

# JUS AD BELLUM: THE NEXT IRAQ

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## I. INTRODUCTION

Our chairman said that the task of this panel is to discuss preemptive military intervention to combat either: the threatened use of force, for example, by terrorists armed with weapons of mass destruction; or outrageous human rights violations, like genocide. While these two categories of threat look quite different, I think it is instructive to discuss them together in the context of preemption, and I am glad we are doing so.

In my presentation, I plan to do the following three things: outline where the law relating to humanitarian intervention stands post-Kosovo; outline where the law relating to preemptive self-defense stands post-September 11th (9/11); and offer a few modest proposals on how to improve the quality of the United Nations Security Council (Security Council) decision-making on these issues. My central argument is that the law is less restrictive than meets the eye, but there are substantial weaknesses in the existing legal and institutional regimes. Those weaknesses can be addressed through a number of substantive and procedural steps, which would constitute a politically viable evolution, but not a revolution in the existing legal order. My proposals focus on the Security Council, not because I believe it has any inherent claim to legitimacy, but because I do not think I can properly defend a more radical transformation of the international legal order in only ten minutes. However, I will conclude with one somewhat radical suggestion, which we may be able to take up in the discussion period.

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## II. KOSOVO: HUMANITARIAN NECESSITY AS AN EXCUSE

I do not intend to review the law relating to humanitarian intervention at length, but rather focus on the international reaction to the Northern Alliance Treaty Organization's (NATO) intervention in Kosovo in 1999. In my view, that is the most illuminating way of understanding where the law currently stands.

The weight of scholarly and official opinion is that the intervention was illegal.<sup>1</sup> None of the three principal legal justifications: authority based on existing Security Council resolutions; a customary right of humanitarian intervention; or self-defense, was persuasive. However, my reading of the international reaction to the intervention is that NATO's violation of the law was in effect *excused*.

The best way of characterizing what happened from a legal point of view is that an interpretive community of governments and actors represented on the Security Council, along with other interested governments, such as lawyers, Non-Governmental Organizations (NGOs), and blue ribbon panelists, deemed the intervention illegal, but turned a blind eye to the violation of the law given the extreme circumstances.

Without going into details, I would argue that this reading is supported by the many statements of government representatives who were disinclined to accept the legality of the intervention, but reluctant to condemn it. This includes many Non-Aligned Movement (NAM) and Islamic countries, and even some NATO countries who stressed the exceptional nature of the action and down-played its relevance as a precedent.

Therefore, the law on humanitarian intervention post-Kosovo is as follows: it is legal with Security Council approval and illegal without it as a general matter, however there may be rare cases of extreme humanitarian necessity when unauthorized action will in effect be excused by the international community.

## III. THE EVOLVING LAW OF SELF-DEFENSE

What about preemptive self-defense? An instructive way of looking at where that law stands post-9/11 is by comparing the reactions to the US-led interventions in Afghanistan and Iraq.<sup>2</sup>

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1. For a review of the literature and analysis of the arguments put forward to justify the intervention, see Ian Johnstone, *Security Council Deliberations: The Power of the Better Argument*, 14 EUR. J. INT'L L. 437, 464-75 (2003).

2. See Ian Johnstone, *US-UN Relations after Iraq: The End of the World (Order) As We Know It?*, 15 EUR. J. INT'L L. 813, 827-36 (2004).

The official justification for the US and allied attacks on Al-Qaeda and the Taliban in October 2001, was self-defense in connection with the events of 9/11.<sup>3</sup> This was a substantial stretch of the concept of self-defense in a two respects: it was invoked against a non-state actor (Al-Qaeda); and in exercising its right of self-defense, the US and its Afghan allies changed the regime in power in Afghanistan.

What is most interesting from a legal point of view is that the world was largely prepared to accept this interpretation of Article 51 of the United Nations Charter (UN Charter). There is ample evidence of this acceptance in the reactions of the Security Council itself and other international organizations such as NATO; the Organization of American States (OAS); the Asian Pacific Economic Cooperation (APEC); and even the Organization of Islamic Countries (OIC), which bent over backwards to avoid condemning the military action as a violation of international law.

Moreover, many states participated directly or indirectly in Operation Enduring Freedom, or at least expressed support for it, and they are participating in the economic and political reconstruction of Afghanistan to this day.

However, when self-defense against terrorism was invoked eighteen months later as one of the justifications for military action against Iraq, the international reaction was quite different. Few states or knowledgeable observers were persuaded that the links between Al-Qaeda and the regime of Saddam Hussein were sufficiently tight to justify the invasion of Iraq on that basis. When that became obvious, the Bush Administration largely gave up trying to make its case on the grounds of self-defense, at least to international audiences. There is no better evidence than the letter of March 20, 2003 that the United States sent to the President of the Security Council setting out the legal justification for the war.<sup>4</sup> It does not contain a word about terrorism, self-defense, or preemption.<sup>5</sup> The legal case is based entirely on the enforcement of existing Security Council resolutions relating to Iraq's weapons of mass destruction.<sup>6</sup>

A broader legal question, which was not directly raised by the Iraq case since self-defense was not the official justification, is whether the doctrine of preemption, as articulated in the National Security Strategy of 2002, is

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3. *Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council*, U.N. SCOR, 56th Sess., U.N. Doc. S/2001/946 (2001).

4. *Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council*, U.N. SCOR, 58th Sess., U.N. Doc. S/2003/351 (2003).

5. *Id.*

6. *Id.*

consistent with the law of self-defense as traditionally understood? The central argument is that Article 51 of the UN Charter permits “anticipatory self-defense,” and that the notion of anticipatory self-defense can and does encompass preemptive strikes against terrorists.

There is a long history to the doctrine of “anticipatory self-defense,” going back to the *Caroline* case of 1842.<sup>7</sup> At that time, US Secretary of State Daniel Webster claimed that self-defense was permissible when the threat of attack was “instant, overwhelming, and leaving no choice of means and no moment for deliberation.”<sup>8</sup> Although, that is still good law, my reading of the Bush Administration’s version of the doctrine of preemption is not consistent with even the most liberal interpretation of that law. What some of the language in the National Security Strategy seems to contemplate is not *preemption* of a truly imminent attack when there is clear and convincing evidence that it is about to be launched, but rather *preventive* action. There is no self-evident line between preemption and prevention, but starting a war now in order to prevent some future, but not well-specified threat from materializing, is not what Secretary of State Webster had in mind. If accepted in its most expansive form, the doctrine stretches the term “armed attack” so far, that it becomes virtually meaningless as a legal concept.

This is not to say that self-defense can never be invoked to forestall future terrorist attacks. If the attack is truly imminent, or if there is a pattern of attacks and credible evidence of both their source and the threat of further attacks, then a state can take defensive military action. This formulation, sometimes called the “accumulation of events theory,”<sup>9</sup> offers a gloss on the notion of anticipatory self-defense, relaxing the test of “imminence” slightly when there is a pattern of attacks. The action against Al-Qaeda in Afghanistan could be justified on that basis. The invasion of Iraq could not!

#### IV. IMPROVING THE QUALITY OF SECURITY COUNCIL DECISION-MAKING

As a result, I read existing law on “unilateral intervention” (intervention not authorized by the Security Council) as less restrictive than meets the eye; humanitarian intervention will be excused in some circumstances and preemptive self-defense against some terrorist threats is lawful.

However, in setting up the High Level Panel on Threats, Challenges, and Change, the Secretary General was motivated by a sense that, while unilateral

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7. See LORI FISLER DAMROSH ET AL., *INTERNATIONAL LAW: CASES & MATERIALS* 969 (4th ed. 2001).

8. *Id.*

9. See, e.g., Oscar Schachter, “The Lawful Use of Force by a State Against Terrorists in Another Country,” 19 *Israeli Yearbook of Human Rights* 209, at 220 (1989); STANIMIR A. ALEXANDROV, *SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW* 166 (1996).

action is necessary and appropriate to deal with some of these threats, greater collective action is also required. More specifically, the Security Council must do more to face *its* responsibilities in dealing with both kinds of threats.

The Security Council has not been idle in either field. Throughout the 1990s, it was increasingly willing to label human rights or humanitarian crises as threats to international peace and security, and to authorize coercive action under Chapter VII of the UN Charter in response. While it has not authorized military action against a terrorist threat to date, it imposed economic sanctions three times in respect of terrorism: against Libya in 1992; against Sudan in 1996; and on the Taliban in 1999. It has also adopted resolutions 1373 regarding financing and other forms of support for terrorism, and 1540 in order to prevent weapons of mass destruction from falling into the hands of terrorists. These acts of law-making by the Security Council are unprecedented in the sense that they impose binding obligations on all states in a general issue area for an indefinite period.

Is it reasonable to think the Council will do more? Without trying to anticipate what the High Level Panel might say, it seems to me that two steps could be taken to improve how these threats are dealt with: the adoption of a set of substantive principles or “considerations” to guide deliberations on intervention; and procedural innovations to make it more likely the Security Council will act, and will do so on a principled basis.

#### *A. Substantive Principles/Considerations*

The broad outline of substantive principles for intervention was foreshadowed in *The Responsibility to Protect Report*.<sup>10</sup> Those criteria related to humanitarian intervention alone, but it is not hard to imagine how they might be converted into more generic principles.

However, instead of hard and fast criteria, I would argue that a more viable and politically realistic way of proceeding would be for the Security Council, General Assembly, and/or any other body engaged in this inquiry, to ask itself a set of questions each time the issue of intervention arises.<sup>11</sup> Questions such as:

- 1) What is the magnitude of the threat or emergency?
- 2) Is the very existence of a state or ethnic group at risk?

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10. INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT* 31 (2001).

11. There is a precedent for this. In 1994, the Council adopted a list of considerations to be taken into account before establishing a peacekeeping mission. *Statement by the President of the Security Council*, U.N. SCOR, 48th Sess., 3372nd mtg., at 2, U.N. Doc. S/PRST/1994/22 (1994).

- 3) Short of that extreme situation, is there a pattern or history of actions to suggest that the threat will materialize?
- 4) How good is the evidence of the threat or emergency? Can it be verified by credible sources?
- 5) Are alternatives to preemptive military action available? Have viable measures short of the use of force been exhausted?
- 6) What are the prospects of success? Are the interveners willing to see it through?

These sorts of considerations would not serve as an automatic trigger or set a threshold for action, but they would structure deliberations and impel the Council to deal with these threats in a more systematic, norm-based way. They would force governments proposing intervention to state their case in terms that are agreed upon in advance. In addition, it would force governments who oppose action to justify their opposition in those same terms.

### *B. Procedural Innovations*

However, substantive guidelines will not go far towards stimulating Security Council action, as long as the veto power stands in the way. There is no self-evident reason why the veto should stand in the way and why each of the five permanent members (P5) should be the final court of appeal on these sorts of decisions. However, the Security Council is the only institutional safeguard that currently exists as a check on abuses. The resulting dilemma is that veto power can block all attempts at preemptive action and yet a right of unilateral intervention, other than in self-defense, is too open to abuse.

A procedural way out of this dilemma, suggested by Thomas Pickering at a recent speech at the Fletcher School, is for the P5 members of the Security Council to reach a gentleman's agreement providing that decisions about the preemptive use of force will be put to a straw poll, and unless two of the P5s signal that they will vote no, the sole objector will abstain on the resolution rather than veto it.<sup>12</sup> In other words, a veto on preemptive action to combat either terrorists' threats or massive human rights abuses, require that two of the permanent members vote no.<sup>13</sup>

An additional safeguard that was not suggested by Mr. Pickering would be for the Council to appoint an impartial commission to assess whether the factual premises employed to justify the intervention were accurate. This assessment

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12. The Honorable Thomas Pickering, Convocation Address at The Fletcher Law School at Tufts University (Sept. 9, 2004). Mr. Pickering was not referring to humanitarian intervention or preemptive action against terrorist threats *per se*, but his proposal could usefully be adapted to deal with those kinds of threats, where the twin problems of Security Council paralysis and unilateral abuses are especially acute. *Id.*

13. *Id.*

would have to come after-the-fact, but it could still reduce the risk of abuse by those in favor of intervention while putting pressure on those who oppose it to do so for non-arbitrary reasons.<sup>14</sup> Accountability derives from the need to provide accurate information to justify preemptive intervention, and to do it on the basis of accepted standards.

Obviously neither of these suggestions would be easy to implement, but they offer a plausible starting point for discussion about how to improve the quality of Security Council deliberations and decisions. They are designed to make Council members more accountable for decisions to act *and* for decisions not to act.

## V. CONCLUSION

The more radical proposal, which I am not confident I can defend, is to forget the gentleman's agreement on the veto and instead turn to some other body for collective endorsement when a veto is cast. The other body could be a self-constituted group of twenty to twenty-five major powers. Their decisions would have to be by qualified majority vote, for example, fifteen-twenty, since all of the P5 members of the Security Council would likely be among the group. Endorsement by this body would not render the action legal, but might reinforce claims that it is excusable in the circumstances.

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14. See Allen Buchanan & Robert Keohane, *The Preventive Use of Force: A Cosmopolitan Institutional Proposal*, 18 ETHICS & INT'L AFF. 1 (2004).