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The Concept of Pre-emption: The Changing Structure of International Order Concerning the Maintenance of International Peace and Security

1. INTRODUCTION

In the aftermath of the terrorist attack of September the 11th, 2001 the US strategy regarding its national security had changed dramatically. A global reaction against such attack had also been at stake once the United Nations Security Council had adopted resolution 1368 on the next day condemning the "horrifying terrorist attack" where the attack has represented a "threat to international peace and security" like "any other act of international terrorism."[2] The act of international terrorism, a definition of which is yet to be discovered though, maybe perpetrated without State's direct involvement. The September 11th attack had been conducted from inside the US territory without the direct involvement of any State.[3] Therefore, a plea of invoking article 51 of the UN Charter had been unlikely to be focused, at least at the initial stage. This is because firstly there had not been an "armed attack" by the definition. Secondly the State involvement was unidentified. The White House and other high officials of the US State Department, however, were extremely active to find the way of justifying potential action of retaliation. The Security Council, working closely with the US, adopted its second resolution on this issue.[4] The resolution, while recognizing the inherent right of individual or collective self-defense on part of the US, had been designed under Chapter VII of the Charter, which entails binding obligation. The resolution, thus, sets up several points to comply with by all States, such as prevention and suppression of financing terrorists, freezing funds and other financial assets of terrorist network and so on. The problem of identifying terrorist network, or individuals of being terrorist suspects, however, becomes crucial. The reliance, as it had been later apparent, was based mainly on the US intelligence reports, which by many reasons were found to be either biased or incorrect. This has brought an international tension, especially among the weaker states critical to the US foreign policies. The speculation has come true when in one of his speeches, President George W. Bush signaled out Iraq, Iran, and North

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[2] See, op. para. 1, SC Res. 1368 of September 12 (2001)
[3] For example, Taleban ruled Afghanistan had not been directly involved for the attack allegedly perpetrated by Al-Quieda network. However, such non-State actor may definitely create a danger to international peace and security. The present structure of international law, nonetheless, does not attribute the responsibility upon Afghanistan for the action of Al-quieda unless a clear authorization by the Security Council is found.
[4] SC Res. 1373 of September 28 (2001)

Korea as constituting "axis of evil."[5] This time an attack on Iraq was planned out on the basis of preemptive self-defense, or in other words the so-called *Bush Doctrine*, what is, as a matter of fact external to international law. The concept, therefore, has raised an intense debate both in international relations and in international law. In this article I will examine the very concept of preemption as being unjustified by the existing structure of international order while the doctrine itself constitutes a threat to international peaceful coexistence.

2. EXISTING STRUCTURE OF INTERNATIONAL ORDER CONCERNING INTERNATIONAL PEACE AND SECURITY

Any attempt to threat or use of force against the territorial integrity or political independence of any State is declared illegal by virtue of article 2(4) of the Charter of the United Nations. This article has got such a wide importance that, according to the scholars of international law it achieves similar importance as of the norm of *jus cogens* – the norm, which is non-derogable in character, and under no circumstance is it allowed to violate. There are, however, two exceptions. The first is Chapter VII mechanism of the Charter of the United Nations, where collective security plan was placed. Secondly inherent right of individual or collective self-defense in response to an armed attack as long as until the UN Security Council is involved.

2.1 Collective Security Mechanism

The UN collective security mechanism requires first a determination that a situation exists what constitutes a threat to the peace, or a breach of peace, or an act of aggression. Article 39 of the Charter, which is called the key article to UN enforcement action - is the authority for such determination. The article states that 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 41 permits the Security Council to impose non-military sanctions against the aggressor or peace-breaker while article 42 allows use of force in order to re-establish peace. Article 39 is important because it corresponds to the exception of non-intervention principle – the principle, which is a pre-existent "super customary"[6] norm in international law and, is also embodied in article 2(4) of the UN Charter, as discussed previously. The Charter, therefore, empowers the Security Council to find a formal determination as regards the violation of article 2(4). Such violation could be confirmed under article 39 of the Charter in order to take further action through enforcement mechanism. A direct relationship is then found between "threat or use of force" under article 2(4) and a "threat to the peace", "breach of peace" and "act of aggression" under article 39, which grants the Security Council jurisdiction under Chapter VII. In other words

[5] Cf. in the State of Union of address on January 29, 2002, viewed from the official White House web site, see, www.whitehouse.gov.

[6] Cf. for *jus cogens* the terms, "super customary" is used by David Kennedy, see, Kennedy, David, *International Legal Structure* (1987), p. 26

"threat of force" corresponds with "threat to the peace" and "use of force" is equivalent to a "breach of the peace" and "act of aggression."[7]

Any violation of article 2(4) of the Charter though constitutes an act of aggression, the determination under article 39 as such, is within the exclusive competence of the Security Council. The *travaux préparatoires* for article 39 of the UN Charter reflect the drafters' intention to allow the Security Council to take enforcement action in a broad range of cases and not to subject it to severe restrictions in its decision when to act.[8] This has been reiterated in the agreement reached by the Security Council meeting at the level of heads of States and Governments in January 1992.[9] In the meeting the opinion was expressed that in present days the Security Council faces new challenges what has brought new risks for the stability and security. Therefore, member States expect the United Nations to play a central role at this crucial stage through the effective Security Council action with respect to these challenges, which seems to re-interpret article 39 in the wider sense. The Security Council, as a matter of fact, is not bound by any definition or formula as to what constitutes threat to or breach of the peace or act of aggression, when it acts under Chapter VII of the Charter.[10] Thus, the determination is a factual question left to the discretion of the Security Council alone. The Council has the power to characterize situations relating to internal disturbances, human rights violations, civil conflicts or (conceivably) the acquisition by a state of nuclear or other weapons of mass destruction, as threats to the peace. Even the refusal of a government or opposition group to accept the results of an election can be deemed to constitute a threat to the peace – at least where it involves the outbreak of hostilities between contending factions or causes some aggravation of international tension, significant refugee flows or other (potential) cross-border effects.[11] Therefore, it is apparent that the Council's discretion to determine the existence of a threat to the peace is certainly very wide.[12]

Moreover, for any kind of binding obligation to be imposed upon a State, States or other entity, the Council needs to act under Chapter VII. For example, the Council demanded that Libya should surrender two of its nationals for prosecution to the United Kingdom or to the USA, despite the existing law of the Montreal Convention,[13] although the Council did not make any mention under which authority it had acted. The demand of the Council was, however, binding because it was followed by a determination of "threat to the peace" and the Council had acted under Chapter VII.[14] For the Libyan case, it is perhaps possible to make a link that terrorism was backed by the State, and such terrorism may constitute "threat to the peace." Let us have one other example. In July 2002, the Security Council adopted resolution 1422 (2002) requesting the International Criminal Court (ICC) to refrain from initiating investigations or proceedings related to peacekeepers of non-State parties to the Statute. This

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7 White, N.D., Keeping the Peace, at p. 35.
8 Simma, (ed.), *The Charterof the United Nations* (2002), p. 718
9 Cf. 3046th meeting of the SC, S/23500, January 31, 1992
10 See, Gill, *Legal and Some Political Limitations* (1995), Netherlands Yearbook of International law (1995), p. 40
11 ibid, pp. 42-43 (Security Council action in relation to Haiti and Angola where the Council imposed a mandatory arms and oil embargo upon the opposition movement UNITA when the movement failed to accept to the results of a UN monitored election and reopened the civil conflict. The embargo was imposed by means of SC Res. 864 (1993))
12 Kelsen, H, *The Law of the United Nations* (1951), p. 727, that it is completely within the discretion of the Security council to decide what constitute a "threat to the peace"; Simma, Bruno, (ed.) *The Charter* (2002), p. 719, that in determining whether a threat to the peace, a breach of peace or an act of aggression exists, the SC enjoys considerable discretion.
13 SC Res. 731 (1992)
14 Cf. confirmed by SC Res. 748 (1992)

resolution, although quite ambiguous, was adopted because the USA threatened to withdraw from the peacekeeping mission, if its peacekeepers were subjected to prosecution in the proceedings of the International Criminal Court for committing war crimes. It is hard here to find a link of "threat to the peace" though, for creating a binding obligation Chapter VII was invoked, the basis of which could be presumed to be article 39. The same way perhaps could be applied for specific individual(s) suspected of breaking international peace, which is now increasingly being developed through the application of newly invented concept - "smart sanctions."

The collective security mechanism does not, however, recognize in anyway the interference in State's internal affairs unless the Security Council's explicit authorization.[15] For the Security Council the interference in the affairs that are necessarily within the domestic jurisdiction of a State is possible only when Chapter VII imposed enforcement mechanism is in question.

2.2 Inherent Right of Self-defense

The other option, when to act unilaterally, or collectively along with the allies, without the Security Council's authorization is action in self-defense. Thus, self-defense is an exception of article 2(4) prohibition. The concept - self-defense, however, seeks clarification as to what is meant by the very term self-defense? When does the right of self-defense emerge? How long does the right exist? Answers to these questions are not very hard to be found. Article 51 of the Charter states - "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. Measures taken by Members in the exercise of this right of self-defense 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." The Charter, however, did not clarify the terms "inherent right," "armed attack" and so on. It is, nonetheless, apparent from this legal construction that an actual armed attack has to be carried out to justify the plea of resorting use of force against the territorial integrity or political independence of a State. A mere fear of being attacked without proper evidence is not by itself sufficient cause for self-defense. The other thing is that State taking action in self-defense must without delay notify the Security Council of the action, and cease to be acting in self-defense once the Security Council takes up the issue. However, under the pressure of changing circumstances, the concept of self-defense has undergone adaptation and expansion through institutional practice. States tend to justify their unilateral action under the guise of self-defense by invoking a very flexible interpretation of the Charter. Some argue such interpretation as "creative." Thomas Franck – one of the well-known scholars of present day in the field of international law – has found five kinds of justifications on the "creative" interpretation of article 51:[16]

[15] Cf. article 2(7) of the UN Charter

[16] Franck, Thomas M., *Recourse to Force State Action Against Threat and Armed Attack,* Cambridge University Press (2002), p. 52

1. The claim that a state may resort of armed self-defense in response to attacks by terrorists, insurgents of surrogates operating from another states;
2. The claim that self-defense may be exercised against the source of ideological subversion from abroad;
3. The claim that a state may act in self-defense to rescue or protect its citizens abroad;
4. The claim that a state may act in self-defense to anticipate and preempt an imminent armed attack;
5. The claim that the right of self-defense is available to exercise a right of humanitarian intervention.

The first case could be one of justifying interpretation of article 51 since an attack perpetrated from other State. A self-defense is possible only once the clear evidence of armed attack is found. In *Nicaragua* case[17], however, the Court denied the US allegation that it had acted in collective self-defense through the invitation from the El Salvador. The Court argued that the evidence would have had to show a pattern of deliberate dispatch of irregular armed forces into El Salvador from Nicaragua. For these purposes, mere evidence of "assistance to rebels in the form of the provision of weapons or logistical support" would not suffice.[18] The Court further declared that the US action against Nicaragua is an act of indirect aggression,[19] and thus violating the fundamental principle under article 2(4), embodied in the Charter. Nonetheless, a direct military assistance to insurgents or terrorist groups by State against other State may constitute a sufficient ground for action in self-defense. Still, the other cases, such as the source of ideological subversion from abroad, protection of citizens abroad, preemption and humanitarian intervention are subject to vigorous debate. The use of these concepts in the exercise of self-defense is dangerous in the sense that unilateral political discretion might take up the control of the force of law. Moreover, the UN will loose largely its credibility. Perhaps this has resulted in non-consensus among the members of the Security Council in the question of use of force against Iraq in 2002. Thus, the US action in preemption to defend itself from Iraq's possible use of Weapons of Mass Destruction against it had simply been a political dilemma (because according to the US the regime change in Iraq will ensure the absence of imminent danger to international peace and security, which majority of the States including the permanent members of the Security Council disagree) rather than being a lawful action. Action such as this will lead to unilateralism suppressing the idea of collective security mechanism of the UN.

3. CONCEPT OF PREEMPTION

On June 7, 1981, nine aircraft of the Israeli air force bombed the Tuwaitha research center near Baghdad. The attack while argued by many as an aggression, and clear violation of article 2(4) of the UN Charter, Israel had claimed to have done it on the basis of anticipatory self-defense. In a note to the Secretary-General, Israeli government claimed to have destroyed the "Osirak" (Tamuz- I) nuclear reactor, which, it said, was developing atomic bombs that

[17] Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports (1986)
[18] See, ibid, at pp. 103-104, para. 195
[19] ibid

were to be ready for use against it by 1985. Thus, the concept of preemption is not new in the State's strategy[20]; but indeed it is a controversial phenomenon. Action by means of anticipation has not yet received recognition by the international community at large. Moreover, the Security Council in resolution 487 (1981) "strongly condemned the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct."[21] This was a unanimous resolution including the affirmative vote of the United States. However, the controversy over the anticipation or preemption again came up when the US had been looking for the plea of attacking Iraq in order for its regime to be changed. In a speech on June 1, 2002, President George W. Bush clarified the strategic policy: "[I]f we wait for threats to fully materialize, we will have waited too long. …We must take the battle to the enemy … and confront the worst threats before they emerge."[22] The clarification in more explicit language had been further held by the Deputy Secretary of Defense Paul Wolfowitz at the International Institute for Strategic Studies on December 2, 2002: "[T]he notion that we can wait to prepare assumes that we know when the threat is imminent. … When were the attacks of September 11 imminent? Certainly they were imminent on September 10, although we didn't know it. …Anyone who believes that we can wait until we have certain knowledge that attacks are imminent has failed to connect the dots that led to September 11."[23] Whatever might be the argument, in no way the concept of preemption matches the idea of multilateralism enshrined in the Charter unless the Chapter VII enforcement mechanism is authorized by the Security Council to preempt. Moreover use of the doctrine unilaterally, is risky for the peaceful inter-State relations.

3.1 Preemption and Self-defense

As it has been evidenced, the concept of preemption concludes an action in advance before an actual attack can be matured. The action may be an offensive action demonstrated against the territorial integrity of other State. Thus, any action such as preemption is in clear breach of article 2(4) of the UN Charter. The classic definition of anticipatory self-defense comes from the U.S. itself. On Dec. 29, 1837, British troops raided a U.S. steamship, the Caroline that was being used at various times, but not at that moment, in support of a Canadian insurrection against Great Britain. A British raiding party boarded the ship while it was moored on the New York side of the Niagara River, attacked those on board and sent the ship over Niagara Falls, killing two people.[24] The resulting dispute was not resolved until 1842, when U.S. Secretary of State Daniel Webster rejected a British claim of self-defense. Webster declared that the right of self-defense was confined to cases in which the "necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation." Thus, when Israel had attacked Iraqi nuclear installation on June 7, 1981, the Security Council including the United States, while being "deeply concerned" about the premeditated air strike, reminded the State of Israel of its obligation under the Charter, particularly under article 2, paragraph 4 of the Charter.[25]

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[20] See also *infra* section 3.1

[21] SC Res. 487 of June 19 (1981)

[22] See, Heisbourg, Francois, *Is Preemption Necessary?* in www.globalsecurity.org, viewed in November 2003

[23] See, www.dod.gov/speeches/2002/s.depsecdef.html, viewed in January, 2003

[24] See, The *Caroline Case*, the discussion is found at http://www.yale.edu/lawweb/avalon/diplomacy/britian/br-1842d.htm

[25] Cf. SC Res. 487 of 19 June (1981)

The implication has envisaged that the action carried out was undermining the UN collective security mechanism. Nonetheless, the Security Council did not take any action against Israel, nor did it designate the attack as "threat to the peace" under article 39 of the Charter. Thus, a soft warning, so to speak, was placed on Israel with a fear that such attack may constitute a threat, and with calling upon Israel to refrain in the future from any such acts or threats thereof. However, Israel argued its action as an exception to article 2(4), meaning that it had acted in self-defense under article 51. The US, despite its condemnation of such anticipatory action, prior to the invasion in Iraq, has turned to favor the argument of anticipation or preemption. The ground, again, was that the self-defense was an exception to non-intervention.

The notion of self-defense, as I examined here, is only limited to defend the territorial integrity and political independence of a State from any action directly or indirectly demonstrated from outside. The action must be one of armed attack. Only then the question of inherent right is born. Then again, the action in self-defense must be reported to the Security Council. The right to self-defense is exhausted once the Security Council takes up the issue, and takes measures necessary. Preemption is not, thus, justified as the ground of self-defense for number of reasons. Firstly, preemption itself is not a defensive action; the first use of force is applied in the case such as preemption, which actually gives birth of an offensive action. Secondly, preemption is not in response to an armed attack. Thirdly, reporting to the Security Council of the action taken is unnecessary or useless because self-defense has not been "inherent" once such action is taken in preemption. Fourthly, if the idea of preemption emerges as a means of self-defense, it may dangerously affect the peaceful coexistence among the nations. The powerful States might freely invoke the concept to legitimize any action they undertake. The World Court has also recognized the strict limits on the right of anticipatory action, for example, in the *Corfu Channel case* decided in 1949. The case arose when, on October 22, 1946, while traveling in Albanian waters in the North Corfu Strait (between Albania and the Greek island of Corfu), two British destroyers struck mines and suffered serious loss of life. After Albania refused to remove the mines, Britain entered Albanian territorial waters to sweep the mines. Britain attempted to justify this invasion of Albania's sovereignty on the ground of self-protection or self-help, arguing that it was protecting future ship passage through the strait. Rejecting the defense, the court declared that it could "only regard the alleged right of intervention as the manifestation of a policy of force which cannot find a place in international law."[26] Thus, the theoretical construction does not recognize preemption as a measure of self-defense as is embodied in article 51 of the UN Charter. However, the changing nature of international conflict has influenced a lot to adopt new doctrine, or at least new mechanism in order to face the unpredicted threats to international order.

3.2 Preemption versus Prevention

"Prevent Our Enemies from Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction"[27] – the starting point of Bush's speech, which followed by, *inter alia*, the concept of preemption and anticipatory action. Despite "prevention" is not the same

[26] See, Corfu Channel (Merits) decision. (UK v Albania) – ICJ Rep. (1946)

[27] See, White House National Security Council, National Security Strategy of the United States of America, Chapter 5, September 17, 2002 (http://www.policyalmanac.org/world/archive/wh_prevention_doctrine.shtml), viewed on 03 January, 2004

as "preemption," it seems that the concepts have perceived the interchangeable meaning, at least throughout the public discussions in the aftermath of his speech. In order to legitimize the potential use of force against Iraq prior to the invasion, some tend to argue that the *Bush doctrine* of use of force conforms to the concept of "prevention" instead of "preemption." The term "preemption" while being a reshuffled concept, "prevention" has until recently been used in the strategic discourse to refer to crisis prevention or preventive deployment as an alternative to the use of force. The United Nations in a number of cases deployed troops creating a buffer zone in order to deter hostility between the parties to a conflict.[28] This has widely seen as "prevention" until recently. Thus, the emphasis in the Bush's speech has had rather different meaning than the case of "prevention." Although he had started with "prevention," the summery of his speech concluded with the action in anticipation whenever it seems necessary for the sake of the so called "Home Land Security." A preemptive attack is described in Chapter 5 of the new NSS (National Security Strategy) of the US:[29]

> 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.

Thus, whether Iraq had caused an imminent threat through mobilization of armies, navies and air force for an attack against the US, had been far from apparent. Chapter 5, therefore, in the following paragraph stated that the concept of imminent threat must be adapted with the capabilities and objectives of today's adversaries. Rogue States and terrorists do not seek to attack by 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. Therefore, the basis on which the US demonstrated use of force against Iraq was a preemptive action, not preventive, as is clear in the Chapter 5 of NSS.

4. IS THE CASE OF PREEMPTION JUSTIFIED UNDER THE EXISTING STRUCTURE?

International order has turned to hold a new shape dramatically after the cold war has ended. The cold war threat has, thus, become "cold" so to speak. The US has emerged as a single super power. It has been free to reformulate its foreign policy without any major international pressure. Some of its policy, therefore, has absorbed much of criticisms. The constant failure of middle-east peace process has seen a vigorous frustration among the Palestinian population. Much of the blame goes for the US policy, which makes the whole Islamic world critical to it. This created the era of extremism hostile to the US and to its interests. The traditional concept of threat to the peace by State has then transformed to threat by non-State actor(s). Moreover, technological development and the employment of new idea

[28] For example, the United Nations peacekeepers in Macedonia during the 1990s, was an effective measures to prevent the emergence of an armed conflict in that part of the Balkans.
[29] See, *supra* n. 26

to confront have emerged as capable of creating non-traditional warfare. The law as regards the collective security mechanism has not, in fact, developed so forth. However, an agreement reached by the Security Council meeting at the level of heads of States and Governments in January 1992, where there was a concern for the new challenges that bring new risks for the peace and security. An effective central role of the United Nations through the Security Council with respect to these new challenges has been intended in the meeting.[30] This was all about it; but still it is important that a multilateral action may be possible to fight even with non-traditional threat to international peace and security. The Security Council agreement under Chapter VII of the Charter is still sufficient to rule the international order.

"Preemption," however, appears as something contrary to the concept of multilateralism in the sense that there has not an authorization by the Security Council, and used, as a matter of fact, by means of unilateral decision. The terrorist attack of "nine eleven" has allegedly been committed by Al-Quieda – a non-State actor. Afghanistan had been targeted to attack on the basis of its providing shelter to Osama-bin-Laden – the chief of the Al-Quieda network, and his allies. The Security Council resolution 1373 (2001) obliges that the States shall not provide shelter to the terrorist groups or networks. Thus by providing shelter to Al-Quieda network, according to the US, Afghanistan was in breach of Security Council resolution. The resolution, however, has not authorized use of force against Afghanistan. The point is that the Charter does not have any mechanism to identify the terrorist groups by its own initiative. Since resolution 1373 reiterated the inherent right of self-defense of the US, some tend to argue the attack on Afghanistan was within the realm of article 51 of the Charter. The presumption follows that the existence of the terrorist network in Afghanistan is a potential threat to the security for the US. An attack, therefore, may lead to capture the terrorists, and destroy their basis. This way the US was presumed to act in self-defense.

Now, let's examine the legitimacy of the US action in Afghanistan. The US had claimed its action against Afghanistan was in the exercise of "inherent" right to self-defense, which according to it, exists wholly outside, and is unconstrained by, the U.N. Charter. Therefore, although an action was possible under article 42 of the Charter to use force if necessary, the US did not rely on it. So I will only examine the case under article 51 that legally allows use of force by State in self-defense. The first question is whether the action of Al-Quieda is imputable on Taleban, as government of Afghanistan. In *Nicaragua* case, the Court rejected the US argument, that that El Salvador was under "armed attack" by Nicaragua because the court "does not believe that the concept of 'armed attack' includes assistance to rebels in the form of the provision of weapons or logistical or other support." Now, this alleged Nicaraguan assistance to the FMLN was comparable to the Taliban conduct -"harboring" Al-Quieda - alleged by the U.S. to give rise to the right to use force in self-defense against the country of Afghanistan. The application of *Nicaragua* decision find such assistance as contrary to the concept of "armed attack" as embodied in article 51 of the Charter. Moreover, there is no credible claim that force is "necessary" or "imminent" where nonmilitary solutions have not been attempted, there was no "armed attack" in the first place, and there was no ongoing attack, the assault having begun and ended on September 11. It is, however, true that the reality of 1986 (the year of Nicaragua Judgment) is not the same as it is in 2001. Therefore, one might not prudently conceive the idea as being closed for the unpredicted future. Moreover, there had been a thin line of argument favoring the US that Security Council resolution 1373 obliges States not supporting in any manner, and sheltering terrorist network. Even then there had been the existence of United Nations with the authority to go forth with the issue.

[30] See, *supra* n. 8

Interestingly, article 51 has one other express limitation. The second clause of article 51 states that the right to use force in self-defense expires once the Security Council has acted. And, on this issue, it has acted, not once, but three times, in resolutions 1368 (Sept. 12), 1373 (Sept. 28) and 1378 (Nov. 14). So recourse to force in self-defense, presumably in preemption, is anyway without legal authority, and thus invalid.[31]

In case of Iraq, the doctrine of "preemption," as replaced by *Bush Doctrine* has gone far beyond the authority. The Bush administration has pushed strongly to seek authorization to use force in Iraq for the Saddam regime to be replaced. The Security Council instead authorizing the use of force, adopted resolution 1441 under Chapter VII by giving Iraq the "final opportunity" to cooperate with the IAEA with regard to inspection of Iraq's disarmament obligation. Iraq had revealed its report of armament. The UN inspection team was satisfied with Iraq's cooperation so far. The US had, however, repeatedly demanded a regime change in Iraq. This has caused division in the Security Council, firstly because Iraq is a sovereign country, and its population has right to choose its leadership free from any international pressure; secondly the Charter does not recognize any interference in matters that are essentially within the domestic jurisdiction of a State under article 2(7), and most importantly Iraq had not posed any credible threat that may endanger international peace and security. The US then, by arguing preemptive self-defense in the exercise of its "inherent" right, had used force unilaterally.

The examination of the legality of use of force against Iraq by the US and the UK finds it unconvincing that any such right under the present framework is available where use of force in advance is permitted. Unlike 1990, Iraq did not commit an armed attack against the territorial integrity of other State this time, nor did it act in breach of the fundamental principles embodied in the Charter. As a matter of fact, it had fully complied with the obligation under resolution 1441, and was under the strict supervision of the UN inspection authority for its disarmament programs. Thus, the attack led by the US, itself was in violation of article 2(4) of the Charter. Furthermore, such action may constitute a *prima facie* evidence of an act of aggression as defined in the General Assembly Resolution 3314 (XXIX), i.e., as "the first use of armed force by a State in contravention of the Charter." On the other hand, the US may not justify its action as under article 51, firstly because there had not been an "armed attack" by Iraq, nor a threat of imminent attack; secondly the issue had been dealt by the Security Council as until then. Therefore, the US led invasion in Iraq had been in clear violation of international law within the present structure of international order.

5. CONCLUSION

The tactics of threat to international peace and security have developed in an unforeseeable manner. As we have seen, now it is possible to demonstrate an attack even without having direct involvement of any State. One may wage an attack while being inspired by an ideological subversion. A suicide bomber may take dozens of life at a same time. Some argue the bombers as terrorists while the others regard them as fighters of just war. It is true,

[31] A legal justification is, nonetheless, possible on the ground that the recourse to force was in assisting the Northern Alliance of Afghanistan, which was recognised as *de jure* government of Afghanistan by the US. In that case, an argument may be invoked that the US had been invited by the Northern Alliance for helping it in order to overthrow the Taleban regime.

that the strict application of the Charter rules does not justify the US action both in Afghanistan and in Iraq within the guise of "inherent" right of self-defense. Both Afghanistan and Iraq were presumed to have provided or likely to provide assistance to terrorists either with providing them shelter or with weapons of mass destruction that may allegedly cause a threat to the security of the US. Although the UN Charter is most often argued to be interpreted softly by accepting the reality of the present days, the interpretation should come through the proper organ responsible for the concerned function. The US did not ask for an authorization to use force in Afghanistan; and in Iraq, it disregarded the United Nations as a whole while resorting to use force. Although the US was successful in building up of a coalition force led by it, the framework of international order remained the same, which it had violated. Even a soft interpretation does not then legitimize the so called restoration of peace in Afghanistan, and in Iraq by its action. Some argue NATO intervention in 1999 in former Yugoslavia (Kosovo) was in the same line as it has been in the case of Iraq. Despite there had been a lack of authorization from the Security Council, the Kosovo crisis has got wider importance and wider international support. Apart from moral justification, there had been some sort of legal justification too. NATO has provided justification under the existing Security Council resolutions, and its action was carried out in accordance with Article 53 paragraph 1, which states that the Security Council shall, where appropriate, utilize regional arrangements or agencies for enforcement action under its authority. One especially dubious example is the view that the failure of the Council to disapprove regional military action amounts to (tacit) authorization. In view of the veto power of the permanent Council members, this is a specious argument. On the other hand, an interpretation of Article 53 paragraph 1 does in good faith leave room for the possibility of implicit as well as *ex-post-facto* authorization.[32] There could be one other justification that contemporary international law establishes beyond any doubt that serious violations of human rights are matters of international concern, and thus gross violation as such breaches the norm of *jus cogens*, which is supreme law. Article 103 of the Charter states that in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail. This provided room for justification under the norms of *jus cogens*, which do not fall within the Charter's restriction once international community at large accept the application of the norm. Therefore, a substantial difference can be drawn between NATO action in Kosovo and the US action in Iraq. One is multilateral use of force through regional arrangement conforming to the basic principles of the Charter while the other is exclusively a unilateral action disregarding whole legal framework of the United Nations. Thus the evidential results demonstrate that the existing structure of international order does not justify "preemption" as legal means to recourse to use of force in self-defense.

[32] See, Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects,* 10, EJIL (1999), pp. 2-5

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APPENDIX

White House National Security Council, National Security Strategy of the United States of America, Chapter 5
September 17, 2002

Bush Prevention Doctrine

Prevent Our Enemies from Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction

"The gravest danger to freedom lies at the crossroads of radicalism and technology. When the spread of chemical and biological and nuclear weapons, along with ballistic missile technology—when that occurs, even weak states and small groups could attain a catastrophic power to strike great nations. Our enemies have declared this very intention, and have been caught seeking these terrible weapons. They want the capability to blackmail us, or to harm us, or to harm our friends—and we will oppose them with all our power."

President Bush
West Point, New York
June 1, 2002

The nature of the Cold War threat required the United States—with our allies and friends—to emphasize deterrence of the enemy's use of force, producing a grim strategy of mutual assured destruction.With the collapse of the Soviet Union and the end of the Cold War, our security environment has undergone profound transformation.

Having moved from confrontation to cooperation as the hallmark of our relationship with Russia, the dividends are evident: an end to the balance of terror that divided us; an historic reduction in the nuclear arsenals on both sides; and cooperation in areas such as counterterrorism and missile defense that until recently were inconceivable.

But new deadly challenges have emerged from rogue states and terrorists. None of these contemporary threats rival the sheer destructive power that was arrayed against us by the Soviet Union. However, the nature and motivations of these new adversaries, their determination to obtain destructive powers hitherto available only to the world's strongest states, and the greater likelihood that they will use weapons of mass destruction against us, make today's security environment more complex and dangerous.

In the 1990s we witnessed the emergence of a small number of rogue states that, while different in important ways, share a number of attributes. These states:

- brutalize their own people and squander their national resources for the personal gain of the rulers;
- display no regard for international law, threaten their neighbors, and callously violate international treaties to which they are party;
- are determined to acquire weapons of mass destruction, along with other advanced military technology, to be used as threats or offensively to achieve the aggressive designs of these regimes;
- sponsor terrorism around the globe; and
- reject basic human values and hate the United States and everything for which it stands.

At the time of the Gulf War, we acquired irrefutable proof that Iraq's designs were not limited to the chemical weapons it had used against Iran and its own people, but also extended to the acquisition of nuclear weapons and biological agents. In the past decade North Korea has become the world's principal purveyor of ballistic missiles, and has tested increasingly capable missiles while developing its own WMD arsenal. Other rogue regimes seek

nuclear, biological, and chemical weapons as well. These states' pursuit of, and global trade in, such weapons has become a looming threat to all nations.

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. Our response must take full advantage of strengthened alliances, the establishment of new partnerships with former adversaries, innovation in the use of military forces, modern technologies, including the development of an effective missile defense system, and increased emphasis on intelligence collection and analysis.

Our comprehensive strategy to combat WMD includes:

- *Proactive counterproliferation efforts*. We must deter and defend against the threat before it is unleashed.We must ensure that key capabilities—detection, active and passive defenses, and counterforce capabilities—are integrated into our defense transformation and our homeland security systems. Counterproliferation must also be integrated into the doctrine, training, and equipping of our forces and those of our allies to ensure that we can prevail in any conflict with WMD-armed adversaries.
- *Strengthened nonproliferation efforts to prevent rogue states and terrorists from acquiring the materials, technologies, and expertise necessary for weapons of mass destruction.* We will enhance diplomacy, arms control, multilateral export controls, and threat reduction assistance that impede states and terrorists seeking WMD, and when necessary, interdict enabling technologies and materials.We will continue to build coalitions to support these efforts, encouraging their increased political and financial support for nonproliferation and threat reduction programs. The recent G-8 agreement to commit up to $20 billion to a global partnership against proliferation marks a major step forward.
- *Effective consequence management to respond to the effects of WMD use, whether by terrorists or hostile states.* Minimizing the effects of WMD use against our people will help deter those who possess such weapons and dissuade those who seek to acquire them by persuading enemies that they cannot attain their desired ends. The United States must also be prepared to respond to the effects of WMD use against our forces abroad, and to help friends and allies if they are attacked.

It has taken almost a decade for us to comprehend the true nature of this new threat. Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option.We cannot let our enemies strike first.

In the Cold War, especially following the Cuban missile crisis, we faced a generally status quo, risk-averse adversary. Deterrence was an effective defense. But deterrence based only upon the threat of retaliation is less likely to work against leaders of rogue states more willing to take risks, gambling with the lives of their people, and the wealth of their nations.

- In the Cold War, weapons of mass destruction were considered weapons of last resort whose use risked the destruction of those who used them. Today, our enemies see weapons of mass destruction as weapons of choice. For rogue states these weapons are tools of intimidation and military aggression against their neighbors. These weapons may also allow these states to attempt to blackmail the United States and our allies to prevent us from deterring or repelling the aggressive behavior of rogue states. Such states also see these weapons as their best means of overcoming the conventional superiority of the United States.
- Traditional concepts of deterrence will not work against a terrorist enemy whose avowed tactics are wanton destruction and the targeting of innocents; whose so-called soldiers seek martyrdom in death and whose most potent protection is statelessness. The overlap between states that sponsor terror and those that pursue WMD compels us to action.

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.

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.

The targets of these attacks are our military forces and our civilian population, in direct violation of one of the principal norms of the law of warfare. As was demonstrated by the losses on September 11, 2001, mass civilian casualties is the specific objective of terrorists and these losses would be exponentially more severe if terrorists acquired and used weapons of mass destruction.

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.

The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather. We will always proceed deliberately, weighing the consequences of our actions. To support preemptive options, we will:

- build better, more integrated intelligence capabilities to provide timely, accurate information on threats, wherever they may emerge;
- coordinate closely with allies to form a common assessment of the most dangerous threats; and
- continue to transform our military forces to ensure our ability to conduct rapid and precise operations to achieve decisive results.

The purpose of our actions will always be to eliminate a specific threat to the United States or our allies and friends. The reasons for our actions will be clear, the force measured, and the cause just.