NATIONAL SELF DEFENSE and INTERNATIONAL LAW

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March 18, 2004

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The most publicized element of the *National Security Strategy* promulgated in September 2002 by the Bush administration is its emphasis on the option to use preemptive military strikes to address threats to the United States before they fully materialize. This was set in the context of terrorist organizations, such as al Qaida, or so-called rogue states, such as North Korea, acquiring and threatening to use weapons of mass destruction; e.g., chemical, biological, or nuclear weapons. I will use the terms preemptive attack, preventive war and anticipatory self-defense interchangeably. Arguably, the term anticipatory self-defense could imply action against a truly imminent alleged threat, while preventive war could be addressed to a threat that is yet to become fully mature, with preemptive attack somewhere in between. However, even though the three terms are somewhat different, the lines between them are not clear, and they all involve aggressive action. Thus, the question becomes, given the circumstances, is a particular attack justified under the rules of international law as a legitimate act of self-defense?

Section III of the *National Security Strategy* document states that the Government will defend "the United States, the American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our borders. While the United States constantly will 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. . ."

Also, in December 2002, the White House released a supplementary Strategy Document to "Combat Weapons of Mass Destruction." Therein, it is implied that both conventional and nuclear forces will be used to prevent the proliferation of weapons of mass destruction and that preemptive action will be taken where appropriate.

It is noteworthy that the September *National Strategy* document itself places this doctrine of preemption in the context of international law:

> 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 attacks . 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.
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> We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.

To emphasize that the aim of this *Strategy* document, in part, is to adapt the international law of self-defense to an age of weapons of mass destruction potentially in the hands of rogue states and terrorists, the *Strategy* document also says: "We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends . . . . We must deter and defend against the threat before it is unleashed."

Evidence that the United States was prepared to engage in preemptive action in the past is beyond question. During the Cold War, if the Government had received reliable information that a Soviet thermonuclear first strike was imminent, there would have been contemplation of utilizing the highly accurate nuclear counterforce weapons the United States possessed, such as the Peacekeeper ICBM and the Trident D-5 nuclear missile to remove such a threat. However, the United States was always careful to insist that it followed a second-strike policy and would only respond with its nuclear forces after being attacked, while continuing to maintain a launch on warning option. The Soviet Union had to assume in its nuclear planning that a counterforce attack on the United States would be ineffective, because the U.S. missiles had been launched before the arrival of Soviet weapons. But, this option was never raised to the level of a doctrine, and it was never even a formal declared Government position. It would seem, for the first time, the *National Security Strategy* document elevated preemptive attack to a doctrine that is supposed to underpin policy decisions.

The United Nations Charter on its face rules out preemptive attack. Article 51 does allow the use of force in self-defense, but this authority is narrowly circumscribed. Thus, in the words of the Charter, a Member nation of the United Nations can engage in military acts of self-defense only after an armed attack has occurred, and then only until the United Nations Security Council has taken control. There are conflicting views as to what this means. Some believe that United Nations Member states have only those rights specifically granted by the Charter. Thus, self-defense would be permitted only after an armed attack had occurred and not in anticipation of one. For example, the preeminent Constitutional Scholar Professor Louis Henkin has written that "the Charter intended to

permit unilateral use of force, only in a very narrow and clear circumstance, in self defense if an armed attack occurs." Others argue that the rule set forth in the Charter did not extinguish customary law rights of self defense and that military preparations obviously undertaken as a prelude to an attack could legitimately be viewed as part of the threatened attack. It has been asserted that the inclusion of the words in the Charter "nothing . . . shall impair the inherent right" shows a clear intent not to restrict the pre-charter customary law rights of anticipatory self-defense.

The basic international law rule governing anticipatory self-defense is the rule set in the famous *Caroline* case. It followed a failed rebellion outside of Toronto in December, 1837. Rebel leader, William Lyon Mackenzie, escaped across the border to Buffalo, New York and succeeded in convincing sympathetic Americans that his situation paralleled that of the Thirteen Colonies. He called for military volunteers to meet him on the American shore of the Niagara River, and—accompanied by some two dozen recruits—occupied an uninhabited Canadian island. By the end of the month, Mackenzie's force grew to between several hundred and 1,000 men, mostly Americans. The British responded by stationing some 2,000 militiamen along the Canadian shore and called upon the United States to stop the flow of men, arms, and supplies to the island. As tensions rose, the British-Canadian commander ordered a Royal Navy officer to capture or destroy a ferry that was being used to bring supplies to the island. After rowing into the river, the officer discovered that the steamer was not docked on the Canadian island, as had been reported, but instead was docked on the U.S. mainland. He decided to carry out his orders anyway, and sank the ship. While only one person on board the ferry was killed, U.S. newspapers misreported the incident, further stoking

tensions along the border. The British claimed the attack was an act of self-defense, but the issue festered for some five years.

In 1842, the United States and Britain finally settled the issue. During negotiations in Washington, D.C., U.S. Secretary of State, Daniel Webster, as part of the settlement, defined the conditions under which self-defense could be used to justify an unprovoked attack on another nation. He wrote that an attack on foreign territory was justified only if the aggressor were able to show a "'necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.'" He added that the attacking country also had a responsibility to limit itself to self-defense measures and to do nothing unreasonable or excessive.

This case sets forth a rule which serves as a precedent that is still binding. In 1976, Israel's ambassador to the United Nations quoted Webster's doctrine when justifying Israel's operation to rescue hostages being held at the Entebbe Airport in Uganda, calling it the 'classic formulation' of the right to self-defense," although it is difficult to see the application of the doctrine in that particular case.

But how should one apply the *Caroline* rule in this age of nuclear weapons, long-range ballistic missiles, so-called rogue states and international terrorist organizations? This is what the National Security Strategy document says it is doing. First, one must look at the general self-defense rules, which are widely accepted as part of international law. For example, any response must be necessary to stop the attack and proportionate to the threat and must be for the purpose of defense not to achieve some political military advantage (that is, it must be aimed at protecting the status quo.) More specifically, with

regard to anticipatory self-defense justifying a preventive attack the additional applicable rules of international law:

Are there objective indicators that an attack is imminent (troop buildups, increased alert level, increased training tempo, reserve call-up, etc.)? Does past conduct or hostile declarations of the alleged aggressor reasonably lead to a conclusion that an attack is probable? What is the nature of the weapons that are available to the alleged aggressor, and does it have the ability to use them effectively? Weapons of mass destruction and long-range ballistic missile systems might make waiting for an actual armed attack exceedingly dangerous. In judging such a case, much would depend on whether there had been a test program demonstrating a long-range ballistic missile capability. Also important would be the likelihood that an alleged aggressor had developed weapons of mass destruction, particularly nuclear weapons. To possess nuclear weapons that are deliverable by ballistic missiles, a nuclear weapon test program is almost certainly required. Crude nuclear weapons of the Hiroshima-type, which can be reliably constructed without a test program, are too heavy and unwieldy to be effectively and accurately delivered by a long-range ballistic missile. Such test programs would be monitorable by intelligence means.

Also, one of the difficult issues involves secret information that an attack is threatening but which a government cannot release to the public because its release would compromise that government's intelligence sources and methods. What burden of proof must a government carry to be seen to be operating within the rule of international law. Can it act legally on its secret information and trust later events will justify its actions?

Lastly, is the use of force the last resort after exhausting all practical, peaceful means? Diplomacy is always the best course to take for long-term success if it is possible.

The new doctrine set forth in the *National Security Strategy* document declares that the United States will not hesitate to act preemptively, alone if necessary, against rogue states and terrorists that threaten the United States with weapons of mass destruction. But the *Strategy* document also sets this doctrine within the rubric of international law and states that the world community must adapt "the concept of imminent threat to the capabilities and objectives of today's adversaries." The military action against Iraq last year was the first application of this doctrine, therefore, it is only fitting that it should also serve as the first test of the legality of that doctrine and the updated concept of preventive attack or anticipatory self-defense that it embraces.

Military action against Iraq, pursuant to a United Nations Security Council mandate would, of course, have been quite a different thing, as it would have carried with it authorization under international law. Given the fact that a new Security Council Resolution (Resolution 1441) demanding that Iraq disarm with respect to its weapons of mass destruction, and that inspectors be permitted access to Iraqi territory to verify this, existed prior to the invasion of Iraq, the issue should be reviewed in the light of the Resolution and the support of the world community for it. If it had been judged that Iraq had not complied with the Resolution and had attempted to hide or deny access to weapons of mass destruction, the Security Council probably would have ordered "all necessary means" to compel compliance, thereby authorizing military action against Iraq. Military action taken by the United States or any other state pursuant to such an

authorization would be legal under international law. On the other hand, had the inspectors found nothing after lengthy and intensive searches (a likely result given the experience of the last year), and reported this fact to the Security Council, it is likely that the Council would not have authorized force. And surely, the Security Council is the appropriate interpreter of its own Resolutions and a clear majority of the Security Council was of the view that, inspective of past Resolutions, including that of November 9, 2002, that is Resolution 1441, a new resolution authorizing force would have been required to legitimize, under international law, an attack on Iraq under the then current circumstances of Spring 2003. However, given the distrust expressed for the inspection process by some senior administration figures—the United States took the position—under the new doctrine—that contrary to the inspectors' preliminary conclusions, the United States was in the possession of intelligence indicating that Iraq did, in fact, possess weapons of mass destruction, and that these weapons represented an imminent threat to the security of the United States. Pursuant to such a conclusion, the United States, with Great Britain, conducted a unilateral preemptive military attack on Iraq at the end of March 2003, before the inspectors had finished their inspections and the process set in motion by Resolution 1441 had been completed. This attack was indistinguishable from a unilateral preemptive attack outside the United Nations' system as it bypassed the UN and the existing Security Council Resolution. Whether such an action taken under the rationale of the new Doctrine, despite the lack of Security Council authorization, was legal under international law depends heavily on the facts and the degree to which they could be ascertained.

In a letter dated October 15, 2002, to the President of the United States, the Association of the Bar of the City of New York strongly urged the Administration to consider military action against Iraq only in the context of a new Security Council Resolution. The letter refers to Secretary Webster's rule, and also recognizes that "what constitutes an imminent threat today cannot be limited to what constituted an imminent threat in Secretary Webster's day." However, the letter goes on to say that on the basis on information so far made publicly available, the United States "has itself not appeared to present the case for an actual or imminent Iraqi attack. In our view, the distinction is not simply a question of uncertainty as to 'the time and place of an attack.' More fundamentally, the United States so far has not publicly made a claim of any certainty or even probability of an Iraqi attack against the United States that rises to a level of imminence justifying unilateral action at the present time." This letter, I believe, is responsive to the question of secrecy, that is if a world order governed by a system of international law is to have a chance to be workable, nation states must publicly justify their actions. Anything can be justified on the basis of "secret information" to which no one else is privy.

Now turning to the test case of the unilateral preemptive military attack on Iraq under the circumstances at the time, outside the Security Council resolution of November 9, let us apply the basic elements of the test described previously.

- Was the potential action aimed at protecting the status quo? No, since such action had been expressed as being directed toward a "regime change."
- Was the military response necessary? No, since there was no imminent, identifiable threat to the U.S.

- Was such a military response in self-defense proportionate to the actual threat? If Iraq truly had been threatening to develop weapons of mass destruction, particularly nuclear weapons, combined with long-range ballistic missiles deliverable against the United States, regime change as a war objective would have been proportionate. But, this was not the case.
- Was there an imminent or immediate threat of an armed attack from Iraq, even considering modern capabilities of weapons of mass destruction and ballistic missiles? No. At that stage in 2003, Saddam Hussein's sole objective seemed to be to preserve his rule.
- Were there objective indicators that an attack of any kind was imminent (troop build-up, missile tests and deployments, nuclear tests): No. The objective indicators suggested that he was preparing to defend against an invasion, not preparing to attack another nation.
- Did the past conduct or hostile declarations of the alleged aggressor reasonably lead to a conclusion that an attack was probable? Perhaps in the past, but not in 2003.
- What was the nature of the weapons available to the alleged aggressor nation, and did it have the ability to use them effectively? It appeared that Iraq had no air force, had virtually no usable ballistic missiles, was years away from a nuclear weapon, had a greatly weakened army, likely possessed chemical and biological weapons (later demonstrated not to be so), but had no means of delivering them except possibly through terrorist agents. Compared to threats such as al Qaida, North Korea, and other terrorist organizations, Iraq was not a short term probable danger.

- Was the use of force the last resort after exhausting all practical, peaceful means? Certainly not, as of March 2003.

To sum up, based on the foregoing, the unilateral assault on Iraq outside of Security Council authorization does not appear to meet the test of the rule of the *Caroline* case. The attack was not directed at protecting the status quo. No immediate attack by Iraq threatened the United States or its Allies. No convincing evidence had been advanced that explained why immediate military action against Iraq was necessary. And finally, at the time, the military force available to Iraq appeared to be limited in scope and effectiveness. Thus, the preemptive attack on Iraq, without the sanction of the Security Council, was not justifiable under international law. A majority of the members of the Security Council interpreted Resolution 1441 (and all past Resolutions) as requiring a new Security Council resolution authorizing the use of force, based on the reports of the inspectors, before it could be said that military action against Iraq was taken pursuant to Security Council auspices. And surely, as I said earlier, the Security Council (determined by the views of a majority of its members) is the appropriate interpreter of its own resolutions, as opposed to one or two of its members. Therefore, if the military action against Iraq, taken outside of the generally held interpretations of the November 9 Security Council Resolution, is properly illustrative of the appropriate interpretation of the *National Security Strategy* doctrine, this doctrine must be considered to be not consistent with international law.