

PREVENTIVE FORCE:

**ISSUES  
FOR  
DISCUSSION**

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## I. INTRODUCTION

The 2002 National Security Strategy states that, while the United States is in a position of unrivaled power relative to other States, it nonetheless faces grave and unprecedented threats. It concludes that a greater reliance than has previously thought to be required must be placed on the use of force intended to prevent damaging attacks from occurring.

The Stanford Group on Preventive Force (hereinafter “Stanford Group”) has, for the last several months, met periodically with experts in various fields to consider the need for, and implications of, a greater reliance on preventive force in the defense of the U.S. and its allies. The meetings have been held under the Chairmanship of former Secretary of State George P. Shultz, Distinguished Senior Fellow at the Hoover Institution, and Dr. Coit D. Blacker,

Director of Stanford's Institute for International Studies, and with the sponsorship of the Hewlett Foundation.<sup>1</sup>

The National Security Strategy recognizes that security must be based on the full range of activities necessary to protect the United States, its people, and its interests. It properly relies on diplomacy, non-proliferation efforts, sanctions, international institutions, alliances, foreign assistance, and other non-controversial methods for enhancing security. It also breaks no new ground in calling for the use of force when necessary to defend the United States from attacks, and for using preemptive force when an attack is imminent. The National Security Strategy goes beyond these established principles, however, and calls for resort to force when necessary to prevent attacks, even if

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<sup>1</sup> This paper has been compiled by Abraham D. Sofaer, acting as reporter, based on discussions of the Stanford Group, and with the assistance of Kori Schake. The paper is not intended to reflect any particular position on any of the issues discussed, and should not be understood to represent the views of the members of the Group, who currently include in addition to Chairmen Shultz and Blacker: Marc Abramowitz; Michael H. Armacost; Gerhard Casper, Jock Covey; Sidney Drell; David J. Holloway; Henry S. Rowen; Scott Sagan; Kori Schake; and Abraham D. Sofaer. The Group has been assisted by Matt Weingart, Catharine Kristian, Scott Tait, James Fanell and Scott Smith who have acted seriatim as Secretary.

they are not imminent. It also reserves to the United States the power to determine – without Security Council approval – when the circumstances justify uses of force, including preventive actions.<sup>2</sup>

The decision to focus this paper, and the discussions that are planned to follow its publication, on issues related to the preventive use of force, is by no means intended to imply that other methods for preventing threats to security are less useful or important. An effective program for preventing threats must be based on the full range of measures available to states that are intended to achieve security without resort to force. These measures are widely accepted as necessary elements of a security design, and have been discussed and evaluated in the National Security Strategy and in many other studies, including the Report of the High-

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<sup>2</sup>. 2002 National Security Strategy, p. 15, available at <<http://www.whitehouse.gov/nsc/nss.pdf>>.

level Panel on Threats, Challenges and Change,<sup>3</sup> and individual studies such as Ashton B. Carter and William J. Perry's Preventive Defense (Brookings 1999). The propositions advanced by the National Security Strategy related to preventive force, however, are novel and have not received adequate scrutiny. The Stanford Group was therefore formed to study the issues raised by those propositions and to prepare an analysis to facilitate examination of the relevant issues in larger discussions and meetings.

The following issues have been identified as those upon which a proper consideration of preventive force should be based:

1. Has the world changed in ways that warrant greater reliance on the use of preventive force? If so, in what ways?

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<sup>3</sup> This Report was requested by Secretary General Kofi Anan to provide a "broad framework for collective security for the new century," and was issued by the United Nations in December 2004. It is available at <[www.un.org/secureworld/](http://www.un.org/secureworld/)>.

2. What is the meaning of “preventive force”? How does it differ from “preemption”?
3. What are the dangers and limitations in using preventive force to deal with threats that might justify such actions?
4. What are the standards for determining the propriety for using preventive force? Are the standards traditionally advanced to govern uses of force a viable basis for ensuring security? If not, what alternative standards are available to guide states?
5. What measures – both standards and procedures – could enhance the legitimacy and reliability of uses of preventive force? Should states always seek to base uses of preventive force on resolutions of the Security Council? When, if ever, should states be considered justified in using preventive force without Security Council approval? How good should intelligence be for responsible leaders to resort to preventive force?

An initial version of this summary description of the relevant issues was considered at a discussion held from May 25 to 27, 2005 at Stanford University.<sup>4</sup> The current version, revised to reflect comments made during the May 2005 meeting, will be considered at a meeting to be held at the Woodrow Wilson School of Public and International Affairs, Princeton University, under the Chairmanship of Dean Anne-Marie Slaughter on March 15-16, 2006. It will be further revised and discussed in an international forum yet to be determined, and thereafter made public.

## **II. Has the world changed in ways that warrant greater reliance on the use of force? If so, in what ways?**

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<sup>4</sup> Participants in that discussion were, in addition to the members of the Stanford Group: Arnold Beichman, Peter Berkowitz, Paul Brest, William Burke-White, Sheena Chestnut, Chris Chyba, Zack Cooper, Chester Crocker, Ivo Daalder, Larry Diamond, Mary Draper, Stephen Flanagan, William Free, Matthew Gunn, Victor Hanson, Hal Harvey, John Hennessy, Thomas Henriksen, G. John Ikenberry, Paul Kern, Will Levi, Tod Lindberg, Tucker Mansager, Shavit Matias, Tom McInerney, John Mearsheimer, Steven Miller, Norman Naimark, Michael Radu, John Raisian, Amanda Reed, Condoleeza Rice, Peter Robinson, Matthew Rojansky, Kori Schake, Smita Singh, Anne-Marie Slaughter, Stephen Stedman, James Steinberg, Thomas F. Stephenson, David Victor, Allen Weiner, Matt Weingart, Marc Weller, and Daniel Zajac.

A. Failed States and Rogue Regimes. In failed states authority and capacity have eroded to the point where they are incapable of satisfying accepted and evolving standards of international conduct. Rogue regimes may have sufficient capacity but they reject accepted standards.

1. International security is based on assumptions related to the powers and responsibilities of states. Each state in the UN Charter system is assumed to be equal with all other states, sovereign, and having the power and responsibility to control all matters within its borders and its foreign relations. In addition to established duties, such as the obligation to refrain from aggression and to police their territories, in recent years states have been found to have important new duties, such as the obligations to prevent terrorist sanctuaries

and attacks, and to protect individuals from serious violations of their human rights.

2. Despite these assumptions and responsibilities, states are often unwilling or unable to act responsibly. Breakdowns in state authority have left significant areas of the world essentially ungoverned (“failed states”) or governed in a manner inconsistent with established international norms (“rogue regimes”). Current concepts of sovereignty therefore tend in these situations to provide protections and de facto as well as de jure legitimacy for incompetent and illegitimate rulers.

3. Due to the breakdown of state responsibility, and to other factors including enhanced expectations of states in areas of human rights, evolving norms and precedents have undercut the notion that states have absolute control over what occurs within their borders.

B. Unprecedented Destructive Capacities. Weapons capable of producing mass casualties are becoming increasingly available to states and non-state actors.

1. Potential membership in the WMD “club” is no longer limited to major players in the state system. Current estimates of the states that possess nuclear, chemical, or biological weapons, and the means of delivery indicate a dangerous trend toward proliferation. [See Annex.]

2. Although all classes of WMD may be capable of creating mass effects, they differ in their nature, availability, and susceptibility to control:

(a) Nuclear Weapons: (i) require access to nuclear fuel (highly enriched uranium or plutonium) by production (by states, running large programs, at great expense), theft or purchase; (ii) require considerable technology with suspect end purpose, access to which can be

made more difficult through classification and export controls, and inspection regimes; (iii) are costly and difficult to develop or to replicate in secret, since a considerable infrastructure is required indicative of purpose; (iv) are more difficult to conceal or to deliver than other forms of WMD; (v) cannot readily be employed without revealing the originator's identity. On the other hand, the gulf from acquiring nuclear material to producing a nuclear bomb is increasingly manageable as a technical matter; less than half of the enriched plutonium and uranium stores in the former Soviet Union (sufficient to produce 50,000 to 60,000 nuclear weapons) is under adequate safeguard or accountability; and no international agreement exists to control plutonium produced in nuclear reactors.

(b) Biological Weapons: (i) are or will soon be widely available to non-state actors, are relatively inexpensive,

and can be produced with little or no external footprint; (ii) can be produced largely if not entirely on the basis of knowledge and equipment that is dual-use, and widely available; (iii) once developed, are readily replicated; (iv) can be delivered globally without great difficulty; (v) can be used with relatively high confidence that the originator will not be identifiable; (vi) are relatively easy to develop and transfer in secret; (vii) would likely be released by military attacks on biological labs or weapons sites, narrowing the scope for using preventive force; and (viii) are uniquely suited for use against civilian population and are not effective on the battlefield.

(c) Chemical Weapons: Many of the characteristics attributable to biological weapons apply to chemical weapons as well. They may, however, be easier to

produce than biological weapons, though more difficult to use against populations.

3. The concept of “deterrence”, as developed for dealing with nuclear weapons, may have little utility for chemical and biological weapons (due to the difficulty of identifying the originator of an attack, and the impracticality of responding in kind).

4. Prevention of proliferation through international regimes and inter-state agreements is of limited utility with regard to biological and chemical weapons, due to the ability of state and non-state actors to develop them in secret.

5. Mitigation of all forms of WMD attacks poses great problems. Mitigation of the consequences of a biological attack (like any other outbreak of infectious disease) requires a high degree of international effort and strong public health systems.

C. Increased Capacities of Non-State Actors. Some non-state actors (including groups using terrorist methods) have acquired significant, unprecedented, transnational capacities.

1. Interconnectedness and openness of modern societies afford transnational actors global mobility and influence.

2. Modern communications technologies provide the means for quickly mobilizing and coordinating international efforts of non-state actors.

3. Modern weaponry and explosives are more easily than ever transported and transferred to and by non-state actors.

4. Economic globalization has enhanced the ability of non-state actors to collect and transfer the limited amounts of funding necessary for operations.

D. Vulnerability of Western Democracies. The Western democracies are target-rich countries, with vulnerable infrastructure, that are constrained by legal principles and practices in dealing with threats. While they possess relatively advanced technological means in many areas, existing capacities cannot provide complete security in virtually any significant area of vulnerability.

E. Islamic Radicalism. The most pervasive threat today is from radicals purporting to act on the basis of religious doctrine or justification based on Islam. Groups with global reach and ambition are the most threatening.

1. Several Islamic radical groups exist that are well organized and funded by states and individuals who share their fundamentalist objectives.
2. Not all these groups share all the same objectives. Several openly advocate aims that affected states (including Islamic regimes) are unprepared to accept,

such as: the reestablishment of an Islamic order in all areas ever controlled by Islam; destruction of the State of Israel; and restoration of some version of the Caliphate.

3. These groups have also declared and demonstrated their willingness to resort to force, including mass violence aimed at civilians and using attackers indistinguishable from non-combatants, to achieve their objectives. They seek the most devastating weapons possible, and are willing to use them in a manner designed to maximize damage to population centers and valuable economic targets. These tactics call into question the sufficiency of retaliatory action.

4. Finally, these groups are difficult to deter, since they are prepared deliberately to engage in suicidal actions. Some have openly espoused or threatened the use of WMD based on the assumption that they can cause far

more damage to their enemies' morale and wealth than could be inflicted in retaliation.

Assuming the validity of some or all of the claimed changes in international security described above, in what ways and to what extent would resort to preventive force provide benefits in dealing with these threats, and at what price?

These issues are dealt with below.

### **III. What is the meaning of “Preventive Force” and how does it differ from Preemption?**

A. Preventive Force. Preventive actions can involve the application of any or all elements of national power: diplomatic, regulatory or military. This study examines those preventive actions that involve the threat or use of force, either as preventative war or the many uses of force short of war. It is assumed here that any resort to preventive force would be preceded and accompanied by the full array of diplomatic and other options.

B. Prevention vs. Preemption. The concept of preemptive force implies the use of force to stop some conduct that is underway and soon to result in harm. It is normally associated with preempting other uses of force, as an aspect of self-defense. Preventive force, on the other hand, does not require that the outcome to be prevented is underway or soon to cause harm. The distinction between preemption and prevention therefore lies in the degree of imminence and certainty of the threat:

1. To preempt is to take action against an actor who has the will, means, and purpose to do harm, and has embarked on doing so.
2. To prevent is to take action based on a predictive assessment of the actor's existing or potential capacities and intentions for the purpose of determining what the actor is likely to do at some point in the future.

C. Ongoing Conflict. It is inappropriate to apply either the concept of preemptive or preventive force to the use of force during an armed conflict. Combatants in armed conflict are free to use all necessary and proportionate force to achieve proper military objectives. During the present conflict in Iraq, for example, the US and its allies need not wait for insurgents to undertake or even plan attacks before using force against them.

Based on this principle, the attacks perpetrated by Al Qaeda prior to and including those of 9/11/2001 provided ample justification in the view of most (though not all) international lawyers for using force against Al Qaeda and its members within Afghanistan whether or not yet another attack on the US was imminent. The use of force against Al Qaeda (and its sponsoring regime the Taliban) within Afghanistan, therefore, while intended to prevent future

attacks, differs materially from preventive actions based on a threat that has not matured to the point of acts of hostility.

D. “War” on Terror. Calling a conflict a “war,” as the Bush Administration has characterized its efforts against terrorism, serves to distinguish those efforts from law enforcement activities, but does not establish that all suspected terrorists and their sponsors may lawfully be attacked. States are responsible for activity that emanates from their territory. To justify using force requires that the state be unwilling or unable to halt such conduct. Thus, assuming that authority existed for the US to attack Al Qaeda in Afghanistan after the attacks of 9/11/2001, attacks on Al Qaeda in other states would have to be separately justified, for example, on the ground that those states could not or would not suppress Al Qaeda’s activities.

E. Categories of Preventive Action. “Preventive force” includes a broad array of actions, and should be evaluated

based on the specific context in which force is used or contemplated. At one end of the spectrum would be a nuclear attack, intended to destroy the capacity of a state to launch a similar attack in the future. At the other end of the spectrum would be limited actions intended to prevent potential threats from developing, such as shooting at the tires of a car that fails to respond to an order to stop, to prevent it from getting close to a building or area that is being protected. Governments routinely exercise preventive force in domestic law enforcement, pursuant to standards based on reasonableness, necessity, and proportionality. In the international context, preventive force has been used in several significant instances that evoked differing responses.

Among the significant categories of preventive actions are the following:

1. Searches, Detentions, and Interrogations. States commonly resort to limited uses of force as law

enforcement actions within their territories. These actions are largely governed by domestic law, with rules usually requiring evidentiary justification (e.g., probable cause), and limiting force to what is reasonable and necessary. States may not lawfully exercise such police powers inside other states without consent or other proper authority. Whether an Internet probe or cyber attack constitutes an infringement of sovereignty is unsettled and will depend on its particular circumstances.

Preventive uses of force analogous to domestic measures also occur internationally. A recent example is the Proliferation Security Initiative, in which over sixty states have agreed to interdict vehicles, planes, or vessels believed to be engaged in illegal proliferation. The initiative does not contemplate resort to the Security Council for prior approval of such actions. Acting pursuant

to the PSI, the US and other states intercepted the BBC China in international waters and seized its cargo of nuclear components headed from North Korea to Libya. This seizure also exposed the A.Q. Kahn nuclear black-market network, and has been widely condoned. Seizures or detentions that occur in foreign territory or have less positive results will likely result in greater scrutiny and criticism. The Geneva and Torture Conventions limit uses of force in interrogations regardless of their location.

2. Hostage Rescue and Protection of Nationals. States have sometimes resorted to force to rescue nationals who are hostages or in danger of capture. The Entebbe Rescue by Israel of 103 hostages from Uganda in 1976 is the classic example. Though seized by the PLO, the Idi Amin Government took control of the hostages rather than fulfilling its duty to protect and release them. Despite some initial criticism, this action is widely regarded as lawful and

legitimate. Uses of force purportedly undertaken for the purpose of preventing harm to nationals who had not yet been taken hostage have also occurred. The US intervened in the Dominican Republic and Grenada, citing the danger to its nationals from rebel groups, and in the process exercising broad control of the areas involved. These actions have less international support and legitimacy than hostage rescues. Even more broadly condemned was the intervention by the UK, France, and Israel in 1956 to take control of the Suez Canal, allegedly for the purpose of protecting their nationals in the area. International criticism, led by the US, led these states to withdraw from the area.

3. Abductions. Limited uses of force are sometimes undertaken by states to capture individuals believed to have engaged in illegal conduct, and/or for the purpose of preventing anticipated attacks. Abductions undertaken within the territory of another state violate the law of that state, and

in general also violate accepted standards of international law. Despite the recognized illegality of such conduct, states occasionally abduct individuals they claim have violated their laws, and often prosecute them for crimes despite demands for their return. Despite the widely assumed illegality of such policies, a high degree of tolerance appears to exist for such positions where the evidence is strong that the individuals seized and prosecuted are in fact guilty of serious criminal activity and the state from which the abduction occurred would have been unlikely either to prosecute or extradite them. Israel's seizure of Adolf Eichmann, for example, was condemned as illegal and a breach of Argentina's sovereignty, but the Security Council did not require Israel to return him to that country. Other known perpetrators of atrocities have been abducted for prosecution with little international criticism. The abduction with US support of Dr. Alvarez-Machain from Mexico, on the other hand, for having allegedly participated in the torture of drug enforcement

agents had little if any international support, and his acquittal after trial in the US undermined the credibility of such operations. Abductions for the purpose of preventing attacks are unlikely to secure international support unless they are of individuals widely accepted as being likely to engage in some future attack, on the basis of prior conduct or other strong evidence.

4. Targeted Killings. States, including the US and Israel, have sometimes targeted individuals or groups who have killed their nationals and are not subject to legal process. In some cases these individuals may be a continuing threat. The US argues that, in such situations, targeted killings are justifiable as necessary, reasonable, and proportionate measures taken in self-defense, despite the absence of proof that the individuals targeted are in the process of preparing additional, imminent, attacks. The US has distinguished such actions from the killing of individuals who

have not attacked Americans but may be political opponents, or may be regarded as enemies. Actions taken against such individuals are properly characterized as “assassinations,” in the US view, amounting to international murders. No state has attempted to defend assassinations as lawful or legitimate.

Targeted killings have been criticized and condemned as unlawful on several grounds. They are typically undertaken without formal trials or specific determinations of guilt. They predictably result sometimes in the killing of innocent individuals, and often in collateral injuries and deaths of civilians. Israel apologized for the successful killing of a known terrorist, because the bomb used on the apartment house in which he was located destroyed the entire building, killing numerous innocents. Such actions certainly violate the national law of the state in which they occur absent that state’s consent, and are generally

regarded as violations of international law as well. To minimize the errors and collateral damage associated with such actions, Israel has established procedural and evidentiary prerequisites, and an internal process to evaluate the legal, political, and ethical consequences of proposed operations. The US used this method to kill one of the perpetrators of the attack on the USS Cole in Yemen, and to kill certain Al Qaeda members in Pakistan near the Afghan border, apparently with the consent of the governments of the states involved.

5. Attacks on Terrorists and Supportive Infrastructure. The US attacked terrorist support facilities in Libya (1986) in response to state-supported attacks by terrorist groups. The US attacked an Iraqi intelligence headquarters (1993) in response to a state-supported effort to kill former US President Bush. The US attacked terrorist training camps in Afghanistan (1998) in response to Al Qaeda attacks on US

nationals and facilities. All these attacks were intended to prevent future attacks; none was approved by the Security Council. Israel has also engaged in attacks on terrorist training camps in Lebanon and Syria, and on the PLO headquarters in Tunis, in response to terrorist attacks, and in order to deter future attacks.

6. Prevention of WMD Development. In 1981, Israel attacked the Osirik Reactor in Iraq in order to prevent Iraq from developing the capacity to produce plutonium, which would make development of a nuclear device more feasible. Iraq claimed the purpose of the plant was to develop nuclear power, and in any event that Israel had no right to prevent Iraq from developing arms of any sort in the absence of an attack by Iraq, or at least an imminent threat of attack. Israel noted that Iraq had insisted on remaining in a state of war with Israel; that Iraq had repeatedly attacked Israel in the past; and that Iraq continued to call for the destruction of

Israel as a proper strategic objective. Israel's action was taken before the threat had become imminent, in part to avoid attacking the plant after it had been put into operation, when radiation would have been dispersed.

The US attacked a plant in Sudan (1998) that it believed was under the control of allies of Al Qaeda and was engaged in producing chemicals for use in weapons. Sudan and the plant owner objected, claiming that the plant did not manufacture the chemicals alleged, and was a private plant producing pharmaceuticals. The US and several allies intervened in Iraq (2003) to enforce Security Council Resolutions related, among other things, to Iraq's suspected possession of WMD, but without explicit Security Council approval. One of the stated reasons for the action was to prevent the Hussein regime from providing weapons to terrorist groups that could use them against the US and its allies.

Two of the most likely and most demanding situations that in the future might call for the application of preventive force are North Korea and Iran. Both regimes are either rapidly moving ahead with nuclear weapons programs, or are behaving in a manner that conveys that conclusion. Both have deceived and seem prepared to continue to deceive the IAEA with respect to the scope and pace of their nuclear programs. Both regimes have openly threatened the use of force and have advocated impermissible objectives, including the destruction of other states. Both have supported terrorist groups and used terrorism to advance their interests and objectives. Both cases, however, illustrate that resort to preventive force has substantial limitations and can prove extremely costly, a lesson also learned in Iraq. In both situations, a preventive attack might not destroy all weapons and certainly would not eliminate important capacities; would be highly likely to result in retaliatory actions against attackers and their allies; could lead to wider

military engagements than anticipated; and could reduce rather than increase the likelihood that the current, irresponsible regimes will be replaced through the actions of internal forces.

7. Humanitarian Interventions. Interventions to prevent or alleviate humanitarian crises within the borders of a single state are rarely if ever preventive in the sense intended in this analysis; they generally occur after the crisis to which they are addressed has become a reality, thereby eliminating the evidentiary uncertainty as to whether a need for preventive action exists. An intervention in Somalia (1992), approved by the Security Council under Chapter 7 of the Charter, was intended to provide food and other relief in an area that had no operating government and in which widespread starvation and illness had become a reality. NATO intervened with force in Kosovo (1999), without Security Council approval, to prevent the expulsion and

killing of Muslims by Christian Serbs, which had already begun. Such uses of force, though addressed to activities already underway, are relevant to the current inquiry in that they represent situations in which the international community or states are prepared to intervene in the territory of sovereign states without their consent, and because they are intended to prevent further injury from taking place. The High-level Panel Report endorsed “the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violation of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.”<sup>5</sup>

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<sup>5</sup> Report at 66. The Report pointedly refers to this as a “responsibility to protect” and not a “right to intervene.” Id. at 65.

8. Maintenance of Hegemony. Some critics of the 2002 National Security Strategy have claimed that, because it supports a policy of using preventive force, as well as of maintaining US hegemony, it can be read potentially to contemplate the use of preventive force to preserve US hegemony. The Bush Administration has rejected this reading of the paper. No conceivably legitimate basis could be advanced for such a policy, or for any preventive use of force in the absence of substantial evidence that provides a reasonable basis for anticipating a tangible threat to national or international security.

The situations described above evoke different responses with regard to their acceptability and legality. Some, such as the use of preventive force to rescue hostages, are less controversial than others, such as the use of force to preclude the possible transfer of weapons to terrorists.

Some, such as the intervention in Kosovo to prevent grave

violations of human rights, are widely supported even though they have little or no established legal support, while others such as attacks on terrorist training camps are widely condemned even though considerable legal support exists for the proposition that such support for terrorism is illegal and prohibited by treaties and Security Council resolutions.

#### **IV. What are the dangers and limitations of basing national security on resort to Preventive Force?**

Resort to preventive force is a problem in which two types of error can occur: One is to take preventive action when no attack would have occurred had no such action been taken; the other is to fail to act against a threat that thereafter actually results in an attack that could have been prevented. Either decision is potentially wrong. The likelihood of error in each case depends on having accurate information and exercising good judgment; the costs of each type of error depend on the consequences of acting versus

not acting in particular cases. No general decision rule is available that will ensure correct prediction.

On the one hand, preventive force may be the only possible basis for providing protection from certain types of threats. The 2002 National Security Strategy advocates reliance on preventive force so that the US and its allies will be able to prevent the infliction of harm on their populations and societies. On the other hand, reliance on preventive force carries dangers and has limitations that must be recognized to avoid advancing claims that enhance rather than reduce risk, or that fail to provide the protection presumed from such uses of force.

A. Enhanced Instability. The decision to utilize preventive force as part of a state's national security strategy could deter potential target states, and even some non-state actors, from developing or utilizing dangerous capacities. Adopting such a policy could also, however, cause potential

targets or states facing similar threats to adopt analogous policies, or to act in anticipation of a preventive attack.

Similarly, while some states may be led to give up WMD programs or aspirations because of the threat or use of preventive force, others may be led to adopt or expedite such programs and goals in order to protect against threatened preventive action.

B. Uncertainty of Conclusions. A decision to use preventive force is a prediction of future actions, and therefore more prone to error than a decision to use force in response to an actual attack, or to preempt an imminent attack. However reliable the intelligence used in concluding that the use of preventive force is necessary, it cannot be known with certainty that, had preventive force not been used, an attack would in fact have occurred on the state anticipating the danger. A hostile regime or leadership may be forced from power before it acts, or may alter its policies without the use

of preventive force. It is unrealistic to assume, moreover, that any state is capable of collecting and correctly appraising the evidence required to evaluate danger accurately, to identify critical targets correctly, and to have confidence that the threat involved will be entirely eliminated by the action contemplated. Inevitably, decisions to initiate preventive action would be made despite substantial uncertainties as well as incomplete or incorrect information on important issues. These uncertainties will result in some attacks that are based on error or inaccurate prediction. Erroneous attacks and other forms of accidental damage frequently occur in warfare. But the use of force in a preventive context may be particularly susceptible to challenge based on legitimacy.

C. Provoking Response. A major danger in the use of preventive force is the response it can potentially provoke from the state or group attacked. A state or group attacked

preventively without Security Council approval is likely to contend that it has the right to respond in self-defense, and could have a credible claim in that regard. Whatever the legal situation, preventive attacks seem more likely than responsive actions to generate resentment among target populations and their sympathizers. Adverse public reactions can undermine or greatly complicate efforts to win support from such populations. Any use of preventive force must also take into account the capacity of the state or the organizations attacked to respond. North Korea, for example, could respond to an attack on its nuclear facilities by attacking South Korea with massive artillery barrages. Dealing with the danger of anticipated response, moreover, could lead a state intent on taking preventive action to attack before a danger is fully developed, and with force sufficient not only to eliminate the particular danger but also the potential response. Where the state attacked is believed to possess WMD, a preventive use of force would demand

intelligence of extremely high quality and specificity to ensure confidence that the threat will be neutralized with a high likelihood of zero counter-strike capability.

D. Limits to Deterrent Value. The threat or use of preventive force against *states* is likely to have considerable deterrent value, in that states are generally assumed to act in a calculated fashion based on their interests. In some cases, force or the threat of preventive force may dissuade a state from pursuing a course of action or program, or cause it to modify its intentions without altering its capabilities. On the other hand, the threat of preventive force could lead a state thus denied overt options to seek covert and deniable partnerships with non-state entities as an asymmetric means of achieving its goals. For instance, a radical Islamic regime whose position might be internally weakened by a preventive strike or which is threatened with being overthrown by liberal forces in the society could provide weapons to terrorist

groups whose use of them would exacerbate tensions with the West and help the regime to stay in power.

Rational state actors will be unlikely to provide weapons of mass destruction to organizations over which they have little or no control. This general expectation provides no assurance, however, against state actors who perceive their interests in irrational ways, or against terrorist groups receiving such support, or from parties within a state who are operating from motives other than rational calculation.

The threat or use of preventive force against *non-state entities* has less potential deterrent value than in the case of states, since such groups are not responsible for a territory and a population. States have indefinite duration and make commitments to other states to secure reciprocal advantages. Non-state entities lack these characteristics and incentives. However, non-state actors still require a physical locality, and some deterrent effect may be secured

by holding states responsible for activities of non-state actors within their territories.

E. Limited Value Based on Nature of Threat. The threat or use of preventive force is not equally likely to prove effective in dealing with all forms of threats. Strategic doctrine has long recognized the inadequacy of preventive actions as a method for dealing with nuclear threats posed by states.

Preventive force is also likely to be ineffective as a means for dealing with other types of threats. For example, once a biological weapon has been developed, it becomes impossible to neutralize that capability by force due to the ease of replicating and dispersing agents, without destroying the group in possession of such a weapon. A more effective strategy against the emerging BW and CW threats, would include defensive measures, such as stockpiling vaccines, antibiotics, and masks; deploying sensors developed for low

level B/CW agents; and supporting first responder preparations.

## **V. By what standards should the propriety of using Preventive Force be determined?**

The legitimacy of uses of force by states depends in part upon how widely accepted are the grounds upon which action is taken. The UN Charter governs the legality of uses of force. The Charter provides that Members “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” (Art. 2(4).) The Charter is a treaty and all its ratifying states are bound by its terms, at least as understood in good faith by each party. Disregarding Charter rules may well be possible for powerful states, but will tend to undermine the legitimacy, not only of the actions taken in disregard of the rules, but also of the rules themselves and the propriety of enforcing them against other

states. The Stanford Group therefore examined the extent to which traditional standards governing uses of preventive force are a viable basis for determining the propriety of such actions, and if not whether alternative standards are available for that purpose.

A. Traditional Rules. The traditional rules advanced by international lawyers for governing the use of force, including preventive force, require, with limited exceptions, that uses of force either be approved by the Security Council, or constitute acts of self-defense against attacks on the defending state. These rules were reaffirmed by the High-level Panel Report, which asserts that no need exists to modify them, since the Security Council is empowered to deal adequately with current threats.<sup>6</sup>

1. Security Council Authority. The Security Council has broad powers to approve uses of force, including uses of

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<sup>6</sup> Report, *supra*, pp.63-64.

preventive force, once it determines that the situation requiring the use of force constitutes a threat to “international peace and security” under Chapter 7 of the Charter. This power is broad enough in theory to cover all the categories of potential uses of preventive force that could reasonably be viewed as justifiable. The only legal limitations on this authority appear to be (a) the Charter allocation to individual states of “matters which are essentially within the domestic jurisdiction of any state . . . .” (Art. 2(7)), which has been given little if any restrictive force in practice, and (b) the argument that the Council cannot act in a manner that limits the “inherent” right of self-defense.

The Council’s authority is limited, however, by the requirement that no Permanent Member of the Council vote against the action proposed. The end of the Cold War made this limitation easier to overcome; the Security Council since 1990 has approved several uses of force in connection with

humanitarian crises (Somalia, Bosnia), in response to aggression (Iraq/Kuwait), and to combat terrorism (Afghanistan). Council approval nonetheless remains a formidable obstacle; since 1990, the Council failed to approve the use of force to stop egregious violations of human rights (Rwanda, Kosovo), and to enforce its own resolutions regarding WMD (Iraq). Obtaining Security Council approval in advance is likely to be particularly difficult with regard to uses of preventive force, which sometimes will require decisive moves, based on imperfect and improvable predictions. Consensus on preventive actions will only be possible to the extent that consensus exists on the predicted threat. The high standards of proof needed to gain the Council's acceptance may rarely be attainable within the short time constraints and the need for surprise that such actions may require.

The Report of the High-level Panel urges that the US and all states and regional organizations adhere to the view that Security Council approval is essential for uses of force other than those in self-defense against an actual or imminent attack. The Report concludes “that if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment – and to visit again the military option.”<sup>7</sup> This statement could be construed to recognize, as a practical if not legal matter, that states may genuinely need to use force in situations where the Council will not approve its use; even assuming such an interpretation, the Report requires at a minimum at least one effort to secure Council

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<sup>7</sup> Report at 63.

approval and the exhaustion of all other alternatives before such actions could be contemplated.

The US and other major powers have never accepted that Security Council approval is an absolute prerequisite to the use of force, whether for actions claimed to be in self-defense or in other situations, including humanitarian interventions. The US continues (in the 2002 National Security Strategy and elsewhere), along with other powers and NATO, to reserve the option of using force without Security Council approval. Given the dangers and legal difficulties of using force without Security Council approval, however, and especially of using preventive force (including the lack of legitimacy, the possibility of error, and the potential for doing greater harm than good), it is appropriate to consider whether the US should as a matter of principle seek Council approval whenever possible for all uses of

force even if it reserves the right to use force preventively if approval is denied.

The international community, and the Council, have adopted supportive principles and policies in the three areas that are of greatest concern to the US and its allies: terrorism; human rights; and WMD proliferation. Secretary General Annan and other world leaders have called for increases in the UN's capacities related to the use of force, in order to enhance the Council's willingness and ability to act promptly and effectively to preserve international peace and security.<sup>8</sup> The High-level Panel Report calls upon the Council to confirm through an interpretive resolution the situations in which it will give serious consideration to the use of force to protect international peace and security, and the situations identified by the Panel as appropriate are

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<sup>8</sup> The European Security Strategy (Brussels, 12 December 2003) provides in this regard (p.9): "Strengthening the United Nations, equipping it to fulfill its responsibilities and to act effectively, is a European priority. We want international organizations, regimes and treaties to be effective in confronting threats to international peace and security, and must therefore be ready to act when their rules are broken."

essentially the same threats identified by the US in its 2002 National Security Strategy.<sup>9</sup> These developments arguably increase the likelihood that efforts to obtain Council approval for the use of force in those situations of greatest concern to the US and the international community will succeed. Finally, the benefits in sharing the burdens of military interventions also lend support to such a principle.

2. Self-Defense. Article 51 provides that “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” Although this provision characterizes the right involved as “inherent” and states that “nothing” in the Charter shall be read to impair the right thus recognized,

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<sup>9</sup> See High-level Panel Report at 23, summarizing the “six clusters of threats with which the world must be concerned now and in the decades ahead,” including inter-state conflict, internal conflict (genocide and other atrocities), nuclear, radiological, chemical and biological weapons, terrorism, and transnational organized crime.

international law has developed in a manner that purports to limit the right of self-defense to actions taken in response to actual attacks on the Member state resorting to force.

In addition, numerous other limitations have been advanced as to the right to self-defense. Some scholars argue (and the ICJ has recently so stated in an advisory opinion) that, to justify acts as self-defense, an attack must be by the forces of another state. The ICJ has also narrowed the right of self-defense to attacks that are substantial, thereby forcing states that are subject to lesser attacks to rely on “other measures” to defend themselves (excluding for example collective action). This suggests support for the argument that attacks on a “Member” of the UN means (with perhaps exceptions for embassies and troops) attacks on the Member’s territory. Another claim advanced is that defensive actions must cease once the attack involved is reported to the Security Council and it assumes jurisdiction, even though

the measures taken by the Council have been insufficient to restore the Member attacked to full control over its territory and population. If Article 51 were narrowly applied, moreover, it would leave no room, for example, for the use of force to rescue hostages, and would severely constrict the protection of allies.

Regarding anticipatory force, the reading given Article 51 by international lawyers and the ICJ would not allow, and many have claimed it does not allow, any use of force in self-defense until an attack actually begins.<sup>10</sup> The High-level Panel Report concludes that international law does allow the use of preemptive force after an attack is at least underway, and its consequences are “imminent,” thus precluding resort to the Council. Even this view of anticipatory self-defense leaves no room for preventive actions without Council approval for the purpose of averting some future danger,

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<sup>10</sup> The High-level Panel concluded the right to respond to imminent threats is part of established international law. This claim would be applicable to the full scope of the historic right of self-defense. In fact, prominent scholars have argued that the language of Article 51 prevents all forms of anticipatory uses of force.

however serious and however high the likelihood of its being realized.

The US has never accepted these limits on the right of self-defense, and they have been disregarded in practice by many states. The 2002 National Security Strategy explicitly rejects the limitation that preventive actions may only be taken in the face of an “imminent” threat, because it concludes that the nature of current threats has made that concept unworkable.<sup>11</sup> The effectiveness of verbal limitations on the actions of states is questionable in any event; Germany, Japan, Italy, and other states made blatantly false claims of imminent threats before undertaking aggressions. Many scholars who believe that the traditional rules were

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<sup>11</sup> The European Security Strategy also suggests (p.7) a need for change from “our traditional concept of self-defense.” The threat of invasion has been replaced by “new threats” which are abroad and dynamic. “The risks of proliferation grow over time; left alone, terrorist networks will become ever more dangerous. State failure and organized crime spread if they are neglected – as we have seen in West Africa. This implies that we should be ready to act before a crisis occurs. Conflict prevention cannot start too early.”

intended by the Charter have nonetheless concluded that those rules are inadequate to deal with modern necessities in the areas of terrorism and humanitarian law. Little agreement exists, however, on how the international community should respond to this lack of clarity or concurrence with regard to the law of self-defense. Several alternative approaches have developed to deal with the situation.

A. Recognizing Exceptions. The most common response among international lawyers to the inadequacy of traditional rules of international law governing the use of force has been to propose the creation (or de facto recognition) of narrow exceptions for specific situations. One exception now widely accepted is the right of states to use force to secure release of its noncombatant nationals from the custody of terrorists holding them as hostages. Another proposed exception that is gaining support or acceptance is the use of

force to prevent massive and serious violations of established principles of human rights, such as genocide.

This approach to the problem of inadequate rules – treating specific situations demanding the use of force as narrow exceptions – could provide a possible basis for permitting some uses of preventive force as related to self-defense. For example, exceptions could allow preventive actions against states or non-state actors that illegally possess weapons of mass destruction; or against terrorist groups that have established records of illegal violence; or against states that fail to satisfy their obligations under international law to give no support to terrorists or to prevent terrorist groups from attacking outside their borders.

An interpretation that would allow significant flexibility with regard to preventive force, advanced by the British Foreign Office, would treat as an “imminent” threat of attack any situation in which the capacity and likelihood of an attack

is established but the time the attack may occur is unknown. This rationale would cover situations for example in which a state has established that it is a threat, and has the means and propensity to inflict harm, but it is not possible to know when its attack might occur. It presumably would not cover situations in which the state had not yet acquired the necessary means (e.g., WMD).

B. Allowing “Reasonable” Uses of Force. Another approach for dealing with the inadequacy of traditional rules has been to construe the right of self-defense as having been preserved in its historical entirety by Article 51, allowing all uses of force in self-defense that are reasonable under the circumstances. This approach would deal with the claim that Article 2(4) narrowed legal uses of force by distinguishing between uses of force consistent with Charter purposes and the territorial integrity of other states, on the one hand, and uses of force inconsistent with those principles. Virtually

every US Administration since Truman has on one issue or another advanced arguments for a more flexible legal regime, and some (beginning with the Kennedy Administration and continuing to the present) have described the proper approach to the use of force as a multi-factored analysis aimed at determining the reasonability of uses of force based in part on the provisions and purposes of the Charter.

Most international lawyers, and the ICJ, have not accepted this more flexible approach, though it has significant support in the domestic law of states (where force is frequently regulated by rules based on reasonableness), and in the reasoning process of political leaders and national security practitioners, who usually evaluate and justify uses of force on the basis of all the factors that are relevant to the particular situation involved.

This more flexible approach might, for example, weigh proposed uses of preventive force based on the gravity of the danger, the likelihood of its realization, the exhaustion of other means for prevention, the extent to which UN Charter based procedures and values support the action, and the proportionality of the action contemplated relative to the danger perceived. Supporters of this approach believe it would be useful as an ordered basis for evaluating uses of preventive force to deal with current threats. Opponents argue, among other things, that it would leave too much discretion to individual states to determine unilaterally their reaction to potential rather than actual danger.

C. Legitimacy as a Substitute for Legality. A narrow interpretation of Article 2(4) requires approval of the Security Council; however, as even the High-level Panel acknowledges, this has often proven untenable. The Council cannot be expected to approve the use of preventive force in

all situations where states believe that a need exists to act preventatively in defense of their interests or to protect against humanitarian disasters. Arguably, in such situations guiding principles could be established distinct from traditional legal standards that enable states and other interested parties to evaluate the legitimacy of the action.

The High-level Panel Report accepts the need for a multi-factored analysis as a necessary basis for determining the legitimacy (or wisdom) of using force. It recommends that the Council adopt “a set of agreed guidelines, going directly not to whether force can legally be used but whether, as a matter of good conscience and good sense, it should be.” It proposes “five basic criteria of legitimacy: (a) Seriousness of threat. . . . (b) Proper purpose. . . . (c) Last Resort. . . . (d) Proportional means. . . . [and] (e) Balance of consequences. . . .” (Report at 67.)

The Report states that its proposal for establishing the legitimacy of uses of force is intended for situations where the use of force would be lawful by traditional standards. It has, however, included among the factors that it believes establish legitimacy all of the factors that establish legality under traditional norms, including “just war” theory.

Therefore, while the High-level Panel may not have intended their criteria to become an alternative to Security Council approval for determining an action’s legitimacy, that could be the practical result of the approach they have suggested.

D. Force Based on National Interest. A common response among national security practitioners to the inadequacy of traditional use-of-force rules, within the US and elsewhere, is to ignore the rules and engage in an interests-based calculation. US officials are viewed, by governments and commentators, as regarding themselves as exempt from the traditional rules by virtue of US military and economic power.

Justifications for this broad discretionary power over the use of force include the arguments that the US is the most likely target for many potential aggressors, and that the US should use its influence and power to lead the world in advancing objectives such as freedom and human rights, rather than be bound by rules intended to support politically neutral outcomes. This approach would leave the US largely unbound by rules in determining whether to exercise preventive force, though subject to the realities and risks that accompany unilateral military initiatives.

Some may contend that this approach provides the most accurate description of how states actually behave. Yet, few if any states would agree with the legality or legitimacy of so broad an allocation of authority to any other state. To the extent such authority is claimed by any state, other states could advance reciprocal claims, potentially creating greater international instability. The question

remains, moreover, whether so broad a claim of authority is necessary to provide adequate security from threats potentially requiring the use of preventive force.

## **VI. What measures could enhance the legitimacy and utility of Preventive Force?**

The dangers, limitations, and lack of standards associated with the use or threat of preventive force warrant careful consideration of the circumstances in which such actions are justifiable, if at all. If the concept of preventive force is to have a place in national security strategy it should be based on standards and procedures that maximize its utility while minimizing its dangers.

### **A. Standards.**

1. Necessity. States have universally accepted the principle that uses of force can be legitimate only if resort to force is necessary. The 2002 National Security Strategy makes clear that diplomacy and all other feasible means must be exhausted before

resort to force, including the use of benefits (economic and security as appropriate) as well as sanctions. Important steps short of force might include, in the area of WMD proliferation for example, establishing effective means of verifying compliance with the Nonproliferation Treaty, including the Additional Protocol, the Proliferation Security Initiative, and providing regional centers for assuring the availability of nuclear fuel for peaceful purposes (i.e. energy and research) to non-nuclear countries to replace their developing forbidden indigenous fuel cycles. The fact that the NPT has built-in discrimination between nuclear and non-nuclear weapon states would need to be taken into account if greater restrictions on non-nuclear states are to be developed, potentially with greater reliance on benefits for such states to go along with new restrictions or enforcement.

2. International Support. The effectiveness and legitimacy of an effort to deal with a threat is enhanced to the extent it has support from other states. This factor supports the notion, discussed above, that any threat or use of force, and particularly of reliance on preventive force, should if possible have the support of the Security Council. Where Council approval is not possible, efforts should be made to secure the broadest support obtainable, through standing and temporary alliances, including regional organizations such as NATO, and fostering concerted action by democratic states. These steps would not only enhance the legitimacy of preventive actions, they could also reduce the risk of error due to the process of debate and scrutiny that such efforts would entail.

3. Charter-Based Objectives. The threat or use of preventive force is likely to be considered illegitimate by most states if based on objectives inconsistent with purposes found in or based upon the UN Charter or otherwise universally accepted. Conversely, reliance on such purposes to justify preventive force is likely to strengthen the legitimacy of such actions. On several issues, UN Resolutions and widely adopted treaties impose duties on states that can be invoked to support the threat or use of preventive force.

- Terrorism. The Security Council and General Assembly have condemned all forms of support for terrorism and terrorist groups. Several widely adopted treaties also make such support illegal. The threat or use of preventive force gains support when invoked in connection with a state complicit

in tolerating or supporting groups that use its territory as a base for terrorist operations, or against a group that calls for or undertakes hostile actions.

- WMD Development or Proliferation. UN resolutions and several treaties make the development, possession, use, and proliferation of some forms of WMD illegal; many states have agreed to additional constraints, particularly regarding nuclear weapons and technologies. The threat or use of preventive force gains support if invoked in connection with illegal weapons development or proliferation. Particular emphasis could be placed on preventing acquisition of nuclear explosive material (Pu239 and U235 primarily).

- Egregious Violations of Human Rights. Many treaties and resolutions make illegal certain violations of human rights, including genocide and torture. Military actions for the purpose of protecting people from widespread violations of these rights are likely to have significant legitimacy.
- Political Freedom. International law provides no support for the proposition that a state can use force against another state in order to advance the political freedoms of the other state's nationals. Some support can be mustered, however, for the proposition that UN Charter purposes should be considered to include a preference for political freedom for all peoples, and therefore that uses of force based on stronger grounds (terrorism;

preventing the use of WMD) gain some legitimacy if they also advance political freedoms.

4. Proportionality. A long-standing, universally accepted standard governing use of force is the principle that the force used should be proportional to the danger involved. Excessive force is force that is unreasonable, given the objective for which force is used, its consequences including its impact on non-combatants, and the availability of less damaging means capable of dealing effectively with the threat involved. The ICJ's decision in *Nicaragua v. United States* utilized a "tit-for-tat" approach suggesting that defensive measures should be no more stringent than the measures against which such actions are taken. The US and other powers have rejected this approach and rely instead on an understanding of proportionality that allows the use of such measures as are reasonably seen to be

required to deal effectively with the threat warranting a use of force. The proportionality of a preventive use of force requires particularly careful calibration, especially where no illegal acts have yet occurred against which the preventive action can be measured. The quarantine of Cuba, implemented during the Kennedy Administration, is widely condoned as a properly calibrated preventive response to a grave threat that had not yet been manifested by any attack on the US.

4. Intelligence. Uses of force are always accompanied by uncertainties. Uses of preventive force are particularly prone to doubts, given the fact that preventive actions are generally taken before an attack has occurred or is imminent. To enhance the legitimacy of preventive actions therefore requires care in recognizing and reducing the uncertainties involved in each case. The level of proof necessary

to justify a particular action will necessarily depend on all the relevant circumstances, including some inherently uncertain factors such as the threat involved and the likelihood of its becoming realized.

But enhanced legitimacy can be attained for a preventive action by determining in advance what relevant facts are known and unknown in each situation, and by properly evaluating the information (intelligence) available with regard to the relevant circumstances that are unknown.

Preventive actions vary materially in the extent to which they are based on findings or assumptions that may fairly be treated as facts. The danger sought to be prevented will in some cases be more tangible than in others before action is taken to prevent further consequences. North Korea's nuclear enrichment activities, for example, are far more advanced than those of Iran. In evaluating whether to

use preventive force to target a suspected terrorist, the uncertainties potentially associated with such a decision will be materially reduced if he is an avowed member of Al Qaeda who has openly advocated terrorist acts. Whether to intervene to protect an ethnic group from the prospect of some form of inhumane treatment will involve fewer uncertainties if inhumane acts have already been threatened and taken against such individuals.

With regard to uncertainties that cannot be definitively resolved, the legitimacy of a use of preventive force will depend in part on the care and competence with which intelligence related to the issues is collected and used. Two Commissions have recently examined the strengths and limitations of the US intelligence community, and the manner in which intelligence has been used by national security officials in resolving uncertainties related to attacks

on the US and other foreign threats such as the existence of WMD in Iraq.<sup>12</sup> Among the principal conclusions of these Commissions are: (1) the need to develop a culture in the intelligence community of “competitive analysis” in which all hypotheses are stringently tested; (2) the importance of relying on integrated, multi-source analysis, rather than single-source assessments; (3) that information sharing within and among all relevant agencies is essential to avoid failures and exploit the potential value of all information; and (4) that the protection of sources and methods, though important, must not be allowed to prevent adequate discussion and evaluation. In the US, the Director of National Intelligence is responsible for improved collection and evaluation of intelligence, and that role is an essential element in enhancing the legitimacy of preventive actions.

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<sup>12</sup> National Commission on Terrorist Attacks Upon the United States (2004); Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction (2005).

B. Procedures. The legitimacy of the threat or use of preventive force is likely to be enhanced if the state contemplating such action adheres to procedures designed to make clear its need and justification.

1. Report to Security Council. The UN Charter requires that all uses of force in self-defense be “immediately reported” to the Security Council (Art. 51). Potential uses of preventive force are more likely to be avoided, or accorded greater legitimacy, when a report is made to the Security Council in advance of any military action than if no report is made. Such reports provide an opportunity for multilateral discussion of the threat perceived, of measures that could avert the threat short of the use of force, of possible Security Council approval of the use of preventive force to deal with the threat, and of the enhanced legitimacy of using force in the absence of

such approval based on criteria such as those specified in the High-level Panel Report.

2. Preference for Multilateral Action. The dangers of preventive force, and the possibility of its use in bad faith, make it preferable from the viewpoint of legitimacy that such actions be undertaken multilaterally, even when Security Council approval cannot be obtained. The EU has stated that the “Security Council has the primary responsibility for the maintenance of international peace and security.” In the event the Council fails to exercise its responsibility, actions by other multilateral groups are likely to be viewed as more legitimate, all other factors being equal, than those of individual states.
- A preference for multilateral support implies a need to ensure multilateral capacity and the willingness to address real though as yet unrealized threats.

Secretary General Anan has stated that states feel forced to act unilaterally because the UN Security Council lacks the ability to call upon dedicated forces to deal with threats promptly and effectively. To the extent the Security Council's lack of capacity and willingness to deal with threats can be remedied through measures such as those recommended by the High-level Panel, the preference for multilateral action through the Security Council is made more viable.<sup>13</sup> A commitment to prefer and effectively to utilize the Security Council to prevent threats from maturing into disasters is also consistent with, and arguably might be enhanced by, the possible use of

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<sup>13</sup>The Report of the High Level Panel includes a number of proposals to enhance the Security Council's capacities to deal with threats. It recognizes that one reason states may want to bypass the Council "is a lack of confidence in the quality and objectivity of its decision-making. The Council's decisions have often been less than consistent, less than persuasive and less than fully responsive to very real State and human security needs. But," the Report concludes, "the solution is not to reduce the Council to impotence and irrelevance: it is to work from within to reform it . . . ." Report at 64.

preventive force to address serious threats that are not resolved by the Council's actions.

3. Justification. A state contemplating resort to preventive force should first present the evidence it claims justifies such extraordinary action, if possible to the Security Council. Where an adequate record is made, as in the case of Iraq's failures to comply with Security Council resolutions, it may be proper to place a burden of proof on the state whose conduct has generated serious concerns. Peaceful resolution of concerns may be more likely if the state allegedly responsible is formally called upon to rebut or remedy the circumstances presented to the Council.
4. Compensation. To encourage care, and as a matter of fairness, states that resort to preventive force could be required to pay fair and just compensation for any harm they cause that results from erroneous

conclusions. Procedures could be established to enable the Council to perform reliable forensic examinations in such situations.

The standards and procedures described above are tentative suggestions that require further elaboration. Other methods may also be devised for enhancing the legitimacy of preventive force, to the extent such measures are undertaken.

## **VII. Conclusion**

An examination of the issues related to the possible use of preventive force does lead to some general conclusions. States currently face real dangers from the use of terrorist methods and the potential use by states or non-state entities of nuclear, biological or chemical weapons. The international community is also confronted with the fact that some states refuse or are unable to comply with their obligations to suppress terrorism and to treat their own nationals

consistently with universally accepted standards of human rights. Analogous dangers and threats to human beings are dealt with domestically by states through preventive measures, in order to minimize the costs and suffering that occur once serious threats are realized. It is natural that states prefer to prevent international threats as well, rather than attempting to deal with them exclusively through retaliation and criminal prosecution. Preventive action in some situations is widely felt to be the most moral and effective measure.

Preventive uses of force entail risks, including the possible exacerbation of the very problems such uses of force are intended to resolve. They are also particularly disfavored by international law, as a method for dealing with threats to security, both because of the UN Charter's provisions related to the use of force and in light of the possibility of errors, bad faith, and the risks of such conduct. The need to consider preventive uses of force is sufficiently

strongly and widely felt in the international community, however, so as to warrant the development of clearer and more universally accepted norms of conduct, both with regard to the need to utilize the Security Council when possible, and with respect to the bases upon which states could justify such actions when the Council fails to act.

Current rules fail to provide acceptable guidance to states with respect to the situations in which resort to preventive force would be considered justifiable, even in the absence of Security Council approval. NATO's intervention in Kosovo to prevent the expulsion of Muslim Kosovars is a case in point. The criteria proposed by the High-level Panel Report for evaluating the legitimacy of uses of force provides useful guidance, and their adoption by the Council would enhance security and the care with which such issues are addressed. Some forms of preventive force, used in certain contexts, are clearly problematic, especially large-scale military efforts. Other forms of preventive force are less so.

Even if all such uses of force continue currently to be regarded as inconsistent with the UN Charter, the development of standards and procedures by which their legitimacy can be tested should contribute materially to the enhancement of international peace and security.