the phrase "if an armed attack occurs" have need of an actual "armed attack" to take action in self-defence. So Article 51 prevents the pre existing traditional right of self defence and suggests that states must wait to launch military action until they are hit first before they can act in response.

The counter-restrictionists allocate bulk of importance to the phrase "inherent right." They generally claim that the word "inherent" indicates an intention on the part of the drafters of the Charter not to restrict the existing right of "anticipatory self-defense."<sup>81</sup> This argument is underlined to an amount by the ICJ reporting that customary law governing self-defense has an existence free of Article 51, and that customary law must be harmonized to Article 51 as the Charter stipulation does not legalize all aspects of self-defense law. Another argument in this case is that, Article 51 does not construct or identify the right of self-defense, its exact purpose is purely to provide as a "rule of construction and instruction"<sup>82</sup> or it is barely a "savings clause"<sup>83</sup> formulated to make certain that not any else Charter proviso damage that inherent right. Noteworthy point

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<sup>79</sup> Ian Brownlie, *Principles of Public International Law* (6th ed. 2003). P.7-8

<sup>80</sup> Thomas Remler, *The Right of Anticipatory Self – Defense and the Use of Force in Public International Law*, University of Cape Town, p. 40

<sup>81</sup> Hannes Herbert Hofmeister, *Neither the Caroline Formula' nor the 'Bush Doctrine'--An Alternative Framework to Assess the Legality of Preemptive Strikes*, 2 U. NEW ENG. L.J. 31, 40 (2005). <http://www.uned.edu.au/law/journal/pdfs/2005-2-hofmeister.pdf>

<sup>82</sup> David B. Rivkin, Jr. et al., *Preemption and Law in the Twenty-First Century*, 5 CHI. J. INT'L L. 467, 470 (2005). [http://www.law.harvard.edu/students/orgs/jlpp/Vol29\\_No1\\_Rivkin.pdf](http://www.law.harvard.edu/students/orgs/jlpp/Vol29_No1_Rivkin.pdf)

<sup>83</sup> Tarcisio Gazzini, *The Changing Rules on the Use of Force in international Law* (2005). 146

here is that if the drafters had the intention to single out "armed attack" as the merely triggering incident for self-defense, then they should have utilized the additional accurate phraseology, "if and only if" or its equal term.

## 2.7. THE SECURITY SYSTEM UNDER THE U.N. CHARTER

As a consequence to the total and general restriction on the exercise of military power by individual states, one sided or collection of states as preserved in Article 2(4). The Charter presents for a scheme of collective protection,<sup>84</sup> efficiently exercised through the Security Council, under Art. 24(1) but bestowed with chief accountability for the preservation of international peace and security.<sup>85</sup> The scheme of joint security is plainly mentioned in the Preamble of the Charter, which says "armed forces shall not be used, save in the common interest", as well as in Art. 1(1), which describes as one of the purposes of the U.N. is "to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace".

However, there are two general exceptions to Art. 2(4) to use force individually. Under Article 51 of the UN Charter, "*a state which is the victim of an armed attack*," might use individual or collective self-defense in opposition to the assailant without preceding permission by the Security Council. Adding up, the Security Council under Chapter VII, can determine the use of military force "*as may be necessary to maintain or restore international peace and security*" Art. 42, in reaction to a danger to the peace, a breach of the peace or an act of aggression Art. 39.<sup>86</sup> Along with these exceptions given in Charter, another exception can be traced in customary law, known as, the anticipatory right of self-defense against "imminent threats".

Under Article 39 only UN Security Council has the power to determine the intensity and imminence of the threat. This power has not been given to any other body,

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<sup>84</sup>Randelzhofer, *Article 2 (4)*, .

<http://www.google.com.pk/search?q=Randelzhofer%2C+Article+2+%284%29%2C+at+14&ie=utf-8&oe=utf-8&aq=t&rls=org.mozilla:en-US:official&client=firefox-a>

<sup>85</sup>Blokker, N and Schrijver, N (eds.) *The Security Council and the Use of Force. Theory and Reality – a Need for Change?* Legal Aspects of International Organization (Volume 44) Leiden/Boston: Martinus Nijhoff 2005

<sup>86</sup> Ibid

*"the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."*

The UN Charter apparently disallows the exercise of force generally. On the other hand there are exceptions to this principle, which get their way into the stipulations of the Charter. There are fundamentally three feasible exceptions in international law, that is to say Security Council authorization underneath Chapter VII of the UN Charter, the containment of individual or collective self-defence given in Article 51 of the UN Charter and, additionally challenged, the issue of humanitarian intervention, which has not been obviously standardized in the Charter.<sup>87</sup>

One more exception to the exclusion of the use of force is specified in Article 51 of UN Charter, which grants for the right of a state to use force individually or collectively in self-defense. A state does not necessitate a Security Council resolution in order to protect itself by using force in retaliation when the adverse State has launched the exercise of force but the action of self-defence is committed only when the Security Council has authorized with its prior permission to use force, this condition plainly has been described Article 51 of the Charter.<sup>88</sup>

Collective self-defense is authorized, along with individual self-defense, by Article 51 of the United Nations Charter. Put simply, if a country in the international system has suffered an armed attack, then any other country has the right, but not the duty, to use armed force against the aggressor in reliance upon the principle of collective self-defense.<sup>89</sup>

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<sup>87</sup> W Scholtz, *The Changing Rules of Jus Ad Bellum: Conflicts in Kosovo, Iraq and Afghanistan*, PER/PELJ . 2004(7)2

<sup>88</sup> Ibid

<sup>89</sup> Craig Martin, *Collective self-defense and collective security: what the differences mean for Japan*, Abduction Politics, North Korea, Japan and the Politics of Fear and Outrage, Thursday, Aug. 30, 2007 Available

The only preconditions, in addition to the determination that an armed attack has occurred or is irrevocably in motion, are that the use of force is deemed necessary, that the force is proportionate to that used in the attack or the threat posed, and that it is immediate. What is crucial to recognize here, however, is that there is no requirement that the U.N. Security Council make any prior determinations, much less authorize the use of force.

In contrast, collective security involves the use of force to maintain or restore international peace and security, as authorized by the U.N. Security Council under Chapter VII, and specifically Article 42, of the U.N. Charter. There need be no "armed attack" as a conditional precedent, but merely a determination by the Security Council that there is a threat to the peace, a breach of the peace, or an act of aggression, such that the use of force or other measures are required to maintain or restore international peace and security.<sup>90</sup>

So the scope of collective security operations is much broader and the threshold for its use much lower, than for collective self-defense; but states may not act unilaterally, singly or together, under the guise of collective security. Authorization by the U.N. Security Council is necessary.

## **2.8. PRE-EMPTIVE SELF-DEFENCE AND THE US INVASION ON IRAQ**

The exercise of armed forces in national self-defence is a right which has been recognized since long by the international community. The customary international law permits nations to act in self-defense if it is deemed necessary to take such action, and the level of the military reaction should not be inconsistent to the threat.

The US military intervention on Iraq launched in 2003, does not fulfill the criteria of the doctrine of anticipatory self-defence under the modern international law. There is not any imminent danger of attack from Iraq. Even Iraq has neither invaded US or one of its allies, nor is there any confirm evidence that an attack by Iraq is impending. Furthermore,

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<http://ishingen.wordpress.com/2007/08/30/collective-self-defence-vs-collective-security-and-what-it-means-for-japan/>

<sup>90</sup> Ibid

there is no publicly revealed evidence that Iraq is providing weapons of mass destruction (WMD) to the terrorists. So the circumstances never allow the *urgency of* military intervention against Iraq.<sup>91</sup>

The military intervention against an approaching attacker should be instantaneous there is no scope of consideration and pondering over action but should be based on imminent necessity of action rather than deliberation. But the United States' military intervention against Iraq seems to be a well deliberated and pre planned invasion, which is absolutely unlawful and illegal under international customary law. There was no preemptive threat of attack by Saddam Hussein. In hindsight, the idea was preposterous. There were no Weapons of Mass Destruction (WMD).<sup>92</sup> There was hardly any military arsenal to speak of in Iraq after the 1990 Gulf War. Iraq was one of the last countries in the world that could have attacked the United States. But, Iraq had oil. Hence, once we understand by studying the facts around the invasion that Iraq was not an eminent threat, we have to move on, considering then what were the real intentions of US invasion of Iraq. The real intention of all wars is that wars make a handful of rich men obscenely rich. Money alone drives men to start wars.<sup>93</sup>

As Steven Barela<sup>94</sup> an eminent international law scholar says, preemptive use of force is legitimate "*as long as tremendous discretion accompanies preemptive action to ensure that the threat is both certain and imminent.*"<sup>95</sup> Preventive war will not come in the same category as preemptive, simply because the reasons are speculative rather than definitive. Speculation is unverifiable and cannot be substantiated. Of course, in this author's opinion, the reasons given by Bush for preemptive war on Iraq were neither speculative

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<sup>91</sup>Wendy S. Davis, *Providing a Framework to Understanding Why the US Invaded Iraq in 2003*  
<http://scholar.lib.vt.edu/theses/available/etd-05032007-200028/unrestricted/ETD.pdf>

<sup>92</sup> Steve Perry; The Bush administration's Top 40 Lies about war and terrorism;  
<http://holywar.org/txt/039.htm>

<sup>93</sup>Garda Ghista; *Pre-Emptive Invasion and International Law*; *Global Research*, December 13, 2005

<sup>94</sup>Doctoral Assistant at University of Geneva; Studied Humanitarian and Human Rights Law at University of Geneva

<sup>95</sup>Garda Ghista; *Pre-Emptive Invasion and International Law*; *Global Research*, December 13, 2005



nor definitive. They were lies. They were not even driven by fear. They were driven by imperialist conquest of another nation's oil wealth.<sup>96</sup>

The UN Charter stipulates that the use of force is almost entirely forbidden unless the state intending to engage in use of force has the prior authorization of the Security Council. Article 24 of the Charter states that the Security Council is to have "*primary responsibility for the maintenance of international peace and security*," and that problems that arise are to be solved first and last by "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." Article 33 states, if two nation states cannot solve their disputes alone, they are required to take the dispute to the Security Council.<sup>97</sup> Article 37, Only after all other strategies have been tried and have failed, is a nation allowed the use of force, Article 42 but then too, only with the authorization of the Security Council.

UN Resolutions 678 and 687 never permitted the US to take military action, either alone or in a so-called coalition of the willing. Resolution 578 authorized the unilateral use of force but this authorization related only to the first Gulf War that took place in 1990. It had no relevance to Bush's illegal invasion of 2003. In 1990 thousands protested that even though Resolution 678 authorized capitulation of Iraq "by any means necessary," invasion was simply not necessary. It can also be said that the Resolution was invalid because the UN had not exhausted all the above-mentioned peaceful means of conciliation and capitulation. Furthermore, Resolution 678 and the eleven Resolutions preceding it said not one word about weapons of mass destruction, which again demonstrates that it had no relevance to the illegal 2003 invasion.<sup>98</sup>

On November 8, 2002, the Security Council passed Resolution 1441. This Resolution made big and unreasonable demands on Iraq at the instigation of the US. But, this resolution also made no mention of authorizing any state(s) to attack Iraq if Iraq failed to

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<sup>96</sup> *ibid*

<sup>97</sup> Michael Mandel, *How America Gets Away with Murder: Illegal Wars, Collateral Damage and Crimes Against Humanity*, London: Pluto Press, 2004, p. 12.

<sup>98</sup> Garda Ghista, *Pre-Emptive Invasion and International Law*; *Global Research*, December 13, 2005

comply with these demands. It states simply that non-compliance by Iraq "will be reported to the Council for assessment." The Resolution also stated that Iraq would "face serious consequences as a result of its continued violations of its obligations." Even here, though, the Resolution did not state what those consequences were. And here is where Bush and Company deliberately misled the American people by implying that he had the God-given authority to decide what were those consequences. The clause "by any necessary means" was never even included in Resolution 1441 as it had been in Resolution 678, although not lack of trying. The US included it in an earlier version, and other Council members rejected the statement. Hence, to wage a war of aggression based on a huge public distortion of Resolution 1441, was a crime beyond measure. This was the greatest hoodwinking of the American people. In summary, neither Resolution 678, 687 or 1441 gave the US any authorization to go to war. The bottom line is that all members of the Security Council knew exactly what Bush was trying to do. They knew that Bush was going to attack Iraq regardless of whether he got their permission or not. By ignoring their decision, their veto of his war of aggression and proceeding to commit carnage and destruction on a helpless people, Bush rendered the United Nations an impotent, obsolete body. Hence, it was not, as Perle claims, Saddam Hussein who brought down the UN. It was George Bush, whose crimes against humanity make Saddam's crimes look like peanuts.

When Bush lost the Security Council vote, he tried a new strategy – the "right of self-defense" in Article 51, which allows the use of force without Security Council approval, however that use of force is to be only used in the event of an "armed attack." There was no armed attack. Hence, by twisting and manipulating international law and particularly the UN Charter, and now Article 51, Bush began his supreme international crime with a "shock and awe" vengeance, with a hell-bent lust to kill and wreak as much havoc and suffering as he could. This is the real Mr. Bush, behind all the photo-ops. As Professor Clinton Hewan says of the Bush regime, they are inhuman. It runs in their genes!

## 2.9. CONCLUSION

Article 51 of the UN Charter confines the use of military force that the members of the United Nations have the “ *inherent right of individual or collective self-defence if an armed attack occurs.*” The necessity of acting in response to such attack permits a state to secure its sovereignty all the way through the unilateral exercise of retaliatory force – but only “ *until the Security Council has taken measures necessary to maintain international peace and security.*”<sup>99</sup>

Just as the Security Council properly establishes the existence of a danger to international peace and security, individual states may no longer exercise the right of self-defence without the Security Council’s previous approval, as happened in Gulf War. Article 51 applies only in the occurrence of an actual armed attack. As Iraq has not in reality attacked the United States, and there is no believable authenticated confirmation linking Iraq to the September 11<sup>th</sup> attack.<sup>100</sup> The US may not call upon self-defence under the UN Charter to rationalize attacking Iraq. US relied on disputed doctrine of preemptive self-defence.<sup>101</sup>

Even though the UN Charter does not present permissible authority to employ force against a supposed and superficial danger of forthcoming attack, there does exist a undecided and dubious customary international law right of preemptive self-defence. In accordance with the famous formulation of former US Secretary of State Daniel Webster, approved by the seminal Caroline case, the legitimate exercise of this right requires<sup>102</sup> “*a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation.*”

The accessible customary international law connecting to pre-emptive self-defense has no scope for significantly intensifying the idea of self-defense, as advocated in the Bush

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<sup>99</sup> UN Charter Article 51

<sup>100</sup> Steve Perry, The Bush administration's Top 40 Lies about war and terrorism <http://holylwar.org/txt/039.htm>

<sup>101</sup> Jackson Nayamuya Maogoto; *New Frontiers old Problems: the War on Terror and the Notion of Anticipating the Enemy*; NILR 2004

<sup>102</sup> International Law after Iraq: An Ethnical or Historical Approach to Justification of Self-Defence, (2006) 13(3) Tilburg Foreign Law Review p. 228-256

government September 2002 "*National Security Strategy*" to approve pre-emptive strikes against States based on latent intimidation coming up from possession of WMD together with chemical, biological, or nuclear weapons and relations to terrorism. Such an development would weaken the current system of prohibition on exercise of military force the same as given in the United Nations Charter. The Bush government dependence on the requirement for "regime change"<sup>103</sup> in Iraq as a foundation for use of force is banned by Article 2(4) of the UN Charter, which prohibits "the threat or use of force against the territorial integrity or political independence of any State".

Furthermore, the existing traditional international law relating to anticipatory self-defence is too ill-defined, unclear and vague to afford any comprehensive regulation on the legitimacy of the United States' armed operations against Iraq. The various doubts highlighted by this suitable recommend there is a real need for the International Law Commission to codify what exactly are the philosophy that is appropriate to the doctrine of pre-emptive self-defense.

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<sup>103</sup> Kenneth Katzman, Iraq: U.S. Regime Change Efforts and Post-Saddam Governance Updated January 7, 2004 Received through the CRS Web  
<http://www.fas.org/man/crs/RL31339.pdf>

## **CHAPTER III**

### **INTERNATIONAL LAW DEALING WITH WEAPONS OF MASS DESTRUCTION, NUCLEAR PROLIFERATION AND TERRORISM --- IN IRAQ PERSPECTIVE**

#### **3. INTRODUCTION**

Considerably the threats and challenges and global security have changed in the running century but the provisions relevant to the security are unaltered. This Chapter presents an overview of collective security system under Article 39, 2(4), and 51 of the right of self-defence under the Terrorism and WMD mechanism and perspective. The adequacy of preemptive strike will be characterized with the different mechanical assessment of international law.

It is alleged that the security system is under threat due to the proliferation of weapons of mass destruction (WMD). The weaker states are considering themselves insecure due to the possession of WMD only in the hands of bigger powers.<sup>1</sup> But now the possession of WMD cannot be limited to the declared nuclear powers, which traditionally are possessing nuclear powers, known as members of Nuclear Club, like France, China, USA, UK and Russia or the non declared nuclear powers like India, Pakistan, Israel and North Korea. The modern issues and the security challenges of 21<sup>st</sup> century and the traditional collective security system envisaged by the UN Charter has been severely denounced by not only US but also by its allies, especially in the wake of incidents linking to “*Operation Iraqi Freedom*” in 2003.<sup>2</sup> The issue of legality or illegality to use

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<sup>1</sup> Thanos P. Dokos, *Countering the Proliferation of Weapons of Mass Destruction, NATO and EU Options in the Mediterranean and the Middle East*, *Contemporary Studies*. P. 66

<sup>2</sup> A Paulus, *The War Against Iraq and the Future of International Law: Hegemony or Pluralism?*, 25 *Michigan Journal of International Law* 691 (2003-2004), at 691. (Cited from The “*Bush Doctrine*” and preemptive strike – a new approach in the right of self-defense?)

force in traditional security system and given by UN Charter in the light of modern issues like terrorism and WMD the Charter law is still applicable.

The major threat that states facing nowadays genuinely, is the relentless threat which is not only alarming for the states individual interests, but rather frightening to international peace and security. This inexorable threat has been posed by the WMD in the hands of rogue and weak states and the attacks of terrorists, as stated by George W. Bush, *"America is now threatened less by conquering states than we are by failing ones. We are menaced less by fleets and armies than by catastrophic technologies in the hands of the embittered few."*<sup>3</sup>

Although the threats and issues are newer in nature, in modern era, rather than Cold War era, so to cope with such threats as US and UK faced on the day of September 11, 2001 and potential threat of WMD, the adoption of pre-emptive measures is not only a heinous step of US, but the integrity, permanence and durability of weaker states is rather significantly in danger. The steps taken by the US, UK and its allies to combat terrorism, to liberate Iraqi people, and to explore WMD in Iraq without the prior permission of UN SC raises apparently a question of International law and its violation by the superpower and its allies in general, who claim to be the champion of the enforcement of international law and aspirations of human dignity.<sup>4</sup>

### **3.1. WHAT ARE WEAPONS OF MASS DESTRUCTION (WMD)?**

The Iraq Survey Group, an international weapons inspection team, defined WMD<sup>5</sup> as "Weapons that are capable of a high order of destruction and/or being used in such a manner as to kill large numbers of people. Can be nuclear, chemical, biological, or radiological weapons but excludes the means of transporting or propelling the weapons where such means are a separable and divisible part of the weapon. Chemical Weapons and Biological Weapons need to

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<sup>3</sup> US NSS, 2002, George W. Bush, Overview of America's International Strategy.

<sup>4</sup> Ibid

<sup>5</sup> Comprehensive Report of the Special Advisor to the DCI [Director of Central Intelligence] on Iraq's WMD," also known as the "Duelfer Report": "Volume 3" (69.8 MB) Sep. 30, 2004

be of a certain size to count as WMD - single chemical or biological artillery rounds would not be considered to be WMD, due to the limited damage they could produce."

The phrase WMD is widely used as that of nuclear, biological and chemical weapons (NBC) but there is no any treaty or international law that must have referred any authoritative definition of it. This expression NBC and the definition of WMD has been stated US official documents, thus Central Intelligence Agency,<sup>6</sup> The US Department of Defence,<sup>7</sup> The US Government Intelligence Office and by the US Presidents George W. Bush in his National Security Strategy, 2002.<sup>8</sup>

### **3.2. DISARMAMENT MEASURES**

Nuclear proliferation has been opposed by many nations with and without nuclear weapons, the governments of which fear that as more countries with nuclear weapons may enlarge the possibility of nuclear warfare. The proliferation of weapons may destabilize international or regional relations, or it may cause infringe upon the national sovereignty of states.<sup>9</sup>

Early efforts to stop nuclear proliferation involved intense government secrecy, the wartime acquisition of known uranium stores (the Combined Development Trust), and at times even complete damage—such as the bombing of a heavy water facility thought to be used for a German nuclear programme. None of these efforts were clearly public, owing to the fact that the weapon developments themselves were kept secret until the bombing of Hiroshima. The devastation by of Nuclear Weapons inclined US and other big powers to limit the construction of WMD worldwide.

#### **3.2.1. Baruch Plan of 1946, Under UN Atomic Energy Commission**

Serious international efforts to promote nuclear non-proliferation began soon after World War II, when the Former US President Truman Administration proposed the Baruch

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<sup>6</sup>-bin/getdoc.cgi?dbname=2001\_presidential\_documents&docid=pd14my01\_txt-9.  
<http://frwebgate.access.gpo.gov/cgi>

<sup>7</sup> CIA Site Redirect – Central Intelligence Agency

<sup>8</sup> American Dialect Society". Americandialect.org. 2003-01-13. Retrieved 2010-08-05.

<sup>9</sup>The Development and Proliferation of Nuclear Weapons,  
[http://www.nobelprize.org/educational/peace/nuclear\\_weapons/readmore.html](http://www.nobelprize.org/educational/peace/nuclear_weapons/readmore.html). Retrieved on 12-7-2011

Plan<sup>10</sup> of 1946, named after Bernard Baruch, America's first representative to the United Nations (UN) Atomic Energy Commission (AEC). The Baruch Plan, which drew heavily from the Acheson Lilienthal Report of 1946. It proposed the verifiable dismantlement and destruction of the U.S. nuclear arsenal (which, at that time, was the only nuclear arsenal in the world) after all governments had cooperated successfully to accomplish two things: (1) the establishment of an "International Atomic Development Authority," which would actually own and control all military-applicable nuclear materials and activities, and (2) the creation of a system of automatic sanctions, which not even the UN Security Council could veto, and which would proportionately punish states attempting to acquire the capability to make nuclear weapons or fissile material.<sup>11</sup>

Although the Baruch Plan was internationally supported by many countries, yet it failed to emerge from the UN Atomic Energy Commission because the Soviet Union planned to veto it in the Security Council. Still, it remained official American strategy until 1953, when US President Eisenhower made his "Atom for Peace" proposal before the United Nations General Assembly. Eisenhower's proposal led eventually to the creation of the International Atomic Energy Agency (IAEA) in 1957. Under the "Atom for Peace" programme thousands of scientists from around the globe were educated in nuclear science and then dispatched home, where many later pursued for secret weapons programmes in their home country.<sup>12</sup>

Efforts to conclude an international agreement to stop the spread of nuclear weapons began after 1960s when four nations (the United States, the Soviet Union, Britain and France) had acquired nuclear weapons. Although these efforts slowed down in the early 1960s, they renewed once again in 1964, after China detonated a nuclear weapon. In 1968, eighteen governments known as Eighteen Nations Disarmament Committee (ENDC) gathered to limit nuclear weapons, and collectively (ENDC) finished negotiations on the text of the Nuclear Non-Proliferation Treaty (NPT). In June 1968, the

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<sup>10</sup> The Baruch Plan | Arms Control, Deterrence and Nuclear Proliferation | Historical Documents | atomicarchive.com

<sup>11</sup> Nuclear proliferation

[http://en.wikipedia.org/wiki/Nuclear\\_proliferation](http://en.wikipedia.org/wiki/Nuclear_proliferation)

<sup>12</sup> Catherine Collins and Douglas Frantz (2007). "How you helped build Pakistan's bomb". Asia Times Online. Retrieved 2011-11-30.



UN General Assembly approved the NPT with General Assembly Resolution 2373 (XXII). In July 1968, the NPT was opened for signature in Washington, DC, London and Moscow. The NPT entered into force in March 1970.

### **3.2.2. International Collaboration to Arm Control --- Nuclear Non-Proliferation Treaty (NPT or NNPT)**

At present, 189 states parties to the Treaty on the "Nonproliferation of Nuclear Weapons", more commonly known as the Nuclear Proliferation Treaty (NPT ) or NNPT. These include Five veto powers as Nuclear Weapons States (NWS) and have been recognized by the NPT.

Besides the five recognized Nuclear Weapons States, four nations, none of which is signatory or ratified the NPT, have acquired nuclear weapons: India, Pakistan, North Korea and Israel. One analyst of the NPT criticizes that it is discriminatory in recognizing as nuclear weapon states, only those countries that tested nuclear weapons before 1968 and demanding all other states joining the treaty to forswear nuclear weapons.<sup>13</sup>

The NPT is frequently seen to be based on an essential bargain:

*"the NPT non-nuclear-weapon states agree never to acquire nuclear weapons and the NPT nuclear-weapon states in exchange agree to share the benefits of peaceful nuclear technology and to pursue nuclear disarmament aimed at the ultimate elimination of their nuclear arsenals".<sup>14</sup>*

Five states have been recognized by the Non-Proliferation Treaty as NWS . These five nations are also the five permanent members of the UN SC. These five NWS agree not to transport "nuclear weapons or other nuclear explosive devices " and "not in any way to assist, encourage, or induce" a non-nuclear weapon state (NNWS) to obtain nuclear weapons (Article I). NNWS parties to the NPT agree not to "receive," "manufacture" or

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<sup>13</sup> Ibid

<sup>14</sup> Graham, Jr., Thomas (November 2004). "Avoiding the Tipping Point". Arms Control Association.

"acquire" nuclear weapons or to "seek or receive any assistance in the manufacture of nuclear weapons" (Article II). NNWS parties also agree to acknowledge safeguards by the IAEA to confirm that they are not distracting nuclear energy from peaceful purposes to nuclear weapons or other nuclear devices (Article III Clause 2).<sup>15</sup>

*"Each State Party to the Treaty undertakes not to provide: (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon State for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by this Article."*

### **3.2.3. Pre-Cold War Weapons Banning System**

In the period prior to World War II, all three WMD risk factors were significantly high, which helps explain why states began to use arms control agreements to address the threat posed by chemical and biological weapons. The analytical framework also helps us understand the substantive nature of the international legal rules developed on chemical and biological weapons. The prohibitions on use were limited to the first-use of chemical and biological weapons—and the agreements did not address development, possession, stockpiling, transfer, and deployment of such weapons. States could, thus, legally develop, possess, stockpile, transfer, and deploy chemical and biological weapons because the arms control agreements did not limit their rights in those contexts. Such stockpiles of chemical and biological weapons served as a deterrent against any state's desire to use chemical and biological weapons first in armed conflict. Under these rules, an illegal first-use of chemical or biological weapons could be met legally with response in kind.

The arms control approach in this period contained a hierarchy in which states viewed chemical weapons as a greater threat than biological weapons, largely because of the more advanced state of chemical weapons technologies. As noted above, the development and use of chemical weapons were more advanced than biological weapons

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<sup>15</sup> Nuclear Non-proliferation Treaty Articles I, II, III

during this period, illustrated by the Hague Declaration's prohibition of asphyxiating gases in 1899 and the horrors of chemical warfare during World War I.

#### 3.2.4. Cold War Arms Control Strategy

The arms control approach developed in the pre-Cold War period represents the first, rather limited, attempt to regulate WMD through international law in the context of the anarchical politics of the international system. Although the subject of international legal control, the development and use of chemical and biological weapons during this period were not central to the dynamics of international politics. During the Cold War period, the arms control approach to WMD expanded significantly and became an integral feature of the structure and dynamics of international relations. Key to the growth in the importance of WMD arms control was the development of nuclear weapons, a new technology with far more destructive power than either chemical or biological weapons.

Generally speaking, arms control relating to nuclear weapons during the Cold War had two basic objectives: (1) stabilizing nuclear deterrence between the United States and the USSR and (2) limiting the proliferation of nuclear weapons in the international system to prevent such proliferation from causing instability and conflict among states. Many treaties designed to advance these two objectives appeared during the Cold War, vastly increasing the body of international law directly on WMD.

Nuclear deterrence became a central feature of international relations in the Cold War period.<sup>16</sup> The bipolar international system, dominated by two ideologically opposed superpowers, created significant political/military motivations for the United States and the Soviet Union to develop, stockpile, and threaten to use nuclear weapons. Technological developments on nuclear weapons (e.g., multiple independently targeted re-entry vehicles (MIRVs) reinforced these motivations but also provided incentives for the two countries to try, through arms control treaties, to stabilize the effect of offensive and defensive technological advancements on nuclear deterrence.<sup>17</sup> One such stabilization effort—the Treaty on the Limitation of Anti-Ballistic Missile Systems of 1972 (ABM

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<sup>16</sup> David L. Bendir, *Nuclear Proliferation Opposing Viewpoints*, Greenhaven Press, 1992, p. 152

<sup>17</sup> Ibid

Treaty)—restricted the development of anti-ballistic missile defenses in order to strengthen nuclear deterrence by increasing each superpower's vulnerability to nuclear attack.

Substantively, the arms control approach in both pre-cold war and post-cold war periods relied on deterrence to prevent the use of WMD. In essence, deterrence is a self-help strategy that depends on the credibility of the threat to use WMD, which itself requires WMD capabilities and stockpiles. In the nuclear weapons context, deterrence was a more complicated strategy, as illustrated by the unique challenges posed to the United States and the Soviet Union from advancing technological capabilities in both defensive and offensive weapons systems. To be effective, deterrence stability ironically required increasing social vulnerability in the face of the developing nuclear threat, as seen in the ABM Treaty.<sup>18</sup>

#### **3.2.4.A. Biological Weapons Convention 1972**

The Cold War period also witnessed a major development in arms control in connection with biological weapons. The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction of 1972 (BWC) supplemented the use prohibition in the Geneva Protocol by banning the development, production, and stockpiling, acquisition, or retention of biological weapons.<sup>19</sup> In short, states joining the BWC agreed to disarm themselves, at least in the context of biological weapons. The BWC represented a dramatic break with the arms control approach for biological weapons that had existed from the adoption of the Geneva Protocol. In the BWC, disarmament replaced a first-use prohibition backed by deterrence. BWC States Parties did not reserve the right to develop, produce, stockpile, or use biological weapons in any circumstances, effectively eliminating deterrence as a strategy for biological weapons arms control.

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<sup>18</sup> Discussing Development of U.S. and Soviet positions on restricting anti-ballistic missile defenses, which included the argument that "defensive deployments were bound to stimulate ever larger and more sophisticated offensive systems on both sides".

<sup>19</sup> Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, art.1, 26 U.S.T. 583, 587, 1015 U.N.T.S. 163, 166.

The breakthrough was substantive in moving the arms control strategy on biological weapons from deterrence to disarmament. Structurally, however, the focus remained state-centric because the BWC was limited state biological weapons programs.

#### **3.2.4.B. Chemical Weapons Convention 1980**

The objective of chemical weapons disarmament also arose during the Cold War. The Preamble to the BWC stated, for example, that the BWC States Parties were “convinced of the importance and urgency of eliminating from the arsenals of States, through effective measures, such dangerous weapons of mass destruction as those using chemical or bacteriological (biological) agents.”<sup>20</sup> Despite the hope in disarmament quarters that the development and possession of chemical weapons would be banned in the same way as biological weapons, this arms control breakthrough did not occur until after the end of the Cold War in the form of the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction of 1993 (CWC).<sup>21</sup>

### **3.3. POST-COLD WAR CHALLENGES TO THE ARMS CONTROL**

The trajectory of the arms control approach on WMD in the early years of the post-Cold War period seemed promising. Biological weapons were already outlawed by the BWC. The CWC had been concluded successfully in 1993. The political and military strain of nuclear deterrence eased substantially with the end of superpower hostilities, as evidenced by the conclusion of the Strategic Arms Reduction Treaty of 1991 (START I)<sup>22</sup> and the Strategic Arms Reduction Treaty of 1993 (START II) between America and Russian Federation.<sup>23</sup>

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<sup>20</sup> Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993

<sup>21</sup> Ibid

<sup>22</sup> Treaty on the Reduction and Limitation of Strategic Offensive Arms (START I), July 31, 1991, U.S.-U.S.S.R., S. TREATY DOC. NO. 102-20 (1991), *reprinted in* [1991] 16 U.N. DISARMAMENT Y.B. app. II.

<sup>23</sup> Treaty on Further Reduction and Limitation of Strategic Offensive Arms (START II), Jan. 3, 1993, U.S.-U.S.S.R., S. TREATY DOC. NO. 103-1 (1993).

Proliferation fears overshadowed the revolution in nuclear strategy completed by the United States' withdrawal from the Anti Ballistic Missile (ABM) Treaty<sup>24</sup> and the signing of the Strategic Offensive Reductions Treaty (Moscow Treaty) between the United States and the Russian Federation.<sup>25</sup> While the old bipolar order was characterized by structural and political constraints imposed by the superpowers on other states interested in developing nuclear weapons, the post-Cold War period has seen these constraints disappear, with at least three countries— India, Pakistan,<sup>26</sup> and North Korea—openly demonstrating and/or declaring their nuclear capabilities.

The proliferation of nuclear weapons to these states focused attention on the weaknesses of the Nuclear Non-Proliferation Treaty (NPT).<sup>27</sup> Neither India nor Pakistan ever signed this agreement, and, although North Korea is a NPT state party, it violated the rules stipulated therein before announcing its formal decision to renounce the treaty.<sup>28</sup> The proliferation nightmare continued as experts believed that other countries, including Iran,<sup>29</sup> Iraq,<sup>30</sup> and Libya, were actively seeking to join the nuclear club. The rejection by the United States of the Comprehensive Nuclear Test-Ban Treaty (CTBT)<sup>31</sup> only added to concerns that state proliferation of nuclear weapons would continue.<sup>32</sup>

As a result, the dominant structure of the arms control approach in the pre-Cold War and Cold War periods—agreements among the great powers backed by a strategy of

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<sup>24</sup> White House, *ABM Treaty Fact Sheet* (Dec. 13, 2001), at <http://www.whitehouse.gov/news/releases/2001/12/20011213-2.html> (last visited Oct. 4, 2003) (“Given the emergence of . . . new threats to our national security and the imperative of defending against them, the United States is today providing formal notification of its withdrawal from the ABM treaty.”).

<sup>25</sup> Treaty on Strategic Offensive Reductions, May 24, 2002, U.S.-Russ., S. TREATY DOC. NO. 107-8 (2002).

<sup>26</sup> Nuclear Threat Initiative, *Pakistan Overview*, at [http://www.nti.org/e\\_research/e1\\_pakistan\\_1.html](http://www.nti.org/e_research/e1_pakistan_1.html) (last visited Oct. 4, 2003) (“In 1998, Pakistan commissioned the Khushab research reactor, which is capable of yielding 10–15 kg of weapons-grade plutonium annually.”).

<sup>27</sup> Treaty on the Non-proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970) [hereinafter NPT].

<sup>28</sup> Nuclear Threat Initiative, *North Korean Nuclear Program Overview: History and Status*

<sup>29</sup> Nuclear Threat Initiative, *Iran Profile*, at [http://www.nti.org/e\\_research/profiles/Iran/index.html](http://www.nti.org/e_research/profiles/Iran/index.html) (last visited Oct. 4, 2011).

<sup>30</sup> Nuclear Threat Initiative, *Iran Profile*, at [http://www.nti.org/e\\_research/profiles/Iran/index.html](http://www.nti.org/e_research/profiles/Iran/index.html) (last visited Oct. 4, 2011).

<sup>31</sup> Nuclear Threat Initiative, *Iraq Profile*, at [http://www.nti.org/e\\_research/profiles/iraq/index.html](http://www.nti.org/e_research/profiles/iraq/index.html) (last visited Oct. 4, 2011).

<sup>32</sup> Daryl Kimball, *What Went Wrong: Repairing the Damage to the CTBT, ARMS CONTROL TODAY*, Dec. 1999, at 3, available at [www.armscontrol.org/act/1999\\_12/dkde99.asp](http://www.armscontrol.org/act/1999_12/dkde99.asp) (last visited Dec. 1, 2011).

deterrence—no longer seemed as relevant. The repressive regimes targeted by the Bush Doctrine (e.g., Iraq, Iran, and North Korea) are not great powers in the classical sense, and many of them either had not signed the relevant arms control treaties or had violated them. At the same time, the threat of WMD terrorism also served to dilute the significance of arms control treaties because such treaties address state rather than non-state behavior. U.S. political, economic, and military supremacy in the international system does not appear to have had sufficient deterrent effect on either state or terrorist proliferation in WMD.

### **3.4. MAJOR INTERNATIONAL ARMS CONTROL INSTRUMENTS**

There are a number of arms control agreements restricting the deployment and use of nuclear weapons, but no conventional or customary international law prohibits nations from employing nuclear weapons in armed conflict. Nuclear Weapon-Free Zones prohibit the stationing, testing, use, and development of nuclear weapons inside a particular geographical region. This is true whether the area is a single state, a region, or land governed solely by international agreements. There are several regional agreements to exclude or preclude the development and ownership of nuclear weapons. These agreements were signed under the assumption that it is easier to exclude/preclude weapons than to eliminate or control them once they have been introduced.

The dimension and composition of the nuclear weapons stockpile has been influenced by several arms control proposal and international treaties. For example, the 1987 Intermediate-Range Nuclear Forces (INF) Treaty eliminated an entire class of weapons; in conformity with the INF Treaty, the United States retired all Pershing II missiles and all U.S. ground-launched cruise missiles (GLCMs). In 1991, the United States unilaterally eliminated all Army tactical nuclear weapons and most Navy non-strategic nuclear systems.

#### **3.4.1. Anti-Ballistic Missile Treaty**

The Anti-Ballistic Missile Treaty (ABM Treaty or ABMT) was a treaty between the Soviet Union and the United State on the limitation of the Anti-ballistic Missile (ABM)

systems used in defensive purposes against missile-delivered nuclear weapons. Signed in 1972, it was in force for the next 30 years until the US unilaterally withdrew from it in June 2002.<sup>33</sup>

The ABM Treaty forbids the deployment of anti-ballistic missile systems for the defence of the national territory, limiting the deployment of such systems to a single site for the United States and the USSR, with no more than 100 interceptor launcher and missiles. Although the initial treaty text permitted each country two ABM deployment sites located no closer than 1,300km of each other and protecting the capital city and an ICBM launch area, these provisions were modified by the ABM Treaty Protocol. The treaty also places considerable restrictions on the deployment of ABM system large phased-array radars (restricting their location to the periphery of the country and facing outward) and prohibits giving ABM capabilities to other weapon systems, such as air defense weapons, and bans testing such weapons in ABM role. The ABM Treaty also prohibits the development of rapid reload or multiple-launch capability for ABM launchers, and of multiple independently-guided ABM missile warheads. Development, testing, and deployment of mobile, air-, space-, and sea-based ABM systems are banned as well. Additionally, the treaty permits the United States and the Soviet Union to maintain a limited number of ABM systems and associated components on designated ABM test sites.<sup>34</sup>

There are many other treaties to control nuclear and WMD Nuclear Nonproliferation. these treaties are Strategic Arms Limitation Talks (SALT) 1972, Anti-Ballistic Missile Treaty 1972, Threshold Test Ban Treaty (TTBT) 1990, Peaceful Nuclear Explosions Treaty, Comprehensive Nuclear-Test-Ban Treaty, Strategic Offensive Reductions Treaty, Nuclear Treaty Monitoring and Verification Technologies, Counter-proliferation Verification Technologies, Stockpile Monitoring Activities.

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<sup>33</sup> Anti Ballistic Missile Treaty, 1972,

<sup>34</sup> ABM Treaty Overview, TEN Years of NTI Building a Safer World  
<http://www.nti.org/db/nisprofs/russia/treaties/abmdescr.htm>



### **3.4.2. International Atomic Energy Agency (IAEA)— Safeguards to Nuclear Weapons Programmes**

The International Atomic Energy Agency (IAEA) is an international organization that searches to promote the peaceful use of nuclear energy, and to restrain its use for any military function, including nuclear weapons. The IAEA was established as an independent organization on 29 July 1957. Though established independently of the United Nations through its own international treaty, the IAEA Statute,<sup>35</sup> IAEA reports to both the UN General Assembly and Security Council.

The IAEA serves as an intergovernmental level for scientific and technical cooperation in the peaceful use of nuclear technology and nuclear power worldwide. The programmes of the IAEA promote the development of the peaceful purposes of nuclear technology, provide international safeguards against wrongly use of nuclear technology and nuclear materials, and promote extend nuclear safety (including the radiation protection) and nuclear security standards and their implementation.

The IAEA's mission is directed by the interests and needs of Member States, strategic plans and the vision embodied in the IAEA Statute. Three main pillars or areas of work strengthen the IAEA's task: Safety and Security; Science and Technology; and Safeguards and Verification

The IAEA as a self-directed organization is not under direct control of the UN, but the IAEA does report to both the UN General Assembly and Security Council. The IAEA has established programmes to help developing countries in arrangement to make systematically the ability to manage a nuclear power programme, including the Integrated Nuclear Infrastructure Group,<sup>36</sup> which has carried out Integrated Nuclear Infrastructure Review missions in Indonesia, Jordan, Thailand and Vietnam.<sup>37</sup> The IAEA reports that

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<sup>35</sup> Statute of International Atomic Energy Agency (IAEA)

<http://www.google.com.pk/search?q=Statute%20of%20International%20Atomic%20Energy%20Agency%20%28IAEA%29&ie=utf-8&oe=utf-8&aq=t&rls=org.mozilla:en-US:official&client=firefox-a&source=hp&channel=np>

<sup>36</sup> Nuclear Power Infrastructure, the Integrated Nuclear Infrastructure Group (INIG), International Atomic Energy Agency.

<sup>37</sup> <http://www.trendingtech.info/technology/iaea-ready-to-help-build-nuclear-power-plant-indonesia/>

roughly 60 countries are considering how to contain nuclear power in their energy plans.<sup>38</sup>

The International Atomic Energy Agency (IAEA) is a central component of the world's commitment to control the spread of nuclear weapons. The IAEA monitors civilian nuclear energy programmes of many nations to ensure that such programmes are not used to develop weapons.

The IAEA regularly scrutinizes civil nuclear facilities to confirm the accuracy of documentation supplied to it. The agency verifies inventories, and models and analyzes materials. Safeguards are designed to prevent diversion of nuclear material by increasing the danger of early detection. They are complemented by controls on the export of sensitive technology from countries such as UK and USA through voluntary bodies such as the Nuclear Suppliers Group. The most important concern of the IAEA is that uranium not be enriched beyond what is necessary for commercial civil plants, and that plutonium which is produced by nuclear reactor not be refined into a form that would be suitable for bomb construction.

### **3.5. IRAQ'S NUCLEAR WEAPONS PROGRAMME**

Iraq ratified the Non-Proliferation Treaty on October 29, 1969, pledging not to manufacture nuclear weapons and agreeing to place all its nuclear materials and facilities under International Atomic Energy Agency (IAEA) safeguards. Iraq violated its Nuclear Non-Proliferation Treaty obligations, however, secretly pursuing a multi-billion-dollar nuclear weapon programme.<sup>39</sup> Iraq's near-term potential to develop nuclear weapons has been curtailed by the implementation of U.N. Security Council Resolution 687, adopted in April 1991, following Iraq's defeat in the 1991 Persian Gulf War. Operation Desert Storm and the inspection and dismantling efforts of the IAEA, assisted by the U.N. Special Commission (UNSCOM) on Iraq, are believed to have left no weapons-capable fissile materials and no nuclear-weapons-related production facilities in Iraq.

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<sup>38</sup> IAEA Highlights in 2010, A Retrospective View of Year's Major Events.

<sup>39</sup> Iraq's Nuclear Weapons Programme, Iraq Watch, WMD Profiles 2006  
<http://www.iraqwatch.org/profiles/nuclear.html> (Retrieved on 12-12-2010)

Iraq's plans to manufacture weapons-grade uranium used virtually every feasible uranium-enrichment process, including electromagnetic isotope (EMI) separation, the use of gas centrifuges, chemical enrichment, gaseous diffusion, and laser isotope separation. The program was initiated in 1982, when the Iraqi authorities decided to abandon Iraq's nuclear reactor program after Israel's June 7, 1981, bombing of the Osirak research reactor. Until the Israeli attack, Iraq had chosen plutonium over highly enriched uranium as the preferred fissile material for its nuclear weapons program. The Osirak research reactor, purchased from France in 1976, was unusually large and was therefore capable of irradiating uranium specimens to produce significant quantities of plutonium.<sup>40</sup> In spite of making progress in the high-explosive testing programme, Iraqi scientists were still struggling to master the high-explosive charges that must be precisely fabricated in order to produce homogeneous shock waves against the core after ignition.<sup>41</sup>

The IAEA concluded that the original plan of the Iraqi nuclear weapon program, as set out in 1988, was to produce a small arsenal of weapons, with the first one to be ready in 1991. While the weaponization team made significant progress in designing a workable device, the original deadline could not have been met because progress in the production of HEU--using the EMIS and gas-centrifuge processes--had lagged far behind. The fact that domestically produced HEU would not have been available for some time led Iraq to modify the objective of the original plan and to undertake the accelerated program.<sup>42</sup>

U.N. Resolution 1284, adopted in December 1999, calls for the streamlining of economic sanctions and for their eventual suspension once United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) has reported that Iraq is cooperating with U.N. resolutions on dismantling its WMD. This resolution remains the legal basis for continuing to control Iraq's assets, but Iraq has refused to allow UNMOVIC on the ground, insisting that the sanctions should be lifted since it has disarmed to the extent

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<sup>40</sup> *ibid*

<sup>41</sup> Thanos P. Dokos, *Countering the Proliferation of Weapons of Mass Destruction, NATO and EU Options in the Mediterranean and the middle East*, Contemporary Security Studies, Routledge US, 2008, p. 90

<sup>42</sup> Graham S. Pearson, *The Search for Iraq's Weapons of Mass Destruction, inspection, Verification and Non-Proliferation*, Global Issues, 2006, p. 108

called for by U.N. resolutions. U.N. Resolution 1284 places no limits on the volume of petroleum that Iraq can export for humanitarian needs.<sup>43</sup>

### **3.5.1. United Nations Security Council Resolutions to Iraq WMD Programme**

In March 2003 the US government declared that "diplomacy has failed" and that it would continue with a "coalition of willing" to liberate Iraq under Saddam Hussein of WMD, the US insisted it possessed. The 2003 invasion of Iraq started a few days later. Preceding to this decision, there had been much diplomacy and discussion amongst the members of the UNSC over the question how to deal with the situation.

Prior to 2002, the Security Council had passed 16 resolution on Iraq. In 2002, the SC unanimously passed Resolution 144. In 2003, the governments of the United States, Britain, and Spain and other coalition of willing states proposed another resolution on Iraq. This proposed resolution was consequently withdrawn when it became clear that several permanent members of the SC would cast no votes on any new resolution, thereby vetoing it.<sup>44</sup> Subsequently it would have become even more difficult for those having inclination to attack Iraq to argue that the Council had authorized the following invasion. Regardless of the threatened or likely vetoes, it seems that the coalition at no time was assured any more than four affirmative votes in the Council—the US, Britain, Spain, and Bulgaria—well short of the requirement for nine affirmative votes.<sup>45</sup>

In 1991 at the end of the Gulf war the Iraqi government agreed to Security Council Resolution 687,<sup>46</sup> which called for weapons inspectors to explore sites in Iraq for chemical, biological and nuclear weapons. After passing of the resolution 687, thirteen additional resolutions “ 699, 707, 715, 949, 1051, 1060, 1115, 1134, 1137, 1154, 1194, 1205, 1284” were passed by the Security Council reaffirming the continuance of

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<sup>43</sup> *ibid*

<sup>44</sup> By Tarik Kafala, *The veto and how to use it*, BBC News Online, Wednesday, 17 September 2003 [http://news.bbc.co.uk/2/hi/middle\\_east/2828985.stm](http://news.bbc.co.uk/2/hi/middle_east/2828985.stm)

<sup>45</sup> Ronan Bennett, *The Guardian*, Saturday 8 March 2008

<http://www.guardian.co.uk/world/2008/mar/08/iraq.unitednations>

<sup>46</sup> Resolution 687". United Nations Security Council.

inspections, or citing Iraq's failure to comply fully with them.<sup>47</sup> On September 9, 1998 the Security Council passed resolution 1194 which unanimously condemned Iraq's suspension of cooperation with UNSCOM, one month later on October 31 Iraq authoritatively declared it would stop all forms of communication with UNSCOM.

The period between October 31, 1998 and the beginning of Operation Desert Fox, December 16, 1998, held talks by the Iraqi government with the UN Security Council. During these talks Iraq attempted to attach conditions to the work of UNSCOM and the IAEA, which was against preceding resolutions calling for unqualified access. After weapons inspections recommenced, UNSCOM requested arms documents related to weapon usage and destruction during the Iran-Iraq WAR. The UN inspectors insisted in order to know if Iraq destroyed all of its weapons, it had to know "the total holdings of Iraq's chemical weapons." Further incidents erupted as Iraqi officials demanded "lists of things and materials" being searched for during surprise inspections.

On December 16, 1998, U.S. President Bill Clinton started Operation Desert Fox, based on Iraq's failure to fully comply with the inspectors. Clinton noted the announcement made by the Iraqi government on October 31, stating they would no longer cooperate with UNSCOM. Also noted was the numerous efforts to hinder UNSCOM officials, including prevention of photographing evidence and photocopying documents, as well as prevention of interviewing Iraqi personnel.<sup>48</sup>

The United States offered intelligence from the Central Intelligence Agency and British MIS to the UNSC suggesting that Iraq possessed WMD. The U.S. claimed that justification rested upon Iraq's violation of several U.N. Resolutions, most recently UN SC Resolution 1441.<sup>49</sup> U.S. president George W. Bush claimed Iraq's WMD posed a significant threat to the United States and its allies.<sup>50</sup> An inspection team UNMOVIC,

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<sup>47</sup> United Nations Special Commission, Establishment Composition Reporting Requirements Mandate, Rights Operational Activities, <http://www.un.org/Depts/unscom/General/basicfacts.html>

<sup>48</sup> Address by the President to the Nation on Iraq Air Strike" (Press release). The White House. 1998-12-16

<sup>49</sup> U.S. Secretary of State Colin Powell Addresses the U.N. Security Council" (Press release). The White House. 2003-02-05.

<sup>50</sup> "President Bush Addresses the Nation" (Press release). The White House. 2003-03-19.

before completing its UN-mandate or completing its report was ordered out by the UN because the US-led invasion appeared imminent.

### 3.5.2. UN Inspections before the Invasion on Iraq

Between the years 1991 and 1998, the UN Security Council assigned a task the United Nations Special Commission on Disarmament (UNSCOM) with finding, verifying and destroying Iraq's WMD. UNSCOM discovered evidence of constant biological weapons research and supervised destruction of the Al Hakam biological weapons production site - allegedly converted to a chicken feed plant.<sup>51</sup> In 1998, Scott Ritter, leader of a UNSCOM inspection team, found gaps in the prisoner records of Abu Ghraib when investigating allegations that prisoners had been used to test Anthrax weapons. Asked to explain the missing documents, the Iraqi government charged that Ritter was working for the CIA and refused to cooperate further with UNSCOM.

On August 26, 1998, just about two months before the U.S. ordered United Nations inspectors withdrawn from Iraq, Scott Ritter resigned from his office rather than participate in what he called the "illusion of arms control." In his resignation letter to Ambassador Butler,<sup>52</sup> Ritter wrote:

*"The sad truth is that Iraq today is not disarmed... UNSCOM has good reason to believe that there are significant numbers of proscribed weapons and related components and the means to manufacture such weapons unaccounted for in Iraq today ... Iraq has lied to the Special Commission and the world since day one concerning the true scope and nature of its proscribed programs and weapons systems."*

On September 7, 1998, in demonstration to the Senate Armed Services and Foreign Relations Committee,<sup>53</sup> Scott Ritter was asked by John McCain (R, AZ) whether UNSCOM had intelligence suggesting that Iraq had assembled the components for three

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<sup>51</sup> "The Inspections Maze". Christian Science Monitor. 2002. Retrieved 2011-04-28.

<sup>52</sup> Resignation Letter Retrieved 30 January 2011

<sup>53</sup> Testimony of Scott Ritter, former UNSCOM Inspector

nuclear weapons and all that it lacked was the fissile material. Ritter replied: "The Special Commission has intelligence information, which suggests that components necessary for three nuclear weapons exist, lacking the fissile material. Yes, sir."

On November 8, 2002, the United Nations Security Council approved Resolution 1441, giving Iraq "a final opportunity to comply with its disarmament obligations" as well as unrestricted inspections by the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) and the International Atomic Energy Agency (IAEA). Saddam Hussein acknowledged the resolution on November 13 and inspectors were invited to Iraq under the direction of UNMOVIC chairman Hans Blix and IAEA Director General Mohamed ElBaradei. Between that time and the time of the invasion, the IAEA "found no evidence or plausible indication of the revival of a nuclear weapons programme in Iraq"; the IAEA concluded that definite items which could have been used in nuclear enhancement centrifuges, such as aluminum tubes, were in fact intended for other purposes.<sup>54</sup> UNMOVIC "did not find evidence of the continuation or resumption of programmes of weapons of mass destruction" or large quantities of proscribed items. UNMOVIC did administer the destruction of a small number of empty chemical rocket warheads.

### **3.6. SEPTEMBER DOSSIER AND IRAQ WMD**

The British Government investigated the Iraq issue for WMD in Parliament. This assessment and investigation is also known as the September Dossier,<sup>55</sup> which ultimately led to the 2003 invasion on Iraq. It contained a number of allegations according to which Iraq also possessed WMD. The dossier even alleged that Iraq had reconstituted its nuclear weapons programme. Without exception, all of the allegations included within the

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<sup>54</sup> "Statements of the Director General". IAEA. Retrieved 2011-09-07.

<sup>55</sup> Dossier was a 2003 briefing document for the Blair Labour government. It was issued to journalists on 3 February 2003 by Alastair Campbell, Blair's Director of Communications and Strategy, and concerned Iraq and WMD. Together with the earlier September Dossier, these documents were ultimately used by the government to justify its involvement in the 2003 invasion of Iraq.

September Dossier have been since proven to be false, as shown by the Iraq Survey Group (ISG).<sup>56</sup>

It was the much-anticipated document based on reports made by the Joint Intelligence Committee, part of the British Intelligence 'machinery'. Most of the evidence was uncredited, ostensibly in order to protect sources. On publication, serious press comment was generally critical of the dossier for tameness and for the seeming lack of any genuinely new evidence. Those politically opposed to military action against Iraq generally agreed that the dossier was unremarkable, with Menzies Campbell observing in the House of the Commons that:

*"We can also agree that Saddam Hussein most certainly has chemical and biological weapons and is working towards a nuclear capability. The dossier contains confirmation of information that we either knew or most certainly should have been willing to assume."*<sup>57</sup>

Nevertheless, two sections later became the centre of violent debate: (1) the allegation that Iraq had sought *"significant quantities of uranium from Africa"*, and (2) the claim in the foreword to the document written by British Prime Minister Tony Blair that *"The document discloses that his military planning allows for some of the WMD to be ready within 45 minutes of an order to use them."*

Even the daily newspapers, *The Sun*, carried the headline *"Brits 45 Mins from Doom"* and the *Star* reported *"Mad Saddam Ready to Attack: 45 Minutes from a Chemical War"*, helping to create the impression among the British public that Iraq was a threat to Britain.

The claim that Iraq was seeking to buy uranium from Africa was repeated in George W. Bush's State of the Union Address, January, 2003. The controversial 16 words used by US President George W. Bush on 28 January 2003 were:

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<sup>56</sup> September Dossier

[http://en.wikipedia.org/wiki/September\\_Dossier](http://en.wikipedia.org/wiki/September_Dossier)

<sup>57</sup> *ibid*



*"The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa."<sup>58</sup>*

In March the IAEA, when it finally obtained the documents referred to by Collin Powell to the UNSC alleging transactions between Niger and Iraq, concluded that they were obvious fakes.<sup>59</sup>

British Foreign Secretary Jack Straw told the Foreign Affairs Select Committee (which was investigating the veracity of the claims in the dossier) that the statement in the dossier rested on separate evidence which was still under review, and that this specific intelligence had not been shared with the CIA. In written evidence to the same committee, however, Jack Straw further disclosed that the intelligence information upon which the British Government had relied was shared separately with the IAEA by a foreign government shortly before their report of 7 March 2003.<sup>60</sup> This was further confirmed in a Parliamentary answer to Lynne Jones MP.<sup>61</sup> Lynne Jones subsequently contacted the IAEA to question whether a third party had discussed or shared separate intelligence with them and, if so, what assessment they made of it. IAEA spokesman Mark Gwozdecky responded to Jones in May 2004:

*"I can confirm to you that we have received information from a number of member states regarding the allegation that Iraq sought to acquire uranium from Niger. However, we have learned nothing which would cause us to change the conclusion we reported to the United Nations Security Council on March 7, 2003."<sup>62</sup>*

The Butler Commission appointed by Blair reviewed and made a specific conclusion on Bush's 16 words: "By extension, we conclude also that the statement in President Bush's

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<sup>58</sup> "Whitehouse: President Delivers 'State of the Union'". [Georgewbush-whitehouse.archives.gov](http://Georgewbush-whitehouse.archives.gov). 2003-01-28. Retrieved 25.10.2011.

<sup>59</sup> Ensor, David (14 March 2003). "Fake Iraq documents 'embarrassing' for US". CNN. Retrieved 15.10.2011

<sup>60</sup> Iraqi Attempts to Procure Uranium . July 2003.

<sup>61</sup> Foreign and Commonwealth Affairs, 30 January, 2004

<sup>62</sup> The uranium from Africa claim [Lynnejones.org.uk](http://Lynnejones.org.uk)

State of the Union Address of 28 January 2003 that 'The British Government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa' was well-founded."

### **3.6.1. The 45 minute claim and Saddam as a Immense Threat to UK and US**

The 45 minute claim lies at the centre of a row between Downing Street and the BBC. On 29 May 2003, BBC defence correspondent Andrew Gilligan filed a report for BBC 4's Today programme in which he stated that an unnamed source - a senior British official - had told him that the September Dossier had been "sexed up", and that the intelligence agencies were concerned about some "dubious" information contained within it - specifically the claim that Saddam Hussein could deploy WMD within 45 minutes of an order to use them.

Now no one was ready to accept the insertion of the claim, Gilligan expanded that the government's director of communications, Alastair Campbell, had been responsible for the insertion of the 45 minute claim. On 15 September, the head of MI6<sup>63</sup> Richard Dearlove<sup>64</sup> told the Hutton Inquiry<sup>65</sup> that the claim related to battlefield WMD rather than weapons of mass destruction of a larger range than just battlefield.<sup>66</sup> On the same day, Tony Cragg, the retired deputy chief of defence intelligence, admitted there were memos from two members of Defence Intelligence Staff (DIS) objecting that parts of the dossier, including the 45-minute claim, was "far too strong" or "over-egged".<sup>67</sup>

On 28 January 2004, the Hutton Inquiry released its report, which among other things concluded that:

"Mr Gilligan accepted that he had made errors" about the 45 minute claim; specifically, his report that the government "probably knew that the 45 minutes claim was wrong or questionable. Information surfacing in late 2009 initially appeared to suggest that the

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<sup>63</sup> MI6 is a British Secret Intelligence Service

<sup>64</sup> Head of the British Secret Intelligence Service (MI6) from 1999 until 6 May 2004.

<sup>65</sup> The Hutton Inquiry was a 2003 Judicial Inquiry in the UK chaired by Lord Hutton, who was appointed by the Labour government to investigate the circumstances surrounding the death of Dr. David Kelly.

<sup>66</sup> "Ex-spy chief says Iraqi WMD claims not manipulated". BBC News. 2009-12-08. Retrieved 12.8.2011

<sup>67</sup> Memo reveals high-level dossier concern, Mathew Tempest, The Guardian, 15 September 2003

source of the 45 minute claim was in fact a taxi driver "on the Iraqi-Jordanian border, who had remembered an overheard conversation in the back of his cab a full two years earlier".<sup>68</sup>

The following day, 30 May 2003, the Ministry of Defence claimed that one of its officials (later named as Dr. David Kelly) had come forward, admitting to having discussed the matter of Iraq's weapons with Gilligan on 22 May. The BBC responded by saying that Kelly differed from Gilligan's key source in "important ways". Kelly was subsequently called before the Foreign Affairs Select Committee whose conclusion was that Kelly was being used as a scapegoat and that he had not been Gilligan's key mole.

On 17 July, Gilligan gave evidence to a private session of the Select Committee, and was subsequently criticised for not naming his source, and for changing his story. The BBC continued to stand by him.

On 20 July, Richard Sambrook, director of news at the BBC, revealed that Kelly was indeed the key source for Gilligan's report, and that the BBC had not said so before so as to protect Kelly. The BBC stressed that Gilligan's reporting accurately reflected Kelly's comments, implying that Kelly had not been entirely truthful with the Select Committee. An inquest into the cause of the death was begun, but was suspended by Lord Falconer.<sup>69</sup> The BBC committed to assisting fully with the then forthcoming Hutton Inquiry into Kelly's death.

Hutton was "satisfied that Dr Kelly did not say to Mr Gilligan" certain dramatic statements which Gilligan had reported as quotations. Regarding certain other statements (reported by Gilligan as quotations but also denied by Dr. Kelly), it was "not possible to reach a definite conclusion" whether it was Gilligan or Dr. Kelly who had lied.

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<sup>68</sup> Andrew Sparrow, senior political correspondent (2009-12-08). "45-minutes WMD claim 'may have come from an Iraqi taxi driver' | Politics | guardian.co.uk". London: Guardian. Retrieved 17.10.2011.

<sup>69</sup> Siddique, Haroon (13 August 2010). "Experts call for David Kelly inquest". The Guardian (London). Retrieved 13.10. 2011.

### 3.6.2. President Bush's Arguments to the

#### United Nations General Assembly

In the wake of 9/11 attack, President Bush demonstrated to the United Nations General Assembly that the outlaw group or regime like that of Saddam was challenge for US security, where the UN Commission on Human Rights had found that Iraq continues to commit extremely grave violations of human rights and defying the UN demands.<sup>70</sup>

Bush stressed his argument to the UN General Assembly pointing to the SC Resolutions that Iraq renounced all the demands of UN to give up all involvement to terrorism. He further argued that,

*"In violation of Security Council Resolution 1373, Iraq continues to shelter and support terrorist organizations that direct violence against Iran, Israel, and Western governments... Iraq's government openly praised the attacks of September the 11th. And al Qaeda terrorists escaped from Afghanistan and are known to be in Iraq."*<sup>71</sup>

President Bush reminded the UN General Assembly that under SC Resolution 687 in 1991, the Iraqi regime agreed to destroy and stop developing all WMD and long-range missiles, and to prove to the world it has done so by complying with rigorous inspections. He added that Iraq had broken all aspects of this fundamental pledge.

*United Nations' inspections also revealed that Iraq likely maintains stockpiles of VX, mustard and other chemical agents, and that the regime is rebuilding and expanding facilities capable of producing chemical weapons.*<sup>72</sup>

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<sup>70</sup> President George W. Bush, Remarks at the United Nations General Assembly, New York, September 12, 2002

<http://www.state.gov> for Senior State Department

<sup>71</sup> Ibid

<sup>72</sup> Ibid

President Bush actually was trying to convince the General Assembly to authorize a SC Resolution to invade Iraq. Like US Secretary of Collin Powell, Bush left no leaf unturned to hatch plan by hook or by crook to induce the UN authorities to permit to attack Iraq,

*"Today, Iraq continues to withhold important information about its nuclear program, weapons design, procurement logs, experiment data, an accounting of nuclear materials and documentation of foreign assistance. Iraq employs capable nuclear scientists and technicians. It retains physical infrastructure needed to build a nuclear weapon. Iraq has made several attempts to buy high-strength aluminum tubes used to enrich uranium for a nuclear weapon."*

Conclusively President Bush demanded the easy passage to Saddam,

*"If the Iraqi regime wishes peace, it will immediately and unconditionally forswear, disclose, and remove or destroy all WMD, long-range missiles, and all related material... It will immediately end all support for terrorism and act to suppress it, as all states are required to do by U.N. Security Council resolutions."*<sup>73</sup>

President Bush argued that Saddam regime was a threat for US, the Middle East and for the stability of the region because, *"with every step the Iraqi regime takes toward gaining and deploying the most terrible weapons, our own options to confront that regime will narrow. And if an emboldened regime were to supply these weapons to terrorist allies, then the attacks of September the 11th would be a prelude to far greater horrors."*<sup>74</sup>

### **3.6.3. Powell Addresses the U.N. Security Council**

On February 6, 2003, US Secretary of State Collin Powell appeared before the United Nations to "prove" the urgency to wage a war with Iraq. Although the presentation failed to change the fundamental position of the Security Council, including France, Russia, China, and Germany, yet Powell succeeded in hardening the general tone of the United Nations towards Iraq. Powell also claimed that Iraq harboured a terrorist network of al-

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<sup>73</sup> President George W. Bush, Remarks at the United Nations General Assembly, New York, September 12, 2002.

<sup>74</sup> *ibid*

Qaeda operative Abu Musab al-Zarqawi.. Powell also showed photos of what he said was a poison and explosives training camp in northeast Iraq, operated by the group. When this camp was visited by a British journalist two days later, all that was found was a few dilapidated buildings and no evidence or signs of any terrorist activity, chemical or explosives. Powell alleged that these training camps had been operating with help from Iraqi agents, despite them being in the northern Iraqi Kurdistan "no fly zone", and thus outside of de facto Iraqi control. Powell also claimed that Iraqis visited Osama Bin Laden in Afghanistan and provided training to al-Qaeda members, although thousands of Arabs from many countries did the same. US intelligence have found no evidence of any substantive collaboration between Saddam Hussein and al-Qaeda.

#### **3.6.4. Weapons of Mass Destruction a Worldwide Threat**

The second major threat to the global security is Weapons of Mass Destruction (WMD). These weapons include the weapons formulated through chemical, nuclear and biological (NBC) substances<sup>75</sup>. All these kinds of weapons have been the area under discussion of numerous international regulations and instruments,<sup>76</sup> Nuclear weapons have been the focal point of attention since the current cases of terrorism. However, numerous efforts have been exercised to limit certain features interconnected to nuclear weapons. The Nuclear Weapons Advisory Opinion of the I.C.J. made clear that "there exists neither a conventional norm of general scope nor a customary norm specifically proscribing the threat or use of force of nuclear weapons per se."<sup>77</sup>

So the nuclear and biological weapons are threat for the whole world either they are in the hand of USA China Russia UK Germany or France. The threat of these deadly arsenals is not new. The United Nations Security Council and General Assembly tried to control and limit the nuclear weapons but this threat is still existing. After the event of

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<sup>75</sup> NATO Handbook, 2001, NATO Office of Information and Press 1110 Brussels – Belgium, ISBN 92-845-0146-6, HB0801EN, P. 144

<http://www.nato.int/docu/handbook/2001/pdf/handbook.pdf>

<sup>76</sup> The Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on their Destruction, General Assembly Resolution A/RES/47/39 (30 November 1992).

<sup>77</sup> International Court of Justice, *Reports of Judgments, Advisory Opinions and Orders, Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996. P 226

World Trade Centre it has become a severe issue not for UN but for US and its allies. The end of the last century with the end of cold war gave birth to modern issues like Global Terrorism (GT) Weapons of Mass Destruction (WMD) and the drift of inequality, which welcomed the 21<sup>st</sup> century in 2001, and has changed the international politics. "This current drift of the world is toward more and more intolerable inequality, an inequality of which most Americans are unaware. But the consequences of global inequality cannot be shielded from Americans forever, as this country learned with a shock on September 11, 2001."<sup>78</sup>

In addition to those threats which originate from terrorists activities, there is another kind of threat to states has come forward during the beginning of the 21<sup>st</sup> century: the latent and potential possession of nuclear, biological and chemical WMD.<sup>79</sup> The really apparent danger is not embedded on the mere possession of WMD, on the other hand, the majority of the states have realized this actuality that the outcome of WMD in the hands of rogue states (RS) may cause devastation.<sup>80</sup>

Particularly the Iraq's alleged enrichment and alleged possession of WMD<sup>81</sup> and the nuclear weapons programme of North Korea have provoked the question of significance and the gravity of danger posed by WMD. The menace posed by terrorist aggression or WMD cannot be limited to a specific region or only to particular states; in fact they cause worldwide threat to international, stability peace and security.

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<sup>78</sup> Peter Dale Scott, *The Road to 9/11; Wealth, Empire and the Future of America*; University of California Press, USA, 2007. P. 252

<sup>79</sup> The joint statement of the then-Ministers of the 15 member countries of the European Union on 16 June 2003: "Weapons of mass destruction were a threat to international peace and security".:

<sup>80</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, 66, in which the Court held that there is no comprehensive and universal prohibition of the threat or use of nuclear weapons as such; see also J A Ramírez, *Iraq War: Anticipatory Self-Defense or Unlawful Unilateralism?*, 34 California Western International Law Journal 1 (2003-2004), at 23. (cited from The "Bush Doctrine" and preemptive strike – a new approach in the right of self-defense? )

<sup>81</sup> US National Security strategy, 2002

### 3.7. THE TRADITIONAL SECURITY SYSTEM UNDER THE U.N. CHARTER

Since the establishment of the United Nations Charter, the right of a state to make use of military power against another state lawfully has been in principle abandoned.<sup>82</sup> Its Article 2(4) unequivocally conditions that,

*“all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations”.*

The inspiration of collective safety measures are unambiguously stated in the Preamble of the UN Charter, which articulate that *“armed forces shall not be used, save in the common interest”*, also in Article 1(1), which expresses as one of the principle of the U.N. *“to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace”*.

Collective security is the essential inspiration underlying the nations yielding the Security Council, in its wide-ranging powers under Chapter VII of the UN Charter. However there are, two commonly acknowledged exceptions to Article 2 (4). In accordance with the Article 51 of the UN Charter, a state which is the sufferer of an armed attack, may *“use individual or collective self-defense against the aggressor without prior authorization by the Security Council.”* In further, the Security Council, under Chapter VII, can take measures concerning the exercise of military force *“as may be necessary to maintain or restore international peace and security”* (Art. 42), in response *“to a threat to the peace, a breach of the peace or an act of aggression.”*<sup>83</sup>

Moreover these Charter-based exceptions to the prohibition of the use of force, one more exception can be sought in customary law, that is, the right of anticipatory self-defense against *“imminent threats”*. In this era of modern technology and challenges of 20<sup>th</sup>

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<sup>82</sup> A Randelzhofer, *Article 2 (4)*, in: *The Charter of the United Nations, A Commentary*, Vol. I, 2<sup>nd</sup> edition (2001), ed. by B Simma, at 14; book or likhin

<sup>83</sup> United Nations Charter Article 39



century the security threats to global interests have changed at a fast speed, where the security system under the Charter and doctrine of customary law have remained in general unaltered. Now the world Superpower has not only crossed the boundaries of traditional security system but also has stemmed a new approach of Pre-emptive strike.

### **3.7.1. Security Council action under Chapter VII of the U.N. Charter Authority to Use Force**

The Security Council is one of the United Nations organs which under Article 24(1) has endowed with primary responsibility to seek the ancient goal of the U.N., that is, "*the maintenance of international peace and security*."<sup>84</sup> Article 24(2) clarifies that the definite powers approved to the Security Council for the discharge of these obligations are placed down, in Chapter VII.

The Article 39 of Chapter VII examines as: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security."

Article 39 has three probable consequences: "the Security Council can confine itself to mere recommendations" (Art. 39); "it can take or order measures not involving the use of armed force but such as economic sanctions" (Art. 41), or "it can take (or rather authorize states to take) measures involving, inter alia, the use of military force, such as operations by air, sea or land forces" (Art. 42).. A determination of Security Council is a essential prerequisite to enforce the provisions of Articles 41 and 42.<sup>85</sup>

In strict sense it means that the efficient employment of collective security against threat caused by the international terrorism and WMD depends completely on the Council's ruling of a threat to or violation of the peace, or an act of violence. Considering the determination of what comprises such danger or breach the Security Council. So, UN SC

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<sup>84</sup> UN Charter Article 51

<sup>85</sup> UN Charter ; Articles 39, 41 and 42 determine the power of the SC.

politically has the lawful natural edge under Article 39, that it enjoys a significant authority of discretion.<sup>86</sup>

### **3.7.2. Rogue States have Gravest Danger and Possession of WMD**

However the gravest danger lies at the crossroads between WMD and terrorism through technology is created by the rogue states, which have sufficient possession of WMD or have intention to seek such technology. As Bush adds in his National Security Strategy of 2002 "Our enemies have openly declared that they are seeking weapons of mass destruction; and evidence indicate that they are doing so with determination" "and have been caught seeking these terrible weapons."<sup>87</sup> he further added that they have been longing to utilize these weapons and nowadays ready to exercise them against their identified enemies. The rogue states are trying to provide transfer WMD to the embittered and non state actors or to the terrorist organizations. US has made number of allegations against Iraq and to justify invasion. Bush tried to prove that Iraq has ties with the terrorist organization al-Qaida and has possession of WMD.

### **3.8. ALLEGATIONS AGAINST IRAQ-- IMMINENT ATTACK AS A POTENTIAL THREAT**

The allegations made by US against Iraq have paved a way to act preemptively. The Chapter V of US National Security Strategy, 2002, identifies the Bush Doctrine and the right to strike preemptively against a "potential threat."<sup>88</sup> George W. Bush also raised the issue of Preemptive strike on Iraq in a very blurred manner, in his famous address to the United Nations General Assembly (GA) on September 12, 2002. Where he added that, *"The first time we may be completely certain that Saddam Hussein has nuclear weapon, he may use one day. We owe it to all our citizens to do everything in our power to prevent that day from coming."*<sup>89</sup>

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<sup>86</sup> *Prosecutor v Duško Tadic*, (ICTY Appeals Chamber of 2 October 1995), at 28; Frowein/Krisch, *Article 39 M Herdegen, Die Befugnisse des U.N. Sicherheitsrates*, (1998), at 14-15. (Available at Christina Claudia Fiebich, *The "Bush Doctrine" and preemptive strike – a new approach in the right of self-defense?*

<sup>87</sup> US NSS, 2002

<sup>88</sup> Bush's National Security Strategy, 2002

<sup>89</sup> Ibid

Bush expressed his views about the justification of preemptive strike in the recognition of international law as the US National Security Strategy describes, issued on only five days after his address to UN General Assembly, vehemently addressed out the U.S. situation on the right of preemptive self-defense: *"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."*<sup>90</sup> Unambiguously identifying the obligation of an "imminent threat", he described his views as a *"visible mobilization of armies, navy, and air forces preparing to attack"*.

So, countering the threat of the rogue states as possessing WMD President Bush vehemently argued his right of strike pre-emptively, where he boldly quoted,

*"The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively"<sup>91</sup>----* 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."<sup>92</sup>

Such doctrine of pre-emptive strike and the military action preemptively without the prior authorization of the world defence and security controlling organization encourages a wide notion in the ground of "unilateral engagement", as well as in the field of "pre-emptive self-defense." This unavoidable authority of the superpower transforms or even challenges the existing and well-documented and worldwide acceptable international law and doctrines, as well as international relations.

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<sup>90</sup> Ibid

<sup>91</sup> President Bush West Point, New York, June 1, 2001.

<sup>92</sup> United States National Security Strategy, 2002

The traditional notions of self-defense under Article 51 of UN Charter and customary law, the unilateral use of force is prohibited, but pre-emptive use of force according to the "Bush Doctrine" neither necessitates an actual armed attack nor an imminent armed attack, but regards as sufficient a potential threat to national security. It means, that terrorist bases or networks that are engaged in mere preparations for future attacks could be destroyed, or that WMD and their installations could be destroyed long before they can actually be employed. To put it in general terms, the "Bush Doctrine" allows (unilateral) action against emerging threats, before they are fully formed.<sup>93</sup>

In spite of the fact that the legality of the "Bush Doctrine" has often been heavily criticized; the doctrine's wide-ranging approach towards the unilateral use of force admittedly yields certain practical benefits, which - in the face of modern security challenges combined with the deficiency of the traditional system to counter these challenges - are anything but immaterial. Besides, a solid, strict and narrow argument in favor of the "Bush Doctrine" seems to be found in the very conception of "self-defense" itself.

### **3.8.1. United State's Defence of Pre-emptive Strike against Imminent Threat**

Under Art. 51 and the Caroline doctrine, the exercise of self-defense is restricted as being permissible against "armed attacks" and "imminent armed attacks" only. But, as the Atomic Energy Commission (AEC) has aptly stated, an armed attack pursuant to Article 51 "is now something entirely different from what it was prior to the discovery of atomic weapons".<sup>94</sup> The dropping of a single nuclear bomb could instantaneously destroy any capability for defense; preparations for counter-measures are either impossible or risk being useless, when the aggressor is to make the first strike. In this regard, Greenwood an international scholar has suggested a more flexible approach towards nuclear threats.

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<sup>93</sup> Lieutenant Colonel Steven d. Westphal, *United States Army, Counterterrorism: Policy of Preemptive Action, USAWC Strategy Research Project*, 2003

<sup>94</sup> Lieutenant Colonel Steven d. Westphal, *United States Army, Counterterrorism: Policy of Preemptive Action, USAWC Strategy Research Project*, 2003

While a threat posed by WMD can under certain circumstances be regarded as imminent, this is not necessarily the case with a potential attack carried out by conventional means.<sup>95</sup> Furthermore, the Legal Adviser to the Department of State, William H Taft IV, has noted that “in order to prevent a catastrophe resulting from an attack by WMD”, one must make sure that “the right of self defence attaches early enough to be meaningful and effective”.<sup>96</sup>

This, however, might not be the case if a state is obliged to wait until it is actually being attacked or until an imminent attack is almost unavoidable. The perception of “self-defense” not only vests a state with the opportunity to defend its territory, its independence, or other interests against damaging manner by others, but also imposes a duty and responsibility on the government towards its citizens to do so.<sup>97</sup> Yet, if policies of containment or deterrence do not work against rogue states or terrorist organizations, should a state, or rather must a state not be allowed more freedom and more flexibility to take action?

The danger of inaction is particularly obvious regarding the harm and suffering that WMD can cause, which is far greater than harm caused by conventional attacks or warfare. Is it thus not better to adopt the approach taken in the “Bush Doctrine” and prevent this harm before it is too late to do so? Would disallowing a state the right to a preemptive strike not mean undermining and rendering irrelevant the very concept of self-defense? On the other hand, is the concept of preemptive action as promoted in the “Bush Doctrine” necessarily the golden road to global security? This question will be answered by analyzing the implications of the doctrine, and in particular by thoroughly elaborating and weighing its dangers and disadvantages.<sup>98</sup>

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<sup>95</sup> Colonel David Diner, US Army, Colonel Thomas McShane, Project Advisor Preemptive Strike against Weapons of Mass Destruction: who's the rogue?

<http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA420090>

<sup>96</sup> Lieutenant Colonel Steven d. Westphal, United States Army, Counterterrorism: Policy of Preemptive Action, USAWC Strategy Research Project, 2003, *IPRI Journal* X, no.1 (Winter 2010): 22-49 <http://ipripak.org/journal/winter2010/Article2>.

<sup>97</sup> Lieutenant Colonel Steven d. Westphal, United States Army, Counterterrorism: Policy of Preemptive Action, USAWC Strategy Research Project, 2003, *IPRI Journal* X, no.1 (Winter 2010): 22-49 <http://ipripak.org/journal/winter2010/Article2>.

<sup>98</sup> Lieutenant Colonel Steven d. Westphal, United States Army, Counterterrorism: Policy of Preemptive Action, USAWC Strategy Research Project, 2003

### 3.9. CONCLUSION

In international law, the scope of the right of self-defence, with respect to anticipatory self-defence has been controversial issue. In the past the anticipatory self-defence appears to be recognized rule of international customary law. Nonetheless, anticipatory self-defence can only be compatible with international rule when the narrow requirements of “imminence, necessity and exhaustion or impracticability of peaceful means are satisfied”,<sup>99</sup> which means that evidence of expected attack is in sufficient amount. Basically the UN Charter system prohibits the unilateral use of force, but with the only exception in Article 51,<sup>100</sup> and with another exception to use of force with the recommendation of UN Security Council under Article 39.<sup>101</sup> But Article 2(4)<sup>102</sup> still strongly prohibits the use of force against the territorial integrity or political independence of a state.

The latent threat to WMD, potential terrorist activities and the reaction to the 9/11 attacks invoked the Bush Doctrine of preemptive self-defence. There is no state practice, opinio juris on this issue and even has not been recognized as a new rule in international law.<sup>103</sup> Moreover, the Bush Doctrine is not consistent with Article 51 of the UN Charter and international customary law on self-defence, particularly in the case of “Operation Iraqi Freedom (OIF).”<sup>104</sup> The obligations of self-defence were not satisfied on OIF, because there was neither actual armed attack was exercised by Iraq on the U.S. soil, nor any

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<sup>99</sup> Abdul Gafur Hamid *The Legality of Anticipatory Self-Defence in the 21<sup>st</sup> Century World Order : A Appraisal*, *Netherland International Law Review*, Vol.54, Issue 3(2007), p. 461

<sup>100</sup> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

<sup>101</sup> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

<sup>102</sup> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations

<sup>103</sup> Nicholas J. Wheeler, *The Bush Doctrine: the Dangers of American Exceptionalism in a Revolutionary Age*, *Asian Preemptive* Vol. 27, No. 4, 2003, 183-216

<sup>104</sup> George w. Bush's address on Start of Iraq War, [guardian.co.uk](http://www.guardian.co.uk/world/2003/mar/20/iraq.georgebush), Thursday, 20, March, 2003, 04.18. GMT <http://www.guardian.co.uk/world/2003/mar/20/iraq.georgebush>

confirmed evidence of any Iraqi plans for an attack or of Iraqi competent authority for such horrible invasion was found guilty.

This new U.S. strategy on preemptive self-defense appears to be very problematical in international law, as it specifies a withdrawal from the security hierarchy of the UN Charter. The Bush Doctrine is not only jurisprudentially suspected, but it is also deliberately dubious.<sup>105</sup> The Bush Doctrine's wide-range scope of anticipatory self-defense develops a risks setting and a dangerous precedent, which can without difficulty be manipulated. It does not reckon a state practice and reciprocity, a fundamental standard of global law. US hegemonic system of invasion under the doctrine out of preemption, persuade a perception of superpower's conceit haughtiness, arrogance and unilateralism.

In case of necessity of use of force, the global-wide community recommends multilateralism, rather than the unilateral action in self-defence. Only the United Nations Security Council should observe the authority for deciding on the issuance of the use of force, with the exception of the cases where the forthcoming attack is imminent and inevitable and that there is no time for a Security Council authorization, which recommends under the criteria of a solid evidence.<sup>106</sup> The US invasion on Iraq demonstrates this significantly. A superpower like the U.S. can devastate a proportionately weak state like Iraq easily. But it sheds a number of questions behind subsequently. "Can it deal with the consequences? Is it willing to pay the high cost, monetarily and humanitarian, of an occupation which may be arguably illegal?"

The threat of terrorism and the proliferation of WMD certainly is a massive challenge to the present international security system. In my estimation, a solution can only be accomplished, when the UN members are under international agreement and prior authorization of actions to be vested in the hand of UN SC.

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<sup>105</sup> Walter Pincus and Dana Milbank, *Bush Clings to Dubious Allegations on Iraq*: Washington Post Staff writers:2003, P. A13

<sup>106</sup>2003 Invasion of Iraq,

[http://en.wikipedia.org/wiki/2003\\_invasion\\_of\\_Iraq#Rationale\\_based\\_on\\_faulty\\_evidence](http://en.wikipedia.org/wiki/2003_invasion_of_Iraq#Rationale_based_on_faulty_evidence)

## **CHAPTER IV**

### ***PRE-EMPTIVE STRIKE ON IRAQ..... AN APPARENT VIOLATION OF INTERNATIONAL LAW***

#### **4. INTRODUCTION**

The legality of the invasion on Iraq by the United States, United Kingdom, and coalition of willing has been widely debated since it launched in 2003. In September 2004, UN Secretary-General Kofi Annan said that:<sup>1</sup> *"From our point of view and the UN Charter point of view, the war was illegal."*<sup>2</sup> The political leaders of the US and UK have argued that the war was legal, while many legal experts and other international leaders have argued that it was illegal. US and UK officials have argued that existing UN Security Council resolutions related to the first Persian Gulf War and the subsequent ceasefire (660, 678), and to later inspections of Iraqi weapons programs (1441), had already authorized the invasion. Critics of the invasion have challenged both of these assertions, arguing that an additional Security Council resolution, which US and UK failed to obtain, would have been necessary to specifically authorize the invasion.<sup>3</sup>

The UN Security Council, as stated in Article 39 of the UN Charter, has the authority to determine the existence of any threat to the peace, breach of the peace, or act of aggression and makes recommendations, or decide what measures shall be taken in, to maintain or restore international peace. The United States and the United Kingdom have

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<sup>1</sup> Ewen MacAskill and Julian Borger in Washington (2004-09-16). *"Iraq war was illegal and breached UN charter, says Annan"*

<sup>2</sup> "Iraq war illegal, says Annan". BBC News. 16 September 2004. Retrieved 2010-05-25.  
[http://en.wikipedia.org/wiki/Legality\\_of\\_the\\_Iraq\\_War](http://en.wikipedia.org/wiki/Legality_of_the_Iraq_War)

<sup>3</sup> O'Connell, Mary Ellen (November 21, 2002). "UN RESOLUTION 1441: COMPELLING SADDAM, RESTRAINING BUSH". Jurist. Retrieved 2011-05-25.



veto power in the Security Council, so action taken by the Security Council becomes highly questionable if US or UK veto the issue.<sup>4</sup>

Strike on WTC was a first attack against United States on its territory, since the approval of UN Charter,<sup>5</sup> which US considered as an armed attack and responded it as Operation Enduring Freedom (OEF), including a proposal to attack Iraq.<sup>6</sup> The plan to invade Iraq and get the hold of the country with the elimination of Iraq's leadership of Ba'ath regime which has continued the development of WMD, and those weapons might again be used against the enemy, or deliver the WMD to the terrorists.<sup>7</sup> The planning for invasion looks for, to preempt any danger by removing the dictator who might approve such attack or support others to do so.

Such strategic planning founded on a notion of preemptive self-defense.<sup>8</sup> Nevertheless, Preemptive self-defence, is clearly illegitimate and unlawful under international law. Armed action in self-defense is permitted only against armed attack if it has occurred.<sup>9</sup> Thus, the reality is that the United States has no right to use force to prevent possible, as distinct from actual armed attacks. The further reality is that the United States does not advance its security or its moral standing in the world by doing so.

Some scholars of international law are of the opinion that pre-emptive strike in terms of self-defense should not be regarded as justifiable, but the United States, the claimant of the champion aspiration of human dignity has time and again supported the proscription

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<sup>4</sup> Taylor, Rachel S. "International Law - War in Iraq - United Nations - Iraq". World Press Review Online. Retrieved 2011-05-25

<sup>5</sup> O' Connell, Mary Mary Ellen, *Lawful Self-Defence to Terrorism*; 63U. Pitt. L. Rev.889 (2001-2002) <http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/upitt63&div=33&id=&page=>

<sup>6</sup> In addition to the Deputy Secretary of Defense, several former Republican Administration officials have favored military action, especially against Iraq. Former Secretary of State Lawrence Eagleburger, said, "You have to kill some of these people; even if they were not directly involved, they need to be hit." Richard Perle, *Next Stop Iraq*, (Nov. 30, 2001), <http://www.fpri.org/enotes/america-war.20011130.perle.nextstopiraq.html>.

<sup>7</sup> Carla Anne Robbins & Jeanne Cummings, *New Doctrine: How Bush Decided that Iraq's Hussein Must Be Ousted, Chilling Warnings in October Sparked Internal Debate on Preemptive Strategy*, A "Dirty Bomb" Scare in D.C., WALL ST. J., June 14, 2002, at A1.

<sup>8</sup> President Bush spoke of "preemption" in a speech on *combating terrorism* at West Point in May, 2002.

<sup>9</sup> United Nations Charter 1945, Article 51

on such pre-emptive exercise of military intervention.<sup>10</sup> The compelling reason to violate such practice of proscription of preemptive self-defence made by the United States is for its national security. The international community has never recommended such unauthorized strike against the territorial integrity and the political independence of a sovereign state. In consequence, the fact is that the US has no right to make use of force to stop a potential and anticipatory latent, cover and buried attack as discrete from actual and tangible armed attacks. Another factual point here is that the United States does not move so forward to advance its security or exercise its moral reputation in the world by striking first on shadowy and dormant danger of WMD.<sup>11</sup> If a latent threat is so frightening then what would be the intensity of the existing chemical and nuclear weapons promoting countries like United States and Russia?

#### **4.1. LEGALITY OF INVASION UNDER THE US CONSTITUTION**

The "Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq," in October 2, 2002 was passed by the US President George W. Bush, with the support of Congress. By the Constitution of the United States, the fight for anti-United States terrorism was authorized.<sup>12</sup> The previous Iraq Liberation Act 1998 was restated that the policy of the United States would be to "remove the Saddam Hussein regime and promote a democratic replacement."<sup>13</sup> This resolution also "supported" and "encouraged" the political and ambassadorial efforts by the President George W. Bush to "strictly enforce through the U.N. Security Council all relevant Security Council resolutions regarding Iraq" and "obtain prompt and decisive action by the Security Council to ensure that Iraq abandons its strategy of delay, evasion, and noncompliance and promptly and strictly complies with all relevant Security Council resolutions regarding Iraq."<sup>14</sup>

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<sup>10</sup> Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense*. The American Society of International Law (ASIL), Task Force on Terrorism, August, 2002.

<sup>11</sup> Ibid

<sup>12</sup> David M. Malone, Ed. *The UN Security Council, From the Cold War to the 21<sup>st</sup> Century*; Lynne Rienner Publishers, USA, 2006, p. 139-142 2003 Invasion of Iraq.

[http://en.wikipedia.org/wiki/2003\\_invasion\\_of\\_Iraq#Legality\\_of\\_invasion](http://en.wikipedia.org/wiki/2003_invasion_of_Iraq#Legality_of_invasion)

<sup>13</sup> Iraq Liberation Act

[http://en.wikipedia.org/wiki/Iraq\\_Liberation\\_Act\\_of\\_1998](http://en.wikipedia.org/wiki/Iraq_Liberation_Act_of_1998)

<sup>14</sup> Ahmad Ijaz Malik, Dr. Pervaiz Iqbal Cheema, Ed., *An Evaluation of Preemption in Iraq Legality of the Iraq War*, Islamabad Policy Research Institute, 2004, P.4

Through resolution President Bush was authorized to use the Armed Forces against Iraq "as he determines necessary and appropriate to "defend the national security of the United States against the continuing threat posed by Iraq; and enforced all relevant United Nations Security Council Resolutions regarding Iraq."<sup>15</sup>

Since its commencement the legality of the Iraq war has been challenged on several forums, and a number of well-known backers of the Iraq invasion of all the invading nations have expressed doubt on its legality. US claims that invasion on Iraq was legal because the authorization was signified by the United Nations Security Council. The International Commission of Jurists, the scholars of international law, the US Lawyers of Committee on Nuclear Policy, and a group of thirty one Canadian professors in law, have condemned the rationale imposed by US and its allies to legitimize war against Iraq. Richard Perle, a Bush's administration senior member of US Defence Policy Board Advisory Committee has admitted that US invasion on Iraq was illegal.<sup>16</sup>

#### **4.1.1. Self-defence under International Law**

The United Nations Charter imagines a legitimate exercise of force in only two circumstances: firstly in individual or collective self-defence,<sup>17</sup> secondly when authorized through the mandate from the UN Security Council under Chapter VII of the Charter. Some scholars of international law claim that a state may also intervene militarily to rescue its nationals who are in risk overseas,<sup>18</sup> without the Security Council authorization,<sup>19</sup> but with the prior consent of the territorial state.<sup>20</sup>

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[http://en.wikipedia.org/wiki/Legality\\_of\\_the\\_Iraq\\_War](http://en.wikipedia.org/wiki/Legality_of_the_Iraq_War)

<sup>15</sup> *ibid*

<sup>16</sup> UN SC Resolution 1441, "Links to Opinions of Legality of War Against Iraq". Robincmiller.com. Retrieved 2009-09-13.

<sup>17</sup> There must be the existence, or imminence, of a serious humanitarian situation variously described as an overwhelming humanitarian catastrophe/gross and egregious human rights violations/an exceptional and most serious situation of emergency.

<sup>18</sup> One such lawyer is Judge Rosalyn Higgins. See Ian Brownlie & C.J. Apperley, Kosovo Crisis Inquiry: Memorandum on the International Law Aspects, 49 INTL & COMP. L.Q. 878, 892-93 (2000). For example, many commentators seemed to regard as self-defense the actions of the Israeli military in rescuing the occupants of a hijacked aircraft at Entebbe in 1976. See, e.g., Malcolm Shaw, International

#### 4.1.2. Justification of Pre-emptive Self-strike under United Nations Security Council Resolutions

In 1991 Operation Desert Storm (ODS) against Iraq was launched on the ground of SC Resolution 678 of 1990. The legality of the operation was not controversial and disputed because the invasion was made under the unanimous decision among the various member nations of the United Nations. The subsequent US and the coalition of willing strike on Iraq in 2003, has characterized in disagreement among the various nations of the world with regard to the legality of the unilateral action.<sup>21</sup> The disagreement with respect to the military intervention against Iraq by 46<sup>22</sup> coalition of willing states of the world, mainly by US, UK Australia and other states in 2003, has highly ever been condemned globally and at international level resistance and demonstrations were raised.

The major ground of US invasion on Iraq was the threat of WMD. So, Bush made this threat, the major pretext to attack Iraq. The criteria to determine of legality of attack must be established UN SC authorization under its regular resolutions. Except Resolution 678<sup>23</sup> adopted at the start of the Gulf War, the UN Security Council has never passed a resolution regarding the authorization of use of force against Iraq. The Resolution 678 authorized the UN member states "to use all necessary means to uphold and implement Resolution 660<sup>24</sup> and all subsequent relevant resolutions and to restore international peace and security in the area." The major function of Resolution 660 was to repair the

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Law 1032-34 (2003); Antonio Cassese, *International Law* 313-16 (2001); Yoram Dinstein, *War, Aggression and Self-Defence* 203-37 (2001).

<sup>19</sup> Rogers, A.P.V.; *Humanitarian Intervention and International Law* ; Pub. Howard Journal of Law and Public Policy; June 22,2004.

<sup>20</sup> Collective self-defense requires a request by the state that regards itself as a victim of an armed attack. See *Military and Paramilitary Activities (Nicaragua. v. U.S.)*, 1986 (June 27). I.C.J. p. 14, 105

<sup>21</sup> Christine Gray 2002 *EJIL* 1-19. Available at *European Journal of International Law (Oxford Journal of International Law.)* <http://ejil.oxfordjournals.org/reports/most-cited> ( Cited on 25-6-2011)

<sup>22</sup> Article Coalition of the willing,

[http://en.wikipedia.org/wiki/Coalition\\_of\\_the\\_willing](http://en.wikipedia.org/wiki/Coalition_of_the_willing)

<sup>23</sup> *Security Council Resolution 678* of 1990. The ICJ also referred to the gravity of an attack in the *Nicaragua* case and emphasized that an armed attack must be on a greater scale and effects than a mere frontier incident. Par 195; *Nicaragua* case. Resolutions of the Security Council can be found at <http://www.un.org/documents/scres.htm>.

All resolutions relating to Iraq can also be found at <http://www.casi.org.uk/info/sciraq.html>. It is impossible to explore all resolutions pertaining to Iraq and therefore only the most relevant resolutions will be highlighted.

<sup>24</sup> *Security Council Resolution 660* of 1990.

sovereignty of Kuwait. When the target under Resolution 678 was achieved the step for ceasefire was constituted under Resolution 687. Iraq agreed to embrace the terms and conditions of Resolution 687<sup>25</sup> and the provisional ceasefire under resolution 686<sup>26</sup> was embodied into a stable ceasefire.<sup>27</sup>

In terms of justification of attack on Iraq, regarding the Security Council Resolutions, US arguments are two folded. US argued that Iraq non-compliance with the terms of the Resolution 678 has restored the authorization to employ force.<sup>28</sup> US stressed that Iraq had contravened the obligations of ceasefire in terms of the different Resolutions 687, 707<sup>29</sup>, 715<sup>30</sup>, 1154<sup>31</sup>, 1194<sup>32</sup> and 1205<sup>33</sup>. Under this contravention US exercised the coalition forces and launched Operation Desert Fox in 1998 to sustain the Resolution 678. The Resolution 687 brought an agreement of ceasefire between UN and Iraq.

The employment of use of force again on the ground of material contravention of the obligations of the cease-fire does not amount to the right to exercise armed force individually without the prior new authorization of UN Security Council.<sup>34</sup> The infringement has been exercised by Iraq against the Resolution of SC, which is the party to the agreement of cease-fire and SC itself must make a decision with regard to material breach of agreement and how to respond in such circumstances. Actually, US ignored the laws constituted by the UN in Chapter VII of the UN Charter.<sup>35</sup>

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<sup>25</sup> *Security Council Resolution 687 of 1991.*

<sup>26</sup> *Security Council Resolution 686 of 1991.*

<sup>27</sup> Lobel and Ratner 1999 *AJIL* 148. *Resolution 687* contains detailed requirements, such as the destruction of chemical and biological weapons with a range greater than one hundred and fifty kilometres; the setting up of a demilitarised zone; resolving the border dispute between Iraq and Kuwait and the continuance of economic sanctions against Iraq.

<sup>28</sup> Gray 2002 *EJIL* 12.

<sup>29</sup> *Security Council Resolution 707 of 1991.*

<sup>30</sup> *Security Council Resolution 715 of 1995.*

<sup>31</sup> *Security Council Resolution 1154 of 1998.*

<sup>32</sup> *Security Council Resolution 1194 of 1998.*

<sup>33</sup> *Security Council Resolution 1205 of 1998.*

<sup>34</sup> Lobel and Ratner 1999 *AJIL* 144; Murswiek 2003 *NJW* 1016.

(Taken from W Scholtz the Changing Rules of *jus ad bellum*: Conflicts in Kosovo, Iraq and Afghanistan )

<sup>35</sup> W Scholtz the *Changing Rules of jus ad bellum: Conflicts in Kosovo, Iraq and Afghanistan*

SC authorized the exercise of force through Resolution where Iraq absolutely breached the agreement.<sup>36</sup> Under the Resolution Operation Desert Fox was justified when Iraq repudiated to cooperate with the UN Weapons Inspectors. US justified its action against Iraq under the Resolutions 1154 and 1205. But these Resolutions do not expressly refer to the use of force and resume the old after a long gap.

Resolution 1441 was significant which affirmed that, *"an enhanced inspection regime with the aim of bringing to full and verified completion the disarmament process,"* stresses that Iraq provided an *"accurate, full, and complete"* announcement of its prohibited weapons program, recollects that *"the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations,"* and *"decides to remain seized of the matter."*

Although after all these proceedings, by the UN Security Council it can be stated that the United Nations has not in fact allowed US to use military power against the sovereignty of Iraq, yet there exists under Article 51 or under Resolution 678 which states the total independence on the part of any UN member to employ military force against Iraq at any point that any member considers there to have been a infringement of the conditions lay down in Resolution 687, is to formulate a absolute mockery of the whole system.<sup>37</sup> Thomas Franck, Professor of International Law, New York University,<sup>38</sup> states that *"It appears apparent that there is no lawful basis for the U.S. and U.K. to uphold that previous Council resolutions permit them to attack Iraq in absence of a new resolution with suitable language authorizing force."*

*Let us examine the list of UN Security Council's Resolutions concerning Iraq.*

#### ***List of United Nations Resolutions Concerning Iraq***

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<sup>36</sup> Gray 2002 *EJIL* 11.

<sup>37</sup> T. Franck, *"Legal Authority for the Possible Use of Force Against Iraq,"* p. 139, ASIL Proceedings (1998).

(taken from Tearing up the Rules: The Illegality of Invading Iraq; March 2003; The Center for Economic and Social Rights; Emergency Campaign on Iraq ; 162 Montague Street \* Brooklyn NY 11201 \* 718.237.9145 \* [www.cesr.org/iraq](http://www.cesr.org/iraq).)

<sup>38</sup> Tearing up the Rules: The Illegality of Invading Iraq; March 2003; The Center for Economic and Social Rights; Emergency Campaign on Iraq ; 162 Montague Street \* Brooklyn NY 11201 \* 718.237.9145 \* [www.cesr.org/iraq](http://www.cesr.org/iraq)

*The United Nations Security Council (UNSC) is the organ of the United Nations charged with maintaining peace and security among nations. While other organs of the United Nations only make recommendations to member governments, the Security Council has the power to make decisions which member governments are obliged to carry out under the UN Charter. The decisions of the Council are known as United Nations Security Council Resolutions.*

*There have been three major events in Iraq's history for which the UN has passed numerous resolutions: the Iran–Iraq War, the Persian Gulf War, and the Iraq Disarmament crisis leading up to and following the 2003 invasion of Iraq.*

<i>Resolution</i>	<i>Date</i>	<i>Vote</i>	<i>Concerns</i>
479	28 September 1980	Unanimous	<i>Noted the beginning of the Iran–Iraq War.</i>
514	12 July 1982	Unanimous	<i>Called for an end to the Iran–Iraq War.</i>
522	4 October 1982	Unanimous	<i>Called for an end to the Iran–Iraq War.</i>
540	31 October 1983	12-0-3	<i>Condemned violations of international law in the Iran–Iraq War.</i>
582	24 February 1986	Unanimous	<i>"Deplores" the use of chemical weapons in the Iran–Iraq War.</i>
588	8 October 1986	Unanimous	<i>Called for the implementation of resolution 582.</i>
598	20 July 1987	Unanimous	<i>Demanded an immediate cease-fire between Iran and Iraq; requested that the UN Secretary-General start an investigation to determine how the conflict started.</i>
612	9 May 1988		<i>Condemned the use of chemical weapons in the Iran–Iraq War, but did not single out Iraq as the only side to use them. Instead, the resolution said that the Security Council "Expects both sides to refrain from the future use of chemical weapons."</i>

619	9 August 1988		Created UNIIMOG to observe the implementation of a cease-fire for the Iran-Iraq War. Extended by resolutions 631, 642, 651, 671, 676 and 685. Terminated 28 February 1991.
620	26 August 1988		Condemned the use of chemical weapons in the Iran-Iraq War.
660	2 August 1990	14-0-1, Yemen abstaining	Condemned the Iraqi invasion of Kuwait and demanded a withdrawal of Iraqi troops. Supported by resolutions 662, 664, 665, 666, 667, 669, 670, 674, and 677.
661	6 August 1990	13-0-2, Cuba, Yemen	Placed economic sanctions on Iraq in response to the invasion of Kuwait.
678	29 November 1990	12-2-1	Authorized use of force against Iraq to "uphold and implement resolution 660 and all subsequent resolutions and to restore international peace and security in the area".
686	2 March 1991	11-1-3	Demanded Iraq's acceptance of all previous resolutions concerning the war with Kuwait.
687	3 April 1991	12-1-2	Formal ceasefire ending the Persian Gulf War, with the conditions that Iraq: <ul style="list-style-type: none"> <li>• Destroys all of its chemical and biological weapons and all ballistic missiles with a range greater than 150 km;</li> <li>• Agrees not to develop nuclear weapons;</li> <li>• Submits a declaration of its weapons programs and voluntarily agrees to on-site inspections.</li> </ul>
688	5 April 1991		Condemned the repression of Iraqi Kurds.
707	15 August 1991		Demands immediate, complete, full compliance with UNSCR 687.
715	11 October 1991		Approves United Nations Special Commission on Iraq and International Atomic Energy Agency inspection provisions.
833	27 May 1993		Acknowledges clarifications of Iraq-Kuwait border and United Nations Iraq-Kuwait Observation Mission (UNIKOM).



899	4 March 1994		Compensation payments to Iraqi private citizens whose assets remained on Kuwaiti territory following the demarcation of the Iraq-Kuwait border.
949	15 October 1994		Condemned the Iraqi military buildup on Kuwait border.
986	14 April 1995		Created the Oil-for-Food Programme. Supported by resolution 1111.
1051	27 March 1996	Unanimous	Created a mechanism to monitor Iraqi "dual use" import and exports.
1060	12 June 1996	Unanimous	Demands Iraq allow access to sites, weapons, transport and equipment by United Nations Special Commission weapons inspectors.
1284	17 December 1999	11-0-4	Changed the Iraqi inspection program from UNSCOM to UNMOVIC.
1441	8 November 2002	Unanimous	Gave Iraq "a final opportunity to comply with its disarmament obligations". After Hans Blix of UNMOVIC reported to the UN on 7 March 2003, the US, UK, and other members of the "coalition of the willing" declared that Iraq remained in material breach of resolution 687. Efforts aimed at a new Council resolution authorizing the invasion were aborted owing to resistance from other members of the Council including veto-wielding members. Iraq was invaded anyway, on 20 March.
1483	22 May 2003	14-0-1, Syria abstaining	Recognized the US and the UK as occupying powers under international law, with legitimate authority in Iraq. Removed economic sanctions imposed during the Gulf War.
1500	14 August 2003	14-0-1, Syria abstaining	Created the United Nations Assistance Mission for Iraq as a special representative of the UN Secretary General. Extended by resolutions 1557, 1619, and 1700.
1546	8 June 2004	Unanimous	Endorsed the dissolution of the Coalition Provisional Authority in favor of the Iraqi Interim Government as a step toward democracy.
1723	18 November 2006	Unanimous	Extended the mandate for Multinational Force Iraq until 31 December 2007.
1790	18 December 2007		Extended the mandate for Multinational Force Iraq until 31 December 2008.

*It shows no resolution has ever been passed to strike Iraq on potential threat of WMD.*

## 4.2. ILLEGALITY OF IRAQ INVASION

The US invasion on Iraq is illegal in terms of all the documentary records of UN Security Council. The Bush Administration was not capable to afford a sole proper justification for a pre-emptive strike. Only 4 members out of 15, of the Security Council voted in favour of war on Iraq. The major intention for the birth of the UN was to hamper the scourge, the unjustifiable death and brutal annihilation of human beings. The Preamble to the UN Charter articulates;<sup>39</sup>

*"to save succeeding generations from the scourge of war, to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."*

Michael Mandel a Canadian Law Professor and an economist expressed that US war on Iraq was an unlawful war;<sup>40</sup> "America's war on Iraq in 2003 was its third illegal war in just under four years. Each one was a blood horror, but the Iraq war distinguished itself both for its bloodiness and for the flagrancy of its illegality. It was virtually certified as illegal by a defeat at the Security Council so unspinnable that President Bush had to back down from his boast to make the members "show their cards" by forcing a vote."

US launched war against Iraq without the prior permission of UN Security Council developed into a war of aggression, as per the UN Charter, because it did not fall into the category of self-defence and was not approved as absolutely necessity<sup>41</sup> in the collective interest of international peace and security. According to the Nuremberg Tribunal, a war of aggression is the supreme international crime. No doubt that the US Congress

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<sup>39</sup> Preamble of UN Charter 1945 "we the peoples of the United Nations determined": "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrows to mankind, to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and For These Ends, to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest..."

<sup>40</sup> Michael Mandel a Canadian Law Professor, "America's war on Iraq in 2003 was its third illegal war in just under four years. Each one was a blood horror, but the Iraq war distinguished itself both for its bloodiness and for the flagrancy of its illegality. It was virtually certified as illegal by a defeat at the Security Council so unspinnable that President Bush had to back down from his boast to make the members "show their cards" by forcing a vote."

<sup>41</sup> Garda Ghista, *Preemptive Invasion and international Law* , December 14, 2005.

approved Bush to wage his war of aggression, which made the war legal as per present American practice but illegal as per the War Powers Act of the US Constitution. Furthermore, this never made it legal as per international law. In international law, any war of aggression constitutes a war crime and crimes against humanity.<sup>42</sup>

The most terrible and the worst feature of the supreme international crime committed by Bush and Administrators is that it he considers that he will not at all be punished for his crimes. When the invasion on Iraq first took place, "Amnesty International" and "Human Rights Watch" were determined about monitoring the laws and customs of war, but they never announced to the media that this war was aggressive and was illegal in the eye of international la.<sup>43</sup>

#### 4.3. PRINCIPAL RATIONALES TO ATTACK IRAQ

The UN Charter is the major source of international law.<sup>44</sup> All member states are legally bound to abide by the terms of UN Charter. UN Charter generally bans the exercise of force under Article 2(4)<sup>45</sup>, except when certain conditions are met. This rule was "enshrined in the United Nations Charter in 1945 for a good reason: to prevent states from using force as they felt so inclined", said Louise Doswald-Beck, Secretary-General International Commission of Jurists.<sup>46</sup>

In accordance with the Article 51 use of force is allowed when an armed attacked has occurred. So, in the absence of armed attack no one either US, UK or its coalition members is not allowed to attack Iraq. If from the adversary the threat is confirmed then

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<sup>42</sup> Nuremberg Principles, Principle vi

Available at; [http://en.wikipedia.org/wiki/Nuremberg\\_Principles](http://en.wikipedia.org/wiki/Nuremberg_Principles)

<sup>43</sup> Garda Ghista, *Preemptive Invasion and international Law*, December 14, 2005.

<sup>44</sup> Howard Friel and Richard Falk, "The Record of the Paper: How the New York Times Misreports Foreign Policy," Chapter I, Without Law of Facts, The United States Invades Iraq," pages 15-17, <http://books.google.com/books?id=LM7cRyu0voC&pg=PA15&dq=UN+Charter+Iraq+invasion+2003+violates&cd=1#v=onepage&q=&f=false>

<sup>45</sup> Article 2(4) of the UN Charter, <http://www.yale.edu/lawweb/avalon/un/unchart.htm#art2>

"All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."

<sup>46</sup> International Commission of Jurists, 18 March 2003, Iraq - ICJ Deplores Moves Toward a War of Aggression on Iraq

the UN Security Council itself authorized to use force. The US and its allies declared Iraq war through joint resolution<sup>47</sup> entirely legal because it had already been authorized by the UN SC Resolution. US resumed the previously demised authorization under temporarily suspended hostilities.

The International Commission of Jurists, US National Lawyers' Guild,<sup>48</sup> US Lawyers committee on Nuclear Policy, and other legal experts have noted Iraq war illegal, and were of the view that the war was without the prior authorization of SC.<sup>49</sup>

#### 4.3.1. Saddam's Link to Al-Qaeda

The Bush Administration focused a specific attention on alleged links between President Saddam Hussein and Jordanian terrorist Abu Musab al-Zarqawi, whom Powell called a "*collaborative of Osama Bin Laden*."<sup>50</sup> After Iraq invasion started, no evidence was marked between Al-Qaeda and Iraq's ties of terrorism, by intelligence agencies, like US CIA, the Defence Intelligence Agency (DIA), and the Defence Department's Director General's Office. CIA in October, 2004, reported that "*CIA found no clear evidence of Iraq harboring Abu Musab al-Zarqawi*."<sup>51</sup> Eventually, due to lack of evidence of Connection between Al-Qaeda and Saddam regime encouraged war critics to allege that "*the Bush Administration fabricated such link purposely to strengthen the case for the invasion*."<sup>52</sup>

Previous to the March 2003 US attack on Iraq, US President Bush claimed to have solid evidence that Iraqi dictator and autocrat President Saddam Hussein possessed and was hiding "*some of the most lethal weapons ever devised*." At that time Bush notified that Saddam would "*stop at nothing until something stops him*." The Bush Management

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<sup>47</sup> Online News Hour: Text of Joint Congressional Resolution on Iraq - October 11, 2002". Pbs.org. Retrieved on 13 April, 2010.

<sup>48</sup> National Lawyers' Guild, 2007 Amendments and Resolutions, "Resolution on Impeachment of Bush and Cheney," <http://nlg.org/membership/resolutions/2007%20Resolutions/Impeachment%20resolution.pdf>

<sup>49</sup> "Links to Opinions of Legality of War Against Iraq". Robincmiller.com. Retrieved 19 may, 2010

<sup>50</sup> Abu Musab al-Zarqawi, [http://en.wikipedia.org/wiki/Abu\\_Musab\\_Al-Zarqawi](http://en.wikipedia.org/wiki/Abu_Musab_Al-Zarqawi) (Retrieved on 23 March, 2010 )

<sup>51</sup> There were no weapons of mass destruction in Iraq Julian Borger in Washington ,The Guardian, Thursday 7 October 2004 11.35 BST, Article history

<sup>52</sup> Millan Rai, *with a Chapter by Noam Chomsky, War Plan, Ten Reason against War on Iraq*. Verso 2002, New York, P. 131

further alleged that Saddam had covert relations with the Al Qaeda terrorist association that accomplished the September 11th attack on the United States of America. Consequently, a massive attack was commenced to put an end to the rogue Saddam dictator's regime. Bush argued that we shall make use of every tool to counter the threat caused by Saddam.<sup>53</sup> The strategic plan which the Bush government employed mainly based on the doctrine of "*best defence is a good offence*."<sup>54</sup> The arrangement of pre-emptive strike to attack Saddam's country before he could attack the United States resulted in a rapid and irresistible intervention that kicked out the Iraqi leader.<sup>55</sup>

Though even the intelligence agencies contemplated that Saddam was concealing WMD, but no evidence could be discovered in support of those declaration or claims about Saddam's collaborative relationship with Al-Qaeda.<sup>56</sup>

By early December President Bush was showing signs of frustration that the neocons agenda to which he had subscribed was leading him nowhere. An early indication came when a reporter asked Bush if the US had found any evidence of links Hussein and Al-Qaeda. "No" he replied, "*We have found no evidence.*"

#### **4.3.2. Possession of Biological and Chemical Weapons Pretext to Attack**

The United States reasonably has been vexed about embittered countries that possess WMD,<sup>57</sup> or going to possess such weapons in particular the states like Afghanistan and Iraq or other fragile states. The states declared as rogue state by President George W. Bush as Iraq, Iran and North Korea are also threat for US and its allies said by President Bush. But mere the possession of such weapons or the future planning to get hold of such weapons does never amount to a ground for brutal armed attack, because the diplomatic ways can be used to resolve the issues. Certainly, Iraq has been prohibited by the UN Security Council from any type of manufacturing of nuclear weapons Nuclear or chemical Weapons, which followed to its defeat in the Persian Gulf War, 1991. This

<sup>53</sup> US NSS 2002, Introduction.

<sup>54</sup> US NSS 2002, P.6

<sup>55</sup> Charles W. Kegley, Jr. *University of South Carolina with Eugene R. Witkopf, Louisiana State University, World Politics, Trends and Transformations*, ed. Carl Bextér, Thomson Wadsworth, 10<sup>th</sup>, 2004, p. 589.

<sup>56</sup> Steve Perry, *The Bush Administration's Top 40 Lies War and Terrorism, Bring 'em On!*

<http://holyywar.org/txt/039.htm>

<sup>57</sup> US NSS, 2002, President Bush, West Point, New York, June 1, 2002.

prohibition was employed in the 1991, UNSC Resolution 678, by the allied campaign against Iraq in "Desert Storm".<sup>58</sup>

Although Iraq was the signatory of NNPT, but the violation of a non proliferation regulations and disarmament requirements do not itself qualify to an armed attack. As, in an advisory opinion the ICJ held that for most of the states, the mere custody of Nuclear Weapons is not unlawful in customary international law. As the ICJ held, "*in view of the current state of international law, and the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a state would be at stake.*"<sup>59</sup> The mere custody when there is no threat of use does not qualify to an illegal and pre-emptive armed strike.

#### 4.4. PRE-EMPTIVE INVASION AND WMD

It is ridiculous plea to seek WMD as a pretext for invasion of Iraq, because quite a few times the UN inspectors had inspected Iraq to find Chemical Biological and Nuclear Weapons under the UNSCOM, IAEA and UNMOVIC, but they found not any weapons.<sup>60</sup> Even after US attack, The Iraq Survey Group (ISG) of seeking weapons could not find any chemical or biological weapons. According to international law there is only UNSC which authorizes the use of force, but US unilateral action is the violation of international law.

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<sup>58</sup> Security Council Resolution, 687 (March 1991).

<http://www.google.com.pk/search?q=SC%20Res%20687%20%28March%201991%29.&ie=utf-8&oe=utf-8&aq=t&rls=org.mozilla:en-US:official&client=firefox-a&source=hp&channel=np>

<sup>59</sup> Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 266 (July 8). The vote on this part of the decision was 7-7 with the president voting in favor to break the tie.

<sup>60</sup> Hans Blix at the Iraq war inquiry -- live, Politics Blog, guardian.co.uk.

<http://www.guardian.co.uk/uk/blog/2010/jul/27/hans-blix-iraq-inquiry-live>  
Fred Kaplan Posted, The Iraq Sanctions Worked, And other revelations from David Kay's report, Tuesday, Oct. 7, 2003, at 7:08 PM ET  
<http://www.slate.com/id/2089471/>

"Throughout the report, Kay kicks up a sandstorm of suggestiveness, but no more. He notes, in alarming tones, the discovery of "a clandestine network of laboratories and safehouses within the Iraqi Intelligence Service," including equipment "*suitable* for continuing CBW [chemical and biological weapons] *research*" (all italics—here and henceforth—added). This is an interesting finding, but it says nothing about CBW *development* or *production* or *deployment*, and proves nothing about whether the equipment was actually *intended* or *designed* for CBW purposes."

A renowned scholar Perle remarks:<sup>61</sup>

*The most dangerous of these states are those that also possess weapons of mass destruction... The chronic failure of the Security Council to enforce its own resolutions is unmistakable: it is simply not up to the task. We are left with coalitions of the willing. .. we should recognize that they are, by default, the vest hope for that order, and the true alternative to the anarchy of the abject failure of the UN."*

Obviously, Perle puts down the ground for the new-fangled Bush Doctrine of pre-emptive/preventive attack of other nations whenever and wherever it pleases. The "*coalition of the willing*" is a euphemism for the US government and whichever other governments it bribes or blackmails to join their imperialist invasions."<sup>62</sup>

In international law the so-called Bush doctrine of pre-emptive strike is a piece of moral and legal junk. With respect to humanitarian values and the US claiming to be the protector of humanity, if the lives of people of other nations are of equal values as the lives of Americans, then on what ground, international law supports US to engage in preemptive attack without any evidence to support that invasion. The death toll and destruction embodies that the perpetrators of this unlawful invasion on Iraq, the real terrorists are Americans rather than the nation being attacked. Therefore the Bush Doctrine, as Dr. Mandel points out, "*is just a sick veneer for the real doctrine that says Might Makes Right.*" He further comments that any nation can wage in preemptive strike, but the US is the only nation due to its mighty power can succeed in such an attack. US has a huger stockpile of WMD than all other nations of the world. If self-defense was appropriate way of war to Mr. Bush, then there should be "*universal authority*," which implies that any country should be justified to invade in the name of self-defense. But

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<sup>61</sup> International Law Scholar Richard Perle, *Guardian* March 21, 2003.

<sup>62</sup> Ibid

Mr. Bush did never under the provisions of this universal demand of international law. He decided for wars without help.<sup>63</sup>

#### **4.4.1. Nuremberg ban on Pre-emptive Strike**

The preemptive war is unambiguously unlawful. The International Military Tribunal known as Nuremberg Tribunal 1946, prohibits the use of force in self-defence to prevent a future allied invasion.<sup>64</sup> The Tribunal concluded that such attack would violate the customary limitations on self-defence and the constituted wars of aggressions whose proscription has been demanded by the conscience of the world.<sup>65</sup> As the Tribunal added:

*"To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."*<sup>66</sup>

The drastic and cruel war of aggression perpetrated by George W. Bush was the only factor imminent leading up to March, 2003. The common people, in every country were opposing the impending US invasion on Iraq. Even the people of US its coalition forces demonstrated against the Iraq war.<sup>67</sup> No doubt the war was fought to collect the private wealth, to maintain anarchic and imperial power which mainly includes the Iraq's oil reserves.

#### **4.4.2. The ICJ's View on Article 51 and Anticipatory Self-Defense Nicaragua v. US**

The international Court of Justice has expressed its views On UN Charter Article 51 for two times, first, in the Nicaragua v. United States Case<sup>68</sup> and second in the "Advisory

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<sup>63</sup> Ibid

<sup>64</sup> Peter Carter QC, Chairman of the Human Rights Committee of the English Bar, The Guardian, London, Thursday 13 February 2003. (Taken from *Tearing up the Rules: The Illegality of Invading Iraq*, The Center for Economic and Social Rights March 2003, Emergency Campaign on Iraq )

<sup>65</sup> ibid

<sup>66</sup> Nuremberg Tribunal 1945

<sup>67</sup> Michael Mandel, *How America Gets Away with Murder: Illegal Wars, Collateral Damage and Crimes Against Humanity*, Pluto Press, USA, 2004, p. 208.

<sup>68</sup> 1986 ICJ



Opinion on the Legality of the Use of Nuclear Weapons in Armed Conflict".<sup>69</sup> In former Case, the Court located that the parties had relied mainly on the traditional right of self-defense in the case of an armed attack. But the question of the legality of a response to an imminent threat of an armed attack was not raised.

Judge Schwebel commented the Judgment, nevertheless that a "state may react in self-defense...only if an armed attack occurs".<sup>70</sup> He further stated on the issue: "I wish to make clear that, for my part, I do not agree with a construction of the United Nations Charter which would read Article 51 as if it were worded: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if, and only if, an armed attack occurs...' I do not agree that the terms or intent of Article 51 eliminate the right to self-defense under customary international law, or confine its entire scope to the express terms of Article 51."<sup>71</sup>

Moreover the Court interpreted the meaning of the word 'inherent' in Article 51, stating that "it cannot, therefore be held that Article 51 is a provision which 'subsume and supervenes' customary international law."<sup>72</sup>

The Court concluded in its judgment that the United States was "in breach of its obligations under customary international law not to use force against another State", "not to intervene in its affairs", "not to violate its sovereignty", "not to interrupt peaceful maritime commerce", and "in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956." Conclusively the ICJ still has neither accepted nor rejected the doctrine of anticipatory self-defense in the post-Charter era.

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<sup>69</sup> 1996 ICJ

<sup>70</sup> 1986 ICJ

<sup>71</sup> Ibid

<sup>72</sup> Ibid

#### 4.5. DOCTRINE OF PRE-EMPTIVE STRIKE .....

##### A DEPARTURE FROM INTERNATIONAL LAW

The Bush Doctrine of pre-emptive strike is a likely to be a radical exit from existing strategies and guiding principle as well as a departure from international law. The US President Bush was ineffectually attempting to legalize an unlawful military strike on another sovereign nation, and using force against the territorial integrity or the political independence of Iraq. Bush was expressly toppling down internationally recognized Iraqi leader Saddam Hussein, and his legitimate government was overturned by the world champion of democracy USA.<sup>73</sup> Bush intervened Iraq militarily without the prior permission of the UN Security Council. Bush committed a war of aggression against Iraq that had not commenced any preceding act of hostility against the United States.<sup>74</sup> This act of aggression was carried out by one country US alone,<sup>75</sup> which happens at present to enjoy a position of the world's unparalleled mightiest military power.<sup>76</sup>

This Doctrine of preemptive strike which is not allowed by any country to intervene against the sovereignty of any other state, the right of the United States to intervene militarily in any country it reckons a danger. It just relies on the theory of no recourse to the United Nations or any external authority, but just on the principle of enforcement of the might is right. If the US were to unilaterally wage a war on Iraq, then what moral authority would America have for warning North Korea, for attacking South Korea, or for India attacking Pakistan, or for Israel attacking any of its neighbours pre-emptively again?

The pre-emptive strike has realized the modern world that we would be back to the law of the jungle and all the progress we have made over the years would be wiped out by this pernicious Bush Doctrine.

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<sup>73</sup> Garda Ghista, *Pre-Emptive Invasion and International Law*, Global Research, December 13, 2005

<sup>74</sup> Ibid

<sup>75</sup> US NSS, 2002, President Bush, Washington D.C.(The National Cathedral), September 14, 2001.

<sup>76</sup> Bush National Security Strategy, 2002, Introduction.

#### 4.5.1. Regime Change a Drama

In his National Security Strategy, 2002, President Bush made another allegation on Iraq that Saddam's regime was an evil, rogue and threat for not only for its neighbours but also for US and its allies. In October, 2002 Bush stated about his future strategy against Iraq that, *"the stated policy of the United States is regime change"*<sup>77</sup> Again Bush stated, *"now I happen to believe the regime of Saddam is a very brutal and repressive regime, I think it does enormous damage to the Iraqi people... so I have got no doubt Saddam is very bad for Iraq."*<sup>78</sup> In a press conference on January 31, 2003, George W. Bush reiterated that, *"Saddam Hussein must understand that if he does not disarm, for the sake of peace, we, along with others, will go disarm Saddam Hussein."*<sup>79</sup>

Throughout the prelude to the Iraq invasion George Bush was explicitly more concerned about asking a single question from the chief UN weapons inspectors, *"Has the Iraqi regime fully and unconditionally disarmed, as required by Resolution 1441, or has it not?"*<sup>80</sup> the major allegations that US made against Iraq were that Iraq was developing WMD and harbouring terrorism. When Collin Powell presented computer generated images of the mobile producing facility for WMD to the UN, the Russian experts criticized this evidence and considered it dangerous and difficult to manage. These allegations were without solid ground and evidence. It was mere a dramatic regime change<sup>81</sup> and to topple over Saddam regime and the real motive was to control Iraqi oil reserves.

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<sup>77</sup> By Bob Kemper, "Saddam can keep rule if he complies: Bush", US president doubts Iraq will satisfy UN

Daily Times October 23, 2002.

[http://www.dailytimes.com.pk/default.asp?page=story\\_23-10-2002\\_pg4\\_1](http://www.dailytimes.com.pk/default.asp?page=story_23-10-2002_pg4_1)

<sup>78</sup> Tony Blair October, 2002, PM gives interview to Radio Monte Carlo.

<sup>79</sup> "Bush, Blair: Time running out for Saddam". CNN. January 31, 2003. Retrieved May 22, 2010.

<sup>80</sup> President George W. Bush, President George W. Bush Discusses Iraq in National Press Conference. The East Room, White House, March 6, 2003

<http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030306-8.html>

<sup>81</sup> George Tenet with Bill Harlow, *At the Centre of the Storm, My years at the CIA*, Harper Collin Publishers, New York, 2007, P. 369

#### **4.5.2. US Unilateral Action..... Aloofness from World Community**

The unilateral way of using force is unlawful according to Article 51 of the UN Charter, this strike can only be lawful if authorized by the Security Council. German Chancellor Gerhard Schroder stated that Germany "would not support a US act of aggression unless it were approved by the UN Security Council. In response, President Bush and his allies developed new definitions of the term "self-defense," saying that today it includes preemptive invasion against "potential aggressors."<sup>82</sup> Frequently Bush emphasized that the established strategies of nuclear deterrence and containment were inadequate for the present. But Bush could not provide any confirmation.<sup>83</sup>

#### **4.5.3. Lack of Authorization to Exercise of Force**

Since Iraq invasion on Kuwait in 1990 SC has passed 60 resolutions. Resolution 678 is the most relevant to the issue passed on November 1990. It authorized "member states co-operating with the Government of Kuwait...to use all necessary means" to (1) "execute Security Council Resolution 660 and other resolutions calling for the cease-fire and to stop of Iraq's occupation of Kuwait and withdrawal of Iraqi forces from Kuwaiti territory" and (2) "restore international peace and security in the area." On the other hand, the phrase "restore international peace and security in the area" was explicitly understood which referred to Iraq's attack of Kuwait. But for US this phrase was not a blank check for future military aggression against Iraq.<sup>84</sup>

#### **4.5.4. United Nations Response on New Fangled Doctrine**

On September, 23, 2003, Secretary General of the United Nations, Kofi Annan expressed the disapproval of the exercise of preemptive strike as observed in Iraq. He stated that this strategy would establish a dreadful and bad model for the future. Annan put emphasis on that Article 33 of the UN Charter evidently demands that "*international disputes*

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<sup>82</sup> Anthony Dworkin, Crimes of War Project: "Iraq and the 'Bush Doctrine' of Pre-Emptive Self-Defence," Intro August 20, 2002.

<http://www.crimesofwar.org/expert/bush-intro.html>

<sup>83</sup> Garda Ghista, *Pre-Emptive Invasion and International Law*, Global Research, December 13, 2005

<sup>84</sup> Ibid

*should be handled through peaceful means."* The implementation of UN Resolution 1368, after the September 11, 2001, attacks, *"the Security Council's interpretation of Article 51 officially and for the first time made the UN responsive to threats from non-state actors."*<sup>85</sup>

#### **4.5.5. Kofi Anon Declares Iraq War Illegal**

In an interview to the BBC World Service United Nations Secretary General Kofi Annan said on September, 16, 2004, that *"the US-led invasion of Iraq was illegal, the war was not in conformity with the Security Council, with the U.N. charter."* When he was again asked to confirm, *"It was illegal?,"* Annan replied: *"Yes, if you wish,"* adding: *"I have indicated it is not in conformity with the U.N. Charter; from our point of view and from the Charter point of view, it was illegal."*<sup>86</sup>

#### **4.6. BUSH DOCTRINE'S INADEQUACY**

The Bush doctrine, fails to plainly define the conditions under which pre-emptive force should be legitimate. Indeed, such ambiguity seems to be deliberate, as comments by the State Department's Legal Advisor suggest:

*"Each use of force must find legitimacy in the facts and circumstances that the state believes have made it necessary. Each should be judged not on abstract concepts, but on the particular events that gave rise to it. While nations must not use preemption as a pretext for aggression, to be for or against preemption in the abstract is a mistake. The use of force preemptively is sometimes lawful and sometimes not."*<sup>87</sup>

The threat inherent in such an open-ended notion of pre-emptive self-defence are evident. First, the lack of clear and objective legal standards could result in increasing global instability and insecurity. If other states act on the same rationale that the US has proposed, and accept such military action as a legitimate response to potential threats,

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<sup>85</sup> Heisbourg, The French Strategy was published in September 2002 and is available on the French Defense Ministry's Web site (<http://www.defense.gouv.fr/actualities/dossier/d140/index.htm>).

<sup>86</sup> Kofi Anon, BBC Interview on Thursday 16, September, 2004.

<sup>87</sup> Memorandum from William H. Taft IV, Legal Adviser, US State Department, to the American Society of International Law – Council on Foreign Relations Roundtable in *Old Rules, New Threats, Policy Implications of the Bush Doctrine of Preemption*, 18 November 2002  
<<http://www.cfr.org/publication.php?id=5250>>

then a 'messy world would become a lot messier'.<sup>88</sup> Once the US invokes this broad concept of preemptive self-defence to justify prophylactic military policies, nothing will stop other countries from doing the same. Doctrines that lower the threshold for preemptive action thus exacerbate regional crises already on the brink of open conflict. For instance, states such as Ethiopia and Eritrea might use the doctrine to justify a first strike, and the effect of the US posture may make it very difficult for international organisations to counsel delay and diplomacy.

Second, the Bush doctrine may also adversely affect long-standing *jus in bello* restrictions on the conduct of warfare. A broad interpretation of preemption would not only weaken restraints on *when* states might use force, but also on *how* they may use force.<sup>89</sup> For example, following the traditional legal principle of proportionality would be difficult in a preemptive war: There is no measure that can be used to assess proportionality against a future attack. Any state contemplating preemptive military action must make a *subjective* determination about *future* events and about how much force will be needed for successful preemption. Confronted with such uncertainties, states are likely to rely upon worst-case analysis leading often to a disproportionate use of force.

The National Security Strategy of the US 2002 – commonly referred to as the 'Bush doctrine' – recognizes the need for a change and therefore argues that,

*"We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and potentially, the use of weapons of mass destruction – weapons that can easily be concealed, delivered covertly and used without warning."*<sup>90</sup>

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<sup>88</sup> Bill Keller, 'Preemption', *The New York Times Magazine* (New York) 15 December 2002, 115. 44 (2005) 2 UNELJ Hannes Herbert Hofmeister

<sup>89</sup> Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense*, 2002, p. 19.

<sup>90</sup> *National Security Strategy of the United States*, 2002

The National Security Strategy then sets out the standard by which the US will act:

*"The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the US will, if necessary, act preemptively."*<sup>91</sup>

Although the Bush doctrine responds to the need to adapt the Charter's rules on self-defence to new threats posed by terrorist networks and weapons of mass destruction, it is not the right way of dealing with this complex issue either. In particular, its policy implications are far-reaching and could be potentially de-stabilising. Already Emmerich De Vattel warned that

*"... a nation may anticipate the other's design, being careful, however, not to act upon vague and doubtful suspicions, lest it should run the risk of becoming the aggressor itself".*<sup>92</sup> *If 'preemptive' self-defence is to become a recognized tenet of international law, its scope must be clearly defined in order to avoid unwarranted aggression."*

Last but not least, doctrines that lower the threshold for preemptive action may also create a perverse incentive: They may accelerate the WMD arms race insofar as it can become rational for states actually to acquire WMD if they are going to face military action simply based on the fact that they are suspected of possessing such weapons. If a state, for example Iran, becomes convinced that it will be the 'next candidate for regime change', it is likely that it might accelerate its WMD programme. Indeed, one of the lessons which the North Korean example holds for other rogue states is that possession of a nuclear deterrent keeps the US from seriously considering military action.<sup>93</sup> Iraq – so the argument goes – was attacked precisely because it lacked an existent nuclear

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<sup>91</sup> *ibid*

<sup>92</sup> Emmerich De Vattel, *The Law of Nations*, Joseph Chitty trans, 1849 ed p.291.

Hannes Herbert Hofmeister, Neither the 'Caroline Formula' Nor the 'Bush Doctrine' – An Alternative Framework to Assess the Legality of Preemptive Strikes

<sup>93</sup> North Korea's February 2005 announcement might be interpreted as an explicit attempt to reinforce the deterrent effect of its nuclear arsenal.

deterrent, whereas North Korea remains fairly safe because of its nuclear weapons arsenal.

#### **4.6.1. A Short-Lived Doctrine---- Implications of Pre-emptive Strike**

Theoretically preemption seems better than what is likely to be in practice.<sup>94</sup> If United States continues the policy of Pre-emptive invasion then in future it will be strategically unsound and unwise to run with the international organizations which proscribes such action. Keeping up the option of preemptive self-defence is a one thing but the authorization by the presidency is quite another. The preemption loses its spirit when it is launched against the weak, rogue and axis of evil states. US strategy to disarm Saddam Hussein, to liberate the Iraqi people from the cruel clutches of dictator does not amount to a moral or legal justification to intervene in Iraq. US employs double standard while dealing with the same issue, as to seek WMD in Iraq US exercise force where the Biological, Chemical and Nuclear Weapons are not confirmed. On the other hand in the case of North Korea which possesses the active NW, the US administration is silent.<sup>95</sup>

If the act of preemption is utilized to preempt the terrorists before they are fully materialized with WMD. But this issue is still under debate whether to cope with Terrorism and WMD, the strike preemptively is enough and justified. This doctrine has no place in international discipline of the world. It was actually an unwise and crucial tool to secure the American interests in the region.<sup>96</sup>

#### **4.6.2. Defects in Pre-emptive Strike**

The Bush doctrine suffers from a number of defects. The peremptory manner of its emergence adds the confusion in it. It focuses entirely on the United States unilateralism and it failed to consider the consequences for international relations. If widespread claim of preemption by states as a right to act preemptively prevails then the weaker states will

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<sup>94</sup> Ivo H. Daalder, *Policy Implications of the Bush Doctrine on Preemption*, Council on Foreign Relations Press, November 16, 2002

<http://www.cfr.org/international-law/policy-implications-bush-doctrine-preemption>

<sup>95</sup> *ibid*

<sup>96</sup> *Ibid*



at the impending threat by the powerful.<sup>97</sup> It also failed completely to mention the non intervention norm by transforming the problem of how the United States might address a few hard cases into general doctrine it appeared to undermine the intervention norm more directly than was necessary. Coupled with the proclamation of the Axis of evil<sup>98</sup> in Bush's January state of the Union speech, its effects internationally may have been to cause more anxiety and opposition than reassurance.

The impact of the doctrine on the evolution of Iraq crisis in 2002-2003 was largely negative. In the event official justification for the war were cast in the less abrasive terms of Security Council Resolutions. It was generally critics of the United States who viewed the war as the first application of the preemption doctrine.<sup>99</sup>

#### **4.6.3. The Hazardous Precedent of Bush Doctrine**

George W. Bush and his doctrine has been thrown into the rubbish stack of history to regenerate an old, superfluous and redundant doctrine formulated by his own. It is a most treacherous, shock<sup>100</sup> and dangerous doctrine and one which threatens to plunge the world into chaos and anarchy, and is a doctrine which rejects and repudiates every principle of international law.<sup>101</sup>

#### **4.6.4. Disadvantages with the Doctrine**

The major concern of Bush Doctrine of pre-emptive strike is that in any way there is no chance of its regular practice. But danger lies in its practice is that it may be a dangerous precedent for the weaker and the fragile states. The exploitation will start by the states.

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<sup>97</sup> David M. Malone, *The UN Security Council, From the Cold War to the 21<sup>st</sup> Century*, Vinod Vasishtha, Viva Books Private Limited, New Delhi, 2006, P. 145

<sup>98</sup> US NSS, 2002

<sup>99</sup> David M. Malone, *The UN Security Council, From the Cold War to the 21<sup>st</sup> Century*, Vinod Vasishtha, Viva Books Private Limited, New Delhi, 2006, P. 145

<sup>100</sup> Ibid

<sup>101</sup> Ian Boyne, *The dangerous Bush Doctrine*, Jamaica Gleaner: Sunday February 23, 2003  
<http://jamaica-gleaner.com/gleaner/20030223/focus/focus1.html>

#### 4.7. BUSH DOCTRINE; A CARTE BLANCHE ON THE WORLD

The subject of Bush doctrine of pre-emptive self-defence strike is clear that it is absurd and ridiculous in international law. If such anarchy of unilateralism prevails then how will the international community be able to stop misuse of the right of pre-emptive self-defence? It is clear that the Bush administration has recommended a regulation that offers whenever, and wherever, a terrorist group or if a possible threat from a state is recognized; it may be damaged without essentially requiring the support of the international community. In this manner the US has the right to strike pre-emptively at any nation that it decides is developing WMD or harbouring terrorism. This does certainly mean a carte blanche for a war on the world, in the opinion of most of the international law scholars.

##### 4.7.1. IRAQ or USA a Rogue State (axis of evil)?

A rogue state is one that is dishonest, not abiding by the international laws and behaving differently from the world accepted standard and causing trouble to the internationally accepted norms.<sup>102</sup> When we keenly observe US and Iraq under the parameter of the definition of and the characteristics of rogue state it is obvious that US is the rugue state not Iraq. We can also analyze it under this criteria by asking some questions: who used the prohibited weapons for the first time on Japan? Who has broken the UN Charter? Who has used the preemptive self-defence an unauthorized policy? Who intervenes against the political sovereignty and territorial integrity of smaller states? Who has killed millions of people around the world in countless wars and covert operations?

Bush in his NSS, 2002 has declared Iraq an axis of evil because Iraq is going to produce WMD. If the standard of roguism is possession of dangerous weapons then US is the major threat for the world and the axis of evil. Bush has declared North Korea, Iraq and Iran "*the axis of evil*" it implies that three states are the orbits of evil worldwide and the states of the world are sacred and harmless. Washington and London declared the Iraq a major "*rogue state*" because Iraq is a "*threat to its neighbors and to the entire world, an*

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<sup>102</sup> A. S. Hornby, Oxford Advanced Learner's Dictionary, Oxford, Oxford University Press, 5 th ed. P. 1018.

*outlaw nation led by a reincarnation of Hitler who must be contained by the guardians of world order.*"<sup>103</sup>

Pointing to Iraq as a rogue state Bush in his NSS, 2002 said, *"new deadly challenges have emerged from rogue states and terrorists, determining to obtain destructive weapons, providing it to the terrorists, using WMD."* He further blamed that *"these states have brutalized their own people, displayed no regard for International law, callously violated international treaties and not complying with the UN SC Resolutions, sponsor terrorism around the world and are rejecting basic human rights and hate United States."*<sup>104</sup>

But the reality is quite contrary to all these allegations on Iraq especially. US exceptionally constitutes its international policies as to wage war against Iraq. In this context UN, US its allies and even its own intelligence were not agreed with the President Bush rhetoric about the need to act unilaterally and the fabricated necessity of attack. It is assumed that Bush and his administration were war mongering madmen<sup>105</sup> not President Saddam.<sup>106</sup>

US is the most alarming for the peace of the world, not Iraq. The U.S. has broken international law many, many times since the end of WWII. As Bush has expressed in his NSS, 2002, *"We have ignored the findings of the International Criminal Court (ICC),<sup>107</sup> the World Court (International Court of Justice), the UN Charter and its resolutions and agreements. US behavior is entirely inconsistent with international behavior over the last fifty years!"*<sup>108</sup>

Though the international norms are obligatory to be observed, because in general perception these are the measurement of the agreement of the nations. These obligatory norms have been particularly codified in the United Nations Charter, International Court

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<sup>103</sup> Noam Chomsky, Rogue State, Z Magazine April 1998

<sup>104</sup> US NSS, 2002, Part V

<sup>105</sup> ibid

<sup>106</sup> Dana Milbank, Bush, VP alter basis for Iraq war, Say Hussein had 'ability to make' deadly weapons, Washington Post, The Boston Globe, February 8, 2004

<sup>107</sup> US NSS, 2002, Part IX

<sup>108</sup> Noam Chomsky, *Rogue States, the Rule of Force in World Affairs*, Reviewed by David Cromwell, Pluto Press (London), 2000

<http://www.chomsky.info/articles/199804--.htm>

of Justice decisions, and various conventions, protocols and treaties after WWII. The United States has ever been regarding itself as exempt from the conditions determined.<sup>109</sup>

UN Security Council passed 16 resolution regarding Iraq wars but no single resolution allowed any state to wage war against Iraq. But US subverted and twisted the interpretation of the text of the resolution that 660, 678, 687, 1154, 1205 and 1441. US justified the Iraq war on the behalf of the "*Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq*," in October 2, 2002 this resolution was passed by the US President George W. Bush, with the support of Congress. So by the national Constitution of the United States of America, the fight for anti-United States terrorism was authorized.<sup>110</sup> The Bush administration explicitly stated that the resolution was aimed to put pressure on the UN to join us in attacking Iraq for it's nuclear, biological and chemical WMD. *Mostly US had to suffer aloofness, many times only one or two states joined its policies, many a times it got scot free of UN GA and SC. No doubt US aims to promote* Security Council resolutions aimed at furthering human rights, peace, nuclear, chemical and biological disarmament, and economic justice. US have used veto power more than 150 times, more than other veto powers of the world.<sup>111</sup>

Attacking a country on the ground of regime change, to search WMD, and false claiming of having ties with terrorists group does not legitimize an invasion. The action of preemption without the world community permission is quite unlawful in international. US itself is the claimer of weapons non proliferation but itself is the biggest user, producer and smuggler. If Saddam regime was a threat for its neighbours and the breaker of SC resolution then UN itself should take action, and its neighbours should go to SC to take action against Iraq. Only SC can authorize to resort to war. Neither a state can do so unilaterally according to Article 51 of the UN Charter. No state is allowed to go to intervene against a territorial integrity of a state. But US violated the Charter's Articles 51, 2(4), 2(7), 39 and 40. US has also violated the Geneva Conventions for targeting on

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<sup>109</sup> Noam Chomsky, *Rogues Gallery, Rogue States Crisis in the Balkans, The Rule of Force in World Affairs*, South End Press, 2000

<sup>110</sup> 2003 Invasion of Iraq.

[http://en.wikipedia.org/wiki/2003\\_invasion\\_of\\_Iraq#Legality\\_of\\_invasion](http://en.wikipedia.org/wiki/2003_invasion_of_Iraq#Legality_of_invasion)

<sup>111</sup> William Blub, *A Guide to the World's Only Superpower*, US Congress Press, 2008, P. 58

civilians, collateral damages, on public installations, water supplies, food shortage, medicine etc.<sup>112</sup>

In WWI and WWII, other US military interventions as proxy wars and direct wars millions of people have killed, the major responsibility goes on the head of US. It has more than 1000 military installation worldwide only to control the world. US wants to establish its imperialism in the world. In the Middle East it controls the oil reserves. US employs double standard in its policies.

From all these references it is clear that is ever convergent to invade whenever and wherever it wishes, that is the cause that I have been apprehensive to ask the International authorities, Why does the United State pose nose in every country's affairs? Why US subverts the international law vehemently? Why does it repeating the primitive laws of "might is right?" Why does it like for others whatever it likes for itself? Why it has 1000 military installations in the world? Why does it monger wars? Why it has been targeting the Middle eastern countries?

It can also be stated that US is the twister, subversive, law breaker and the employer of its strategies of pre-emption, dissident of international then, who is rogue state IRAQ or UNITED STATES OF AMERICA? Definitely the answer is USA.

#### **4.8. STATUS OF PRE-EMPTIVE STRIKE IN INTERNATIONAL LAW**

To assess the rationalization of pre-emptive strike in terms of international law two aspects are necessarily considered; firstly, the principle of 'jus ad bellum', secondly the appropriateness of a decision to go to war. In international law the essential basis is the state sovereignty and territorial integrity as Article 2(4).<sup>113</sup> So international law evidently implies that state should not interfere with each other's sovereignty and affairs. The Charter of United Nations has a wide-ranging proscription against the exercise of military force, "but authorizes the Security Council to use force even in the absence of aggression

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<sup>112</sup> Geneva Conventions 1947.

<sup>113</sup> UN Charter, Article 2(4)

by the target, and permits unilateral and non-UN multilateral acts of self-defense under certain constraints.”<sup>114</sup>

According to the Articles 39, 41 and 42, the Security Council can authorize to use force only. Article 51 authorizes unilateral and non-UN multilateral acts of self-defense. Thus, according to the UN Charter there are two exceptions where force can be used: in case of self-defense and when there are threats to peace and security. First, Article 39 provides right for the Security Council to determine if there is threat to peace and Article 42 tells that the Security Council can authorize use of force against the offending state. Second, about right of using force in anticipatory self-defense, there are two interpretations of the Charter on Article 51. It says that before there is actual attack, states cannot use preemption as self-defense. Other interpretation is that it does not limit the use of force in self-defense to actual attack has occurred. But it should be nearly certain that the attack would occur. Thus, there are two interpretations about the permissibility of preemptive war.

#### **4.8.1. A New-Fangled Opening of the World**

US strategy toward Iraq has challenged the vital purpose of the United Nations, specifically the Charter's proscription on the use of force. The Security Council has failed to grasp the common ground of international law. Bush and his Administration have openly insisted that the U.S. will attack Iraq and hunt "regime change, under any and all circumstances, including opposition in the Council." President Bush also argued that, "we really don't need anybody's permission."<sup>115</sup>

The Security Council resolutions on Iraq do not permit the use of force against Iraq. To exercise such militarization US would require further authorization from the UN Security Council.<sup>116</sup> The Bush administration has presented a number of justifications to start war

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<sup>114</sup> Steven C. Welsh, *Preemptive War and International Law*, *International Security Law Project*, December 5, 2003. (taken from the From Deterrence to Pre-emption)

<sup>115</sup> "U.S. Says U.N. Could Repeat Errors of 90's," *New York Times*, p. A1 (March 11, 2003).

<sup>116</sup> R. Singh, A. Macdonald, Matrix Chambers, Public Interest Lawyers on behalf of Peacerights, "Opinion on the legality of the use of force against Iraq," para. 2, p. 3 (10 September, 2002); R. Singh, C. Kilroy, Matrix Chambers, Public Interest Lawyers on behalf of the Campaign on Nuclear Disarmament, "Further

against Iraq. Yet the pre-planned military action against Iraq is an act of aggression against the territorial integrity of Iraq.<sup>117</sup> The characterization of US strike on Iraq either preemptive or preventive does have nothing to modify the illegality of global law.(Freiburg Lawyers Declaration, on behalf of over 100 German jurists, February 10, 2003)

The US government committed a mass murder of Iraqi civilians without any excuse or any lawful jurisdiction. US has committed crime in the eye of international law. If no one is above the law then the US personnel involved in Iraq war must be punished. The war criminals in Iraq must be brought to justice.<sup>118</sup> Canadian Lawyers Against War, January 23, 2003.

#### **4.8.2. Future Prospects of Bush Doctrine**

The answer to the question of the legality of Iraq war in the legal context is significantly clear. The scholars of international law and the diplomats cut to the heart of the legitimacy of Iraq war. The overwhelming public opposition globally to the Iraq war highlights the illegality of Iraq war. If the war is legitimized by the UN Security Council, then the coalition of willing nations can argue that they are lawfully permitted to ignore world community opinion.

The Centre for Economic and Social Rights (CESR) deems that observance of fundamental ideology of international law is the essential prerequisite for defending the Economic, Social and Cultural Rights everywhere.<sup>119</sup> The illegitimate and unauthorized exercise of military force in Iraq intimidates the civilized and modernity of world drive us back to the world where the lawlessness spreads and the law of jungle prevails over the

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Opinion in the Matter of the Potential Use of Armed Force by the UK against Iraq,± para. 25, 28, p. 13-14 (23 January 2003).

<sup>117</sup> David M. Malone, edi, *The UN Security Council, From the Cold War to the 21<sup>st</sup> Century*, Viva New Selhi, 2006, p. 157.

<sup>118</sup> Canadian Lawyers Against War, ±Chretien could face investigation for war crimes,± (January 23 2003).

<sup>119</sup> P. R. Ghandhi, *Blackstone's International Human Rights Documents*, Oxford , Oxford University Press, 5<sup>th</sup> edition, 2006 p. 81

rule of law, where the peace for the enrichment of human rights are demolished by the powerful states not only of Iraqi people but of the people around the globe.

However anyway, the war waged by US and its coalition forces can never be justified under realistic or logical analysis of international law. In support of US invasion on Iraq, Bush's arguments are based on the unilateral right of preemptive self defence. These arguments are groundless and manifestly illegal, and Bush has added up to an act of aggression within the legal capacity of a offense against security and peace. With such unlawful wars the collective responsibility of Security Council to keep up international peace and security has been demolished. It would pave a free way to unilateral use of force by superpowers or small powers or by non state actors. The practice of international law for promoting human rights would be abandoned and the global security would be at risk.<sup>120</sup>

#### **4.9. BUSH AND BLAIR ADMIT THERE WERE NO WMD IN IRAQ**

Tony Blair told Fern Britton, in an interview to be broadcast on BBC1, that he would have found a way to justify the Iraq invasion. Tony Blair has said he would have invaded Iraq even without evidence of weapons of mass destruction and would have found a way to justify the war to parliament and the public.<sup>121</sup>

"If you had known then that there were no WMDs, would you still have gone on?" Blair was asked. He replied: "I would still have thought it right to remove Saddam Hussein".

He explained it was "the notion of him as a threat to the region" because Saddam Hussein had used chemical weapons against his own people.

"This was obviously the thing that was uppermost in my mind. The threat to the region. Also the fact of how that region was going to change and how in the end it was going to

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<sup>120</sup> Amy Zalman, Ph.D., *Iraq War -Bush Iraq War Justification Timeline, The Bush Administration's Changing Iraq War Justifications*,  
<http://terrorism.about.com/od/wariniraq/a/IraqWaronTerror.htm>

<sup>121</sup> The Guardian, Saturday 12 December 2009,  
<http://www.guardian.co.uk/uk/2009/dec/12/tony-blair-iraq-chilcot-inquiry>



evolve as a region and whilst he was there, I thought and actually still think, it would have been very difficult to have changed it in the right way."<sup>122</sup>

Bush and Blair have been forced to concede that there were no WMD in Iraq. The US and UK used WMD as an excuse to invade Iraq, install a puppet government, and take control of the oil industry. There never was any evidence whatsoever to support their claim that Iraq had stockpiles of WMD.<sup>123</sup>

Now they will use "intelligence failures" as their excuse. This is pure spin. An "intelligence failure" is a clever way of promoting the assumption that some intelligence did exist to support their claims. In reality, there was literally no evidence of WMD in Iraq.<sup>124</sup>

President Bush acknowledged for the first time yesterday that some prewar assessments of Iraq's weapons stockpiles may have been wrong.<sup>125</sup> In deciding to back up an independent review of the intelligence regarding Iraq's weapons of mass destruction, President Bush was implicitly conceding what he could not publicly say: that something appears to be seriously wrong with the allegations he used to take the nation to war in Iraq.<sup>126</sup>

#### 4.10. CONCLUSION

Strike in preemption is one of the salient features of the US military strategy as a response to anarchic and radical forms of aggression by states and non-state actors. The preemptive strike, globally is the attempt to enforce an unacceptable discipline of might is right in the world, which has come to be known as "*Bush Doctrine of pre-emptive strike*"<sup>127</sup> articulated in the President's imperialistic style threat that "*you are either with*

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<sup>122</sup> Tony Blair admits: I would have invaded Iraq anyway, The Guardian, Saturday 12 December 2009

<sup>123</sup> Bush and Blair admit there were no WMD in Iraq  
<http://www.theinsider.org/news/article.asp?id=456>

<sup>124</sup> Ibid

<sup>125</sup> Bush and Blair admit there were no WMD in Iraq  
<http://www.theinsider.org/news/article.asp?id=456>

<sup>126</sup> <http://www.washingtonpost.com/wp-dyn/articles/A3980-2004Feb1.html>

<sup>127</sup> Phyllis Bennis, *War With No End, The Global War on Terror: What It Is, What It's Done to the World*, Verso, London, New York. 2007, P. 24

*us or against us.*"Bush Doctrine, globally is an effort to impose discipline on an unruly world.

The war against Iraq was framed as the obligatory counter answer to the Iraqi WMD, of Iraq's nuclear chemical and biological programmes, the ties between Bin Laden and Saddam, and concomitant responsibility of Iraq for the event of destruction of WTC, none of all these of course existed. In occupied Iraq, only after the invasion the war's brutality exposed in the highest level of death and devastation. Obviously it was an exposure of replacement pretext for the regime change, liberate the Iraqi people dramatically and the democratization, which was played to the central stage of the world to justify the clearly unjustifiable war against Iraq.<sup>128</sup>

The Bush Doctrine of pre-emptive strike has threatened to distort the international establishment controlling the use of force. If such new doctrine outlines the state practice, the consequences shall be damaging for the whole world and especially the weaker states. If the practice of preemptive strike prevails, it would be difficult to control. If the international system of exercise of force is based on equality of all states then how the standard are different for the superpower and the other fragile states.

The international community is facing a crossroads in Iraq crisis, the 9/11 incident has changed the whole scenario of world. The international law itself is called into question due to escalating crisis and the non compliance of international laws, by the world's strongest military power, ever standing at the every crossroad to wage war against a member state of United Nations without the prior authority by the international organization and well accepted principle of law.<sup>129</sup>

As the US Secretary of the State Colin Powell, stated on March 6, 2003 that, "*The United States will invade Iraq with a coalition of the willing nations, either under United Nations authority or without United Nations authority, if that turns out to be the case.*"<sup>130</sup>

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<sup>128</sup> Ibid P. 25

<sup>129</sup> Mike Bowker, The University of East Anglia, UK, *Russia America and the Islamic World*, Ashgate USA, England, 2007, P. 101

<sup>130</sup> John Tagliabue, "France and Russia Ready to Use Antiwar Veto," New York Times, 6 March 2003

The central mechanism of United Nations has failed and destabilized repeatedly to prevent wars during the past half of the century. The principal task of the United Nations Security Council as the worldwide ~~guarantor~~ of international peace and security has overtly been challenged by the two of its permanent members the United States of America and the United Kingdom of Great Britain. The product of this confronting challenge may determine whether the conflicts arising in future will be determined by the legally recognized multilateral means or illegitimate resort to force by individual states.<sup>131</sup> The future of the of collective security system to protect the whole humanity from the scourge of war and the recurrence of that unprecedented massacre, established after the World War II by the United Nations is at a great risk.

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(Taken from Tearing up the Rules: *The Illegality of Invading Iraq*, The Center for Economic and Social Rights, Emergency Campaign on Iraq, March 2003)

<sup>131</sup> *The Illegality of Invading Iraq*, The Center for Economic and Social Rights, Emergency Campaign on Iraq, March 2003

[http://www.embargos.de/irak/irakkrieg2/vr/tearing\\_up\\_the\\_rules\\_cesr.htm](http://www.embargos.de/irak/irakkrieg2/vr/tearing_up_the_rules_cesr.htm) (12-4-2010)

## **CONCLUSION**

American history is replete with US exceptionalism and its foreign policy is mostly based on combination of three elements: hegemony with the notion of expansion, unilateralism with the conception of aloofness from the international community and now preemptive strike with a self-righteous Superpower leading subservient ally.<sup>1</sup> George W. Bush's employment of the strategy of preemptive strike has distorted the notion of right of self-defence. He responded the latent and shadowy imminent threat of terrorism and WMD into aggressive prevention to future threats. Bush exercised this new-fangled hard line strategy in reaction of WTC incident which invoked the Bush Doctrine of preemptive self-defence. Bush Doctrine is not consistent with the international law. It is a new emerging rule in international law. Moreover, Bush has violated the existing laws of use of force as enshrined by the UN Charter, especially the Article 51 and 2(4).

In international law the Strategy of preemption is problematic, as is likely to be a withdrawal from the security architecture of the Charter. The Bush Doctrine is not only jurisprudentially suspected, but also questionable strategically. No doubt it is a dangerous precedent for the manipulation of preemptive strike on weaker states by the powerful states. The state practice of diplomatic solution to disputes and the principle of reciprocity, cardinal principle of international law, have been kicked out by the United States. The aggressor may follow the doctrine as fashion encouraging the dominance of superpower arrogance and unilateralism.

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<sup>1</sup> James Chace, *Empire, anyone?*, The New York Review of Books 51 (15) (7 October 2004) 15-18.

Taken from- JSYP Journal on Science and World Affairs, Vol. 1, No. 2, 2005 123-131

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From dissociated hegemony towards embedded hegemony, Multilateralism as a by-product of American security concerns

Bush's decision to withdraw from ABM, ICC, NPT, KP and invasion on Iraq without the prior authorization by the UN Security Council and to make other hegemonic military geopolitical-economic moves are the overt evidence of US unilateralism. The unapproved US military intervention has been viewed by the global community as defiance of international law. US unilateralism has been condemned not only by its traditional allies but also by the UN General Assembly, and also the cool reception of President Bush on his address to the 59<sup>th</sup> session of UN GA on September, 2004, and the hurling shoe by the Iraqi journalist was an open proof for hatred of US unilateral measurements. The United States itself is the main stream of the nonproliferation government, on the other hand has unilaterally enlarge its own strategy for unilateral exercise of nuclear arsenal as on Hiroshima and Nagasaki and is moving toward unilateral expansion of its bases.

No doubt the attacks on WTC and Pentagon, the probability of terrorists' access to CBW, the critical proliferation of WMD and the expected approach of so called rogue states to mass murder arsenals has endangered dramatically the existing global security system. This insecurity is not a matter of an individual state only US, but a matter of collective security which can be addressed by the international Security Council. The national security strategy, national defence system, the constitutional presidential power to wage or the congressional permission to go to war on the territory of a sovereign state has no room at international forum, whatever the intensity of threat may be. Mere latent threat does never provide a legal basis for unilateral action.

When states go beyond the boundaries of the limitation of law then the barbarity, savagery and cannibalism prevails. In the past the World Wars death tolls and devastation has taught humanity a lesson to refrain from use of force, which glimpses in the UN Charter Preamble; the scourge of war has been observed for two times, "which twice in our lifetime has brought untold sorrow to mankind." To maintain peace around the world was the chief reason to establish UN but the superpowers US devastates its sole purpose. But US has sought the way to cope with such issues by pre-emptive invasions and paying nothing heed to the world recognized Security Council. US prefers to cope with such situation alone rather than collectively. But the state practice of countering terrorism and

WMD is greater threat for weaker states of the world. The unilateral way of exercise of force is unacceptable to the world community. The unilateralism has been named as preemptive strike, which is a new approach in the face of new challenges.

It is ridiculous to take the pleas to seek WMD, for the invasion of Iraq, because many times the UN inspectors had inspected Iraq to find CBNW under the UNSCOM, IAEA and UNMOVIC, but they found not any weapon.<sup>2</sup> In Iraq war more than 100,000 Iraqis have been killed after US seeking WMD. According to international law there is only UN SC which can authorize the use of force, but US aloofness and unilateral action is the violation of international law.

If the possession of WMD is such an overwhelming threat for US and for the rest of the world then in my opinion the powerful countries enjoying the high camp of Nuclear Arsenals are more dangerous to the weaker states, *"the most dangerous of these states are those that also possess weapons of mass destruction... The chronic failure of the Security Council to enforce its own resolutions.....We are left with coalitions of the willing. .. we should recognize that they are, by default, the best hope for that order, and the true alternative to the anarchy of the abject failure of the UN."*

Perle put down the ground for the new-fangled Bush Doctrine of pre-emptive/preventive attack of other nations whenever and wherever it pleases. The "coalition of the willing" and NATO is a euphemism for the US government and whichever other governments it bribes or blackmails to join their imperialist invasions."<sup>3</sup> Clearly the Bush's invasion on Iraq was grossly immoral, because it is the sign of lust of selfish group of men seeking for oil and riches abroad through imperialist invasion.

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<sup>2</sup> Hans Blix at the Iraq war inquiry – live, Politics Blog, guardian.co.uk.

<http://www.guardian.co.uk/uk/blog/2010/jul/27/hans-blix-iraq-inquiry-live>

Fred Kaplan Posted, The Iraq Sanctions Worked, And other revelations from David Kay's report, Tuesday, Oct. 7, 2003, at 7:08 PM ET

<http://www.slate.com/id/2089471/>

"Throughout the report, Kay kicks up a sandstorm of suggestiveness, but no more. He notes, in alarming tones, the discovery of "a clandestine network of laboratories and safehouses within the Iraqi Intelligence Service," including equipment *"suitable for continuing CBW [chemical and biological weapons] research"* (all italics—here and henceforth—added). This is an interesting finding, but it says nothing about CBW *development or production or deployment*, and proves nothing about whether the equipment was actually *intended or designed* for CBW purposes."

<sup>3</sup> Ibid

## **1. WAR OF AGGRESSION AND PREEMPTIVE STRIKE**

Bush commenced a war of aggression against Iraq, because it was based on aggressive decision on trifle ground of imminent threat of terrorism and potential use of WMD against US in few days. This war was also illegal due to lack of recommended authorization from SC. Such wars in international law have never been left unpunished. To handle such war crimes International Criminal Court has been established in 2002. But US refused its jurisdiction. Is this not US mockery to international Court? Is US rendering the ICC in its very inception? US also argued that the permanent members of the Security Council would be exempt from being declared as rogue states, and hence exempt from prosecution on any count. This demand is illogical and arrogant. The fatal flaw of the International Criminal Court is that once again it was emerged from inside the United Nations, which is on the whole nothing more than a pawn, a tool, and puppet in the hands of the United States. In this state of affairs, there will be no justice, and no practical value of the ICC. Rather, it will be a vehicle to perpetrate injustice, by singling out persons of lesser countries alone for punishment.

## **2. BUSH'S HELL-BENT TO DEMISE UN**

The United States was fully hell-bent on Iraq invasion. Actually President Bush had formulated agenda to do so. He ignored the non-military alternative options of resolving the Iraq issue as Saddam Hussein was prepared to take \$1 billion and go into exile before the Iraq war, according to a transcript of talks between U.S. President George W. Bush and an ally, Spanish newspaper El Pais reported.<sup>4</sup> He also paid no attention to diplomatic solution. President Bush deliberately was a war monger, he engraved illegal reasons to Iraq crisis, his grief usually turned to anger and to resolution. He demanded enemies will be brought to justice. His nonsensical and full of anger, sorrow and crazy rhetoric to the American people were only to make them fool and win their support. American could not

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<sup>4</sup> Jason Webb (September 26, 2007). "Bush thought Saddam was prepared to flee: report".

Taken from 2003 Invasion on Iraq

[http://en.wikipedia.org/wiki/2003\\_invasion\\_of\\_Iraq](http://en.wikipedia.org/wiki/2003_invasion_of_Iraq) (Retrieved on 12-4-2011)

Wed Sep 26, 2007 5:25pm EDT

<http://www.reuters.com/article/2007/09/26/us-iraq-bush-spain-idUSL2683831120070926>

imagine the horrors to Iraqis. Bush decision on latent issue terrorism and WMD was short term insight. The decision to attack was without deliberation and the magnitude of consequences of war devastation. It was a blind decision.

President Bush took a so illegal step to invade Iraq to protect American's future devastation, but President Bush forgot the darkness being spread. Why a civilized and modern state did so to the weaker one. Nowadays people around the globe hate America due to its arrogant policies and exploitation. They hate for their sufferings. WTC attack damaged the hundred US families but US has destroyed millions of family members and their homes. Is this a justice to Iraqi people? Bush sought justice in attacking on Iraq, but see! Where the Iraqis are standing? Who will take the notice of Such powerful state and bring the perpetrators of war to justice?

UN was established to save the succeeding generation from the scourge of war and was initiated by the superpowers of the world but US the originator always violated it. According to UN Charter Article 39 only US Security Council has authority to determine the existence of any threat to peace, breach of the maintain international peace and security. If we apply this Article on Iraq War, United States attacked on Iraq without UNSC authorization, violated the principles contained in the Charter and without just cause. The UN Charter in Article clearly gives a notable and outstanding scope that if a member of United Nations persistently violates the Principles contained in the Charter may be expelled from UN Organization by the General Assembly upon the recommendation of the Security Council. So I would suggest that SC must pass a resolution against US to expel it from UNO because US has been persistently violating the UN Charter.

### **3. UN's DEMISE AT THE HANDS OF SUPERPOWER**

Since the very commencement of the UN, this Organization has been an extension of US free enterprise and under its influence. It intervenes in world affairs when it is in the capitalistic interests of the US to do so. It has been ignoring the UN SC Resolutions and the laws obligatory under international forum. It twists the meaning of the Resolution



according to its own accord. As it did to Iraq, it molded and interpreted the wording of the Resolutions of 660, 678, 687 and 1441 to develop justification to invade Iraq. It has been ignoring and oppressing the UN Charter since long. UN was established by the US to maintain international peace and security, but US used it for its own interests. As in 2003, when UN SC ignored to authorize the invasion on Iraq, US rendered the Council's obligations and UN an impotent attacked on Iraq.<sup>5</sup>

US exerts influence on officials of United Nations and recognizes its possessiveness toward the UN. Now UN has lost the role impartiality among the nations. Clearly US is the country that can do fundamental long term damage to the UN through deliberately neglect its obligations. All UN senior officials are regularly telephone exchanges and frequently visit to Washington and New York. UN mainly depends upon US army. US is the leading country in the world predicted more global leader. But US has never fought for UN peace keeping mission or to maintain international peace and security.<sup>6</sup>

In order to make the UN Security and its authority more effective, it is the need of the hour to reform the UN structure and the power of Security Council. The authorization to exercise military force must remain exclusively in the hands of the Security Council. It must be ensured that its decisions are respected and fully implemented by states. Furthermore, Council action needs to be complemented by the concerted efforts of the international community of states as organized by the General Assembly, UN members and NGO's.

The existence of UN and Security Council is in danger in the hands of United States, due to its military might. UN is at its critical situation of breathing its last. But whatever it entertains superiority, it cannot alone control the international modern issues like terrorism and proliferate the world from Weapons of Mass Murder (WMM). It is the best time for the common regimes of the world to take a bold step to dissolve the United Nations and to give it a gracious burial. World nations are requested to constitute a new world government that will have the military authority to implement the United Nations Charter laws and other international treaties and conventions.

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<sup>5</sup> Garda Ghista, Pre-Emptive Invasion and International Law, Global Research, December 13, 2005

<sup>6</sup> Paul F. Diehl, The Politics of Global Governance, International Organizations in an Interdependent World; Lynne Rinner Publishers, USA, 2<sup>nd</sup> edi. 2005, P.467-483

Since the very commencement of the UN, this Organization has been an extension of US free enterprise and under its influence. US intervenes in world affairs when it is in the capitalistic and corporate interests of the US to do so. It has been ignoring the UN SC Resolutions and the laws obligatory under international forum. It twists the meaning of the Resolution according to its own accord. As it did to Iraq, it molded and interpreted the wording of the Resolutions of 660, 678, 687 and 1441 to develop justification to invade Iraq. It has been ignoring and oppressing the UN Charter since long. UN was established by the US to maintain international peace and security, but it used it for its own interests. As in 2003, when UN SC ignored to authorize the invasion on Iraq, US rendered the Council's obligations and UN an impotent attacked on Iraq.<sup>7</sup> Historically, sorry to say it was the US President Wilson who configured the League of Nations (LON), but it was not ratified subsequently by US, because US cannot be limited within the walls of law.<sup>8</sup>

#### **4. GLOBAL VOICE DEMAND FOR JUSTICE**

The tyranny, imperialism, anarchy and the international dictatorship of the superpower either of US or Britain should be abolished with an iron hand. In this modern era people avoid wars and demand an end to the arbitrary lawlessness and the violence of its aristocracy and anarchy. Nowadays we have observed US global power play and aristocracy through United Nations and its important wing Security Council. UN Security Council surrenders power to a global tyranny of America, as US violated the UN Charter and its obligations and indulge in war against Iraq. We require a World government founded on Economic Democratic Societies to end this dark era of international "state of nature."

In the American history George W. Bush has proved himself as universal tyrant. The reaction to his crimes ushered in the requirement of global democracy and liberty in which no country has ever invaded and plundered another country. It is the end of international law and UN history, which echoes in US characteristics of its world dictatorship moves and US illegal and irrational and unauthorized invasions on weaker

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<sup>7</sup> Garda Ghista, Pre-Emptive Invasion and International Law, Global Research, December 13, 2005

<sup>8</sup> League of Nations From Wikipedia, the free encyclopedia  
[http://en.wikipedia.org/wiki/League\\_of\\_Nations](http://en.wikipedia.org/wiki/League_of_Nations)

and fragile states. People are dreaming for a new era of universal freedom a world government representative.

In Bush's own words the UN was born to save the world from war and to move the world to justice. He also remarked that we through SC and LON dedicated standards of human dignity. But Bush himself challenged the standard of human dignity by violating the standard formulated by these world constituted laws. Mr. Bush has quenched his thirst for barbaric deeds through the absolute imperative characteristics and oil imperialistic motives.

## 5. SUGGESTIONS AND RECOMMENDATIONS FOR FUTURE SECURITY

Bush started a cruel, illegal and drastic war and war of aggression, premeditated and preplanned war against the threat of WMD and terrorism. It was a supreme crime which US committed on waging Iraq war. Bush Administration his allies and military personnel, Rumsfeld, Cheney, Gonzales, Collin Powell Blair, Straw and many others are guilty of the supreme international crime of war of aggression that include within itself the accumulated evil of the whole, as affirmed by the Nuremberg Tribunal. But the question is who will hold a trial for these culprits? and who will pass judgment and sentence them to lifelong imprisonment for their supreme crimes? Will any country in the world take a bold step to do this work for whole humanity? Will any nation step forward to eliminate the imminent threat US imposing to the world? Bush's hands are bloody for thousands of casualties in Iraq and Afghanistan. He has taken the revenge for few hundred in WTC incident. But who will take the revenge of Iraqis? Will Bush and his others be punished for their war crimes? Will the victims of war see justice in their lives?

The criminals of war crimes in Iraq should be prosecuted under the Brussels-based World Tribunal on Iraq<sup>9</sup> or the tribunals like Nuremberg Tribunal, Tokyo Tribunal or International Criminal Court for Rwanda, if ICC does not have function and ICJ is not

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<sup>9</sup> The BRussells Tribunal are intellectuals, artists and activists who denounce the logic of permanent war promoted by the American government and its allies, affecting for the time being particularly one region in the world: the Middle East. It started with a people's court against the PNAC and its role in the illegal invasion of Iraq, but continued ever since. It tries to be a bridge between the intellectual resistance in the Arab World and the Western peace movements.

effective. The B. Russells Tribunal are intellectuals, artists and activists who denounce the logic of permanent war promoted by the American government and its allies, affecting for the time being particularly one region in the world: the Middle East. It started with a people's court against the Project for the New American Century (PNAC)<sup>10</sup> and its role in the illegal invasion of Iraq, but continued ever since. It tries to be a bridge between the intellectual resistance in the Arab World and the Western peace movements.

Let the World Tribunal on Iraq, with its "*jury of conscience*" replace the court of ICC, and let this genuine jury, representing justice, representing the common people, try and convict the perpetrators of the supreme international crimes of war. Let them rebuild what the United Nations and the international criminal law requires from the world community to practise.

Hopefully when an honest and US non-influential government in Iraq will be elected then the Iraqi people through their Federal Government should file suit against UUS to the ICC or other World Anti-War Tribunal.<sup>11</sup> Iraq also deserves to demand reparations from US to rebuild Iraq.

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<sup>10</sup> PNAC was an American think tank based in Washington, D.C. that lasted from 1997 to 2006. It was co-founded as a non-profit educational organization by neoconservatives William Kristol and Robert Kagan. The PNAC's stated goal was "to promote American global leadership." Fundamental to the PNAC were the view that "American leadership is both good for America and good for the world" and support for "a Reaganite policy of military strength and moral clarity." The PNAC exerted influence on high-level U.S. government officials in the administration of U.S. President George W. Bush and affected the Bush Administration's development of military and foreign policies, especially involving national security and the Iraq War.

<sup>11</sup> The World Anti-War Tribunal is suggested tribunal to be established in case of failure of existing tribunals as ICC and ICJ.

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