

## **Pre-emption and the legitimacy of US Hegemony**

In the 5 or more years since the doctrine of pre-emption was first proclaimed in the US Bush Administration's first *National Security Strategy* it continues to symbolise for many states the dangers to international society posed by a hegemonic state. The doctrine of pre-emption is but one facet of a US foreign policy that has been informed by a deep sense of American exceptionalism, a heavy reliance on military strength to achieve its objectives, and a demonstrated impatience and lack of confidence in multilateral institutions. The use of force by the US in Iraq in 2003, despite the obvious disapproval of a majority of the international community, demonstrates all of these characteristics and caused many states and commentators to fear that the US had "for the moment, contracted out of international society" and was in fact a danger to the continued existence of a pluralistic international society itself.<sup>1</sup>

The confidence of the United States in its ability to 'contract out' of international society has been dented by its post war experience. The failure to find evidence of stockpiles of WMD in Iraq or any significant link between the Hussein regime and international terrorist groups has undercut the core arguments put forward to support a unilateral right of pre-emptive self-defence, just as the huge costs of restoring security and rebuilding Iraq has made evident the limitations of US military power. International society has been able to extract some real costs

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<sup>1</sup> Tim Dunne, "Society and Hierarchy in International Relations", *International Relations*, 2003, vol. 17(3): 303-320 at p. 316.

from the United States of acting without concern for international legitimacy in pursuing its goals and means. Whilst the United States continues to view pre-emption as an essential tool in the fight against WMD proliferation and international terrorism, the failure of Iraq presents an opportunity for international society to reassert itself in the battle over the legitimacy of pre-emptive military action. Indeed, there are early signs in the security manifestos of a number of states as well as inter-governmental organisations, that some aspects of pre-emptive action in this context may be acceptable in a much more constrained form.

Thus, in the context of the continuing battle of ideas over the legitimacy of pre-emption, this paper will put forward the argument that there is a clear interest for all states in the development of agreed rules to circumscribe the pre-emptive use of force in international relations. From the view of the United States, the Iraq War has demonstrated the price paid for ignoring international legitimacy where burden sharing is concerned, are considerable. From the view of international society, there are also real incentives to encouraging the hegemon to 'contract' back in to international society. Great powers working within the system have the potential to underwrite the security and stability of the system as a whole, as enforcers of the rules, even if there is a price to paid in terms of special privileges. That is, where the doctrine of pre-emption is concerned, there are real interests on both sides in establishing a new consensus over the use of force in a post September 11 world.

From a broader perspective, this paper seeks to place the debate about pre-emption within the context of the larger debate about the nature and sources of hegemonic power. It will argue that that failure of the United States to gain support for military action against Iraq in 2003 stemmed from a fundamental misapprehension about the limits of material power, and the importance of legitimacy as a non-material source of hegemonic power. The debate over the legitimacy of pre-emptive self-defence is as much a contest of ideas about the use of force in international affairs, as it is about an assessment of the legitimacy of the United States as a leader of international society. Importantly, the Administration failed to distinguish between hegemony as a material fact and hegemony as a leadership role in international society. Given that the US continues to believe that the threat posed by rogue states and international terrorism may require the pre-emptive use of military force, I will argue that US policy needs to take into consideration the importance of legitimacy to the success of the pre-emptive use of force against such threats.

To make this argument, the paper will be divided into three parts. The first section will discuss the rationale behind the doctrine of pre-emptive self-defence and how it differs from existing international law. In the second section I will discuss why the doctrine was rejected in the Iraq crisis of 2002-2003, and what lessons can be drawn from it particularly in relation to the importance of legitimacy as both a constraint and enabler of hegemonic power. The third section will briefly discuss the emerging consensus on the pre-emptive action

where WMD proliferation and international terrorism is concerned, and how the lessons of Iraq can be applied to elucidate agreed rules on pre-emption in this context. I will argue that if there is an emerging consensus that the risk of WMD proliferation to rogue states and international terrorism is grave and of importance to the community at large, then there are good grounds for a compromise position on pre-emption to be agreed, one that would balance between the interests of individual states in defending their security, against the interests of all in system stability.

### ***New Tools for New Threats***

The introduction of a new doctrine of self-defence by the Bush Administration came in the context of a profound shift in threat perceptions after the September 11 terrorist attacks on New York and Washington. The attacks demonstrated to the Administration that despite the US's overwhelming military power, as an open society it remained vulnerable to terrorist attacks by groups that had proven to be both determined and capable.<sup>2</sup> By November 2001 the potential threat posed by these groups had become magnified with intelligence gathered from Afghanistan revealing connections between Pakistani nuclear scientists and al-Qaeda members together with designs for the making of a crude radiological weapon or

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<sup>2</sup> The Whitehouse, Office of the Press Secretary, *The National Security Strategy of the United States of America*, September 2002, preamble (henceforth referred to as the NSS); David Rieff, "Hope is not enough," *Prospect*, October 2003, vol. 91:26-32 at p.32; Nicholas J. Wheeler, "The Bush Doctrine," *Asian Perspective*, vol. 27(4), 2003: 183-216 at p.185.

'dirty bomb'.<sup>3</sup> Whilst there was no direct evidence linking Iraq to the September 11 terrorist attacks, the release of the Bush Administration's first *National Security Strategy*<sup>4</sup> ("NSS") in September 2002 made clear that it believed that the possibility of an alliance between "rogue states" and transnational terrorist groups was real and immediate and posed the core threat to US national security. An alliance between two groups sharing a deep enmity of the United States effectively multiplied the threat to US national security posed by each of them individually.<sup>5</sup> The Administration's 2006 *National Security Strategy* has not diverged from this threat assessment.<sup>6</sup>

The case for a new legal doctrine of pre-emptive self-defence in the NSS is predicated on the view that new threats require new thinking and new strategic responses. In particular it was argued that the Cold War strategy of deterrence would not work against either rogue states or international terrorists because both lacked a fear of overwhelming retaliation that was the essence of mutually assured destruction. Rogue states could not be deterred from seeking to acquire WMD because these weapons provided the key to a number of strategic objectives: to achieve regional hegemony and to protect against outside interference in efforts to achieve this goal. Further rogue states could not be

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<sup>3</sup> Bob Woodward, Robert G. Kaiser and David B. Ottaway, "U.S. Fears Bin Laden Made Nuclear Strides; Concern Over 'Dirty Bomb' Affects Security", *The Washington Post*, 4 December 2001; Kamran Khan and Molly Moore, "2 Nuclear Experts Briefed Bin Laden, Pakistanis say", *Washington Post Foreign Service*, 12 December 2001; Michael Getler, "The Dirty Bomb" and the Alert, *The Washington Post*, 9 December 2001.

<sup>4</sup> Op cit, NSS, 2002.

<sup>5</sup> Idem.

<sup>6</sup> The White House, *The National Security Strategy of the United States of America*, March 2006 at p. 20.

deterred from using WMD because of the irrational, ruthless and single-minded nature of their leaders who would be prepared to sacrifice the lives of large numbers of their populations to achieve these objectives.

The policy of deterrence was also argued to be ineffective in preventing international terrorist groups from seeking to acquire and using weapons of mass destruction. These groups actively sought to produce spectacular human casualties, did not value their own self-preservation and as non-state actors had no home base that could be targeted for retaliation.<sup>7</sup> Therefore, it was argued, a new pro-active rather than reactive strategy was needed to prevent rogue states and their terrorist clients from obtaining WMD. The centre-piece of this new strategy was the Administration's declaration of its intention to "act alone if necessary, to exercise our right of self-defence by acting pre-emptively".<sup>8</sup>

The right of pre-emptive self defence, as declared by the NSS, asserts a claim to use force in much wider circumstances than envisaged under existing international law. The use of force by individual states is highly circumscribed under the terms of the UN Charter with article 2(4) prescribing the 'threat or use of force' with two exceptions: the use of force in self-defence under article 51 and the collective use of force authorised by the Security Council under Chapter VII. Article 51 recognises the "inherent" right of an individual state to use force in its

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<sup>7</sup> See Op cit, NSS, p. 15.

<sup>8</sup> Op cit, NSS, p. 6

own defence after it has suffered an “armed attack” reflecting a classical conception of warfare between states.

Many international lawyers take a literal and restrictive reading of the provisions of the UN Charter and therefore insist that a state must suffer an armed attack before being allowed to use force in self-defence.<sup>9</sup> Restrictionists share the view that the UN Charter provides a definitive statement of international law and was designed precisely to supersede customary law doctrines that allowed states to use force routinely for the achievement of foreign policy goals. For these writers, any use of force in anticipation of an armed attack, is prohibited under international law.

Far before the invention of the doctrine of pre-emptive self-defence this restrictive view came under criticism on the grounds that it failed to take account of changes in the practice and technology associated with modern warfare, particularly the advent of nuclear weapons and improved delivery systems. It was argued that to expect a state to wait until it had suffered the consequences of a catastrophic attack, whether by conventional or nuclear weaponry, was an irrational and unrealistic expectation<sup>10</sup> that would require states to “assume the

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<sup>9</sup> See Ian Brownlie, *International Law and the Use of Force by States*, (Oxford: Clarendon Press 1963); Louis Henkin, “Force, Intervention and Neutrality in Contemporary International Law”, 1963 *Proc. ASIL* 147, 166; Phillip Jessup, *Modern Law of Nations* (New York: The Macmillan company 1948) p. 164-7.

<sup>10</sup> Antonio Cassese, *International Law in a Divided World*, (Oxford: Oxford University Press 1989) at p. 231; Rosalyn Higgins, *Problems and Process: International Law and How We Use it*, (Clarendon, UK: Clarendon Press 1994) p. 242.

posture of sitting ducks” when faced with “complete obliteration.”<sup>11</sup> Further, the many advancements in technology used for intelligence gathering and reconnaissance could be used to guard against abusive practices.<sup>12</sup>

Supporters of this pragmatic approach look for justification in the terms of article 51, reading the term ‘inherent’ as an explicit recognition of the continued operation of customary international law on the use of force in self-defence, namely the continued operation of the *Caroline* principles of necessity and proportionality. On this view, the use of force in self-defence would be acceptable under international law where the necessity of its exercise was “instant, overwhelming, and leaving no choice of means, and no moment for deliberation”<sup>13</sup> and where the specific act of self-defence was limited in terms of its “intensity and magnitude to what is reasonably necessary” to achieve the object of repelling the threat of attack.<sup>14</sup> Thus, the use of force in self-defence in anticipation of an imminent attack was acceptable where other non-violent modes of response were unavailable or ineffective.

Whilst the arguments made by eminent jurists are certainly relevant to any discussion of the legality of anticipatory self-defence, post 1945 state practice

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<sup>11</sup> Myres S. McDougall, ‘The Soviet-Cuban Quarantine and Self-Defence’, July 1963, *AJIL* vol.57(3):597-604 at p.600-601.

<sup>12</sup> See Antonio Cassese, *International Law*, (Oxford: Oxford University Press 2005) p. 358.

<sup>13</sup> R. Y. Jennings, “The Caroline and McLeod cases,” 1938, *American Journal of International Law*, January 1938, vol. 32(1): 82-89 at p.82.

<sup>14</sup> Op cit, Myres S. McDougall, p. 598; See Donald R. Rothwell, “Anticipatory Self-Defence in the Age of International Terrorism”, *Queensland Law Journal*, 2005, vol. 24: 337-353 at p. 339; Abraham D. Sofaer, “On the Necessity of Pre-emption”, *EJIL*, 2003, vol. 14(2): 209-226 at p. 219 for a detailed examination of the reasoning used in *The Caroline* incident.

and *opinio juris* does not show strong support for the use of force in self-defence in anticipation of an imminent attack. In terms of *opinio juris*, prior to September 11 only Israel, Iraq, Japan, the US and Canada had overtly advocated the acceptance of a right to anticipatory self-defence.<sup>15</sup> More commonly, states have instead represented their use of force as an act of self-defence in response to an armed attack, however implausible might be the circumstances.<sup>16</sup>

In terms of state practice, the use of force by Israel to destroy the Iraqi *Osiraq* nuclear reactor in 1981 on the basis of an explicit claim to act in anticipatory self-defence provides a clear example of the rejection of the doctrine by a majority of states.<sup>17</sup> Here the Israeli government destroyed the Iraqi nuclear reactor prior to it becoming operational or 'hot' based on the judgment that the reactor was not built for peaceful energy producing purposes, but to produce nuclear weapons.<sup>18</sup> From Israel's perspective, given the numerous statements made by members of the Hussein regime of their intent to "support the liquidation of the racist Zionist entity", any nuclear weapons produced by Iraq would inevitably be used against it.<sup>19</sup> From this perspective, there was a necessity of self-defence, instant and

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<sup>15</sup> *Op cit*, Antonio Cassese, *International Law in a Divided World*, p. 231.

<sup>16</sup> Christine Gray, *International Law and the Use of Force* (Oxford: Oxford University Press 2000) at p. 112.

<sup>17</sup> Christine Gray notes that Iraq's initial justification for invading Iran in the First Gulf War was preventive self-defence. However, this justification did not last, with the Iraqi's switching to the use of force in response to an armed attack. See *ibid* Christine Gray p. 113.

<sup>18</sup> "Letter dated 8 June 1981 from the Permanent Representative of Israel to the United Nations addressed to the President of the Security Council", 8 June 1981, UN Document S/14510. See also the statement of Mr Blum, Representative of Israel, "Security Council Official Records 2288<sup>th</sup> Meeting: 19 June 1981", UN Document S/PV.2288 paragraph 44-75.

<sup>19</sup> See statement of Mr Blum, Representative of Israel, "Security Council Official Records 2280<sup>th</sup> meeting: 12 June 1981" at paragraph 64-69.

overwhelming, given that the reactor could only be destroyed prior to it becoming operational.<sup>20</sup>

These arguments for the use of anticipatory self-defence were rejected unanimously by the Security Council and were instead viewed as an act of aggression.<sup>21</sup> Only a handful of states were prepared to accept that force could be used in self-defence where there was clear evidence of an imminent attack which could not be repelled by other means.<sup>22</sup> Even then, none of these states believed that Israel had satisfied the test of imminence, placing reliance on the opinion of the IAEA that the reactor did not have the capacity to produce nuclear weapons.<sup>23</sup> Of particular concern was possibility of giving individual states greater discretion over what threats justified the use of force, opening the possibility of abuse particularly by more powerful states.<sup>24</sup>

It is against this background of strong opposition to a general right of anticipatory self-defence that the invocation by the Bush Administration of a right of pre-emptive self-defence must be understood. The doctrine of pre-emption seeks to broaden the scope of international law beyond the already shaky boundaries set

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<sup>20</sup> Ibid. Blum stated that once operational, "...no Government of Israel could contemplate bombing the reactor. Such an attack would have brought about a massive, radioactive, lethal fallout over the city of Baghdad, and tens of thousands of innocent residents would have been hurt."

<sup>21</sup> UN Security Council Resolution 487 (1981).

<sup>22</sup> See op cit, Antonio Cassese, p. 232-233.

<sup>23</sup> Between 15 and 19 June 1981, 38 states gave their views on the use of force by Israel (including members of the Security Council). Of these, only 6 states explicitly supported the contention that the *Caroline* principles of necessity and proportionality continued to bind states, but that Israel had not used force in response to an imminent, overwhelming threat, leaving no choice of alternative means (United Kingdom, United States, Ireland, Sierra Leone, Uganda and Niger). See UN Doc. S/PV.2282, S/PV. 2283, S/P.V. 2284, S/P.V. 2285, S/P.V. 2286, S/P.V. 2288.

<sup>24</sup> Quoted in Antonio Cassese, *International Law in a Divided World*, p. 232.

by anticipatory self-defence. The NSS characterises anticipatory self-defence as being uncontroversial in international law, a fact which we know to be untrue, and further argues that “[we] must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries”.<sup>25</sup> The doctrine puts forward the view that where threats are sufficiently serious, pre-emptive action is justifiable “even if uncertainty remains as to the time and place of the enemy’s attack”.<sup>26</sup>

Thus, the case for the acceptability of the use of force beyond the test of imminence is three pronged. Firstly it is argued that the threat of attack is a serious one, using the traditional risk assessment criteria of probability and consequences. The likelihood of an attack by rogue states with nuclear weapons is argued to be almost certain given the goal of challenging US hegemony and asserting regional dominance. Similarly, an attack by international terrorists using nuclear weapons is also almost certain, if they are able to acquire such weapons, because of their desire to challenge US hegemony through spectacular attacks on US citizens and civilian infrastructure. Secondly, if it is accepted that an attack is highly likely to occur and would unarguably have grave consequences, then pre-emptive action on a broader scale than imminence implies, is justified.

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<sup>25</sup> *The National Security Strategy 2002*, p. 15.

<sup>26</sup> *Ibid.*

Finally, the US argues that the standard of imminence is modelled on an outdated view of warfare between states. Traditionally, evidence of an impending attack would be clearly visible, through the mobilisation of armies, navies, and air forces preparing to attack”.<sup>27</sup> In contrast, America’s new enemies, well aware of the clear imbalance of military power, would logically take advantage of asymmetrical warfare tactics, namely terrorist attacks, using “weapons that can be easily concealed, delivered covertly, and used without warning”.<sup>28</sup> In these circumstances, it is argued that the victim of such an attack would not easily be able to make a determination about whether an attack is imminent. Thus, where the means of attack are covert and concealed and consequences of inaction are so great the US argues that it has no choice but to act where an attack is not necessarily imminent, but highly likely to occur in the near future. The stretching of the bounds of self-defence to this extent was for a majority of states a step too far as the Iraq War was to demonstrate.

### ***The Iraq War and Pre-emption***

The acceptability of the doctrine of pre-emption to the international community was systematically tested in the lead-up to the Iraq war. It is not my intention here to provide a comprehensive history of events leading up to the war.<sup>29</sup>

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<sup>27</sup> Op cit, NSS, p. 15.

<sup>28</sup> Ibid.

<sup>29</sup> See for example Bob Woodward, *Plan of Attack* (New York: Simon and Schuster 2004); John Keegan, *The Iraq War* (New York: Alfred A. Knopf 2004); Robert J. Pauly Jr. And Tom Lansford, *Strategic Preemption: US Foreign Policy and the Second Iraq War* (Aldershot, UK: Ashgate 2005).

Rather my interest here is to delineate the extent to which the doctrine of pre-emption, as it was applied to Iraq, was accepted by the international community and why. There were two core arguments put to the General Assembly in September 2002 by the US President to justify pre-emptive action, impliedly of a military kind, against Iraq. Firstly, it was argued that in the absence of UN weapons inspectors in Iraq between 1998 and 2002 it could be reasonably predicted, on the basis of Iraq's past consistent obstruction of UN efforts to disarm it, that the Hussein regime had taken active steps to reactivate its WMD programs. Secondly, in the post September 11 environment, there was a real and grave risk that should Iraq have reconstituted its WMD programs, that it would supply these weapons to the other determined enemy of the United States, Al-Qaeda, which would then be used to commit catastrophic attacks against civilians.<sup>30</sup> In these circumstances Bush argued that it was vital for the international community take urgent pre-emptive action be taken to ensure that neither possibility would eventuate, and that if no action were forthcoming that the United States reserved the right to use force in pre-emptive self-defence.<sup>31</sup>

The response of the international community to this argument demonstrated a rejection of the case for collective pre-emptive military action in this case, as well as the ultimate rejection of a unilateral right to use force against Iraq under the doctrine of pre-emptive self-defence. In agreeing to the terms of resolution 1441

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<sup>30</sup> See "The President's remarks at the United Nations General Assembly – 12 September 2002", Office of the Press Secretary, <http://www.whitehouse.gov/news/releases/2002/09/print/20020912-1.html>.

<sup>31</sup> Ibid.

(2002), the Security Council did accept a core concern of the United States as warranting collective pre-emptive action but not of the military kind. Here the unanimous vote on a resolution demanding that Iraq comply with a new intrusive weapons inspections regime backed up by the threat of 'serious consequences' for non-compliance, demonstrated an acceptance by the Council that the very possibility of Iraqi re-armament was a threat sufficient to provoke pre-emptive action. However, the failure to endorse the use of 'all necessary means' in resolution 1441 unmistakably established the reluctance of core members of the Council to endorse military action where the threat was still unproven.

This reluctance to authorise military action on the basis of an as yet future unproven threat was to characterise the diplomatic negotiations that ensued in the early part of 2003. Whilst it was accepted that the first inspector's reports evidenced a lack of adequate compliance by Iraq with its disarmament obligations under resolution 1441, a majority of states sought to give the inspections process more time with which to verify, with more certainty, whether Iraq had in fact re-constituted its weapons programs. The largely circumstantial evidence presented to the Security Council on 5 February by US Secretary of State Colin Powell failed to convince the key states of France, Russia and China that Iraq was in fact deceiving the inspectors about its WMD capacity and had established connections with al-Qaeda which would justify the abandonment of the inspections process.<sup>32</sup> In essence, a majority of the Council was not

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<sup>32</sup> Walter Pincus, "Alleged Al Qaeda Ties Questioned", *The Washington Post*, 7 February 2003; US Department of State, Office of the Spokesman, "Remarks: Secretary of State Colin L. Powell

prepared to authorise the use of force on the basis of an unproven fact – that Iraq had in fact taken steps to reconstitute its weapons programs. It was on this basis that the case for the collective use of force to pre-empt such a threat from emerging was rejected, a view confirmed by the resounding disapproval of the use of force by the US coalition of the willing in March 2003.

### *Legitimacy and the rejection of Pre-emption*

Having established that the case for collective and unilateral pre-emptive military action against Iraq was rejected by a majority of the international community, the question then becomes, why was it rejected? In explaining the rejection of the doctrine, two distinctions can be made to categorise the objections made to it, both involving concerns of international legitimacy. By the term legitimacy I mean “a generalised perception or assumption that the actions of an entity are desirable, proper, or appropriate, within some socially constructed system of norms, values, beliefs and definitions”<sup>33</sup>, with the system of norms in question in this case referring to being the accepted norms of international society. In the first category I place objections based on a normative belief by a majority of states that the doctrine was illegitimate as informed by accepted norms on the use of force in international society at this time. In the second category I include

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to the United Nations Security Council, New York”, 5 February 2003 at [http://www.un.int/usa/03print\\_clp0205.htm](http://www.un.int/usa/03print_clp0205.htm).

<sup>33</sup> March Suchman, “Managing Legitimacy: Strategic and Institutional Approaches”, *Academy of Management Review*, 1995, vol.20(3): 571-610 at p. 574 quoted in Ian Hurd, “Legitimacy and Authority in International Politics”, *International Organization*, Spring 1999, vol.53(2): 379-408 at p. 387.

objections to the doctrine based on a broader rejection of the legitimacy of the proponent of the doctrine – the United States – and its assertion of a role as leader of international society in this matter.

An analysis of the reasons given by states in Security Council and outside it for the rejection of the use of military force against Iraq shows that states were highly influenced by their belief in the legitimacy of core norms on the use of force and appropriate behaviour for members of the Security Council.<sup>34</sup> In keeping with their duties as members of the Security Council, seven states expressed the view that it was incumbent upon them to ensure that the decisions of the Council would be enforced, to avert a serious undermining of the credibility of the UN and its ability to deter transgressions in the future.<sup>35</sup> Importantly, in justifying their support for disarmament through an enhanced inspection regime (and a rejection of the authorisation of force) eleven states referred to two normative beliefs: a commitment to the peaceful settlement of disputes and the use of force as a last resort.

In the debate which ensued about the use of force after the release of the unfavourable first Inspector's reports these normative beliefs continued to be highly influential. Whilst the US, UK and Spain pushed for Iraq to face the

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<sup>34</sup> Whilst the public statements of state decision-makers cannot alone provide a complete explanation of events, they do tell us much about the way in which the debate on Iraq was framed and consequently circumscribed.

<sup>35</sup> See the statements of the representatives from the US, UK Mexico, Ireland, Russia, Colombia and Cameroon, "4644<sup>th</sup> Meeting of the Security Council", 7 November, UN Doc. S/PV.4644; some also referred approvingly to calls by Kofi Annan for the Security Council to "face its responsibilities". See Kofi Annan, Secretary General of the United Nations, Address to the UN General Assembly, 12 September 2002, *UN Press Release*, SG/SM/8378-GA/10045.

“serious consequences” contemplated under resolution 1441<sup>36</sup> a strong majority of eleven states<sup>37</sup> in the Council supported the alternative plan put forward by France, Russia and Germany (endorsed by China) which called for the institution of a strengthened inspections process, on the basis that all peaceful means of dispute settlement had not been exhausted.<sup>38</sup> Similarly, in terms of the international community at large, a strong majority of states supported the continuation of the inspections regime guided by their belief in the peaceful settlement of disputes, including members of the Non-Aligned Movement, the Organisation of African States, and the Arab League.<sup>39</sup> Of the 53 states who gave their individual views in an open meeting of the Security Council on 11 March, 69% agreed that the inspectors needed to be given more time with 67% justifying their stance on the belief that all peaceful means had not yet been exhausted.<sup>40</sup>

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<sup>36</sup> See United States, United Kingdom and Spain, “Draft resolution: Released by the US Mission to the United Nations”, 24 February 2003, US Department of State website, <http://www.state.gov/p/10/rls/othr/197937.htm>; “Spain, United Kingdom of Great Britain and Northern Ireland and the United States of America: draft resolution”, 7 March 2003, UN Doc. S/2003/215, OP3.

<sup>37</sup> See the statements of the representatives for Angola, Cameroon, Chile, China, France, Germany, Guinea, Mexico, Pakistan, Russia, and Syria, “4714<sup>th</sup> Meeting of the Security Council, 7 March 2003, UN Doc. S/PV.4714.

<sup>38</sup> See “Annex to the letter dated 24 February 2003 from the Permanent Representatives of France, Germany and the Russian Federation to the United Nations addressed to the President of the Security Council: Memorandum,” UN Doc. S/2003/214, 24 February 2003; Annex II to the letter dated 28 February 2003 from the Permanent Representatives of China and the Russian Federation to the United Nations addressed to the Secretary General,” UN Document S/2003/238, 28 February 2003.

<sup>39</sup> Ambassador Dumisani Kumalo of South Africa on behalf of the Non-Aligned Movement, “Statement to the Security Council on the situation between Iraq and Kuwait”, 4709<sup>th</sup> Meeting of the Security Council, 18 February 2003, UN Doc. S/PV 4709; See also the “Statement on Iraq” issued on the completion of the XII conference of Heads of State or Government of the Non Aligned Movement, Kuala Lumpur on 20-25<sup>th</sup> February 2003 [http://www.berama.com/events,newnam2003/readspeech.shtml?declare/dc2202\\_iraq](http://www.berama.com/events,newnam2003/readspeech.shtml?declare/dc2202_iraq).

<sup>40</sup> See 4747<sup>th</sup> Meeting of the Security Council, 11 March 2003, UN Doc. S/PV 4717; Analysis of the statements made to the Council is drawn from the PhD thesis of Lavina Lee, *Legitimacy and Hegemony: An examination of the nature of the relationship between international legitimacy and*

The insistence by the majority of states that the inspections regime could be relied upon to verify and enforce Iraqi disarmament demonstrated the deep reluctance of states to weaken the normative prohibitions on the use of force. From the point of view of the US, UK and other members of the 'coalition of the willing' Iraqi re-armament could be deduced by inferences drawn from Iraq's past aggression, resistance to UN disarmament efforts, and lack of complete and active cooperation with UNMOVIC and IAEA inspectors. For the rest of the Council, the use of force on the basis of an inference, rather than factual proof that Iraq had re-armed showed a real opposition to the weakening of the prohibition on the use of force that would be required if pre-emptive military action were to become acceptable. Such a right would allow individual states wide discretion to use force in self-defence on the basis of an unproven and still potentially future threat, which in the words of the French President, Jacques Chirac, would be 'extraordinarily dangerous' and lead to 'tragic consequences'.<sup>41</sup>

Turning to the second category of objections, it can also be argued that the rejection of the doctrine of pre-emptive self-defence was also tied up in a broader rejection of the United States in its assertion of a leadership role in international society in this matter. There were a number of aspects of the US approach to the issue of Iraqi disarmament which undermined its standing as a leader of international society. Firstly, an assertion of the right to act unilaterally against

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*followership of the United States in the Gulf Crisis of 1990-1991 and the Iraq Crisis of 2002-2003*, University of Sydney 2007.

<sup>41</sup> Interview of President Jacques Chirac, *New York Times*, 8 September 2002.

Iraq under the doctrine of pre-emptive self-defence, undermined its credibility in claiming to act to further the interest of the international community, rather than its own parochial interests in achieving regime change in Iraq. States were left to question what interests the US had in involving the UN and the international community in disarming Iraq if the Administration was already confident in the legitimacy of its cause, the legitimacy of its method, and the legitimacy of its end goal. The perception that the US was merely using the UN instrumentally, as a means of legitimising an already decided goal and course of action, was far from dispelled by the rhetoric and actions of members of the Administration throughout the crisis.

The instrumental use of the UN process could be inferred from the scepticism displayed by members of the Administration towards UN involvement in the first place, as well as toward the inspections regime. Others have highlighted the fact that key members of the Administration, Donald Rumsfeld, Paul Wolfowitz and Dick Cheney did not support the involvement of the UN.<sup>42</sup> There was also considerable scepticism about the efficacy of the inspections regime in being able to verify conclusively that Iraq had not reactivated its WMD programs with Vice President Cheney stating publicly that the “return of inspectors would provide no assurance whatsoever of [Saddam Hussein’s] compliance with UN resolutions”, but would merely “provide false comfort that Saddam was somehow

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<sup>42</sup> See Lawrence Freedman, “War in Iraq: Selling the Threat”, *Survival*, summer 2004, vol. 42(2): 7-50 at p. 30; also op cit, Bob Woodward.

back in his box.”<sup>43</sup> Similarly, in a speech on 23 January 2003, Deputy Secretary of State Paul Wolfowitz reiterated the Administration’s position that it was extremely difficult for the inspectors, even if they were better resourced, to “search every potential hiding place ‘in a country the size of France, even if nothing were being moved’”.<sup>44</sup>

In light of this scepticism, it was clear that the Administration had a deep impatience with the accommodation of diverse interests inherent in the UN process. The concerted build-up of US troops in the Gulf by January 2003 suggested that the US had little commitment to the UN authorised inspections process but had gone to the UN as a favour to the UK Blair government whose participation in a possible war on Iraq appeared to require it.<sup>45</sup> Whilst the approval of the Security Council would prove useful for the purpose of legitimisation, particularly in terms of the benefits of greater burden sharing by the community at large, the US was confident in its right and capacity to achieve the goal of regime change without outside approval. The perceived rush to war by the US gave states cause to doubt US arguments about the seriousness of the Iraqi threat, the urgent need to disarm it, and to question whether the US was truly seeking to lead the community to achieve the common interest in stability or to achieve its own parochial interests.

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<sup>43</sup> Dick Cheney, “Speech before the Veterans of Foreign Wars in Nashville, Tennessee”, 26 August 2002 quoted in *ibid*, Lawrence Freedman p. 30.

<sup>44</sup> Deputy Secretary Wolfowitz, Speech on Iraqi Disarmament to the Council of Foreign Relations, 23 January 2003 quoted in *op cit*. Lawrence Freedman p. 30.

<sup>45</sup> See Philip Gordon and Jeremy Shapiro, *Allies at War: America, Europe and the Crisis over Iraq*, New York: McGraw Hill 2004) at p. 144; “The Divided West: Blair’s Mission Impossible – the doomed effort to win a second UN resolution”, *Financial Times*, 29 May 2003.

Secondly, the US assertion of authority to interpret what was in the interests of the collective evidenced an imperial style was fundamentally at odds with the institutionalised multilateral processes of the UN and the principle of sovereign equality fundamental to the very idea of international society. From the outset, President Bush took the line in his speech to the General Assembly that a failure to act by the members of the Council would signify the abrogation of their special responsibilities to protect international stability. In these circumstances Bush argued that the US had no choice but to act unilaterally to maintain international peace and security. Again, in justifying the use of force by the coalition after the invasion, the US and UK again returned to this theme, arguing that they were acting to enforce the will of the international community under the ‘continuing authority’ of the Council expressed in resolution 678.<sup>46</sup> Thus, it was the US (and its allies), not the Security Council, which would have the final say as to what constituted the collective interest justifying the use of force. This support for the central authority of the Council, rather than the United States, as the body with the legitimate right to decide on appropriate measures to defend the common interest in order was expressed by eleven states in the Council prior to the vote to accept the terms of resolution 1441.

Of note was the statement by the French representative that the “main and constant objective of France” in negotiations over resolution 1441 was that the

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<sup>46</sup> See statement of Mr Negro Ponte, US representative to the Security Council, “4726<sup>th</sup> Meeting of the Security Council”, 27 March 2003, UN Doc. S/PV. 4726(Resumption 1) p. 25; statement of Sir Jeremy Greenstock, United Kingdom, “4726<sup>th</sup> Meeting of the Security Council”, 27 March 2003, UN Doc. S/PV. 4726(Resumption 1) p. 23.

authority of the Council was strengthened, with the two-stage approach being designed to ensure “that the Security Council would maintain control of the process at each stage.”<sup>47</sup> Underlying these sentiments was to ensure that force would be authorised only where the collective interest was served, with the Council having the task of “not permitting a nation – whatever nation it may be – to do what it wants, where it wants.”<sup>48</sup> The ultimate failure of the Administration to accommodate the views and interests of the collective, or at least to make a more concerted attempt to persuade rather than dictate, deeply undermined US pretensions to act as a legitimate leader of international society.

Finally, the broad terms of the doctrine of pre-emption demonstrated unwillingness on the part of the US to be constrained in the use of its predominant power capabilities, which itself undermined US pretensions to ‘leadership’. The vague parameters of the doctrine made obvious the desire to remove the shackles imposed by international law on the use of the US’s predominant military capabilities, whilst perfunctorily clothing US unilateralism with a rationale and justification of sorts. In these circumstances, the plausibility of US claims to represent the interests of the community were tainted by a doctrine which sought to legitimise its desire to act in a manner unfettered by these interests.

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<sup>47</sup> Mr Levitte, France, “4644<sup>th</sup> Meeting of the Security Council, UN Doc. S/PV.4644, 8 November 2002, p. 5.

<sup>48</sup> Statement of an unnamed French Diplomat, quoted in Tyler Marshall, Maggie Farley and Doyle McManus, “A war of words led to unanimous Iraq vote; the long-sought UN resolution shows the extent of US power – and its limits”, *The Los Angeles Times*, 1 November 2002.

## *Legitimacy and US Hegemony*

Our discussion of the role of international legitimacy in the rejection of US leadership on Iraqi disarmament Iraq also makes clear that the Bush Administration did not consider such normative considerations of great importance. There was little doubt that the Administration believed that the US possessed sufficient material capabilities to achieve regime change in Iraq, and whilst the legitimization provided by a Security Council resolution would be useful instrumentally, it was not so useful as to justify a change of course.

Fundamentally, the Administration's approach to the issue of Iraqi disarmament demonstrates a misapprehension about the limits of material power, the nature of hegemony in a society of states, and finally, the importance of international legitimacy as both a constraint and enabler of hegemonic power. As Reus-Smit has observed, the Administration's approach to US hegemony is based on an unbalanced view of power as being derived predominantly from the possession of material resources,<sup>49</sup> taking an 'elements of national power' approach<sup>50</sup> rather than from a social basis. The possession of material resources was presumed to un-problematically translate into political influence.<sup>51</sup> This assumption is prevalent in materialist approaches to hegemony within IR scholarship.

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<sup>49</sup> Christian Reus-Smit, "The misleading mystique of America's material power", *Australian Journal of International Affairs*, November 2003, vol. 57(3): 423-430.

<sup>50</sup> David Baldwin, "Power and International Relations", in Walter Carlsnaes, Thomas Risse and Beth A. Simmons (eds.) *Handbook of International Relations* (London; Thousand Oaks, California: SAGE Publications 2002) at 178 and 179.

<sup>51</sup> *Ibid*, p. 425.

Structural Realists define hegemony in terms of unipolar distribution of material capabilities in the system, which is likely to be short-lived under the logic of the balance of power.<sup>52</sup> Whilst hegemony is likely to be a temporary condition, this does not preclude the emergence of a hegemonic order of sorts embodied in rules, norms and institutions, however “whatever elements of authority emerge internationally are barely once removed from the capability that provides the foundation for the appearance of those elements. Authority quickly reduces to a particular expression of capability”.<sup>53</sup> Thus, for materialists the Administration’s approach to foreign policy is easily explainable – a hegemon will depend primarily on its predominant material power capabilities to achieve its goals, through the application of bribery and coercion.<sup>54</sup> International law and institutions are used instrumentally as a tool to achieve the national interest and discarded or remoulded where interests change. The use of force in Iraq under the guise of a new legal doctrine represents the application of hegemonic power to adapt the rules of order to suit changing security interests.

The materialist approach to hegemony and power presents a simplified and under-socialised view of international relations and as such results in counter-productive outcomes. Taking a constructivist approach to hegemony requires an

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<sup>52</sup> See Kenneth Waltz, *Theory of International Politics* (Reading, Mass: Addison-Wesley Pub.Co. 1979);

<sup>53</sup> Kenneth Waltz, “The anarchic structure of world politics”, reproduced in R. Art and R. Jervis, *International Politics: Enduring Concepts and Contemporary Issues* (New York: Pearson/Longman 1979/2005 7<sup>th</sup> Ed.) p. 32; see also John Mearsheimer, *The Tragedy of Great Power Politics* (New York: W. W. Norton & Co. 2001) p. 49.

<sup>54</sup> See also Robert Gilpin, *War and Change in World Politics* (Cambridge, UK: Cambridge University Press 1982) p. 30, 31, and 34.

acknowledgment that hegemonic states, whilst well endowed materially, are constrained also by the ideational structure of international society which itself gives meaning to hegemony. Under this approach, hegemony is more than a material fact. Of relevance here is hegemony as a social identity – a leadership role in international society. Whilst Westphalian international society has developed on the basis of a formal equality of its members, English School scholars have long observed the acceptance of informal and formal hierarchies among states with an acknowledgment of both the special interests and special responsibilities of Great Powers in relation to the management of international order.<sup>55</sup>

The legitimacy of such hierarchy has depended upon the development of rules and norms with which to justify unequal power relations. For Beetham, the legitimacy of a system of unequal power relations “depends upon the extent that: i) it conforms to established rules; ii) the rules can be justified by reference to the beliefs shared by both dominant and subordinate; and iii) there is evidence of consent by the subordinate to the particular power relation.”<sup>56</sup> Of particular here importance is the second criteria, the normative beliefs that have developed within international society, and continue to evolve, by which to judge the legitimacy of US hegemony.

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<sup>55</sup> See op cit, Tim Dunne p. 307; See Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London: MacMillan Press Ltd 2<sup>nd</sup> Ed. 1995) Chapter 9; Martin Wight, *Power Politics* (London: Leicester University Press 1978, 1995 ed.) p. 43-44.

<sup>56</sup> David Beetham, *The Legitimation of Power*, (Atlantic Highlands, NJ: Humanities Press International, Inc.) p. 15-16.

Drawing from Gramscian and English School theory<sup>57</sup> constructivist scholars such as Cronin and Reus-Smit argue that subordinate states will follow a hegemonic leader if the basis of the international order it promotes is not purely exploitative but is universal in conception in the sense of being compatible with their interests.<sup>58</sup> Similarly, Beetham argues that for unequal power relations to be justified as legitimate it must be “seen to serve a recognisably general interest, rather than simply the interests of the powerful.”<sup>59</sup> Whilst the hegemon is recognised as having a greater interest and prerogatives in terms of maintaining system stability and order, in return, subordinate states expect that the hegemon will accept certain limits in their actions to do so.<sup>60</sup> For Cronin, these limitations include “that legal (sovereign) equality be maintained...; that the hegemon follow the rules and avoid unilateral acts that may violate them; that its freedom to manoeuvre be limited by its responsibilities; ...that it accommodate the secondary powers of major importance” and that it follows procedural limits when acting in the role of hegemon.”<sup>61</sup>

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<sup>57</sup> See Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London: MacMillan Press Ltd 2<sup>nd</sup> Ed. 1995) Chapter 9; Martin Wight, *Power Politics* (London: Leicester University Press 1978, 1995 ed.) p. 43-44.

<sup>58</sup> Bruce Cronin, “The Paradox of Hegemony: America’s Ambiguous Relationship with the United Nations”, *European Journal of International Relations*, 2001, vol. 7(1):103-130 at p. 108, Christian Reus-Smit, *American Power and World Order* (Cambridge: Polity Press 2004) p. 65; see also Jean-Marc Coicaud, *Legitimacy and Politics: a contribution to the study of political right and political responsibility* (United Kingdom: Cambridge University Press 2004) translation from French at p. 11.

<sup>59</sup> Op cit, David Beetham, p.17.

<sup>60</sup> See Clark and Ikenberry on the role of the idea of constitutionality and the legitimacy of international order. Ian Clark, *Legitimacy in International Society*, (Oxford: Oxford University Press 2005) at p. 220 and 227; G. John Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order after Major Wars* (Princeton, NJ: Princeton University Press 2001) p.29-32.

<sup>61</sup> Op cit, Bruce Cronin p. 111; See also op cit Hedley Bull p. 196 and 221-222.

In examining the US approach to the disarmament of Iraq it is evident that it has not acted in conformity with the expectations of legitimate behaviour for state in a leadership role. Whilst US practice has not challenged explicitly the principle of formal equality among states, it has sought to reserve for itself the right to decide what are in the best interests of the community as a whole. The use of force in defiance of majority opinion, without the accommodation of 'secondary powers of major importance', justified by a doctrine which places little constraint on the use of power, and in disregard of the procedural limits within the UN Charter together provided ample justification for the rejection of the US as a leader of international society. In combination, US practice in the Iraq case demonstrated to the rest of international society that it was pursuing its own parochial interests rather than the interests of the society as a whole.

Whilst this may be the case, given the disparity in material resources between the US and the rest, does the US need to worry about the normative judgments of other members of international society? What is argued here is that the failure to take such normative judgments into consideration shows an underestimation of the effect of international legitimacy as not only a constraint on hegemonic power, but also a source of hegemonic power. As Beetham has argued, legitimacy matters because it affects "the behaviour of those subordinate within a power relationship: its legitimacy provides them with moral grounds for cooperation and obedience. Legitimate power or authority has the right to expect obedience from subordinates, even where they may disagree with the content of

a particular law or instruction; and subordinates have a corresponding obligation to obey.”<sup>62</sup>

If we use Dahl’s famous definition of power as causative relationship where “the behaviour of actor A at least partially causes a change in the behaviour of actor B”<sup>63</sup> then legitimacy provides a normative form of power that a hegemonic state is able to access if it is able to engender a belief in the legitimacy of the order it promotes.<sup>64</sup> Whilst materialist conceptualisations of hegemony emphasise coercion and self-interest as primary ‘reasons’ for obedience among less powerful states, a constructivist conceptualisation of hegemony would additionally emphasise the normative belief in the legitimacy of a hegemonic order. That is, whilst the former characterise obedience according to the “logic of expected consequences” (fear of sanction or expectation of benefits), the latter characterise it in terms of the “logic of appropriateness”.<sup>65</sup> That is, subordinate states will conform to the norms of international order because of a belief that doing so is rightful, proper and appropriate and ought to be obeyed out of a sense of normative obligation.<sup>66</sup>

Further, legitimacy is a form of hegemonic power in a broader systemic sense. The long-term value of legitimacy in supporting the longevity and stability of an

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<sup>62</sup> Op cit David Beetham, p. 26.

<sup>63</sup> Op cit David Baldwin, at p. 178.

<sup>64</sup> See also G. John Ikenberry and Charles A. Kupchan, “Socialization and Hegemonic Power”, *International Organization*, Summer 1990, vol. 4(3):283-315 at p. 290.

<sup>65</sup> James March and Johan Olsen, “the Institutional Dynamics of International Political Orders”, at p. 951.

<sup>66</sup> Ian Hurd, p. 387.

order based on unequal power relations has also been consistently observed. In resource terms, the maintenance of an unequal order through the use of coercion and appeals to self-interest is of high cost to maintain, prone to instability, and engenders a poor quality of cooperation.<sup>67</sup> Cooperation here is based either on the constant application of force, or the provision of “a positive stream of benefits” which dries up if neither is forthcoming.<sup>68</sup> By contrast, where a hegemon is able to engender a belief in the legitimacy of its leadership role and the norms of order, the maintenance of order is achieved with less effort and cost than one that is not socially recognised. Where this occurs, subordinate states effectively redefine the meaning of ‘self-interest’ to include a commitment to the standards, laws, rules and norms present in international society at the intersubjective level.<sup>69</sup> Compliance with the rules and norms of order is achieved therefore through a system of self-enforcement rather than the costly external application of coercion or the offering of inducements.

Logically, where a hegemonic order loses legitimacy in the eyes of subordinates, then a hegemon loses a valuable form of power which underpins the stability and longevity of the order it promotes at a far lower cost than achieved through coercion and bribery. Thus legitimate power is a double edged sword. It can be a form of power that is useful instrumentally for a hegemonic state in maintaining order, but the constitutive effects of the normative structure of the system also has the effect of limiting hegemonic power. Accepted norms constitute

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<sup>67</sup> Op cit, Beetham p. 28-34;

<sup>68</sup> op cit, Ian Hurd p. 387.

<sup>69</sup> Op cit, Ian Hurd, p. 388.

hegemonic power by defining the range of legitimate behaviour that will cause other actors to recognise a hegemonic state's identity as a leader. If a hegemon is able to act within those expectations it can in turn expect other states to acknowledge its rights and responsibilities in relation to international order i.e. it is empowered by the community of states. Alternatively, if a hegemonic state acts outside the bounds of appropriate behaviour associated with its identity as leader, then the community of states has the capacity to withdraw recognition of its identity. As a consequence, a hegemon can no longer expect voluntary assistance in the achievement of common goals, but will have to resort to dominating behaviours in order to achieve its interests.

This analysis can be directly applied to the use of force in Iraq. It can be argued that there were real consequences attached to the use of force by the US in Iraq despite the normative disapproval of the broad majority of international society. Whilst some had feared that the Iraq war heralded the end of a plural international society, time has shown that the society of states has the ability to extract real material costs from a hegemonic state which acts outside the expectations of proper behaviour associated with the role of leader. As a consequence of its unilateralist and dominating approach, the majority of states were not prepared to acknowledge any special prerogatives over the maintenance of international order. States were reluctant to support the US diplomatically, politically and militarily before the war, and even more reluctant to share in the burdens associated with the restoration of security and

reconstruction efforts after the war. As each year passes, ever more states with a security or civilian presence in Iraq have withdrawn their support, leaving the United States to bear the huge and growing burden virtually alone.<sup>70</sup> The decreasing domestic support within the US itself for the war has been largely due to perceived mismanagement of the post-war reconstruction phase and the huge burden of the continuing war on the economy. It has been estimated recently that in financial terms alone, the war is likely to cost \$3 trillion US dollars and has already exceeded the cost of the 12 year Vietnam war.<sup>71</sup> Putting aside the question of whether a UN authorised regime change in Iraq would have been viewed with more legitimacy by the Iraqi people, and therefore have been less protracted, the failure to understand hegemony as a social role, and international legitimacy as a form of power has arguably resulted in real and significant costs to the United States.

### **The Future of Pre-emption?**

In the years since the end of the Iraq war, despite the failure to find WMD in Iraq, evidence of a direct operational connection between the Hussein regime and Al-

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<sup>70</sup> See Jeremy M. Sharp, "Post-War Iraq: A Table and Chronology of Foreign Contributions", *CRS Report for Congress RL 32105*, updated 5 November 2004; Steve Bowman, "Iraq: US Military Operations and Costs", *CRS Report for Congress*, RL 31701, updated 20 November 2004; Jeremy Sharp and Christopher M Blanchard, "Post-War Iraq: Foreign Contributions to training, peacekeeping and reconstruction," *CRS Report for Congress*, RL 32105m, updated 6 June 2005; Curt Tarnoff, "Iraq: Recent Developments in Reconstruction Assistance", *CRS Report for Congress*, updated 12 August 2005.

<sup>71</sup> Joseph Stiglitz and Linda Bilmes, "The Three Trillion Dollar War", 23 February 2008, Timesonline, [http://www.timesonline.co.uk/tol/comment/columnists/guest\\_contributors/article3419840.ece](http://www.timesonline.co.uk/tol/comment/columnists/guest_contributors/article3419840.ece)

Qaeda,<sup>72</sup> and the huge costs associated with pre-emptive military action,<sup>73</sup> the Bush Administration has not abandoned its commitment to the doctrine of pre-emptive self-defence. The 2006 *National Security Strategy* continues to view the possibility of an alliance between “rogue” states transnational terrorist organisations as a grave and continuing threat that may require the pre-emptive use of military force to combat.<sup>74</sup>

Internationally, whilst it is not accurate to say that there has been a reversal of fortunes for pre-emptive self-defence, there have been some indicators, in the security strategies of individual states and inter-state organisations, that pre-emptive action may be acceptable where there is a high risk of attack with WMD by terrorists or rogue states.<sup>75</sup> Putting aside past support for the doctrine among coalition members such as Australia, the UK and Japan, others such as Russia and India have asserted the right to take military action pre-emptively in self-defence in the context of international terrorism.<sup>76</sup> More surprisingly, the French *Programmation Militaire 2003-2008* expresses a preparedness to consider “the

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<sup>72</sup> Institute for Defense Analyses, Iraqi Perspectives Project, *Saddam and Terrorism: Emerging Insights from Captured Iraqi Documents*, Volume 1 Redacted, <http://abcnews.go.com/images/Politics/Saddam%20and%20Terrorism%20Redaction%20EXSUM%20Extract.pdf>; “Study Finds No Qaeda-Hussein Tie”, *The New York Times*, 14 March 2008.

<sup>73</sup> Iraq Survey Group, *Comprehensive Report of the Special Advisor to the DCI on Iraq’s WMD*, 30 September 2004.

<sup>74</sup> The White House, *The National Security Strategy of the United States of America*, March 2006 at p. 20, and 23; See also the US Department of Defense, *National Defense Strategy*, March 2005 <http://www.au.af.mil/au/awc/awcgate/nds/nds.pdf>.

<sup>75</sup> See Peter Dombrowski and Rodger A. Payne, “The emerging consensus for preventive war”, *Survival*, Summer 2006, vol. 48(2): 115-136.

<sup>76</sup> Ibid; Vladimir Putin quoted in CNN, “Russia Considers Terror Strikes”, 17 September 2004, CNN online, <http://edition.cnn.com/2004/WORLD/europe/09/17/russia.putin/index.html>; Moscow News, “Top Brass defends Russia’s right to pre-emptive strike,” 24 January 2008, <http://www.mnweekly.ru/news/20080124/55305669.html>

possibility of pre-emptive action...from the time that an explicit and confirmed threatening situation is identified".<sup>77</sup>

At the UN the 2004 report of the UN High Level Panel on Threats and Challenges,<sup>78</sup> whose recommendations were effectively adopted by Kofi Annan a year later,<sup>79</sup> accepted that the possible combination of "irresponsible states", international terrorists and WMD may "justify the use of force, not just reactively but preventively and before a latent threat becomes imminent", but only in the where authorised by the collectively via the Security Council.<sup>80</sup> Controversially, it also took the view that anticipatory self-defence was an existing right under international law,<sup>81</sup> an issue that we have argued is far from settled.<sup>82</sup> The position of the European Union on pre-emptive action is also not entirely dismissive, with support being expressed for "conflict prevention and threat prevention" in the context of nuclear proliferation and international terrorism,<sup>83</sup> but

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<sup>77</sup> Quoted in Gary L. Guertner, "European Views of Preemption in US National Security Strategy", *Parameters*, July 2007, vol. 37(2): 31-44 at p. 36.

<sup>78</sup> UN High Level Panel on Threats, Challenges and Change, "A more secure world: our shared responsibility", UN Document 2004, <http://un.org/secureworld/report2.pdf>, paragraph 94, p. 55.

<sup>79</sup> Report of the Secretary General of the United Nations, *In Larger Freedom: towards security, development and human rights for all*, UN Doc. A/59/2005, 21 March 2005.

<sup>80</sup> *Ibid*, UN High Level Panel Report, paragraph 191.

<sup>81</sup> See Christine Gray, "The Bush Doctrine Revisited: The 2006 National Security Strategy of the USA", *Chinese Journal of International Law*, 2006, vol. 5(3): 555-578 at p. 566

<sup>82</sup> Christine Gray notes that the *Outcome Document* produced after the UN World Summit in 2005 did not follow the position of the Panel on anticipatory self-defence. See *op cit*, Christine Gray "The Bush Doctrine Revisited", p. 566; UN Document A/60/L.70, 15 September 2005, para 79.

<sup>83</sup> European Council, "A Secure Europe in a Better World: European Security Strategy", December 2003, at p. 11.

again emphasis the important role of international law and the primary responsibility for peace and security remaining with the Security Council.<sup>84</sup>

Thus whilst a doctrine of pre-emption establishing a unilateral right to act continues to have weak support among the international community at large, there is some evidence that more states are prepared to contemplate that collective military action may be necessary to prevent the proliferation of WMD to rogue states and international terrorists, rather than relying on deterrence alone. Given that continued commitment by the US to pre-emptive self-defence in this context, there is much that can be learned from the Iraq experience which could be utilised in seeking a future for pre-emption under parameters that are acceptable to the international community at large.

There are clear interests for both the United States and the rest of the international community in establishing a legal and normative basis for pre-emptive self-defence. From the US point of view, the Iraq war should make clear the strong instrumental incentives to engage in the legitimacy debate on pre-emption. Normative acceptance of pre-emption would obligate other members of international society to share in the political, financial and military burdens associated with military action. Further the quality of cooperation and assistance in any pre-emptive action would most likely be significantly greater. However, the Iraq experience should also highlight that to access this form of normative

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<sup>84</sup> Op cit, Christine Gray, "The Bush Doctrine Revisited", at p. 565; See also Raimo Varynen, "Preventive Action by Military Means: A Contested Approach", *Global Society*, January 2006, vol. 20(1): 69-86 at p. 84.

empowerment requires that a hegemon act within the constraints associated with a leadership role of international society. Inherent in this role prescription, at this historical moment, is a willingness to show constraint in the use of its predominant material capabilities, and to exhibit a readiness to accommodate and act in the interests of the community at large.

The interest of international society in encourage a wayward hegemon to 'contract' back in is also compelling. The potential of a hegemonic state to cause significant disruption to a system based on sovereign equality is of course worth averting. Apart from this observation, there should also be consideration of the basic historical justification for the social acceptability of hierarchy, namely the disproportionate burden carried by great powers for law enforcement and system stabilisation. Herein lies the great paradox at the heart of a hegemonic order. Whilst society seeks to restrain the untrammelled use of hegemonic power, it also seeks to ensure that a hegemon plays a leadership role such that its greater material power can be utilised for common purposes. Thus, where there are grounds for believing that there is a growing consensus on the appropriateness of pre-emptive action, where WMD proliferation to rogue states and international terrorism is concerned, then there are real interests for all in establishing a new consensus over the use of force in a post September 11 world.

How might consensus on pre-emptive self-defence be achieved, taking into consideration the normative beliefs of states about the legitimate use of force,

and the legitimate exercise of leadership in international society? Central to the opposition to the doctrine of pre-emptive self-defence is the open-ended nature of the right, which would allow individual states to decide for themselves whether a future threat was sufficiently grave, in terms of its likelihood and consequences, to warrant the use of force. A right expressed in these terms fails to guard against the use of force as a common instrument of policy rather than as a last resort risking destabilisation of the system. The fear pre-emption could be used as a cloak to mask the aggressive use of force by the most powerful states is understandably strong among the weaker members of society, who would be the likely targets of such action. Such a fear was magnified by the Iraq war.

It is argued here that the unilateral right to pre-emptive military action in self-defence is normatively unacceptable to the majority of states in the system. As such, in engaging in the battle of ideas over the legitimate use of force in international society, the United States should abandon the commitment to a unilateral doctrine of pre-emption. This doctrine is seen to be a central tool with which the Administration has sought to justify the unfettered achievement of US goals. By its very nature it cannot be re-packaged to assuage the fears of less powerful states about US intentions.

Rather, the United States should concede this point, signifying a readiness to compromise and accommodate, and instead advocate the normative acceptance of an individual right to act in anticipatory self-defence. Whilst the UN High Level

Panel and the Secretary General's report assumed that such a right was accepted in law, as we have discussed above, this is far from certain.<sup>85</sup> Such a right is far less open to abuse, requiring clear and cogent evidence of an imminent threat which cannot be averted by other means. It should also accommodate the need to take action to avert an imminent attack using WMD, particularly where collective action through the UN may be too slow to respond, whilst also ensuring that force cannot be used indiscriminately via the requirement of clear evidence of an imminent threat.

At the same time, the United States should concede that broader pre-emptive military action, along the lines advocated by the Bush doctrine, should only be taken under the authorisation of the Security Council. Such a show of constraint should go some way to re-establish the right of the US to act as a leader of international society, just as the procedural safeguards contained in the decision-making procedures of the Security Council should assuage concerns over abuse. Further, the Iraq experience shows clearly that pre-emptive action may result in complex and long-term nation-building of immense cost, and which would have greater chances of acceptance by domestic populations where UN endorsement is given. In this circumstance the US would be prudent to obtain the support of the international community before taking action.

Finally, in the legitimacy debate on pre-emption the interest of the community in bringing the US back into the fold requires some commitment to take the new

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<sup>85</sup> See *op cit*, Christine Gray "The Bush Doctrine Revisited" at p. 566.

security threats and the possible need for pre-emptive action seriously. Whilst the UN High Level Panel identified five essentially just war criteria by which to judge the legitimacy of the collective use of force (gravity of the threat, proper purpose, last resort, proportionate means and the balance of consequences) it avoided the issue of 'rightful authority' where the Security Council is deadlocked, potentially through a misuse and abuse of the veto.<sup>86</sup>

The reliance on the Security Council can only be justified where it can be relied upon to act to protect the common interest, and where it does not there are strong temptations for threatened states to act unilaterally. In the interests of all to avert unilateral pre-emptive action, consideration must be given to 'rightful authority' resting also with regional organisations, as has been advocated in the International Commission on Intervention and State Sovereignty report in the context of humanitarian intervention.<sup>87</sup> Support for pre-emptive action by regional organisations is a second best option, but still a reasonable option to maintain control over the use of force for the pursuit of collective rather than parochial interests. A requirement that force be authorised by the agreement of a regional organisation ensures that "there is a greater chance that there is a valid factual predicate for acting" and a "convergence between those who bear the costs and those who reap the benefits of action."<sup>88</sup> Such an approach, which

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<sup>86</sup> Op cit, *A More Secure World*, p. 204-9; Andrew Hurrell, "Legitimacy and the use of force: can the circle be squared?", *Review of International Studies*, 2005, vol. 31: 15-32 at p. 30.

<sup>87</sup> International Commission on Intervention and State Sovereignty, "The Responsibility to Protect", 2001, <http://www.iciss-ciise.gc.ca/>

<sup>88</sup> Ivo Daalder and James Steinberg, "The Future of Pre-emption", *The Los Angeles Times*, 4 December 2005.

maintains some form of collective control over the use of force, is more likely to be seen as legitimate by the majority of smaller, less powerful states in the system.

In this paper we have sought to place the debate about pre-emptive self-defence within the context of the larger debate about the nature of hegemony and the sources of hegemonic power in a society of states. We have argued that the failure of the United States to gain support for military action against Iraq stemmed from a fundamental misapprehension about the value of legitimacy as a constraint but also an enabler of hegemonic power. Essentially, under the direction of the Bush Administration an overreliance on material power without regard to the rules, norms and beliefs of international society relating to the legitimate use of force and legitimate behaviour for a leader within international society has resulted in an overall diminution of US abilities to achieve its interests.

In the aftermath of Iraq, new leadership in the US should learn from scholars such as Inis Claude who wrote many years ago that “power and legitimacy are not antithetical but complementary...Legitimacy, in short, not only makes most rulers more comfortable but makes all rulers more effective – more secure in the possession of power and more successful in its exercise.”<sup>89</sup> The first step in this realisation would be to take a new approach to the use of force which

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<sup>89</sup> Inis L. Claude Jnr, “Collective Legitimization as a Political Function of the United Nations”, *International Organization*, 1966, vol. 20: 367-379 at p. 368.

encapsulates a stronger vision of a consensual order, where the prerogatives of leadership are recognised to come at the price of restraint for the common interest.

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