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Jutta Brunée & Adrian Di Giovanni

Iraq

A fork in the road for a special relationship?

In his September 2003 address to the United Nations general assembly, Secretary General Kofi Annan warned that the UN charter's legal and institutional framework on the use of military force among states had come to a "fork in the road."¹ He asked a "high-level panel on threats, challenges and change" to consider practical options for reform. Quite clearly, the secretary-general's initiative was a response to the combination of the United States's rhetoric of preventive war, its assertion that the UN was risking irrelevance in security matters, and the invasion of Iraq in March 2003. It thus seems obvious where the United States stands in the debate that Annan launched on "whether it is possible to continue on the basis agreed upon, or whether radical changes are needed." It may seem equally clear that Canada's answer is that the world must maintain the existing multilateral framework. In other words, it may seem that Canada and the United States are now headed down diverging legal and policy roads, with potentially serious implications for their "special" relationship. Indeed, it is tempting to see the fact that Canada chose not to support the US-led intervention in Iraq and the American displeasure with that decision as indicative of what is to come.

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¹ Kofi Annan, address to the general assembly, New York, 23 September 2003, www.un.org.

In this essay, we examine these assumptions and look more closely at where the two countries are headed on matters of the use of force and international security. We suggest that it is important to separate the policy decisions and legal arguments made specifically in relation to the Iraq intervention from broader policy themes. There are significant differences between American and Canadian policies on the use of force framework, but they cannot be reduced to simple unilateral vs. multilateral, or radical change vs. status quo, formulas. More importantly, differences notwithstanding, there are also opportunities for engaging the United States in the renewal of the global security regime.

THE IRAQ INTERVENTION

In September 2002, the US government published a new national security strategy (NSS) that appeared to challenge the existing UN framework on the use of force. A central tenet of the strategy was that the confluence of weapons of mass destruction (WMD), global terrorist networks, and rogue states requires that the US be able to use force preventively to eliminate emerging threats.² The expanded concept of self-defence inherent in the doctrine of preemption raised alarms in international policy circles, heightened by the fact that it coincided with a renewed US focus on Iraq. In an address to the UN general assembly on the anniversary of the terrorist attacks on the United States, President George W. Bush moved the threat to international security posed by Iraq to the top of the international policy agenda. That speech is now widely remembered for the president's challenge to the relevance of the United Nations and its security council.³ The events that ensued are well known. After protracted debates, the security council adopted resolution 1441, which found that "Iraq has been and remains in material breach of its obligations under relevant resolutions" and gave Iraq a "final opportunity to comply with its disarmament obligations." Upon renewed inspections to assess Iraq's performance, the council would reconvene "in order to consider the situation and the need for full compliance...in order to

2 "National security strategy of the United States of America," September 2002, 13-16, www.whitehouse.gov.

3 George W. Bush, address to the United Nations general assembly, 12 September 2002, www.whitehouse.gov: "All the world now faces a test, and the United Nations a difficult and defining moment. Are Security Council resolutions to be honored and enforced, or cast aside without consequence? Will the United Nations serve the purpose of its founding, or will it be irrelevant?"

secure international peace and security.” The resolution recalled “that the council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations.” Resolution 1441 was a compromise between the position of France and Germany and that of the US and UK. While the former countries contended that the resolution established a two-step process for any potential invasion of Iraq, the latter claimed that its language left open the possibility of action by member states without a further resolution. US and UK officials nonetheless returned to the security council at the beginning of February 2003 to argue that the resumed weapons inspections were not succeeding and that Iraq remained a serious threat to international peace and security. However, it quickly became clear that a second resolution authorizing the use of military force would not garner sufficient support. In March 2003, the US and UK, with a “coalition of the willing,” invaded Iraq without such explicit authorization.

Many commentators have cast the Iraq invasion as a test case for the newly minted US doctrine of preemption. Indeed, the US president and other government officials used the rhetoric of self-defence and threat prevention in statements to the American public, along with references to Saddam’s ties to al Qaeda and to his regime’s brutal oppression of the Iraqi people.⁴ However, it is important to note that self-defence was mentioned only in passing in the official legal justification of the intervention. Under article 51 of the UN charter, states must notify the security council that they are acting in self-defence. While the US did so in the case of the military action in Afghanistan in October 2001, its March 2003 letter to the security council asserted primarily that the invasion of Iraq was justified as enforcement of council resolutions.⁵ As did

4 In the US domestic context, self-defence and preemption were also offered as part of the justification for presidential authority to go to war. See the “Report in connection with presidential determination under public law,” 107-243, reprinted in 149 cong. rec. H1958, H1959, daily ed. 19 March 2003, which notes that “Iraq harbors terrorists and because Iraq could share weapons of mass destruction with terrorists who seek them for use against the United States,” and that, “based on existing facts, including the nature and type of the threat posed by Iraq, the United States may always proceed in the exercise of its inherent right to self-defense, recognized in Article 51 of the UN Charter” (ibid., at H1960).

5 J.D. Negroponte, “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, 21 March 2003. Compare it to “Letter dated 7 October 2001 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/2001/946, 7 October 2001.

the UK and Australia in similar letters, the US argued that the ceasefire that had ended the first Gulf War was contingent upon Iraqi compliance with various resolutions. Given Iraq's continued breaches of these resolutions and their disarmament provisions, the council's original authorization to enforce peace and security in the Gulf region was said to be revived. Thus, the US legal justification claimed that the Iraq intervention was conducted not unilaterally but within the UN's multilateral framework.

What was Canada's position on the Iraq intervention? To say the least, the Canadian government was hedging its bets and ducking the hard questions until the very last moment. In fairness, from the outset, when the possibility of a military campaign was first raised in 2002, the Canadian government expressed a strong preference for following a multilateral process within the UN. Nonetheless, it was difficult to discern a clear Canadian legal position on the Iraq intervention. In January 2003, then-minister of foreign affairs Bill Graham refused to say whether Canada would insist on a second resolution before supporting the use of force against Iraq. In February 2003, then-prime minister Jean Chrétien suggested that resolution 1441 was sufficient authority if Iraq failed to comply.⁶ Eventually, on the eve of the invasion, the prime minister declared before the house of commons that Canada would not be contributing to the US-led coalition against Iraq without a new resolution of the security council. Clearly, the Canadian government was attempting to strike a difficult balance between the views of the Canadian public and the needs of its most important ally. Unfortunately, it remained unclear whether Canada's objection was purely procedural, or whether it questioned that military intervention was justified in the circumstances.

The ambiguity in Canada's stance was due not just to its words, but also its actions. Canada actually did contribute to the US efforts, both in the lead-up and during the war in Iraq. Canada had frigates patrolling the Persian Gulf, committed to redeploying some 2,000 troops to Afghanistan (thus allowing the US to divert resources to Iraq), and supported the use of

⁶ It is hardly surprising, then, that in January 2003 the *Globe and Mail* and the *Toronto Star* published contradictory headlines on whether Canada would participate in a US-led coalition. See, for example, Jeff Sallot, "PM to Bush: Hold off on war, Canada will break with US if it hits Hussein without mandate from UN," *Globe and Mail*, 24 January 2003, A1; and Allan Thompson, "Chrétien supports US push for war, Bush, PM speak on phone—another UN resolution not needed: PM door opened to joining US-led military action," *Toronto Star*, 24 January 2003, A1.

NATO forces to protect Turkey in the case of an invasion from Iraq. The net result was that Canada provided more support to the US war effort than many members of the coalition. This support should have put Canada in Washington's good books. Instead, the US government declared its disappointment with its neighbour. One can surmise that Canada's rhetorical support was more important to Washington than its material resources. After all, the American agenda was short on international legitimacy, not military power. As some observers have noted, the ambiguities in Canada's position may also have undercut its influence in the security council debates, where it had previously enjoyed considerable "soft power." In the days before the invasion of Iraq, Canada worked in the background in a final attempt to arrive at a second resolution. This compromise resolution would have set strict benchmarks and deadlines for the Iraqi regime that, if not met, could have triggered military intervention. However, the US and other protagonists in the council quickly rebuffed these efforts.⁷

BROADER POLICY THEMES

Even if Iraq did not become the legal test case, the US doctrine of preemption has challenged the legal status quo. But to determine the extent of the challenge, we must look beyond the headline-grabbing Bush doctrine and combative political rhetoric.

First, it should be noted that elements of a preemptive policy had been evolving already during the Clinton administration.⁸ What accounts for the international uproar caused by the NSS, then, was the crystallization of a policy posture into a doctrine that appeared to significantly expand states' right to self-defence. Yet it is precisely on this point that care must be taken not to read too much into the NSS. There has been confusion in US political rhetoric between "preemption" and "prevention." While the former has long been accepted as "anticipatory" self-defence against an imminent threat, the latter would be illegal under existing international law. Shortly after the release of the NSS, the legal adviser to the US state department clarified that it should be read not as a bald claim to a right to preventive war but as an effort to re-assess the concept of "imminence" in light of new threats:

7 See Kim Richard Nossal, "Canada: Fading power or future power," *Behind the Headlines* 59, no. 3 (2002): 10.

8 See Robert S. Litwak, "The new calculus of pre-emption," *Survival* 53 (2002): 44.

While the definition of imminent must recognize the threat posed by weapons of mass destruction and the intentions of those who possess them, the decision to undertake any action must meet the test of necessity.... In the face of overwhelming evidence of an imminent threat, a nation may take pre-emptive action to defend its nationals from unimaginable harm.⁹

Whether a new definition of “imminence” is required or whether “new threats” can be accommodated within what is already a flexible concept is open to debate. But without doubt, it is a debate that is legitimate and timely. We have yet to hear where Canada stands. In a June 2003 speech to the Canadian Bar Association, the legal adviser to the Canadian Department of Foreign Affairs agreed that the imminence question was crucial but ventured only that it was “too early to draw definite conclusions, but there are clearly some challenges for public international law and foreign policy apparent from the debates and events of the past months.” Obviously, it was not for the legal adviser to define Canada’s foreign policy on the matter. But the issue goes to the very foundations of the international security framework and the government must address it head-on. If it wants to participate in the reshaping of the rules on the use of force, or ensure the continuing validity of existing rules, Canada must take a position.

Canada must also be alert to one particular danger: the possibility that what is currently a relatively fact-driven assessment of imminence is supplanted by a range of criteria that undercut the very feature that accounts for the power of international law to constrain states in this highly charged area—its ability to impose justificatory discipline. Notwithstanding the US legal adviser’s emphasis on evidence of an imminent threat, the NSS contains the seeds for an assessment that focuses not on a concrete threat but on states’ past behaviour and their regimes’ profiles as rogue, failing, or abusive. The US government does not yet appear to have adopted a uniform position in this respect. Notwithstanding the official legal justification for the Iraq intervention, the parallel public rhetoric could be read as an effort by some government actors to test new parameters for self-defence. This rhetoric clearly must be taken seriously, not least because it has been taken up by prominent American academics. For example,

⁹ William H. Taft IV, “The legal basis for preemption,” memorandum to the American Society of International Law/Council on Foreign Relations roundtable on “Old law, new threats?” 18 November 2002.

Anne-Marie Slaughter, a leading international law scholar and dean of the Woodrow Wilson School at Princeton, has argued for a “duty to prevent” regimes that menace their own citizens as well as other states from acquiring WMD, if necessary through military means and without security council authorization. Relatedly, political scientists Allan Buchanan and Robert Keohane have mused about the moral validity of a distinction between self-defence and humanitarian intervention. From a “cosmopolitan” standpoint, they argue, preventive use of force should be permitted when human lives are threatened, be it at home or abroad.¹⁰

It can hardly be denied there are linkages amongst humanitarian crises, repressive regimes, collapsing states, terrorism, and international security threats. It is equally clear that effective policy responses must carefully consider and address these linkages. But neither effective decision-making on the use of force nor international law is aided by merging all of these issues into one sweeping category of security threat.¹¹ The great danger is that war is too easily justified as defensive and placed beyond challenge. The contours of the “threat” demanding response become blurred, and categories of justification are disabled. Neither development would be in Canada’s interest.

Perhaps counterintuitively, the preoccupation with global security threats may provide a window of opportunity for Canada to advance the debate on humanitarian intervention and the report on the “responsibility to protect” by the international commission on intervention and state sovereignty (ICISS).¹² The report posits that in cases of extreme crisis—such as large-scale ethnic cleansing or genocide—the principle of non-intervention must yield to a responsibility to protect particularly threatened populations. The report emphasizes the overriding importance of a wide spectrum of proactive measures and assistance to local governments in discharging their responsibility to protect, as well as of non-forcible forms of pressure. But it also offers a set of carefully crafted threshold criteria for recourse to military

10 Lee Feinstein and Anne-Marie Slaughter, “A duty to prevent,” *Foreign Affairs* 83 (January-February 2004):136; Allen Buchanan and Robert O. Keohane, “The preventive use of force: A cosmopolitan institutional perspective,” *Ethics & International Affairs* 18 (2004): 1.

11 For a detailed discussion see Jutta Brunnée & Stephen J. Toope, “The use of force: International law after Iraq,” *International and Comparative Law Quarterly* 53 (2004): 785.

12 International Commission on Intervention and State Sovereignty, “The responsibility to protect,” December 2001, www.dfait-maeci.gc.ca.

means where “serious and irreparable harm is occurring to human beings, or is imminently likely to occur.”

When the report was released in December 2001, it was drowned out by concerns about increased interventionism in the name of a “war on terror.” Initial efforts by Canada to promote the report thus met with the resistance of both developing countries and European states such as Germany and France. Although there are good reasons to worry about the potential scope of humanitarian intervention, and its possible abuse, we do seem to be at a crossroads. If no legal adjustments are made to provide for a carefully circumscribed responsibility to intervene, even wider and more dangerous claims may be advanced. Though hard, identifying the precise parameters for intervention is preferable to blending humanitarian and security justifications.

Here lies Canada’s opportunity to advance both its internationalist values and its security interests.¹³ It can lobby for support of the responsibility to protect initiative by those countries that are concerned about growing military interventionism. At the same time, Canada can work to re-engage the US by highlighting those features of the initiative that should appeal to US interests. For example, by promoting proactive engagement with governance or humanitarian crises within states, the ICISS report actually focuses on some of the “root causes” of global terrorism and other threats to international peace and security. At the same time, it resonates with the American policy emphasis on enhancing its security by building democracy and rule of law around the globe.¹⁴

But there is at least one more reason for Canada to promote the ICISS report. It could also offer opportunities for helping the security council take up the US challenge to its relevance and effectiveness. The criteria outlined in the ICISS report offer a starting point for developing guidelines to assist the security council in determining when collective action is needed for human protection. Clearly, such guidelines would not be a panacea for lacking political will. But they would help discipline deliberations and demand focused justification of the need for military intervention, its appropriateness, and its likelihood of success. Work on guidelines for humanitarian intervention could also help begin a dialogue on more broadly

13 On the need for Canada to assert itself on both fronts, see Jennifer M. Welsh, *At Home in the World: Canada’s Global Vision for the 21st Century* (Toronto: HarperCollins, 2004).

14 See, for example, George W. Bush, “Address to the United Nations general assembly,” 21 September 2004.

relevant criteria on when the council should authorize the use of military force to address collective security threats.¹⁵

All indications are that the Canadian government has recognized these opportunities. The need to develop rules on the responsibility to protect was front and centre in Prime Minister Paul Martin's address to the UN general assembly in September 2004. Canada also successfully promoted the idea in its submissions to the high-level panel, which endorsed the responsibility to protect in its December 2004 recommendations.¹⁶ In pursuing these efforts, Canada may find an ally in Britain, which has also been stressing the need to build consensus on the broad criteria for action by the security council.¹⁷

What are the chances of US re-engagement? The cabinet changes after George W. Bush's re-election, especially the appointment of one of the key architects of the NSS, Condoleezza Rice, as secretary of state, suggest that US policy will be shaped by strong unilateral impulses. Add to that the go-it-alone rhetoric of administration officials, which seems to appeal to large segments of the US electorate and to feed on latent suspicion of international law and institutions. Yet the US justified its Iraq intervention as designed to enforce security council resolutions and, shortly after the invasion of Iraq, returned to the council for resolutions that legitimated its occupation and created a UN role in Iraq.¹⁸ For all its failings, the security council does appear to have a unique and enduring ability to confer legitimacy on international action. That legitimacy cannot be attained, let alone maintained, by stitching together varying coalitions of the willing. Given the reaction to its intervention in Iraq, and the ongoing difficulties in stabilizing that country, the US is likely to pay renewed attention to ensuring that its "hard power" is supported, rather than undercut, by legitimacy considerations.¹⁹ The fact that effective responses to global security threats require broad

15 See Gareth Evans, "When is it right to fight?" *Survival* 46 (2004): 59. See also "A more secure world: Our shared responsibility," report of the high-level panel on threats, challenges, and change, UN doc. A/59/565, 29 November 2004, paras.204-209, www.un.org.

16 *Ibid.*, paras. 199-203.

17 See Jack Straw, "Shaping a stronger United Nations," speech at Chatham House, 2 September 2004.

18 See Ian Johnstone, "US-UN relations after Iraq: The end of the world (order) as we know it?" *European Journal of International Law* 15 (2004): 813, suggesting that, given its diplomatic deeds, US unilateralist rhetoric was "cheap talk."

19 See Jane Boulden & Thomas G. Weiss, "Tactical multilateralism," *Survival* 46 (2004): 103.

international cooperation also makes a return of the US to the multilateral arena probable. Finally, even at the domestic level, it is unlikely that the US government would find support in the near future for another military intervention without international backing and burden-sharing. Thus, ironically, for all its preventive war rhetoric and unilateral bluster, the United States may now be less, rather than more, likely to be interventionist.

CONCLUSION

We asked which paths Canada and the United States have chosen from the “fork in the road” marked by the 2003 Iraq invasion. To the extent that conclusions can be drawn at this relatively early stage, the most important—and perhaps surprising—insight would seem to be that both countries are calling for pivotal changes to the existing framework. The US has launched the world into a debate on whether and to what extent the parameters of a state’s right to use force unilaterally to defend itself must expand in light of new security threats. Canada is urging the international community to define the scope of a responsibility to protect, and to outline criteria for military intervention for human protection purposes. If the international framework on the use of force is to remain viable, a consensus must be reached on both sets of issues. What role can Canada play to that end?

The Iraq moment has prompted (over)heated rhetoric in both the United States and Canada. But all indications are that the two countries are working to put the disagreement over Iraq behind them. If we are correct in our assessment that real opportunities exist for re-engaging the US in multilateral approaches to peace and security, Canada must seize the new moment that is presenting itself for reasoned dialogue. In actively promoting the idea of the responsibility to protect, the new Canadian government has positioned itself to influence the reshaping of a crucial part of the international security framework. Canada must be prepared to invest significant diplomatic and material resources if this effort is to succeed. But the dividends may be handsome. Canada would at once leverage its strongly held humanitarian and internationalist values and help address global security challenges in a manner that is realistic in view of its expertise and resources. To the extent that it emerges as an international player in this latter regard, and to the extent that it casts its norm entrepreneurship as complementary to US policies on global security, we believe that Canada can also rebuild its influence in what remains a “special” relationship.