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# Doctrine and Practice of Preventive War

Its Impact on European Security

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## Summary

The recent war against Iraq was strategically explained and morally justified as a necessary preemption to save America from terrorist attacks using weapons of mass destruction (WMD). Unilateral military interventions, sometimes preventive, sometimes retaliatory, but mostly short, played a part in American foreign policy throughout the 1990s, with right-wing US politicians putting pressure on the government to intervene against Saddam Hussein for a number of years. Thus, the war did not come out of the blue. What was new was the elevation of preemptive strikes to a military doctrine by a presidential document, the National Security Strategy (NSS), which presented preemptive strikes as a regular future instrument for the American military in an ongoing and long lasting “war against terror”. Although embellished with Wilsonian language on the promotion of democracy and human rights, this document defines military power as the primary tool of US foreign policy which will ultimately, under American leadership, introduce democratic reforms in the Greater Middle East and elsewhere.

The diplomatic prelude to the first application in Iraq in the United Nations Security Council led to a compromise text in November 2002 that was based on open dissent on “automaticity” (for America to go to war should she judge Iraqi compliance to be insufficient); later in February/March 2003 a proposed second resolution was openly defeated in spite of extraordinary American pressure; a promising last minute proposal was rejected by the US.

The bitterness of transatlantic and intra-European divisions is without precedent. All partners were affected by it. In Germany, foreign policy consensus fell apart and its cushioned situation in a benign hegemonial system ended. Britain’s customary eagerness to please the US in security affairs paid off badly. The problems of European Common Foreign and Security Policy (CFSP) were laid open. They will remain unresolved, and will prohibit serious European actions in real crises, until there is a radical change of the international situation, be it an American return to isolationism versus Europe, a change in the British basic orientation, or the emergence of security priorities which force all European partners to make sacrifices in sovereignty and resources. If nothing like this happens, the Europeans will continue to paper over their CFSP problems.

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## 1. The “National Security Strategy of the United States of America” of September 2002 – an Overall Presentation

Until 1991 the West had a common enemy. From then until 1995 East and West lived in harmony, and changes in the post-Soviet and post-Yugoslav areas seemed manageable on a consensual basis. From 1995 until 2001 (September 11, to be precise), problems of change had become messy and burdensome but were mostly left to the benevolent hegemony of the United States for settlement. For a year after, the West seemed to have regained a unity of purpose in combating globalized terrorism, a new enemy of mankind. Just one year later, in the autumn of 2002, America’s hegemony, its nature and intentions, became the subject of bitter discussion. The divisions permeated many societies, and all alliances. It affected all security institutions. A presidential document on American security strategy played a central role in these debates.

An Act of Congress from 1986 obliges the American president to submit such reports periodically. The news value of most preceding documents of this kind had been limited. This time the echo was widespread. Whereas neo-conservatives like Norman Podhoretz praised the “Bush doctrine” in almost hymnic terms for its “moral decisiveness and political resolve”,<sup>1</sup> the liberal foreign policy establishment of the East and West coasts mostly concentrated on the risks involved.<sup>2</sup>

The document with the official title “National Security Strategy of the United States of America”<sup>3</sup> (henceforth NSS) enumerates eight strategic objectives some of which are difficult to give practical meaning (such as the sentences on human dignity and the centrality of moral principles); others (such as the promotion of free trade and economic

- 1 Norman Podhoretz, In Praise of the Bush Doctrine, in: Commentary, September 2002, p 20. Outstanding amongst numerous other eulogies: Philip Zelikow, The Transformation of National Security – Five Redefinitions, in: The National Interest, Spring 2003, pp. 17ff.
- 2 Outstanding the Occasional Paper of the American Academy of Arts and Sciences “War with Iraq. Costs, Consequences and Alternatives”, Cambridge/Mass., 2002 (henceforth: War with Iraq). Based on a meeting of the Committee on International Security Studies of the academy as early as October, 2002, this publication in three chapters covers the overall problems of the “New National Security Strategy” (by Carl Kaysen/John D. Steinbruner/Martin B. Malin), on the merits and risks of an attack against Iraq (by Steven E. Miller) and on the economic consequences of such an attack (by William D. Nordhaus). Also thought provoking is Andrew J. Bacevich: “A new war on behalf of freedom and against evil, akin to nazism re-legitimized the exercise of American power [...]” But the author questions the legitimacy and warns against the consequences of an unlimited war against terrorism, which is “a tactic and not an enemy”; Andrew J. Bacevich, American Empire, Cambridge/Mass. (Harvard University Press) 2002, pp. 231. Joseph E. Nye in his numerous books and articles deserves, of course, special mention. Also of interest: Jack Snyder, Imperial Temptations, in: The National Interest, spring 2003, pp. 29ff. Representative for a German position is Klaus-Dieter Schwarz, Amerikas Mission, in: SWP Aktuell, Nr. 38, October 2002, and, from a legal point of view, Christian Tomuschat, Der selbstverliebte Hegemon, in: Internationale Politik, Nr. 5, 2003, pp. 39ff.
- 3 National Security Strategy of the United States of America (NSS), September 2002, [www.whitehouse.gov/nsc/nss.pdf](http://www.whitehouse.gov/nsc/nss.pdf)

growth or the resolution of regional conflicts) continue traditional lines with certain modifications. Promises to sharply increase development aid programs and efforts to combat AIDS, though much applauded at the time of issue, have not been followed up by credible action. Much has been written about the Wilsonian language on democracy at the end of the document, and we will return to that later in this chapter. But the most concrete and, at the same time the most innovative and controversial announcement, is the doctrine of preemptive war against “rogue states” capable of providing terrorists with weapons of mass destruction (henceforth WMD). The second innovation is the intention to maintain military forces stronger than any potential rival and, above all, to deter such rivals from seeking equality. The relevant passage reads: “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>4</sup>

As American armed forces are already larger and better equipped than the fifteen ranked behind them in international statistics, this statement will hardly change anything in the real world. What’s new is the elevation of military superiority to a national doctrine and the formal statement of the US’s intention to “dissuade” others to close up.<sup>5</sup>

The NSS appeared at the time of President Bush’s declaration at the UN General Assembly (September 20) in which he referred the Iraqi problem to the Security Council while expressly reserving America’s right to take the issue into her own hands if the latter “failed its responsibilities”. Thus, the affirmation of America’s unilateral right to military interventions found world-wide echo as providing a “blueprint for a perpetual series of hot wars and preventive strikes initiated whenever it is determined that another state is accumulating threatening weapons or harboring terrorists”.<sup>6</sup>

The present report tries to analyze the political problems of such a doctrine, its impact on the United Nations’ system, the legal and moral issues involved, and above all, its consequences for European unity. As the literature on all these issues is already enormous, but mostly quite specialized, I am aiming at a synopsis of the historic, legal and political aspects.

Firstly, a remark on terminology: the term “preemption” played a role in early nuclear strategy when both American and Soviet strategists in different phases were tempted by the idea of an all-out “decapitating” nuclear strike against the adversary.<sup>7</sup> Since then in

4 Ibid., p. 30.

5 Such ideas had lingered in conservative circles since Paul Wolfowitz, then Deputy Assistant Secretary of Defense for Policy, had included them, in March 2002 in a policy paper on future US force postures, although at the time President Bush Sr. ordered the paper to be withdrawn for fear of negative effects on his re-election campaign.

6 Carl Kaysen et al., U.S. National Security Policy: In Search of Balance, in: War with Iraq, see above (footnote 2), p. 4.

7 Gregg Herken, *Counsels of War*, Expanded Edition, New York (Oxford University Press), 1987, notably pp. 97, 145, 159, 165.



American military terminology the word “preemptive” is reserved for short-term strikes whereas “preventive” relates to mid- or long-term action. Current political language follows this practice. Lawyers continue to speak of “preventive self-defense” also against imminent dangers.

As a consequence of the priority given to the fight against terrorism, the defense against future attacks with WMD, and in particular the collusion between terrorists and “rogue states”, other security concerns have been downgraded. Nuclear proliferation, for instance, is mentioned only in passing. This reflects a change of priority. Classical nuclear arms control concentrated on the objective size of the nuclear potential and the likelihood of its use; therefore, friendly nuclear threshold countries like Japan or Brazil were also under close scrutiny (Israel was always an exception). Today, the perceived intentions and the reliability of a state are decisive. In the last analysis, the use of nuclear weapons was seen as the ultimate, the most horrible of possible terrorist actions. As if to atone for the cursory treatment of proliferation problems, the White House published an additional paper two months later called “National Strategy to combat Weapons of Mass Destruction” but it remained widely unnoticed.

Amongst local conflicts only the Middle East is mentioned as a central concern. The Kashmir problem, which could lead to the first nuclear confrontation in history, is portrayed as a local problem, which the two protagonists, India and Pakistan, will hopefully solve (a correct estimate as it now seems). They both receive honorable mention as partners in fighting terrorism. “Global terrorism” is singled out as the main danger. The United States is declared to be at war with that “particularly elusive enemy” which comprises “terrorists of global reach”, above all, Al Qaeda. But as “no cause justifies terror”, the paper concludes that “all acts of terrorism are illegitimate so that terrorism will be viewed in the same light as slavery, piracy or genocide”.<sup>8</sup> Such a principle would outlaw all acts of “asymmetric warfare” including national insurgencies and would, if successfully applied, lead to a global preservation of the status quo, however unjust.

Universal and regional institutions of co-operative security are not given a central role. The United Nations’ system is mentioned twice, and only in passing: as a partner in the reconstruction of Afghanistan and in the fight against Aids in Africa. NATO is portrayed as a task rather than an asset: if it can be reformed, enlarged, and strengthened, it may reappear “as central to the security and the interests of its member states as was the case during the Cold War”.<sup>9</sup> European efforts to “forge a greater foreign policy and defense identity” are mentioned without further comment. As a partner in business, the EU appears only in the promotion of African regional stability, and is bypassed altogether in the promotion of international trade. Post-conflict reconstruction and regional stability

8 NSS, see above (footnote 3), pp. 5 - 6.

9 Ibid., p. 26.

by co-operation, the two fields in which the European Union is most successful, are barely mentioned.

All in all, the paper portrays the state of mind of a leadership obsessed by one traumatizing experience and dominated by the fear of its repetition; the picture of an administration at war. Indeed, throughout the Iraqi campaign and thereafter, the administration stressed the continuity of the war against “terrorism”. This state of mind explains many side aspects, such as the stridency in political discussions with trusted allies, the preference of pressure over persuasion in diplomacy, the classification of friends and foes, the moral indignation over allies who prefer a peaceful solution, and finally, the sometimes absurd virility cult practiced by certain American columnists. Worse still, the concentration on global terrorism blocks the view of the “indispensable nation” for other global problems such as the environment and the north-south relationship. Terrorism may be more to geo-politics than “a strong wind is to geography – a potent, spectacular, and destructive element, but one that affects surface features, not underlying tectonic forces and the location of fault lines”.<sup>10</sup> To remain in the picture, global terrorism could instead be compared with a series of earthquakes which are indeed caused by underlying tectonic forces. But here the image ceases to be useful: as social phenomena, these forces can be prevented by social strategies that go to the roots of tension.

Of course, the American nation suffered a traumatic shock from its second Pearl Harbor. This vibrant society, with its superb political-intellectual life, will one day return to a more balanced approach. After “9/11”, the American government, in its warlike mood, was more concerned with striking than with healing.<sup>11</sup> Consequently, after a brilliant military campaign in Iraq, it had no convincing concept for reconstruction. Widely ignoring local conditions, the Pentagon, to whom this task was entrusted, simply put its hopes in the gratitude of the Iraqi population for its liberation; “nation building” would be accomplished by a transitional military government with comprehensive responsibilities – a solution last practiced in Japan and Germany in 1945 but by a different military (which as conscript armies represented the open mind of the American and British societies) in different countries (homogeneous and industrialized nation states).

In contrast to this warlike emphasis of military power, the document contains numerous evocations of human rights, human dignity and pledges to promote freedom, democracy, progress and free-market economy all over the world. This blend of pragmatic power politics and idealistic aims strings a cord with an American audience. The same is true for the self-confident language on American leadership in an inevitable development towards “democracy, development, free markets and free trade to every corner in the

10 Charles A. Kupchan, *The End of the American Era*, New York, 2002, p. 109.

11 The hope expressed in the previous sentence is apparently about to come true as the final report of the Sept 11 commission includes a call for a broad rethinking of American foreign policy towards the Arab and Muslim world, declaring that the United States need “a preventive strategy that is as much, or more, political as it is military”. Cf. David E. Sanger in *International Herald Tribune* 24/25 July 2004.

world". The president expressly welcomes the responsibility of the United States in this great mission "to further freedom's triumph over all the foes of mankind".<sup>12</sup> Such manifestations of American exceptionalism go down well with a public still traumatized by the attack on two of its national symbols. This "distinctly American internationalism", as the paper calls it, also justifies the military superiority over all "rival powers": preserving American security and superiority furthers the interests of mankind as a whole. But the document is vague on the "missing link": how to transform military power into human progress.

## **2. Historic Background**

### **2.1 International Precedents**

There have been several American military interventions over the last few decades. Some of them, such as the mining of Nicaraguan ports by Reagan in 1984 or the bombing of Libya in April 1986, were in conflict with international law. The hidden support for the Contra insurgency in Nicaragua (1984 to 1987) was opposed by Congress and was financed by doubtful means. The action against Libya was a short "surgical" retaliation; most other actions took place in Latin America, a traditional US backyard, and some of them had a semblance of justification by cold war power relations. The air strikes in August 1998, labeled "Infinite Reach", on a chemical plant in Sudan and an Al Qaeda training camp in Afghanistan were intended to retaliate for Al Qaeda attacks against the destroyer "USS Cole" and the American Embassy in Daressalam: no serious harm was done to the Afghan camp, and the plant in Sudan turned out to produce fertilizers. This touch of half-heartedness and inefficiency produced intense anger from the Republican opposition and skeptical irony from the Europeans.

Operation "Allied Force" against Yugoslavia which ran from April to June 1999 started without a Security Council mandate (unobtainable in the face of declared Russian and probable Chinese opposition). It clearly violated the UN charter, but it was recognized by the whole Western world as a cogent necessity to prevent a humanitarian catastrophe and to stop Serbian nationalism, which in the previous crises had laid bare the inadequacies of traditional peaceful crisis management.

In December 1998 the US together with Great Britain launched "Desert Fox", an air operation against Iraq, targeting suspected biological warfare facilities and Republican guard barracks. This was done in reaction to Iraq's unwillingness to co-operate with UNSCOM; the United Nations' arms control inspection team, set up at the end of the Kuwait war. "Desert Fox" was criticized by the American radical conservatives as typical

12 Both quotes from the presidents' cover letter to the NSS, see above (footnote 3).

Clintonian symbolic military enterprise, destined to satisfy public opinion and to do as if the evildoers were punished – “by bombing the desert”. In legal terms the two powers justified their actions by the same arguments they used in March 2003 (“continued authority”, see below, Chapter 5), but at that time nobody cared.

To sum up, previous US administrations have used armed force, mostly on a limited scale, and mostly without consultations (Grenada, a Commonwealth country, was occupied without even informing Britain). None of these actions produced any transatlantic crisis. But they are early indicators of unilateral tendencies. In particular, the Clinton administration, so much maligned by the Republican opposition for lacking clout, had prepared the intellectual ground for present actions. It was Clinton’s last Defense Secretary, William Cohen, who first defined the danger, which his successor professed to be fighting in Iraq: Cohen repeatedly warned of the danger of terrorists acquiring WMD from “rogue states”. And Foreign Secretary Madeleine Albright spared no effort in forging a national and international consensus on the Kosovo war in the absence of a UN mandate. The lack of a mandate even suited American intentions of the time: NATO, as the representation of most Western democracies, was to be established as an alternative source of legitimacy for enforcement measures. Efforts to include corresponding language into the NATO Summit Declaration of Washington (April 1999) met with European resistance. But “Madeleine’s war” revealed a tendency to neglect the UN system in favor of unilateral action. Washington regarded NATO’s self-mandated war as a useful precedent, whereas all European NATO members considered it an exceptional case, which was highly controversial in their citizens’ opinions.

## 2.2 Domestic Precedents

Another string of events includes the debate between traditional conservatives and neo-conservatives within the Republican Party. President Bush Sr. decided to stop his forces at the Kuwaiti border in 1991, partly because he expected Saddam Hussein to be toppled by his defeat, partly because his military leaders, with General Powell at the top, feared too many casualties. The UN Security Council mandated the coalition only to liberate Kuwait, not to occupy Iraq, it was said. Neo-conservative columnists immediately challenged this decision which remained controversial within the Republican Party. At the time, Secretary of Defense Cheney made comments which make fascinating reading today:

“[...] if you are going to go in and try to topple Saddam Hussein you have to go to Baghdad. Once you’ve got Baghdad it’s not clear what to do with it. It’s not clear what kind of government you would put in place of the one that’s currently there now. [...] How much credibility is that government going to have if it’s set up by the United States military when

it's there? How long does the United States military have to stay to protect people that sign on for that government and what happens to it once we leave?"<sup>13</sup>

The first Bush administration opted for a policy of "comprehensive containment". Security Council resolution 687 dated April 3, 1991 established a system of inspections to remove all WMD, carried out by UNSCOM and enforced by an embargo on Iraq's oil exports. To protect the Shiites in the south and the Kurds in the north the two Anglo-Saxon powers established two no-flight zones with regular patrol flights.

Under the pressure of economic sanctions the Iraqi government at first co-operated reasonably well with UNSCOM until 1997 notwithstanding occasional outbursts of anger and national pride. After that date, they started to sabotage the work of the inspectors until UNSCOM was forced to end its operation in late autumn 1998.

Some observers maintained that containment by inspections and economic sanctions led to the destruction of most of the chemical and biological weapons. (That Saddam Hussein stopped his nuclear program after his defeat in the Kuwait war was beyond reasonable doubt). Official US policy always continued to consider Iraqi arms control as unfinished business to be pursued with intensified pressure. The neo-conservative wing of the republican opposition drew a different conclusion from Saddam's new course of obstruction: containment had run its course and had to be replaced by forcible disarmament and regime change. This new attitude was laid down in an open letter dated January 26, 1998, by prominent Republicans urging President Clinton "to implement a strategy for removing Saddam's regime from power". The list of the 18 signatories reads like a "who's who" of the present administration and its journalistic supporters.

Under such pressure, the Clinton administration in December 1998 resorted to operation "Desert Fox". National Security Adviser Sandy Berger presented it as a synthesis of containment and regime change: "this strategy [...] is to contain Saddam in the short and in the medium term by force if necessary, and to work towards a new government over the long term." However, in October 1999 the Republican majority in Congress forced through an Iraq "Liberation Act", which formulates as "the sense of the Congress" that it should be the policy of the United States to support efforts to remove Saddam Hussein from power in Iraq.

Economic sanctions, an essential part of containment, deprived the country of its main source of income, oil revenues. Later an "oil for food" program was introduced to bring some relief to the suffering masses. All these measures combined weakened the power of the Iraqi state as it demoralized the regular army, decisively degraded its combat capacities, damaged its oil industry, and weakened the moral of the people. However, it also fastened the grip of the regime on the population; it was detrimental to regime change as it destroyed the middle class, the possible pillar of a reformed and more

13 Quoted by Steven E. Miller, *Gambling on War: Force, Order, and the Implications of Attacking Iraq*, in: *War with Iraq*, see above (footnote 2), p. 40.

democratic regime. It also created a parasitic network of smugglers, black marketers and gangsters which at present specializes in looting, robbing and smuggling and will no doubt find other lucrative professions as the present disorder continues. The most convincing moral arguments for a much *earlier* use of military force could be found in the senseless cruelty of a containment policy which made the country suffer more, than, say, its conquest by the victorious coalition army in March 1992.

The chorus of advocates of regime change grew over the years (the advocate of moderation of 1991, Dick Cheney, joined them by signing the open letter mentioned earlier). Nevertheless, the new administration, in its early days, cooperated in traditional containment by improving the United Nations sanctions system (the “smart sanctions” resolution 1382 of June 2002). President Bush may already have been leaning towards regime change under the influence of conservative advisors. But it took the shock of September 11, 2001, to change policy. After that date military power “emerged as never before as the preferred instrument of American state craft”.<sup>14</sup> As early as the first cabinet meeting on September 15, Defense Secretary Rumsfeld mentioned Iraq as an object of military action but the president decided that Afghanistan had priority.<sup>15</sup> However, by this stage he was already thinking in terms of a global war in which Afghanistan would be only the first campaign. The new enemy – globalised terrorism – was as dangerous but more elusive than previous enemies. As another war against the enemies of freedom, a national effort in America’s great tradition, it would last long and claim sacrifices. The term “crusade” offered itself naturally, and speechwriters came to learn that it offended Muslim ears. The enemy was likened to predecessors like Nazism, Japanese militarism, and Soviet communism, so that her own effort could be legitimized by the great liberal principles of W. Wilson and F. D. Roosevelt. Thus, the president managed to rally the nation in a masterly manner behind his purposes, but this war rhetoric also gained a life of its own as a legal concept: If the US are at war, zealous lawyers wrote in various memos, the president as Commander-in-Chief, enjoys complete discretion in the exercise of his war powers; in the light of his “complete authority over the conduct of war, [...] criminal statutes are not read infringing on the president’s ultimate authority in these areas”.<sup>16</sup>

14 Bacevich, see above (footnote 2), p. 230.

15 Bob Woodward, *Bush at War*, New York (Simon and Schuster), 2002, pp. 75, 91.

16 Working Group Report, “Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal Historical Policy and Operational Considerations”, March 6, 2003, published on the website of the Wall Street Journal, p. 20.

### **3. The Doctrine Applied**

#### **3.1 Preparations for War**

In his message on the State of the Nation in January 2002, President Bush mentioned Iraq as part of the “axis of evil”. During his Berlin visit in May 2002, Bush mentioned Iraq several times but Schröder was in no mood to discuss it. By summer, the discussion focused on how to initiate and justify the war. Both Prime Minister Blair and Secretary Powell advocated a Security Council resolution particularly to ensure support, or at least toleration, from moderate Arab states. Dick Cheney, Donald Rumsfeld and his Deputy Paul Wolfowitz opposed this idea and a legendary turf battle ensued. The draft of President Bush’s UN speech was revised 21 times, with the reference to a Security Council resolution alternatively included (at the insistence of the State Department) and deleted (under pressure from the Pentagon). Bush delivered his speech before the United Nations’ General Assembly on September 12. He signed his document on the NNS on September 20. The United States and Great Britain submitted their draft resolution to the Security Council on September 30.

After complicated negotiations the Council issued its Resolution 1441 on November 8. It provided for a new and stringent inspection regime as a last chance, and it produced a diplomatic problem called “automaticity”: the text stated that Iraq would face the “gravest consequences” if it violated its new obligations. But who would determine the violations? Who would decide on the consequences? Resolution 1441 contains compromise formulae on these questions but was accompanied by contradictory interpretative statements. The American Delegate, seconded by his British colleague, declared that if the Security Council “failed to act decisively in the event of further Iraqi violation the resolution did not constrain any member state from acting to defend itself from a threat posed by that country” (official recordings of the Security Council meeting of November 8, 2002). France, China and Russia submitted the opposite interpretation: the use of force would require an additional resolution. Thus, the question of “automaticity” was answered by an unclear text accompanied by two opposing interpretations. It is therefore difficult to consider Resolution 1441 as a mandate to resort to war. Probably anticipating such an equivocal result, the United States and Great Britain had maintained throughout the proceedings that in reality they were already vested with a Security Council authorization to use force (dating back to 1991) and that they had seized the Security Council only to show co-operation and to give Iraq a last chance (see below, Chapter 5).

#### **3.2 The Division of the West**

Meanwhile, popular opposition against the American war plans rose up all over Europe. It was particularly adamant in Germany where American plans of massive initial bombing (“shock and awe”) revived memories of the extinction of German cities fifty years ago. Publications on these bomb raids, long suppressed as politically incorrect for distracting

the German mind from its own war guilt, had recently mushroomed. Predictions of a humanitarian disaster, including the mass starvation of children, also found a broad echo.

Judging by past experience, a German chancellor might have been expected to establish an all-party consensus on the need for transatlantic solidarity, to cautiously regret the decision to go to war, to express the hope of its short duration and to explain the impossibility for Germany to participate. Foreign Minister Fischer claimed from the outset to be guided by security concerns: He predicted “Chaos” in the region and dangers for the Middle East peace process. Chancellor Schröder, probably in full knowledge of American war planning against Iraq, warned at an early stage, that his support would not be extended to “adventures”, but he tried to keep the subject out of discussion until July, always referring to the promise by Bush to consult him if necessary. The heavier the military built-up, the harsher the American rhetoric, the greater the popular excitement on both sides of the Atlantic, the less credible this formula became. Finally Schröder used Vice President Cheney’s call for a “regime change” in his August 26 address as an excuse for openly declaring his opposition. Of course he also wanted to boost his ailing reelection campaign. It is hard to understand why a democratic politician should be blamed for expressing the profound anxieties of his electorates. A big part of the nation expected public guidance and had waited for it impatiently. Campaign considerations apart, it was logical for the German government to oppose a war which it considered unpromising and dangerous. Logically, but not rationally, one might object since this was a symbolic act without any open third party support and, internationally, fraught with tensible disadvantages. But by its opposition, the German government paved the way for the future coalition with France and Russia, and Schröder set an international sign which later, in February/March 2003, consolidated in a strategy of war prevention. In Washington, German-American relations were defined as “poisoned”. There were reasons for American resentments on certain side issues but above all there was a need for a diplomatic quarantine around Germany in order to deter others.<sup>17</sup>

For the German establishment, a world collapsed. German diplomacy had felt comfortable in a network of institutions in which highly important security issues were constantly consulted. They were proud of being admitted to almost all restricted diplomatic circles, like the “QAD” (US, Great Britain, France and Germany), which discretely pre-consulted on most security issues and prepared multilateral conferences, or

17 A Bavarian Bundestag deputy for the SPD, probably the last one with an education in classical languages, compared Bush with “Caesar Augustus” which should have flattered the president. But the minister of justice committed the gravest mistake a German politician could possibly make: she compared Bush to “Nazi Adolf” which not only disqualified her as a tactician but also as a historian: in 1939, Hitler’s economic war machine was well prepared, and he had no reason to detract German attention from economic problems. Schröder’s letter of regret (published online by FAZnet on November 19, 2002, is generally considered inadequate. But the real reason for Washington’s official anger was based on politics, not on courtesy.



the Balkans Contact Group, or the “G8” (the group of the wealthiest industrial countries, which also deals with foreign policy matters).

Now, for several weeks there were no German-American contacts on the political level and few between mid-level officials. Until January 2003, Germany was internationally isolated. Its domestic foreign policy consensus, hitherto unshakeable, was broken. Opposition leader, Angela Merkel, during a tour to the US, was warmly welcomed by the Bush administration and distanced herself from the chancellor’s course. But the CDU soon found out that the public did not honor this attitude (Edmund Stoiber, their candidate for chancellor, never shared it). The fact remains that the two nations, in a question of war and peace, held opposite positions and openly fought them out, with much bitterness on both sides. For most Germans the Iraq war was a frivolous war of choice fought for geopolitical or even economic reasons; most Americans believed until recently that it was an existential necessity, a just war in defense of the homeland.

As a permanent member of the Security Council, France had again become a major actor, to the delight of its policy makers. In September and October 2002 many French commentaries expressed superiority over Germany, which, by lack of flexibility, was left without influence. At that time, France seemed prepared to eventually vote for, and participate in, military coercion. The working atmosphere between the French and American delegations was excellent throughout the negotiations of Resolution 1441. Only later did the French realize that Washington wanted a preventive war regardless of inspection results. The turning point was probably January 10, 2003.<sup>18</sup> The fortieth anniversary of the Elysée treaty (end of January 2003) offered an opportunity to present a common Franco-German platform, this time with security issues at its centre, an old goal of Gaullist policy. Traditional German Atlanticists, particularly influential in high positions of the Foreign Office, realized the Anti-American thrust in all that, but Germany, in her isolation, had no alternative. To make matters even worse for them, Russia was co-opted to a group that actively opposed a major American purpose.

The British followed a tradition that was best described by Raymond Aron forty years ago. In his book *Paix et Guerre Entre les Nations* Aron writes:

18 When Iraq presented its report on the destruction of its WMD to the Security Council, Paris considered it defective, but reparable. But it was rejected in Washington as totally inadequate and a violation of Resolution 1441 in itself. This and the following information, particularly in Chapter 4 is based on the author’s interviews with high-ranking German officials. A valuable additional source is the article by James P. Rubin, *Stumbling into War*, in: *Foreign Affairs*, September/October 2003, pp.46 - 66. Rubin was Assistant Secretary of State for Public Affairs in the Clinton administration and is now Visiting Professor of International Relations at the London School of Economics. His presentation is based on insider information obtained in London and he frequently refers to unnamed British officials, less than happy about the course of events. The best chronicle in the media, written by Gerard Baker and others is: “The Divided West”, a series of four articles in: *Financial Times*, May 28-31, 2003. He corroborates most of Rubin’s and my own information.

“The British governments since December 1941 have all been convinced that the American alliance was indispensable in order first of all to win the war, then to ensure the security of Great Britain, they accepted the American leadership as inevitable. As the result of this resolution (or resignation) British tactics always involved the same procedure: first to convince the American leaders to adopt the policy London regarded as best, subsequently to influence public opinion and the organs of public opinion. And once the American leaders have taken a decision, if even contrary to London’s preferences, London will follow the leader without losing hope that events or criticism will open his eyes. It is by discussion, loyalty and presence that the British attempt to influence the United States.”<sup>19</sup>

Up to this day, British practice corresponds to this description – a remarkable continuity over all political turns of over half a century, including the Suez shock of 1956. London fared well with it and therefore saw no reason for change, certainly not for the prospect of a common European security policy. In October 2002, Blair told the cabinet: “We must steer close to America. If we don’t, we will lose our influence to shape what they do.”<sup>20</sup> However, this time the traditional recipe strained the national consensus and weakened Blair’s political position. No doubt, the prestige of the British army was increased by its determination and skill in fighting and in pacifying its area. But the overzealous efforts at public diplomacy produced mixed results. It started with a “White Paper” of September 2002, which contained exaggerations in central points, to be followed by a dossier in February cobbled together by a junior ace from other sources including a University seminar paper that contained the canard on Iraq’s Uranium purchase from Niger. On the other hand, hardliners in the Bush administration are unlikely to forget that Blair’s insistence led them twice into Security Council negotiations, which they disliked in principle and which went wrong in practice. In turn, this negative outcome can be attributed, at least partly, to a lack of flexibility from Washington, and there is a good deal of unhappiness amongst British officials about it, which slowly pierces the veil of the legendary discretion of British bureaucracy.<sup>21</sup> Above all, Pfaff writes: “The foreign office and Downing Street have recognised that the Bush administration is exploiting Britain’s position in Europe in a way that is destructive of Britain’s interests.”<sup>22</sup>

19 Raymond Aron, *Paix et Guerre Entre les Nations*, Paris (Calman-Lévy), 1962, p. 461, here quoted from an English edition.

20 According to the diary of Robin Cook, as quoted by Warren Hoge, *Cook’s Diary Casts Doubt on Blair*, in: *International Herald Tribune*, October 6, 2003. To this day, Prime Minister Blair claims that in addition to doing the right thing in British-American relations he was right in substance: an evil dictator was removed and conditions in the Middle East are improved.

21 Such regrets clearly surface in Rubin, see above (footnote 18), notably pages 51 and 54 (“A continuing source of bitterness for British officials”). Note also the column by William Pfaff with a telling title which reflects the uneasiness of the British military with American counterinsurgency tactics: William Pfaff, *This could be the End of a Beautiful Friendship*, in: *International Herald Tribune*, January 15, 2004.

22 Pfaff, see above (footnote 21).

## 4. Hopes, Fears and Consequences

### 4.1 The End of Peace Efforts

The controversies in the Security Council during the first weeks of 2003 were a disgrace to NATO, to the European Union, and to diplomacy. In the face of a war that some wanted, others feared, passions ran high, crisis management by compromise was replaced by legal tricks, accompanied by an unprecedented use of pressure, if not intimidation. Phone lines between heads of states ran hot. It began with a Security Council meeting, which the French Foreign Minister had scheduled for January 20, to discuss terrorism on a ministerial level but then surprised Secretary Powell with a broadside on the American position on Iraq. This was a radical turn in French behavior, explicable only by President Chirac's change of mind some days earlier. Powell has resented this "highjacking" of his presence ever since. He suffered another setback on February 5, when he failed to convince the Security Council of Iraq's "material breaches". Few of the facts he presented were new and the new assertions could not be proven. In this situation, American diplomacy gave the unfortunate impression of relying on pressure for lack of convincing arguments.

To quote but one example, President Putin would later relate that President Bush had told him in one of his phone calls that he "risked the strategic relationship with the United States". Putin replied dryly that avoidance of war in Iraq also had strategic importance.<sup>23</sup>

On February 20, the French Ambassador in Washington, Levitte, in a conversation with Deputy Security Advisor Hadley, warned the Americans not to table a second resolution in the Security Council. It would cause unnecessary damage, he argued; if the US went to war without another resolution, its legality would be "hazy" but could still be maintained. If they sought another resolution and were rejected, the illegality of the war would be brought out in daylight.<sup>24</sup> Hadley accepted the argument on a personal basis. But the administration was committed: they had promised to try to get a second resolution to Prime Minister Blair, who needed it for his own audience.

This is not the place to tell the negotiating history of this second resolution, the first draft of which was tabled by the US, the UK and Spain on February 24.<sup>25</sup> The United Nations system, with the Security Council at its core, functioned well because it did precisely what it was meant to do by its founders: it accurately reflected the opinion of the various regions of the world on a question of war and peace – Western Europe divided, Central and Eastern Europe loyal to their new protector, all other continents, including

23 Author's interview, March 2004.

24 Baker, see above (footnote 18), p. 11.

25 This is done by sources indicated above in footnote 6.

the emerging major powers of Russia and China, unanimously opposed. In the final countdown, the coalition could not secure a single vote among the undecided six countries.<sup>26</sup> By asking the Security Council for a second resolution they implicitly devaluated their previous claims to have sufficient authority already for enforcement action by previous resolutions. Unwittingly, they reanimated the discussion on the central issues: was there a right to preemptive or preventive war? Did Iraq pose a danger that would justify such a war? How obvious did the danger have to be and who had the burden of proof? As long as the Anglo-Saxons submitted texts, which answered these questions in their favor by simply restating automaticity,<sup>27</sup> they had no chance of winning a majority. It was a text of this kind that President Chirac threatened with a veto in his interview of March 10. There were last minute efforts by Britain, supported by Canada, to arrive at a real compromise by establishing a final delay of thirty days in which Iraq would have to prove total openness and full co-operation with the international inspectors, particularly where uncertainties still existed, e.g., in accounting for certain chemical and biological substances which had previously existed, and in the destruction of the remaining mid-range missiles. Iraq would have until mid-April to meet these specific requirements, called “benchmarks”. After that, the coalition would have a right to strike. Although this compromise would have provided for “automaticity” it would also offer a long cooling-off period, which Germany and others would have found difficult to refuse. France participated in the negotiations for such a “benchmark” solution because it feared the consequences of a veto and in particular a war in which the allies would eventually find WMD. In that case “we would all be dead” said a high French official.<sup>28</sup> But Washington offered only a one-week extension until mid-March. When the British realized that under these conditions they would only obtain the five secure votes and none of the undecided votes, they withdrew their proposal.

As always, there is a vivid debate among the American political class on all aspects of this diplomatic defeat. Yet for a long time the majority of the American nation were convinced that Iraq under Saddam Hussein did pose a threat to the nation and that important allies deserted them. But a majority of West Europeans (including those nations whose governments supported America) failed to see a threat of this magnitude. These conflicting perceptions of basic security issues are a novelty in transatlantic history. It is the real source of all irritations.

26 The coalition could muster four votes; the three sponsors plus Bulgaria. There were five certain opponents, China, France, Germany, Russia and Syria. The undecided six were Brazil, Mexico, Pakistan and three African states.

27 The first draft of February 24 proposed to state “that Iraq had failed to take the final opportunity afforded to it in resolution 1441.” The revised draft of March 7 proposed to state: “That Iraq will have failed to take the final opportunity [...] unless on or before March 17, 2003 the Council concludes that Iraq has demonstrated [...] co-operation.” This was a thinly veiled version of automaticity: the opponents of war would have needed a resolution to prevent it.

28 Rubin, see above (footnote 18), p. 56.

## 4.2 A Diplomatic Balance Sheet

The rift will produce after-effects in spite of present efforts at damage limitation by all actors. All other changes are related to it. Let us enumerate the most important ones in summary:

- The British prime minister has earned little gratitude in Washington and his domestic position is weakened. Transatlantic loyalty will remain strong in Great Britain but automatic support for all American security concerns (one might call it the Aronsyndrome) may not be taken for granted any longer; this could have consequences for European foreign and security policy.
- Germany has lost her security consensus and her cozy place in the Atlantic community. She had her first national security debate for twenty years (the last one being on mid-range nuclear missiles in the 1980s). She needed a new balance between her European and Atlantic orientation. All this may seem a profound change but one for which the time had come. This would explain the lack of excitement in the public and the self-assurance of the people in power.
- The Turkish political class has suffered a shock; it is impossible to predict its effect. Much will depend on the consequences drawn by the Turkish general staff: they could either try to re-establish the special relationship with Washington or they could allow their politicians to make more of the necessary concessions on the way to Europe.
- France is not much affected. She was lucky that no WMD were found in Iraq. American efforts to “punish” her produced scant results, also owing to globalization: a boycott of Michelin tires, for instance, which are produced in the United States, would have cost the jobs of American workers.
- Enormous damage was done to NATO’s sense of cohesion. Within six months, the climate of confidence, reliability and co-operation built up by decades was destroyed in a negative interplay of the main actors, to which each of them contributed – as if they all instinctively felt they did not need each other any longer. This affects all three pillars of the alliance: its cohesion, its community of values, and its common purpose. All this happened only four years after its proudest hour in the post-conflict era, the Kosovo campaign of spring 1999, when NATO was in the centre of military and sometimes political affairs. It may remain useful, but not indispensable, as a “specialized agency” for post-conflict military control as recently as in Afghanistan and maybe even Iraq.
- The central question of the EU deserves a separate chapter at the end of this essay.
- The United States lost a good deal of confidence and prestige. These are renewable commodities for a superpower. Credibility is different. Rubin recalls the events of 1962, “when John F. Kennedy sent former Secretary of State, Dean Acheson, to brief Charles De Gaulle about the Soviet deployment of nuclear missiles in Cuba. Acheson

offered de Gaulle a full intelligence briefing, but the French president told him it wasn't necessary, saying, he trusted Kennedy never to recur unless he was sure of his facts."<sup>29</sup> The damage done to credibility weakens leadership and loyalty. Leadership is strongest when the junior partner does not even feel to be led, when he takes it for granted and is content to follow. To quote the German example: at the beginning of the crisis, a sizeable portion of the public opinion was aghast: how could we contradict the United States in a security concern of the highest priority? Now the public has learned that it can be done without lasting damage to the nation's interests.

- As to nuclear counter-proliferation no clear picture emerges. The more the big states fear an attack by conventional forces with overwhelming firepower, the more they will be tempted to go nuclear. Such tendencies could already be seen after NATO's intervention in Kosovo. There are few important Third World countries without ethnic conflict potential. "I would advise them to go nuclear" an Indian general told the author in February 2000. In these countries, the concept of humanitarian intervention is mostly considered a unilateral act in which the West applies double standards.<sup>30</sup> Should anticipatory self-defense remain "the centerpiece of American security policy",<sup>31</sup> such tendencies could be reinforced. In the short run fear may prevail and induce rulers like Gaddafi to surrender their WMD stockpiles (Libya had shopped around but had no program for WMD productions and military use). Of course, analysts like William Safire attribute this and all other positive developments to "America's preemptive policy".<sup>32</sup> But the Iranian leaders appeared ready to give up their nuclear design in negotiations with three European foreign ministers and within the framework of IAEA. Initial US pressure was not helpful, and for a while, after the president had given Secretary Powell a free hand, the West, and to a degree Russia, was acting in concert, with promising results.<sup>33</sup> The hardening of Iran's attitude in June 2004 may be a symptom of an internal power struggle but if the Iranians still had reason to fear "America's preemption" (Safire's words) they were likely to adopt a much more guarded, less provocative attitude. On the contrary, their regional influence as the big Shiite power has increased as a consequence of the disorder in Iraq. In the long run it is difficult to see how the present non-proliferation system could be maintained if not backed up by a valid and efficient system of banning and controlling the use of force. Indonesia, Brazil, Argentina, and later Algeria come to mind as openers of the floodgates.

29 Ibid., p. 65.

30 See Günter Joetze, *The European Security Landscape after Kosovo*, ZEI Discussion Paper C64, Centre for European Integration Studies, University Bonn, 2000, p. 13.

31 Madeleine K. Albright, *Bridges, Bombs, or Bluster*, in: *Foreign Affairs*, September/October 2003, p. 3.

32 William Safire, *America is rolling back global Terror*, in: *International Herald Tribune*, January 13, 2004, p. 7.

33 Author's interview at the German Foreign Office on January 8, 2004.

### 4.3 A Political-Military Balance Sheet

Among the most prominent victims of the war were those military experts who predicted long urban warfare in Baghdad and big American casualties. Instead, in a brilliant and decisive adaptation of Blitzkrieg tactics US troops advanced swiftly around centers of resistance and cut off their supplies. As to Iraqi war casualties, the best estimate is 4300 civilians and 9000 soldiers.<sup>34</sup> Although the awful fire barrage of the first days is likely to have exacted a much higher toll, it was not the humanitarian catastrophe feared by some. Saddam Hussein was unable to use any of the means of asymmetric warfare ascribed to him. He had no time to set the oil fields on fire, he had no more SCUD missiles to menace Israel, and if he ever had any WMD, he had no occasion to use them. In short, the overwhelming military power of the US was capable of reaching the immediate war aim, the destruction of Saddam's power structure and the occupation of the entire country. But it had taken six months to build up this terrifying force. It would have been natural for a powerful criminal, had he really been armed to his teeth with WMD, to resort to counter preemption against the buildup around him.<sup>35</sup> He did not and the American leadership expressed confidence that he would not during the campaign.<sup>36</sup> This reveals a basic contradiction in any doctrine of preemption: it depicts the enemy as extremely dangerous, yet must show confidence to destroy him without risk.<sup>37</sup>

President Bush declared the official end to hostilities on May 1. By the end of December 2003 American generals qualified Iraqi resistance as a guerrilla war. To date (July 2004) it is costing eight times more American lives than the actual conquest. Under conditions of widespread resistance, crime and sabotage, no order, let alone a democratic one, can be established. In the Shiite area, religious intolerance, discrimination of women, and a preference for theocratic structures are resurging and seem out of reach by outside influence. But a realistic reconstruction policy will have to rely on the spiritual leaders of the majority population, and that is what the Transitional Authority was doing. Small wonder, that the Shiite leaders for the time being present themselves as moderates, and demand early elections. Once left alone, they are likely to use democratic forms to establish theocratic control.

In the north, the existing local Kurdish power structures will not be dismantled by the occupation forces. Instead, the Transitional Authority has decided that the early date of

34 Frankfurter Allgemeine Zeitung, October 30, 2003, p. 1, referring to a study of the Washington-based "Project for Alternative Defences".

35 A fear expressed by Miller, see above (footnote 13), p. 16.

36 See quote from Secretary Rumsfeld, Jack Snyder, *Imperial Temptations*, in: *The National Interest*, Spring 2003, p. 33.

37 Former Foreign Secretary James Baker recalls in his memoirs that in his last conversation with Iraqi Foreign Minister Assis, before the war in 1991 (on January 9, 1991), he clearly told him that Iraqi use of WMD would meet with an American nuclear reply, quoted in Gregor Schöllgen, *Die Außenpolitik der Bundesrepublik Deutschland*, Bonn, 1999, p. 204.

transfer of sovereignty (July 1, 2004) makes it impossible to attempt such far-reaching and complicated administrative transactions. This means that the new Iraq will enter into independence with additional problems of secessionist movements and ethnic conflicts in the northern areas with mixed populations, especially Kirkuk. In addition, this will present the United States with a situation of either Turkish intervention or Turkish resentment. Add to this the continued resistance and the uncertainties in the Sunnite areas, the general lack of security, the economic problems and the sorry state of the oil industry, any prospects of a democratic and stable Iraq, which could serve as a model for other Arab countries and stimulate the whole area towards development and self-determination, are hard to discern.

There are additional problems affecting the military: unless defeat were conceded, more than half of the combat strength of the American armed forces will remain immobilized in Iraq for an unforeseeable period of time. This makes future interventions dependent on the co-operation of other nations including those of "Old Europe". Moreover, continued occupation would necessitate an excessive use of reservists and National Guards – with grave risks for the troops' morale and domestic support.<sup>38</sup> To make matters worse, post-conflict reconstruction by the American army appears infinitely more complicated than foreseen. These troops are trained to be professional fighters in technical combat, but are structurally unfit to control, let alone rebuild, unfamiliar societies. Trained for technical combat with the avoidance of friendly casualties, their method of silencing attacks by overwhelming airborne firepower demand an disproportional toll of innocent lives. This turns hesitance into hatred. The logic of unilateral preemption proves to be more complicated than had been foreseen: "hit and run" is not enough.

Even a liberal like Steven Miller expected that the capture and destruction of larger amounts of illegal weapons, in particular of WMD, would remove "one of the greatest potential threats to US and regional security".<sup>39</sup> By now it is certain that there was no such threat. "How was the US so misled", asked a New York Times editorial already on January 12, 2004.<sup>40</sup> Although in the meantime a Senate inquiry has put the entire blame on the CIA, it is still an open question whether American politicians were guiding CIA officials in fabricating a system of faked evidence or vice versa.

Miller concludes his own analysis with thinly veiled irony:

"According to advocates, in short, a successful war will remove Saddam from the scene, liberate Iraq, promote democracy in the Middle-East, enhance regional security, boost the international community by enforcing its will against a transgressor and buttress American power, influence and leadership. This is a lot of good to be achieved by a cheap war."<sup>41</sup>

38 Cf. William Pfaff, Reclaiming the U.S. army, in: International Herald Tribune, 24/25 June 2004.

39 Miller, see above (footnote 13), p. 11.

40 Here quoted from International Herald Tribune, January 15, 2004.

41 Miller, see above (footnote 13), p. 11.



Reading this list of expectations against present-day realities is enough to assess the damage.

## **5. Legal and Moral Considerations**

People on both sides of the Atlantic supported or opposed the Iraq war out of basic convictions. Politicians were not guided by legal or moral reasoning. Nevertheless, the intense moral and legal debate before and during the war went beyond day-to-day operational needs. The international order and its institutions, in particular the UN system, were at issue. Does the latter still provide answers to the new dangers of globalised terror, or does its almost unrestricted ban of the use of force now stand in the way of necessary military actions? Who shall judge on these questions? And if the existing law is inadequate, can considerations of moral philosophy replace it?

In a “perfect” legal order the rules are accepted as binding by its subjects, not just because they are enforced but also because the subjects accept them as fair and useful. Such rules will normally reflect a minimum moral standard as well. A breach of the law would then also be morally reprehensible. In a “normal” modern state, its legal order is enforceable over its whole territory. We have become accustomed to measuring legal orders with such yardsticks: they are morally acceptable and universally enforced. But international law, without a universal law enforcement agency, does not measure up to these standards. Just as in medieval societies with their multi-polar distribution of power, legal rules could not be enforced everywhere but were nevertheless considered law. The case of the United Nations Charter (henceforth UNC) is similar.

Every legal system, national or international, can come into conflict with changes in society. Since a society almost always develops more quickly than its legal system, this has to be accepted to a certain degree as inherent in the nature of law. For stability it is an essential element of any legal system. At least in theory, national law can be adapted easily to changing social circumstances. But an international treaty system is much more difficult to change. This requires complicated procedures, a consensus between all member states, and ratification, which poses a dilemma: since international systems may remain unchanged for a longer period than national laws, they may distance themselves more profoundly from reality; but on the other hand, they are much more difficult to amend. To a certain extent, this dilemma is inherent in any international treaty system. A government entering into such a system must be aware of it and may act in bad faith if it later evokes such developments for getting rid of its obligations under this system. Yet the gap between real needs and restricting norms may be so profound that to consider it obsolete and therefore illegitimate can be justifiable. This phenomenon is called “desuetude”. In such cases, law and ethics will fall apart and a state will be tempted, in case of need, to evoke ethical considerations to justify a breach of formal law. The tradition of a “just war” would be such a consideration.

Applying these general considerations to the war on Iraq, we observe first of all that American and British diplomats, far from declaring the UN legal system obsolete, have consistently referred to the Security Council as their source of legality. They claimed “continuing authority”<sup>42</sup> based on previous Security Council resolutions. In a letter to the president of the Security Council on March 20, the American ambassador to the UN stated this case as follows:

“Resolution 687 (1991) imposes a series of obligations on Iraq (...) that were conditions of the cease-fire established under it. It has long been recognized and understood that a material breach of these obligations removes the basis of the cease-fire and revives the authority to use force under Resolution 678 (1990).”<sup>43</sup>

The British representative argued on similar lines. In the heated public debate on the relevance of the UN system it escaped most commentators that the two main participants in the war scrupulously legitimized their actions in terms of that system.<sup>44</sup>

Another way of justifying the war would be the right of self-defense, which is recognised by Article 51 UNC as an “inherent right” in the event of an imminent armed attack against a state. In classical international law the term “imminent” was interpreted narrowly: the best example was the Six Days War of 1967 when the Egyptian army was already dislocated in battle order on the western side of the Suez canal before the Israeli air force struck. The NSS now maintains that in combating globalised terrorism self-defense must be preemptive, because the forces of terrorism are invisible and strike without warning. The traditional term “imminent” should therefore be interpreted more broadly. This sounds reasonable. After all, there is no legal definition for the requirements of self-defense, which Article 51 recognizes as a pre-existing, an “inherent” right. The international community might have been convinced more easily if the NSS had presented this as an exception for emergencies but not as a new rule. In the words of Madeleine Albright, the NSS transformed “anticipatory self-defense – a tool every president has quietly held in reserve – into the centerpiece of its national security policy. This step was dangerously easy to misconstrue (do we really want a world in which every country feels entitled to attack any other that might some day threaten it?)”<sup>45</sup> Preemption also poses a problem of legal clarity and legal security. Of course, if a government obtains intelligence of terrorist preparations nobody will blame it if it acts decisively with

42 Adam Roberts, *Law and the Use of Force after Iraq*, in: *Survival*, Vol. 45, No. 2, Summer 2003, pp. 31ff.

43 *Ibid.*, p. 33.

44 That their arguments may seem “tortuous” and that they may be factually unfounded, is an entirely different matter. Adam Roberts cites the doubts against a continuation of the original authority: Have not the actors changed? (The coalition of 1991 was much larger than the actors of 2003.) Who is party to the armistice agreement (the United Nations or the states acting under its authority)? Can an authority use force to continue its existence for 13 years when the majority of the Council have changed their position and the situation has fundamentally changed? If the guiding principle, as Roberts asserts, “has to be that a resolution once passed, remains in effect”, should the Council not change its drafting practices and insert end dates in its decisions establishing enforcement measures? *Ibid.*

45 Albright, see above (footnote 31), p. 4.

whatever forces necessary, also on foreign territory. But if the danger is so concealed that nobody discovers it, preemption moves dangerously near to aggression. Finally, under Article 51 the state under attack is only entitled to interim measures, whereas the Security Council remains responsible for the final settlement.

But what happens if the United Nations System and the Security Council should become obsolete? In numerous political declarations, the American president has hinted at such a possibility when announcing that the United States would settle the matter at their own responsibility when “the Security Council failed to his responsibilities”. In order to support this thesis, Michael J. Glennon draws up long lists of cases of uncontrolled violence, which the Security Council could not prevent or terminate.<sup>46</sup> However, most of the conflicts cited by Glennon were fought on a sub-state or extra-state level for which the Charter System was not devised.<sup>47</sup> They are reasons to amend, not to abolish it. In Cambodia and East Timor the UN system successfully dealt with grave cases of sub-state wars or ethnic conflicts. There were also traditional wars between states, where the UN system intervened successfully: in the Korean war – by the General Assembly’s resolution “Uniting for Peace” of November 1950, and of course to repel the Iraqi aggression against Kuwait in 1991. Other cases, such as the Soviet invasion in Afghanistan and the occasional US incursions into their Caribbean and Central American backyards demonstrate the necessity of reinforcing, not abolishing the UN system, in particular the voting procedures in the Security Council. This is unfinished business, begun by President Wilson in 1917 and continued after the Second World War by a consensus of the entire American political class. Not everybody will throw such great effort into the dustbin of history so light-heartedly as Richard Perle, who, elated by the beginning of war and the prospect of victory, spoke of the “international wreckage of the liberal conceit of safety through international law administered by international institutions”.<sup>48</sup>

American political history shows a remarkable continuity of basic political concepts; there is little doubt that this great nation, in the light of future experiences and as a result of its continuing public debate, will return to co-operation in enforcing international law. After all, the American constitution in its Article VI paragraph 2 declares international treaties as part of the “supreme law of the land”. Clearly, the UNC is such a treaty. This point was ignored by the president’s advisors who let him repeatedly declare that he swore an oath on the US constitution to defend the security of his country, but not on the United Nations Charter – or that he had to ask anybody’s opinion as to whether the

46 In a series of articles, mostly in American periodicals of international law, but also in *Foreign Affairs*. A good condensation is found in his German article “Der Traum” in *Frankfurter Allgemeine Zeitung*, June 25, 2003, p. 7. See also Anne-Marie Slougher, Good Reasons for going around the UN, in: *International Herald Tribune*, March 19, 2003. Evoking the precedent of NATO’s action against Kosovo, she calls the Iraq war “illegal but legitimate”.

47 See, e.g., Michael J. Glennon, Why the Security Council failed, in: *Foreign Affairs*, May/June 2003, pp. 16ff.

48 In his article, Thank God for the Death of the UN, *The Guardian*, March 21, 2003.

security of the United States was at stake. At the same time his representative at the United Nations, who knows better, claimed the war to be legal by “continued authority”. Weak as this argument was, it showed the desire to stay in the United Nations system which was not shared by the president’s political advisors.

Russia, China and the majority of all European countries, in a meeting of the Security Council on March 26, 2003, officially declared the coalition’s war as “illegal”. If that judgment is accepted, the war was also aggression in terms of the resolution of the UN General Assembly of December 14, 1974.<sup>49</sup> It was precisely to avoid these consequences that the German government refrained from such statements but declared the war as “unwarranted” (unangebracht) – partly to keep the last bridges to the United States intact, partly out of internal constitutional concerns: Article 26 of the Federal Basic Law prohibits Germany from supporting “wars of aggression”. To declare the war as illegal would therefore have forced the Federal Government to deny flyover rights or the use of bases in Germany. Few political forces in Germany would have gone so far – with the notable exception of a Party Congress of the Greens in November 2002, which restricted the room for maneuver of the Foreign Government in case of “aggression” and practically tabooed the mentioning of this term, and of Article 26.

If the UNC is still valid and the war was illegal, it could not be justified by considerations of moral philosophy, but, for some, this may seem an overly formalistic approach not suited to the historic situation of the American nation, its passions and its recent experience. Under the shock of “9/11” an overwhelming majority of Americans, constantly being told that they were involved in a continuing defensive war, naturally looked for new culprits, demanded additional punishment, believed in a collusion between Islamist terrorists and that old enemy, Saddam Hussein, and for all these reasons deeply disapproved of the “obstruction” by other nations against such a course, which they considered entirely legitimate. Small wonder also that the Security Council, as the place where such “obstruction” was practiced came under suspicion, and that a need for alternative sources of legitimacy was felt. Scholars of ethics presented them in the “just war” theory. A prominent example of the use of that venerable doctrine to satisfy modern needs is the appeal by 90 American intellectuals entitled “What we’re Fighting for” issued in February 2002, during the Afghan campaign which, without even mentioning the United Nations, bases the American anti-terror warfare in this tradition. This declaration drew an emotional reprise from pacifist German intellectuals under the title “An International Order based on Peace and Justice looks different”.<sup>50</sup>

The “Just War” doctrine was first developed by Saint Augustinus under the conditions of early Christianity, which, once it had become a state religion, needed intellectual

49 General Assembly Resolution 3314 / XXIX of December 14, 1974. Note in particular Article 2 of that document: “The first use of armed force shall constitute prima facie evidence of an act of aggression.”

50 The American letter is published under copyright of the Institute for American Values. The German letter can be found at the website of the University of Kassel: [www.uni-kassel.de/fb10/frieden](http://www.uni-kassel.de/fb10/frieden)

instruments to overcome the deep-seated pacifist feelings of its underground period.<sup>51</sup> War was admissible when it had a “just cause”, particularly the fight against infidels. In the 16th century, the late Spanish scholastics used the theory to humanize – with little success – the Spanish conquest overseas. Later, under the full development of the Westphalian system of sovereign states, the requirement of “just cause” was dissolved into a sovereign right of states to resort to war: the Italian lawyer Alberto Gentili first observed that two princes in a conflict might each have a “just cause”.<sup>52</sup> The sovereign right of states to go to war was born. It was uncontested until the Briand-Kellog Pact in 1928 banned all wars between states. This ban, a diplomatic revolution, initially had its loopholes. Between then and 2001 all efforts by the civilized international community were directed at reinforcing this ban and defending it against totalitarian aggression. As imperfect as these efforts were in practice, never before were they declared outdated. Were they now replaced by the reintroduction of a unilateral sovereign right to war, this would be a radical shift for which the history of international political thought would offer no example.

It is worrying that the advocates of the “just war” theory in contemporary American discourse rarely mention the United Nations Charter. Which authority abrogated its norms and replaced them by a set of antiquated ecclesiastical teaching remains unclear, as is the question of which authority decides on their applicability. “Just causes” can be easily construed, and few states resort to war without a deep conviction to have such a cause. Collective security systems are an attempt to control the anarchy stemming from competing convictions of this kind. But if we resort to the old Bishop of Hippo we logically should appoint a substitute for the Pope, too.<sup>53</sup>

51 Cf. in particular the excellent oversight with numerous further references of Neta C. Crawford, *Just War Theory and the US Counterterror War*, electronic edition at [www.absanet.org](http://www.absanet.org). Crawford correctly describes the many dilemmas which arise from the application of the just war theory to preemptive counter-terrorists strikes. She would have come to the same conclusions had she applied the legal tradition developed in interpreting Article 51 of the United Nations Charter. Particularly meritorious is her analysis of the evidence needed to legitimate such preemptive strikes. She rejects the reversion of the burden of proof practiced by the administration but reduces the requirement for evidence to a “credible fear” (p.15). A good practical evaluation is given by former President Jimmy Carter who addresses the key problem of “legitimate authority”, which in his view lies with the Security Council: Jimmy Carter, *An Attack is not yet justified*, in: *International Herald Tribune*, March 10, 2003.

52 Herfried Münkler, *Die Neuen Kriege*, Hamburg (Rowohlt), 2002, p. 113.

53 This key problem of the mandating authority is addressed by Chris Brown, *Self-defence in an Imperfect World*, in: *Ethics and International Affairs*, Vol. 17, No. 1, April 2003, pp. 2 - 9. Brown at least takes the UN System into account but argues that the Security Council is not an independent institution capable of setting legal precedents. Therefore, states have a right to evaluate their security risks independently and if necessary, to resort to “preemptive” military strikes. Brown concedes this right only for “preemption” against short-term dangers, not for “prevention” (long term developments). As stated above in chapter 1, this distinction is not universally accepted but may prove to be helpful.

## 6. Consequences for the European Union

The Iraq crisis shed a cruel light on Europe's common foreign and security policy. It mercilessly revealed Europe's division over transatlantic relations and Middle-East policy. Member states had always considered their political relations with the United States (as opposed to trade relations) as their *domaine réservée*. Nevertheless, never before had they opposed each other so strongly about these relations. And never before were they unable to find durable compromise formulae even after the event. When the foreign ministers at their Athens meeting in January 2003 finally reached a compromise by referring to Security Council Resolution 1441 (of which they had conflicting interpretations), the disagreement was laid bare three days later in a public declaration of support of the American position by eight EU member and candidate states. Unilateral action and individual declarations dominated the issues for months. As Thomas Risse reminds us, this was the first time that the EU members fought out their differences in public; in earlier crises they had always been able to hide their differences by "agreeing to disagree".<sup>54</sup> On the other hand, individual EU members have rarely been exposed to so much pressure, public anger and retribution from Washington, and even its loyal supporters, above all the British prime minister, found little reward for their risks and efforts. The crisis has highlighted both the need for European cohesion and the absence of it.

The deeper reasons for this development are, firstly, that the EU member states never discussed, much less acted on, a common attitude towards the US which was a jealously guarded core-interest for most of them. Secondly, the deep conceptional rift between the two sides of the Atlantic has to be noted. The official strategy of the United States, as laid out in the NSS, concentrates on one central danger, terrorism, relies on military power for controlling it, and postulates for the good of the world the continuation of American dominance, which will be defended by military means if necessary. By contrast, the strategy of the European Union is twofold. Firstly, it establishes a pacified area of cooperative stability within its boundaries, and secondly it tries to project this as a model to neighboring areas, more by inducement than by coercion. All these efforts are based on gradualism: gradualism in subject matters, in economics starting with coal and steel and ending with a complete Economic Union, then adding agriculture, and turning to new areas such as legal co-operation and immigration; gradualism of methods (from loose inter-governmental co-operation to supranational structures; gradualism in participation (subsidiary: not all tasks, such as the currency union, can or will be tackled by all members simultaneously); gradualism in membership, new members are admitted one by one, according to their economic and political maturity. For over forty years this strategy proved successful, it led to a degree of integration that makes military conflict between member states unthinkable. The projection of this model to Central Europe is about to be

54 Thomas Risse, *Auf dem Wege zu einer Gemeinsamen Außenpolitik? Der Verfassungsentwurf und die Europäische Außen- und Sicherheitspolitik*, in: *Integration 2003*, Vol. 4, 2003, pp. 564ff.

completed. In South East Europe it has a chance to succeed. It is networking all over Eastern Europe, the Caucasus and the Mediterranean. These efforts went on reasonably well. Even the Euro-Mediterranean partnership (the Barcelona process) is now gaining prominence as a model for a freely agreed civilian-centered cooperative system for the Greater Middle East.

In order to make this strategy successful it had to be constantly oversold as a series of grand designs. Resounding names had to be found for small practical steps. To turn to the narrower field of this study, “European Political Co-operation” was one day in 1993 re-baptized “Common Foreign and Security Policy”. But the practitioner in the field felt little difference. Every time the European leaders were confronted with the overwhelming military might of the United States they solemnly declared their will to increase European defense efforts – particularly after the show of American power in the Kosovo campaign at the Cologne summit in June 1999. At their Helsinki meeting a year later, the European Council defined “headline goals”, i.e., commitments on the number of troops made available for common tasks. The tasks were defined at an earlier Petersberg Meeting, and range from emergency aid in natural catastrophes to “peace enforcing measures”, i.e., military interventions (see Article 17, paragraph 2 of the Treaty on the European Union in the Nice version – still in force –, hereinafter TEU). Such measures normally require a Security Council mandate – without it the EU would almost certainly not reach the required unanimity for a decision on the measure (Article 23, paragraph 1, TEU). This means that the United States, as a permanent member of the Security Council, in practice has a veto over independent European power projection. In the long debate with the US and Turkey on autonomous planning and command capacities for the European forces or the use of NATO assets for these aims (“Berlin-plus”), the Europeans lost sight of this basic point.

Questions of war and peace have rarely been discussed and never decided in European institutions. Thus, before the first Gulf War in early 1991, British Prime Minister Margaret Thatcher advocated her hard line bilaterally while Chancellor Kohl also explained his difficulties in private, citing, in particular, the difficulties for ratification of the Two Plus Four Treaty in Moscow. In April 1999, during a trip to the US, Prime Minister Blair advocated the use of ground troops against Serbia in Kosovo publicly, to the embarrassment of the German Government. There were several consultations on the use of ground troops, including one between the defense ministers of the “Western Five” (US, UK, France, Italy and Germany) but none in the EU.<sup>55</sup> In the Iraq crisis each major actor took up his position without any prior European consultation: not Prime Minister Blair when he publicly pledged his support in early July 2002, not Chancellor Schröder when he declared his opposition in August. There was no European consultation before the British tabled the Second Resolution in January 2003 and not even before President

55 Günter Joetze, *Der letzte Krieg in Europa? Das Kosovo und die Deutsche Politik*, Stuttgart and Munich (DVA), 2001, pp. 112, 131.

Chirac declared his veto. Co-ordination and information on transactions in the Security Council as foreseen by Article 19 TEU were not practiced. And for three months at least, the European scene was marked by sharp controversy with no trace of the solidarity pledged in Article 11 of the Treaty. Maybe this provision was not even violated in a technical sense because it presupposes a common European position, which simply did not exist.

After these experiences, an honest discussion on chances and limits for a European defense should be possible. Thomas Risse points out how a future European foreign minister could use his skills of consultation and organization to achieve more coherence.<sup>56</sup> This could again open up a gradual process. It remains, of course, to be seen whether the European Constitution will enter into force (not before 2007 if all goes well) and whether the future foreign minister has the willpower to use his expertise in the way advocated by Risse. A cynic might add that member states can control such developments by choosing someone with limited leadership capacities.

Romano Prodi, ever the optimist, sees a European war-making capacity at the end of the process when in a speech in Paris in May 2001 he remarked:

“To become a real actor in the domain of security the Union must answer certain questions, which so far have been evaded, such as the question for which cause would we be prepared to die in common? [...] From what point on will human lives have to be put at risk?”<sup>57</sup>

Progress in European integration was often achieved against formidable odds. Similar developments in the defense sector cannot be excluded. But there are good arguments for concentrating on a “European stability policy” and limit military ambitions to improved co-operation. Prime Minister Blair had this in mind when he said in his Cardiff speech (November 28, 2002): “unless it is clear from the outset it is complementary to NATO, working with it, adding to our defense capabilities not substituting Europe for NATO then it will never work”. But other European voices expressed the wish, “to avoid the roles of the Athenians in ancient Rome, i.e., to subordinate ourselves to the wishes of a new empire.”<sup>58</sup> Is a military build-up the right strategy to achieve this aim?

The Council of the European Union on December 12, 2003 issued a paper on “European Security Strategy” (hereinafter ESS), that avoids similar rhetoric. It refrains from demanding more integration in the military field, instead it demands the “systematic

56 Risse, see above (footnote 54), p. 570.

57 Speech before the Institute d'étude Politiques, Paris, 29 May 2001, <http://europa.eu.int/comm>

58 Report of the Foreign Relations Commission of the European Parliament accepted by the Parliament of March 27, 2003, quoted by Gregor Schöllgen, *Der Auftritt, Deutschlands Rückkehr auf die Weltbühne*, Berlin/München (Propyläen) 2003, p. 166 (retranslated by the author). Unlike Gregor Schöllgen, I fail to discover a sense of purpose in comparable phrases. The comparison is revealing, nevertheless: It is quite possible that the Europeans, like the Athenians before, have lost the eagerness to win wars. They might resign themselves to a honorable but secondary role in an empire but might want to dissimulate this situation by posturing and making resounding statements.



use of pooled and chaired assets” and “the transformation of our militaries (note the plural) into more flexible mobile forces”. Under the heading “Policy implications for Europe” it states that “the European Union has made progress towards a coherent foreign policy and effective crisis management.” After this rather optimistic presentation it demands: “if we are to make a contribution that matches our potential, we need to be more active, more coherent and more capable. And we need to work with others.” On this last point the ESS adds that “our aim should be an effective and balanced partnership with the USA. This is an additional reason for the EU to build up further capability and increase its coherence”.<sup>59</sup>

Thus the lowest common denominator between Europeans is to improve their military posture to improve their standing in Washington. But how realistic is such an approach? As shown above, common and independent military action cannot be expected from the European Union under present circumstances against a determined position of the United States. This kind of action would, under present and future EU-rules, require a unanimous decision of the European council. This in turn would be possible only if a security council mandate existed. Such a mandate would require approval by the United States as a permanent member of the council. In addition, European action depends on NATO facilities, above all, command structures. Again, a unanimous decision of the NATO Council would be needed to make them available under a complicated procedure called “Berlin-plus”. Even if the present lack of transport aircraft and satellite communication were rectified, non EU-NATO-powers, like the US, Turkey, and Canada, are in a position to control independent European action.

It is precisely because of this dependence on NATO command assets that the summit at Tervuren on April 29, 2003 proposed the nucleus of an EU military headquarters. The aim was to achieve “autonomy” of EU decisions from the United States. As is known, the four participants of Tervuren (France, Germany, Belgium and Luxembourg) invited the United Kingdom to participate in this process to make it viable. Finally, the British negotiated with the other European partners, and with Washington in parallel, a compromise, which a high-ranking NATO-officer contently called “first class burial”, for the idea of a European headquarters was reached.<sup>60</sup> The American Ambassador to NATO, Nicholas Burns, had polemized untiringly against that “serious menace to NATO”.

To sum up, European military action would be possible only in minor cases where American interests are not involved, or where the United States would like others to do the military work for them. These are precisely the kind of tasks which the common European defense policy presently shoulders: limited peacekeeping in former Yugoslavia,

59 The Council of the European Union, *A Secure Europe in a Better World – a European Security Strategy*, adopted by the European Council on 12 December 2003, <http://ue.eu.int/uedocs/cmsUpload/78367.pdf>, p. 13.

60 Horst Bacia, *Von Tervuren spricht niemand mehr. Ein EU Hauptquartier wird es nicht geben*, in: *Frankfurter Allgemeine Zeitung*, December 4, 2003.

crisis intervention in Central Africa of the kind of Operation Artemis in June 2003 to secure the provincial capital of Bunia. As always, the chorus of advocates of an incremental approach celebrates this as a promising beginning. The question is whether more can be expected and whether such action involves any particular political effort. They are useful but will they really serve the purpose of making Europe a valuable partner of the United States in security matters? On the contrary, at least the Bush administration is likely to continue to oppose an independent European security structure. For a change in this situation, one has to imagine a scenario under which EU members are unanimous on a major conflict the resolution of which requires military force, which the United States, out of weakness or for lack of interest will let go unchallenged – or, to make the scenario even less realistic, the 25 member states of the Union are determined to act even without a United Nations mandate.

Of course, the European countries have shown themselves in the past to be capable of rapid structural changes in cases of sudden need. The development of their cooperation in internal security from intergovernmental cooperation to a “space of freedom, security, and law” are a case in point. If the United States really did need a partner in leadership, be it by imperial overstretch or by catastrophic developments, the European Union would find itself forced to fill the void if as, for instance, in South East Europe or the Middle East, its own vital interests are at stake. Washington would then, and probably only then, be prepared to accept Europe as a security partner.

So much for autonomous capacity for military action. What about the basis of it, a common political attitude on main issues? It is quite possible that the Iraq experience has created the preconditions of a European public opinion, as Jürgen Habermas observed.<sup>61</sup> It is interesting in this context that in most publications on US-EU relations “the Europeans” are invariably equaled with those who opposed the war – although more European governments supported than opposed it. At the same time, the last elections to the European parliament showed the discontent of almost all European nations with their respective governments. A European identity can, however, not be built on negatives, be it alienation from America or unhappiness at home. The absolute priority for all European efforts should therefore be given to the domestic (economic, financial, social) tasks. The hope to gain American respect or a greater say in world affairs by more combat-ready troops is ill-founded in purpose and unrealistic in practice.

Military missions apart, will Europe be able to speak with a common voice, with clear positions on really serious matters such as the Middle-East peace process and the American role in it? There is reason to assume that the political leaders continue to pay lip-service to such ambitious goals and that their aides busily paper over the existing fundamental differences, that the venerable practice of structural tinkering will continue to hide political determination – and that the European Union think tanks, university

61 Jaques Derrida/Jürgen Habermas, *Unsere Erneuerung, nach dem Krieg: Die Wiedergeburt Europas*, in: FAZ, 31. Mai 2003, S. 33.

institutions, and learned periodicals will spare no effort to analyze each new document as a step towards greater unity. Changing this situation seems hardly possible because all politicians share an interest in maintaining the appearance of acting together in the security field while avoiding real sacrifices in resources or sovereignty in order to create it: the Germans, who are eager to maintain their low level of military spending, the French for keeping their freedom of action in their African *domaine réservée*, and the British in order to maintain their privileged position in Washington. A serious political analysis should deal with this smoke screen as a political reality in the way smoke is a reality, but concentrate on the promising capacities of the European Union as a civilian power.