Hastings International and Comparative Law Review

Volume 27
Number 3 *Spring 2004*

Article 2

1-1-2004

Preemption, Prevention and Anticipatory Self-Defense: New Law regarding Recourse to Force

Thomas M. Franck

Preemption, Prevention and Anticipatory Self-Defense: New Law Regarding Recourse to Force?

By THOMAS M. FRANCK*

On September 17, 2002, what had hitherto been a collection of little-noticed speeches and expositions of the President of the United States was published as a coherent and very notable new National Security Strategy (NSS). One of its stated aims is to "prevent our enemies from threatening us, our allies, and our friends, with weapons of mass destruction . . . ."[1]

The reach of the new strategy, one discovers on further perusal, extends far beyond older, conceptually familiar notions of *anticipatory self-defense*, and even exceeds the bounds of more recently-asserted notions of *preventive measures*, to stake out a new claim to the lawful use of force *preemptively*. "We must be prepared," the President said, "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."[2]

There is not too much argument to be made against that general proposition, at least until it is carefully parsed, as it surely was by the team that drafted it. On further examination, however, it actually stakes out a lot of new ground, legally speaking. In part, this is a matter of its temporal dimension.

Traditional notions of anticipatory self-defense have claimed the right to take forceful action before an enemy could launch a "first

* Murry and Ida Becker Professor of Law Emeritus, New York University School of Law.

1. INTERNATIONAL INFORMATION PROGRAMS, U.S. DEP'T OF STATE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Sept. 2002), pt. I, available at <http://usinfo.state.gov/topical/pol/terror/secstrat.htm> [hereinafter NATIONAL SECURITY STRATEGY].

2. *Id.* pt. V.

use" attack, when there was irrefutable evidence of its imminence and only when no other means would have availed. This has become known as the Caroline doctrine, enunciated by U.S. Secretary of State Daniel Webster in 1842, which limits the right to situations where there is a necessity to act that is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[3]

More recently, the temporal standard may have been relaxed, at least in state practice, sufficiently to take into account clear evidence of an intent made manifest by palpable threats—not necessarily to be realized quite so instantly, but within a short time—to launch a strike which, were it allowed to occur, would incapacitate the targeted state's ability to survive and respond.[4] But not until the publication of the 2002 NSS had any state formulated a claim to be entitled to respond with force to "rogue states *before they are able to threaten*" an attack. Under this doctrine an attack need not be imminent, it need not even be threatened, it need merely be *expected,* sometime. What the United States wants to preempt is the right of another state to *aspire* to threaten us.

As determined by whom? If we are to have a new norm in interstate relations that allows a state to attack another on the mere belief that it might someday constitute a serious threat, that would evidently leave a great deal of discretion in the hands of every government. As legal systems go, it would not be one that demanded much self-restraint of its constituents. The President's answer to that conundrum is that new dangers require new remedies. What is really new about the doctrinal ground staked out by the NSS, however, is not merely that it moves back the clock to permit the use of force, even so far as to permit military action to preempt something that may not occur for quite some time. The broader claim is that any government is free to determine entirely by itself, without deference to others, whether its concerns about a future threat are realistic and substantial. It emancipates government from any inhibitions on its

3. Abraham D. Sofaer, *On the Necessity of Pre-emption,* 14 EUR. J. INT'L L. 209, 214-220 (2003), available at <www.ejil.org/journal/Vol14/No2/art1.pdf>. For a discussion, see 1 OPPENHEIM'S INTERNATIONAL LAW 420-27 (Robert Jennings & Arthur Watts eds., 9th ed. 1996).

4. That Egypt, in 1967, intended to attack Israel was demonstrated by its abrupt demand for the withdrawal of the UN Truce Supervisory Organization which had sought to prevent cross-border incursions of *fedayeen* fighters from Egypt and the wholesale deployment of the Egyptian airforce, army and navy. *See* THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 101-05 (2002).

right to act, freeing it from having to justify its fears to anyone.

In the past, legal rules pertaining to first use of force at least required the user to submit its reasons to review by others. In the Caroline exchange British Foreign Secretary Palmerston, whose agents had launched the preemptive strike against irregular cross-border raiders located in the United States, clearly felt the need to justify to Secretary of State Webster his country's preemptive recourse to force. In the 1967 Israeli strike against Egypt, Jerusalem evidently felt compelled to demonstrate to the UN Security Council the extreme necessity that had forced its hand. The NSS goes out of its way, however, to appropriate to the sole and unreviewable discretion of the U.S. government the decision to deploy force to *prevent* a threat that has not yet materialized. Even if the time and place of the enemy's attack is uncertain, the United States "will, if necessary, act preemptively"[5] and that decision is to be America's alone. "While the United States will constantly strive to enlist the support of the international community," the President declared, "we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively . . . ."[6]

This, as it turned out, is precisely the doctrine that the United States implemented in its attack on Iraq in 2003. The catastrophic failure to secure the requisite approval of the Security Council for his invasion in no way inhibited President Bush because, he had made clear, no one but America could judge whether Iraq's weapons program constituted, or ever would constitute, a threat to our security. Later, as it became apparent that there were no ready-to-use weapons of mass destruction to be found, the administration increasingly began defending its unilateral—or, bilateral, if you count Britain—recourse to force as a lawful action to *preempt* the possibility of such weapons ever being developed by a mendacious government which, it was said, would surely have wanted to have them if and when it could.[7]

---

5. NATIONAL SECURITY STRATEGY, *supra* note 1, pt. V

6. *Id.* pt. III.

7. President Bush stated in February 2004 that the decision to invade Iraq had come down to whether to "take the word of a madman or take action to defend the American people." Even in light of a failure to find weapons of mass destruction, he said the action was justified, noting that Saddam Hussein "had the intent to arm his regime with weapons of mass destruction." Bob Drogin & Greg Miller, *CIA Chief Saw No Imminent Threat in Iraq*, L.A. TIMES, Feb. 6, 2004, at A1. The notion that the United States could act militarily to prevent even the creation of weapons of mass destruction dates back to the last days of the first Bush administration, where it was

The principal innovation of the new doctrine, which seeks to forestall a danger before it materializes—rather than just to anticipate or prevent it after it has risen to the level of an actual threat—is not merely to push back the moment for a military response from when a threat becomes imminent to some undefined earlier time when it

---

supported by then Secretary of Defense Dick Cheney in a draft document entitled "Defense Planning Guidance." While the document was dismissed by the incoming Clinton administration, Cheney had praised its view of America as a superpower unrestrained by traditional diplomatic ties. He told a drafter of the document that it provided "a new rationale for our role in the world." James Mann, *The True Rationale? It's a Decade Old*, WASH. POST, Mar. 7, 2004, at B2.

In the case of Iraq, Vice President Cheney justified a unilateral preventative attack on the basis that Iraq was "actively and aggressively" seeking nuclear weaponry. Robin Wright, *Confrontation with Baghdad*, L.A. TIMES, Sept. 9, 2002, at A1. Condoleezza Rice justified an attack by saying that, although there was some uncertainty about whether the weapons existed, "[w]e don't want the smoking gun to be a mushroom cloud." Todd S. Purdum, *Bush Officials Say the Time Has Come for Action on Iraq*, N.Y. TIMES, Sept. 9, 2002, at A1. By January 2003, Condoleezza Rice wrote that the problem with Iraq was that it was acting like "a nation with something to hide." Condoleezza Rice, *Why We Know Iraq Is Lying*, N.Y. TIMES, Jan. 23, 2003, at A25.

The vision of America as an unfettered solitary actor was reflected by a number of comments made by senior officials concerning the ability of non-U.S.entities to deal with the Iraqi weapons program. President Bush himself told Congress in his 2004 State of the Union Address, "America will never seek a permission slip to defend the security of our people." Elisabeth Bumiller & Richard W. Stevenson, *State of the Union: The Overview*, N.Y. TIMES, Jan. 21, 2004, at A1. Shortly before President Bush addressed the United Nations in September 2002, Vice President Dick Cheney said that Europeans "really don't have the capacity to do anything . . . [T]hey can't deal with Saddam Hussein." Purdum, *supra*. Testifying before Congress later that month, Secretary of Defense Donald Rumsfeld stated that U.N. inspections would actually help the Iraqi weapons program because they "wouldn't work" and delayed more effective measures. According to Rumsfeld, United States action was required because "[t]he longer nothing happens, the more advanced [Iraq's] weapons programs go along." Todd S. Purdum & Elisabeth Bumiller, *Bush Seeks Power to Use 'All Means' to Oust Hussein*, N.Y. TIMES, Sept. 20, 2002, at A1. When the CIA and nuclear weapons inspectors clashed over the meaning of aluminum tubes Iraq tried to purchase, the Bush administration again displayed its disregard for expertise outside the United States by saying that the disagreement was a result of Iraq "spinning" the inspectors. Michael R. Gordon, *Agency Challenges Evidence Against Iraq Cited by Bush*, N.Y. TIMES, Jan. 10, 2003, at A10.

Charting its course as an unencumbered power, the United States repeatedly stressed that it had the right to act unilaterally. National Security Adviser Condoleezza Rice told CNN, "Let's be very clear that the absence of resolutions is not the problem." Mike Allen, *War Cabinet Argues for Iraq Attack*, WASH. POST, Sept. 9, 2002, at A1. Secretary of State Colin Powell stressed that U.S.efforts in the United Nations did not amount to putting the ball in the UN's court. The United States retained its power to act as the administration deemed appropriate. *With Few Variations, Top Bush Advisers Present Their Case Against Iraq*, N.Y. TIMES, Sept. 9, 2002, at A8.

becomes conceivable. It seeks to do that, too, of course. But much more significant is how the new doctrine boldly asserts an intent that the U.S. government, and *only* it, will determine whether a threat of a future threat is real.

It could be replied, of course, that there is nothing really new about even that astounding claim. Arguably, each government has always retained, in the background of its diplomacy, the big stick necessary to pursue its essential self-interest against any other government that is inferior to it militarily. That, however, is not necessarily the conclusion this administration wants anyone to draw. The new doctrine is not meant to create a world in which every nation keeps a nuclear weapon in its bedside drawer—the way 80 million Americans are said to keep pistols—with a license to shoot anyone suspected of being unfriendly. It is very unlikely that Washington is eager to have its new doctrine adopted by New Delhi and Beijing, let alone Tehran and Pyongyang. Yet, inconveniently at such moments as this, law is all about the gander's right to the goose's sauce.

Lawyers sympathetic to the aims of the NSS are perfectly aware of this problem. Judge Abraham Sofaer, the legal adviser of the State Department under Bush *père,* poses the problem with characteristic clarity: "Can the concept of self-defense accommodate a role for pre-emption that satisfies the need of leaders to protect their people, without providing a ready basis for states to use pre-emption as an excuse for aggression?"[8] The answer is that there might be such a legal concept, but it certainly isn't one that is on offer by the present U.S. administration. Rather, what is proposed is a doctrine based not on law and reciprocity but on power, one that frees the superpower while subordinating to its will the rights of everyone else.

The United States is certainly not the first self-described superpower to seek to construct a non-reciprocal international system. Athens, during the Peloponnesian wars, sought to institute as a rule governing its relations with little upstart states like Melos, that "the strong do what they can and the weak suffer what they must."[9] Neither would it be the first to proclaim that it is building an empire that will last a thousand years. Still, one cannot but feel the chill wind of history as one reads the NSS' bold proclamation that "our military must . . . dissuade future military competition. . . . Our forces will be

8. Sofaer, *supra* note 3, at 211.

9. THUCYDIDES, THE COMPLETE WRITINGS OF THUCYDIDES: THE PELOPONNESIAN WAR 331 (Richard Crawley trans., 1934).

strong enough to dissuade potential adversaries from pursuing a military build-up in hopes of surpassing, or equaling, the power of the United States."[10] It all calls to mind not so much Alexander the Great and the Emperor Tiberius Claudius as the poem by Shelley:

> Two vast and trunkless legs of stone
> Stand in the desert . . .
> My name is Ozymandias, king of kings:
> Look on my works, ye Mighty, and despair!
> Nothing beside remains. Round the decay
> Of that colossal wreck, boundless and bare
> The lone and level sands stretch far away.[11]

To sustain the perpetual rule of unipolar power, quite aside from any consideration of its ethical probity, requires, at a minimum, a sound, profitable organization of one's imperium. Compared with Britain and France, which benefited mightily in the nineteenth century from their far-flung empires, and The Netherlands, which profited hugely from its overseas dominions in the eighteenth, America is rapidly becoming the Enron of imperialism. Our economic-social fabric already is badly frayed. The eminent Republican economist Kevin Phillips has shown that, in the past two decades, the income gap between the richest 1% and the poorest 20% of the U.S. population has more than doubled, from a ratio of 30:1 in 1979 to 75:1 in 1997.[12] An angry, alienated populace is not the best springboard for global governance. Neither is our budget deficit, currently running at about $500 to $600 billion per annum. That constitutes well above 5% of the nation's GNP.[13] Such a ratio is prohibited by the European Monetary Union as fiscally irresponsible. Meanwhile, our trade deficit has ballooned to $3 trillion since 1982, and we have sold off $8 trillion of American assets to cover part of this shortfall. In the past eighteen months, the dollar has lost about a quarter of its value vis-à-vis the Euro, but this could be peanuts compared to what would happen if Europeans, Asians and Latin Americans get tired of financing our sole superpower binge in return for risible rates of interest. In short, our empire does not look like

10. NATIONAL SECURITY STRATEGY, *supra* note 1, pt. IX.

11. Percy Bysshe Shelley, *Ozymandias* (1818).

12. Kevin Phillips, *How Wealth Defines Power,* AM. PROSPECT, May 1, 2003, at 8.

13. Lawrence J. Korb, *Overpaying the Pentagon,* AM. PROSPECT, Sept. 16, 2003, at 17. The lower estimate for fiscal year 2004 is offered by Joshua B. Bolten, director of the White House Office of Management and Budget. Edmund L. Andrews, *Deficit Doubles but Falls Short of Forecast*, N.Y. TIMES, Oct. 21, 2003, at A22.

much of a money-making proposition except, perhaps, as the *New York Times* has pointed out, to the extent that taxpayer dollars may "excessively enrich politically connected companies like Halliburton and Bechtel."[14]

The most insupportable cost of America's fascination with unilateralism, however, is the destruction of the multilateral system so painstakingly built in 1945 on the ruins of the League of Nations. Our insistence, after World War I, on remaining unconstrained by any multilateral collective security system made inevitable the incredibly painful (mainly to others) learning experience of World War II. The UN system was built on two pillars. The first is a renunciation by states of recourse to force except in self-defense against an armed attack.[15] The second is the creation of a system of collective measures—ranging from diplomatic and economic sanctions to military measures—that may be deployed when the Security Council decides that a situation constitutes a "threat to the peace, breach of the peace, or act of aggression."[16] What the current administration in Washington has done is to blow up both pillars—which, admittedly, had become pretty rickety after almost sixty years—and put nothing in their place except the suggestion of a benevolent American power monopoly.

What was done is bad enough,[17] but how it was done was even worse. The United Nations is not just a treaty, it is the nearest thing the world has to a constitutional instrument.[18] With almost every state in the world a party to the Charter, it has taken on many of the characteristics of a foundational instrument that underpins the normative system of state interactions. The NSS manages to both ignore and trash it as if it had simply become irrelevant.

Now, to some extent the Charter has, indeed, become obsolescent and, at a minimum, is in urgent need of reform. It was, after all, written at a time when the aggression of massed armies, deploying tanks and propeller aircraft, fairly defined the nature of the

14. Editorial, *Waiting for Democrats on Iraq*, N.Y. TIMES, Oct. 20, 2003, at A16.

15. U.N. CHARTER art. 2, para. 4; art. 51.

16. *Id.* art. 39.

17. I have developed this analysis of the legal implications of America's policy towards Iraq in: Thomas M Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607 (2003).

18. Thomas M. Franck, *Is the U.N. Charter a Constitution?, in* NEGOTIATING FOR PEACE 97 (Jochen Abr. Frowein et al. eds., 2003), available at <http://edoc.mpil.de/fs/2003/eitel/95_franck.pdf>.

problem it was intended to address collectively. Nuclear weaponry, not to mention the threat of nuclear terrorism by non-statal entities, was still pretty much in the unimagined future. By limiting the right of states to use force only in the event of an actual armed attack, the Charter altogether failed to address emerging issues: massive violations of human rights by regimes oppressing their own people; civil wars that cause massive flows of refugees across borders; and indirect aggression by one state against another utilizing cross-border insurgent movements.

While the Charter is extraordinarily hard to amend, like any foundational instrument, over time it has been construed so as better to conform to evolving practice. The United States has been a prime architect of these changes. It introduced and provided the necessary impetus for the adoption of the "Uniting for Peace Resolution" by which the General Assembly granted itself a secondary responsibility for preserving international peace and security when, because of the veto, the Security Council was prevented from discharging its primary responsibility in that regard.[19] The United States also led the effort to persuade the International Court of Justice to approve this creative interpretation of the Charter.[20] The Charter's so-called Chapter 6½, which invents and implements a concept of collective peacekeeping that finds no resonance in the black-letter text, is also the pure product of creative interpretation.[21] There are many other instances in which, through the practice of UN organs, the Charter has been interpreted in ways that make it better accord with the evolving needs of the global system.[22]

The emergence of a palpable threat of global terrorism, especially when set next to the development of weapons of mass destruction by rogue states that may choose to ally themselves with terrorists, has made it imperative that there be further changes in the way the Charter's text is construed in practice. The NSS could have steered the process of multilateral diplomacy in that direction by beginning a discourse on creative interpretations that would circumvent the obvious paradox of a state—one genuinely and reasonably believing itself to be the potential target of an attack by

19. G.A. Res. 377 (V), U.N. GAOR, 5th Sess., at 10 (1950).

20. Advisory Opinion, Certain Expenses of the United Nations, 1962 I.C.J. 151, 164 (July 20).

21. FRANCK, *supra* note 4, at 20-44.

22. *Id.* at 1-19.

weapons of mass destruction, whether by a rogue state, a terrorist network or both—being compelled by an absurdly strict reading of Article 51 to await the actual attack before taking remedial action. But that paradox is easily circumvented without having to destroy the whole twin-pillared system. No one in the international community expects a state in that position to allow itself to become a sitting duck. On the other hand, most of the community of governments does expect a nation, believing itself so threatened, to present its evidence to a legitimate body representative of the international community and, except in the most dire circumstances, to await authorization before taking necessary preemptive measures. Such, after all, was the procedure successfully followed by the United States after the attacks of Al Qaeda on New York and Washington in 2001, when prompt authorization for military action was received from both the Security Council and NATO.[23]

The NSS policy, however, abandons that multilateral process in favor of action at the sole behest of the actor. That, of course, is not only a breach of the Charter—there have been many instances of those, alas—but a repudiation of the whole diplomatic process of collective decision-making that all previous U.S. administrations had tried to reinforce as being in the national interest. That has very real costs. In the words of Professor Harold Koh:

> For over the past two centuries, the United States has become a party not to just a few treaties, but to a global network of closely interconnected treaties enmeshed in multiple frameworks of international institutions. Unilateral administration decisions to break or bend one treaty commitment thus rarely end the matter, but more usually trigger vicious cycles of treaty violation. In an interdependent world, the United States simply cannot afford to ignore its treaty obligations while at the same time expecting its treaty partners to help it solve the myriad global problems that extend far beyond any one nation's control: the global AIDS and SARS crises, climate change, international debt, drug smuggling, trade imbalances, currency coordination, and trafficking in human beings, to name just a few.[24]

---

23. The Security Council not only accepted that the attacks constituted a cause for the exercise by the United States of the right of self-defense, but also acknowledged the culpability of those "harbouring the perpetrators, organizers and sponsors" of such acts. S/RES/1368, SCOR (2001).

24. Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1500 (2003).

There are more costs incurred by the unilateralism so boldly proclaimed by the NSS policy on preemption. Any system of governance needs checks and balances that prevent it from stumbling precipitously into a chasm when it thinks it is crossing a bridge. The reason the President felt impelled to claim a right to resort to military force whether or not he could persuade other states—even most of our traditional allies—that such action was either necessary or beneficial was because his advisers suspected that the case for invading Iraq was unlikely to convince other states. That, in fact, it rested on dubious intelligence and questionable ideological assumptions has been all too clearly demonstrated by subsequent events. Would our national interest not have been advanced if, finding our proposed course of action so overwhelmingly rejected, we had stopped, looked again, and listened?

In a recent filmed interview, Robert McNamara, the Vietnam-era Secretary of Defense, discusses the nation's lack of empathy for dissenting views and sees in it a recurrent danger to the formulation of sensible policies. "What makes us so omniscient?" he asks.

> We are the strongest nation in the world today, and I do not believe we should ever apply that economic, political or military power unilaterally. If we'd followed that rule in Vietnam, we wouldn't have been there. None of our allies supported us. If we can't persuade nations with comparable values of the merit of our cause, we'd better re-examine our reasoning.[25]

Obviously, listening is only a prerequisite, not a substitute, for action when it comes to combating the threat of global terrorism and weapons of mass destruction. As the UN Secretary-General told the 2003 meeting of the General Assembly, "it is not enough to denounce unilateralism, unless we also face up squarely to the concerns that make some States feel uniquely vulnerable, since it is those concerns that drive them to take unilateral action. We must show that those concerns can, and will, be addressed effectively through collective action."[26] This is not a hopeless challenge. In his speech, Kofi Annan called for the beginning of "a discussion on the criteria for an early authorization of coercive measures to address certain types of

25. Stephen Holden, *Film Festival Review: Revisiting McNamara and the War He Headed*, N.Y. TIMES, Oct. 11, 2003, at B9. The quotation is transcribed from *The Fog of War: Eleven Lessons from the Life of Robert S. McNamara,* directed by Errol Morris (Sony Pictures Classics 2003).

26. Kofi Annan, Address to the UN General Assembly (Sept. 23, 2003).

threats—for instance, terrorist groups armed with weapons of mass destruction."[27]

Dare one hope for another NSS, soon—one that will open, rather than foreclose, that discussion?

27. *Id.*