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Why is the Concept of Preventive War so Controversial in World Politics and how is it Dissimilar to the Idea of Pre-emption?

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OLIVER LEWIS, DEC 3 2007

“One can never anticipate the ways of divine providence securely enough” to declare war because one held a belief of the future hostile intent of one’s adversaries, remarked Otto von Bismarck in 1875. Such arguments have surrounded the concepts of preemption and its illegitimate counterpart – prevention – long before the inception of the controversial Bush Doctrine in the 2002 National Security Strategy of the United States. Preemption has been practiced for centuries as a legitimate means of self-defense for states. Prevention, an aggressive strategy intended to neutralise a threat before it can come fully into existence, has traditionally been outlawed under international law, international organisations and Just War theory.

But the Bush Doctrine, if recognised as a viable solution to the altered strategic threat environment of the 21st century and adopted by other states, could directly challenge conventional wisdom on the use of force and bring about fundamental changes in customary international law. To achieve this, proponents of preventive war must provide concrete answers to questions of imminence; how states can interpret an attack as imminent, how compelling must a threat be before a state may properly act and should a state be required to justify its threat assessment, or its preventive action, to the United Nations or international community?

Preemptive war is an example of customary international law that has been enshrined as a legitimate mode of action for states in the United Nations Charter as a furtherance of the natural ‘right’ to self-defense. Preemptive attack is, according to Arend, “the use of military force in advance of a first use of force by the enemy”[1]; it is executed as a first strike in anticipation of receiving an attack from an opponent in the near future. However, strict limitations are placed on the justification required for preemption, crucially that there is an imminent threat of unprovoked aggression[2]. Consequently, while the United Nations Charter also expressively forbids the use of military force in international relations, with aggressive war declared illegal following the Nuremberg International Military Tribunal[3], the principle exception is in cases of self-defense, for a state is not obliged to suffer the first blow of an attack before it may be permitted to respond. Therefore a state may launch an attack preemptively against another if it perceives there is an imminent threat. In Chapter VII of the UN Charter the second exception is established, whereby force may be authorised only by the Security Council if it determined there was a threat to peace and security. Thus the United Nations Charter outlined, rather ambiguously, when the use of force is permissible and established the Security Council as the only legitimate forum for authorising military action where doubt as to the legitimacy of military action might exist (when the immediacy of a threat is not readily apparent to the international community). However, the ambiguity of Chapter VII is such that while some jurists and policy-makers contest otherwise, Hammond argues that the UN Charter “does not allow for preemptive self-defense in response to a threatened attack”[4] but that customary international law has recognised that right under highly restricted conditions. Nevertheless, Dipert argues that Chapter VII does include a Hobbesian right to attack preemptively in self-defense but that the unilateral immediacy of the response extends only so long as it takes the Security Council to deliberate on the issue[5]. In customary international law, that is law created by what states do in practice rather than officially drafted, Arend argues that there was an accepted doctrine of anticipatory and preemptive self-defense long before the advent of the UN

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Charter[6]. Precedent in customary international law for preemptive (anticipatory) conflict was established in the Caroline incident (1837) when British and Canadian forces preemptively sunk the American SS *Caroline* because it was being used to supply Canadian rebels near Niagara Falls. The oft cited criteria for preemptive attack from US Secretary of State Daniel Webster declared that it was permissible if the threat was “instant, overwhelming, leaving no choice of means, and no moment for deliberation”: Therefore supporting Hammond's assertion that the Webster provision does not allow anticipatory action as a response to a threat in anything but the most immediate future[7]. Taylor expands on Webster's requirements, indicating that self-defense must be proportional and not retributive or punitive[8]. In President Bush's 2002 National Security Strategy (NSS) preemption is, as Heisbourg recognises, “developed in great detail but in a way that both downplays the novelty of the doctrine and appears to set limits on the kind of preemptive action it advocates”[9]: Specifically, as others have identified, the NSS asserts that the United States has used preemption in the past but that the strategy must evolve to reconsider the definition (without proposing a new definition in the document) of ‘imminent threat’ given the changed strategic situation following the September 11th2001 terrorist attacks. As the response from the international community has exemplified, the Bush administration has taken the concept of preemption “to an even more controversial level”[10], bringing it far closer to the questionable concept of ‘prevention’. The concept of ‘preemption’ in the NSS blurs the distinction between preemption and prevention by calling for a redefinition of how immediate a threat needs to be, given that, as Taylor clarifies, “the world now faces a very new kind of threat, one in which states and non-state actors may have the potential to inflict destruction on an even greater scale” and the increased availability to non-state and ‘irrational’ state actors of technologies capable of causing large-scale destruction has “increased the inclination of... some states toward preemptive military action”[11]. The primary focus of preemption in the NSS is the right to initiate attacks against terrorists and ‘rogue states’ that threaten, or are close to acquiring, weapons of mass destruction (WMD)[12]which is an attempt at establishing a new norm of what constitutes an immediate threat. However, while calling for a redefinition of the threat without offering one, the NSS has created more international confusion than illumination[13], opening the door to potential misuse of the strategy as one of ‘preventive war’.

International opinion generally holds preventive war to be illegal and illegitimate under customary international law, treaties and the United Nations Charter, as it is perceived as an aggressive offensive strategy rather than defensive. Prevention is a military attack against an adversary that may pose some putative future rather than immediate threat[14]; there is no established timeline for the threat posed, and it may or may not realise its potential. Hammond argues that the crucial element of the hegemonic ‘Bush Doctrine’ is in its open embrace of preventive war; that it will unilaterally and without recourse to international law “attack militarily and overthrow any government that it defines as an enemy, regardless of whether that country has made any overt threat against the US”[15]. In the NSS and subsequent policy speeches, the Bush administration has clarified these threats as terrorist, rogue state or any international actor with the potential for a WMD capability that could damage US security and interests. The June 2002 West Point speech delivered by President Bush outlined the emerging strategy of preventive war, asserting that in order to defend itself against WMD the US “could legitimately strike against enemies that were developing weapons of mass destruction, regardless of whether they had succeeded or had made any direct threat to use them against the United States”[16]. ‘Defensive’ prevention becomes necessary, it is argued, because the limitations of intelligence gathering may result in catastrophic WMD-threats being delivered without any fore-knowledge of their existence and therefore a state would become aware too late to counter them. Thus, Webster's formulation for preemption should be expanded to include prevention because the original concept of ‘imminence’ assumed a realistic prospect of fore-warning which is no longer the case when WMD can be concealed and delivered covertly without any such warning; thus prevention becomes self-defence even without direct knowledge of the time and place of an attack[17]. Consequently, the Bush administration has asserted that this scenario provides merit to the argument that the United States may need to initiate preventive attacks even if they are not certain that the enemy actually possesses a weapon: To wait for intelligence confirmation of the threat is likely to be too late to stop the threat from realising its aim. Therefore a doctrine of ‘prevention’, by definition, would deprive the actor of power or hope of realising a threat by eliminating the possibility of the threat's existence[18]. There is an emerging consensus among international scholars that the Bush administration's doctrine could redefine a new international norm of preemptive and preventive war as more states publicly acknowledge that the “risk of calamitous surprise attacks, especially with [WMD], might well justify preventive strikes against terrorists or preventive wars against their state sponsors”[19]. Dombrowski and Payne document that the UN High-Level Panel on Threats, Challenges, and Change largely embraced American thought regarding preventive war by recognising that the changed nature of threats

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which combine WMD, terrorists and irrational actors may justify the use of force preventively and “before a latent threat becomes imminent”[20]. However, the panel did not go so far as to vindicate American claims for unilateral action under the veil of self-defense, instead agreeing with the sentiment of the international community in that preventive force must still be multilateral and authorised by the Security Council and adhere to the basic principles of *jus ad bellum*.

The distinction between preemption and the legality of prevention is in the question of imminence; of the immediacy of the threat. Much of the confusion lies in the lack of any established definition of what timeframe a threat must fall within for preemptive action to be legitimate under international law. Most literature indicates that preventive anticipatory attack lacks the level of imminence of a preemptive attack; the threat has not yet realised its full potential, it is reasonably believed that it will do so “sometime in the indefinite or non-immediate future”[21]but could still, arguably, never do so therefore cannot be a legitimate reason to initiate conflict. Preemption is therefore different from prevention because the former is legitimate self-defense as action intended to forestall an imminent attack while the latter is an application of military force against a “vague and uncertain [threat] of possible conflict at some indefinite point in the future”[22]; this is the widely held belief of the principal difference. Hammond couches preemption strictly as Webster’s response to an instant, overwhelming threat and prevention as action to make a possible future attack impossible but crucially recognises that this distinction is not always made clear and that the terms are used interchangeably[23]. Heisbourg supports this, arguing that the broadening of the interpretation of preemption beyond principles of imminence to include any attack ‘initiated by oneself’ has allowed “prevention and preemption to be used interchangeably in numerous strategic situations”[24]. This is the case in the NSS of the Bush administration, which uses the language of preemption to justify a strategy of prevention[25], using the two terms “more or less interchangeably”[26]therefore obscuring the difference on the grounds that the threat posed by WMD is of such a magnitude that the US must respond “well in advance of an immediate threat”[27]. This nebulous attitude causes confusion as to the administration’s intentions regarding anticipatory intervention which can be especially dangerous, Slocombe asserts, when preventive war is interpreted as “an unbounded invitation to use force on mere suspicion of the ambitions or intent of another nation”[28]and by doing so delegitimises the right of self-defensive preemption, thus is in danger of negating the purpose of international law. To many in the international community, propose Dombrowski and Payne, preemptive war looks too much like preventive war, “which has long been viewed as illegal and illegitimate”[29]. However, Heisbourg speculates that using the terms interchangeably and upsetting the basic principles of the use of force in international relations, the Bush Doctrine could revolutionise international norms of the use of force[30]or conversely the continued linguistic ambiguity of the administration’s policy could hinder the realistic prospect of actual legal innovation[31]. Consequently another clear distinction is in the current legality of the two terms; preemption is permissible providing it follows the principles of Just War theory, limited aims and Webster’s notions of necessity and proportionality. But when such action does not follow these established principles or when preemption is used regularly it becomes, as Crawford states, a cover for a “preventive offensive war doctrine”[32].

Preventive war is initially controversial because it breaks with the conventional norms of international relations that dominated the Cold War, principally that of deterrence. Preventive war, by resorting to the use of force in the face of future long-term threats, is refuting the ability of tools of conventional statecraft to successfully deter the new form of international actors from resorting to the use of force. Hammond argues that the Bush Doctrine “has repudiated deterrence”[33]while Dombrowski and Payne identify that “Cold War-era retaliatory policies, which embraced the logic of deterrence, are increasingly disparaged and renounced”[34]. Ikenberry mirrors the thinking of the Bush administration when he asserts that transnational terrorists that have no geographical base of operations cannot be deterred “because they are either willing to die for their cause or able to escape retaliation”[35]and consequently the retaliatory second-strike capability that deterred foreign aggression is of little use in ensuring security. In the West Point speech, Bush spoke in terms of a changed strategic environment following the Cold War: “For much of the last century, America’s defense relied on the Cold War doctrines of deterrence and containment. In some cases, these strategies still apply”[36]but for the more pressing 21st century threats a new set of strategies is required. Therefore it is necessary to pursue a more aggressive form of anticipatory first-strikes to eliminate the ability of opponents to attack at some future point regardless whether that actor is a state or terrorist entity.

Similarly, another area of controversy is in the implications preventive war has on traditional notions of state

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sovereignty. The political independence of states has been guaranteed by the basic principles of international law since the evolution of the modern state system; it clearly implies that “governments may not be overthrown from outside”[37] and that no foreign power has the right to intervene in the domestic governance and territorial integrity of another state. While sovereignty has long been a central idea in the international system, but the emerging consensus for the Bush administration’s conception of preventive war threatens to change how sovereignty is perceived – and upheld – in international relations. According to Slocombe, the US administration has “declared that it will regard countries that give sanctuary to terrorists as subject to military attack just as much as the terrorists themselves”[38] and further, that states who fail in their obligation to suppress terrorist operations, even if they do not ‘support’ terrorists, have violated their responsibilities to their citizens and the international community and consequently drawn into question the sanctity of their sovereignty. Furthermore, transnational terrorists are non-state actors that do operate within state borders therefore any US preventive action will violate that state’s sovereignty even if the attack is not against the state itself. This issue raises particularly difficult issues regarding state sovereignty and uninvited intervention of foreign military within the state’s territory. Former Italian Prime Minister Silvio Berlusconi supported the Bush doctrine but identified that this new use of military force would require “a change in international law, which previously held that the sovereignty of a single state was inviolable”[39]. Bluntly, as Ikenberry remarks, governments are held responsible for what goes on within their borders therefore, according to the Bush administration, governments that “fail to act like respectable, law-abiding states”[40] or allow terrorists to operate within their territory because the state is unable to enforce their laws will forfeit their rights of sovereignty[41]. Beyond this attempt to alter the sovereign norm of world politics there also resides the question as to whether the United States has the authority to relinquish another state’s sovereignty; whether sovereignty can only be violated with international consensus (through the Security Council) or whether it is an inalienable right of any state.

The current strain of preventive war is problematic because it promotes unilateralism on the part of the state pursuing it, contributes to the breakdown of international organisations and alliances, undermines the long-term success of non-proliferation goals[42] and arguably brings the international system closer to a volatile Hobbesian state of nature. Moreover, it rejects the tradition of diplomatic bargaining and mutual respect among allies, a stable balance of power, and non-military deterrence of one’s adversaries[43]. The Bush strain of preventive war assumes that alliances and multilateral norms are distractions which could hinder the detection and timely elimination of threats where the margin of error is minimal, consequently “the United States has decided it is big enough, powerful enough, and remote enough to go it alone”[44] which is seriously alienated itself from the international community who understand multilateralism as the desired conduct of international relations. However, there is an indication that European allies have begun to accept the broadening of the threat perception along American lines, however actual force must still be employed “a last resort and be undertaken in the context of a multilateral process and mandate from the UN Security Council”[45]; the British government’s desire for “a second resolution from the UN Security Council in 2003 to authorise explicitly the use of force to assure Iraqi compliance with various prior resolutions”[46] is an example of the dominant European strand of prevention. Furthermore, the United States actively pursues unilateralism after practical reasoning that spending on US military capabilities has “left allies [so] far behind” that they will experience difficulty coordinating with American forces and, according to former Secretary of Defense Rumsfeld, joint operations could severely hinder effective operations; “the mission will be dumbed down to the lowest common denominator, and we can’t afford that”[47]. A lack of commitment to multilateral decision-making and alliance-based joint operations accentuates the belief in the American drive for total hegemony and by not seeking international approval of controversial policies the US is ignoring a powerful legitimising tool and promoting not only the harrowing idea of unbridled US power but the prospect of giving credence to other states pursuing questionable unilateral action.

By broadening its conception of threats to make preventive war a possibility the United States is itself becoming a threat to international security and stability. Advocating a strategy of prevention is highly likely to agitate states that are already on an adversarial footing with the US, contributing to existing fears of armed American intervention and potentially provoking fearful states into pursuing more vigorously the development of weapons of mass destruction or more sophisticated domestic defense systems. The ‘axis of evil’ and rogue states which the US has arrayed itself against “cannot be expected to remain passive in the face of this new challenge posed by the United States”[48] and if a state feared it would be the subject of US-induced regime change it “might hasten what is currently a partially developed WMD acquisition or development program”[49]. In seeking a deterrent from preventive attack, nuclear and other WMD proliferation may escalate among precisely those ‘irrational’ states that the US previously targeted

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for non-proliferation strategies. Furthermore, there is the possibility that states unwilling to use WMD themselves may, out of fear of the more active interventionist US, pass them on to terrorist organisations that would be willing to use them[50]. Aside from US opponents, other states may see this as an opportunity to pursue prevention strategies to achieve their own foreign policy interests or resort to military action to 'settle' long-standing disputes: India and Pakistan support the logic of US 'preemption' against each other[51] and some speculate that China may apply the new brand of preemption to Taiwan[52]. Therefore it becomes readily apparent that any widespread use of preventive attack would not only revolutionise norms of the customary application of military force but would heavily destabilise international relations and create a far more hostile world.

Thus, it is necessary that a clear delineation must be established between preemptive and preventive war if modern states are to effectively respond to the changing nature of threats to their national security. The question of imminence must be tackled, preferably by an international body widely perceived as objective and legitimate, and a suitably clear definition codified under international law. As the United States prosecutes its new foreign policy strategy there is likely to be opportunities to revolutionise the norms of the use of force in international relations, however this can only be achieved if the US relinquishes the freedom of policy-maneuvring afforded it by its highly ambiguous stance on anticipatory conflict and commits itself to a conceptualisation of prevention more acceptable and understandable to the rest of the international community, otherwise American could find itself alone, prosecuting a limitless war in search of the chimera of absolute security.

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[14]Brown, op. cit., p. 3

[15]Hammond, op. cit., p. 97

[16]ibid., p. 99

[17]Slocombe, op. cit., p. 125

[18]Heisbourg, op. cit., p. 77

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[20]ibid., p. 124

[21]Dipert, op. cit., p. 33

[22]Slocombe, op. cit., p. 124

[23]Hammond, op. cit., p. 106

[24]Heisbourg, op. cit., p. 78

[25]Hammond, op. cit., p. 100

[26]Heisbourg, op. cit., p. 77

[27]Hammond, op. cit., p. 106

[28]Slocombe, op. cit., p. 124

[29]Dombrowski, op. cit., p. 115

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[36]Heisbourg, op. cit., p. 76

[37]Hammond, op. cit., p. 107

[38]Slocombe, op. cit., p. 124

[39]Dombrowski, op. cit., p. 117

[40]Ikenberry, op. cit., p. 53

[41]ibid., p. 52

[42]ibid., p. 56

[43]Hammond, op. cit., p. 97

[44]Ikenberry, op. cit., p. 54

[45]Dombrowski, op. cit., p. 125

[46]ibid.

[47]Ikenberry, op. cit., p. 53

[48]Heisbourg, op. cit., p. 84

[49]ibid., p. 85

[50]Ikenberry, op. cit., p. 52

[51]Dombrowski, op. cit., p. 120

[52]ibid., p. 121

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Written by: Oliver Lewis
Written at: Aberystwyth University

About the author:

Oliver Lewis is an academic advisor to the Ministry of Defence and completing a PhD in International Studies at the University of Cambridge, where he researches on the culture(s) and education of elite transnational groups.

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