War on Terror,
international law on

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This entry begins with a short background to the problem of terrorism in the postwar era. Probably the most sustained use of terrorism emerged from the independence struggle against French colonialism in Algeria, in which the anti-colonial forces were sufficiently weak not to risk direct confrontation. Their strategy was, therefore, to use terrorist methods against the vastly superior colonial enemy. Terrorism was promoted as a necessary form of struggle for national liberation. It was the weapon of the weak. It is unclear whether the price paid to secure Algerian independence was so high and institutionalization of violence within the culture so deep that, even during independence, the Algerians have experienced the violence of sporadic terrorism and excessive responses from the authorities to these challenges. Nevertheless, the ostensible message of the Algerian war of national liberation served as a model for other struggles against colonial rule or foreign occupation. Essentially, the struggle was strategically directed by terrorism and, since the Algerians succeeded in discarding colonial rule, terrorism, the weapon of the weak, seemed to be legitimated.

In the Cold War, where the hegemons sought to extend their own influence and limit their adversaries', it became a component of a state’s strategic posture to promote forms of insurrection and the use of terrorism through surrogate entities. Part of the rationale was that neither hegemon wished to confront the other directly because each had an immense stockpile of nuclear weapons and sophisticated delivery systems. As a result, the criminalization of terrorism became hedged with competing and irreconcilable objectives. This was encapsulated in the phrase “one person’s terrorist is another person’s freedom fighter.” Recently, an analogous perspective was affirmed by the Congressional head of the Committee on Homeland Security. Congressman King scheduled hearings on Muslim alienation in the United States, the concern being that there could be covert support for terrorism from this subgroup. When asked to explain his own support for the IRA, the Irish terrorist group, he explained that this was appropriate since the Irish Republican Army (IRA) had not attacked the United States directly. If a hegemon disagreed with the ideology of a dissident or insurrectionary group then it was easy to label that group terrorist. On the other hand, if that group’s ideology was comparable with its own, then it was easy to label that group a national liberation movement and its operatives, freedom fighters. For this reason, international law has been unable to find a consensus for the suggestion that a terrorist should have the standing in international law analogous to that of a pirate. The Roman lawmaker Cicero defined piracy as a crime against civilization itself, which English jurist Edward Coke famously rephrased as hos-tis humani generis — enemies of the human race. However, although terrorism is, in the judgment of many, a crime against civilization, the critical steps required to define it as such have not been realized internationally.

When we deal with the War on Terror we are dealing with a novel idea. In general, war targets another sovereign state. There are no explicit rules in the law of war that identify a war against a concept, which is abstract and possibly even diffuse. When President Bush declared a War on Terror after the attacks of 2001 on the World Trade Center and the Pentagon, there emerged a complex question as to whether the War on Terror was essentially a unilateral US form of war or whether some rethinking of the basic rules was needed.
to accommodate the concept better under modern international law. The initial comment made by Bush administration officials was that the Al-Qaeda attack was an attack by an unrecognized non-state entity and therefore was not covered by the conventional rules of international law. The implication was that whatever rules governed the US response to this form of terrorism would be the rules created by the United States itself. This was a strong impulse within the Bush administration. It was, however, given more thought and refinement in the document produced in September 2002 titled *The National Security Strategy of the United States of America*. This became known as the Bush Doctrine (Bush 2002a).

In the introduction to this doctrine, President George W. Bush (2002a) noted that the defense of the nation today had changed dramatically: "enemies in the past needed great armies and great industrial capacities to endanger America. Now, shadowy networks of individuals can bring great chaos and suffering to our shores for less than it costs to purchase a single tank." The President noted that modern terrorists were skillful in infiltrating open societies and had the ability to use modern technologies for their destructive purposes. Having stated the problem, he also proposed the appropriate US response to it. To defeat terror, he maintained, the United States has to use every tool in its arsenal. These included military power, improved homeland defense, law enforcement, intelligence, and attacks on terrorist financing. The central issue he identified was that the war on terrorism had to be essentially global in its reach, and the duration of this war would have to be indefinite. Further, Bush suggested that states that aided, harbored and abetted terrorists would be regarded as *allies of terror* and deemed to be *enemies of civilization*. Toward the end of this introduction of the Bush Doctrine, the President conceded, almost as an afterthought, that it was important to build a safer and more secure world through alliances and multilateral institutions. Here the President mentions the UN as an organization of possible relevance.

On June 1, 2002, the President gave a speech at West Point (Bush 2002b) in which he set out his administration's reconstruction of international law in the face of the global terror threat. The first of these innovations was the suggestion that there are certain rogue states in the international community. The President provided five criteria that characterize these states: their rulers are essentially crooks who steal the state's natural resources for personal gain; they completely reject international law and treaty obligations and threaten other states; they are determined to acquire and deploy weapons of mass destruction; they sponsor terrorism around the world and reject the enlightened values of the United States and the world community. A rogue state loses the shield of sovereign independence in international law. It is a state that may be subject to external intervention because of its rogue status. This approach would significantly alter the meaning of Article 2(7) of the UN Charter, and change that of both Article 2(4) and Article 51.

The second important statement regarding US policy and international law doctrine in the context of the War on Terror was a reconstruction of the boundaries of a state’s right to self-defense in light of the peculiar circumstances that accompany acts of modern terrorism. Here the administration explored the traditional meaning of self-defense which 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.” It was this imminent threat concept that the Bush Doctrine expanded to fit the necessities of fighting in the war against terror. According to Bush (2002a):

> We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorist 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.
After this statement of the problem, the President provided an expansion of the imminent threat gloss of self-defense to express what he deemed to be the option, under international law, of “preemptive actions.” In the President’s own words:

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 are the specific objective of terrorists and these losses would be exponentially more severe if terrorists acquired and used weapons of mass destruction.

When the United States invaded Afghanistan, Afghanistan fell within the general category of a rogue state in the sense that by providing Al-Qaeda with a home base on Afghan territory and by its ostensible noncooperation in the apprehension and extradition of Al-Qaeda’s leaders it was essentially a state sponsor of terrorism. In this sense the country’s sovereignty and territorial insulation from accountability under international law and US policy were porous, and it was subject to intervention because, as a terrorist haven, it provided an imminent threat to the United States, justifying a preventive intervention. There were hardly any voices in the international community that challenged the lawfulness of the US invasion of Afghanistan. The next target of preemptive attack was Iraq. There the Bush administration argued vociferously that Saddam Hussein’s administration had been acquiring weapons of mass destruction, which, coupled with the threat that it might use these weapons in terrorist-style actions, qualified Saddam’s regime as a rogue state. An effort was made to link Saddam’s regime to Al-Qaeda. Because this was not a clear-cut case, the administration took the matter to the Security Council. It did not get explicit authorization to intervene in Iraq, but, nevertheless, construed an ambiguous resolution as giving it a green light to attack Iraq militarily. The attack on Iraq remains controversial. And there are strong arguments that the reasons given to justify the intervention by the Bush administration were untrue. More than that, there is ample evidence that the administration knew that its reasons would not hold up. Indeed, there is evidence that the top legal adviser to the government of the United Kingdom did not believe that there was a justification in international law for the attack on Iraq.

Whether the preemptive attack on Iraq could technically be justified under international law is still a controversial matter. Some leading scholars (jurist consults) have maintained that the war was unlawful under the UN Charter. It would be appropriate to appraise more carefully the technical arguments for the lawfulness or unlawfulness of the attack in furthering the war against terror. One technical justification for the attack is that the attackers were acting under Security Council Resolutions that authorized the use of force against Iraq in the 1991 Persian Gulf War. Technically, the war had not ended. A condition of its formal termination required the complete disarmament of Iraq and an accounting for possible weapons of mass destruction (WMD). Although this provides a technical justification, the circumstances and context of the 1991 War were so different as to strain credible interpretation. A search for further and stronger grounds of justification is necessary.

Resolution 678 authorized the use of “all necessary means to uphold” Security Council Resolution 660, as well as resolutions passed after 660. These resolutions served to restore international peace and security in the Gulf. Resolution 678 therefore served as the technical legal basis for the 1991 Persian Gulf War. Resolution 687 stipulated a cease-fire, but imposed conditions relating to the disarmament of Iraq, in particular, conditions relating to the identification and destruction of WMD. Since the cease-fire was subject to certain disarmament conditions, including inspections conducted by the United Nations, a material breach of these cease-fire conditions terminated the grounds on which the cease-fire was created under Resolution 687. The material breach
provides a continuing justification for the invocation of armed force against Iraq. The specific interpretive issues involve the question of whether the words “all necessary means” found in Resolution 678 (United Nations Security Council 1990) cover Resolution 687 (United Nations Security Council 1991). It is argued that since Resolution 678 was decided prior to 687, it cannot, without more support, be read as covering the later Resolution 687. The critical paragraph of Resolution 678 reads as follows:

[Resolution 678] Authorizes Member States cooperating with the government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 ... the foregoing resolutions, to use all necessary means to uphold and implement Resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.

The critical paragraph of Resolution 687 reads as follows:

[The final operative paragraph of resolution 687 reads that the Security Council] decides to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area.

It is possible to read these two resolutions together, but one is stretching syntactic interpretation to secure authorization for the 2003 Gulf War from this base of authority. Resolution 687 specifies in categorical terms that the Security Council decided to remain seized of the events that led to the creation of Resolution 687. One can therefore read Resolution 687 – by necessary implication – as terminating the authorization of Resolution 678 because the matter was effectively before the Security Council. If the Council is seized of the matter, so the argument would go, it would be obliged to conclude whether a material breach of the conditions of the cease-fire exists. If it found such a breach, the Council would have to authorize the use of force. The critical resolution, in addition to those already discussed, for justifying the 2003 Gulf War, is United Nations Security Council Resolution 1441. According to Resolution 1441 (United Nations Security Council 2002):

[The United Nations Security Council] Decides that Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687 (1991), in particular through Iraq’s failure to cooperate with United Nations inspectors and the IAEA, and to complete the actions required under paragraphs 8 to 13 of resolution 687 (1991);

[The United Nations Security Council] Decides, while acknowledging paragraph 1 above, to afford Iraq, by this resolution, a final opportunity to comply with its disarmament obligations under relevant resolutions of the Council; and accordingly decides to set up an enhanced inspection regime with the aim of bringing to full and verified completion the disarmament process established by resolution 687 (1991) and subsequent resolutions of the Council;

Recalls ... that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations;


The phrase, “serious consequences” in Security Council Resolution 1441 did not textually authorize the use of force. Indeed, the plausible construction of its language is that if the Council seriously contemplated the use of force, it could have done so specifically, since the authorization of the use of force comprises one of the major decisions that the Council can take. Accordingly, the Council would not leave the question of the use of force to an implication in textual language supplemented by tenuous strands drawn from preceding resolutions. To some, therefore, an analytical interpretation of whether the use of force in Iraq was authorized by the Security Council is an argument that cannot be sustained on the basis of the language used in the relevant texts and the interrelationships between them.
Broader interpretive standards might justify the use of force under relevant resolutions, but these justifications may sound highly technical and may not carry a justification that clearly sustains the object and purpose of the interpretation. Here, in effect, the concept of preemptive action seems not to be justifiable under United Nations Security Council resolutions and processes. The text alone seems to provide no justification for the attack, and a purposive and teleological interpretation of the text would provide only weak legal support.

A central element in the American and British claims, in contrast with those states that favor the primacy of Security Council decision making, is that the American and British perspectives undermine the institutional competence of the United Nations, particularly the Security Council, by overriding the principle that the Security Council has primary jurisdiction over matters of collective security. To assert security values outside the principle of institutionally regulated collective action reverts to the almost completely decentralized authority manifested by the League of Nations, which opened the door to unilateralism and weakened the force of international peace keeping institutions. Unilateralism may be a quick-fix solution that earns immediate popular approval, but it is no substitute for sustained collaborative action in making lasting peace.

The United Nations is best suited for turning swords into ploughshares. In the age of globalization and interdependence, UN institutions of collective security are absolutely indispensable to world order. Despite this institutional competence, it does not necessarily follow that a state may not take unilateral preemptive action. New types of threats might require a more careful appraisal of the primacy of the Security Council’s institutional reach and the scope of certain unilateral actions under color of Article 51 or self-defense under customary international law. The central question is what institutional innovations within the Council as a whole, particularly with regard to the P-5, might be developed to respond effectively and collectively to new global security threats.

The strongest credible reason for unilateral armed intervention by the United States and the United Kingdom is to counter terrorism. Access to WMD by terrorists constitutes such an important security threat that reasons beyond the letter of international law must be canvassed to ultimately determine the lawfulness of the US/UK position. As earlier indicated, whether one uses a textual or contextual method of construing these provisions, the weight of interpretive logic does not support the construction given by either the Bush administration or the Attorney General of the United Kingdom. Such a construction must assure the perspective of a neutral third party. Because of the nature of the international constitutional system, the power to interpret and decide is vested in the Security Council. However, the Security Council cannot repudiate the construction given to these provisions by the United States and the United Kingdom; both nations have the power to prevent this from happening. This effectively leaves the question of the lawfulness of the attack based on a construction of these resolutions partly in the perspectives of the critical state actors themselves, a model of the principle of international law-making realism, which Georges Scelle called the *dédoublement fonctionnel* – the double law-making character of a sovereign state as both a claimant and a decider of the meaning, reach, and justification of an international law claim.

A reasonable claim of this character might strengthen the juridical basis of a claim to lawfulness if the position is objectively compelling and gains widespread acceptance. In the context of high stakes issues, states may be ill-advised to act in the international arena if the fundamental basis of their actions rests on a highly technical legal justification that lends itself to other permissible constructions that undermine it, and would, in any event, require more compelling justifications because the legal predicate, although plausible, is a weak one. When a state intends to go to war with an utterly “formal” legal basis to justify it, international public opinion and common
morality will likely require its position to be supplemented by stronger, justifiable principles prior to taking action.

It is perhaps precisely with this consideration in mind that the United States and the United Kingdom shifted their technical justifications for the invasion of Iraq away from sole reliance on previous Security Council resolutions. If Saddam Hussein were, in fact, secretly developing nuclear, biological, or chemical WMD, the possibility of a terrorist delivery system would pose a future threat to the United States and the United Kingdom. In the aftermath of the attacks of September 11, this was a strong and legitimate national security and self-defense concern. It not only comprised a powerful justification, but also increased the weight given to the technical construction of the relevant Security Council resolutions. It may be that the United States and the United Kingdom understood this when they made the issue of WMD a major part of the justification for the attack on Iraq. This, in turn, generated national and international concerns about the reliability and interpretations of intelligence regarding WMD.

Certainly, WMD coupled with the threat of an apocalyptic form of terrorism provided compelling justifications for the kind of action the states saw as permissible and lawful, but we must enter this analysis cautiously. Threats alone may not justify the specific strategic form of intervention undertaken. In short, even if Saddam Hussein’s alleged WMD posed a threat to the security of the United States and the United Kingdom, it is not certain that an armed attack was the most reasonable defense of American and British national security interests, or that such an attack could not have been effectively pursued in the Security Council. The American and British claims become particularly vulnerable in light of a more critical examination of the principle of self-defense under international law. It is precisely in this area where the Bush Doctrine is most challenging. The Bush Doctrine recognizes that the proliferation of WMD during the Cold War could be limited by policies that might rationally influence an adversary. The American adversary during the Cold War was committed to a balance of global power and to a rational, risk-averse policy. In this context, deterrence stabilized international security and permitted international cooperation in areas of arms control and nonproliferation. However, the days of the Cold War – when WMD were generally regarded as weapons of last resort – are over. Contemporary security theorists surmise that the enemies of the West now view WMD as an effective instrument of destruction. Within this context, the concept of deterrence as conventionally understood is weak if not obsolete. According to President Bush:

> [t]raditional 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. (Bush 2002a)

The new Bush doctrine makes a narrow but reasonable claim that Article 51 of the UN Charter – relating to self-defense – simply cannot be read literally. Article 51 provides a state with a right of self-defense in international law, “if an armed attack occurs.” The Bush Doctrine explicitly claims that a state may lawfully take action to defend itself if there is an imminent danger of attack; the Bush administration holds that anticipatory self-defense is conditioned by the factual imminence of an attack. As a technical matter of interpretation, if this broader construction of Article 51 is accepted, it must also have a technical justification to validate the form of such an interpretation.

Two principal justifications may, in theory, be presented to support the new Bush doctrine of preemption. First, one must assume that self-defense in international law holds its place of prominence in the UN Charter and in customary international law, because of the importance of the term “self.” This effectually means that even though institutions of collective security for collective action are currently
highly developed, from a historical perspective, a significant element of security management must ultimately be left to the principle of the "self" included in the concept of international self-defense. Notwithstanding the constitutional development of efforts to institutionalize collective security through the Security Council and regional security associations, it is still the case that an important competence over national security lies with the individual nation-state. If this assumption is correct, then the critical question is whether there are standards that might guide a rational invocation of the right to self-defense if the conditions in a given situation make preemptive action reasonable. This leads us to the second element of justification. If we accept the fact that the word "self" in "self-defense" simply recognizes important imperfections in the system of collective security, then the structure of a state's claim to self-defense comes close to the principle of the dédoublement fonctionnel. The state is a claimant, claiming the right to preemptive self-defense. Since the state may have acted on that claim, the state has an international obligation to justify it as an exercise of a national security competence that is reasonable within the framework of the major purposes and policies of the international constitutional system. This principle was well expressed by Professor H.A. Smith (1950), writing in another context:

The law of nations, which is neither enacted nor interpreted by any visible authority universally recognized, professes to be the application of reason to international conduct. From this it follows that any claim which is admittedly reasonable may fairly be presumed to be in accord with law, and the burden of proving that it is contrary to the law should lie on the State which opposes the claim.

What the doctrine seeks to do, however, in light of the September 11 attacks, is to suggest that states "must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries." Since terrorists and rogue states seek to use unconventional means to attack the security of their perceived adversaries, they will seek to inflict the highest amount of damage upon their victim states by operating covertly and potentially unleashing WMD on innocent civilian populations without warning.

In the war against terrorism, the Bush Doctrine unambiguously states that the United States reserves the option to use force in preemptive action to protect its national security. According to President Bush (2002a), "[t]he 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." The Bush Doctrine notes that "rogue states" might have the resources to develop WMD and may disseminate or deploy them because they "display no regard for international law... and callously violate international treaties to which they are a party." This is a far-reaching stretch for contemporary international law.

There are two separate issues that must be distinguished in the formulation of the doctrine and its relationship to international law. The first is simply the threat of terrorism absent the threat of WMD. The restraints international law impose on the Bush Doctrine regarding such a threat would be, at a minimum, whether preemptive action – which cannot meet an objective criterion of imminence because of the nature of the terrorist threat – can still meet an objective standard of reasonableness reconcilable with the fundamental right to self-defense under Article 51 of the Charter or evolving customary international law. Such action runs the risk of attempting to justify standardless interventions, unguided by principles of international law and the trade-off between the war against terror and unilateral action might be seen as an especially dangerous strategy of action. It is therefore imperative that international lawyers carefully articulate the standards that might justify a preemptive intervention; it is additionally essential that the procedures for reporting interventions to the Security Council be fully employed so that such standards of justification may be
clearly established within the framework of the Security Council’s mandate of primary responsibility over matters of international peace and security. Even if a terrorist organization such as Al-Qaeda poses a threat to the security of another state, that threat must be based on credible intelligence that can subsequently be made available to the Security Council subject to the reporting requirements of Article 51.

Situations involving possible access to, or deployment of, WMD by terrorist groups seem to change the legal calculus considerably. It is therefore vitally important that when the Bush administration acted on the rogue state principle in attacking Iraq, it based its strategic analysis and self-defense justifications on Iraq’s control of WMD, as well as on the possibility that Iraq might distribute those WMD to terrorist groups with the capacity to attack the United States, the United Kingdom, and other possible targets of opportunity. It is also possible that a threat posed by the combined existence of terrorism and WMD may require decision-making innovations on the part of the Security Council, if the principle of collective responsibility is to be preserved. Perhaps the Security Council could create an institutional mechanism of intelligence cooperation, at least among the five permanent members, with full participation by a representative of the Secretary-General. Other States Parties might also have roles in this process, as appropriate to their specific security concerns. Additionally, the Security Council might want to examine the development of enhanced intelligence capabilities, so that the United Nations may more effectively protect its own personnel.

Facts implicating WMD would significantly change the criteria of what might count as a reasonable invocation of preemptive self-defense, which could theoretically stretch the meaning of “imminence” to suggest possible extinction. One might look at the rules governing the regime of nuclear weapons and conclude, as Judge Weeramantry did, that they should be declared unlawful per se. Paradoxically, this argument might provide the strongest justification for the Bush Doctrine's policy of preemptive strikes against rogue states that have or might have the capacity to make, disseminate, and possibly use WMD. If, for example, nuclear weapons are per se unlawful, then the possible development and use of them by a state may well strengthen the characterization that such a state is both a rogue state and a candidate for preemptive action. Of course, this line of argument glosses over the fact that many states that have WMD are not rogue states and seemingly fall under the protection of rules that prohibit intervention into their internal affairs. The rogue state argument might then suggest that such a state must meet some criterion of “rogueness” that carries an international law justification, which must have existed without regard to its status as a state posing a WMD threat. It is possible that Iraq was a prime candidate for this kind of analysis in the sense that its “rogueness” was tied to its aggression against Kuwait and the Iraqi regime’s reluctant tolerance of or uncooperative attitude toward the UN inspection regime. We should note, however, that in the shifting justifications for the attack against Iraq, it was the concern for the threat of WMD that seemed to be the strongest. Invading forces did not find these weapons. It is possible that they were simply looking for the wrong things. With the almost decade-long inspections regime, it is hardly likely that the Hussein regime would have kept the recipe for producing WMD inside Iraq in some logical place accessible to inspectors or to invading forces. There can be no doubt that the Hussein regime clearly had an incentive and a desire to produce WMD. However, an incentive and a desire to produce WMD is not the same as actually having deployable WMD capabilities. However, Israel has WMD and this fact posed a regional threat to most Arab states, which is why Egypt’s position after 1973 was to move ahead with a peace treaty with Israel.

Although this is not officially acknowledged in the Camp David Accords, Egypt’s position on the prospect of peace in the Middle East was influenced by the fact that Israel had WMD. Indeed, Egypt has had a longstanding policy of promoting the idea that the Middle East should
be a nuclear-free zone. It was one of the prime movers in the promulgation of the Treaty of Pelindaba (Organization of African Unity 1996), which made Africa a nuclear-free zone. The Hussein regime took an alternative course, namely, to seek to match Israeli WMD developments with its own. The Iraq regime then became Israel's critical state security threat in the region.

Indeed, a symmetrical balance of WMD in the Middle East runs into the political problem that the checks and balances in a totalitarian state are not the same as those in a democratic state, and thus the symmetry and deterrence value of the threat of mutual destruction is largely illusory. Israel's bombing of Iraqi nuclear reactors was an example of a stretched version of anticipatory self-defense, based on an expanded reading of the concept of an imminent threat. Israel's idea of imminence was redefined by the nature of the threat, namely, Iraq's scientific progress in the direction of the possible production of WMD. Consequently, so long as the Hussein regime had the desire, resources, and technical capability to produce and possibly deploy WMD, that regime would pose a serious threat to the security of the Israeli state. Strategic planners would also have to consider the possibility that WMD could be deployed outside the boundaries of conventional state defensive or offensive posture; they could be passed on to terrorist groups, thus insulating itself both from responsibility and the possible use of such weapons. In short, a rogue-type regime could disseminate WMD to terrorist groups on an anonymous basis, and thus insulate itself both from responsibility and the prospect of retaliation. Introducing the terrorism element into such strategic and operational concerns tests the foundations of the self-defense principle as it is traditionally understood.

If a regime is not reluctant to use WMD, it will be perceived as a greater and more realistic threat than a state that has them, but has never used them. The use of chemical weapons in Hallabja, a Kurdish-populated city in Kurdistan, signaled to the world community the possibility that the Hussein regime might be willing to use chemical weapons in circumstances that cannot be justified by international law. Most human rights groups would have characterized the use of chemical weapons to exterminate the Kurdish population of Hallabja as a human rights atrocity and, at least, as an international crime under the Genocide Convention, since the manifest targeting of a specific group carried the Hussein regime's intent to destroy it in whole or in part.

International lawyers must work more carefully through the specific problem posed by the Bush administration concerning the conditions now linked to the major forms of armed conflict, which threaten individual and collective security. We would submit that a central principle implicit in the Bush doctrine is that when the reasons for a rule change, the rule must accordingly change. This principle works on the assumption that rules are responses to problems in society generated by certain conditions. When conditions change, it might be possible to salvage the general basis of the rule, which might continue to serve a purpose; it would thus be necessary for interpreters to decipher new meanings that might be ascribed to the rules, but they must be developed with far greater exactitude than the formulations that currently appear in the new Bush doctrine. The idea that terrorists are non-risk-averse, have access to significant resources, and could have access to WMD provides a small margin for error on the part of both states and the Security Council in seeking to maintain international peace and security. If a mistake is made, the consequences of the use of WMD would be catastrophic, and one suspects that the freedoms we now enjoy would be even more significantly diminished as a political matter. This means that we must ever more carefully scrutinize background facts and intelligence communiqués, as they become available, and cautiously monitor conflict situations in ways that have not yet been done to ensure that the balance between security and liberty is not destroyed. This balance is
crucial to the foundations of the rule of law as we currently understand it.

Against this background we come to precise issues implicit in the claims asserted by the new Bush Doctrine. Two important principles merit analysis. First, the doctrine observes the concept and expectation of what constitutes a rogue state; second, the doctrine acknowledges that regime change may be justified by international law when states meet the “rogueness” criterion. According to the Bush Doctrine, there are five characteristics that determine rogue state status. Rogue states are states that: 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 its stands.

The drafters of the rogue state definition might, of course, have had a specific regime in mind when drafting these criteria. However, it seems that these drafters stumbled upon one of the most important, but nonetheless difficult, questions of when a state is subject to international jurisdiction based on international concern. What, in short, is the scope of an international obligation under the UN Charter to limit the concept of sovereignty? The distinction made by the Charter is that certain matters are reserved to the domestic jurisdiction of a state. The implication is that sovereignty is divisible; some facets of sovereignty cannot trump the concept of international obligation and some preserve sovereign autonomy over matters essentially within the domestic jurisdiction of a state. The five criteria listed by the Bush Doctrine involve factors that are clearly within the purview of international jurisdiction because they are specifically, individually, and collectively matters of international concern. Generally, this outlook might be surprising since the Bush administration’s approach to matters of international obligation was littered with claims to US exceptionalism, or what others have called US unilateralism. If the Bush Doctrine sought to hold sovereign regimes in the international community to its emerging standard of adherence to international obligations, soon the United States would not be able to pick and choose which rogue states to coddle and which to destroy.

If one eliminates the “rogue state” language of the Bush Doctrine and simply examines criteria indicative of unacceptable international behavior under the UN Charter, the concept of a “rogue state” is not normatively exceptional. Indeed, it gravitates to a position long held by liberals and progressives in the international community that UN Charter values must infuse the authority foundations of the state. In short, the rogue state criteria are essentially the same criteria normatively unacceptable for admission to UN membership. Liberal international lawyers have long supported humanitarian intervention when threats to international peace and security – based on the same criteria indicated by President Bush – are threatened. The rogue state principle has other interesting ramifications. It perhaps highlights the lacuna in the international system which, traditionally, bases the recognition of a state on such practical criteria as control over territory, population, internal governance, and the capacity to manage foreign relations. Modern international law has sought to base the recognition of a state as a member of the United Nations on its ability and willingness to uphold the values of the UN Charter, in particular the values related to peace and security. The rogue state principle seems to dramatically move the concept of what comprises an acceptable sovereign state in the direction of the explicit standards, policies, and purposes behind the UN Charter. If the United States sought to define the concept of a rogue state in unilateral terms, the unilateral invocation of critical UN Charter standards is an endorsement rather than a depreciation of the Charter as an organizing principle of sovereignty and world order. We do not believe that
this is what the Bush Doctrine intended, but this may be an unintended consequence.

There is a further insight that can be drawn from the new Bush doctrine. We have already mentioned the fact that international law contains traditional criteria for the identification of a state as well as those additional normative criteria discernable from the UN Charter. Additionally, the recognition of the new states in the Balkans has imposed even more strenuous criteria on the recognition of sovereignty by demanding that these new states’ constitutions must be democratic, safeguard human rights, and secure the protection of minorities. Where, then, does the Bush Doctrine lead us? The rogue state concept implies that decision makers must now take a far more discriminating look at the nature of a state and the trimmings of sovereignty within which it is clothed. There are more discriminating criteria to distinguish states than simply size.

There is a third and final element in this aspect of the analysis. In 1998, Congress enacted legislation that encouraged the United States to work toward the replacement of the Hussein regime in Iraq. A group of neoconservative politicians led by such figures as Richard Perle and Paul Wolfowitz produced a study that suggested that the then-existing circumstances in Iraq compelled the United States to embark on a policy of regime change. This policy was submitted to the Clinton administration, although the Clinton administration did not act on it. Several of the same neoconservative intellectuals were also in the business of advising Benjamin Netanyahu concerning Israel’s security interests and the future. The document they produced implied a quite valid criticism of US government policy in the Middle East. If it was the US policy to preserve the status quo, then US policy would fail because the status quo was committed to armed conflict and, from the Arab side, dedicated to the possible extinction of Israel. Since most of these Arab states are undemocratic and unaccountable, creating peace with them would essentially be a tactical or strategic expedient to postpone conflicts indefinitely, not end them. Theorists then realized the potential of a regime change in Iraq, which could be the lever to completely shift the paradigm of Middle East conflicts. The strategic implications were essentially these: if Iraq’s Hussein regime could be overthrown and a democratic regime instituted with a strong American military and intelligence presence, this presence could influence regime change in Iran, where the Ayatollahs are known to be unpopular, in Syria, which runs on undemocratic Baa’hist lines, and could exert tremendous pressure on Saudi Arabia to adapt.

The assumption made by the neoconservatives was that the promotion of democracy and the empowerment of civil society would dramatically shift the paradigm of conflict in the Middle East. These assumptions were based on the notion that certain kinds of states are most reluctant to wage war; these kinds of states often have vested interests in making peace and developing their societies by progressive means. This builds on the oft-cited dictum that democracies tend not to make war on each other. This suggests a further principle, which implies a claim that the preferred form of sovereign independence is tied to democratic values, and that democratic values are themselves critical for the establishment of enduring peace. It is not altogether clear in the aftermath of the invasion and occupation of Iraq that this indeed is the scenario that is being played out. If this is an accurate estimation of the strategic objectives of US policy, then one must admit that it was a vastly ambitious and incredibly risky exercise. The critical question is: can war be justified simply to promote democracy?

The new Bush doctrine must not be read simplistically; its creators might have thought they were erecting a narrow construct to justify unilateral intervention. The Bush Doctrine also established an ostensible, yet elementary, framework with regard to international relations and practice, which over time may generate expectations about the permissible limits of what is and is not lawful. The Bush Doctrine, in fact, seemed to promote the ideas of aggressive international obligation, rethinking of
state responsibility, and virtually and implicitly asserted that democracy is a critical normative standard for maintaining peace and security in the world community. These values have not always been characteristic of US foreign relations. Statements of principle do not exhaust the analysis of the lawfulness of certain conduct under international law. The methods, techniques, strategies, and tactics to secure a state’s objectives must still be subject to the most rigorous scrutiny to determine if they meet at least a standard of reasonableness; if these doctrines do manifest reasonable restraint in their assertion of claims in the international system, they must additionally justify them.

Let us backtrack a bit. Israel basically has a monopoly on WMD in the Middle East. It developed nuclear capability because it apparently felt that, ultimately, nuclear deterrence was and is the only way to guarantee its continued existence. There is evidence that, during the 1973 war, the Israeli Cabinet considered using nuclear weapons to defend itself if it became necessary. Clearly, Egypt would have been one of the target states for a nuclear attack. It is therefore not surprising that the Egyptians seriously examined the nuclear threat; Egypt soon opted to become a nuclear-free state, committed to abolish nuclear weapons in both the Middle East and Africa. We suspect that this Egyptian policy was induced by the facts that Israel had nuclear weapons and a territorial rearrangement could not be achieved through the use of force. The Egyptians had an incentive at Camp David to make peace. The Israelis also had an incentive to make peace, particularly with an Arab state working so aggressively to rid the Middle East and Africa of nuclear weapons. Iraq, however, had a different point of view. Clearly, Israeli nuclear weapons constituted a threat to Iraq and from Iraq’s point of view, there needed to be a symmetrical rather than an asymmetrical balance of power in the Middle East. Thus, Iraq’s effort to develop WMD enhanced the security threat in the region, and partly explains why Israel attacked the Iraqi nuclear reactor near Baghdad on the morning of June 7, 1981.

Legal justifications do not exhaust a rational inquiry into whether the use of force is permissible. Broader contextual factors might serve to enhance or lighten the weight of proffered justifications. Indeed, strategic justifications may have an influence on what is and is not permissible or reasonable in the context of states’ international relations. Strategic justifications may undermine the claim that certain forms of conduct are lawful, while they might support other claims to lawfulness. The critical question, then, is what strategic calculations animated the Bush administration to press for an attack on Iraq in the face of Security Council opposition, which itself created a global crisis of confidence in either the prudence of US foreign policy or in the relevance of the United Nations as an institution for moderating conflicts and developing peaceful structures of global importance? The central argument articulated by the Bush administration was that Iraq was in breach of its obligation to disarm. If this were all, the justification for going to war – upholding the United Nations’ inspection regime – seems weak if the inspection regime itself had not completed its work and if the United Nations reposed faith in the fact that the regime could complete its work. This left the administration to offer a second justification, that Iraq was a rogue state with WMD and was therefore a threat to international peace and security. A preemptive attack with regime replacement to follow would be justified. As we have seen, the latter is a more serious claim that must be examined from a strategic point of view.

A single nuclear power in the Middle East – or a state with other WMD capabilities – constitutes a major security threat for all states and peoples in the region and two WMD powers immeasurably enhance the instability of the region. From the Israeli point of view, WMD in the hands of a contiguous dictator is a long-term and vital security threat. Under such circumstances, the Israeli authorities would have a vital interest in seeing preemptive action in Iraq and possibly even regime change. Likewise, the U.S. Congress also saw the threat posed by Iraq and enacted
legislation calling for the replacement of the Saddam Hussein regime.

The problem with the American development of the Rogue State Doctrine is that it would appear to be ideologically defined. Implicit in the Rogue State Doctrine is the idea that a state that is intricately involved in promoting global terrorism is abusing its sovereignty. However, a better defense of the Doctrine would be to insist that the abuse of sovereignty represents a violation of the obligations a sovereign state undertakes under the UN Charter and international law. Since this idea is undeveloped from this perspective an overview of the importance and challenges of the abuse of sovereign concept under international law is provided.

Scholars recognize a distinctive “abuse of sovereignty” concept. This should not be unusual since the international system provides both rights and obligations for sovereigns. If they abuse their rights and disparage their obligations, they could be accused of being delinquent in international law, and that delinquency could be described—as an abuse of sovereignty. For example, the Bush administration’s rogue state idea seems to be an implicit recognition of the abuse of sovereignty concept. Changes in international law and the scope of international obligation suggest that more discriminating typologies of the sovereign state be developed to allow us to critically account for the normative foundations of statehood and sovereignty. There are (at least) 13 typologies of different states in the international system involved with the abuse of sovereignty idea. They are:

- Failed states;
- Anarchic states;
- Genocidal states;
- Homicidal states;
- Rogue states;
- Drug-influenced states;
- Organized-crime-influenced states;
- Kleptocratic states;
- Terrorist states;
- Authoritarian states;
- Garrison or national security states;
- Totalitarian states; and
- Democratic rule of law states.

The abuse of sovereignty idea remains somewhat controversial in international law. And the rogue state idea promoted in the Bush Doctrine seems also to have been reduced in importance. On the other hand international society has witnessed a revolt against the authoritarian state described as the “Arab Spring.” Its most important events have been replacement of authoritarian rulers in Tunisia and Egypt, and the fall and subsequent death of the authoritarian leader of Libya, Colonel Gaddafi. Moreover, there has been continuing public demonstrations for democratization in Syria in the face of savage state repression. Even states such as Iran and Turkey have warned the Ba’athist Regime in Syria that it cannot continue its authoritarian ways. In a sense, the War on Terror appears to have unleashed at least indirectly a stronger commitment to popular democracy.

The international community has taken cognizance of the problem of terrorism since 1934. The League of Nations adopted a Convention on the prevention and punishment of terrorism in 1937, but it never came into force. Terrorism has been on the agenda of the United Nations for more than 50 years. The principal UN response has been the adoption of a multitude of universally binding legal tools to suppress and punish terrorism. These legal tools are important because they clarify and establish a normative standard that validates the criminalization and delegitimization of forms of terrorism which fall within the reach of UN-inspired treaties. In addition, they provide a response to these forms of terrorism, reinforcing global disapproval with the support of a global criminal law sanction. The development of the treaty-based regime against terrorism has in part been necessitated by the difficulty of developing a universal and comprehensive definition of terrorism as a universal crime, analogous to the crime of piracy iure gentium. This latter issue continues to be actively pursued in the UN context.
This has meant that the approach, globally, to the prohibition of terrorism has in some degree been sectoralized, and its message may be similarly fractionalized. Moreover, the multitude of sectoral treaties adds a further degree of complexity to an already complex phenomenon. The assumption behind theses treaties is that the international community can imagine the kinds of acts that terrorists might perform and then specifically proscribe those particular acts. It is an approach that implicitly either creates a legal vacuum within which the terrorist can function, or, worse, by regulating some terror acts apparently and implicitly validates others. This remains a significant problem.

The United Nations has adopted 13 major anti-terrorism treaties, in addition to amendments to them. In 1963 it adopted the Convention on offenses and certain other acts committed on board aircraft; in 1970, the unlawful seizure of aircraft Convention; in 1971, the Civil Aviation Convention to suppress unlawful acts against the safety of civil aviation; in 1973, the Convention to guard internationally protected persons against terrorism; in 1979, the Convention against terrorists taking hostages; in 1980, the Convention on the physical protection of nuclear materials. In 1988 the United Nations adopted a Protocol relating to the Suppression of Unlawful Acts of Violence in International Airports, a Convention to suppress unlawful acts against the safety of civil aviation; in 1973, the Convention to guard internationally protected persons against terrorism; in 1979, the Convention against terrorists taking hostages; in 1980, the Convention on the physical protection of nuclear materials. In 1991 it adopted a Convention that required a marking of plastic explosive for the purpose of detection, and in 1997 an International Convention for the suppression of terrorist bombings. This Convention creates a regime of universal jurisdiction. In 1999 the United Nations adopted an international Convention to suppress the financing of terrorism, and in 2002 a Convention to suppress acts of nuclear terrorism. Currently the UN is actively negotiating a draft Comprehensive Convention on International Terrorism. The War on Terror continues to generate important issues about world order and the role of international obligation and international law. Central to these issues is the possibility of a reappraisal of the nature of the state and the scope of its authority as rooted in its people.

SEE ALSO: Geneva Conventions; Human rights; Piracy; September 11; Sovereignty; Terrorism; Terrorist cells; United Nations; War on Terror.

REFERENCES

FURTHER READING


