The Bush Doctrine in the Context of International Law and Human Rights

Noah R. Converse

Follow this and additional works at: https://scholarsarchive.byu.edu/byuplr

BYU ScholarsArchive Citation

This Article is brought to you for free and open access by the Journals at BYU ScholarsArchive. It has been accepted for inclusion in Brigham Young University Prelaw Review by an authorized editor of BYU ScholarsArchive. For more information, please contact scholarsarchive@byu.edu, ellen_amatangelo@byu.edu.
The Bush Doctrine in the Context of International Law and Human Rights

Noah R. Converse

With the Security Council refusing to justify a war with Iraq, considerations for the human rights of the Iraqi people are seemingly in conflict with international law. The Bush Doctrine fails the test of international law but may yet be justified.

The renewed threat of terrorist attacks against the United States has set in motion a transition in domestic and international policy. Since September 11, the Bush Administration has gradually broadened the scope of the military to include preemptive strikes against foreign powers. This policy, known as the Bush Doctrine, has replaced the former policies of defensive deterrence with the more aggressive military postures of preemption. When implemented to justify attacking Iraq, the Bush Doctrine bears questionable merit; however, there must be other guiding considerations in determining the justification for military intervention.

Historically speaking, the standard for international law concerning "anticipatory self-defense" largely evolved after British troops destroyed an American vessel in American waters for supplying aid to the Canadian insurrection in 1837. Britain claimed, "A state need not absorb an enemy's attack," but that it may "anticipate it and lawfully strike first." Following the same mode of preemptive logic, the Strategic Air Command in the 1950s stood ready to launch a full-scale nuclear attack on the Soviet Union in the event that the United States learned of an imminent attack. Likewise, in

1 Noah R. Converse is a neuroscience major from Illinois. Noah is interested in law, public policy, and debate. He hopes to find a career that utilizes both neuroscience and law.

Israel preempted an attack by Syria, Jordan, and Egypt after learning of an inevitable Egyptian offensive. Israel determined their best chance for survival was to destroy their foe to prevent an attack. Israel was justified in this course of action against the Arab nations because attack was in fact imminent, and neither sanctions nor reprimand were ever leveled against Israel by the international community.

Concerning Afghanistan, the United States had suffered an armed attack by terrorists aided and abetted by the Afghan government. Because nations are prohibited from sponsoring terrorism, a sovereign nation is justified in taking action against states that sponsor terrorist activities. The United Nations Charter outlines that, just as Libya was sanctioned by the Security Council for "its continuing involvement with terrorist activities," the U.S. response—largely a preemptive measure to thwart future terrorist activities—was equally justified in attacking the Taliban in Afghanistan for supporting and sustaining al Qaeda.

The Bush Administration claims that because Saddam Hussein possesses weapons of mass destruction, he is likely to either give weapons of mass destruction to terrorist organizations or use them against the United States. The administration considers Saddam Hussein a terrorist for using chemical weapons against Iraqi Kurds and firing SCUD missiles at Israel during the Gulf War and thereby justifies preemptively striking Iraq.

Michael Waltzer, quoted by William A. Galston as an authority on the philosophies of waging a just war, explains, "First strikes can occasionally be justified before the moment of imminent attack, if we have reached the point of sufficient threat. This concept has three dimensions: a manifest intent to injure, a degree of active preparation that makes that intent a positive danger, and a general situation in which waiting or doing anything other than fighting, greatly magnifies the risk." Waltzer further emphasizes,
"The potential injury, moreover, must be of the gravest possible nature: the loss of territorial integrity or political independence." Given the rationale of preemptive military action, the question arises: has the United States government provided sufficient evidence and reasoning to justify a preemptive attack against Iraq?

According to Ivan Eland, director of defense policy studies at the Cato Institute, the president has "failed to provide specific evidence that the Iraqi government had any role in the terrorist attacks of September 11." Although the administration may claim that a war with Iraq is merely an extension of the military action in Afghanistan against terrorism, attacking Iraq would be exclusively preemptive, whereas Afghanistan was in retribution for the September 11 attacks. While terrorist attacks in America provided evidence for justifying military action in Afghanistan, no specific evidence exists of an imminent Iraqi attack; hence, the manifest intent of Iraq to injure the United States is wholly speculative.

Regarding the degree to which Iraq is preparing to attack the United States, the president also speculates that Saddam possesses nuclear weapons. Vice President Cheney disclosed that he fears Iraq may soon acquire nuclear weapons, but admitted that no one knows when. Evidently, identifying situations when Saddam would use such weapons within U.S. borders is equally speculative. The production of weapons of mass destruction, alone, does not demonstrate a manifest intent to injure.

Additionally, Eland questions why the United States is concerned about the "purely hypothetical" danger posed by Iraq, in light of more tangible nuclear threats. North Korea and Iran currently have nuclear programs, and North Korea even boldly claims to have nuclear weapons. Eland adds that Pakistan is "a nuclear nation in which Islamists could take power" and is, therefore, "a more dangerous source of nuclear proliferation than

---


Iraq."7 Regarding Pakistan, Doug Bandow, senior fellow at the Cato Institute and former special assistant to Ronald Reagan, states, "The government of Pervez Musharraf is none too steady; Islamabad has long supported the Taliban and its military intelligence forces almost certainly contain al Qaeda sympathizers."8 Such a regime, brought to power by coup or otherwise, would be more dangerous than Saddam because they would have already obtained nuclear weapons and would likely have little regard for defending their homeland, thereby rendering deterrence irrelevant.

Vice-President Cheney stated, "The risks of inaction are far greater that the risks of action."9 However, it is insufficient to justify war with Iraq when a manifest intent to injure has not been established. O'Hanlon echoed President Bush's philosophy of preemptive action by saying that the United States does "not have the luxury of waiting to attack until we are hit first" and that "the traditional tool of deterrence will not work against enemies prepared to lose their lives to kill Americans."10 Unfortunately, attacking Iraq will do virtually nothing to eliminate the threat imposed by weapons of mass destruction as more countries as well as terrorist groups are able to produce or acquire such weapons.

A war with Iraq would mark a dramatic shift in the influence of international law concerning warfare. The United Nations, a forum designed to resolve international disputes and encourage compliance with international law, generally affords the greatest chances for avoiding unjustified warfare. International law, as presently constituted under the UN Charter, has historically represented the time-tested methods for optimal relations among nations and a systematic methodology for appropriately determining justification for war. George P. Fletcher, Cardozo Professor of Jurisprudence at Columbia University, notes, "The real danger of unilateral action against Saddam Hussein is not that the mission

7 Ibid.
9 Galston, "Perils of Preemptive War."
10 O' Hanlon, "The Bush Doctrine."
will fail, though it might, and might fail catastrophically. Rather, it is that such action will signal the end of the law’s influence in setting military policy.”\textsuperscript{11} By circumventing the Security Council and thereby altering international law and the current standards for war, President Bush will establish a new international norm for preemptive military strikes.

William Galston, professor of public affairs at the University of Maryland, also supports the argument that an overly generalized application of the doctrine of anticipatory self-defense will cause a shift in the international standards justifying warfare. “We must ask ourselves how the new norms of international action we employ would play out as nations around the world adopt them and shape them to their own purposes.”\textsuperscript{12} What we ought to fear more than a failure in Iraq, devastating though it may be, is an easy victory. If the invasion were to fail, the Bush Administration’s policy would be called into question and heavily debated. If we succeed, any opposition to the invasion would be drowned out by the proclamations of victory. Conceivably, the president’s broad application of pre-emption would go largely unquestioned, leaving open the possibility for future abuse.

Many news reports talk of destabilizing the Middle East if the United States topples Saddam. Yet, the real danger of a war with Iraq is stabilizing or further polarizing the Middle East. According to an April 2002 publication by the U.S. government, in a hearing before the Committee on International Relations in the House of Representatives numerous experts on the Middle East testified of the latent aggression and hostility prevalent throughout the Arab nations in the form of anti-Americanism and anti-Semitism. Yigal Carmon, President of The Middle East Media Research Institution, testified of hatred towards the United States in Arab media like Al-Jazeera, which “cater to the Anti-American sentiments of


\textsuperscript{12} Galston, “Perils of Preemptive War.”
the masses” and are, in Carmon’s opinion, mainly a product of government indoctrination. “Prior to September 11, one could frequently find articles which openly supported, or even called for, terrorist attacks against the United States. Following September 11, the media overwhelmingly approved of the attacks and praised Osama bin Laden.”

Carmon also presented two textbooks from Syrian and Palestinian schools as evidence of an equally devastating system for indoctrinating hatred against the United States and Israel, “that teach and preach—among other messages of hate—Jihad and martyrdom.” The results of anti-Americanism are further illustrated by the bombing of the USS Cole; the Saudi government has also struggled to control resentment towards the United States. Similar sentiments have been expressed in Indonesia and in Kenya. In addition, “despite the strong support for the United States proclaimed by President Pervez Musharraf since the September 11 attacks, Pakistan’s freewheeling media is filled with hostility for America.” There are also strong sentiments against the United States in Iran, and even in Kuwait, a country previously liberated by the U.S.

Bandow warns of the volatility of the situation if America were to invade Iraq, noting that war in the Middle East would generate unpredictable consequences: “The U.S. would be sloshing gasoline over a combustible political situation in friendly but undemocratic Arab regimes stretching from North Africa to Southeast Asia.” Ideological differences within the Arab states are far less significant than their underlying hostility towards the American aggressors. Their differences could readily be bridged, given the proper impetus.

14 Carmon, “Words Have Consequences.”
17 Bandow, “Second Gulf War.”
Although Iran has agreed to allow U.S. aviators safe passage through its country, and Pakistan is currently supporting the war on terror, nationalistic pressures within these countries could quickly dissolve such alliances. Overthrowing Saddam in an act of preemption, if not conducted in a judicious manner, could galvanize resentment towards the United States and result in increased vulnerability to terror threats from Iraq as well as the Middle East.

Violating international standards for warfare could be hazardous to the peace and security of the entire world. By preemptively attacking Iraq, “the United States would act as a law unto itself, creating new rules of international engagement without the consent of other nations. . . . If the administration wishes to argue that terrorism renders the imminence criterion obsolete, it must do what it has failed to do thus far—namely, to show that Iraq has both the capability of harming us and a serious intent to do so.”18 Thus far the United States has not proven an Iraqi attack is imminent, let alone that Iraq has the intent to carry out terrorist attacks on the United States.

The aforementioned criticisms on the Bush Administration’s arguments suggest that war appropriately has its place when necessity warrants the defense of freedom. And in spite of the instability that could be created throughout the world if the war is not conducted appropriately, we must also weigh in the balance the inherent rights of individuals to live under a government that protects their liberties. To determine justification for the Iraqi conflict, however, we must look deeper than the narrow arguments based solely upon established international law. Ultimately, we must determine if the right of the Iraqi people to live in freedom outweighs the right of Iraq to govern as a sovereign nation as provided by the UN Charter, thereby overriding the arguments that military intervention is not warranted under international law.

Moral law, which governs both the rights of individuals and nations, whether implicitly or explicitly, lends to every human being the right to life, liberty, and the pursuit of happiness. In the end, a purely legalistic approach to opposing the war in Iraq is found to be

18 Galston, “Perils of Preemptive War.”
shortsighted and morally sterile. Cicero asserts, "Power and law are not synonymous." Governments may have power to legalize immoral activities, but they cannot make such activities lawful. Although sanctioned by the German government, genocide was not and never will be lawful. Moral law does not derive its power from the individual or collective voices of any form of government; it supersedes the powers of generals or theocrats, presidents or parliaments, and even monarchs or dictators. Moral law, upon which all law is ultimately based, decrees inherent and inalienable rights to individuals.

The real question, therefore, is not whether preemptive strikes are just or unjust according to international law, but rather, is there a greater consideration justifying war with Iraq that would supersede the constraints imposed by international law. The aforementioned arguments effectively intellectualize and ignore the moral ramifications and obscure legitimate justification for attacking Iraq: to liberate an oppressed people. Seeing the Iraqi people dance in the streets of Baghdad in utter jubilation as Saddam Hussein's statue is toppled from its pedestal ought to suggest that there is a much greater significance to the war in Iraq than our own servile interests. To realize that we stopped short of liberating the people of Iraq following our liberation of Kuwait is to come to the humble conclusion that for twelve unnecessarily prolonged and agonizing years the people of Iraq were forced to endure hardship and oppression because we were unwilling to share with them the lifeblood of democracy.

Hearing Iraqi POWs tell stories of being impressed into military service and families being threatened with their lives for refusing to

---

19 Cicero stated, "Power and law are not synonymous. In truth they are frequently in opposition and irreconcilable. There is God's law from which all equitable laws of man emerge and by which men must live if they are not to die in oppression, chaos and despair. Divorced from God's eternal and immutable Law, established before the founding of the suns, man's power is evil no matter the noble words with which it is employed or the motives urged when enforcing it." Quoted in Ezra T. Benson, An Enemy Hath Done This (Salt Lake City: Parliament Publishers, 1969), 160.

20 Thomas Paine said, "Rights are not gifts from one man to another, nor from one class of men to another. . . . It is impossible to discover any origin of rights otherwise than in the origin of man; it consequently follows that rights appertain to man in right of his existence, and must therefore be equal to every man." Quoted in Benson, 128.
fight for Iraq, one must give pause and wonder about the yet untold atrocities of a regime unbridled by the bounds of justice. What a power and an awesome burden, the power to make men free! When in the course of history has there ever been a nation so powerful that it has lent its strength to liberate a people who have been indoctrinated to hate them?

In light of the intellectual arguments previously presented in this paper, although legitimate and well articulated by their various authors, we must each ask ourselves if the collective rights of individuals to lay claim on their inherent right to freedom is subordinate to the current standards of international law regarding preemptive strikes. In contrasting the arguments against a war with Iraq in the context of international law with the argument for a war in Iraq based on the individual human rights of Iraqi citizens, who can deny that we not only have the sacred responsibility to protect the freedoms of those who are free, but also to establish freedom for those who are oppressed. Indeed, what is the role of international law but to ensure the rights of individuals to obtain and retain liberty? Law that does not ensure these inherent rights and, by default, upholds oppressive regimes is far worse than no law at all.

Some will perhaps claim that the Iraqi people did not collectively voice their desire for American intervention. Such a position is ignorant to the nature of oppression. On the contrary, the entire world recognized the need to force Saddam from power. The years following the Gulf War saw both embargoes and sanctions, weapons inspectors and diplomacy. Diplomacy failed.

We can make legalistic arguments and appeal to international precedents, but in the end we can make no argument that the Iraqi citizen does not have the same inherent right to liberty as we each claim. Therefore, we must each decide if we will support the current international law and the current precedents, or if we will support a new precedent for international law that seeks to place the rights of individuals above the rights of oppressive regimes.

In spite of the arguments of increased hostility towards the United States for waging this war, there is no greater sacrifice that the United States could offer than to afford the Iraqis the opportunity to exercise their innate and intrinsic freedoms as a testament of our true
ambitions and motives. A liberated Iraq, established as a beacon of liberty before the world, will demonstrate that we both value and desire the freedom of all humankind.

America may yet face negative consequences for circumventing international law, particularly if the Arab world, in spite of the actual circumstances surrounding the war, continues to believe that America seeks only domination and conquest. And although the argument put forth by the Bush Administration regarding a preemptive strike is at best poorly defined, the establishment of a liberated Iraq will hopefully blunt some of the insurgent passions throughout the Middle East. There may yet be hostility directed towards the United States for its actions in Iraq—evil will always oppose good. Totalitarians, dictators, tyrants, and those who uphold such forms of government will always oppose democracy, but such has always been in opposition to the cause of liberty.

Paraphrasing the words of Benjamin Franklin, those who would give up liberty for safety deserve neither liberty nor safety. We forfeit our liberties as a nation when we subject ourselves to the political whims of the world and choose not to exercise our sovereign right to act unilaterally in defending our national interests and safeguarding or establishing the liberty and freedom of other peoples. Certainly we could avoid the war and live comfortably for a time while the Middle East continues to fester under the strains of false indoctrination; but the end result would be all but certain. On the other hand, nothing will do more to assuage the hostilities directed towards America, and the West as a whole, than for the world to see a free Iraq, igniting a yearning within other oppressed peoples to enjoy the same.

21 Benson, 215.