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## Assessing Claims of a New Doctrine of Pre-Emptive War under the Doctrine of Sources

James Thuo Gathii

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## Assessing Claims of a New Doctrine of Pre-Emptive War under the Doctrine of Sources

### Abstract

After examining state practice and *opinio juris* on the preemptive use of force in the last few years, I conclude that the prohibition of preemptive war where there is no armed attack or an instant, overwhelming threat has not changed. Under customary international law, this prohibition of preemptive use of force is a customary international law norm of extremely high normativity and as such state practice inconsistent confirms the norm particularly in the absence of evidence of its widespread and representative repudiation. Second, under the doctrine of sources, state practice inconsistent with a norm of customary international law or persistent dissension from it, does not establish a new norm but is instead regarded a violation of the norm. Third, even assuming that persistent objectors to the prohibition of preemptive use of force in the absence of an armed attack or instant, overwhelming threats, regard themselves as having created a new rule binding to themselves, under the doctrine of sources a small number of states cannot within a limited time frame create a new rule without 'a very widespread and representative participation' in the practice. Finally, a small number of states cannot create a new rule of customary international law where there is practice which conflicts with the rule or where there are protests to the new rule. This is particularly so with respect to a rule relating to the prohibition of the use of force which is a 'conspicuous example of a rule of international law having the character of *jus cogens*' with respect to which practice inconsistent with it would be regarded as a violation of the norm rather than as establishing a new norm.

### Keywords

International law; *Jus cogens* (International law); War on Terrorism, 2001-2009

# ASSESSING CLAIMS OF A NEW DOCTRINE OF PRE-EMPTIVE WAR UNDER THE DOCTRINE OF SOURCES<sup>©</sup>

JAMES THUO GATHII\*

After examining state practice and *opinio juris* on the preemptive use of force in the last few years, I conclude that the prohibition of preemptive war where there is no armed attack or an instant, overwhelming threat has not changed. Under customary international law, this prohibition of preemptive use of force is a customary international law norm of extremely high normativity and as such state practice inconsistent confirms the norm particularly in the absence of evidence of its widespread and representative repudiation. Second, under the doctrine of sources, state practice inconsistent with a norm of customary international law or persistent dissension from it, does not establish a new norm but is instead regarded a violation of the norm. Third, even assuming that persistent objectors to the prohibition of preemptive use of force in the absence of an armed attack or instant, overwhelming threats, regard themselves as having created a new rule binding to themselves, under the doctrine of sources a small number of states cannot within a limited time frame create a new rule without 'a very widespread and representative participation' in the practice. Finally, a small number of states cannot create a new rule of customary international law where there is practice which conflicts with the rule or where there are protests to the new rule. This is particularly so with respect to a rule relating to the prohibition of the use of force which is a 'conspicuous example of a rule of international law having the character of *jus cogens*' with respect to which practice inconsistent with it would be regarded as a violation of the norm rather than as establishing a new norm.

Après avoir examiné ces dernières années l'usage de l'État et l'*opinio juris* concernant le recours préventif à la force, j'en suis arrivé à la conclusion que l'interdiction des guerres préventives, lorsqu'il n'existe ni attaque armée, ni menace imminente et impérieuse, n'a pas évolué. Aux termes du droit coutumier international, cette interdiction d'un recours préventif à la force constitue une norme du droit coutumier international d'une normativité extrêmement élevée et un tel usage incohérent de l'État confirme la norme, particulièrement s'il n'existe aucune preuve de son rejet généralisé et représentatif. Deuxièmement, selon la doctrine des sources, un usage pratique incohérent de l'État avec une norme de droit coutumier international, ou la non-observation constante d'une telle norme, n'établit aucunement une nouvelle norme, mais est plutôt considérée comme une violation de la norme. Troisièmement, même si l'on assume que les opposants obstinés à l'interdiction du recours préventif à la force, lorsqu'il n'existe ni attaque armée, ni menace imminente et impérieuse, considèrent avoir créé une nouvelle règle qui les contraint eux-mêmes, selon la doctrine de sources, un petit nombre d'États ne saurait, dans un délai donné, créer une nouvelle règle sans « une participation très étendue et représentative » à la pratique. Enfin, un petit nombre d'États ne peut pas créer une nouvelle règle de droit coutumier international lorsqu'une pratique est en conflit avec la règle, ou lorsque qu'il existe des contestations de la nouvelle règle. Cela est particulièrement vrai d'une règle liée à l'interdiction du recours à la force qui est un « exemple manifeste d'une règle de droit international revêtant le caractère de *jus cogens* », pour laquelle une pratique qui lui est incohérente serait considérée comme une violation de la norme plutôt que comme l'établissement d'une nouvelle norme.

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\* Associate Professor, Albany Law School. SJD Harvard; LL.B. (Hons.) Nairobi. I would like to thank Sergio Simoes for the excellent research assistance. I am also indebted to Antony Anghie and Obiora Okafor for their insightful comments. All errors are mine.

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## I. INTRODUCTION

The prohibition of the use of force under international law has been criticized for restricting the pre-emptive use of force after recent terrorist attacks on the United States. Under the Bush doctrine, the United States has been the most vocal exponent of this critique, and its 2003 war against Iraq is the most conspicuous application of the doctrine of pre-emption. Russian President Vladimir Putin, Israeli Prime Minister Ariel Sharon, British Prime Minister Tony Blair, Italian Prime Minister Silvio Berlusconi, and Australian Prime Minister John Howard have also emphasized the importance of the pre-emptive strike doctrine in defending their countries against gathering threats of terrorism and weapons of mass destruction in the hands of leaders such as Saddam Hussein. These states have in one way or another advocated a new rule of international law allowing the pre-

emptive use of force.<sup>1</sup>

The United States, Israel, the United Kingdom, Italy, Australia, and Russia are all members of the United Nations (UN). As members of the United Nations, they are bound by the prohibition against the use of force under article 2(4) of the *Charter of the United Nations*.<sup>2</sup> Thus, unless it is possible to replace a UN *Charter* and a customary international legal prohibition that is as important as the prohibition of the use of force, then their enunciation of a new doctrine of pre-emption would be contrary to prevailing law.<sup>3</sup> In this article, I take these countries seriously when they argue that the prohibition of the use of force ought to be reinterpreted in accordance with the changing global security situation arising particularly from threats of terrorism and weapons of mass destruction. As such, the basic issue I address is whether enunciations of a policy in support of pre-emptive use of force,<sup>4</sup> as well as state practice of pre-emptive war, can change the customary international legal and UN *Charter* prohibition of the use of force except as authorized under article 51.

To do so, I evaluate what the State practice and *opinio juris*<sup>5</sup> show on pre-emptive war, particularly since the United States, Australia, Israel, and Russia each declared their own versions of a new doctrine of pre-emptive war. My examination is not restricted to countries advocating this new doctrine. Rather, I examine as many countries for which I could

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<sup>1</sup> Jordan Paust has argued that the claim that a dissenter can sometimes not be bound by norms of customary international law is a minority view and is “illogical, false and threatening” to the nature of customary international law. See Jordan Paust, “Customary International Law in the United States: Clean and Dirty Laundry” (1998) 40 *Germ. Y.B. Int’l L.* 78. Paust is cited with approval by former Justice and Vice-President of the International Court of Justice C.G. Weeramantry. See C.G. Weeramantry, *Universalizing International Law* (Leiden: Martinus Nijhoff, 2004) at 226.

<sup>2</sup> 26 June 1945, Can. T.S. 1945 No. 7 [UN *Charter*]. Except as is authorized under Chapter VII of the UN *Charter* and article 51 thereof, and as I will note below, there is a good case that anticipatory self-defence may be permissible but in extremely rare cases.

<sup>3</sup> Another basis for excusal from this norm that might be advanced is that these countries are persistent objectors to the norm prohibiting the use of force and as such they are not bound by the illegality of pre-emption. However, as noted in Part III B, C, and D, this argument is not available for *jus cogens* norms. See in particular, *infra* notes 64-69.

<sup>4</sup> I suppose, without accepting the tenability of this position, that such enunciations may evidence *opinio juris* on the part of such States.

<sup>5</sup> In the *North Sea Continental Shelf Cases*, [1969] I.C.J. Rep. 3 at 44 [*Continental Shelf*], the International Court of Justice (ICJ) held that for a custom to be regarded as having the status of customary international law, “[n]ot only must the acts concerned amount to a settled practice, they must also be such, or carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it.”

determine state practice and *opinio juris* since 2002.<sup>6</sup>

I conclude that state practice and *opinio juris* on the pre-emptive use of force have not changed the prohibition of pre-emptive war for at least three reasons.<sup>7</sup> First, the pre-emptive use of force is prohibited both under the UN *Charter* and under customary international law since pre-emptive strikes are not preceded by an armed attack. This prohibition is of extremely high normativity and, as such, state practice inconsistent with it confirms the norm against non-use of force in the absence of widespread and representative repudiation. Second, I argue that pre-emptive use of force has not changed the prohibition of pre-emptive war because State practice inconsistent with a norm of customary international law, or persistent dissension from this norm, does not establish a new norm, but is instead regarded as a violation of the norm under the doctrine of sources.<sup>8</sup> Third, even assuming that persistent objectors to the prohibition of pre-emptive use of force in the absence of an armed attack or an instant, ascertainable, and overwhelming threat regard themselves as having created a new rule binding to themselves, under the doctrine of sources a small number of states cannot, within a limited time frame, create a new rule without “a very widespread and representative participation” in the practice.<sup>9</sup> A small number of states cannot create a new rule of customary international law where practice conflicts with a rule of customary international law that has achieved the status of a *jus cogens* norm or where

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<sup>6</sup> My analysis here is therefore consistent with the ICJ’s jurisprudence to the effect that the “substance of the law must be ‘looked for primarily in the actual practice and *opinio juris* of States.’” See *Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion, [1996] I.C.J. Rep. 226 at 253 [*Nuclear Weapons*], citing *Continental Shelf (Libyan Arab Jamahiriya/Malta) Case*, [1985] I.C.J. Rep. 68 at 29.

<sup>7</sup> In this article, I proceed from the premise that an armed attack is a precondition for the exercise of the right of self-defence under article 51 of the UN *Charter* and that anticipatory self-defence where the *Caroline* test is met would be permissible, although I do not concede that the doctrine of anticipatory self-defence is permissible under the UN *Charter* system. The formulation of an instant and overwhelming threat is attributable to U.S. Secretary of State Daniel Webster in connection with the *Caroline* Incident. See Letter from Daniel Webster, U.S. Secretary of State to Lord Ashburton, British Envoy to Washington (24 April 1841) in “Webster-Ashburton Treaty—The Caroline Case” excerpt from Hunter Miller, ed., *Treaties and Other International Acts of the United States of America*, Vol. 4, Documents 80-121 (Washington: Government Printing Office, 1934) at 1836-46, online: The Avalon Project at Yale Law School <<http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm>>.

<sup>8</sup> In *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, [1986] I.C.J. Rep. 14 at 98 [*Nicaragua*], the ICJ rejected the view that instances of departure from a rule of international law should be treated as indications of the recognition of a new rule. Instead the Court held such departures “should generally have been treated as breaches of that rule.”

<sup>9</sup> The ICJ has observed that “even without the passage of any considerable period of time, a very widespread and representative participation” in a practice is a precondition for its recognition as a norm of customary international law: *Continental Shelf*, *supra* note 5 at 42.

there are protests to the *new* rule.<sup>10</sup> This is particularly so with respect to a rule relating to the prohibition of the use of force that is a “conspicuous example of a rule of international law having the character of *jus cogens*”<sup>11</sup> with respect to which practice inconsistent with it would be regarded as a violation of the norm, rather than as establishing a new norm.

Ultimately, I claim that the evidence of state practice examined here constitutes clear evidence of aggression in violation of the UN *Charter*, customary international law, and aggression resolutions. In Part II, I set out the law governing the use of force in general, and in pre-emptive war in particular. In Part III, I set out the criteria under the doctrine of sources for the emergence of an alternative norm on the pre-emptive use of force. In Part IV, I assess the evidence, state practice, and *opinio juris* on pre-emptive use of force against the criteria, and in the conclusion, I assess this evidence under the doctrine of sources.

## II. THE LAW GOVERNING THE USE OF FORCE

### A. *The Prohibition of the Use of Force*

Article 2(4) of the UN *Charter* limits the use of force in relations between States.<sup>12</sup> A primary rationale for limiting the use of force is to safeguard the territorial integrity or political independence of other States, or to prevent its use in any other manner inconsistent with the purposes of the United Nations. In addition, the great inequalities of power between nations, economic motives to acquire resources and preserve access to them, and ideological motives including humanitarian reasons are all causes for outlawing war. Under the UN *Charter*, States are required to resolve disputes between themselves by peaceful means.<sup>13</sup>

The prohibition of the use of force is reinforced by Article I of the 1928 Kellogg-Briand Pact For the Renunciation of War that repudiated war

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<sup>10</sup> This is effectively the holding of the U.S. Supreme Court in *The Paquete Habana* 175 U.S. 677 (1900) at 708 where the practice of less than fifteen States was found by the Court to have established a rule of customary international law “that [coastal] fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.”

<sup>11</sup> *Nicaragua*, *supra* note 8 at 100. Article 2(4) of the UN *Charter* provides that “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any manner inconsistent with the purposes of the United Nations.”

<sup>12</sup> Article 2(4) prohibits a threat to the peace, a breach of the peace or an act of aggression.

<sup>13</sup> Article 2(3) of the UN *Charter*.

as an instrument of national policy in the following terms:

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.<sup>14</sup>

In the *Nicaragua* decision, the ICJ found that the prohibition of the use of force in the UN *Charter* was a norm of customary international law.<sup>15</sup> The limitation of the use of force under article 2(4) makes its use permissible in accordance with collective use of force with the authorization of the Security Council<sup>16</sup> or under article 51, which permits States to employ force in self-defence against armed attacks in the absence of action against such attacks by the United Nations.<sup>17</sup>

The collective or defensive use of force must meet the standard of necessity, which simply means that there must be no other way of resolving the controversy in question, and the standard of proportionality, which simply means that forcible measures must be strictly confined to protecting against injury.<sup>18</sup>

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<sup>14</sup> *Treaty between the United States and other Powers providing for the renunciation of war as an instrument of national policy*, 27 August 1928, 94 L.N.T.S. 57.

<sup>15</sup> *Nicaragua*, *supra* note 8 at 100-01. In addition, according to Robert H. Jackson, *The Nuremberg Case, as Presented by Robert H. Jackson Chief of Counsel for the United States, Together With Other Documents* (New York: Cooper Square, 1971) at 82-84, "Any resort to war—any kind of war—is a resort to means that are inherently criminal. War inevitably is a course of killings, assaults, deprivations of liberty, and destruction of property. An honestly defensive war is, of course, legal and saves those lawfully conducting it from criminality. The very minimum legal consequences of the treaties making aggressive war illegal is to strip those who incite or wage them of every defense the law ever gave, and to leave the war-makers subject to the judgment by the usually accepted principles of the law of crimes."

<sup>16</sup> Articles 42 and 43 of the UN *Charter* give the Security Council authority to engage in the collective use of force to maintain international peace and security. See also *Nicaragua*, *supra* note 8 at 103 (noting that a State that has suffered an armed attack may request assistance in collective self-defence). See also B.S. Chimni, "Towards a Third World Approach to Non-Intervention: Through a Labyrinth of Western Doctrine" (1980) 20 *Indian J. Int'l L.* 243.

<sup>17</sup> Article 51 of the UN *Charter* provides that:

Nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

<sup>18</sup> One of the classic statements of necessity and proportionality is a letter sent by U.S. Secretary of State Daniel Webster to British authorities noting that, assuming there was a necessity if British authorities entered into the United States at all, they should do "nothing unreasonable or excessive" since acts justified by necessity and self-defence "must be limited to that necessity of self-defence, and



## B. *Use of Force in Self-Defense Under International Law*

As noted above, article 51 of the UN *Charter* only authorizes the defensive use of force where there has been an armed attack.<sup>19</sup> As noted by the ICJ in *Nicaragua*, where there is no armed attack, there is no right of collective armed response,<sup>20</sup> even if such a collective action was undertaken “in strict compliance with the canons of necessity and proportionality.”<sup>21</sup> The Court defined an armed attack as including acts of a significant scale by armed bands.<sup>22</sup> Under the UN *Charter* system, the precondition of armed attack is intended to prevent the danger of unilateral recourse to the use of force in a world of unequal sovereign nations with differing ideologies, economic capabilities, and resources.

Since article 51 is silent as to the right of self-defence under customary international law in cases beyond armed attack, some have argued that by implication, the silence eliminates such a right. This view is consistent with the finding of the ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*<sup>23</sup> where the ICJ unanimously held that a threat or use of force involving nuclear weapons is contrary to article 2(4) of UN *Charter* and unlawful if it fails to meet all the requirements of article 51 thereof.<sup>24</sup> The point here is simply that the Court still treats an armed attack as a precondition to the invocation use of self-defence. This argument is fortified by the claim that, as the ICJ held in *Nicaragua*, non-intervention and self-defence are the same under customary international

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kept clearly within it.” Letter to Henry S. Fox, British Minister to Washington (24 April 1841) in 29 Brit. & For. St. Papers 1129 at 1138. The ICJ recently acknowledged this customary international law obligation in *Nuclear Weapons*, *supra* note 6 at 247, where it noted in part: “a ‘threat’ contrary to Article 2 paragraph 4, depends upon whether the particular use of force ... would necessarily violate the principles of necessity and proportionality.”

<sup>19</sup> *Nicaragua*, *supra* note 8 at 103, noting that “in the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack.”

<sup>20</sup> *Ibid.* at 110-11.

<sup>21</sup> *Ibid.* at 122. See also Judith Gardam, “Proportionality and Force in International Law” (1993) 87 Am. J. Int’l L. 391.

<sup>22</sup> *Ibid.* at 103-04.

<sup>23</sup> *Supra* note 6.

<sup>24</sup> *Ibid.* at 436. In addition, the Court observed at 263 that it “cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with article 51 of the Charter, when its survival is at stake.” In light of these pronouncements, the Court recognizes the continuing validity of meeting the requirements of article 51 of the UN *Charter* as a precondition for the exercise of the right of self-defence.

law as under the UN *Charter*.<sup>25</sup> Hence, the right of self-defence is deemed not to include a right of anticipatory self-defence since there is no customary international law rule on self-defence separate and apart from that under the UN *Charter*, as the Court in *Nicaragua* found. In fact, in *Nicaragua* the Court noted that although the United States was apparently relying on an “inherent right of self-defense,” it had not claimed such a right existed.<sup>26</sup> On this view, for a state to exercise the right of self-defence, it must be victim of an armed attack. Such an attack must include not merely action by armed forces at the border, but rather the sending by, or on behalf of, a state of armed forces against another state as to amount to an actual armed attack by a regular force, or the substantial involvement by a regular force.<sup>27</sup> In short, there is no inherent right of self-defence under article 51 of the UN *Charter* outside the prohibition of the use of force except where there is armed attack.

### C. *Anticipatory Self-defence: An Extremely Limited and Controversial Doctrine*

The only persuasive basis for proceeding outside the parameters of the use of force in self-defence, without conceding legality under article 51 of the UN *Charter*, occurs in rare cases “[w]here there is convincing evidence not merely of threats and potential danger but of an attack being actually

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<sup>25</sup> *Nicaragua*, *supra* note 8 at 110, noting that “in the view of the Court, under international law in force today—whether customary international law or that of the United Nations system—States do not have a right of ‘collective’ armed response to acts which do not constitute an ‘armed attack.’”

<sup>26</sup> *Ibid.* See also Oscar Schachter, “In Defense of International Rules on the Use of Force” (1986) 53 U. Chicago L. Rev. 113 at 135; Louis Henkin, *How Nations Behave* (New York: Columbia University Press, 1979) at 141; Yoram Dinstein, *War, Aggression, and Self-defence*, 3d ed. (Cambridge: Cambridge University Press, 2001) at 167 [Dinstein, *War* 3d ed.]. By contrast, Judge Schwebel’s dissent in *Nicaragua* argued in part that article 51 does not provide “if, and only if, an armed attack occurs” to justify his view that article 51 inheres a right of self-defence, *supra* note 8 at 347; See also Anthony Arend & Robert Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (London: Routledge, 1993) at 182-83.

<sup>27</sup> *Nicaragua*, *supra* note 8 at 103, 110. See also Philip C. Jessup, *A Modern Law of Nations* (New York: Macmillan, 1948) at 166-67, cited in Oscar Schachter, “The Right of States to Use Armed Force” (1984) 82 Mich. L. Rev. 1620 at 1634, where he argues that the United States has “stated that the term ‘armed attack’ [under article 51 of the UN Charter] should be defined to include not merely the dropping of a bomb but ‘certain steps in themselves preliminary to such actions.’” [Schachter, “Right of States”]. See also Michael Byers, Book Review of *Recourse to Force: State Action Against Threats and Armed Attacks* by Thomas H. Franck (2003) 97 Am. J. Int’l L. 721, warning that the privileging of the Security Council in the context of the use of force would make the law available to serve the interests of powerful at the expense of weak states. But see Lori Damrosch & Bernard H. Oxman, *Agora: Future Implications of the Iraq Conflict* (2003) 97 Am. J. Int’l L. 553 discussing the legality of the Iraqi conflict, especially contributions by William H. Taft, Todd F. Buchwald, and John Yoo and Ruth Wedgewood arriving at a different conclusion.

mounted ... . [In such an instance] an armed attack may be said to have begun to occur, though it has not passed the frontier.”<sup>28</sup> In another formulation, the *Caroline* test, anticipatory self-defence is considered to be permissible where the “necessity of that self defense is instant, overwhelming and leaving no choice of means, and no moment for deliberation.”<sup>29</sup> However, there has yet to be a good case in which the very limited and contested notion of anticipatory self-defence met the *Caroline* test. The closest case that might have, but is now regarded as not having met the *Caroline* test, was Israel’s first strike against Egypt in the 1967. Few regarded it as a good example of a permissible anticipatory attack under the *Caroline* test, especially after it became clear following the attack that there was no overwhelming threat that justified the attack to ensure Israel’s survival.<sup>30</sup> Many States criticized the attack, which made it clear that the attack would not serve as a precedent to legitimize “a general right to anticipatory self-defense.”<sup>31</sup> This reluctance to expand the right of self-defence to include anticipatory actions, including under a unanimous UN Security Council resolution, accounts for the strong condemnation of Israel’s pre-emptive attack on an Iraqi nuclear reactor in 1981.<sup>32</sup> In this attack, Israel was regarded as having failed to show that the Iraqi nuclear reactor posed a potential or imminent attack, and the UN General

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<sup>28</sup> Yoram Dinstein, *War, Aggression, and Self-defence*, 2d ed. (Cambridge: Grotius, 1994) at 190 (quoting Sir Humphrey Waldock). See also Dinstein, *War* 3d ed., *supra* note 26 at 220-26; Louis Henkin, “International Law: Politics, Values, and Functions” (1989) 216 *Recueil des Cours: Collected Courses of the Hague Acad. of Int’l L.* 33 at 142-62; Oscar Schachter, *International Law in Theory and Practice* (Boston: M. Nijhoff, 1991) at 150-52 [Schachter, *International Law*]. It is noteworthy that some scholars have argued that article 51 does not state all the requirements for a lawful resort to force in self-defence. An example of such an unstated requirement is that of proportionality and necessity. From this perspective, such scholars argue that article 51 preserved an inherent right of self-defence. See Christopher Greenwood, “International Law and the Preemptive Use of Force: Afghanistan, Al-Qaida and Iraq” (2003) 4 *San Diego Int’l L.J.* 7 at 8, 12. Professor Greenwood, however, concludes that “In so far as talk of a doctrine of ‘pre-emption’ is intended to refer to a broader right of self-defense to respond to threats that might materialize at some time in the future, such a doctrine has no basis in law” (*ibid.* at 15).

<sup>29</sup> Schachter, *International Law*, *ibid.* at 141; Schachter also notes that, “[w]hile strong positions have been taken by nearly all States against ‘preventive’ or ‘preemptive’ war, some uncertainty remains as to threats of force that credibly appear as likely to result in imminent attack” (*ibid.* at 151).

<sup>30</sup> Dinstein, *War* 3d ed., *supra* note 26 at 173; John Quigley, “The United Nations Action Against Iraq: A Precedent for Israel’s Arab Territories” (1992) 2 *Duke J. Comp. & Int’l L.* 195 at 203-13.

<sup>31</sup> Thomas Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge: Cambridge University Press, 2002) at 105 [Franck, *Recourse*].

<sup>32</sup> SC Res. 487, UN SCOR, UN Doc. S/RES/487 (1981).

Assembly also condemned the attack.<sup>33</sup> The United States' pre-emptive attack on a pharmaceutical plant in Sudan in 1998 on suspicion of manufacturing weapons of mass destruction is another example where evidence confirmed after the fact that there was no production of weapons of mass destruction at the factory.<sup>34</sup> These examples highlight the practical difficulty of meeting the *Caroline* test for an attack to qualify as anticipatory self-defence. Such instances therefore evidence disregard of the prohibition of the use of force by hegemonic States, precisely of the type the prohibition was intended to safeguard against.<sup>35</sup>

To summarize, anticipatory self-defence does not meet the requirements of an armed attack under article 51 and is therefore per se illegal under the UN *Charter* and customary international law. Having noted this, I agree with the weight of well-informed opinion that where there is convincing evidence of an impending attack that meets the rigorous requirements of the *Caroline* test, the Security Council and members of the United Nations would acquiesce to a State's exercise of its right to self-defence.<sup>36</sup> Convincing evidence of an impending threat must include the possession of weapons capable of horrific destruction of life and an intention on the part of those possessing them to use these weapons against a State justifying its right to self-defence on the basis that, without defending itself in advance, those possessing the weapons would render its self-defence impossible once the attack was underway.<sup>37</sup>

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<sup>33</sup> Franck, *Recourse*, *supra* note 31 at 105-06. See also Stanimir A. Alexandrov, *Self Defense Against the Use of Force in International Law* (Boston: Kluwer Law International, 1996) at 159-65, 296, arguing that Israel's actions could not be justified on self-defence grounds. But see Anthony D'Amato, "Israel's Air Strike Upon the Iraqi Nuclear Reactor" (1984) 77 Am. J. Int'l L. 584.

<sup>34</sup> See *El-Shifa Pharm. Indus. Co. v. United States*, 55 Fed. Cl. 751 (2003), showing that the U.S. government did in fact concede that there was no manufacturing of weapons of mass destruction at the factory.

<sup>35</sup> For a discussion of such expansive doctrines of use of force, see Winston P. Nagan, "The New Bush National Security Doctrine and the Rule of Law," (2004) 22 Berkeley J. Int'l L. 375.

<sup>36</sup> Thus there is uncertainty regarding the legality of self-defence even in a case that meets the *Caroline* test. I would also note that similar uncertainty exists with regard to the use of nuclear weapons in self-defence: see *Nuclear Weapons*, *supra* note 6 at 265-67, holding that "the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."

<sup>37</sup> In this, I am in agreement with Christopher Greenwood. See Greenwood, *supra* note 28 at 15-16.

D. *Pre-emptive Use of Force: A Clear Violation of International Law*

Pre-emption is a much broader and therefore much more dangerous doctrine than anticipatory self-defence since it is not preconditioned on overwhelming evidence of a horrific attack. Pre-emption refers to the “initiation of military action in anticipation of harmful actions that are neither presently occurring nor imminent.”<sup>38</sup> The 2000 U.S. National Security Strategy explicitly seeks to eliminate the requirement of necessity noting that “[w]e must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.”<sup>39</sup> Thus, unlike anticipatory self-defence, which has a tenuous justification under a broad construction of the right to self-defence, pre-emption does not have any basis whatsoever in international law. It is based on an outlawed version of an inherent right of self-defence.<sup>40</sup> Thus, its proponents argue that national security makes it imperative that the scope of the self-defence exception be determinable only by the country using it to defend itself.<sup>41</sup> Big powers such as the United States have also argued they have a responsibility to maintain international order, and therefore, the self-defence exception should be interpreted in that context and in light of the purposes of the UN *Charter* so as to yield interpretations consistent with its peace and security mandate.<sup>42</sup> Ultimately, States like the United States that favour pre-emption now advocate changing rules of international law to accommodate their right to act pre-emptively against gathering threats and to take defensive action on the basis of their own perception of national interest and capabilities.<sup>43</sup>

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<sup>38</sup> Allen Buchanan & Robert O. Keohane, “The Preventive Use of Force: A Cosmopolitan Institutional Perspective,” online: Political Science Department of Duke University <<http://www.poli.duke.edu/people/faculty/docs/Preventive%20Force.pdf>>.

<sup>39</sup> U.S., *The National Security Strategy of the United States of America* (Washington, D.C.: The White House, 2002), online: <<http://www.whitehouse.gov/nsc/nss.pdf>> [*National Security Strategy*] at 19.

<sup>40</sup> Mary Ellen O’Connell, “The Myth of Pre-Emptive Self-Defense,” online: The American Society of International Law <<http://www.asil.org/taskforce/oconnell.pdf>>; Bruce Ackerman, “But What’s the Legal Case For Preemption?—A Comment” *The Washington Post* (18 August 2002) B2; Kofi Annan, “The Secretary General Address to the General Assembly” (23 September 2003), online: The United Nations <<http://www.un.org/webcast/ga/58/statements/sg2eng030923.htm>>.

<sup>41</sup> See e.g. Abraham Sofaer, “Terrorism, the Law and National Defense” (1989) 126 *Mil. L. Rev.* 89 at 90-122.

<sup>42</sup> Michael Reisman, “Coercion and Self Determination—Construing Article 2(4)” (1984) 78 *Am. J. Int’l L.* 642.

<sup>43</sup> Thus, the United States argues in *National Security Strategy*, *supra* note 39 at 6, that “we will not hesitate to act alone, if necessary, to exercise our right of self defense by acting preemptively against such terrorists to prevent them from doing harm against our people and our country.”

E. *Has the Law of Self-defence Embodied in article 51 Collapsed?*

Some have argued that, particularly in the post-cold war period, expanding categories of cases have emerged in which force was used with Security Council authorization outside of the collective security framework envisaged in the UN *Charter* and absent armed attacks.<sup>44</sup> Such authorizations of the use of force included efforts to support humanitarian missions, as in Somalia, to prevent gross violations of human rights, as in Kosovo, and to promote democracy, as in Haiti.<sup>45</sup>

Thomas Franck has argued that these examples confirm yet again that the UN *Charter* prohibition against the use of force in international relations is obsolete.<sup>46</sup> Scholars such as Franck regard the United Nations as having acquiesced to these expanding justifications for the use of force. In his view, “no constitution can flourish if its branches can be torn off by any malevolent passer-by” but that “flexibility in fundamental law needs to be supported by the inflexible probity of the factual and contextual evidence to which that law is applied.”<sup>47</sup>

If, as Franck fears, malevolent “passers-by” threaten what is left of the prohibition, an ad hoc approach to questions regarding the use of force, which ought to summon a principled and predictable response, invites abuse particularly by powerful States unwilling to play by rules of international law.<sup>48</sup> As the ICJ observed in *Nicaragua*, the consistent reiteration and elucidation in the statements of countries of the

<sup>44</sup> See e.g. Michael Glennon, “The Fog of Law: Self Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter” (2002) 25 Harv. J.L. & Pub. Pol’y 539.

<sup>45</sup> Some of the best expositive essays on this era of humanitarianism are Vasuki Nesiah, “From Berlin to Bonn to Baghdad: A Space for Infinite Justice” (2004) 17 Harv. Hum. Rts. J. 75, and David Kennedy, *The Dark Side Virtue: Reassessing Humanitarian Interventionism* (Princeton: Princeton University Press, 2004). See also Ronald C. Santopadre, “Deterioration of Limits on the Use of Force and Its Perils: A Rejection of the Kosovo Precedent” (2002) St. John’s J. Legal Comment. 369.

<sup>46</sup> He first announced this in 1970. See Thomas Franck, “Who Killed Article 2(4)? Changing Norms Governing the Use of Force By States” (1970) 64 Am. J. Int’l L. 836. But see Louis Henkin, “The Reports of the Death of Article 2(4) Are Greatly Exaggerated” (1971) 65 Am. J. Int’l L. 544.

<sup>47</sup> Thomas Franck, “The Use of Force in the Struggle Between Humanity and Unreason” in Obiora Chinedu Okafor & Obijiofor Aginam, eds., *Humanizing Our Global Order: Essays in Honour of Ivan Head* (Toronto: University of Toronto Press, 2003) at 86.

<sup>48</sup> For a similar view, see Byers, *supra* note 27, arguing that Franck’s arguments impliedly licence powerful governments to run over less powerful States. See also James Gathii, “Foreign and Other Economic Rights Upon Conquest and Under Occupation: Iraq in a Historical and Comparative Perspective” (2004) 25 U. Pa. J. Int’l Econ. L. 49, arguing that the United States has consistently sought to be free from the constraints of international law in its foreign affairs.

commitment against use of force confirms the significance of this rule.<sup>49</sup> Louis Henkin has therefore argued that the invasion of Panama by the United States did not erode or modify established law on non-use of force as was demonstrated by the fact that a large majority of the States of the world rejected legal justifications of the United States invasion of Panama.<sup>50</sup> The same is true of the pre-emptive war the United States waged with its small group of allies against Iraq in 2003 and of the expanding claims of a doctrine of pre-emptive war, as we shall see below. As the ICJ contemplated in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, article 51 is alive and well.<sup>51</sup>

### III. CRITERIA FOR THE EMERGENCE OF A NEW NORM UNDER THE DOCTRINE OF SOURCES

#### A. *The Higher Normativity of the Norm Against the Use of Force*

The prohibition of the use of force is a norm of “higher normativity,” which means that it ought to be maintained “even in the face of inconsistent practice.”<sup>52</sup> Oscar Schachter further observes that it “is sufficient to recognize that there is a category of norms that are part of general international law: which governments in general regard as obligatory despite violations, even if widespread” and that the prohibition on the use of force was one of them.<sup>53</sup> Further, under the doctrine of sources, State practice inconsistent with a rule of international law is not treated as evidence of emergence of a new rule. Instead, such inconsistent practice should, according to the ICJ be treated as a breach of that rule.<sup>54</sup> As

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<sup>49</sup> See *Nicaragua*, *supra* note 8 at 99-100.

<sup>50</sup> Louis Henkin, “The Invasion of Panama and International Law: A Gross Violation” (1991) 29 *Colum. J. Transnat’l L.* 311 at 312; Ved P. Nanda, “The Validity of United States Intervention in Panama Under International Law” (1990) 84 *Am. J. Int’l L.* 494. Similarly, an overwhelming number of African and Asian countries did not support the United States’ blockade in the Cuban missile crisis. See A. Mark Weisburd, *Use of Force: The Practice of States Since World War II* (University Park: Pennsylvania University Press, 1997) at 215-18.

<sup>51</sup> *Supra* note 6 at 263, where the Court noted that it “cannot lose sight of the fundamental right of every State to survival, and thus to resort to self defense, in accordance with Article 51, when its survival is at stake” [emphasis added].

<sup>52</sup> Oscar Schachter, “Entangled Treaty and Custom” in Yoram Dinstein, ed., *International Law at a Time of Perplexity: Essays in Honor of Shabtai Rosenne* (Boston: M. Nijhoff, 1989) 717 at 733-34.

<sup>53</sup> Oscar Schachter, “New Custom: Power, *Opinio Juris* and Contrary Practice” in Jerzy Makarczyk, ed., *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Boston: M. Nijhoff, 1996) at 539.

<sup>54</sup> *Nicaragua*, *supra* note 8 at 98.

the evidence shows in Part IV below, only a small number of States have proposed a new doctrine on the pre-emptive use, but there has been widespread dissent undermining the claim that a new norm has emerged.

B. *Dissenters to Customary International Law Norms Are Bound*

In the *North Sea Continental Shelf Cases*, (*Germany v. Denmark*)<sup>55</sup> Judge Lach observed that

the fact that some states have enacted special legislation or concluded agreements at variance with a particular rule ... cannot be held to have disturbed the formation of a general rule of law on delimitation. Particular exceptions do not necessarily frustrate the emergence of a general customary rule, thus giving it a greater suitability for shaping the emerging law of the future than would be the case with treaty law.<sup>56</sup>

The claim that a dissenter can sometimes not be bound by norms of customary international law is a minority view and has therefore been called “illogical, false and threatening” to the nature of customary international law.<sup>57</sup>

Further, as the ICJ observed in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, profound disagreements between States as to the existence of a norm advanced as a customary international law makes it impossible that there is *opinio juris* in favour of such a norm.<sup>58</sup> As such, simply because a few States have advocated a new doctrine of pre-emptive war does not, in light of the significant differences of opinion between States, lead to the establishment of an *opinio juris* in favour of pre-emption.

C. *Dissenters of Customary International Law Norms Are Bound if they Did Not Object During the Formation of the Norm*

As a general matter, rules of customary international rule can arise where “the necessary degree of generality is reached” even in the face of

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<sup>55</sup> *Supra* note 5.

<sup>56</sup> Cited approvingly in Weeramantry, *supra* note 1 at 226.

<sup>57</sup> Jordan Paust, “Customary International Law in the United States: Clean and Dirty Laundry” (1998) 40 *German Y.B. Int’l L.* 78-116. See also Tiyanjana Maluwa, “Custom, Authority and Law: Some Jurisprudential Perspectives of Customary International Law” (1994) 6 *Afr. J. of Int’l and Comp. L.* 387, esp. at 407.

<sup>58</sup> *Nuclear Weapons*, *supra* note 6 at 254.



the opposition of one State.<sup>59</sup> However:

if a custom becomes established as a general rule, it binds all States which have not opposed it, whether or not they themselves played a part in its formation. This means that in order to invoke a custom against a State, it is not necessary to show specifically acceptance of that the custom as law by that state; its acceptance of the custom will be presumed so that it will be bound unless it can adduce evidence of its actual opposition to the practice in question.<sup>60</sup>

As such, objections to the pre-emptive use of force would only have been effective if they were made while the norm was in formation and, at the time, expressed unambiguously and with persistent objections to it.<sup>61</sup> For example in the *Norwegian Fisheries* case, the ICJ rejected application of a ten-mile rule to Norway, which had objected to it during its formation, although in this case the Court also found that no such rule existed.<sup>62</sup> In *Asylum Case*, Peru was held to have repudiated a custom that may have existed among other Latin American countries.<sup>63</sup> By contrast, the United States, Russia, Israel, and Australia have, in the past, unambiguously accepted the rule against non-use of force, including pre-emptive use of force; as a result, their declarations of a new norm would fall short of establishing a new inconsistent norm.

D. *Persistent Objection to a Jus Cogens Norm is Impermissible and a Violation of the Norm*

Persistent objectors cannot validly assert objections to *jus cogens* norms. *Jus cogens* norms allow no derogation.<sup>64</sup> *Nicaragua* held that the rule against the use of force was a “conspicuous example of a rule of international law having the character of *jus cogens*.”<sup>65</sup> Further, when a rule of international law is established, objectors to the rule cannot block the

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<sup>59</sup> Sir Humphrey Waldock, “General Course on Public International Law” (1962) 106:2 Rec. des Cours 1 at 49-53.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.* This rule is also reflected in *Restatement (Third) of Foreign Relations Law of the United States* §102 (1987) at Comment d [*Restatement*].

<sup>62</sup> *Anglo-Norwegian Fisheries Case (U.K. v. Norway)*, [1951] I.C.J. Rep. 116.

<sup>63</sup> (*Columbia v. Peru*), [1950] I.C.J. Rep. 266.

<sup>64</sup> *Restatement*, *supra* note 67 at Comment k.

<sup>65</sup> *Nicaragua*, *supra* note 8 at 103-04. See also Robert Jennings & Arthur Watts, eds., *Oppenheim's International Law* (Essex: Longman, 1992) at 7-8; Jonathan I. Charney, “Universal International Law” (1999) 87 Am. J. Int'l L. 529 at 539-41.

application of the rule.<sup>66</sup> Thus, protests and opposition to a proposed rule by some members of the international community discredits the generality of such a proposed rule.<sup>67</sup>

A small number of states cannot create a new rule that is inconsistent with a *jus cogens* norm. As such, State practice that conflicts with a *jus cogens* rule would be violating the rule rather than establishing a new rule.<sup>68</sup> As the ICJ held in the *Continental Shelf* cases, a "very widespread and representative participation" is necessary to establish a norm of customary international law.<sup>69</sup>

#### IV. WHAT STATE PRACTICE AND *OPINIO JURIS* CONFIRM

In this Part, I examine both State practice and *opinio juris* on pre-emptive war, especially among those States that have advocated this doctrine. I do so by examining what the leaders of these countries have espoused as the doctrine in White Papers, speeches, and other evidence. I also examine the response of States that do not espouse this doctrine. The response of the United Nations and the European Union is also examined. The purpose of this evidentiary inquiry is to take seriously the claim that rules prohibiting the use of force should be changed to accommodate pre-emptive war or that in light of the practice of these States, that there is an emerging norm of pre-emptive war by testing whether the evidence meets the threshold criteria under the doctrine of sources for the establishment of such a norm.

The prohibition of the use of force in general and the pre-emptive use of force in particular are not only prohibitions under customary international law but are also *jus cogens* norms. This sets an almost insuperable barrier for their displacement without widespread and representative participation in the repudiation of these prohibitions as announced by States supporting pre-emption. I will examine these States and objectors to their announced doctrine of pre-emption in turn.

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<sup>66</sup> J. Charney, "The Persistent Objector Rule and the Development of Customary International Law" (1985) 56 Brit. Y.B. Int'l L. 1 at 23-24.

<sup>67</sup> Gennadij Michajlovic Danilenko, "International *Jus Cogens*" (1991) 2 E.J.I.L. 42 at 65; R. St. J. Macdonald, "Fundamental Norms in Contemporary International Law" (1987) 25 Can. Y.B. Int'l L. 115 at 131.

<sup>68</sup> See *Nicaragua*, *supra* note 8, where the ICJ rejected the view that instances of departure from a rule of international law should be treated as indications of the recognition of a new rule. Instead the Court held such departures "should generally have been treated as breaches of that rule."

<sup>69</sup> *Continental Shelf*, *supra* note 5 at 42.

A. *Israel*

The Sharon administration has embraced the doctrine of pre-emption to safeguard its security in the absence of an armed attack from the occupied territories or from its neighbours. For example, in June 2002, Israel launched a pre-emptive helicopter strike in the Gaza strip killing four Hamas leaders following suicide bomb attacks associated with Hamas. The Sharon administration stated thereafter that the pre-emptive attack was the beginning of a "massive activity against Hamas in the [Gaza] Strip."<sup>70</sup>

Sharon has continued to invoke the doctrine of pre-emption to justify Israel's actions in Palestinian controlled territory as self-defence. In a span of five days following 10 June 2003, Sharon ordered seven Israeli helicopter strikes against suspected Hamas targets in response to terrorist acts committed on Israeli territory.<sup>71</sup> Israel's most serious recent assertion of its support of pre-emption occurred when it crossed Israeli borders and fired missiles into Syria in October 2003 in retaliation for a restaurant suicide bombing in Haifa. A spokesman for Prime Minister Sharon stated that Israel would "not tolerate the continuation of this axis of terror between Tehran, Damascus and Gaza."<sup>72</sup> In a speech delivered by Sharon on 11 January 2004, the Prime Minister reaffirmed his belief in such pre-emptive strikes, asserting that "Syria is suspected to help and cover to the terror in Iraq, and Syria is behind together with the Iranians the leading terror against Israel ... they continue to help the Hizbullah."<sup>73</sup> Sharon warned that Israel would not become silent or inactive regarding its defence: "[I]f someone thinks for one minute that Israel will make any concession whatsoever when terror continues, that is a wrong assumption ... when it comes to security, no pressure by anyone, not now and not in the future, there will not be any compromises. We have the right to live peacefully."<sup>74</sup> To attain this peace, Sharon warned threatening States that

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<sup>70</sup> Uri Dan "Israeli Forces Storm Hebron: Sharon Pledges 'Massive' Push Against Terror" *New York Post* (25 June 2002) at 4.

<sup>71</sup> "Israel Will Continue Actions to Curb Palestinian Suicide Bombings" *AFX News* (15 June 2003).

<sup>72</sup> Michael Matza "Israel retaliates with strike on suspected terrorist camp in Syria" *Knight Ridder Newspapers* [Washington Bureau] (5 October 2003).

<sup>73</sup> Ariel Sharon, "Address by Prime Minister Ariel Sharon to the Foreign Press Corps" (11 January 2004), online: Israeli Ministry of Foreign Affairs <<http://www.mfa.gov.il/MFA/Government/Speeches%20by%20Israeli%20leaders/2004/Address%20by%20Prime%20Minister%20Ariel%20Sharon%20to%20the%20Fore>>.

<sup>74</sup> *Ibid.*

Israel was prepared to “hit its enemies any place and in any way.”<sup>75</sup>

Like other nations that actively adopt the doctrine of pre-emption, Israel asserts that peaceful diplomacy remains the first option in resolving disputes. Sharon has in fact publicly stated that his government seeks a “real, durable peace [and is] fully committed to opening negotiations” with Arab countries, but also maintains the position that Israel will retain the right to defend itself in the face of a threat that has not fully materialized.<sup>76</sup> Despite such statements, the Israeli administration has most recently stated that pre-emption remains an option in dealing with the problems that its nation faces today, including Iran’s nuclear development. Sharon reaffirmed Israel’s right to act pre-emptively, calling Iran’s nuclear exploration the “biggest danger to the existence of Israel.”<sup>77</sup> In a statement on 29 September 2004, Sharon stated that Israel “would take measures to defend itself” and would consider “all options” in case Iran maintains its nuclear program.<sup>78</sup> The Iranian nuclear crisis brings up a familiar point in Israeli defence history under Sharon.

When Sharon served as defense minister in 1981, Israel acted on similar statements when it launched a pre-emptive strike against the French-built Osirak nuclear reactor located a few miles outside of Baghdad, Iraq.<sup>79</sup> Since that time, the Prime Minister’s views on pre-emption appear not to have changed and seem to be, in fact, long-held. This stems from his belief that the possibility of Islamic neighbours obtaining nuclear weapons of mass destruction “is not a question of the balance of terror, but a question of [Israel’s] survival. We shall therefore have to prevent such a threat at its inception.”<sup>80</sup> His administration largely believes that firm, continuous pre-emptive strikes will safeguard Israel “because they undeniably weaken terrorist organisations.”<sup>81</sup>

Thus, in a speech delivered earlier this year, Sharon stated, “I feel

<sup>75</sup> Linda S. Heard, “Syria Wins a Match in a Rigged Game” *Gulf News* (9 December 2003), online: <<http://www.gulf-news.com/articles/opinion.asp?ArticleID=104979>>.

<sup>76</sup> *Ibid.*

<sup>77</sup> Uzi Mahnaimi & Peter Conradi, “Israel Targets Iran Nuclear Plant” [London] *Sunday Times* (18 July 2004) 24.

<sup>78</sup> “Israel in Warning to Iran, Financial Times Information” *Global News Wire—European Intelligence Wire* (29 September 2004).

<sup>79</sup> David Wood, “Analysis: Experts fear Iran acquiring atomic arms” *Seattle Times* (27 April 2004) A3, online: <[http://seattletimes.nwsources.com/html/nationworld/2001913658\\_irannukes27.html](http://seattletimes.nwsources.com/html/nationworld/2001913658_irannukes27.html)>.

<sup>80</sup> *Ibid.*

<sup>81</sup> “Israel Vows to Continue Policy of Assassinations Against Militant Leaders” *Channel NewsAsia International* (26 April 2004), online: <[http://www.channelnewsasia.com/stories/afp\\_world/view/81887/1/.html](http://www.channelnewsasia.com/stories/afp_world/view/81887/1/.html)>.

it is my historic responsibility to defend the lives of Israeli citizens, and that's what I am going to do."<sup>82</sup> Statements made by members of his administration appear to support the Prime Minister's belief. David Baker, a Sharon official, stated that Israel would "not stand idly by and wait until the next Palestinian terror attack occurs, and thus will take pre-emptive measures to thwart such terror before it lashes out."<sup>83</sup>

Egyptian president Hosni Mubarak denounced the Syrian raid as "aggression against a brotherly state."<sup>84</sup> The Lebanese Prime Minister stated that the United Nations should help to control Israel's aggression, and Germany's Chancellor Gerhard Shroeder denounced pre-emption altogether, holding that chances for peace "become more complicated when the sovereignty of a country is violated."<sup>85</sup>

While holding that Israel must be cautious in avoiding escalation, President Bush stated that he "made it very clear to Prime Minister Sharon that Israel has a right to defend herself, that Israel must not feel constrained in terms of defending the homeland."<sup>86</sup> British Prime Minister Tony Blair has supported Israel's pre-emptive strike policy noting that, "What's changed for me is post September 11th, you no longer wait for the thing to happen. You go out and actively try to stop it."<sup>87</sup> Prime Minister Howard of Australia has also defended Israel's stance stating, "Israel has no stauncher friend or ally than Australia in her legitimate aspiration to exist behind secure internationally recognised borders."<sup>88</sup>

## B. *Russia*

In contrast to the United States, Australia, and Israel, Russia appears to have adopted a more moderate pre-emption doctrine. For example, in September 2002, President Vladimir Putin stated that he preferred a resolution of the situation in Iraq through the use of diplomacy,

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<sup>82</sup> *Supra* note 73.

<sup>83</sup> Soraya Sarhaddi Nelson, "Israeli Crackdown in Gaza Strip Leaves at Least 2 Palestinians Dead" *Knight Ridder Newspapers* [Washington Bureau] (16 March 2004).

<sup>84</sup> *Supra* note 75.

<sup>85</sup> *Supra* note 72.

<sup>86</sup> Phillip Coorey, "Bush's Nod to Israel on Forceful Defence" *The [Australia] Mercury* (8 October 2003) 25.

<sup>87</sup> "An assassination which does not make Israel safer" *[London]Independent* (27 September 2004) 30, online: <[http://comment.independent.co.uk/leading\\_articles/story.jsp?story=566025](http://comment.independent.co.uk/leading_articles/story.jsp?story=566025)>.

<sup>88</sup> John Howard, M.P. [Australia], "Address to the National Press Club" (The Great Hall, Parliament House, 14 March 2003), online: <<http://www.pm.gov.au/news/speeches/speech74.html>>.

based on “existing UN Security Council regulations and in strict compliance with the principles of international law.”<sup>89</sup> Yet, in 2002, Russia threatened to launch pre-emptive strikes on Georgia if authorities were unable to crush guerilla bases there.<sup>90</sup> In contrast to the Israeli and American positions threatening pre-emptive strikes wherever there may be an imminent danger to its people, Putin’s administration seems to embrace a more selective pre-emptive theory. According to Putin, “if the practice of using preventive strikes becomes more widespread and stronger, then Russia reserves the right to react in a similar way.”<sup>91</sup> Thus, while Putin has been critical of the doctrine of pre-emptive force and was, for a long time, an outspoken critic on the Security Council of use of force by the United States, Russia today “reserves the right to strike pre-emptive blows.”<sup>92</sup>

Thus, after a fifty-seven hour siege of a Moscow theatre by Chechen terrorists in October 2002, Putin ordered his military to incorporate a pre-emptive doctrine into the Russian defence policy, and warned that Russia would strike “all the places where the terrorists themselves, the organizers of these crimes and their ideological and financial inspirers are.”<sup>93</sup> While stressing the need to obey international law and the importance of the United Nations, Putin warned, “whoever threatens Russia, he should remember that there will be proportionate retaliation.”<sup>94</sup>

The issue of pre-emption was once again prevalent in Russia in 2004 when a Beslan school was held hostage by Chechen terrorists, resulting in the deaths of hundreds of people, including children. Shortly following the hostage crisis, a senior military official, Colonel General Yuri Baluyevsky, stated that Moscow was prepared to take any action necessary to “liquidate terrorist bases in any region of the world.”<sup>95</sup> Britain’s Foreign Secretary Jack Straw was quick to approve of Russia’s pre-emptive stance

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<sup>89</sup> “Putin Urges Talks on Iraqi Crisis” *United Press International* (26 September 2002).

<sup>90</sup> *Ibid.*

<sup>91</sup> “Putin Says Russia Reserves Right to Use Preventive Strikes” *Prime Time—Tass Business News Agency Newswire* (9 October 2003).

<sup>92</sup> “President Putin: Russia Reserves the Right to Pre-Emptive Strikes” *RIA Novosti* (9 October 2003).

<sup>93</sup> Steven Lee Myers, “Hostage Drama in Moscow: Russia Responds; Putin Vows Hunt for Terror Cells Around the World” *The New York Times* (29 October 2002) A1.

<sup>94</sup> “Russia has right to preemptive strike in certain conditions—Putin” *Itar-Tass News Agency* (17 October 2003) (Lexis).

<sup>95</sup> Andrew Woodcock, “Straw Defends Russian Threat to Attack Terrorist Bases” *Press Association* (8 September 2004).

holding that the UN *Charter* permitted such self-defense.<sup>96</sup> The European Union however, reacted differently to the Russian official's comments, stating through a spokeswoman that it was against "'extra-judicial killings' in the form of pre-emptive strikes."<sup>97</sup>

Putin gave one of his strongest statements on the importance of Russia adopting a pre-emptive strategy on 4 September 2004, a few days following the Beslan tragedy. Beslan followed a series of terrorist acts against Russia including the Chechen bombing of two Russian passenger planes in August, as well as a suicide bombing in a Moscow subway station.<sup>98</sup> In a public speech from the Kremlin, Putin asserted that Russia had been unresponsive to terrorists and had "showed [itself] to be weak" noting that "the weak get beaten."<sup>99</sup> Putin also declared that the terrorists had waged a "total, cruel and full scale" war against Russia, and announced plans to strengthen the country's defense.<sup>100</sup> Only a few weeks after this statement, Putin confirmed that his administration would be forming an anti-terrorism agency that would "have the power to destroy criminals in their hideouts, and if necessary, in other countries."<sup>101</sup>

While Putin has advocated pre-emption, he continues to refer to the importance of complying with international law and United Nations Security Council Resolutions—unlike Bush, Sharon, and Howard. For example, Putin stated that while Russia is making "fundamental preparations for pre-emptive action against terrorists," it will do so "in strict compliance with the law, the Constitution, and international law."<sup>102</sup> Putin has also backed the rights of other nations to use pre-emptive force because "no country is secure from terrorist attacks."<sup>103</sup>

Putin continues to advocate the importance of peaceful settlement

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<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> "Putin targets terrorists: Russia getting ready to make pre-emptive strikes, won't bargain with Chechen rebels, President says" *The Record [Kitchener-Waterloo, Ontario]* (18 September 2004) A6.

<sup>99</sup> Vladimir Putin, "Address" (Moscow, Kremlin, September 2004), online: <[http://president.kremlin.ru/eng/speeches/2004/09/04/1958\\_type82912\\_76332.shtml](http://president.kremlin.ru/eng/speeches/2004/09/04/1958_type82912_76332.shtml)>.

<sup>100</sup> *Ibid.*

<sup>101</sup> Cynthia Kirk, "Putin Calls for Changes in Russia's Political System" (Radio Broadcast, originally aired September 2004) [Voice of America, Special English, presented by Steve Ember], transcript available online: Voice of America <<http://www1.voanews.com/SpecialEnglish/article.cfm?objectID=CD9DDED8-8850-4EBE-BD8C31A27E1E5173>>.

<sup>102</sup> Viktoriya Sokolova, "Anti-terrorist measures to be pre-emptive, constitutional: Putin" *Itar-Tass News Agency* (17 September 2004) (Lexis).

<sup>103</sup> *Ibid.*

of disputes.<sup>104</sup> Yet, as he stated in December, “the price of procrastination, the price of losing initiative is extremely high. We pay the blood, the lives of our comrades and civilians for this.”<sup>105</sup> Russia’s equivocation on the issue of pre-emption is also evidenced by its criticism of the United States’ invasion of Iraq in 2003. The Permanent Representative of the Russian Federation to the United Nations presented to the Security Council a statement signed by President Putin opposing the war.<sup>106</sup> Putin argued in the statement that the United States had not proved that Iraq had weapons of mass destruction or that it was a sponsor of international terrorism. In the statement, Russia argued that regime change by a foreign country was contrary to international law and that only the citizens of a country could change their government.<sup>107</sup> Russia argued that the U.S.’s unilateral use of force would only endanger international peace and security and undermine the United Nations system of collective security.<sup>108</sup>

### C. *Australia*

Much like President Bush and Prime Minister Sharon, Australian Prime Minister John Howard sees the protection of his citizens as his most sacred duty. In a campaign speech against his opponent in 2004, Howard said that “the first responsibility of a prime minister is to ensure the defense, protection and security of his country.”<sup>109</sup> Like these leaders, Prime Minister Howard shares the more aggressive theory of pre-emption and unhesitatingly promulgates its importance. Australia’s support for pre-emption has resonated through much of the Pacific, creating both positive and negative responses from Asian-Pacific neighbours.

Howard announced to the world that his administration would not remain silent or ambivalent if there was evidence that a pre-emptive strike

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<sup>104</sup> Vladimir Putin & Gerhard Schroeder, “Joint statement by President of the Russian Federation Vladimir Putin and Federal Chancellor of the Federal Republic of Germany Gerhard Schroeder” (Moscow, Kremlin, September 2004), online: President of Russia <[http://president.kremlin.ru/eng/speeches/2004/09/09/1142\\_type82912\\_76594.shtml](http://president.kremlin.ru/eng/speeches/2004/09/09/1142_type82912_76594.shtml)>.

<sup>105</sup> “Putin Urges Violent Pre-Emptying Efforts in Caucasus.” *Interfax News Service* (20 December 2003) (WL).

<sup>106</sup> United Nations Security Council, Sergey Lavrov, Letter dated 20 March 2003 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary General, UN Doc. S/2003/348.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> Neville D’Cruz, “Howard Reiterates Plan for Pre-Emptive Action” *Malaysia General News* (20 September 2004).



would avert a terrorist threat against Australia. Howard's 2002 statement summarizes a view that has remained unchanged:

"[T]he principle that a country which believes it is likely to be attacked is entitled to take pre-emptive action is a self-evidently defensible and valid principle .... [L]et me make it perfectly clear: if I were presented with evidence that Australia was about to be attacked and I was told by our military people that by launching a pre-emptive hit we could prevent that attack from occurring I would authorise the pre-emptive hit and expect the Opposition to support me in the process ... ." <sup>110</sup>

Prime Minister Howard became even more resolute in his pre-emptive approach following the 12 October 2002 bombings in Bali, Indonesia that killed 180 people, including 82 Australians.<sup>111</sup> Following October 2002, Australia was no longer a stranger to terrorism and Howard began to demand reform of international law. He began to assert that the United Nations was outdated and no longer suited for the contemporary problems facing the world, arguing that while it may have been effective throughout the Cold War, the current mandate of the United Nations was not designed to handle modern terrorist threats.<sup>112</sup> Howard's early adoption of pre-emption and of reform of international law were hailed by the White House. White House Press Secretary Ari Fleischer affirmed, "A nation that remains in the status quo after an event like September 11th, can only endanger its own people."<sup>113</sup> Such praise from the United States however, did not alter the views of Australia's Asian-Pacific neighbours.

Howard's comments seeking reform of the United Nations and promising pre-emptive attacks were not welcomed by Malaysia, Indonesia, or the Philippines. Malaysian Prime Minister Mahathir Mohamed warned that his country was sovereign, and should its sovereignty be violated by Australia, it would not hesitate to defend itself. Mohamed warned, "We will hold this as an attempt to wage war against the government and the country ... . We will take action according to our country's laws."<sup>114</sup> An Indonesian military chief similarly warned Australia to beware of taking any action that may threaten Indonesian sovereignty: "Such an action is an act of

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<sup>110</sup> Interview of the Prime Minister the Hon. John Howard M.P. (20 June 2002) online: <<http://www.pm.gov.au/news/interviews/2002/interview1709.htm>>. See also "Fed: Howard says he'd strike first if Australia threatened" *AAP Newsfeed* (20 June 2002) (Lexis).

<sup>111</sup> Sid Maher, "Bush backs Howard strike plan" *Courier Mail [Queensland, Australia]* (4 December 2002) 2.

<sup>112</sup> "Green Party Attacks Howard Comment on Pre-Emptive Strikes" *Financial Times [New Zealand]* (2 December 2002) (Lexis).

<sup>113</sup> *Supra* note 111.

<sup>114</sup> Mark Baker, "Howard Caught In Asian Hornet's Nest" *The Age* (4 December 2002) 2.

aggression against another sovereign country and we will not stand by should they attack ... even if they say it is against terrorists.”<sup>115</sup> In a softer approach, the Philippines stressed that Australia was moving in the wrong direction with its foreign policy by adopting the pre-emptive approach. The Philippine National Security Advisor Roilo Golez stated that “governments must work together, not act unilaterally” and noted that Howard’s comments did “not follow the doctrines of peacekeeping and sovereignty.”<sup>116</sup>

Not every Asian neighbour, however, was critical of Howard’s explicit adoption of this expansive pre-emption doctrine. The Japanese claimed that they were “comfortable” with Australia’s position and welcomed the approach.<sup>117</sup> Despite criticism, Howard has continued to make his country’s newly adopted defence theory clear. In Australia’s 2003 “Defence Update,” the Australian government claimed that diplomacy remained the preferred option, but recognized that “international cooperation will not always succeed” and noted that pre-emptive measures are on the list of options available to secure Australia.<sup>118</sup> Recently taking a more diplomatic tone however, Howard has downplayed his comments praising pre-emption, stating that they were not directed toward his Pacific neighbours, and that they should feel confident that Australia has no intention to pre-emptively attack Indonesia, Malaysia, or other Pacific neighbours at this time.<sup>119</sup> Howard has also promised that while Australia intends to retain pre-emption as a valid option in its foreign policy, it would never attack another State without first consulting it: “We would always co-operate and we would always collaborate, but what I have said is if there was no alternative, this is the action we would take.”<sup>120</sup>

In a speech delivered to Australia’s Strategic Policy Institute, Howard stated that while Australia would continue to work through the United Nations, “we will not confine our interaction with particular

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<sup>115</sup> *Ibid.*

<sup>116</sup> John Shaw, “Threats and Responses: Asia-Pacific; Startling His Neighbors, Australian Leader Favors First Strikes” *The New York Times* (2 December 2002) A11.

<sup>117</sup> Shane Green, “Japan Defends PM Over Asia Row” *The Age* (10 December 2002) 1.

<sup>118</sup> Australian Government Department of Defence, Defence Update, “The Threat of Weapons of Mass Destruction” (2003), online: Australian Government Department of Defence <<http://www.defence.gov.au/ans2003/section5.htm>>.

<sup>119</sup> Chris Jones & Malcolm Cole, “First-blood doctrine rejected—PM like Rambo: Labour” *Courier Mail [Queensland, Australia]* 6.

<sup>120</sup> Maria Hawthorne, “Howard defends his pre-emptive pledge” *Geelong Advertiser (Regional Daily)* (22 September 2004) 5.

institutional forms or processes as ends in themselves.”<sup>121</sup> Howard confirmed his stance in September 2004 when he stated that, “[t]his idea that the defense of Australia is something that is negotiable in the forums of the UN is a doctrine I would never accept.”<sup>122</sup> These statements are eerily similar to President Bush’s 2004 State of the Union speech when the President declared that “America will never seek a permission slip to defend the security of our country.”<sup>123</sup>

Australia seems to be moving in the direction of preparing for pre-emptive strikes. Howard announced campaign plans in August 2004 to create a one hundred million dollar Australian flying squad that would be deployed to Indonesia, the Philippines, and other countries in the region to assist local police in detaining suspected terrorists.<sup>124</sup> As part of this plan, Howard also promised to expand Australia’s intelligence service and send Australian intelligence resources to Asian-Pacific countries to prevent terrorist attacks.<sup>125</sup>

#### D. *The United States*

The United States’ 2002 National Security Strategy Report announced that, if faced with a threat, the country would no longer wait for allies’ approval before it would act: “While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone to exercise our right of self defense by acting pre-emptively against such terrorists.”<sup>126</sup> In a speech delivered at West Point in December 2002, Bush laid out his new foreign policy vision, that America should “be ready for pre-emptive action when necessary to defend our liberty and to defend our lives.”<sup>127</sup> The Bush administration points to history for this shift in policy approach, stating in its Security Report that America has long held pre-emption as an option in its foreign policy and in

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<sup>121</sup> John Howard, “Transcript of the Prime Minister the Hon. John Howard MP Address to the Australian Strategic Policy Institute, Westin Hotel, Sydney” 18 June 2004, online: <<http://www.pm.gov.au/news/speeches/speech921.html>>.

<sup>122</sup> “No mixed messages on pre-emptive strikes, says Howard” *AAP Newsfeed* (21 September 2004) (Lexis).

<sup>123</sup> George W. Bush, “State of the Union Address” (Washington, D.C., 20 January 2004), online: <<http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>>.

<sup>124</sup> “Rivals Swap Jibes on Security” *Cairns Post* (21 September 2004) 9.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Supra* note 39 at 6.

<sup>127</sup> Richard Halloran, “America’s Right to Strike First When in Danger” *Baltimore Sun* (6 December 2002) 27A.

some cases has even acted pre-emptively.<sup>128</sup> Examples mobilized to support this point include President Kennedy's naval blockade of Cuba, the 1986 missile attack against Libya, and President Clinton's 1998 air strikes in Sudan and Afghanistan.<sup>129</sup> Much like the Sharon and Howard administrations, the Bush administration has sought to modify international law to ensure that it reflects contemporary threats.<sup>130</sup> President Bush made his belief clear when he proclaimed in his 2004 State of the Union address that, "After the chaos and carnage of 9/11, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States, and war is what they got."<sup>131</sup>

Under the Bush doctrine, the United States is willing to bypass organizations like the United Nations and the European Union to "act against such emerging threats before they are fully formed."<sup>132</sup> While President Bush speaks of the important role that the United Nations plays in the world today, his administration is much more focused on implementing an anti-terrorist, pre-emptive, and America-first approach.<sup>133</sup>

<sup>128</sup> *Supra* note 39 at 15.

<sup>129</sup> See John Alan Cohan, "The Bush Doctrine and the Emerging Norm of Anticipatory Self Defense in Customary International Law" (2003) 15 Pace Int'l L. Rev. 283 at 323-25, arguing that, should pre-emption become an international custom, it has the capability to become a legitimate part of international law. See also Ed Timms, "Will Pre-Emption Strategy Be Casualty of Iraq War? Some Feel Bush Policy Alienates Allies; Backers Say Rogue States Curbed" *Dallas Morning News* (20 March 2004) 1A, outlining examples of previous American pre-emptive actions. But see Louis Henkin, "Use of Force: Law and U.S. Policy" in Louis Henkin *et al.*, eds., *Right v. Might: International Law and the Use of Force* (New York: Council on Foreign Relations Press, 1991) 37 at 45-46; Abram Chayes, *The Cuban Missile Crisis* (New York: Oxford University Press, 1974), noting that the Cuban missile crisis was not predicated on self-defence claims.

<sup>130</sup> According to the *National Security Strategy*, *supra* note 39 at 15:

[f]or centuries, international law 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. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means ... Instead, they rely on acts of terror and ... weapons that can be easily concealed, delivered covertly, and used without warning ... The United States cannot remain idle when dangers gather.

<sup>131</sup> *Supra* note 123.

<sup>132</sup> *National Security Strategy*, *supra* note 39 at 4.

<sup>133</sup> "President Meets with U.N. Secretary General Kofi Annan," (3 February 2004) (Transcript of remarks at the White House) online: The White House <<http://www.whitehouse.gov/news/releases/2004/02/print/20040203-1.html>>.

E. *Japan and Taiwan*

When Prime Minister Howard announced Australia's acceptance of pre-emption, he received mixed reviews from his Asian-Pacific neighbours. Countries like Indonesia and Malaysia were the most vocal against pre-emption, warning that independent national sovereignty must be respected and that no pre-emptive strikes would be allowed without retaliation.<sup>134</sup> Two other Pacific region powers have, with the support of the United States, adopted and supported the doctrine of pre-emption.

The first nation to actively support Australia in its adoption of pre-emption was Japan. Fearing the increasing threat posed by a nuclear-capable North Korea, Japan's chief defence minister, Shigeru Ishiba announced in February, 2003 that Japan would explore an offensive military capability to pre-emptively deal with a missile attack. Mr. Ishiba warned that Japan would not hesitate to launch a pre-emptive attack on North Korea if it received firm intelligence information that North Korea was planning a missile strike against Japan.<sup>135</sup> In April 2003, Japan acted on its inclination toward pre-emption when it launched two spy satellites to gather information, mostly about North Korea, which it sees as a dire threat to the region.<sup>136</sup> Most recently however, Japanese Prime Minister Junichiro Koizumi's advisory panel recommended, in the country's most recent defence report, that Japan modernize its Constitution and its non-nuclear weapons and commands systems to create a pre-emptive strike capability in case it is necessary in the face of an attack.<sup>137</sup> Japan was one of the only countries to support the United States' 1998 pre-emptive strikes in Afghanistan and in Sudan.<sup>138</sup>

Following in Japan's footsteps, Taiwan has also seemingly adopted a pre-emptive doctrine, especially with the backing of the United States. According to Taiwan's Minister of National Defense Tang Yao-ming, Taiwan has begun to prepare its armed forces for a pre-emptive strike should China decide to launch a surprise attack against the island.<sup>139</sup> Peter Brooks, a former American defense official, advised Taiwan that mounting pre-emptive strikes on certain Chinese mainland strategic centres like ports

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<sup>134</sup> "Malaysia Able to Deal With Terrorism Threat, Says Najib" *Malaysia General News* (20 September 2004) (Lexis).

<sup>135</sup> Frank Ching, "Contagious Disease" *South China Morning Post* (10 April 2003) 13.

<sup>136</sup> *Ibid.*

<sup>137</sup> "Japan Turns to Pre-Emption" Editorial, *Business Times Singapore*, (15 October 2004) (Lexis).

<sup>138</sup> John Alan Cohan, *supra* note 129 at 325.

<sup>139</sup> Frank Ching, *supra* note 135.

and air bases would be an effective defence strategy for the island nation.<sup>140</sup>

F. *Division Within Europe: But Overwhelming Opposition Nevertheless*

Britain and Italy have adopted the pre-emptive strike doctrine into their foreign policies, while Germany and France have refused, emphasizing the importance of maintaining the prohibition of pre-emptive use of force under international law.

French President Jacques Chirac has declared that he is against pre-emptive strikes. In response to the pre-emptive action in Iraq, Chirac stated in an interview that "we just feel that there is another option, another way, a less dramatic way than war, and that we have to go down that path."<sup>141</sup> Chirac wishes to maintain the importance of multilateral action and believes that pre-emption poses a great danger to international diplomacy and the current world order. As he stated in September 2003, "In an open world, no one can live in isolation, no one can act alone in the name of all, and no one can accept the anarchy of a society without rules."<sup>142</sup> By contrast, British Prime Minister Tony Blair argued that "Containment will not work in the face of the global threat[s] that confront us."<sup>143</sup> Blair thus believes that the United Nations should be given the "capability to act effectively" against terrorism.

Italian Prime Minister Silvio Berlusconi, a close ally of the United States, also supports an expansive doctrine of pre-emptive war. Following the killing of eighteen Italian soldiers in Iraq, Berlusconi remained resolute that his country would not be "intimidated or deterred" by terrorist attacks.<sup>144</sup> Similarly, at a NATO Summit, Berlusconi flaunted the muscle of the coalition to terrorists, warning that whatever their mission is, it is futile because they would "never be able to beat us."<sup>145</sup> Chirac's opposition to the doctrine is by no means an isolated view in Europe. In fact, his views are much like those formally adopted by the European Union.

In considering a new European Security Strategy in 2003, the

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<sup>140</sup> *Ibid.*

<sup>141</sup> David Jackson, "Bush Blames France for United Nations Impasse" *Dallas Morning News* (17 March 2003) 1A.

<sup>142</sup> Elisabeth Bumiller, "The Struggle for Iraq: The President; Bush, at U.N., Defends Policy Over Iraq" *The New York Times* (24 September 2003) 1.

<sup>143</sup> Douglas Davis, "Blair Defends Iraq War Stand" *Jerusalem Post* (7 March 2004) 5.

<sup>144</sup> Richard Owens, "Italians Mourn Victims of Blast" *The Australian* (14 November 2003) 9.

<sup>145</sup> Daniel Schorr, "Taking the Battle to the Terrorists" *Christian Science Monitor* (7 June 2002)

European Union debated whether pre-emption and first-strike should be included in the policy declaration. In a draft from Robert Cooper, a former policy advisor to British Prime Minister Tony Blair, pre-emption was included as a viable defence measure.<sup>146</sup> France and Germany however, ensured that all references to “pre-emption” were excised from the submitted draft and instead replaced with “preventative engagement,” which is more focused on diplomacy and multilateral negotiation.<sup>147</sup> In a public statement concerning the change, a German diplomat stated “We are not having a security doctrine that reflects the U.S. view or that [suggests] we are doing this to please the Americans.”<sup>148</sup> This position is consistent with resolution 1.6.8 of the European Parliament of September 2002, which “asserted that pre-emptive strikes were not the most effective approach in the fight against terrorism” and “reiterated the need to develop within the transatlantic framework a common and comprehensive approach to security and the risks to security, in a balanced way and on an equal footing.”<sup>149</sup>

G. *An Overwhelming Number of States From All Regions of the World Oppose Pre-emption*

The overwhelming number of States in the world have openly opposed the declaration of a supposed new norm of pre-emptive use of force. For example, the Chargé d’Affaires of the Permanent Mission of Malaysia to the United Nations argued that the unilateral action by the U.S.-led Iraq invasion of 2003 under the pre-emption doctrine constituted evidence of an illegitimate act of aggression, and expressed regret for the resort to military action without exhausting all the avenues in peaceful means.<sup>150</sup> This Malaysian diplomat argued that Iraq had been actively cooperating with the inspection process and regretted that the war would produce a humanitarian and economic catastrophe for the people of Iraq.<sup>151</sup>

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<sup>146</sup> Judy Dempsey, “Words of War: Europe’s First Security Doctrine Backs Away from a Commitment to US-Style Pre-Emption” *Financial Times [London]* (5 December 2003) 17.

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

<sup>149</sup> EC, European Parliament Resolution, *Assessment of and Prospects for the EU Strategy on Terrorism One Year After 11 September 2001*, [2002] Bulletin EU 10-2002, online: European Communities <<http://europa.eu.int/abc/doc/off/bull/en/200210/p106008.htm>>.

<sup>150</sup> Letter from Zainuddin Yahya, Chargé D’Affaires A.I. of the Permanent Mission of Malaysia, to the Secretary General of the United Nations, UN Doc. A/58/68 (19 March 2003) online: <<http://daccessdds.un.org/doc/UNDOC/GEN/N03/290/91/IMG/N0329091.pdf?OpenElement>>.

<sup>151</sup> *Ibid.*

This Malaysian view was also amplified by its Deputy Prime Minister Datuk Seri Adbullah Ahmad Badawi who argued that the use of pre-emption by United States, Britain, and Australia in the Iraqi conflict was illegal.<sup>152</sup> According to this Malaysian leader, the countries of Southeast Asia were opposed to the intrusion of other nations.<sup>153</sup>

The Permanent Representative of Qatar to the UN communicated to the United Nations the opposition of the Gulf Cooperation Council (GCC) to the pre-emptive war against Iraq because of its illegality under international law and the collective security arrangements of the GCC states.<sup>154</sup> The Permanent Observer of the League of Arab States to the UN also condemned the military action in violation of international law and the recurring attempts by the United States to interfere in the internal affairs of the Arab world.<sup>155</sup> Like the GCC, the Arab States' expressed their solidarity with Iraq in opposing a U.S.-led invasion.<sup>156</sup> According to the Permanent Observer, a resolution of the League of the Arab states deemed the invasion of Iraq as constituting aggression and as a violation of the UN *Charter*, a departure from international legitimacy, a threat to international peace, and an act of defiance against the international community and world public opinion.<sup>157</sup>

Other non-Council members also expressed their opposition against the U.S.-led action.<sup>158</sup> Burno Rodriguez Parrilla, Representative from Cuba, noted that the invasion was a unilateral one that would "have devastating consequence worldwide and would be the end of democracy in international relations, as well as totally destabilize the Middle East ... . It would place all States, with no exception, at risk of facing the unpredictable hazards of a universal tyranny and at the mercy of new 'pre-emptive wars.'"<sup>159</sup>

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<sup>152</sup> Shad Faruqi, "Illegality of the Invasion" *New Straits Times* (28 March 2003) 12 (WL); "Fed: Closer Asian Links Best Anti-Terror Policy, Says Rudd" *Australian Associated Press General News* (2 October 2004) (WL).

<sup>153</sup> "Southeast Asia can look out for itself" *New Straits Times* (27 October 2003) (WL).

<sup>154</sup> Letter from Nassir Abdulaziz Al-Nasser, Permanent Representative of Qatar to the United Nations, to the Secretary-General of the United Nations, UN Doc. S/2003/376 (26 March 2003).

<sup>155</sup> Letter from Yahya A. Mahmassani, Permanent Observer of the League of Arab States to the United Nations, to the President of the Security Council, UN Doc. S/2003/365 (24 March 2003).

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.*

<sup>158</sup> United Nations Security Council, Press Release (3 November 2003) (SC/7685), online: <<http://www.un.org/News/Press/docs/2003/sc7685.p2.doc.htm>>.

<sup>159</sup> *Ibid.*



The South African Representative to the UN, Dumisani S. Kumalo, told the United Nations that the invasion was unnecessary and the impact of such war would be crippling, and argued that South Africa favoured the peaceful disarmament of Iraq.<sup>160</sup> Ahmed Aboul Gheit, the UN Representative from Egypt, supported the South African position and argued that an invasion would have a profound impact on the way the Security Council deals with other issues in the decades to come and would undermine the commitment to the UN *Charter*.<sup>161</sup> The UN Representative from India, Vijay K. Nambiar, appealed to the United States not to aggravate the already extremely difficult situation in the region and asserted that military force shall always be the last resort and under the condition that it comes from the general body of Security Council.<sup>162</sup> Ahmed Own, Libyan Envoy to the UN, reiterated that the United States and Britain, as proponents putting forward all the justification for the war, had nonetheless failed to present a convincing case, and they were in essence seeking a regime change in Iraq under the disguise of self-defence.<sup>163</sup> The UN Representative from Switzerland emphasized a deep concern about any violation of international humanitarian law that would result from pre-emptive military attack.<sup>164</sup> Luiz Tupy Calda De Moura, Representative from Brazil, argued that any potential unilateral military attack would have the effect of undermining the collective efforts and progress that have been made so far by the international community, and would hamper any further actions by UN to combat terrorism.<sup>165</sup> New Zealand also refused to support any unilateral military action without the joint resolution from Security Council.<sup>166</sup>

Several other countries opposed the pre-emptive invasion of Iraq. For example, the Philippines in its opposition noted that it preferred upholding world peace through disarmament and multinational negotiations to pre-emptive wars.<sup>167</sup> The Indonesian government also criticized countries that use unilateral actions against other nations in the

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<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*

<sup>167</sup> H.E. Mr. Joseph Ejercito Estrada, President of the Philippines (Statement delivered at the United Nations Millennium Summit, 8 September 2000), online: <<http://www.un.org/millennium/webcast/statements/philippines.htm>>.

name of national security.<sup>168</sup> Nugroho Wisnumurti, an Indonesian representative to the United Nations, further expressed concern regarding the use of pre-emptive doctrine against “non-nuclear States.”<sup>169</sup> Similarly North Korea articulated its concern about the possibility of a pre-emptive strike from the United States in violation of its sovereignty.<sup>170</sup> The Bangladeshi Foreign Minister Mished Khan addressed the UN General Assembly indicated Bangladesh’s support of the United Nations, and its peaceful conflict resolution, and in the process, condemned pre-emptive and unilateral uses of force.<sup>171</sup> Jarmo Sareva, a representative from Finland who also addressed the United Nations indirectly critiqued the United States’ pre-emptive war against Iraq.<sup>172</sup> Christian Faessler, a representative from Switzerland addressed the United Nations and indicated the importance of international organizations and international treaties, and also indirectly criticized the American-led war against Iraq.<sup>173</sup>

More opposition to pre-emptive war came from the Brazilian government also concerned that a new arms race and nuclear warfare could result from the adoption of a policy of unilateral action by powerful countries against less powerful countries.<sup>174</sup> Luis Cappagli, Argentina’s representative to the UN, articulated the importance of multilateral fight against terrorism thereby indirectly suggesting opposition to unilateral pre-emption.<sup>175</sup> In addition, the Peruvian representative to the UN, Oswaldo De Rivero, expressed concerns with the “new security doctrine” that could lead to a nuclear arms race.<sup>176</sup> Finally, Mohamed El Baradei, the director of International Atomic Energy Agency—the agency charged with the responsibility of preventing the proliferation of nuclear weapons—has argued in favour of restructuring of the UN Security Council to avoid future

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<sup>168</sup> United Nations, Press Release, GA/DIS/3248, “‘Crisis in Confidence’ in Collective Security, Diversion of Scare Resources to Arms Among Issues Raised, As First Committee Begins Debate” (10 June 2003), online: <<http://www.un.org/News/Press/docs/2003/gadis3248.doc.htm>> [“Crisis”].

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*

<sup>171</sup> H.E. Mr. M. Morshed Khan, M.P., Foreign Minister of Bangladesh (Statement delivered at the 58th Regular Session of the United Nations General Assembly, 29 September 2003), online: <<http://www.un.org/webcast/ga/58/statements/bangeng030929.htm>>.

<sup>172</sup> “Crisis”, *supra* note 168.

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.*

<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid.*

pre-emptive strikes by nations.<sup>177</sup> According to Mr. El Baradei, pre-emption is a dangerous policy and its best antidote would be to make the United Nations better able to uphold world peace.<sup>178</sup>

#### H. *The United Nations*

United Nations Secretary General Kofi Annan has made the UN's stance unequivocally clear: the UN *Charter* does not permit pre-emption. Annan has therefore warned that expanded doctrines of pre-emption are inconsistent with international law and, if adopted, they will encourage the proliferation of "unilateral and lawless use of force, with or without justification."<sup>179</sup> This would in turn destabilize the international order and diplomatic structure that has been developing since the end of World War II.<sup>180</sup> This position is informed by the obligation in article 51 of the UN *Charter* that authorizes self-defence "if an armed attack occurs," but not necessarily before an actual attack, or even a possible attack based on intelligence information.<sup>181</sup> The Secretary General's legal interpretation of article 51 is also informed by policy considerations grounded in traditional diplomacy and cooperation as recognized under Chapter 6 of the UN *Charter*. According to the Secretary General, "new threats must be met, not with unilateral pre-emption, but with a collective response."<sup>182</sup>

While the United Nations Secretary General and a broad membership of the organization have declared that pre-emption in the absence of an armed attack or an imminent threat is not permissible under the UN *Charter*, the United Nations Security Council has legitimated<sup>183</sup> the United States' aggressive efforts to "disrupt and destroy" terrorist organizations from planning and operating around the world through a variety of efforts, including disabling terrorist groups' material support and

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<sup>177</sup> See "El Baradei urges overhaul of international security system" *Agence France-Presse* (19 May 2003) (WL, AGFRP).

<sup>178</sup> *Ibid.*

<sup>179</sup> Bumiller, *supra* note 142 at 1.

<sup>180</sup> United Nations, Press Release, UN Doc. SG/SM/8891-GA 10157, "Adoption of Policy of Pre-Emption Could Result in Proliferation of Unilateral, Lawless Use of Force, Secretary-General Tells General Assembly" (23 September 2001), online: <<http://www.un.org/News/Press/docs/2003/sgsm8891.doc.htm>> [United Nations, "Adoption of Policy"].

<sup>181</sup> SC Res. 1373, UN SCOR, 4385th Mtg., UN Doc. S/RES/1373 (2001).

<sup>182</sup> *Supra* note 180.

<sup>183</sup> See *e.g.* *supra* note 181, establishing the Counter-Terrorism Committee.

finances.<sup>184</sup> The Counter-Terrorism Committee, established under Resolution 1373 to monitor global anti-terrorism activities, has granted broad powers to block and confiscate private property belonging to groups (including religious organizations and charities that have been shown to have little or nothing in common with terrorists) and individuals suspected of terrorism, without any due process and in clear violation of United Nation's human rights mandates.<sup>185</sup> By refusing to act within the confines of international law and with due process in the blocking and confiscating of private property, both the United States and the Counter-Terrorism Committee depart from prior practice, under which peace treaties between belligerent States exempted property belonging to religious bodies and charitable organizations from confiscation and liquidation.<sup>186</sup>

## V. CONCLUSION

The analysis of State practice on pre-emption suggests that a relatively small but powerful group of States has banded together in mutual support of each others' adoption of a pre-emptive strike doctrine, with the United States at the centre of this group of States. The other States in this group are the United Kingdom, Israel, Australia, Russia, Italy, and to a lesser extent Japan and Taiwan. This pre-emption doctrine undermines the collective security arrangements that place questions of maintaining international peace and security in the hands of the Security Council. The United States conceded that the Security Council has that authority in its withdrawal from the compulsory jurisdiction of the ICJ after the Court determined it had jurisdiction to entertain Nicaragua's case against the United States.<sup>187</sup> Were it to be accepted, the adoption of the pre-emption doctrine gives these States the exceptional authority to police the world without restraint, and at the expense of States not meeting the approval of this band of States. Such a policy violates the equality of States under international law, and assumes that the use of force is the most appropriate

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<sup>184</sup> *Ibid.*

<sup>185</sup> See generally Jose E. Alvarez, "Hegemonic International Law Revisited" (2003) 97 Am. J. Int'l L. 873 at 878 discussing the UN Council's efforts to combat terrorism as violating international human rights standards.

<sup>186</sup> See F.A. Mann, "Enemy Property and the Paris Peace Treaties" (1948) 64 Law Q. Rev., 492 at 503, listing exemptions from liquidations and confiscations of property.

<sup>187</sup> See Abraham D. Sofaer, Statement of Legal Adviser of State Department, to Senate Foreign Relations Committee (4 December 1985), in Dep't St. Bull. (January 1986) at 70-71, noting in part "[t]he Charter gives to the Security Council—not the court—the responsibility for evaluating and resolving claims concerning the use of armed force and claims of self defense under Article 51."

response to address threats of terrorism and weapons of mass destruction.<sup>188</sup>

Tom Farer has noted the danger of a few States banding together in a “condominium” with an agreement on “ends and means and active collaboration” among themselves as constituting a step towards aggressive unilateralism.<sup>189</sup> This is exactly why a policy of pre-emptive war is a grave danger; not only does it further erode the now-frayed prohibition on the use of force, but also it also erodes the “normative prohibition on non-intervention.”<sup>190</sup>

In sum, the policy of the “condominium,” to use Farer’s term, constitutes nothing more than a policy of aggression against countries that cannot defend themselves against the superior capabilities of the condominium membership.<sup>191</sup> Such a policy might unfortunately spark “increasingly norm-less violence, pitiless blows followed by monstrous retaliation in a descending spiral of hardly imaginable depths.”<sup>192</sup> One would hope not.

Finally, it is beyond dispute that, based on the doctrine of sources outlined in Part III and the evidence of State practice studied in Part IV above, pre-emptive use of force where there is no armed attack has not been altered, and cannot easily be altered. As a normative guide, the prohibition of the use of force is, however, in danger.

The reasons why the policies of condominium countries have left the prohibition of the use of force intact, though admittedly frayed, are as follows. First, this prohibition is a customary international law norm of

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<sup>188</sup> Notably, in *Nicaragua*, *supra* note 8 at 134-35, the Court observed that the “use of force could not be the appropriate method to monitor or ensure” respect for human rights. This logic, I would argue, applies with equal force to rooting out terrorism and weapons of mass destruction issues, with respect to which the Security Council has adopted Resolution 1373 as a framework within which to address them, not to mention other regimes such as that governing the work of the International Atomic Energy Agency. The case for these mechanisms of resolving such global questions cooperatively is elegantly defended in Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge: Harvard University Press, 1995).

<sup>189</sup> Tom J. Farer, “Beyond the Charter Frame: Unilateralism or Condominium?” (2002) 96 *Am. J. Int’l L.* 359.

<sup>190</sup> *Ibid.* at 363

<sup>191</sup> See B.S. Chimni, “Marxism and International Law: A Contemporary Analysis” *Economic and Political Weekly* (6 February 1999) 337 at 345, making a similar point in a different context.

<sup>192</sup> Farer, *supra* note 190 at 363. The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, GA Res. 2625, UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8028 (1970) and Definition of Aggression, GA Res. 3314, UN GAOR, 29th Sess., Supp. No. 31, UN Doc. A/9631 (1974) were both adopted by consensus and embody a broad definition of prohibited armed intervention as well as aggression.

extremely high normativity and inconsistent state practice confirms the norm, particularly in the absence of evidence of its widespread and representative repudiation. Second, under the doctrine of sources State practice inconsistent with a norm of customary international law, or persistent dissension from it, does not establish a new norm but instead is considered a violation of the norm. Third, even assuming that persistent objectors to the prohibition of pre-emptive use of force (such as the United States, Israel, and Australia) in the absence of an armed attack regard themselves as having created a new rule binding to themselves, under the doctrine of sources a small number of states cannot, within a limited time frame, create a new rule without "a very widespread and representative participation" in the practice. Finally, a small number of States cannot create a new rule of customary international law where practice conflicts with an already established rule of customary international law that has achieved a *jus cogens* status or where there are protests to the *new* rule. As demonstrated in Part IV above, the five or so condominium countries have been heavily criticized by numerous States, regional organizations (such as the League of Arab States) and supranational organizations including by the United Nations and the International Atomic Energy Agency. In any event, the policies and practices of this small group of condominium countries cannot change the rule prohibiting the use of force, as it is a "conspicuous example of a rule of international law having the character of *jus cogens*"<sup>193</sup> where practice inconsistent with it would be regarded as a violation of the norm rather than as establishing a new norm. Ultimately, as Oscar Schachter argued two decades ago, too liberal a construction of the right of self-defence under article 51 would license the use of force inconsistent with the prohibitions of the UN *Charter* and customary international law. Similarly, where the "imminence of an attack is so clear and the danger is so great that defensive action is essential for self-preservation," the UN *Charter* ought not to be read to exclude a right of self-defence.<sup>194</sup> International law arguably entitles States to protect themselves without the necessity of an expanded doctrine of self-defence against imminent threats in general. In fact, the absence of any weapons of mass destruction in Iraq following the U.S.-led pre-emptive war demonstrates the danger of justifying attacks on other States on the basis of pre-emptive strikes. An overwhelming number of countries has spoken. Pre-emptive wars are illegal. Further, there has been overwhelming public opposition to the U.S.-led war against Iraq, giving further credibility to the illegitimacy

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<sup>193</sup> *Nicaragua*, *supra* note 8 at 100-01. See also article 2(4) of the UN Charter.

<sup>194</sup> Schachter, "Right of States", *supra* note 27 at 1634.

and illegality of pre-emptive war.

The dwindling coalition of countries that supported the war against Iraq in 2003 as evidenced by the withdrawal or sizeable reductions of troops by Spain, Ukraine and Bulgaria among others indicates or acknowledges the growing disapproval of the Iraq war within the handful of countries that supported this unprecedented pre-emptive war.

