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## 1

# Self-Defense in International Relations

Theorization of the relationship of international law to the broader political system of which it is a sub-system is of relevance to scholars of international law and international relations... The retention of a power-law dichotomy has effectively blocked moves towards a more sophisticated conceptualization of the significance of international law to international politics... The two disciplines have for the most part remained comfortably disengaged on the subject. And yet, international legal theorists have increasingly recognized their need for greater understanding of the politics of international law and stand to gain much from a fresh theorization of the international law-international politics relationship that subsumes the power-law dichotomy. Such a theorization would offer a more meaningful basis for inter-disciplinary dialogue, the goal of which would be a theory of international politics capable of incorporating legal debate itself.<sup>1</sup>

In light of the ongoing debates surrounding the political and legal implications of preemptive military action, this book provides an examination of some crucial theoretical issues and legal standards constituting the context of that debate. The book offers a multidisciplinary assessment of the concept of self-defense and anticipatory self-defense with the intention of exposing the relationship between power and international law. This is done by scrutinizing the concept of anticipatory self-defense through the dual lens of international relations theory and international law, theory and practice. A study of international law without a discussion of international relations and power politics would be flawed or incomplete.<sup>2</sup>

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What we have been witnessing thus far is separation of international relations from that of international law in what Louis Henkin refers to as the “*dialogue de sourds*.”<sup>3</sup> Henkin argues that it is not only unfortunate but also destructive for the two disciplines to remain separate. According to Henkin, it is crucial to understand “the system” in order to understand law because “[at] different times the actors, the problems, the law and its influence are all different.”<sup>4</sup> Similarly, social sciences must be the basis of international laws that aim to regulate state behavior. In the words of Anne-Marie Slaughter Burley:

If social science has any validity at all, the postulates developed by political scientists concerning patterns and regularities in state behavior must afford a foundation and framework for legal effort to regulate that behavior.<sup>5</sup>

The realities of the international system help us to better understand the strengths and weaknesses of international law, as international law does not function in a vacuum and is, in fact, a part of the reality of international politics. As William Coplin states, “... international law is a part of political reality and serves as an institutional means of developing and reflecting a general consensus on the nature of international reality.”<sup>6</sup>

This book seeks to extend existing discussions and debates on the controversial right to anticipatory self-defense in international law. The US-led war on Iraq has opened up a Pandora’s box, full of questions about the possibilities and limitations of the use of anticipatory self-defense, the future of the United Nations and the role of the United States in a post-cold war international order. Existing discussions on the right and exercise of anticipatory self-defense can be extended to deal with the complex relationship of anarchy, (uni) polarity, power, politics and justice. The value of such an analysis of self-defense goes beyond a descriptive account to more policy-oriented prescriptions for the United Nations, the United States and other members of the world community. Discussing the concept of anticipatory self-defense serves as a powerful tool for international law-making, agenda setting and decision-making. This book seeks to demonstrate the arrogant and reckless (mis) interpretation of international law in order to justify illegal maneuvers in international politics, setting dangerous precedent for other states.

Let us consider three specific scenarios, in the realm of the hypothetical.

First, the US decides to wage a preemptive war against Iraq (2003) based on the assumptions that Iraq had weapons of mass destruction that pose a threat to international peace and security. It is established that there is an irrefutable link between the terrorist attacks of September 11 and Saddam Hussein and that the Iraqi government had violated several Security Council Resolutions. This presents an imminent danger to the security of the US and the international community at large. Iraq contests all the above accusations despite which the US starts gearing up for a use of force in the name of preemptive self-defense. Awaiting a potential use of force against it by the US, the Iraqi government decides to preempt. It uses force against the US in the name of self-defense by “preempting a preemption.”

Second, consider a scenario involving the right of self-defense in a world charged with nuclear weapons and weapons of mass destruction. On 16 October 2002, the United States announced that North Korea had acknowledged a secret nuclear program following which the US stopped oil shipments to N. Korea. On 22 December 2002, North Korea removed its monitoring devices from its Yongbyon plant and forced US nuclear inspectors to leave North Korea ten days later. On 28 January President Bush urged North Korea to give up its nuclear program, referring to it as an oppressive regime and referring the matter to the Security Council. Following President Bush’s demand, a senior Pyongyang official, Ri Kwang-hyok acknowledged that North Korea was capable of attacking “all military personnel and all military commands of the United States in the world” as a self-defense measure. North Korea’s neighbors, particularly Japan, concerned at the developments, responded with a threat to use force in self-defense by launching preemptive military action in the event that it found evidence that Pyongyang was planning a missile attack against it. Defense Minister Shigeru Ishiba clarified that it would be “a self-defense measure” if North Korea was going to “resort to arms against Japan.”<sup>7</sup> As a response to US pressure on North Korea to dispose off its nuclear program, North Korea flexed its muscle and announced on 10 January 2003 that it was withdrawing from the Nuclear Non-Proliferation Treaty as a measure of self-defense. North Korea asserted that Pyongyang “declares its total freedom from the binding force of the safeguards accord with the International Atomic Energy Agency.” North Korea’s defiant stand came as a result of leaked Pentagon nuclear papers recommending small-scale precision nuclear weapons to destroy the Weapons of Mass Destruction (WMD) of rogue regimes, North Korea having been identified as one of them. In response to the leaked Pentagon reports, Pyongyang accused the US of “working in real earnest

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to prepare a dangerous nuclear war to bring nuclear disasters to our planet and humankind." Pyongyang also warned of "strong counter-measures" in self-defense.<sup>8</sup>

South Korea would want an avoidance of war on the peninsula. More so, it would want close ties with US, Japan and China in order to block North Korea's ambition of gaining political, economic and military concessions that would not be in South Korea's interest. China has a similar standpoint. Strategically, China is aware that a nuclear North Korea could aggravate the possibility of military confrontation on the peninsula. This could prompt South Korea, Japan and perhaps Taiwan to build up nuclear weapons. This in turn would be a tremendous threat to China's security, probably requiring China to divert funds from economic modernization to militarization. While aware of the threats, China is uncomfortable putting direct pressure on Pyongyang.<sup>9</sup> China's ambassador to the UN, Zhang Yan, said, "The only correct and effective approach... is through constructive dialogue and consultations on the basis of equality," without the Security Council getting involved.<sup>10</sup> With the military power and the political will to attack first, North Korea's possession and potential use of nuclear weapons in self-defense presents a threatening scenario to international peace and security with the potential of unleashing wide-scale destruction if war were to break out.

Third, let us consider the case of Iran. On 20 January 2005, US Vice-President Dick Cheney stated in an MSNBC program that Iran is "right at the top of the list" of trouble spots worldwide located by the Bush administration. Vice President Cheney then touched upon the possibility of a preemptive Israeli attack on Iran "if the Israelis became convinced the Iranians had significant nuclear capability." He argued that the US hoped to avoid a war in the Middle East and that the US preferred a solution through diplomatic means.<sup>11</sup> On 10 February 2005, President Khatami made a statement saying, "The Iranian nation is not after a war, violence or clashes, but the world must know that the Iranians will not tolerate any invasion" and condemned US warnings as "psychological warfare" which according to Khatami was consistent with US "expansionist policies." A preemptive strike on Iranian nuclear capabilities by the US or any other ally was called "the most stupid move" by Iranian nuclear negotiator Rowhani while the Iranian Defense Minister Shamkhani brushed aside the possibility of a US attack, saying "Iran is not a small country like Iraq; wherever they attack us, they will be attacked."<sup>12</sup> Official Iranian statements reflecting fearlessness are abundant. Iran claims that it "would respond within 15 minutes to any attack...and it is sharpening its abilities to wage a guerrilla war."<sup>13</sup>

Despite denials for any immediate plan of attack, there has been talk about a possible preemptive destruction of Iran's nuclear installations. Beres, a Professor of international law states, "President Bush has assuredly authorized the Pentagon to prepare plans for the preemptive destruction of that country's developing nuclear installations. Leaving aside the difficult tactical side of such an operation – and whether or not it would actually be helpful to American national security – a prior question arises: 'Would this particular preemption be permissible under international law?'"<sup>14</sup>

Each of the scenarios described above fall in the realm of anticipatory self-defense. What exactly is anticipatory self-defense? In simple terms, anticipatory self-defense is a state's decision to attack another state that is perceived to have aggressive plans, before the latter attacks first. Snyder defines "defense" in terms of "deterrence" and states that "defense means reducing our own prospective costs and risks in the event that deterrence fails."<sup>15</sup> Anticipatory self-defense is anticipating an attack and defending oneself before the attack occurs. Anticipatory self-defense can be preemptive or preventive.<sup>16</sup>

A preemptive war is justified by a *clear and present danger* of an attack by another state, i.e. an imminent threat of an attack (e.g. increasing size of military, acquisition of weapons with the intention of use, threatening activities by troops of an enemy state, belligerent declarations signaling an intention of war, and indicators that clearly show that an attack is close). The logic of a preventive war is to attack now since current enemies that seem to be growing stronger may attack later. The difference between a preemptive and a preventive strike is the lack of an "imminent" threat even if a "distant" threat exists. A preventive preemption, then, is unintelligible since it is not any longer an act of "defense." According to Benjamin Barber:

Self-defense says: "We are already at war thanks to our enemies: our declaration of war is but a confirmation of an observable condition." Preventive war says: "It is a dangerous world where many potential adversaries may be considering aggression against us or our friends, or may be acquiring the weapons that would allow them to do so should they wish to: so we will declare war on that someone and interdict the possible unfolding of this perilous chain of could-be's and may-be's."<sup>17</sup>

Many scholars have tried to spell out the definitions of preemption and prevention and the differences between the two.

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Kegley and Raymond distinguish a preemptive military attack from a preventive military attack as follows:

A *preemptive* military attack entails the use of force to quell or mitigate an impending strike by an adversary. A *preventive* military attack entails the use of force to eliminate any possible future strike, even when there is no reason to believe that aggression is planned or the capability to launch such an attack is operational. Whereas the grounds for preemption lie in the evidence of a credible, imminent threat, the basis for prevention rests on the suspicion of an incipient, contingent threat.<sup>18</sup>

Van Evera defines these two terms as follows:

A preemptive mobilization or attack is mounted to seize the initiative, in the belief that the first mover gains an important advantage and a first move by the opponent is imminent. A preventive attack, in contrast, is mounted to engage an opponent before it gains relative strength. The incentive to preempt is two-sided: both adversaries gain by forestalling the other. The incentive to prevent is one-sided: the declining state wants immediate war, while the rising state wants to avert war.<sup>19</sup>

Reiter further clarifies these definitions:

A war is preemptive if it breaks out primarily because the attacker feels that it will itself be the target of a military attack in the short term. The essence of preemption, then, is that it is motivated by fear, not by greed.<sup>20</sup>

Gaddis proposes the following definitions of preemption and prevention:

Preemption implied military action undertaken to forestall an imminent attack from a hostile state. Prevention implied starting a war to keep such a state from building the capacity to attack.<sup>21</sup>

Despite the differences between preemption and prevention, the terms are often used interchangeably due to the difficulty with proving "imminent threat." What is common between preventive and preemptive self-defense wars is that both are fought, officially, in the interest of the state.<sup>22</sup> In an interview with John Shirek, NBC (Friday,

Sept. 27, 2002), Donald Rumsfeld, Secretary of Defense, responded to a question about preemptive strike and referred to President Kennedy's action in the Cuban Missile Crisis saying "he decided to engage in preemptive action, preventative action, anticipatory self defense, self defense, call it what you wish."<sup>23</sup> The difference between these terms is, indeed, rather slim.

The debate surrounding anticipatory self-defense has recently been re-ignited following the attacks on US soil on September 11, 2001, and the subsequent National Security Strategy (NSS) formulated and released by the Bush administration on September 11, 2002.<sup>24</sup> The four main themes of the Bush NSS are: 1) the call for preemptive military action against terrorist organizations and aggressor states that seek to develop Weapons of Mass Destruction (WMD); 2) the proclamation of non-tolerance against any state that challenges the global military prowess of the United States; 3) a commitment to multilateral cooperation but also a readiness to act alone, if necessary and 4) the spread of human rights and democracy in the world, especially in Muslim countries.<sup>25</sup> The most controversial of these themes has been the embracing of anticipatory self-defense. The doctrine of preemption, one can argue, has replaced the cold war doctrines of containment and deterrence.

According to the NSS Report:

We will disrupt and destroy terrorist organizations by... defending the United States, the American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our borders. While the US will constantly strive to entrust the support of the international community, it 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.<sup>26</sup>

The NSS report refers to international law's recognition of the right of self-defense, at the same time claiming that the concept of "imminent threat" needs to be altered in the face of new enemies with unconventional weapons. Reiterating the need for preemptive action in light of new and dangerous threats to US interests, the NSS report reads:

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

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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.

The NSS report affirms that the US will use preemption in order to "eliminate a specific threat to the United States or our allies and friends" with clear actions, measured force and *just cause*. Blurring the line between criterion for preemption and prevention, the NSS Report states that:

And, as a matter of common sense and self-defense, America will act against (such) emerging threats *before* they are fully formed... (Our) forces will be strong enough to dissuade potential adversaries from pursuing a military build-up in hopes of surpassing, or equaling, the power of the United States.<sup>27</sup>

The US military flexed its military muscle twice in a period of two years against countries that do not, at first glance, appear to be potential adversaries of the US, nor hopeful of surpassing or equaling the military might of the US. On 7 October 2001, the US (with support from the UK, Australia, Canada and the Afghan Northern Alliance) launched a "preventive" invasion of Afghanistan under the gamut of "Operation Enduring Freedom," immediately following attacks on US soil on 9/11. This invasion was waged in order to remove the ruling Taliban and find Osama Bin Laden who was the alleged mastermind of the attacks on US soil. On 20 March 2003, the US, along with the "coalition of the willing" including the UK, started the Iraqi invasion. The main justification was that of "preemption" in light of the threats perceived by the US from the "oppressive" regime of Saddam Hussein who had violated several Security Council Resolutions, was said to possess weapons of mass destruction and was said to have tangible links with terrorist organizations. However, since these threats were not "imminent" according to the various definitions of preemption, the US war on Iraq can be adjudged "preventive" rather than "preemptive." And preventive wars are always "illegal."

Analysts, lawyers, critics and ordinary citizens began posing questions related to the legality and ethics of the US use of force in lieu of peaceful or diplomatic means. There were those that argued that the wars were outright illegal and unethical. Some others argued that the wars were both legal and ethical. Still others questioned whether the wars were legal but unethical, and illegal but ethical.<sup>28</sup> The ethical aspects of the use of force by the US in Afghanistan and Iraq are not the direct focus of this book.

In the past, anticipatory self-defense has been used in four cases namely the Caroline Incident (1837), the Cuban Missile Crisis (1962), The Middle East War (1967) and the Israeli bombing of Osiraq Reactor (1981). The right to self-defense is a controversial issue because although this right is legalized by Article 51 of the UN Charter, its use is paradoxical and may undermine or defeat the very purpose of the international legal mechanisms set up to protect world order. This book teases out the complexities involved in answering whether a more peaceful and harmonious world legal order needs a greater or lesser reliance upon self-help.

Arguing that we need “greater reliance upon self-help” could imply a lack of faith in international law, particularly collective security measures, in contributing to a peaceful and harmonious world order. It could simultaneously imply that states do not have the tendency to peace and harmony, in an anarchical international system, without sanctions and controls present in a centralized form of law. Arguing that we need “lesser reliance upon self help” could imply that we have faith in the international legal structure, particularly collective security measures, to redress violations of rights of States, thereby making their reliance on self-help measures unnecessary. In arguing the latter, we may be assuming that States have a natural tendency to peace and harmony not requiring a centralized legal system to keep their behavior under checks and controls. In both cases, a burning question to ask is “under what conditions can an anticipatory self-defense argument be used and defended by the most powerful country in the world – the United States?” Is the use of self-defense simply a means for protecting its position of primacy in the post-cold war world?

Several arguments are advanced in this book regarding anticipatory self-defense and the US war in Iraq 2003, using a wide spectrum of concepts, themes and tool of analysis. Although broad, these arguments converge to make a compelling case for the importance of the inseparability of international law and international politics.

First, the right of anticipatory self-defense, if abused, is a threat to international peace and security and needs to be understood in the context of the international political context, (i.e. anarchy and polarity) not just legal references because anarchy and polarity affect the way a state views its security and insecurity with respect to the intentions of other states. Second, anarchy affects the prospects of peace and cooperation between states and thereby the success of international legal instruments. States in the anarchical international system of self-help are predisposed to seeking relative gains and are concerned about the problem of cheating that arises from a lack of trust in international

commitments. International institutions such as the United Nations are therefore unable to successfully mitigate the effect of anarchy, thereby the use of self-defense. Unless the international laws regulating the use of force are stringent enough to curtail the misuses of force by great powers, peace will only be a dictated peace.

Third, the current system is unipolar with the US being the most powerful country in the world today after the collapse of the Soviet Union. Unipolarity gives the US the power to choose to violate international law without adequate checks and balances from other states, international organizations or peace groups in order to stop an illegal war. External constraints are insufficient to monitor superpower behavior and use of force.

Fourth, the US waged an illegal preventive war against Iraq, trampling upon major institutional norms, aware that neither international institutions like the United Nations or the international dissenters to the US-led Iraqi invasion could overshadow its calculated national interests. Fifth, despite its illegal use of preventive force, the United States justified the US-led invasion using the framework of international law (i.e. self-defense), democracy, freedom and human rights not owing to its respect for international obligations but due to its need to project itself as a benign superpower that uses its "iron fist with a velvet glove."

Sixth, the US has set a dangerous precedent for other states to replicate. Seventh, the trend of preventive warfare set by its use of force in Afghanistan and Iraq can only change with a change in either US foreign policy (i.e. from unilateralism to multilateralism), in the US attitude towards international law (i.e. greater respect for the principles and treaties of international law) or a change in system (i.e. from unipolarity to bipolarity or multipolarity). Eighth, the US policy of preserving primacy, while trampling on the international law of the use of force, more specifically self-defense, is an effort to preserve and further strengthen its dominant position in world politics. Lastly, the use of self-defense to justify an illegal use of force by a superpower is suspicious owing to the innumerable ways by which a superpower can protect its national interests without disrupting world order or hurting peace. The fate of the United Nations depends precariously on the power politics of the international system.

Neorealist concepts are used in this book to analyze US behavior in the international anarchical system, which is currently unipolar. The neorealist framework helps us to understand the inter-relationship between anarchy, polarity and the US violation of the international

law regarding self-defense. It is not implied that the frequency of the use of force in international relations is necessarily a function of the system polarity but that a unipolar world allows the superpower to abuse international law without any serious international repercussions. This book does not deal with other “levels of analysis” – i.e. individual and state – to the same extent as it does the international level. This book does not claim that neorealist provides the only suitable and accurate framework for analyzing dynamics of war, peace, cooperation and conflict in international relations, but that it is the most useful in understanding US justifications for the US led war in Iraq 2003, and the inability of international law, states opposed to war and public opinion against war to prevent the US use of force.

Many alternative theoretical enterprises provide insight for understanding different aspects of the US war on Iraq 2003. Environmental theories, for instance, bring to light the relationship between a decline in non-renewable resources such as oil and war. This relationship is extremely pertinent in understanding the US strategy of getting a stronghold on Iraq. Feminist theorists expose the invisibility of women in international relations and the impact of war as a result of decisions taken by primarily male policy-makers in a patriarchal world, on women, children and the people that reside on the margins of power. Constructivists would argue that anarchy, unipolarity, and negative images of an Iraq governed by Saddam Hussein are constructs of international society where meaning is given through culture which then acts as norms through ideas and shared knowledge. Marxists would view the US war in Iraq as an organized strategy premeditated to guarantee its complete hegemony by a display of military strength as a part of an imperialist post-cold war project. Post-modernists would forward an epistemological and ideological critique of the relationship between power and knowledge exposing hierarchies and the multiple interpretations of events through deconstruction and double reading. The contributions of theoretical approaches to explain events in international relations are innumerable. However, the goal of this book is not to debate which theory is the best in understanding the war on Iraq 2003. Rather, it is to analyze the relationship of power in international relations and law with an assessment of self-defense in international law.

Chapter 2 discusses the three concepts that constitute the theoretical backdrop of this book, providing the contextual basis for understanding the concept of self-defense in subsequent chapters, namely, 1) Anarchy implying a lack of leadership, an absence of hierarchy, a lack of formal

institutions of governance at the international level and the lack of a legitimate government; 2) Unipolarity, which we witness today with the US being the most dominant state actor in international relations after the collapse of the USSR and the end of the cold war; and 3) The decentralized nature of international law implying that although there are rules that govern all aspects of international law, there are no “teeth” to enforce these rules.

Chapter 3 discusses the prohibitions against the use of force in international law. Chapter 4 highlights the exceptions to the prohibitions on the use of force, including that of self-defense. Chapter 5 analyzes the legality of the US use of force in Afghanistan and Iraq, using the criteria of necessity, immediacy and proportionality in the context of the post-cold war unipolar order. This concluding chapter then delves into an assessment of the implications of anarchy, unipolarity and the nature of international law on the future of international relations, law and world order.

The right of self-defense, as documented and codified in the UN Charter, is an important one in order to protect and ensure the sovereignty and independence of states when collective security measures fail. In a decentralized anarchical system of international law, there will inevitably be circumstances in which states will need to protect their fundamental rights when legal measures fail. Although it is difficult to envisage any legal system without exceptions to the use of force in the form of self-defense, this exceptional right needs to be carefully circumscribed and backed up with an effective forum for determining the discriminate or indiscriminate use of this right. An undefined and unregulated right to self-defense, particularly anticipatory self-defense, could defeat the purpose of the prescribed prohibition to use force under international law. The removal of the prohibition against the use of force would, for obvious reasons have devastating consequences for the peace and harmony of the world order. Yet, too narrow and constrained a right to self-defense may lead the problems of rigidity and excessive dependence on legal texts.

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