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**Müge KINACIOĞLU**

Assoc. Prof. Dr., Hacettepe University, Department of International Relations

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# War on Terror' and Hegemony: International Law-Making Regarding Terrorism After 9/11

Müge KINACIOĞLU\*

## ABSTRACT

The focus of analysis in this article is the process of hegemonic law-making regarding terrorism utilizing unilateral power and the collective legitimization function of the UN. In order to explore how hegemony influences the development of international legal norms concerning the use of force and terrorism, the article examines the ways in which the United States as a prevailing actor in the international system has sought to translate its political power to develop a new norm of preemption and to impose international legal obligations on states with regards to the suppression of terrorism through the United Nations Security Council's Chapter VII resolutions after September 11 terrorist attacks.

**Keywords:** Terrorism, Hegemony, International Law, United Nations, Collective Legitimization

## 'Terörle Mücadele' ve Hegemonya: 11 Eylül Sonrasında Terörizm Bağlamında Uluslararası Hukuk Oluşumu

### ÖZET

Bu makale, tek taraflı güç ve Birleşmiş Milletler'in kolektif meşrulaştırma işlevi aracılığıyla, terörizm ile ilgili hegemonik hukuk oluşturma sürecini analiz etmektedir. Hegemonyanın kuvvet kullanımı ve terörizm konularında uluslararası hukuk normlarının gelişimini nasıl etkilediğini tespit etmek için, bu çalışma, uluslararası sistemin en etkili aktörü olarak Amerika Birleşik Devletleri'nin 11 Eylül terör saldırıları sonrası, siyasi gücünü; yeni "ön-alıcı saldırı" normunu biçimlendirmek, ve Birleşmiş Milletler Güvenlik Konseyinde, 7.Bölüm kararlarını terörle mücadele konusunda uluslararası toplumu bağlayacak, hukuki kurallar oluşturmak için nasıl kullandığını ve nasıl kullanmaya çalıştığını incelemektedir.

**Anahtar Kelimeler:** Terörizm, Hegemonya, Uluslararası Hukuk, Birleşmiş Milletler, Kolektif Meşrulaştırma

\* Assoc. Prof. Dr., Department of International Relations, Hacettepe University, Ankara, Turkey.  
E-mail: mkinaci@hacettepe.edu.tr.

This article aims to analyze the role of political power in changing international norms with regards to the use of force in self-defense against terrorism and legal obligations of states in relation to counter-terrorism and non-proliferation of weapons of mass destruction to terrorists. The dominant approach in international relations presume that hegemony ignores international law when they deem it opposed to their interests or alternatively use the existing law to advance their interests. This line of thinking holds on one hand, effectiveness of international law in restraining great powers is highly doubtful, and on the other, its enforcement on others is dependent on great powers. International law, therefore, does not function, “when there is neither community of interests nor balance of power.”<sup>1</sup> Thus, according to the political realist approach, international law is both an instrument and product of power.<sup>2</sup> Seeking to go beyond this realist analysis, which reduces international law to politics, this article will argue that the relationship between power and law is far from being a linear one and much more complex. It will contend that dominant states employ numerous ways of interaction with international law, which do not enable them to turn their political power into law at all times. In connection to “war on terror”, the article will maintain that international law has been both a means of power and an impediment to its use. In order to explore how hegemonic systems influence the development, stability and persistence of international legal norms concerning the use of force and terrorism, the article will examine the ways in which the United States (US) as a prevailing actor in the international system has sought to translate its political power to develop a new norm of pre-emption (or rather prevention) and to impose international legal obligations on states with regards to the suppression of terrorism through the United Nations (UN) Security Council’s Chapter VII resolutions after September 11 terrorist attacks. Thus, the focus of analysis in this article is the process of hegemonic law-making regarding terrorism utilizing unilateral power and the collective legitimization function of the UN.

For the purposes defined above, the article will first provide a brief overview of the concept of hegemony in international relations literature. Second, it will examine the relationship between hegemonic powers and international law. In this section, it will explore the ways in which hegemony interacts with the sources of international law and the strategies they follow in connection with international legal framework. Shifting focus to the hegemonic practice, the third part will analyze the unilateral attempts of the US to change the existing norms of the use of force in self-defense in the “war on terror”. The following part will first examine the Security Council’s legislative powers under the UN Charter and second, look at the ways in which its legislative powers were utilized in creating obligations on states with regards to terrorism and nonproliferation of nuclear weapons. The article ends with concluding remarks on the extent to which the US has achieved to employ its political power to make changes in legal norms in relation to terrorism.

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<sup>1</sup> See generally, Hans Morgenthau, *Politics Among Nations*, New York, Alfred A. Knopf, 1948, p.229.

<sup>2</sup> See John Mearsheimer, “The False Promise of International Institutions”, *International Security*, Vol.19, No.3, 1994/95, p.13.

## The Concept of Hegemony in International Relations

As one leading scholar pointed out, although the concept of hegemony refers to the dominance of one state over the others in international system, it has been used in confusing ways.<sup>3</sup> In realist thinking, it found its expression as great powers' special role in managing international order. Great powers, on the other hand, were by and large defined in relation to military and political factors. During 1970s, one group of realists underlined the importance of economic factors as well in addition to the coercive aspects of military power. As a realist scholar, Gilpin for example, emphasized the importance of economic power and cooperation through multinational corporations, whereby the hegemon is aided by a degree of consent to its leadership. In this respect, he argued that the role of the US as the hegemon was essential for bringing out a stable liberal economic world order.<sup>4</sup>

The neoliberal arguments laid even more emphasis on the economic aspects of hegemonic power and in fact contended that economic power constitutes the essential element of hegemony. Keohane for example, maintained that in addition to military power, hegemony requires control over raw materials, capital markets and a comparative advantage in the production of high value goods.<sup>5</sup> Further, according to the neoliberal institutionalists, persuasion represents one of the main mechanisms of hegemonic domination. In this respect, Nye called attention to the significance of "soft power" or "co-optive power", which he defined as the ability "to structure a situation so that other nations develop preferences or define their interests in ways consistent with one's own nation".<sup>6</sup> In a similar vein, Ikenberry and Kupchan pointed out that hegemonic power consisted of an ideational element in that norms identified with the hegemon become internalized also by the other states' leaders. In short, this assimilation function provides for the crucial mechanism through which other powers conform with the hegemon.<sup>7</sup> The structural Marxist analysis of international relations on the other hand, associates the term "hegemony" solely with the economic power and largely overlooks the "consent" dimension in connection with prevalence in political, cultural and organizational levels.<sup>8</sup>

Currently in international relations literature, the debate concerning the concept of hegemony largely revolves around Antonio Gramsci's theory of hegemony, which has made significant contributions to the critical international relations theory. His conceptualization lays the emphasis on the ideological dimension of hegemony. A hegemonic order is provided by the shared values and understandings emanating "from

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<sup>3</sup> Joseph S. Nye, Jr., "The Changing Nature of World Power", *Political Science Quarterly*, Vol.105, No.2, 1990, p.186.

<sup>4</sup> See in general, Robert Gilpin, *The Political Economy of International Relations*, Cambridge, Cambridge University Press, 1987.

<sup>5</sup> Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, Princeton, Princeton University Press, 1984, p.32.

<sup>6</sup> Joseph S. Nye, Jr., *Soft Power: The Means to Success in World Politics*, New York, Public Affairs Press, 2004.

<sup>7</sup> G. John Ikenberry and Charles A. Kupchan, "Socialization and Hegemonic Power", *International Organization*, Vol.44, No.3, 1990, p.283-315.

<sup>8</sup> See Immanuel Wallerstein, *The Politics of the World Economy*, Cambridge, Cambridge University Press, 1984.

the ways of doing and thinking of the dominant social strata of the dominant state”.<sup>9</sup> Thus, presenting an appealing model of society that other states try to imitate, hegemon’s power derives from values in addition to the material factors. Nonetheless, the defining feature of such hegemony remains to be inequality and hierarchy.

Following this brief survey of the conceptualization of hegemony in international relations literature, for the purposes of this article, hegemony is defined both in relation to material –military and economic power- and ideational –widely accepted superior values-factors.

## Hegemony and International Law

The degree that hegemonic power can influence the development and/or change the international law is debated among legal scholars within the framework identified as hegemonic international law (HIL). The idea of HIL first appears paradoxical since international law is based on the notion of “equality of states”. The UN Charter Article 2(1) states that it is “based on the principle of sovereign equality of all its Members”. The principle is maintained in a number of international legal and political documents as well.<sup>10</sup> Secondly, the concepts of international law and hegemony also seem to be irreconcilable, for hegemonic involvement in the formation of international law would entail breach of the norm of nonintervention in the internal affairs of states, and thus would violate the principle of sovereignty. A leading scholar argues that HIL is marked by recurring projections of military power and interventions in the domestic affairs of other states.<sup>11</sup> Nonetheless, despite these seeming paradoxes, even the classical legal scholars recognized the role of power and power differences in international law.<sup>12</sup>

Given the subject under scrutiny in this article, the most relevant discussion for the analysis of HIL concerns the influence exerted by one dominant power through its rhetoric and practice on the sources of international law, namely, the treaty and the customary law.<sup>13</sup> One view holds that hegemony and international law co-exist to the extent that the hegemon is involved in law-making. By the very nature of being the predominant power, the hegemon is in need of rules governing especially its economic relations. The hegemon as the primary beneficiary from an open world economy, can be expected to actively seek and lead the creation of rules to regulate world trade.<sup>14</sup> In the aftermath of the Second World War, for example, trade and economic matters constituted the essential frameworks for US engagement with international law. Similarly, in the post-Cold War era, US leadership in international law-making in areas of trade and

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<sup>9</sup> Robert W. Cox with Timothy J. Sinclair, *Approaches to World Order*, Cambridge, Cambridge University Press, 1996, p.517.

<sup>10</sup> See for example, UN General Assembly Resolution, “Inadmissibility of the Policy of Hegemonism in International Relations”, UN Doc. A/RES/34/103, 14 December 1979.

<sup>11</sup> Detlev F. Vagts, “Hegemonic International Law”, *American Journal of International Law*, Vol.95, No.4, 2001, p.843.

<sup>12</sup> See for example, Hersch Lauterpacht (Ed.), *Lassa Francis Lawrence Oppenheim, International Law: A Treatise Vol. I*, London, Longmans, Green & Co., 1955.

<sup>13</sup> Jose E. Alvarez, “Hegemonic International Law Revisited”, *American Journal of International Law*, Vol.97, No.4, 2003, p.873.

<sup>14</sup> See Vagts, “Hegemonic International Law”, p.844-845.

investment has been crucial. US efforts were the driving force for establishing the World Trade Organization, as well as for the creation of NAFTA. In addition, the US has taken a central role in concluding bilateral free-trade agreements and investment treaties. In the area of trade and investment, then, the US can be said to be an active contributor to and leader of law-making due to the fact that the US appears to be the most beneficiary of an orderly world trade.<sup>15</sup>

Notwithstanding the active US role in the law of world trade, generally speaking, treaties are considered to irritate hegemony, for they constrain the scope of unilateral action. In this respect, it is argued that hegemony tends to be reluctant to enter into multilateral agreements, which establish international regimes and organizations, whereby lesser powers can create coalitions against them.<sup>16</sup> One can give US avoidance of the Convention on Biodiversity, the Comprehensive Test Ban Treaty, the Convention on Landmines, the Kyoto Protocol, and withdrawal of its signature from the Rome Statute of the International Criminal Court by the Bush administration as such examples.<sup>17</sup> On the other hand, as the US has frequently done, a hegemon can utilize international organizations to increase its power and reinforce its dominance by using its voting privileges. Insofar as an international organization is founded by a multilateral treaty, which represents shared standards of appropriate behavior, the distinctive value of an international organization lies primarily in the legitimacy it provides to the hegemon's actions. Such legitimate rule transforms hegemony's dominance to authority,<sup>18</sup> since hegemonic policies aided by "legitimacy" provided through a multilateral institution do not appear mere manifestations of self-interest. Second, as claims of legitimacy generate obedience by other states,<sup>19</sup> enhancement of authority as such decreases the costs of enforcement of the rules by the hegemon.<sup>20</sup> In a similar vein, international organizations and compliance with international law can be instrumental for the hegemon to further pacify its dominance in other states' perception.<sup>21</sup> Finally, if the hegemon appears to be guided by the existing standards of legitimacy and acting in accordance with the legal norms, it may also effectively stabilize its dominance in the long-term. However, legitimacy provided by international organization and international law is a double-edge sword for the hegemon. In order to breed legitimacy, international organizations themselves need to be perceived legitimate, in that the rules which put constraints on unilateral action

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<sup>15</sup> Nico Krisch, "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order", *European Journal of International Law*, Vol.16, No.3, 2005, p.384-385.

<sup>16</sup> Vagts, "Hegemonic International Law", p.846.

<sup>17</sup> The Clinton administration signed the Rome Statute in 2000, but did not submit it to Senate ratification.

<sup>18</sup> On the relation between legitimacy and authority, see Ian Hurd, "Legitimacy and Authority in International Politics", *International Organization*, Vol.53, No.2, 1999, p.379-408.

<sup>19</sup> Thomas Franck argues that legitimate norms give rise to a "compliance pull". Thomas M. Franck, *The Power of Legitimacy Among Nations*, Oxford, Oxford University Press, 1990, p.24.

<sup>20</sup> Krisch, "International Law", p.374.

<sup>21</sup> For detailed elaboration of legitimacy as a resource for pacification, see Nico Krisch, "Imperial International Law", Global Law Working Paper 01/04, New York University School of Law, New York, USA, 2004, [http://www.law.nyu.edu/global/workingpapers/2004/ECM\\_DLW\\_015797](http://www.law.nyu.edu/global/workingpapers/2004/ECM_DLW_015797) (Accessed on 23 July 2011), p.7.

need be honored by the hegemon. In other words, if the institutions are widely believed to be mere tools of the dominant powers, whereby they violate law when it conflicts with their interests, both international organizations and international law will fail to provide legitimacy to the hegemon's actions. Thus, the dilemma for the hegemon is that in order to utilize international organizations and international law for legitimating its policies, it too need to abide by the constraints of the international institutions and its related law. As one leading legal scholar puts, in using institutions and international law, the hegemon "faces a trade-off between enhanced legitimacy and wider constraints".<sup>22</sup>

One other issue in relation to the value of international organization for hegemon is the legalization of its hegemony. Within the context of this article, one can argue that the UN's organizational structure is a good case in point insofar as the design of the Security Council represents the legal acknowledgment of inequalities of power in contravention to international law based on sovereign equality of states. In this sense, the UN Charter serves as the "legal basis" of the political hegemony of five permanent members. However, it should be underlined that hegemony cannot be created solely by law or treaty.<sup>23</sup> In this sense, to the extent that the other four permanent members lack the "actual" predominance of the United States in international politics in both military and economic terms by themselves alone, the UN constitutes a special venue especially for the United States, whereby it can ensure other states' compliance out of duty, i.e. out of a conviction that obedience is required and proper.

With respect to customary international law, hegemon's contribution to law-making is much more complex than to formulation of legal rules through treaties. According to Article 38 of the Statute of the International Court of Justice, international custom evinces "general practice accepted as law".<sup>24</sup> The two elements that characterize a norm to be international customary law are state practice, and states' perception of legitimacy and legality of the norm in question, which in legal terms is referred to as *opinio juris*. The relevant question here is whether the hegemon's power and influence can extend to the formation of a new customary rule and/or prevent it to become the law by its abstention. In this respect, although the ambiguity of customary law makes it conducive to be manipulated by dominant powers, norm setting is harder due to equal status of the state practices in the process compared to that of treaties. Consequently, the dominant actors have often failed to elaborate customary legal norms in line with their preferences due to relatively egalitarian formation of law.<sup>25</sup> With respect to treaties, however, the dominant states may find it easier to turn their preferences into treaty provisions through political pressure during negotiation process. On the other hand, breach of treaties is more costly, as the evasion is visible, especially when there are institutional mechanisms for monitoring enforcement. In contrast, the cost of failure of compliance with customary

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<sup>22</sup> Krisch, "International Law", p.375.

<sup>23</sup> Charles Kruszewski, "Hegemony and International Law", *American Journal of International Law*, Vol.35, No.6, 1941, p.1134-1135.

<sup>24</sup> *Statute of the ICJ*, Article 38, para.1.

<sup>25</sup> For detailed analysis of this point Stephen Toope, "Powerful but unpersuasive? The role of the USA in the evolution of customary international law", Michael Byers and Georg Nolte (Eds.), *United States Hegemony and the Foundations of International Law*, Cambridge, Cambridge University Press, 2003, p.287-316.

law is less acute due to the vague nature of customary law in general.<sup>26</sup> In short, since emergence of a new customary law requires both the material factor –state practice- and the psychological factor –*opinio juris*-, customary norm setting appears more challenging for the powerful actors, while appeal to customary norms may be more attractive due to relative imprecision of the rules.

### **Unilateral US Attempts to Change the Law of Self-defense against Terrorism**

The US decision to undertake a military action in Iraq not only without Security Council authorization but also in defiance of overwhelming opposition of the majority of the Security Council as well as its NATO allies was a turning point in terms of commitment of the world's dominant power to the normative underpinnings of international order regarding the use of force. In this context, the most controversial issue has become the Bush administration's conception of the preemptive use of force as formulated in the National Security Strategy (NSS) of 2002.

#### ***Customary Law of Anticipatory Self-defense and the Bush Doctrine***

Admittedly, the concept of preemption has long been a contentious doctrine in international law. Under the UN Charter, Article 51 provides for the only exception to the general prohibition of unilateral use of force. It contains the right to individual and collective self-defense, and specifies the conditions under which individual states may resort to force. In legal terms, the most contentious issue regarding self-defense pertains to whether the use of right of self-defense is confined to the circumstances whereby an armed attack has already occurred or whether this right can be invoked in anticipation of such an attack. Some scholars argue that Article 51 should not be interpreted as excluding the right to anticipatory self-defense in case of an imminent danger of attack. Supporters of this view refer to the legal criteria for permissible self-defense as formulated by US Secretary of State Daniel Webster, in the *Steamer Caroline* incident,<sup>27</sup> as reflecting the authoritative customary law.<sup>28</sup> According to this formulation, the anticipatory self-defense is admissible, when "the necessity of that self-defense is instant, overwhelming, and leaving no choice of means and no moment for deliberation."<sup>29</sup> Thus, first, the state resorting to use of force in self-defense needs to demonstrate that the use of force by the other state is imminent and that there is no available remedy other than use of force to prevent the attack, and second, it is required to take action proportionate to the threat.

Bush administration's articulation of preemptive self-defense as a ground for invasion of Iraq was far more extensive than anticipatory self-defense traditionally understood. At the 2002 West Point Commencement, President Bush stated that "not only will the United States impose preemptive, unilateral military force when and where

<sup>26</sup> Krisch, "Imperial International Law", p.12-13.

<sup>27</sup> *Caroline* incident refers to the British attack in 1837 to a vessel owned by US nationals, *Caroline*, on the basis of its alleged support to the anti-British insurgency in Canada and with a claim to right to self-defense. For details of this case, see Lauterpacht, *Lassa Francis Oppenheim*, p.300-301.

<sup>28</sup> Timothy L. H. McCormack, *Self-Defence in International Law, The Israeli Raid on the Iraqi Nuclear Reactor*, New York, St. Martin's Press, 1996, p.247.

<sup>29</sup> See note of Webster to British authorities, 27 July 1842, quoted in McCormack, *Self-Defence in International Law*, p.183.



it chooses, but the nation will also punish those who engage in terror and aggression and will work to impose a universal moral clarity between good and evil.” He further maintained that, “If we wait for threats to fully materialize, we will have waited too long.”<sup>30</sup> The National Security Strategy (NSS) of 2002 expressed this conception of preemption by stating “as a matter of common sense and self-defense, America will act against such emerging threats before they are fully formed.”<sup>31</sup> It argued that “[t]he greater the threat, the greater is the risk of inaction— and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack.” Therefore, it claimed “the United States will, if necessary, act preemptively” in order to prevent hostile acts by adversaries.<sup>32</sup> Referring to the legal ground for advocacy of such policy, the NSS asserted:

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.

We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.<sup>33</sup>

Thus, the NSS argued for adjustment of the concept of the imminent attack in the customary law to “the capabilities and objectives of today’s adversaries.”<sup>34</sup> In a similar vein, President Bush’s second term NSS, released on 16 March 2006, reiterated that the US “does not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy’s attack,” grounding the right to do so on “long-standing principles of self defense.”<sup>35</sup>

## **Impact of the Bush Doctrine on Customary Rules of Self-Defense**

The assertion of preemptive action in Bush Doctrine had several problems. First, this formulation of anticipatory self-defense in essence is based on the idea of prevention rather than preemption insofar as it conceives responses to non-imminent threats. It is the removal of the element of immediacy, which in turn dilutes the criterion of necessity, of this articulation that lies at the heart of the legal discussion. Given the changed nature of the threats, in particular terrorism and proliferation of weapons of mass destruction (WMD) to terrorist organizations, it is indeed possible to conceive of threats that are

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<sup>30</sup> President George W. Bush, Graduation Speech, United States Military Academy, West Point, New York, 1 June 2002, <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html> (Accessed on 20 September 2010).

<sup>31</sup> The National Security Strategy of the USA, September 2002, p.ii, <http://merln.ndu.edu/whitepapers/USnss2002.pdf> (Accessed on 7 May 2011).

<sup>32</sup> *Ibid.*, p.15.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> The National Security Strategy of the United States, March 2006, p.23, <http://www.comw.org/qdr/fulltext/nss2006.pdf> (Accessed on 7 May 2011).

real but not imminent. The problem with the expansive formulation of anticipatory self-defense, however, is less with the requirement of immediacy *per se*, when there is credible evidence of the reality of the threat in question -determined by capability and hostile intentions- and when there is no alternative course of action.<sup>36</sup> The controversy arises as to the agency of the decision i.e whether the decision of a preventive offensive war in relation to terrorism can be taken unilaterally.

Second, such loose understanding of preemptive action not only considerably removes the restraints on "when states may use force" but also "undermines the restraints on how states may use force."<sup>37</sup> A subjective determination of a possible attack logically leads to a subjective determination of the amount of force required for preempting a possible attack. Thus, not only the immediacy and necessity criteria but also the proportionality component of the customary understanding of anticipatory self-defense becomes troublesome.

Finally, another problematic issue regarding the Bush doctrine of preemption is not only its unilateral character but also its total US focus.<sup>38</sup> The fact that the conception of extended anticipatory self-defense in the NSS does not entail a discussion of the limits and criteria of preemptive action as a possible resort by other states suggests that invocation of such a right is reserved to the US only. Hence, in effect, the US attempted at bringing a new interpretation to a customary law with the NSS of 2002, according to which "rogue" states that sponsor terrorism and try to acquire WMD would be subject to a new cluster of legal rules, whose enforcement is reserved for the US only. In other words, the US approach amounted to creating different categories of states according to which those states allegedly support terrorism are denied to enjoy their rights under international law.<sup>39</sup>

The reactions to the US-led invasion of Iraq demonstrates that such a hegemonic interpretation of a customary law remains far from becoming the accepted formula for a new customary norm of anticipatory self-defense against terrorism. The failure of provoking a general acceptance can be also discerned from the fact that the US did not employ this line of legal reasoning for its military action against Iraq. Rather, the US asserted that its action was authorized under existing Security Council resolutions,<sup>40</sup> most notably by Resolution 678 of 1990.<sup>41</sup> Similarly, the United Kingdom did not invoke such a right either.<sup>42</sup> This said, it has to be noted that there was explicit opposition at

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<sup>36</sup> Gareth Evans, "When is it Right to Fight?," *Survival*, Vol.46, No.3, 2004, p.65.

<sup>37</sup> Mary Ellen O'Connell, "The Myth of Preemptive Self-Defense," *The American Society of International Law*, Task Force on Terrorism, p.19, Available at <http://www.asil.org/taskforce/oconnell.pdf>. (Accessed on 10 June 2011).

<sup>38</sup> Adam Roberts, "Law and the Use of Force After Iraq", *Survival*, Vol.45, No.2, 2003, p.47.

<sup>39</sup> Krisch, "International Law", p.387.

<sup>40</sup> For detailed legal basis of the invasion put forward by the US, see Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2003/351, 20 March 2003.

<sup>41</sup> Resolution 678 authorized a coalition of states to repel Iraq from Kuwait and to restore international peace and security. SC Res. 678, 29 November 1990, <http://www.un.org/Docs/scres/1990/scres90.htm> (Accessed on 13 September 2011).

<sup>42</sup> See Memorandum by the Foreign and Commonwealth Office, Iraq: Legal Basis for Use of Force

the UN to the US legal theory for the invasion. At the Security Council, the Russian representative stated that none of the Security Council decisions “authorizes the right to use force against Iraq outside the Charter of the United Nations. Likewise, many other states strongly objected to the intervention on legal grounds. Among them were Malaysia (as Chair of the coordinating bureau of the non-aligned movement), Libya, Indonesia, India, Brazil and Switzerland.<sup>43</sup> Further, the Council of the League of Arab States adopted a resolution on 24 March 2003, calling for immediate cessation of acts of war and withdrawal of foreign forces from Iraq.<sup>44</sup> The UN Secretary-General Kofi Annan also expressed his concern prior to invasion that “[i]f the US and others were to go outside the Council and take military action it would not be in conformity with the Charter.”<sup>45</sup> Finally, there was significant public opposition to the war in many states.<sup>46</sup> As UN Secretary-General warned in his address to the General Assembly on 23 September 2003, it states “reserve the right to act unilaterally, or in ad hoc coalitions,” this would be “a fundamental challenge to the principles on which, however imperfectly, world peace and stability have rested for the last fifty-eight years.”<sup>47</sup> Consequently, the US action in Iraq was largely considered not only unlawful but also illegitimate to the extent that it lacked an explicit authorization from the Security Council and was undertaken despite strong expression of disapproval. The fact that the US did not employ the NSS legal argument in the Security Council during its efforts to obtain authorization to use force further demonstrates that the US acknowledgment of the absence of *opinio juris* to modify customary norm of anticipatory self-defense to be applicable to terrorism.

## Collective Hegemonic Law through Security Council

Despite its outright refusal to authorize the Operation Iraqi Freedom, the Security Council’s practice in the aftermath of the September 11 events raised concerns about its hegemonic capture insofar as the resolutions adopted regarding terrorism and nonproliferation of nuclear weapons depart from Council precedents and impose on states to adopt similar counterterrorism legislation of their own.

### *Security Council as World Legislator*

Article 24 of the UN Charter gives the Security Council “primary role for the maintenance of international peace and security.” To that effect, under Chapter VII, the Security

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against Iraq, 17 March 2003, [http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/notices/annex\\_c\\_-\\_memorandum\\_by\\_foreign\\_and\\_commonwealth\\_office\\_170303.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/notices/annex_c_-_memorandum_by_foreign_and_commonwealth_office_170303.pdf) (Accessed on 2 June 2011).

<sup>43</sup> See UN Doc. S/PV. 4726, 26 March 2003.

<sup>44</sup> Letter Dated 24 March 2003 from the Permanent Observer of the League of Arab States to the United Nations Addresses to the President of the Security Council, UN Doc. S/2003/365, 24 March 2003.

<sup>45</sup> UN Secretary-General Kofi Annan, The Hague, The Netherlands, 10 March 2003, <http://www.un.org/apps/sg/offthecuff.asp?nid=394> (Accessed on 3 June 2011).

<sup>46</sup> See for example “Across Europe, Millions Protest a War in Iraq”, *Washington Post*, 15 March 2003, p.A17.

<sup>47</sup> The Secretary-General Address to the General Assembly, 23 September 2003, <http://www.un.org/webcast/ga/58/statements/sg2eng030923> (Accessed on 8 July 2011).

Council is empowered to take binding decisions on the measures that member states should take to maintain or restore international peace and security. The UN Charter is fairly open-ended regarding the Security Council's enforcement powers under Chapter VII, when it determines there is a "threat to the peace, breach of the peace, or act of aggression" (Article 39). However, it does not furnish explicit definitions as to what constitutes a threat to peace, a breach of the peace, or an act of aggression. It leaves this completely to the judgment of the Security Council. Thus, as one scholar notes, "a threat to the peace is whatever the Security Council says is a threat to the peace."<sup>48</sup> The binding nature of its decisions of this inegalitarian body may seem to contradict with consent-based international legal order. However, Article 25, whereby states agree "to accept and carry out the decisions of the Security Council in accordance with the present Charter", signifies the pre-given consent of the member states to such law-making powers. Finally, it is also important to note that state obligations under the Charter prevail over their obligations arising out of any other international agreement in case they conflict (Article 103).

Stretching the interpretation of the concept of "threat to peace" in Article 39 to include "non-military sources of instability in the economic, social and humanitarian and ecological fields" and declaring the proliferation of all WMD as constituting a threat to international peace and security already in early 1990s,<sup>49</sup> the Security Council increasingly exercised expansive legislative powers in the post-Cold War. Within the framework of this activism, the Security Council resolutions for example, founded United Nations Compensation Committee, two ad-hoc war crimes tribunals for Yugoslavia and Rwanda, inflicted disarmament obligations on Iraq, required Libya to surrender the Lockerbie suspects, established international protectorate in Kosovo and imposed sanctions on certain states. Nevertheless, all these resolutions were prompted by a particular event, conflict or situation. By implication, the measures they took aimed addressing those circumstances, and thus their application was generally restricted by time and space. By contrast, resolutions that followed 9/11 created general and abstract legal obligations binding all states unbound by time limitations or defined geographical area. Among these, three in particular are significant. First, despite failing to produce a general agreement on its doctrine of preemption, the US appears to have given rise to a normative change in the law of self-defense in relation to terrorist acts through resolution 1368. Further, with resolutions 1373 and 1540, dealing with terrorism and proliferation of nuclear weapons respectively, the US translated its preferences regarding its top security concerns into general legal obligations for all member states. In this sense, these resolutions amount to an extension of the NSS of the US.

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<sup>48</sup> Michael Akehurst, *A Modern Introduction to International Law*, London, George Allen and Unwin, 1984, p.181.

<sup>49</sup> See the statement issued by the President of the Security Council following its meeting of Heads of State and Government, UN Doc. S/23500, 31 January 1992, p.3-4.

## Chapter VII Resolutions that Changed and Created New Law Concerning Terrorism

The day after the September 11 events, the Security Council unanimously passed Resolution 1368, which recognized “the inherent right of individual and collective self-defense in accordance with the Charter,” condemned the terrorist attacks of 9/11 and stated that it “regards such acts, like any act of international terrorism, as a threat to international peace and security.” It also expressed the Council’s “readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism,” and recognized that Article 51 self-defense extended to use force against “those responsible for aiding, supporting or harboring the perpetrators, organizers and sponsors of these acts will be held accountable.”<sup>50</sup> NATO assumed a similar position by invoking collective defense clause of the Washington Treaty (Article 5).<sup>51</sup> A clear position was also taken by the European Council. On 21 September, affirming its solidarity with the US, the European Union stated that “on the basis of Security Council Resolution 1368 a riposte by the US is legitimate.” The member states declared that they were prepared to undertake actions that “must be targeted and may also be directed against abetting, supporting or harboring terrorist.”<sup>52</sup> A week later, the Security Council adopted Resolution 1373 of 28 September 2001. Reiterating main points of Resolution 1368, Resolution 1373 put a number of requirements on states to prevent the financing of terrorist acts and the recruiting of terrorists.<sup>53</sup> Although these resolutions were not direct authorizations of force, by admitting a right of self-defense in this context, they nevertheless established a legal ground for the following US-led intervention in Afghanistan.<sup>54</sup> In addition, these resolutions and related statements recognized the right of self-defense to attack the terrorist bases on the territory of states that are unable or unwilling to prevent terrorist actions, and established regime responsibility for failure to prevent or punish such actions. The Security Council responses and resolutions together with wide state support evince that the US military campaign in Afghanistan was widely regarded as a legal and legitimate act of self-defense. Thus, one may point to a normative change regarding the scope of self-defense insofar as the concept of “armed attack” was extended to include acts of terrorism by non-state terrorist organizations, and by extension, use of force against those regimes that have failed to prevent terrorist attacks is permitted.

Resolution 1373 which was adopted unanimously under Chapter VII on 28 September 2001 is distinctive in that the threat to peace is not associated with a particular conduct or situation, but rather a type of behavior, “terrorist acts”.<sup>55</sup> It provides that “all states ... [f]reeze without delay the funds and other financial assets of economic resources

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<sup>50</sup> UN Doc. S/RES/1368, 12 September 2001.

<sup>51</sup> Statement by the North Atlantic Council, 12 September 2001, <http://www.nato.int/docu/pr/2001/p01-124e.htm> (Accessed on 18 August 2011).

<sup>52</sup> Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001, [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/140.en.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/140.en.pdf) (Accessed on 18 August 2011).

<sup>53</sup> UN Doc. S/RES/1373, 28 September 2001.

<sup>54</sup> Roberts, “Law and the Use of Force”, p.37.

<sup>55</sup> Matthew Happold, “Security Council Resolution 1373 and the Constitution of the United Nations”, *Leiden Journal of International Law*, Vol.16, No.3, 2003, p.598.

of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts". It further requires states to refrain from providing support or safe haven to terrorists, prevent terrorists from using their territories, ensure prosecution of perpetrators or supporters of terrorist acts, cooperate in these matters and become parties to international conventions on terrorism. Finally, it establishes a Counter-Terrorism Committee (CTC) to monitor the implementation of the resolution, which consists of all the members of the Security Council. In fact, the obligations imposed on states by Resolution 1373 parallel to those comprised in the 1999 Convention for the Suppression of the Financing of Terrorism. Notwithstanding, given that only four states (United Kingdom, Botswana, Sri Lanka, Uzbekistan) were party to it by the time Resolution 1373 was accepted, the resolution not only significantly interfered and curbed the conventional law-making process between the states,<sup>56</sup> but also denied the sovereign right of states whether or not to become a party to an international agreement. Moreover, it creates a set of norms applicable to all states in all circumstances and in all situations that qualify as terrorist acts. In other words, unlike the individualized resolutions, it is not limited to any single country, society, or group of people and thus, applicable to all cases subject to no geographic and temporal limitation. Further, the terms "terrorism", "terrorist acts", "terrorists", "international terrorism" are not defined in the resolution. The lack of such definitions gives a wide discretion to CTC to interpret the scope of states' obligations under the resolution.<sup>57</sup> Finally and more significantly, by the very nature of being a Chapter VII resolution, it is backed by the possibility of enforcement actions including use of force in case states fail to abide by it. In its paragraph 8, the resolution states that the Security Council shall take "all necessary steps" to ensure the full implementation of the resolution. Although the wording is different than the usual language of those Council resolutions authorizing force (i.e. "all necessary means"), it may potentially provide a legal basis for preemptive use of force against terrorist acts not only by the US but also by other powerful states. In his letter sent to Security Council and to the Organization of Security and Cooperation in Europe in September 2002, President Putin of Russia, for example, argued that Georgia's violation of resolution 1373 could force Russia to use its right to self-defense as "stipulated in Resolution 1368".<sup>58</sup> Hence, resolution 1373 has potential critical implications for normative order regarding use of force against terrorism. In effect, by imposing counter-terrorism regulations through a legally binding Security Council resolution, the US managed to legislate for states without becoming subject to it due to its veto power. Nonetheless, it should be noted that it was widely welcomed by the UN member states.<sup>59</sup> It was declared as a "groundbreaking resolution"<sup>60</sup>, a "landmark decision",<sup>61</sup> and a "historic event".<sup>62</sup>

<sup>56</sup> For a similar view, see Stefan Talmon, "The Security Council as World Legislator", *American Journal of International Law*, Vol.99, No.1, 2005, p.175.

<sup>57</sup> Happold, "Security Council Resolution 1373", p.594.

<sup>58</sup> President Putin's address to leadership of UN Security Council and OSCE Heads of State, 12 September 2002, [http://reliefweb.int/sites/reliefweb.int/files/reliefweb\\_pdf/node-109576.pdf](http://reliefweb.int/sites/reliefweb.int/files/reliefweb_pdf/node-109576.pdf) (Accessed on 14 July 2011).

<sup>59</sup> See for example, UN Doc. A/56/757, 26 December 2001, p.4 (India and the European Union).

<sup>60</sup> UN Doc. A/56/PV.48, 12 November 2001, p.9 (Turkey).

<sup>61</sup> UN Doc. A/56/PV. 25, 15 October 2001, p.10 (Singapore).

<sup>62</sup> UN Doc. S/PV. 4413, 12 November 2001, p.15 (United Kingdom).

Less than three years later, the Security Council undertook a similar legislative activity by unanimously adopting 1540 on 28 April 2004. Resolution 1540, like 1373, imposed obligations on all member states to prevent the proliferation of WMD to non-state actors. Adopted under Chapter VII, the resolution requires that all states “refrain from providing any form of support to non-State actors” that attempt to obtain “nuclear, chemical and biological weapons and their means of delivery” and calls on all states to criminalize the proliferation of such weapons. Among others, it obliges states to “adopt and enforce appropriate effective laws” to this end, establish “domestic control” on nuclear materials, develop “physical protection measures” and “border controls” to prevent illicit trafficking of such materials, create “criminal and civil penalties for violations of export control laws”. Like the Resolution 1373, Resolution 1540 was not adopted in response to a concrete threat arising out of a specific event. Therefore, it is also spatially and temporally unlimited. Initiated and sponsored by the US again, Resolution 1540, in contrast to 1373, was adopted after months of negotiation.<sup>63</sup> Notwithstanding, the final document reflected the points outlined by President George W. Bush in his speech to the General Assembly in September 2003.<sup>64</sup> One other difference from Resolution 1373 is that unlike the matter dealt with under Resolution 1373, there exists a gap in international law governing nonproliferation of WMD to non-state actors. The existing nonproliferation regime is focused on state proliferation, whereas 1540 aimed to prevent weapons proliferation to terrorist networks. While there are international conventions on biological and chemical weapons, and similar requirements for national legislation, 1540 established “binding obligations regarding all three weapon types” and avoided “the negotiation process and voluntary commitments under these treaties”.<sup>65</sup> In fact, during the open discussion of the resolution before its adoption, questioning Security Council’s prerogative to prescribe legislative action to member states, Pakistan argued that the existing nonproliferation treaties can be improved “through negotiation among sovereign and equal states”,<sup>66</sup> while some others suggested that along with the Council resolution, multilateral negotiations should start in order to improve the existing regimes or to create a new one if necessary.<sup>67</sup> In addition, it brings obligations to all states whether or not they are parties to aforementioned treaties, which in turn makes them all accountable for such proliferation. More precisely, there is not a corresponding convention being negotiated or agreed by states on this question. Finally, as a Chapter VII resolution, like Resolution 1373, it is not only binding, but also can be potentially enforced through measures at the hands of the Council.

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<sup>63</sup> For other states concerns about the draft resolution, see for example UN Doc. S/PV. 4950, 22 April 2004, p.6 (China); p.18 (Germany); p.20 (Peru); p.21 (New Zealand).

<sup>64</sup> President George W. Bush’s Address to the United Nations General Assembly, 23 September 2003, <http://www.un.org/webcast/ga/58/statements/usaeng030923.htm> (Accessed on 15 August 2011).

<sup>65</sup> Peter Crail, “Implementing UN Security Council Resolution 1540, A Risk-Based Approach”, *Nonproliferation Review*, Vol.13, No.2, 2006, p.357.

<sup>66</sup> UN Doc. S/PV 4950, 22 April 2004, p.15.

<sup>67</sup> UN Doc. S/PV 4950, 22 April 2004, p.5 (Algeria); p.6 (China); p.21 (New Zealand).

## **Conclusion**

This article analyzed the extent to which superiority in military and economic terms can translate to normative change in the international society. Within this context, it examined whether or not the US has achieved to change the law of self-defense in “war on terror” and create new law concerning terrorism and proliferation of WMD.

A decade after 9/11, the primary rules of customary international law regarding anticipatory self-defense do not seem to have undergone a modification to be applicable against terrorist acts completely in line with the preferences of the US. In fact, unilateralism in reinterpretation of customary laws proved to be counterproductive in that the US could not succeed in getting an authorization for its invasion of Iraq. Without the soft power component, i.e. legitimacy, superior military and economic power could not bring an automatic change in customary law. Although the existing customary rules of anticipatory-self-defense did not inhibit the dominant power to proceed with the invasion, considerable loss of moral power in Iraqi invasion would arguably will affect possible future US unilateral military actions. Thus, one can expect US would feel more compelled to appear acting in line with the existing normative rules.

In the context of the UN, where the US supremacy is institutionalized and legalized, the US managed to reinterpret the law of self-defense to include terrorist attacks as amounting to an “armed attack” as well as to create regime responsibility for terrorist acts. In addition and perhaps more important, the US initiatives to create legal obligations binding all states akin to obligations under treaties, were also successful due to the presupposed legitimacy of the Security Council. Thus, the UN Security Council has made up for the lack of legitimacy factor in unilateral efforts to change the law of self-defense against terrorism. Chapter VII resolutions in this sense served as instruments to turn hegemonic norm preferences into binding law for all states.

As a result, while hegemony as a form of leadership made law-making regarding terrorism possible, hegemony as a way of command failed in bringing about a normative change with respect to this issue. Therefore, it can be expected that for its top security concerns such as terrorism, the US will prefer to resort to utilization of Chapter VII resolutions to modify and change the contours of international law. Yet, the dilemma remains for the US: If the US strives to affect the development of international law concerning terrorism, it will have to strengthen its appearance as a benign hegemon seeking for management of common problems for collective interests of the international society through coordination of its preferences with those of others within international organizations.



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