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# Terrorism Prevention and the Right of Preemptive Self-Defense

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## 1. Introduction: Right of Preemptive Self-Defense in the Era of Surging International Terrorism

The concept of right of self-defense has long been recognized under international law. In general, its legitimacy and necessity have been rarely challenged and almost universally accepted by states. The actual application of the concept to a specific situation, however, almost always has led to fierce confrontation among interested parties regarding whether the international situation at issue indeed warrants exercise of the right of self-defense. This is mainly caused by a fact-specific and case-specific nature of the concept. Therefore, when a “prospective element” is added to this already laden and fiercely debated concept, and thus when the debate is about whether an uncertain future event may authorize the exercise of the right of self-defense, the issue inevitably invites further complication.

Apparently, this seems to be what is going on with respect to the concept of so-called “preemptive self-defense.” The preemptive self-defense (or anticipatory self-defense) is generally understood to be an expansion of the traditional right of self-defense. It appears that the issue of preemptive self-defense first appeared in 1967, when Israel initiated military operation against Egypt based on intelligence that its Arab neighbors were allegedly planning to attack Israeli military positions. Israel again resorted to preemptive self-defense in 1981 by raiding and destroying a nuclear power facility in Iraq, also based on the information that Iraq was allegedly engaged in the development of nuclear weapon that could be used against it. Given the fact that the 1981 raid was not triggered by the information of imminent attack as shown in 1967, the aerial raid

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fomented more controversy over the issue of preemptive self-defense and its scope.

Similar logic was also adopted by the United States when it was contemplating an invasion of Iraq in 2003.<sup>1</sup> On March 20, 2003, the Bush administration initiated a military operation against Iraq by asserting Iraq's alleged possession of Weapons of Mass Destruction ("WMD") and its future threat to the security of the United States. By going forward with the concept of preemptive self-defense, the Bush administration apparently tried to keep the U.N. Security Council at bay, and resorted to unilateral military operation against Iraq.<sup>2</sup> Basically, the United States argued that the invasion was critical to protect its people and interest both at home and abroad, before an actual wave of attacks reaches the U.S. borders, which was then known as the "Bush Doctrine."<sup>3</sup> Despite the failure to locate a WMD and waning support for the war, this doctrine (or its equivalent) seems to be still maintained by the United States.<sup>4</sup> In any event, the U.S. action in Iraq and the underlying doctrine in the post-September 11 era have triggered more debates in the international community on the issue of right of preemptive self-defense. In spite of the importance to build and maintain international consensus on this issue, unfortunately there does not seem to be a reliable guideline for states on this issue.<sup>5</sup>

<sup>1</sup> Richard Falk, *The New Bush Doctrine*, THE NATION (July 15, 2002). For instance, the Bush administration unveiled a sweeping new national security strategy yesterday, declaring that the United States is prepared to launch preemptive strikes against terrorists and nations that threaten America with weapons of mass destruction. See Tom Bowman, *Bush Details Preemptive Strike Policy*, CHICAGO TRIBUNE, Sept. 22, 2002.

<sup>2</sup> To circumvent the intervention of the U.N. Security Council, a state needs to refer to the right of self-defense provided in Article 51 of the U.N. Charter. See U.N. Charter art. 51.

<sup>3</sup> Rachel S. Taylor, *Article 51 and the Argument for the Pre-emptive Self-defense*, WORLD PRESS REVIEW, available at <http://www.worldpress.org/specials/iraq> (last visited on Oct. 1, 2008).

<sup>4</sup> For instance, despite growing concern and anti-war sentiment within the United States, President Bush on March 16, 2006 reaffirmed his first-strike policy against terrorists and rogue nations. In the National Security Strategy of the United States of America, a report prepared and published by the White House regarding the current status of war against terrorism, President Bush made clear that the policy of preemptive strike is a key element in the U.S.'s right of self-defense. He stated that:

To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively in exercising our inherent right of self-defense. The United States will not resort to force in all cases to preempt emerging threats. Our preference is that nonmilitary actions succeed.

And no country should ever use preemption as a pretext for aggression.

White House, *National Security Strategy of the United States of America* (March 16, 2006), at 18. See also Bill Nichols and Barbara Slavin, *New Security Strategy Reaffirms Bush's Preemptive Strike Policy*, USA TODAY (Mar. 16, 2006). In this regard, one commentator states that President Bush was the first U.S. President to explicitly support the doctrine of preemptive self-defense as a rationale for going to war. See Matthew Klapper, *The Bush Doctrine and North Korea*, 8 Gonz. J. INT'L L. (2004-05).

<sup>5</sup> Still, it appears that the scholars are sharply divided over the legitimacy of the preemptive self-defense. See, e.g., Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense*, paper published by the American Society of International Law Task Force on Terrorism 2-3 (Aug. 2002).