

The Doctrine of Pre-Emption and the War in Iraq Under International Law

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Introduction

The use of force in self-defence is lawful only if an armed attack occurs – not if one is likely to occur – against a state. Customary international law permits pre-emptive self-defence only when a threat is so grave and imminent that the victim cannot wait to act in self-defence until the attack has actually started. The Bush doctrine of pre-emption as formulated in the National Security Strategy (NSS) goes beyond this narrow principle and reserves the right to attack pre-emptively even without a definite and imminent threat. The war in Iraq constitutes the first test case in the implementation of the doctrine and calls for an extensive examination of the reasons offered to justify the pre-emptive use of force. This study concludes that the gravity and immediacy of the threat Iraq posed to international security has clearly been exaggerated. The war was launched on the basis of subjective threat assessments; and the high standard of proof that lawful pre-emption demands, was not met. Yet, the Bush doctrine has repercussions beyond Iraq; it is not entirely clear whether pre-emptive force will also be used against other states that the Bush administration finds threatening. The implications of the new doctrine are both uncertain and dangerous. On the basis of its potential for abuse, the right to use force pre-emptively, unnecessarily endangers the already fragile international legal order.

The war in Iraq, no matter what the long-term consequences may be, will be remembered for the salience of a new doctrine in American security strategy. Pre-emptive use of force, also called anticipatory self-defence, has become an important element of the Bush administration's overall approach to US security following the September 11 attacks. It has been the centerpiece of the arguments used to justify the unilateral use of force in Iraq with the implication that it could serve as a pretext for future use of force against other states as well. Policy analysts are now asking whether a successful campaign in Iraq would encourage the US to apply the doctrine to Iran and North Korea, both of which are clearly further ahead in their nuclear programmes.

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What is striking and quite problematic about the Bush doctrine is the expansion of the traditional meaning of pre-emption to allow for unrestrained and indiscriminate use of force in international affairs. It is in every nation's national security interest to have a strong international legal regime regulating the use of force; this does not exempt the superpowers. Yet, the new doctrine of pre-emptive attack that advocates the right to use force against other states, in advance and in the face of uncertain threats, creates a flagrant violation of the spirit and the letter of the UN Charter and seeks to turn the inherent right of self-defence into a blank cheque. This article explores the traditional meaning of pre-emption in international law and points out the ways in which the current US doctrine departs from it. It then questions the legitimacy of the Iraqi war and suggests that the justifications offered do not stand up to close scrutiny. It concludes by pointing out the practical danger of elevating pre-emption into a state doctrine, which would create windows of opportunity for other states, now checked by the international legal order.

Pre-emption Under International Law

To limit the use of force in international relations, which is the primary goal of the United Nations, there must be checks on its use. Under the UN Charter, there are only two exceptions to the all out ban on the use of force: one is enforcement action to maintain international peace and security, carried under Chapter VII of the Charter, the other is the inherent right of individual and collective self-defence, enshrined in Article 51 of the Charter. The self-defence exception has been the most often invoked justification for the use of force without Security Council authorisation, yet it is also the most problematic.

Under Article 51, the triggering condition for the exercise of self-defence is the occurrence of an armed attack. Legitimate self-defence requires the actual existence or occurrence of an armed attack; an open-ended threat does not suffice. Some, though, not all authorities interpret Article 51 to permit anticipatory self-defence when a threat is so grave, so direct and so definite that the victim does not have to wait until the attack has actually started in order to act in self-defence.¹ If an aggressor is in the midst of, or just about to attack, one need not absorb the first blow before fighting back. The attack, however, must be imminent, if not already underway. Pre-emptive strikes must meet a high standard of justification; otherwise they are acts of aggression that violate international law.

¹ A. D'Amato, "Israel's Air Strike upon the Iraqi Nuclear Reactor," *American Journal of International Law*, vol.77 (1983)

Pre-emption is certainly not a novel idea nor is it newly invented by the Bush administration. Hugo Grotius, who is considered the founder of modern international law, placed considerable emphasis on this idea in his discussion of self-defence. He writes in 'De Jure Belli Ac Pacis' that "war in defence of life is permissible only when the danger is immediate and certain, not when it is merely assumed."² In addition, he argues, "the danger must be immediate and imminent in point in time."³ Customary international law has been supportive of the right of pre-emption or anticipatory self-defence but only under extreme circumstances and within clearly defined boundaries. A formula expressing this idea and its limits, one that is widely accepted by the international legal community as an indicator of the status of pre-emption under current international law, is that which was pleaded by the US in the Caroline case in 1891. After attacking a US ship of that name, the British government justified its action on the basis of self-defence. "Those on the Caroline," they said, "were supporters of a rebellion against British rule in Canada."⁴ In an exchange of diplomatic notes, US Secretary of State Daniel Webster argued that a nation could only justify such pre-emptive hostile action if there was a "necessity of self-defence instant, overwhelming, leaving no choice of means and no moment for deliberation."⁵ Webster's criteria subsequently became the standard governing anticipatory action in international law.

Today a majority of international lawyers argue that under the UN Charter, even a restricted right of pre-emption as articulated by Webster no longer exists.⁶ According to this view, the previous notions of self-defence, predating the Charter, have lost their relevance, as Article 51 of the Charter has already codified customary international law in its own terms; and it is clear that the text of Article 51 does not preclude unprovoked pre-emptive action. State practice seems to concur with this argument; the occasions where states resorted to the argument of pre-emptive self-defence to support their case are very rare. And, on occasions where they could legitimately argue for pre-emptive self-defence, they chose not to do so. Christine Gray, a prominent scholar of international law, argues, "The reluctance to rely on anticipatory self-defence is strong evidence of the controversial status of this justification for the use of force."⁷ States go to great lengths to secure the widest possible support for their action; they seem hesitant to provide a justification that they know will be unacceptable to the vast majority of states.

² Hugo Grotius, *De Jure Belli Ac Pacis*, trans. Francis W. Kelsey (Oxford: Clarendon Press, 1925), vol.II, Book II.

³ *Ibid.*

⁴ U.S Government, Secretary of State Daniel Webster, *British and Foreign State Papers (1840-1841)*, vol.29, p.1129.

⁵ *Ibid.*, p.1138.

⁶ Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963), pp.275-8.

⁷ Christine Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 2000), p.115.

More striking is the fact that when states, on occasion, considered using pre-emption for justifying their use of force, they either quickly altered course or met with widespread international condemnation. American administrations, for example, have long debated the relative merits of pre-emptive war. In the early days of the Cold War against the Soviet Union and later in the 1962 Cuban missile crisis, anticipatory self-defence was found to be contrary to American values and the ideals that shape American foreign policy. President Kennedy rejected a proposal for making a pre-emptive strike against Cuba, saying that this would be a "Pearl Harbor in reverse." "For 175 years," he added, "we have not been that kind of country."⁸ The US in this case opted to seek and received an approval from a regional organisation, the Organization of American States (OAS).

The most significant precedent in the pre-emptive use of force was set by Israel when it attacked Iraq's Osirak nuclear reactor in 1981. Israel justified its action on the basis that Iraq's nuclear programme constituted a grave threat to Israel's security and that its weapons of mass destruction were capable of destroying Israel. Israel pleaded its case to the UN by claiming that "in removing this terrible nuclear threat to its existence, Israel was only exercising its legitimate right of self-defence within the meaning of this term in international law and as preserved under the UN Charter."⁹ However, in this case the Security Council unanimously "condemned the military attack by Israel in clear violation of the Charter of the UN and the norms of international conduct."¹⁰ At the time, the Reagan administration chose to "condemn" the attack; France declared it "unacceptable." A New York Times editorial began "Israel's sneak attack ...was an attack of inexcusable and short-sighted aggression; the LA Times declared it "state-sponsored terrorism."¹¹

The reason Israel faced widespread criticism at the time has great relevance to today's debate on pre-emption. The sense of outrage was based on the belief that pre-emptive strikes would seriously undermine international peace and security. As stated in the Caroline case, an imminent and overwhelming threat must exist to justify the use of force in pre-emptive self-defence. Israel simply argued that if Iraq were allowed to put the reactor into service, a nuclear attack on its population would eventually be highly probable. There was obviously no imminent threat and no overwhelming necessity on the part of Israel to justify its attack. It relied on assumptions and subjective threat assessments; Webster's criteria of necessity and immediacy were not met. In the Osirak case, the international community

⁸ A. Chayes, "Law and the Quarantine of Cuba," *Foreign Affairs*, vol.41 (1963), p.550.

⁹ Quoted in Anthony D'Amato, "Israel's Air Strike against the Osirak Reactor: a Retrospective," *Temple International and Comparative Law Journal*, vol.10 (1996), p.259-264

¹⁰ UN Doc. S/ Res/487 (1981).

¹¹ Nicholas D. Kristof, "The Osirak Option," *New York Times*, November 15 2002.

prevented the setting of a very dangerous precedent that would allow states to use force without any conclusive proof that the attacked states were even planning an attack.

The Bush Doctrine

The Bush doctrine seems to ignore or undermine the long established custom and state practice governing the anticipatory use of force in international affairs. By allowing preventive attacks in the absence of the threat of imminent attack, it attempts to create a new precedent that would wreak havoc in international peace and security. The Bush administration also departs from the principles and ideals on which American foreign policy have long been established. By elevating pre-emption as a last resort under exceptional circumstances into a policy doctrine, the current administration clearly delves into uncharted waters in international relations. The domestic and international ramifications of such an act are so great that it is imperative to examine in detail what the Bush doctrine entails and how it has been developed.

The Bush doctrine has officially ended the dominance of deterrence in American strategic planning and shifted it to one of pre-emption. It was first articulated at the President's West Point speech in June 2002. There, President Bush declared that while "in some cases deterrence still applied, new threats required new thinking... If we wait for threats to fully materialize we will have waited too long."¹² The President pursued this line of argument again in his address to the UN General Assembly on 12 September 2002.¹³ The principle of pre-emption was then incorporated into the administration's National Security Strategy (NSS), now known as the Bush doctrine, in September 2002 and has appeared in virtually every pronouncement on Iraq since then.

The bottom line for the Bush doctrine is this: The strategies that won the Cold War - containment and deterrence - won't work against new threats, because the nature of the threats we face today, is such that it is extremely difficult to identify, locate and confront them with conventional methods. As it is put in the NSS, "it has taken almost a decade for us to comprehend the true nature of this new threat. Given the goals of the rogue states and terrorists, the US can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker... 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."¹⁴ It goes on to state that ... "as a matter of common sense and

¹² Remarks by the President at 2002 Graduation Exercise of the US Military Academy, West Point, NY.

¹³ U.S. Government, President George W. Bush, "Address to the UN General Assembly," September 12, 2002. Available at www.whitehouse.gov/news/releases/2002/09/20020912.html

¹⁴ U.S. Government, National Security Strategy available at www.whitehouse.gov/nsc/nssall.html

self-defence, America will act against such emerging threats before they are fully formed."¹⁵ The Bush doctrine asserts that global realities now legitimise pre-emptive use of force and make it a strategic necessity. In particular, the willingness of rogue states and terrorist groups to acquire and use weapons of mass destruction indicates the immediacy of new threats that require preventive action. "Traditional concepts... will not work against a terrorist enemy whose avowed tactics are wanton destruction and the targeting of innocents; whose most potent protection is statelessness. The overlap between states that sponsor terror and those that pursue weapons of mass destruction compels us to action."¹⁶

The NSS is careful to specify a legal basis for pre-emption. It is acutely aware of its meaning under international law and the traditional restrictions placed on its use in custom and state practice.

"For centuries international law recognised 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 pre-emption on the existence of an imminent threat - most often a visible mobilisation of armies, navies and air forces preparing to attack."¹⁷

Yet, the administration argues in the strategy that the classic doctrine of pre-emption must be expanded beyond the Caroline formula to deal more effectively with the new threats. The restrictive concept of anticipatory self-defence must be abandoned to allow for a prompt and effective response to the challenge of terrorists and their supporters. Particularly, the concept of immediacy must be adapted to the emerging new threats. "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, the United States will, if necessary, act pre-emptively."¹⁸

The Bush doctrine is, in essence, another attempt by the current administration to set itself apart from the laws and regulations that bind other nations. There is no basis in international law for dramatically expanding the concept of anticipatory self-defence, as advocated in the NSS, to authorise pre-emptive strikes against states based on potential threats arising from possession of weapons of mass destruction and links to terrorism. There is also no indication

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

in the NSS on where to draw the line when it comes to taking preventive military action against states that possess weapons of mass destruction, as there are so many of them in the current international scene. Such a vague and open-ended approach to the use of military force provides endless opportunities for abuse. Among all this uncertainty and confusion surrounding the Bush doctrine, there is one thing that is beyond any doubt: the war in Iraq has been the first test case in the implementation of the new US strategic doctrine, and the war's long-term success or failure will have a great bearing on the doctrine's further use for justifying military operations elsewhere in the world.

Iraq War and Pre-emption

There have been many justifications offered by the US government for the use of force in Iraq, but one theme persisted in countless policy statements made by the administration: Iraq's possession of weapons of mass destruction and its close ties to terrorism, namely to al-Qaida, constitute a threat to international peace and security and Saddam Hussein must be stopped before he acts on his deadly intentions.

Just a few days before the announcement of the new NSS, President Bush spelled out the case for pre-emptive self-defence against Iraq in his address to the UN General Assembly: "The first time we may be completely certain [Saddam Hussein] has a nuclear weapon is when, God forbids, he uses one; we owe it to all our citizens to do everything to prevent that day from coming."¹⁹ Bush pursued the same argument again in another policy announcement on Iraq on 7 October 2002, saying, "If we know Saddam Hussein has dangerous weapons today - and we do - does it make any sense for the world to wait to confront him as he grows even stronger and develops even more dangerous weapons?"²⁰ President Bush articulated the case for pre-emptive war in Iraq more fully and forcefully in his State of the Union address on 28 January 2003:

"Some have said we must not act until the threat is imminent. Since when have terrorists and tyrants announced their intentions, politely putting us on notice before they strike? If this threat is permitted to fully and suddenly emerge, all actions, all words, and all recriminations would come too late. Trusting in the sanity and restraint of Saddam Hussein is not a strategy and it is not an option."²¹

¹⁹ George W. Bush, "Address to the UNGA," www.whitehouse.gov/news/releases/2002/09/20020912.html

²⁰ U.S. Government, George W. Bush, "Excerpts from the President's Address to the Nation on Iraq," October 7, 2002. Available at www.whitehouse.gov/news/releases/2002/10/20021007-8.html

²¹ U.S. Government, President George W. Bush, "President Delivers State of the Union," 28 January 2002 Available at www.Whitehouse.Gov.news/releases/2003/017print/20030128-19.html.

One can cite numerous statements by the current administration outlining the risks Saddam Hussein's government posed to the US and its allies. But the question is whether they all added up to a legitimate case for pre-emptive use of force against Iraq. One can say with hindsight that the administration's avowed reasons for going to war do not stand up to close scrutiny. The most important justification for the war was Iraq's possession of weapons of mass destruction, which have yet to materialise. The failure to this day to find any weapons has generated a major controversy in the US and Britain, with critics arguing that the allies either exaggerated the weapons' existence or fabricated a case to justify launching the war. The allegations of close ties between Saddam Hussein and al-Qaida would have garnered some support for the war, but as James Rubin, the former Under Secretary of State for Public Affairs, argues, "the link was never established, only alleged, and no other country accepted it: in fact foreign intelligence services were told by the CIA that the agency itself doubted these claims."²²

Before the war, the allies argued time and time again that weapons of mass destruction existed in large quantities and posed a threat so urgent and imminent that military action was required to disarm Iraq. An intelligence dossier published in September 2002 in the UK argued that Iraq had unconventional weapons that could be launched within forty-five minutes of an order being given.²³ President Bush endorsed this claim in a "Global Message" issued on 26 September, still on the White House website; there the President claimed that Iraq "could launch a biological or chemical attack forty-five minutes after the order is given."²⁴ The accusation that Iraq could launch a devastating attack at a moment's notice was significant, because it added urgency to the claim that the Iraqi regime constituted a major threat to peace and that this threat was imminent and had to be dealt with quickly and effectively. As it has turned out, the forty-five minutes charge was not true. Although weapons may still be found in Iraq, the possibility of their activation at such short notice has been refuted by arms control experts.

Another unsubstantiated allegation, that led to the question of whether the allies exaggerated intelligence with respect to Iraq, was made by President Bush in the 28 January State of the Union address about Iraq's efforts to buy uranium in Africa. This led to a major controversy in the US, as some intelligence officials have publicly declared that they warned the White House not to include this claim in the President's speech, but were effectively sidelined.²⁵ In addition, the US

²² James Rubin, "Stumbling into War," *Foreign Affairs* (September/October 2003).

²³ U.K. Government, *Weapons of Mass Destruction: The Assessment of the British Government*.

²⁴ U.S. Government, President George W. Bush, "Global Message," 26 September 2002. Available at www.whitehouse.gov/news/releases/2002/09/iraq/20020926-7.html

²⁵ James Risen and David E. Sanger, "After the War: CIA Uproar; New details Emerge on Uranium Claim and Bush's Speech," *New York Times*, 18 July 2003.

Justice Department has begun a full investigation into whether Bush administration officials illegally disclosed to journalists the name of an undercover CIA agent, married to former Ambassador Joseph Wilson, who, more than a year ago, concluded in a report to the CIA that there was no evidence that Saddam Hussein tried to buy uranium ore in Niger in an effort to build nuclear arms.²⁶ Meanwhile, the International Atomic Energy Agency (IAEA) announced in a March 2003 report that documents alleging this procurement of Uranium from Niger were "not authentic".²⁷ The IAEA proclaimed on 27 January 2003 that it had not found that Iraq had restarted a nuclear programme and it repeated that conclusion on 7 March 2003.²⁸

The Bush administration has also tried to connect Iraq to al-Qaida. In making its case for war, the administration dismissed the arguments of experts who noted that despite some contacts between individuals in Iraq and al-Qaida over the years, there was no evidence of an ongoing and substantive relationship.²⁹ The 28 September radio address that mentioned the forty-five minute allegation, also included an unsubstantiated charge by the President that "evidence from intelligence sources, secret communications, and statements by people now in custody, reveal that Saddam Hussein aids and protects terrorists, including members of the al-Qaida. Secretly, and without fingerprints, he could provide one of his hidden weapons to terrorists, or help them develop their own."³⁰ Secretary of Defence Donald Rumsfeld also claimed that his administration had "bulletproof evidence" of an al-Qaeda link. Secretary of State Colin Powell made a similar case to the UN arguing about an al-Qaeda cell in Iraq.³¹ Now, months into the invasion of Iraq, these claims look more far-fetched than ever. Numerous intelligence experts and top CIA officials have long argued that the radicals of al-Qaeda and the secularist Saddam regime simply did not have anything in common to form any relationship based on shared interests.³² Yet the administration continues to argue that the invasion of Iraq constitutes the second phase in the war on terror that began after the attacks of 11 September 2001. From what we know about Iraq and al-Qaeda there appears to be no credible basis for carrying that battle to Iraq.

²⁶ Richard W. Stevenson and Eric Lichtblau, "The Struggle for Iraq: Intelligence; President Orders Full Cooperation in Leaking of Name," *New York Times*, 1 October 2003.

²⁷ International Atomic Agency, IAEA Director General Dr. Mohamed El Baradei, "The Status of Nuclear Verifications in Iraq, An Update," 14 February 2003. Available at www.iaea.org/worldatom/press/Statements/2003/ebsp2003n006.shtml

²⁸ International Atomic Agency, "The Status of Nuclear Weapons," 7 March 2003. Available at www.iaea.org/worldatom/Press/Statements/20037ebsp2003n006.shtml.

²⁹ "Letter from George J. Tenet to Senator Bob Graham," 7 October 2002, *New York Times*, 9 October 2002, p.A12.

³⁰ U.S. Government, President George W. Bush, "Radio Address," 28 September 2002. Available at www.whitehouse.gov/news/releases/2002/09/20020928

³¹ William Beeman, "Al-Qaida - Iraq Connection Tenuous at Best," *Pacific News Service*, 6 February 2003. Available at www.Brown.edu/Departments7Anthropology/publications/General_Powell.htm.

³² Walter Pinus, "Alleged Al-Qaida Ties Questioned," *Washington Post*, 7 February 2003, p. A21.

These and many other allegations made by the allies on the eve of the war raise a troubling question as to whether the intelligence assessment was adjusted to fit the predetermined decision to launch the war. A judicial inquiry in the UK into the death of David Kelly, a British weapons of mass destruction expert, who alleged to journalists that the British government misled its public about Saddam Hussein's weapons capabilities to justify the war against Iraq, has generated even more question marks. Even though the inquiry has not yet produced a final verdict, much evidence has been revealed to suggest that the British government sidelined the intelligence community in making its case for the war in Iraq.³³ The failure to date to find any banned weapons has also raised a major debate over the rationale for the war in the US. The House Intelligence Committee has been conducting an inquiry into the intelligence shortcomings before the war. It has produced a recently disclosed letter to George Tenet, the Director of the CIA, in which it said "the Intelligence available to the US on Iraq's possession of weapons of mass destruction and its programmes and capabilities relating to such weapons...and its links to al-Qaida was fragmentary and sporadic."³⁴ The letter is all the more damaging as it comes from a committee controlled by the Republicans and is signed by the committee chairman, Congressman Porter Goss, a Republican and a former CIA agent who is quite sympathetic to White House policies. This letter echoes many of the claims raised by Hans Blix, the retired chief of the UN inspections in Iraq, that many of Iraq's weapons have already been accounted for or destroyed. As he put it so aptly, "it is somewhat puzzling that you could have 100 percent certainty about the weapons' existence and zero certainty about where they are."³⁵ This gives credence to the claims that administration officials may have distorted intelligence findings in making their case for the war.

Iraqi noncompliance with the UN resolutions banning weapons of mass destruction had been the strongest justification for the war, yet since the war, we have not seen any evidence at all that illegal weapons existed in Iraq before the war. In fact, the Iraq Survey Group, 1500 partly civilian technical experts, hired by the US government to search for banned weapons in Iraq, has failed to find any unconventional weapons. After three months of intense searching, the chief inspector, Dr. David Kay, testified to Congress that "to date we have not uncovered evidence that Iraq undertook significant post - 1998 steps to actually build nuclear weapons or produce fissile material."³⁶ That conclusion contradicts the

³³ "Bush Takes Responsibility for Niger Claim," *The Guardian*, 30 July 2003.

³⁴ Gary Younge, "US Intelligence on Iraqi Weapons 'Flawed'," *The Guardian*, 29 September 2003.

³⁵ Gary Younge, "Iraq: After the War: Blix Attacks Shaky Intelligence on Weapons," *The Guardian*, 23 April 2003, p.13.

³⁶ James Risen and Judith Miller, "No Illicit Arms Found in Iraq, U.S. Inspector Tells Congress," *New York Times*, 3 October 2003.

administration's prewar allegations that Iraq had reconstituted its nuclear programmes and deflates the urgency the allies attached to taking military action against Iraq.

It seems clear that banned weapons barely existed in prewar Iraq and posed no immediate threat to the international community that may have justified a pre-emptive attack. Though it is still possible that US investigators may find relatively small amounts of such weapons, we must keep in mind that the justification for war was that the Iraqi weapons of mass destruction constituted an imminent threat to the US and its allies. This could only be a legitimate claim if Iraq had been in possession of nuclear weapons that were ready to be launched. We now know that Iraq did not have any such capability before the war. As long as the UN inspectors are not allowed back in Iraq, whatever weapons the allies find at this point will not have any credibility in the international public arena. Given the US and British track record of faulty claims, there is a legitimate concern that the allies may manipulate what little evidence they find in Iraq to reinforce their credibility.

Conclusion

It is now beyond any doubt that the gravity and immediacy of the threat Iraq posed to the US was clearly exaggerated. The war was launched on the basis of assumptions and dubious threat assessments. Pre-emption demands a high standard of proof that can stand up to world scrutiny and the allies have failed to provide it. Given the absence of any credible evidence of an imminent and overwhelming threat and in light of the development of customary international law with respect to pre-emption, the Iraqi war does not meet even the most flexible criteria of lawfulness.

Yet the repercussions of a pre-emptive doctrine as formulated by the current US administration do not end in Iraq. The weak and inconclusive evidence presented to the international community to justify preventive action underlines the practical danger of a doctrine of pre-emption. Vagueness and potential for abuse is inherent in any broader definition of pre-emption, and this includes the Bush doctrine. This is mainly because its potential range of application is limitless: any nation considered to be a threat to the US is at risk of facing preventive action. There is no limit on how serious the threat must be to justify a pre-emptive attack. There are no standards to be employed to decide when, where, and who to attack. Does possession of weapons of mass destruction constitute an automatic trigger, or should a connection with terrorism be established? There are many states that

support terrorists, why not go after them? There are twenty-five countries that have not signed any treaties dealing with nonproliferation, why not take pre-emptive action against them? The Bush doctrine leaves these questions unanswered.

Elevating pre-emption into a policy doctrine gives an incentive to other states to use prevention as a pretext for aggression. If the US can use force pre-emptively, then other states can as well. To argue otherwise is to deny the principle of sovereign equality and to admit that different sets of laws apply to the US than to the rest of the international community. In addition, given the difficulties of relying on doubtful intelligence assessment and its potential political interpretation, the case for a generalised right to wage pre-emptive war beyond the Caroline formula, is just not workable. Any such move would constitute a flagrant violation of the Charter's legal framework and unnecessarily imperil the already fragile international legal order.