

Maine Law Review

Volume 58
Number 2 *Symposium: French and American
Perspectives Towards International Law
and International Institutions*


Article 12

June 2006

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Recommended Citation

Sophie Clavier, *Contrasting Perspectives and Preemptive Strike: The United States, France, and The War on Terror*, 58 Me. L. Rev. 565 (2006).

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CONTRASTING PERSPECTIVES ON PREEMPTIVE STRIKE: THE UNITED STATES, FRANCE, AND THE WAR ON TERROR

*Sophie Clavier**

I. INTRODUCTION

A few years ago, Samuel P. Huntington's article in *FOREIGN AFFAIRS*, "*The Clash of Civilizations?*"¹ described a "West vs. the Rest" conflict leading to the assumption of an essentially unified Western civilization settling "[g]lobal political and security issues . . . effectively . . . by a directorate of the United States, Britain and France"² and centered around common core values "using international institutions, military power and economic resources to run the world in ways that will . . . protect Western interests . . ."³ Against the West, the specter of disorder and fundamentalism was looming and would precipitate conflicts. This widely accepted dichotomy fails to take into account differences that exist within the 'West.' These differences are not seen in European or American discourse, or in their diplomatic rhetoric, but they are apparent in the substantive meaning each assigns to concepts such as democracy, sovereignty, and the rule of law.

An illustrative example of this point is the rift between the United States and France over the war in Iraq.⁴ This rift reached a crisis three years ago at the United Nations, and, notwithstanding diplomatic pleasantries, it is still very much alive. Hailed by some as a champion of peace and criticized by others as an irresponsible nation, France was singled out by the United States and British administrations as the culprit of the failure of diplomacy.

There are many aspects to this quarrel. This Article concentrates specifically on the impact of the Bush Doctrine⁵ of preemptive war⁶—the claim of the right to strike

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1. Samuel P. Huntington, *The Clash of Civilizations?*, 72 *FOREIGN AFF.* 22 (1993).

2. *Id.* at 39.

3. *Id.* at 40.

4. For an overview of France's position on the Iraq war, see Stanley Hoffmann, *France, the United States & Iraq*, *THE NATION*, Feb. 16, 2004, at 16; Paul Starobin, *The French Were Right*, *NAT'L J.*, Nov. 8, 2003, at 3406.

5. First introduced to the public during the President's commencement address at the United States Military Academy on June 1, 2002, the Bush Doctrine signaled a major shift in U.S. security strategy. Bush stated that "[i]f we wait for threats to fully materialize, we will have waited too long." George W. Bush, Commencement Address at the United States Military Academy in West Point, 38 *WEEKLY COMP. PRES. DOC.* 944, 946 (June 10, 2002). The National Security Strategy paper issued by the White House on September 17, 2002 developed the doctrine further. See *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15* (2002), <http://www.whitehouse.gov/nsc/nss.pdf>.

6. Many have argued that the Bush administration's new approach is more accurately described as *preventive* self-defense (an attack initiated on the basis of an imminent or proximate threat) rather than as *preemptive* self-defense (an attack initiated against a non-imminent or non-proximate threat). See CARL

first and do so unilaterally—and the French reaction to it, as it pertains to international law. When the Bush Administration introduced its new strategic doctrine in the National Security Strategy of September 2002, the United States claimed the right to use force preemptively against any country or terrorist group that could potentially threaten American interests. Most United Nations members promptly rejected the Bush Doctrine as incompatible with the accepted view that armed force can only be used in self-defense against armed attack or when authorized by the Security Council.

France emerged as the spokesperson, especially at the United Nations, of the worldwide opposition to the Bush Doctrine. As a result, much of the rebuttal coming from the United States was directed at France. Condoleezza Rice, the U.S. National Security Adviser at the time, was quoted as suggesting that U.S. policy should be to “[p]unish France, ignore Germany and forgive Russia.”⁷

This Article discusses the United States’ and France’s differing perspectives on the use of force in international law at the time of the crisis. More importantly, it will address the likelihood (or not) that the Bush approach could modify or alter existing international law and the role that France can play in this process. Finally, it will assert that while contrasting legal perspectives are topical, they cannot hide the underlying reasons for the ongoing quarrel between France and the United States. Political considerations, economic interests, and cultural issues are a fundamental part of any comprehensive understanding of the situation and are part and parcel of the relationship between international law and international politics in the current world order.

II. THE USE OF FORCE: FROM CONGRUENCE TO DIVERGENCE

Following World War II, France and the United States had similar approaches to international law. With the creation of the United Nations in 1945, both countries, as well as their allies, championed the construction of a rule-based order in which, in their international relations, states would replace unilateral action with multilateralism.⁸

The establishment of the U.N. was not the first attempt to outlaw the use of force by sovereign states, but it was the most drastic modification of the Westphalian system of states. This is not to say that peace had not been a concern before. The teachings of St. Augustine⁹ and Grotius,¹⁰ that war must be based on just causes, were not foreign to the drafters of the Treaty of Westphalia.¹¹ The agreement was, after all, a peace treaty, putting an end to the Thirty Years War and envisioning in a non-violent future “[t]hat this Peace and Amity be [observed] and cultivated with a Sincerity and Zeal

KAYSE ET AL., AMERICAN ACADEMY OF ARTS & SCIENCES, WAR WITH IRAQ: COSTS, CONSEQUENCES, AND ALTERNATIVES 3 (2000).

7. Gary Younge, *US will 'work round' German leader*, THE GUARDIAN, May 26, 2003, available at <http://www.guardian.co.uk/usa/story/0,12271,963613,00.html>.

8. John Gerald Ruggie, *Multilateralism: The Anatomy of an Institution*, 46 INT’L ORG. 561 (1992).

9. See, e.g., Benedetto Conforti, *The Doctrine of Just War and Contemporary International Law*, 12 ITALIAN Y.B. INT’L L. 3, 3-4 (2002).

10. E.g., HUGO GROTIUS, DE JURE BELLI AC PACIS (A.C. Campbell trans., M. Walter Dunne 1901) (1646).

11. Peace Treaty Between the Holy Roman Emperor and the King of France and their Respective Allies, Oct. 24, 1648, available at <http://www.yale.edu/lawweb/avalon/westphal.htm> [hereinafter Treaty of Westphalia].

that each Party shall endeavour to procure the Benefit, Honour and Advantage of the other”¹² Then again, the greatest legacy of Westphalia was to replace transnational disputes over religion with state-to-state disputes. The Westphalian order is one in which legally equal and independent states recognize no limits on the exercise of their sovereignty other than those expressly consented to by the state itself. This positivist nature of international law,¹³ a consequence of the quasi-untouchable principle of sovereignty as an attribute of European states, has remained almost unchanged¹⁴ since the writings of Vattel.¹⁵ From this perspective, force is a legitimate instrument of foreign policy.

Indeed, before World War I, the use of force was seen as a natural function of the state and a prerogative of its uncontrolled sovereignty. Peace was desired, encouraged, and discussed at the Hague Conferences of 1899 and 1907,¹⁶ but not strictly outlawed. Instead, the Contracting Parties agreed “to use their *best efforts* to ensure the pacific settlement of international differences.”¹⁷

After World War I, the League of Nations attempted to go further and to implement President Wilson’s vision of a system of pacific settlement of all disputes.¹⁸ As such, it set out to formally replace self-help¹⁹ with a system of collective security.²⁰ Self-help, a core element in the theory of realism, “is necessarily the principle of action”²¹ in the anarchic structure of the international system where no higher authority exists to prevent and counter the use of force. In contrast, collective security is based on the belief that although military force remains an important characteristic of international life, there are nevertheless realistic hopes that peace can be envisioned as an indivisible good—an attack on one is an attack on all. In the end, the League of Nations established the procedural steps necessary before resorting to war, thus mandating a “cooling off” period, but not a strict prohibition. Subsequently, in 1928, the United States and France drafted and ratified the Kellogg-Briand Pact.²² However,

12. *Id.* § 1.

13. For a detailed discussion on international law and positivism, see Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT’L L. 260 (1940).

14. The French and the American revolutions redefined sovereignty and shifted it from the ruler to the people, but this did not alter the existing world order. In their international relations, states were not concerned with the political organization of others.

15. E. DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS* (Charles G. Fenwick trans., 1916) (1758).

16. Convention Between the United States and Certain Powers for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1779, 1 Bevans 230, and Oct. 18, 1907, 36 Stat. 2199, 1 Bevans 577.

17. *Id.* art. 1 (emphasis added).

18. League of Nations Covenant art. 16, para. 1, *reprinted in* 1 INTERNATIONAL LEGISLATION 11 (Manley O. Hudson ed. 1931) (“Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League . . .”).

19. On the concept of self-help, see KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979).

20. “Collective security originated in former U.S. President Woodrow Wilson’s intent for a community of democratic nations to guarantee and enforce international peace” Joachim Krause, *Multilateralism: Behind European Views*, 27 WASH. Q. 43, 44 (2004). See also Adam Roberts & Benedict Kingsbury, *Introduction: The UN’s Role in International Society since 1945*, in UNITED NATIONS, DIVIDED WORLD 30 (Adam Roberts & Benedict Kingsbury eds., 2d ed. 1993).

21. WALTZ, *supra* note 19, at 111.

22. Treaty Providing for the Renunciation of War as an Instrument of National Policy, U.S.-Fr., Aug.

while the United States and France renounced war as an instrument of national policy, the Kellogg-Briand Pact did not create obligations for third parties. Furthermore, none of the preceding international legal norms prohibited the use of force against non-states. States remained the guardians of the monopoly over the use of force internally, and nowhere in treaty or customary law could we see, prior to World War II, a desire to limit the use of force by recognized states (or civilized nations) on populations of non-recognized states or territories.

Indeed, it was not until the Charter of the United Nations that the international community expressed a commitment to regulate the use of force between states, not as an option, but as a universal norm. Under collective security, states agree to abide by certain rules in order to maintain stability, and, when necessary, to band together to stop aggression.²³ The aim of the Charter is to substitute law and diplomacy for force as the primary regulators of relations among nations²⁴ as outlined in Article 1(1):

The Purposes of the United Nations are . . . [t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.²⁵

Furthermore, the U.N. Charter mandates that all states “settle their international disputes by peaceful means in such manner that international peace and security, and justice, are not endangered”²⁶ and “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state,”²⁷ except in the limited circumstances of “individual or collective self-defense if an armed attack occurs”²⁸ or collectively approved measures. In this sense the U.N. system of collective security departs from the Westphalian system, not by questioning the principle of sovereignty, but quite the contrary—by envisioning that the protection of that very system could only come from the context of a legally mandated universal system of collective security, the core of which is the prohibition of unilateral force. Indeed, after World War II, while the positivist nature of international law has remained strong, limits have been placed on states’ sovereignty in order to guarantee, through universal norms of peace, justice, and human dignity, the very survival of the Westphalian system of states.

27, 1928, 46 Stat. 2343, available at <http://www.fletcher.tufts.edu/multi/texts/historical/bh115.txt> [hereinafter Kellogg-Briand Pact]. The Kellogg-Briand Pact, established in 1928 on the initiative of Aristide Briand, the then French foreign minister, and Frank B. Kellogg, former U.S. Secretary of State, is an international treaty “providing for the renunciation of war as an instrument of national policy.” *Id.* It remains a binding treaty under international law.

23. See Charles A. Kupchan & Clifford A. Kupchan, *The Promise of Collective Security*, 20 INT’L SEC. 52, 52-54 (1995). Collective security is based on the conditions that states must renounce the use of military force to alter the status quo, broaden their view of international interest to take in the interests of the international community, and overcome their fear and learn to trust each other. *See id.*

24. KAYSE, *supra* note 6, at 4.

25. U.N. Charter art. 1, para. 1.

26. U.N. Charter art. 2, para. 3.

27. U.N. Charter art. 2, para. 4.

28. U.N. Charter art. 51.

One can see incidentally how the system of law and institutions created or strengthened after World War II reflects the values of western countries and, more specifically, the philosophical and political experiences of France and the United States. International law is conceptualized, as is domestic law, as a necessary part of the social contract whereby some individual (or states') rights are subordinated to the greater collective good in order to guarantee the very survival of the system. This new order envisioned an international rule of law embodying the same norms of equality and justice that were the cornerstones of the rhetoric, if not the practice, of the French and American revolutions and subsequent democratic political regimes. Both countries strongly believed—and still do—in the universal validity of their own specific experience.

Many events and circumstances have altered this congruence since 1945. These events and circumstances require thorough examination. This Article, however, focuses on the situation today and explains how, in the perception of France, the Bush administration has not only clearly departed from the aforementioned established legal framework, but, more importantly, in creating a dangerous confusion around the concept of self-defense, has attempted to reverse years of progress made in international law on restricting the use of force.

Without a doubt, a selective survey of the evolution of the prohibition of force in international law clearly displays a trend toward expanding the prohibitions on the use of force and thus limiting the legal exceptions to its use. Furthermore, this brief review of treaties, evidence of customs, and judicial decisions highlights the fact that the use of force outside of these increasingly restrictive exceptions is now a peremptory norm.

The prohibition of the use of force, set out in Articles 2(3) and 2(4) of the U.N. Charter, was reaffirmed in the *Corfu Channel Case*.²⁹ The International Court of Justice (ICJ) determined that because of its de-mining activities, the U.K. had engaged in self-help, a violation of the principles of the newly created framework of collective security. Indeed, "the Court [could] only regard the alleged right of intervention, as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in International Law."³⁰ This is a remarkable decision given the fact that in the first part of the judgment the ICJ recognized the responsibility of Albania in preventing the innocent passage by the U.K. in the channel. Even in response to a 'wrong,' a state could not intervene unilaterally, or worse, illegally.

Two decades later, the U.N. General Assembly, the composition of which had changed due to decolonization, went further and refined the meaning of 'use of force.' Indeed, as aforementioned in this Article, previous attempts at the regulation of the use of force, either before or immediately after World War II, referred to the use of force between equals. It was reflective of a realist perspective of the world whereby the foreign relations of states were strictly regulated, regardless of internal elements. A major assumption of the realist theory in international relations is the belief that states, unitary and rational actors, interact with each other as billiard balls.³¹ By contrast, the

29. *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4 (Apr. 9).

30. *Id.* at 35.

31. This realist metaphor was first used by Arnold Wolfers. ARNOLD WOLFERS, DISCORD AND COLLABORATION: ESSAYS ON INTERNATIONAL POLITICS 19-24 (1962).

1970 Declaration on Friendly Relations authoritatively interpreted Article 2(4) as prohibiting “armed intervention . . . against [not only] the personality of the state [but also] against its political, economic, and cultural elements”³²

More recently, the ICJ expanded the ban of force, affirming that the *threat itself* of the use of force was tantamount to force in certain circumstances. In its 1996 Advisory Opinion on the legality of the threat or use of nuclear weapons, the ICJ irrevocably stated that “[t]he notion of ‘threat’ and ‘use’ of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal—for whatever reason—the threat to use such force will likewise be illegal.”³³ The same opinion makes clear that while Article 2(4) insists on “political independence” and “territorial integrity,”³⁴ it also prohibits force in any manner inconsistent with the Charter, thus making it illegal to use force for any particular object whether or not it is strictly within the confines of political independence or territorial integrity.

Earlier, but more important in terms of the strength of the prohibition of the use of force, the ICJ acknowledged that the illegal use of force had been recognized as a violation of a customary norm *erga omnes*. *Nicaragua v. U.S.* made clear that the prohibition of aggression was a norm of *jus cogens*,³⁵ accepted and recognized by the international community of states as a whole, as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same peremptory character.

Meanwhile, as the prohibition of the use of force continued to strengthen, exceptions to that interdiction had to be equally refined. Force can always be used when authorized by the Security Council.³⁶ These collectively approved measures may range from “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations”³⁷ to “action by air, sea, or land forces.”³⁸

Force may also be used as a right to exercise individual or collective self-defense.³⁹ The Charter refers to the right of self-defense as “inherent.”⁴⁰ This adjective qualifies self-defense as being on par with a natural right (*droit naturel*), that is to say a right which is inviolable. The U.S. and France, as well as all of the other members

32. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, at 123, U.N. GAOR, 6th Comm., 25th Sess., 1883rd plen. mtg., Agenda item 85, U.N. Doc A/8018 (Oct. 24, 1970).

33. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 246, reprinted at 35 I.L.M. 809, 823 (1996).

34. U.N. Charter art. 2, para 4.

35. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 100-101 (June 27). See generally Harold Maier, *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT'L L. 77 (1987).

36. See, e.g., U.N. Charter art. 39 (granting authority to the Security Council to determine the existence of breaches to peace and to take actions).

37. U.N. Charter art. 41.

38. U.N. Charter art. 42.

39. See U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence 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.”).

40. U.N. Charter art. 51.

of the U.N., recognize the right to self-defense, and no country would disagree that if an armed attack occurs, then the right to exercise self-defense is triggered. By contrast, if there is no armed attack, then self-defense—whether individual or collective—cannot be invoked. Judicial decisions abound on this point. For example, in the aforementioned *Nicaragua* case, the ICJ clearly indicated that “[s]tates do not have a right of ‘collective’ armed response to acts which do not constitute an ‘armed attack.’”⁴¹ In that sense, this decision of the ICJ confirmed that not all armed, illegal acts justify the use of force in self-defense. Similarly, in the *Case Concerning Oil Platforms*,⁴² the ICJ refused the argument of the United States that it had been attacked by the laying of Iranian landmines in international waters. At this point it is relevant to highlight that the French version of Article 51 does not use the word “aggression” (*aggression armee*) which carries in French a much more restrictive meaning than “*attaque armee*” would have.⁴³

On the other hand, if an armed attack occurs, it gives rise to the right to self-defense even when the attacker is not a state, but, a non-state actor. This right was unanimously reaffirmed by the Security Council after 9/11.⁴⁴ In Resolution 1368, the Security Council held that any act of international terrorism was a threat to international peace and security, and “[d]etermined to combat by all means threats to international peace and security caused by terrorist acts, [r]ecogniz[ed] the inherent right of individual or collective self-defense in accordance with the Charter.”⁴⁵ This was confirmed two weeks later in Resolution 1373.⁴⁶

Given this context, and because self-defense is an exception to the prohibition of the use of force, national governments often attempt, as a matter of policy, to expand the definition of self-defense. As a result, and on a case-by-case basis, the international community has validated or rejected the doctrine of anticipatory self-defense. The massive military build up in Egypt and the nationalization of the Suez Canal were, in Britain’s opinion, enough to justify an anticipatory strike against the Nasser government; however, this was ultimately rejected by the international community, mainly due to the lack of support from both the U.S. and the U.S.S.R.⁴⁷ The opposite is true of the Israeli actions on the eve of the Six-Day War, which are often viewed as a legitimate exercise of self-defense, because of the imminent attacks on Israel by the Egyptian military. In the same vein, Israel also invoked anticipatory self-defense when it bombed an Iraqi nuclear reactor on June 7, 1981. Indeed, in the U.N. Security Council, Israel contended that it “was exercising its inherent right of self defense as understood in general international law and as preserved in Article 51 of the Charter of the United Nations.”⁴⁸ The Security Council disagreed, and in Resolution 487

41. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 110 (June 27).

42. *Case Concerning Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161 (Nov. 6).

43. English translation: armed aggression v. armed attack.

44. See S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th Mtg., U.N. Doc. S/RES/1368 (Sept. 12, 2001); S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th Mtg., U.N. Doc. S/RES/1373 (Sept. 28, 2001).

45. S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th Mtg., U.N. Doc. S/RES/1368 (Sept. 12, 2001).

46. See S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th Mtg., U.N. Doc. S/RES/1373 (Sept. 28, 2001).

47. See G.A. Res. 997, U.N. GAOR, Special Sess., at <http://www.ipcri.org/files/997-1956.html> (last visited Feb. 22, 2006).

48. S.C. (36), 2280th – 2288th Mtgs. (1981).

(1981) it “strongly condemn[ed] the military attack by Israel in clear violation of the Charter of the United Nations and the norms of International conduct.”⁴⁹

In all the aforementioned cases, the United Nations made a careful attempt to stay away from interpreting the Charter as a blanket authorization of all anticipatory actions, and instead addressed the level of threat that is necessary to legitimize such action. In this sense, while self-defense is a response to an illegal use of force, anticipatory self-defense is a response to the credible and imminent *threat of an illegal use of force*.

At this juncture it is necessary to look at the current U.S. administration’s policy. It is not new for the U.S., as for any other state, to claim the right to anticipatory self-defense. This right was asserted during the Cuban Missile Crisis in 1962 when the United States regarded the Soviet Union’s secret installation of nuclear missile bases in Cuba as an immediate threat to U.S. security and imposed a quarantine on offensive military equipment to Cuba in self-defense.⁵⁰ President John F. Kennedy recognized during the crisis that “[w]e no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation’s security to constitute maximum peril.”⁵¹

However, the National Security Strategy of 2002 goes further than anticipatory self-defense in the face of an imminent danger by invoking a right to preemptively strike at any time. The Bush administration’s willingness to use force to address “emerging threats before they are fully formed”⁵² takes the already controversial doctrine of anticipatory self-defense a step further into the realm of subjectivity and potential danger.⁵³ Although anticipatory self-defense knows some antecedents and is more or less assimilated to self-defense in the case of an imminent attack, preemptive strike knows no legal precedent in the post-World War II era. The Security Strategy report acknowledges that, “for centuries, international law recognized that nations need not suffer an attack before they can lawfully take actions to defend themselves against forces that present an imminent danger of attack.”⁵⁴ However, the report proposes to extend the application of this concept beyond an actual threat, imminent or otherwise, to even the *possibility* of a threat:

Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often 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 . . . by identifying and destroying the threat before [it] reaches our borders⁵⁵

49. S.C. Res. 487, U.N. SCOR, 2288th Mtg., U.N. Doc. S/RES/487 (June 19, 1981).

50. John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT’L L. 563, 573 (2003).

51. *Radio and Television Report to the American People on the Soviet Arms Buildup in Cuba*, 485 PUB. PAPERS 806, 807 (Oct. 22, 1962).

52. The National Security Strategy of the United States of America (Sept. 17, 2002), *available at* <http://www.whitehouse.gov/nsc/nss.pdf>.

53. Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT’L L. 599, 607 (2003).

54. THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 6, 15 (Sept. 17, 2002), *available at* <http://www.whitehouse.gov/nsc/nss.pdf>.

55. *Id.* at 6, 15.

It finally redefines self-defense as a right to act not only preemptively, but also unilaterally:

[W]e will not hesitate to act alone if necessary, to exercise our right to self-defense by acting preemptively against such terrorists . . .

. . . .

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.

. . . .

[I]n an age where the enemies of civilization openly and actively seek the world’s most destructive technologies, the United States cannot remain idle while dangers gather.⁵⁶

France, like the United States, is aware that new threats—such as those from terrorist groups—have to be taken into consideration when developing a security strategy. This became obvious in September 2003, when the French Ministry of Defense stated: “Outside our borders, within the framework of prevention and projection-action, we must be able to identify and prevent threats as soon as possible. Within this framework, possible preemptive action is not out of the question, where an explicit and confirmed threat has been recognized.”⁵⁷ Thus, French concerns lie not so much in the concept of preemptive action, but more so in the far-stretched definition of preemptive self-defense used by the Bush administration.

This concern can be summarized in the following line of argument. Self-defense is circumscribed in law and in practice by elements of time and space.⁵⁸ On issues of time, self-defense has to be more or less instantaneous and overwhelming—immediately or soon after an attack, or right before an imminent attack. These traditional requirements find their expression in the *Caroline* incident.⁵⁹ The dispute between the U.S. and Great Britain, which lasted from 1837-1842 after Britain attacked the U.S. steamer *Caroline*, is often cited in support of the right of a state to resort to force when it faces an imminent threat. The United States rejected the British claim that its attack in United States territory on the steamer *Caroline* was a justifiable act of self-defense because the vessel had been used and might be used again to ferry supplies to rebels fighting British rule in Canada.⁶⁰ Secretary of State Daniel Webster pronounced that a state need not suffer an actual armed attack before taking defensive action, but may engage in anticipatory self-defense if the circumstances leading to the

56. *Id.*

57. MINISTRY OF DEFENSE, 2003–2008 MILITARY PROGRAM BILL OF LAW (Sept. 12, 2002), available at http://www.defense.gouv.fr/sites/defense/english_contents/files/the_military_programme_bill_of_law_2003-2008.

58. Frédéric Mégret, *War: Legal Semantics and the Move to Violence*, 13 EUR. J. INT’L L. 376, 378 (2002).

59. 29 BRIT. & FOREIGN ST. PAPERS 1226 (1857). See also 30 BRIT. & FOREIGN ST. PAPERS 193 (1858) (exchange of letters between the United States and United Kingdom); R. Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT’L L. 82 (1938).

60. Richard Gardner, *Neither Bush nor the “Jurisprudes,”* 97 AM. J. INT’L L. 587 (2003).

use of force are “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”⁶¹

On the issue of location, or where the act of self-defense takes place, self-defense has to target the attacker, or the state imputable for the attack if the attacker is not a state. At the time the U.N. was founded, self-defense was understood in reference to states, not non-states, as seen in Article 50 of the U.N. Charter declaration on “preventive or enforcement measures against any state.”⁶² Even after the attacks of September 11th, the Security Council, in adopting Resolutions 1368 and 1373, emphasized states’ responsibility in combating and preventing terrorism:

The Security Council . . . [e]xpresses its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations.

. . . .
[The Security Council] [d]ecides also that all States shall . . . [r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists . . .

. . . .
[and] [d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens⁶³

In addition to supporting Security Council resolutions 1368 and 1373, France approved of, and participated in, the attacks on Afghanistan after 9/11, agreeing with the United States that the Taliban’s support of Al-Qaida made the terrorist attacks on the United States imputable to Afghanistan.⁶⁴ The international community, or at least NATO, recognized the actions against Afghanistan as an act of self-defense. In a statement on September 12, 2001, the North Atlantic Council expressed:

The commitment to collective self-defense embodied in the Washington Treaty was first entered into in circumstances very different from those that exist now, but it remains no less valid and no less essential today, in a world subject to the scourge of international terrorism.⁶⁵

Subsequent events have been more problematic. The Bush administration then started talking about a “war on terror” as if it were paired with the same legality as the attacks on Afghanistan.⁶⁶ However, the “war on terror” eradicates the temporal and spatial limits placed on the exercise of the right of self-defense. The use of the term “war on terror” removes the first obligation to circumscribe self-defense in terms of time. Since terror is an elusive concept and terrorism a constant threat, the “war on

61. See Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), in 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 412 (1906).

62. U.N. Charter art. 50.

63. S.C. Res. 1368, *supra* note 45.

64. See Fight Against International Terrorism, <http://www.ambafrance-us.org/news/statmnts/2001/terrorist/speech5.asp> (last visited Feb. 22, 2006).

65. Statement by the North Atlantic Council, Sept. 12, 2001, <http://www.nato.int/docu/pr/2001/p01-124e.htm>.

66. See *infra* note 67 and accompanying text.

terror” legitimizes the use of force at any time as if in a perpetual state of self-defense, whether the attack is past, imminent or potential, and does so for an indefinite period of time. Rumsfeld stated that this war will last as long as the enemy is not defeated. Bush reaffirmed that “our war on terror begins with Al Qaida, but it will not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.”⁶⁷ This indefinite component is also reflected in some of the names given to the military operations in Iraq—“Infinite justice” and “Never-Ending Freedom,” to name a few.⁶⁸

Not only does the war on terror remove time constraints on the exercise of self-defense, it also disregards the legal and commonsense constraint that self-defense has to be exercised against the attacker. The vocabulary of a “war on terror” means that the Bush administration legitimizes the use of force against any state.⁶⁹ Since terrorist groups move across borders but are always in a territory (there are no virtual terrorists yet), the Bush Doctrine allows any state to be the object of an attack if it is suspected of aiding or even sympathizing with terrorists groups. Moreover, the Bush Doctrine legitimizes the use of force in cases where a state shows signs that it may, potentially, at some point in time, support terrorist groups.⁷⁰

Therefore, if self-defense can be invoked as a perpetual state and against any “enemy”—in Rumsfeld’s words—most would agree that the Bush doctrine eviscerates the interdiction of the use of force under Article 2(4), redefines Article 51, and ultimately enfeebles the United Nations.⁷¹ This is precisely France’s point.

The remedy, according to France, is not to deny self-defense or redefine some of the circumstances regarding its applicability, but simply to address all situations in a multilateral fashion. On the eve of the Iraqi war, the French insisted that “legitimacy, particularly with respect to the use of force, resides exclusively in the institutions of the ‘international community,’ namely the U.N. Security Council.”⁷² France’s minister of foreign affairs at the time, Dominique de Villepin, insisted before and during the war that “[n]o country by itself has the means to build Iraq’s future. In particular, no state can claim the necessary legitimacy. It is from the United Nations alone that the legal and moral authority can come for such an undertaking.”⁷³ French President Jacques Chirac echoed the same sentiment in an interview on September 8, 2002 in Paris, declaring his opposition to unilateralism and to any action not orchestrated by the U.N. Security Council.⁷⁴

The United States sporadically had assured the rest of the world of its intent to act in a multilateral framework; however, many believe that what the United States termed as multilateralism was no more than an accumulation of bilateral initiatives negotiated

67. President’s Address to Joint Session of Congress and the American People, Sept. 20, 2001, <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>.

68. See, e.g., The United States and the Global Coalition Against Terrorism, September 2001-December 2003, <http://www.state.gov/r/pa/ho/pubs/fs/5889.htm> (last visited Feb. 22, 2006).

69. See, e.g., *supra* note 67 and accompanying text.

70. See sources cited *supra* note 5.

71. See generally G. John Ikenberry, *America’s Imperial Ambitions*, 81 FOREIGN AFF. 44 (2002).

72. Paul Starobin, *The French Were Right*, NAT’L J., Nov. 2, 2003, at 3412.

73. Dominique De Villepin, French Minister of Foreign Affairs address to the UN Security Council (Mar. 19, 2003), http://www.un.int/france/documents_anglais/030319_cs_villepin_irak.htm.

74. Elaine Sciolino, *French Leader Offers Formula To Tackle Iraq*, N.Y. TIMES, Sept. 9, 2002, at A1.

with weaker countries, using the full range of American diplomatic and economic power. The term used by the Bush administration, “coalition of the willing,”⁷⁵ demonstrated that rather than gaining support from the international community, the United States had chosen to collaborate with whoever was available.

In addition, President Bush stated his eagerness to act unilaterally if necessary. In May 2002, Bush explained in a speech before the German Bundestag that multilateralism was important to his administration’s diplomacy, but it had its limits and its results were not necessarily decisive.⁷⁶ The United States would indeed “consult closely with our friends and allies at every stage. But make no mistake about it, we will and we must confront this conspiracy against our liberty and against our lives.”⁷⁷ During his re-election campaign, President Bush made clear that “the President’s job is not to take an international poll. The President’s job is to defend America,”⁷⁸ and further that “[t]he use of troops to defend America must never be subject to a veto by countries like France.”⁷⁹

Harsh critique of Bush’s foreign policy of pre-emptive military action comes from America’s international affairs scholar John Ikenberry, who describes the Bush strategy as a “grand strategy” that “begins with fundamental commitment to maintaining a unipolar world in which the United States has no peer competitor,”⁸⁰ a condition that is to be permanent so “that no state or coalition could ever challenge [the U.S.] as global leader, protector, and enforcer.”⁸¹ Ikenberry asserts that “[t]he new imperial grand strategy presents the United States [as] . . . a revisionist state seeking to parlay its momentary power advantages into a world order in which it runs the show.”⁸² The strategy threatens to “leave the world more dangerous and divided—and the United States less secure.”⁸³

This critique echoes France’s viewpoint on the Bush Doctrine, which Jacques Chirac has described as “extraordinarily dangerous” reasoning that “[a]s soon as one nation claims the right to take preventive action, other countries will naturally do the same.”⁸⁴

This fear that other countries may emulate the United States needs to be addressed. Will the practice of states change following the United States’ example? Could this lead to a modification of the current understanding of self-defense and the use of force?

75. Steve Schifferes, *US names ‘coalition of the willing,’* BBC NEWS, March 18, 2003, <http://news.bbc.co.uk/2/hi/americas/2862343.stm>

76. Allison Ehlert, *Iraq: At the Apex of Evil*, 21 BERKELEY J. INT’L L. 731 (2003).

77. President George W. Bush, Remarks to a Special Session of the German Bundestag (May 23, 2002), <http://www.state.gov/p/eur/rls/rm/2002/10418.htm>.

78. President George W. Bush, President’s Remarks to the National Association of Home Builders (Oct. 2, 2004), <http://www.whitehouse.gov/news/releases/2004/10/20041002-7.html>.

79. President George W. Bush, President’s Remarks at Victory 2004 Rally in Allentown, Pennsylvania (Oct. 1, 2004), <http://www.whitehouse.gov/news/releases/2004/10/20041001-10.html>.

80. Ikenberry, *supra* note 71 at 49.

81. *Id.* at 50.

82. *Id.* at 60.

83. *Id.*

84. Elaine Sciolino, *Threats and Responses: Perspectives, French Leader Offers Formula to Tackle Iraq*, N.Y. TIMES, Sept. 9, 2002, at A1.

III. IS IRAQ A DANGEROUS PRECEDENT?

Given the anxiety over Bush's "war on terror," a question comes to mind. Is there any foundation to the fear that the preemptive strike in Iraq, and the possibility of more strikes on other countries, could alter the current regime which outlaws the use of force and regulates the circumstances precluding its wrongfulness?

It is undeniable that throughout history powerful states have shaped and reshaped international law, usually to fit their interests, real or perceived. The law of the sea, of airspace, and of trade, to name a few, have consistently reflected the interests of powerful states or sometimes the very interest of the hegemonic power, be it Rome, Spain, or England.⁸⁵ States have shaped law through positive and explicit rules in treaties, as well as through customary norms described as "evidence of a general practice accepted as law" under the Statute of the International Court of Justice.⁸⁶ For example, Mohammed Bedjaoui, cited in Anthea Roberts's very thorough work on customary international law, argues "that the freedom of the high seas was developed to meet the needs of wealthy states with large fleets rather than the interest of states whose shores were approached."⁸⁷

It is beyond common sense to think that we could see a multilateral treaty expressly recognizing a right to preemptive strike. The current world order is a paradox. Nation-states have very unequal levels of effective military power and striking capabilities. Very few nation-states could be considered strong, because very few have either conventional or nuclear capacities. In fact, many nation-states could be considered rather weak. By contrast, the legal order knows no distinction and follows the western egalitarian ethos of one vote per country. As a result, a majority of comparatively weaker states would never vote for their potential destruction at the hands of the very strong minority.

If law is to change, therefore, it is to do so in a more progressive way. One then wonders if the current practice of the United States could create a customary norm that would alter the current legal order. Let's see whether or not we are at that threshold against which some, including France, have warned. I argue that, given the current circumstances, an alteration in the current legal order is not possible, in large part because of the vocal opposition of France.

The first issue—and it is a sizeable one—is whether or not customary international law is still an effective source of international law. In a community of close to two hundred states, where diversity of state practice and belief is the norm more than the exception, can we expect a non-written rule to be binding on sovereign states? The conclusions offered by George Norman and Joel Trachtman⁸⁸ provide a credible answer to that question. Norman and Trachtman systematically looked at compliance

85. See generally Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369 (2005).

86. Statute of the International Court of Justice, June 26, 1945, art. 38(1)(b), June 26, 1945.

87. MOHAMMED BEDJAOU, TOWARD A NEW INTERNATIONAL ECONOMIC ORDER 51-52 (1979), cited in Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 768 (2001).

88. George Norman and Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541 (2005).

by states to non-written norms, and then argued that by virtue of their effects, these norms do exist.

The second issue when dealing with customary international law resides in its nature. Two elements are necessary to make a customary norm: an objective element (an identifiable general practice) and a subjective element—the *opinio juris*—that the practice is indeed legal.⁸⁹ State practice refers to general and consistent practice by states, while *opinio juris* means that the practice is followed out of a belief of legal obligation.⁹⁰ While there is a debate on the respective weight and scope of both elements in creating a norm, there is no doubt that both elements need to be present. Anthea Roberts's analysis of traditional and modern approaches to customary international law indeed shows that while the interplay of both has varied over time, an emphasis on practice leading way to an emphasis on *opinio juris*, neither one can ever be totally disregarded.⁹¹

Questions arise, however, when the practice appears to be *extra legem*—outside of the law—or even *contra legem*—in opposition to the law. For example, when Truman unilaterally declared jurisdiction over the continental shelf,⁹² most maritime countries did the same. This created an instant customary norm even though it was the result of a one-time practice. More recently, and more closely related to our topic since we are looking at the use of force, attention needs to be paid to the progressive possible legitimization of forceful humanitarian intervention not explicitly authorized by the Security Council. The Charter is silent on the topic of humanitarian intervention. If it is not authorized by the U.N. Security Council, humanitarian intervention is neither self-defense, nor a legal countermeasure.

The Charter “reaffirm[s] faith in fundamental human rights,”⁹³ but does not do much to protect them, and Article 2 of the Charter prohibits intervention “in matters which are essentially within the jurisdiction of any State.”⁹⁴ Kenneth Roth, executive director of Human Rights Watch, argues that there is “considerable value in receiving the endorsement of the U.N. Security Council . . . before launching a humanitarian intervention,” but “in extreme situations, U.N. Security approval should not be required.”⁹⁵

So it seems that we are witnessing the emergence of a new norm due to recent practices of states. NATO's intervention against Serbia over Kosovo in 1999 was outside of current law, yet created a more or less generalized *opinio juris* that an intervention to stop ethnic cleansing or acts of genocide is, if not legal, then at least perfectly legitimate, especially if the action is multilateral in nature.⁹⁶ In referring to multilateral treaties, such as the Convention on the Prevention and Punishment of the

89. North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20).

90. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW 102(4) cmt. c (1987).

91. Roberts, *supra* note 87, at 768.

92. See Proclamation No. 2667, 3 CFR 67 (1945) (Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf).

93. U.N. Charter pmbl.

94. U.N. Charter art. 2, para. 7.

95. Kenneth Roth, *Setting the Standard: Justifying Humanitarian Intervention*, 26 HARVARD INT'L REV. 58, 62 (2004).

96. See Bartram S. Brown, *Humanitarian Intervention and Kosovo: Humanitarian Intervention at a Crossroads*, 41 WM. & MARY L. REV. 1683 (2000).

Crime of Genocide of 1948, where states have agreed that “genocide whether committed in time of peace or in time of war is a crime under international law which they undertake to prevent and to punish,”⁹⁷ it is often argued that these norms reach the status of peremptory norms. By contrast, but along the same lines, most concur that an intervention in Rwanda would have been legitimate, as is the case with Darfur.⁹⁸

The key therefore is not only the practice of states, regardless of how influential and powerful the states, but the accompanying *opinio juris* as well. At this juncture it is useful to look at the actions in Iraq along the following lines: Was the strike against Iraq authorized? If not, was it prohibited? If indeed it was prohibited, was it or was it not perceived by the international community as nonetheless legitimate?

The United States and Britain had both maintained that they had the legal authority to use force against Iraq from previous resolutions by the Security Council.⁹⁹ They first invoked U.N. Security Council Resolution 678 of November 1990, authorizing all necessary means against Iraq after its invasion of Kuwait. However, France and other members argued that while 678 authorized the use of force to get Saddam out of Kuwait, the mandate stopped with the withdrawal of the Iraqi troops.¹⁰⁰ The United States and Britain also invoked Resolution 687 of April 1991, arguing that this resolution mandated that Iraq renounce weapons of mass destruction.¹⁰¹ Failure to comply would be tantamount to a breach of the cease-fire agreements and could, if necessary and with no further ado, subject Iraq to more force. France argued the reverse, namely that Resolution 687 only authorized the Security Council to remain seized of the matter; it was not a blanket authorization to act without further decision by the Security Council.¹⁰²

Finally, the United States and Britain invoked Resolution 1441 of November 2002 and its mention of “serious consequences” if Iraq were to find itself in “material breach” of its commitment to comply with inspections.¹⁰³ On this point, the French and the United States disagreed on facts as well as law. The United States argued that the inspectors’ reports showed erroneous statements made by Iraq, as well as an overall lack of cooperation. The French argued that inspectors needed more time to prove facts one way or the other. France also insisted that Resolution 1441 by no means gave authorization to use force unilaterally. It only authorized the Security Council to define, then enact, in a two-step process, “serious consequences.”¹⁰⁴ There is therefore little doubt that Yoo’s argument is incorrect, and that the unilateral action of the United States was not only not explicitly authorized, but probably prohibited under Article 2(4) of the United Nations Charter.

97. U.N. Office of High Comm’r for Human Rights, Dec. 9, 1948, Convention on the Prevention and Punishment of the Crime of Genocide, art. 1.

98. Scott Straus, *Darfur and the Genocide Debate*, FOREIGN AFFAIRS, Jan./Feb. 2005.

99. A very good summary of the Bush/Blair argument can be found in YOO, *supra* note 50.

100. S.C. Res. 678, U.N. Doc. S/Res. 678 (Nov. 29, 1999).

101. S.C. Res. 687, U.N. Doc. S/Res. 687 (Apr. 3, 1991).

102. *Id.*

103. S.C. Res. 1441, U.N. Doc. S/Res. 1441 (Nov. 8, 2002).

104. *Id.*

At the same time, the opposition of many states to the war on Iraq, including the loud and explicit viewpoint of France, clearly establishes that even if the U.S. maintains that it was acting within the confines of the law, the rest of the world believes that if there was law, it was self-defined, and not international. No *opinio juris* that the intervention could be perceived as legitimate, if not legal, followed. Quite the contrary, the world opinion expressed by the United Nations took a firm approach against it.¹⁰⁵ Not surprisingly, the High Panel on Threats, Challenges, and Change¹⁰⁶ established by Kofi Annan in 2003 in response to the global debate on the nature of threats and the use of force to counter them, concludes that, “in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted,”¹⁰⁷ thus making preemptive war an unacceptable doctrine. The report poses the question regarding a threat which is not imminent but still claimed to be real: If states can “without going to the Security Council, claim in these circumstances the right to act, in anticipatory self-defence, not just pre-emptively (against an imminent or proximate threat) but preventively (against a non-imminent or non-proximate one)?”¹⁰⁸

The High Level Panel answered that “if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to,”¹⁰⁹ but no action without authorization will be accepted. In contrast, on the issue of humanitarian disasters and interventions, the High Level Panel acknowledged that “[t]he Security Council so far has been neither very consistent nor very effective in dealing with these cases [Rwanda, Kosovo, Sudan], very often acting too late, too hesitantly or not at all.”¹¹⁰

105. See *Opposition to the War and Occupation in Iraq*, <http://www.globalpolicy.org/ngos/role/iraq.htm> (last visited Feb. 22, 2006).

106. *High Level Panel on Threats, Challenges, and Change, A More Secure World: Our Shared Responsibility*, ¶ 191 (Dec. 2, 2004), <http://www.un.org/secureworld/report2.pdf>. The High Panel on Threats, Challenges, and Change consists of 16 members from different states, including Thailand, France, Brazil, Norway, Ghana, Australia, United Kingdom, Uruguay, Egypt, India, Japan, Russia, China, Pakistan, Tanzania, and the United States, and who work either for international governmental organizations or are states' representatives. *Id.*

107. *Id.*

108. *Id.* at ¶ 189.

109. *Id.* at ¶ 190.

110. *Id.* at ¶ 202. The High Level Panel further states that:

There is a growing recognition that the issue [of humanitarian disasters] is not the “right to intervene” of any State, but the “responsibility to protect” of *every* State when it comes to people suffering from avoidable catastrophe – mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease. And there is a growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the wider international community

Id. at ¶ 201.

And further that:

[S]tep by step, the Council and the wider international community have come to accept that, under Chapter VII and in pursuit of the emerging norm of a collective international responsibility to protect, it can always authorize military action to redress catastrophic

As a result, while it is always possible—and in fact likely—to see countries act unilaterally and preemptively in the future, it is doubtful that the Bush Doctrine will become an accepted practice under international law. Iraq is a dangerous precedent, but as a matter of fact, not because it will change the law.

IV. THE GREATER CONTEXT OF THE FRANCO-AMERICAN QUARREL

The Franco-American divergence of the last couple of years on the issue of Iraq has indeed focused on interpretations of international law. These differences cannot hide the broader economic, political, and cultural contexts in which the Franco-American dispute over Iraq took place.

It is undeniable that the French, like the Americans, the Russians, the Chinese and others, had economic interests in the region of Iraq. France had a much smaller trade interest in Iraq than the United States, but it also has an oil interest. Saddam also owed money to the French, and they had a legitimate concern that a new regime may not honor the debt.¹¹¹

The financial thesis had also been brought forward to explain France's and Germany's position. A few years ago Iraq started selling its oil in Euros instead of U.S. dollars, resulting in the rise of the Euro against the dollar.¹¹² Another allegation, made by the New York Times, was the fact that France's military complex had been selling military equipment to Iraq and was poised to expand those sales.¹¹³ Economic issues therefore had to play a role in the situation, but they cannot, by themselves, sufficiently offer a comprehensive analysis. Political factors, external and internal, should also be taken into consideration.

Externally, since the end of the Algerian war which marked the bloody demise of the French Empire, France has been struggling to reclaim its position as a world leader.¹¹⁴ Multilateralism, and by extension international law and institutions, are not only instruments to be used in coping with international problems, but France also considers them "instrument[s] for checking the hyperpower (*hyperpuissance*), the United States."¹¹⁵

Moreover, France perceives itself as the primary balancing mechanism to the unmatched power of the United States¹¹⁶ because France enjoys the coveted role of permanent member of the Security Council. France, especially under Chirac, has displayed its desire to reclaim the Gaullian tradition of being the third voice, the non-

internal wrongs if it is prepared to declare that the situation is a "threat to international peace and security," [sic] not especially difficult when breaches of international law are involved.

Id. at ¶ 202.

111. Carrie Satterlee, *Facts on Who Benefits from Keeping Saddam Hussein in Power*, <http://www.heritage.org/Research/MiddleEast/wm217.cfm> (last visited Feb. 22, 2006).

112. Faisal Islam, *Iraq Nets Handsome Profit by Dumping Dollar for Euro*, THE OBSERVER, Feb. 16, 2003, available at <http://observer.guardian.co.uk/iraq/story/0,12239,896344,00.html>.

113. Justin Vaisse, *Anonymous Sources: The Media Campaign Against France*, THE BROOKINGS INSTITUTE, July 2003, available at <http://www.brookings.edu/views/articles/fellows/vaisse20030701.htm>.

114. See generally Pascal Boniface, *Is France Still a Great Power?*, <http://www.queensu.ca/cir/pdf/Martello22.pdf> (last visited Feb. 22, 2006).

115. Krause, *supra* note 20, at 50.

116. See HUBERT VÉDRINE AND DOMINIQUE MOÏSI, *FRANCE IN AN AGE OF GLOBALIZATION* (Philip G. Gordon, trans.) (2001).

aligned option. The “you are with us or against us” approach could only antagonize the French population. Nevertheless, lacking the means to counterbalance the United States’ power on its own, France perceives multilateralism as a preferred instrument.¹¹⁷ This is part of the reason why France had to excoriate Bush’s preemptive actions.

A look at the internal politics of France is also needed to understand the French position. With over five million Muslims, Islam is the second largest religion in France.¹¹⁸ As a result, France cannot afford to exacerbate religious tensions already existing in French society. Racial tensions are key forces in the French political context. During the last presidential election, in the months preceding the diplomatic crisis over Iraq, the incumbent socialist Prime Minister Jospin was defeated in the first round by Jean Marie Le Pen, leader of the extreme right party, who essentially ran an anti-immigrant campaign.

As a result, the traditional left, the Muslim population, and many others who are usually opposed to Chirac’s conservatism, rallied behind him and elected him by an overwhelming majority. The message was clear: he had been elected by default and out of fear of the alternative. In the conflict with the United States, Chirac presented himself as the champion of the 80% of voters who voted for him. It may have not been so in other circumstances. The business community, Chirac’s traditional voting base, is much more favorable to the United States than the general population, and its members have much to fear in terms of future trade negotiations between the two countries.

Finally, one cannot ignore the cultural context of the Franco-American relationship and how it played out on the Iraqi question. France is one of the only Western European country against whom the U.S. has not fought. The two nations’ relationship precedes the U.S. revolution, and is characterized by mutual admiration. Such a strong alliance has allowed both countries to criticize the other without reluctance. Both countries, however, have indulged melodramatic portrayals of each other. French resentment of the U.S. stems primarily from a sense of rivalry combined with the realities of cultural differences and misunderstandings. These sentiments help shed some light on the crisis over Iraq.

Both countries pride themselves on being the birthplace of modern democracy and the champion of constitutionally guaranteed human rights.¹¹⁹ Since the title of “champion” is a zero-sum one, it leads to frequent diplomatic issues. France, in its historic role of colonizer and in its current relations with former colonies, has always legitimized its actions as a matter of duty—a civilizing mission. The French implicitly resent the United States for supplanting France and assuming France’s former role. Of course, neither the United States nor France use the term “civilizing mission,” but the implicit message in the American rhetoric is that it is America’s duty to democratize (different terminology, same concept) the rest of the world. The spreading of democracy is an intrinsic justification of the Bush Doctrine.

117. Krause, *supra* note 20, at 51.

118. International Religious Freedom Report 2004, at <http://www.state.gov/g/drl/rls/irf/2004/35454.htm> (last visited Feb. 22, 2006).

119. On the shared ideals and interests of France and the United States, see Martin A. Rogoff, *A Comparison of Constitutionalism in France and in the United States*, 49 ME. L. REV. 21 (1997).

Finally, major cultural differences exist between the two countries.¹²⁰ These differences are the object of many studies and not the point of this Article. During the crisis over Iraq, however, some cultural issues relating to style and language were noteworthy. Bush's and Rumsfeld's straight-forward message was often seen as refreshing by the American population at large: a no-nonsense, tell-it-like-it-is approach. In France, however, the general sentiment was that Bush's and Rumsfeld's rhetoric was the antithesis of what diplomats and politicians should strive for. They appeared rude, boorish, and uneducated. It is important to understand the reasons behind these different perceptions.

I argue that the educational systems in both countries have much to do with these differences in perception. A population's psychology is shaped not only by the substance of what is taught, but also through its methods of assessment. In the United States, multiple-choice questions teach that there is always a solution and that if A is the right choice, then B is not. This gives a very dualistic perspective to life and to politics in particular: "Saddam is bad, therefore I am good." Problem solved. The French, by contrast, do not "solve" problems this way, but discuss them at length. In test-taking, the French have to write essays and they are trained early on in a dialectical method: thesis, anti-thesis, synthesis. This method expands critical thinking but never really favors one solution over another. Therefore, the fact that "Saddam is bad," does not mean "I am good." This method furthermore leads to an aversion for simple equations and explanations. As a result, while it would be hard to prove, this method seems to create a particular dislike for the simplistic rhetoric of the current American administration, not only on substance but on style.

V. CONCLUSION

The final issue of this Article is not strictly within the study of international law, but it is within the conceptual space between international law and power politics. The mainstream theoretical description¹²¹ of that space argues that international law is nothing but a tool of power politics, complied with only if international norms coincide with self-interest. From this perspective, we can analyze both the United States' and France's viewpoints. The U.S. administration views international law not so much as not coinciding with its interests, but frankly, as an obstacle to its interests and to the free exercise of its sovereignty. Consequently, the Bush administration has shown extreme reluctance, to say the least, to accept any supranational institution or legislation. Examples of this reluctance include the Kyoto Protocol, the Statute of the International Criminal Court, the Convention against Torture, and the Protocol to the Vienna Convention, to name a few. International law is often presented to the domestic audience as a potentially dangerous and nebulous field that is more or less controlled by rogue states or cowardly French men, and intrinsically good for others but bad for Americans. Participation or compliance is seen as political weakness and as an erosion of U.S. power. Indeed, maybe it is the prerogative of the very strong not to comply.

120. Many of the preceding and following comments on culture and language reflect the personal observations of the author.

121. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

Other countries do not have America's means, which some would say is why they tend to comply with norms that they cannot defy. International law then becomes not an obstacle to sovereignty but, conversely, a champion and a guarantor of sovereignty. For less powerful states, sovereignty and security are better achieved through multilateralism, institutions, and the rule of law. In this realist perspective, one can argue that the United States' and France's positions on law are not that different: one resists it to protect its sovereignty, the other uses it to protect its sovereignty. What differs is not their view of the law, but their relative power in the world. In this light, France has always had the same discourse as the United States. It strongly affirms the ultimate superiority of its belief system, but unlike the United States, it does not have the means to implement it unilaterally.

I, however, believe this approach and analysis of the two countries' positions to be conceptually limiting. The reality is that most states, regardless of power, do comply with norms that sometimes do not reflect strict short-term national interests, but rather demonstrate long-term trade aspirations or even security issues.¹²² We can also agree in a more constructivist perspective, that international law is not only constraining but equally constitutive. Society creates law, which in turn shapes society. "It may matter less to respect the rules that international society dictates than to devise rules that will yield an international society that one can aspire to."¹²³ Perhaps then it is time not to obscure the exceptions to the use of force, but to refine and limit these exceptions as much as we can. The alternative is frankly just too scary.

122. For various examples, see *LEGALIZATION AND WORLD POLITICS* 385 (Judith Goldstein et al. eds., 2000); Norman & Trachtman, *supra* note 88.

123. Mégret, *supra* note 58, at 398-99.

REVIEW ESSAY

CONCERNING FRENCH INTERNATIONAL LAW *MANUELS*: A CRITICAL REVIEW OF THE PRINCIPAL FRENCH TEXTBOOKS IN PUBLIC INTERNATIONAL LAW

DOMINIQUE CARREAU, *DROIT INTERNATIONAL PUBLIC* (Pedone, 8th ed. 2004).

JEAN COMBACAU & SERGE SUR, *DROIT INTERNATIONAL PUBLIC* (Montchrestien, 6th ed. 2004).

EMMANUEL DECAUX, *DROIT INTERNATIONAL PUBLIC* (Dalloz, 4th ed. 2004).

PIERRE-MARIE DUPUY, *DROIT INTERNATIONAL PUBLIC* (Dalloz, 7th ed. 2004).

ALAIN PELLET & PATRICK DAILLIER, *DROIT INTERNATIONAL PUBLIC* (L.G.D.J., 7th ed. 2002).

Reviewed by Alix Toublanc

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II. PRELIMINARY PROBLEMS OF DEFINITION AND SCOPE OF ANALYSIS

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