

The Use of Preventive Force as an Element of US National Strategy
By James Steinberg

The Bush Administration's National Security Strategy of 2002 touched off a vigorous debate in the United States and abroad over whether and when it is appropriate to use force other than in response to an attack (imminent or actual). In the report, the Administration stated:

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction— and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.¹

Many of the Administration's critics denounced this new and dangerous policy, and the Administration itself touted the need to go beyond past practice, warranted by the novel and dangerous threats facing the United States.² But the use of preventive force – and the debates over its legality and wisdom -- predates the Bush Administration's post 9/11 strategy. A careful examination of the history, rationale, costs and benefits of using preventive force suggests that while rare, preventive force has a legitimate role to play in tackling some of the most dangerous security problems facing the United States and the wider international community.

1. Historical (post-1945) perspective: The debate over the appropriate use of force has its roots in the provisions of the UN Charter, which was adopted in the context of the perceived threats facing the international community after World War II. The Charter's principal preoccupation was oriented toward strengthening collective defense against aggression as the pre-eminent threat to peace and security; as well as enshrining restrictions on countries' interference in other nations' internal affairs in the context of decolonization. Article 2.4 proscribes the use of force stating “[a]ll 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.”³ There are two exception to this proscription—“the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations” (Article 51) and the use of force authorized by the Security Council under Chapter 7 of the Charter, which authorizes the Council to act in the face of threats to international peace and security.

¹ *The National Security Strategy of the United States of America* (Washington, DC: The White House, 2002).

² In a speech at West Point in June, 2002, President Bush called for “new thinking” on the preventive use of force. George W. Bush, “Remarks by the President at 2002 Graduation Exercise of the United States Military Academy,” West Point, NY Jun 1, 2002.

³ *Charter of the United Nations*, Chapter I, Article 2.4. <http://www.un.org/aboutun/charter/>

Although the Charter explicitly limits the right of self-defense to actual attack, most analysts have argued that this includes the right to respond to imminent threats of attack, drawing on the doctrine that has its roots in Grotius and the Caroline case. Although this view is not universal, it has been endorsed by the current UN Secretary General in his recent report.⁴

There are several rationales for limiting the use of force to an actual or imminent attack. These include the danger of destabilizing international relations by encouraging one nation to act to forestall a possible attack by the other, a danger that was realized in the 20th century in the competitive mobilizations that helped spur World War I (the need to act in order to avoid surprise, which only encourages the potential adversary to act in turn); and the danger that in a nuclear context, one side would be spurred to act preventively on the basis of strategic or tactical warning to avoid being “decapitated” by the other’s first strike (an issue that was much debated due to the dangers of first-strike nuclear capacity in the context of the US-Soviet arms race). The proscription is deeply rooted in the concept of just war, which includes the requirement of “last resort” as an element of *jus ad bellum*. It is reinforced by the fact that the capability to act does not imply an intention to do so and the difficulty of distinguishing between offensive and defensive capabilities – it is no accident that the United States typically calls our nuclear capability our “deterrent” even though the possession of nuclear weapons by at least some countries has been seen as “threat” to the United States. This latter concern is reinforced by the difficulty of judging intentions, both because of the inherent limitations of assessing future intentions, as well as the particular intelligence challenges of judging motivations (as opposed to capabilities).

During the Cold War, there were several important occasions where the use of preventive force was considered and rejected, including the option of an air-strike against the Russian missiles in Cuba in 1961 and the Chinese nuclear facilities in 1963-64.⁵ In at least one dramatic case -- the Israeli attack on the Iraqi reactor at Osirak -- the international community, including the United States, condemned the action as a violation of the Charter.⁶

Despite these strong considerations, the bar against preventive use of force (other than when authorized by the Security Council) began to erode significantly in the post-Cold War period. A number of factors contributed to this development. First, the end of the Cold War itself reduced the chance that the use of force would escalate to a superpower

⁴ “Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack.” *In Larger Freedom: Towards Development, Security and Human Rights for All* (New York: United Nations, 2005) 33.

⁵ Francis J. Gavin, “Blasts from the Past: Proliferation Lessons from the 1960s,” *International Security* October 2004: Vol. 29, Issue 3. See also Marc Trachtenberg, “The Bush Strategy in Historical Perspective,” in James Wirtz and Jeffrey Larsen, eds., *Nuclear Transformation: The New U.S. Nuclear Doctrine* (New York: Palgrave Macmillan, 2005). Some argue that the Cuba blockade itself was an actual example of preventive use of force.

⁶ UN Security Council Resolution 487 (1981) “*Strongly condemns* the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct” (<http://domino.un.org/UNISPAL.NSF/0/6c57312cc8bd93ca852560df00653995?OpenDocument>)

conflict, making the risk of acting preventively more acceptable.⁷ A second factor was the failure of the Security Council to react effectively to the grave humanitarian crises of the 1990s in Rwanda and Bosnia. This had implications both for the substantive rationale for using force: the growing recognition of the legitimacy of “humanitarian intervention” (even though nominally the Security Council’s authority under Chapter VII is limited to threats to peace and security, not to purely humanitarian emergencies) and the willingness of the NATO countries to use force outside the authority of the Council when there was no threat of attack against them.

Third was the growing use of preventive force against what were increasingly seen as the dominant threats to security in the post-Cold War environment – the proliferation of weapons of mass destruction (WMD) and terrorism. In 1994, Defense Secretary William Perry threatened the use of force against North Korea’s nuclear facilities if it failed to return to compliance with the nuclear Non-Proliferation Treaty (NPT) – a clear threat of “preventive force” for counter-proliferation goals. In 1998, the Clinton Administration attacked the Al Shifa chemical plant in Sudan, based on intelligence that suggested the plant was being used to manufacture chemical weapons and had ties to Osama bin Laden, who had been implicated in the attacks on the U.S. embassies in Africa in August 1998 – another use of force to prevent a terrorist from acquiring WMD. The Administration also attacked a terrorist training facility in Afghanistan, one goal of which was to kill potential attackers against the United States and destroy their facilities. Months later, the Clinton Administration again used preventive force, this time against suspected WMD related targets in Iraq (Desert Fox), to deprive Iraq of elements of its WMD capability following the end of the inspection regime established at the end of the first Gulf War.

2. The Bush Administration’s Approach to Preventive Force

Although there was considerable debate about the wisdom, legality, and effectiveness of each of these preventive uses of force, they did not trigger the same degree of debate over the basic premise as that which erupted following the issuance of the Bush Doctrine after the 9/11 attacks. The President first outlined his approach in his commencement address at West Point in June 2002:

“For much of the last century, America's defense relied on the Cold War doctrines of deterrence and containment. In some cases, those strategies still apply. But new threats also require new thinking. Deterrence -- the promise of massive retaliation against nations -- means nothing against shadowy terrorist networks with no nation or citizens to defend. Containment is not possible when unbalanced

⁷ Kosovo is particularly instructive in this regard, since the NATO actions at several points risked direct military conflict with Russia (the Russian deployment of intelligence ships in the Adriatic, the Russian deployment of forces to Pristina in the immediate aftermath of the conflict and the thwarted effort to resupply them) Robert Kaiser and David Hoffman, “Secret Russian Troop Deployment Thwarted,” *Washington Post* Jun. 25, 1999: A1; “Russia’s ‘Key Role’ in Kosovo” *BBC News* April 7, 1999 (<http://news.bbc.co.uk/1/hi/world/europe/313939.stm>); “Sources: U.S. suspects Russia feeding info to Belgrade” *CNN* April 19, 1999 (<http://www.cnn.com/US/9904/19/us.kosovo.03/>). It is reasonable to wonder whether NATO would have taken such risks over a “humanitarian” crisis occurring on the territory of a Soviet “ally” during the Cold War.

dictators with weapons of mass destruction can deliver those weapons on missiles or secretly provide them to terrorist allies...If we wait for threats to fully materialize, we will have waited too long...We must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge.”⁸

The view was further amplified in the President’s cover letter to the new National Security Strategy:

“The gravest danger our Nation faces lies at the crossroads of radicalism and technology. Our enemies have openly declared that they are seeking weapons of mass destruction, and evidence indicates that they are doing so with determination. The United States will not allow these efforts to succeed. We will build defenses against ballistic missiles and other means of delivery. We will cooperate with other nations to deny, contain, and curtail our enemies’ efforts to acquire dangerous technologies. And, as a matter of common sense and self-defense, America will act against such emerging threats before they are fully formed.”⁹

According to the President and his national security team, there are three reasons for a more expansive use of preventive force -- the changing *nature of the actors* who threaten the United States (rogue states and terrorists v. traditional state adversaries); the *threat* (clandestine WMD) and the *inadequacy of relying on collective action* through the Security Council (“While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively”).¹⁰

Changing actors who pose a threat. According to Bush, the two legitimate targets for preventive use of force are *rogue states* and *terrorists*: “We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends.”¹¹

According to the Administration, the reason why prevention is more necessary against terrorists is two-fold. First, they *cannot be deterred*: “Traditional concepts of deterrence will not work against a terrorist enemy whose avowed tactics are wanton destruction and the targeting of innocents; whose so-called soldiers seek martyrdom in death and whose most potent protection is statelessness.”¹² Second, because they act clandestinely, in small groups, and do not rely on traditional weaponry, attacks by terrorists are *not susceptible to visible warning indicators*—“Enemies in the past needed great armies and great industrial capabilities to endanger America. Now, shadowy networks of individuals can bring great chaos and suffering to our shores.”¹³

⁸ George W. Bush, “Remarks by the President at 2002 Graduation Exercise of the United States Military Academy,” West Point, NY Jun 1, 2002.

⁹ *The National Security Strategy of the United States of America* Cover Letter

¹⁰ *Ibid* 6.

¹¹ *Ibid* 14.

¹² *Ibid*

¹³ *Ibid* Cover Letter.

Similar concerns underpin why prevention is more appropriate against “rogue” states than traditional adversaries. First, the National Security Strategy avers that deterrence is less effective against rogue states asserting that “deterrence based only upon the threat of retaliation is less likely to work against leaders of rogue states more willing to take risks, gambling with the lives of their people, and the wealth of their nations.”¹⁴

Second, because rogue states are too weak to take on conventional American military capability, they, like terrorists, are more likely to rely on asymmetrical threats that are hard to detect: “Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.”¹⁵

Third is the danger that rogue states may clandestinely give weapons, especially WMD, to terrorists to avoid accountability for attacks on the United States. “Containment is not possible when unbalanced dictators with weapons of mass destruction can...secretly provide them to terrorist allies.”¹⁶

Fourth, the very fact of a rogue state possessing WMD poses a threat, even if the “use” of such weapons can be deterred: “For rogue states these weapons are tools of intimidation and military aggression against their neighbors. These weapons may also allow these states to attempt to blackmail the United States and our allies to prevent us from deterring or repelling the aggressive behavior of rogue states.”¹⁷

Growing risks of miscalculating the threat. The second core reason for revising the approach to the use of preventive force is the catastrophic cost of misjudging the imminence of the threat: “the greater the threat, the greater than risk of inaction—and the more compelling case for taking anticipatory action to defend ourselves, even if the uncertainty remains as to the time and place of the enemies’ attack.”¹⁸ In more colorful terms, then National Security Advisor Rice warned of the danger that the only “smoking gun” – warning of the act –could be “a mushroom cloud.”¹⁹ In effect, the Administration was arguing that whatever costs were associated with lowering the barrier to preventive force, they were outweighed by the dangers of waiting too long to act.

Inadequacy of collective security mechanisms. The third core reason was the failure of collective security mechanisms to provide sufficient assurance that they would act and therefore obviate the need for the U.S. or ad hoc coalitions, to respond in an effective and timely way. This unwillingness to rely on the Security Council was rooted in frustrations

¹⁴ Ibid 14.

¹⁵ Ibid 15

¹⁶ George W. Bush, “Remarks by the President at 2002 Graduation Exercise of the United States Military Academy,” West Point, NY Jun 1, 2002.

¹⁷ *The National Security Strategy of the United States of America* 15

¹⁸ Ibid

¹⁹ Wolf Blitzer, “Search for the ‘Smoking Gun’,” *CNN* Jan. 10, 2003.

<http://www.cnn.com/2003/US/01/10/wbr.smoking.gun/>

about UNSC action – or lack of it -- in the 1990s and a more general skepticism among Administration officials about the value of the UN itself.

3. How strong is the case for the preventive use of force?

In order to evaluate the administration's arguments, and to determine what role preventive force should play in U.S. strategy, it is necessary to disaggregate the various circumstances in which the use of preventive force might be called into play.

1. Counter-terrorism: killing or abducting terrorists and disrupting terrorists operations.

As noted above, the Clinton Administration engaged in the use of force against terrorists; instances of such action included the attacks on the Khost training camp in Afghanistan in 1998 and the forcible "rendition" of suspected terrorists to third countries. The Bush Administration has used similar tactics, such as in the case of the Predator strike against suspected terrorists in Yemen in 2002. Other examples of such a policy include the Israeli government's stated policy of using targeted assassination against suspected terrorists.

There are several reasons to consider seriously the use of preventive force against terrorists. First, at least in the case of terrorists who have resorted to suicide attacks, it is reasonable to judge that they are truly not deterrable. Second, it is difficult to apply a test of imminence, since the nature of their activities makes it difficult to assess imminence with regard to the time and place of attack. As the 9/11 attacks show, there are high potential costs of waiting too long and catastrophic results if terrorists act, even if they lack WMD. The alternatives are poor, since it is impossible to protect every potential target of attack or to interdict an attack once underway, and the collateral costs of the targeted use of force against individuals or small groups can be small. Thus preventive use of force in this context can meet most of the just war tests.

There are, however, a number of countervailing costs and risks. Given the limitations of intelligence, the factual predicate that establishes an individual or group as a legitimate target is inevitably uncertain, risking the killing of innocent individuals. The fact that these determinations are not made in a systematic way with "due process" safeguards risks undermining the rule of law in favor of arbitrary judgments of who is "guilty." The use of force in this context risks legitimizing the extrajudicial use of force by any state who asserts that the actions of third parties represent a threat to their security, such as those who oppose the Iranian regime. Similarly, this extrajudicial use of force undermines America's claim to be the avatar of the rule of law. There are also political and diplomatic costs associated with using force in a country that is not in a state of war with the United States.

Considering the arguments for and against together suggests that the preventive use of force against terrorists is a necessary tool, but should not be used indiscriminately, and strong internal controls should be adopted to assure to the greatest extent possible a strong factual predicate.

2. Eliminating dangerous capability especially WMD (counter-proliferation)::

In recent years there have been a number of examples of the preventive use (or threatened use) of force to deprive a potential adversary of the capability to attack. The classic example of course is the Israeli attack on Iraq's Osirak nuclear reactor; as noted above, the 1994 threat against Yongbyon in North Korea and the attacks against Al Shifa and Iraq's WMD capacities in 1998 fit into this category.

There are a number of plausible arguments in favor of such preventive actions. Most compelling is the fact that in some cases, the mere fact of possession of a dangerous capability may be judged unacceptable (either because it frees a state to act more dangerously believing that the possession of WMD insulates it against attack, or because its possession might lead others to seek similar capabilities, leading to destabilizing proliferation). In this case, intention is irrelevant, so the traditional tests are inapt. Second, the threat of preventive strikes may help to deter the potential acquirer from pursuing the dangerous capability, or lead them to the negotiating table, as with the North Koreans in 1994. Third, some elements of dangerous intent may be hard to detect, such as, for example, the transfer of WMD from a state to terrorist organizations -- so in the case of states with ties to terrorists, the possession may be the closest one can get to a warning. Similar considerations were adduced in support of the use of force against the Soviet missile deployment in Cuba (the short flight time and lack of anti-missile capability meant that at the point that the threat became truly imminent, it might have been too late to respond). Targeted attacks on facilities might have limited collateral damage (or not, as discussed below) and are clearly proportional, in the sense that they are limited to ending the dangerous capability, not inflicting broader harm.

There are, however, important reasons for caution. Destruction may not be the only way to get rid of dangerous capabilities; over the past decades, a number of states have given up WMD capabilities voluntarily -- South Africa, Ukraine, Belarus, Kazakhstan and nascent nuclear programs in Argentina and Brazil. The use or threat of force against WMD capabilities could have the unintended consequence of speeding up the efforts of others to acquire them to gain a measure of protection against attack, or lead them to conceal dangerous facilities. These attacks could be of limited effectiveness if facilities are hidden or dispersed or if the country has the ability to rapidly reconstitute. The use of force under these circumstances could provoke retaliation which could worsen security. Attacking facilities in a rogue regime could have the unintended consequences of rallying support for a government, which might otherwise be unpopular with its own citizens, strengthening its hold on power. There are problems of consistency, since in some cases the acquisition of WMD has not triggered the preventive use of force (India and Pakistan), and as the Iraq case so vividly illustrates (but also the North Korean suspected facility at Kumchang-ri in 1998-99), there is the danger that the attack will be based on faulty intelligence, with all of the adverse consequences that has been shown to bring. Finally, of course, is the question of the reliability of intelligence, as the Al Shifa

example demonstrates, and the potential costs associated of a “mistaken” use of preventive force in these circumstances.²⁰

Thus, like the use of preventive force against terrorists, preventive force has a role to play in dealing with the acquisition of dangerous capabilities, especially WMD, but the wisdom of its use is highly fact dependent and requires a very careful balancing of the real benefits to be achieved against likely costs.

3. Interventions in the case of state failure

A third category, not directly discussed by the Bush National Security Strategy is the preventive use of force in the case of state failure, where the intervention is designed to remove a potential threat that the state in question cannot or will not handle.

Humanitarian intervention (“the duty to protect”) is the most well examined example. Hostage rescue cases fall into this category.²¹ But it is possible to imagine other cases where the internal policies of countries pose other kinds of threats, such as the failure to handle an infectious disease outbreak, where there could be pressure to consider a forceful intervention to protect other countries from the disease’s spread.²²

The arguments for these kinds of interventions are typically moral, although in the case of genocide there is a legal basis. The example of Rwanda shows why early intervention may be critical, but it also illustrates the primary difficulty associated with the use of force under these circumstances—the difficulty of judging that the state will fail to live up to its obligations until the feared harm is already underway. There is a highly elastic class of cases where prevention might be desirable but few rules to judge when it is necessary. An overbroad approach not only has political ramifications for an international system that is still heavily based on state sovereignty, but practical considerations as well – such as the potentially enormous drain on international resources to intervene in a large category of failed states, and the uncertainty of success (just consider the United States’ nineteen year presence in Haiti in the early 20th century).

4. The preventive use of force to effect regime change.

A fourth category of the use of force involves the overthrow of a regime in the absence of evidence that the regime intends imminently to attack. The most obvious example is the overthrow of the Taliban in Afghanistan and the intervention in Iraq. The predicate is that the regime is simply too dangerous to be allowed to continue in power. There is a humanitarian analog possible as well – that the regime’s human rights violations, or its inability to protect its own people, justify its replacement by force.

²⁰ This is not to say that Al Shifa was a “mistake,” looked at either from the perspective of the facts known at the time and the costs/benefits of acting under uncertainty, or even in retrospect.

²¹ It is noteworthy that in the case of the Israeli raid at Entebbe in 1976, the Security Council declined to support Uganda’s request for a resolution condemning the raid.

²² I am indebted to Stephen Stedman for this idea.

As the Afghanistan case demonstrates, it is possible to conceive circumstances where there appears to be no other way to eliminate a threat (virtually every other tool had been exhausted vis a vis the Taliban). In the case of Iraq, the argument might be that the failure of Iraq to meet its obligations pursuant to the 1991 ceasefire and accompanying UNSC resolutions, justified recourse to war.

There are obviously strong arguments against the use of preventive force to effect regime change. First, with respect to most threats emanating from states, including so called “rogues” there is reason to believe that deterrence or containment can be effective, notwithstanding the assertions of the Bush Administration; most rogue leaders relish their hold on power. Second, it is difficult to establish the factual predicate of which rogue regimes are too dangerous to be allowed to continue; at various times the rogue list has included Cuba, yet few seriously contemplate (at least since the Bay of Pigs) forceful regime change. The use of force to change governments could undermine the broad prohibition against aggression. Perhaps most tellingly, the high costs of military intervention in blood and treasure, and the uncertain outcome makes it difficult to make a convincing judgment that the attacker will be better off after a regime change. Even in the case of WMD possession, there is no guarantee that the successor regime will not pursue WMD capabilities, and in any event, as Iraq shows, the fallout both within the attacked country and the region can be substantial. Moreover, the use of force to change a regime without Security Council approval can come at a high cost to the attacker’s prestige and thus “soft power,” so the long-term cost/benefit calculation could be quite negative even if the operation is reasonably successful in narrow terms.

Thus the preventive use of force to effect regime change is highly problematic and should be reserved for cases of grave risk where all other measures have clearly been exhausted. In the rare cases that meet this test, such as Afghanistan, it would seem possible to secure Security Council approval and, at a minimum, broad international endorsement to provide legitimacy for the action

4. Toward a New Consensus on the Preventive Use of Force

The preceding discussion shows that some threats do require a rethinking of criteria for the preventive use of force. The question then is how to expand permissible use but minimize risks.

There have been several efforts to achieve a new synthesis, which focus on both substantive and procedural criteria to justify the preventive use of force.

The Report of the High Level Panel on Threats, Challenges and Change, appointed by the UN Secretary General, was one such effort to address this problem. It acknowledges that new types of threats had emerged since the adoption of the Charter that need the attention of the international community, and where the use of preventive force both in the security and humanitarian context would justify the preventive use of force. It urged the Security Council to acknowledge the need to address such threats and develop a set of criteria to be applied by the Council in judging whether the preventive use of force was warranted.

It suggested that the Security Council was the appropriate authority to authorize such use of force, and argued that if the Security Council failed to act, the fact that the threat was by definition not imminent would give concerned states an opportunity to pursue other, non-forceful means. It left open the possibility that if these subsequent efforts failed a state or states must legitimately resort to force even if the Security Council continued to refuse to act.²³

By endorsing the idea that prevention might be appropriate in some cases (including pursuant to the duty to protect, and in threats involving terrorism and WMD) with appropriate institutional endorsement, the Panel certainly sought to expand the substantive grounds for the use of force, in ways that have not been widely accepted by the UN members. Although the Council in principle has been free to act without a finding of “imminent” threat under Chapter VII, the goal of the Panel appears to have been to increase the chance that the Council would in fact do so under such circumstances, therefore reducing the felt need of nations to act without Security Council approval.

Although expanding the scope of Council action in response to threats is certainly a valuable step, there are reasons to believe that this will not obviate the need for preventive action outside the Council. This is due in large part to the inherent asymmetries between the costs and benefits experienced by different countries in the face of these threats. The United States, with global responsibilities and interests, is likely to (and in fact, does) perceive a greater threat to its environment than many other countries, and may feel the need to take action even in circumstances where there is no direct danger to the United States. In addition, some of the policies of the current Administration have exacerbated the sense that the United States is the preferred target or adversary both for terrorists and states who feel threatened by the United States’ more proactive policies (as evidenced by the intervention in Iraq).

In these cases, the benefits to the United States (or conversely, the risks of inaction) may appear to outweigh the costs associated with preventive action identified above. But for states that do not feel so directly threatened, the systemic destabilizing effects of a more expansive use of preventive force may seem to outweigh the speculative and indirect dangers posed by non-imminent threats.²⁴ This resistance to endorse a broader view is buttressed by a widespread sense that the United States needs to be “reined in” from its more activist policies. At least three permanent members of the Security Council (France, Russia, and China) share this view to varying degrees. In these circumstances, Security Council approval is unlikely to be forthcoming despite a strong sense by the United States of danger and lack of alternatives. And for some states, the danger of accepting the precedent may appear to pose a direct danger, as for example, in China’s

²³ *A More Secure World: Our Shared Responsibility* (New York: United Nations, 2004).

²⁴ A few analysts argue that because terrorism and WMD potential threaten almost all members of the international system, Security Council action will become more likely in the face of these threats. They point to the fact that all the permanent members in principle a partners in the “war on terrorism” and as nuclear states under the NPT, have a shared interest in limiting the spread of nuclear weapons. But this theoretical convergence is belied by the countries’ behavior in the Security Council, at least to this point. Iran and North Korea represent potentially important tests of this proposition.

concern that doctrines of humanitarian intervention could provide a predicate for acting against China itself.

As an alternative to Security Council approval, some have advocated an approach that would accept the legitimacy of preventive interventions approved by regional or other multilateral organizations. This approach has the virtue of avoiding the potential arbitrariness and other dangers of unilateral (or ad hoc coalition) action discussed above, while avoiding likely stalemates in the Council. The model for this kind of action is Kosovo, although strictly speaking, Kosovo was not a preventive action, since the danger that NATO sought to address was already well underway when NATO began to use force.

Regional organizations are a particularly appealing venue for decision-making on the use of preventive force, since there is likely to be a great convergence of who bears the costs and who reaps the benefits of action. When all of the countries in the region reach a similar conclusion as to the necessity and efficacy of a preventive action, there is a greater chance that there is a valid factual predicate for acting (a combination of intelligence and prediction). Of course, there is a danger that the regional organization is little more than a pawn of a dominant member (one need only think of the decision of the Association of Eastern Caribbean States in endorsing the 1982 US intervention in Grenada, the role of Russia in the CIS, or to a lesser extent, the role of Nigeria in ECOWAS). And regional organizations may also suffer from the same problem of asymmetry as the UNSC (consider the problem facing the OSCE in Kosovo). In some cases, the “problem” state may itself be a member of the organization (as in the case of the OSCE and Russia with respect to Chechnya), which has led some to argue in favor of “consensus minus one” to handle such circumstances. Finally, in some cases there may be no meaningful regional organization.

Some have advocated the use of “like-minded” groupings to legitimate decision-making on the preventive use of force. One example is reliance on the Community of Democracies.²⁵ There are two principal arguments in support of this approach. First is the idea that legitimation of the action stems from the greater legitimacy of each of the individual governments making the decisions. This would seem true to a point, but, as the debates over who “belongs” to the Community of Democracies indicate, there is no bright line between states which are democratically legitimate and those which are not. The second argument is prudential: because democracies are more accountable to their people, who bear the cost in blood and treasure of military action, they are therefore less likely to use force arbitrarily. This is to a considerable extent an empirical judgment. It would seem that recent US actions are inconsistent with this view, but the proposition can only be tested over the long term.

Both of these approaches ground the legitimacy of action in the procedural/institutional framework within which the decision is taken. An alternative or supplemental approach is to focus on the substantive criteria used to justify the use of preventive force. The High

²⁵ Ivo Daalder and James Lindsay, “An Alliance of Democracies: Our Way or the High Way,” *Financial Times* Nov. 6, 2004.

Level Panel took this approach by arguing that in reaching decisions, the Security Council should rely on six criteria, largely drawn from the literature on “just war”: seriousness of threat; proper purpose; last resort; proportional means and balance of consequences. Similar considerations arguably underlie the Bush Administration’s approach even in the context of unilateral action. Then National Security Advisor Condoleezza Rice laid out the Administration’s thinking in a speech just a few days after issuing the National Security Strategy:

“But this approach must be treated with great caution. The number of cases in which it might be justified will always be small. It does not give a green light -- to the United States or any other nation -- to act first without exhausting other means, including diplomacy. Preemptive action does not come at the beginning of a long chain of effort. The threat must be very grave. And the risks of waiting must far outweigh the risks of action.”²⁶

There is relatively broad agreement on the relevance of some version of these just war principles, but considerable skepticism as to the degree that they really represent limiting factors. Because each are highly fact dependent, and to a considerable degree subjective, there are likely to be many disputes about the applicability of these principles to a given case, even if the principles themselves are agreed.

Another approach, which focuses on the substantive grounds for preventive force, is the elaboration of agreed norms. Perhaps the best example is the case of genocide. Over the past decade, there has been growing international agreement that intervention is justified to prevent genocide (and perhaps other “grave abuses” of humanitarian law). In the WMD arena, it could be argued that repeated violations of the NPT might represent a similar, internationally agreed norm justifying action. The existence of twelve conventions against terrorism could also fall into these categories. In cases where there is a clear, widely agreed norm, the use of preventive force to enforce the norm would arguably have significant legitimacy, even in cases where the Security Council is unwilling or unable to act. Another version is what Judge Abe Sofaer has termed “charter-based” interventions, where the action is justified on the basis of substantive principles of the UN Charter, even where there is no formal action by the Security Council.²⁷ Of course, like the just war principles, a determination of just what constitutes the norm, and whether it has been violated is both fact dependent and subjective, but this approach at least provides a common framework for nations to discuss the appropriateness of the use of force in a given case. The clearer the norms, the more useful this approach will be.

²⁶ Condoleezza Rice, “A Balance of Power that Favors Freedom,” New York: Manhattan Institute, Oct. 1, 2002.

²⁷ Abraham D. Sofaer, On the Necessity of Pre-emption, *Eur J Int Law* 2003 14: 209-226; doi:10.1093/ejil/14.2.209 He doesn’t explicitly call them Charter-based interventions but argues for them.

There are two other considerations that need to be brought to bear on the policy choices. The first is the question of whether in any of the types of cases identified above, there should be a “declaratory” policy governing the preventive use of force, or whether it should be seen as a case-by-case “exception” to a general policy not to use force preventively. The key advantage of a declaratory policy is that it may help obviate the need to use force at all – in effect, the stated policy can act as a deterrent to a set of actions. The downsides are two-fold. First, it is difficult to articulate with any specificity when force would be used, given the highly fact-based nature of many of the examples. Second, the danger of under- or over-inclusiveness: if the definition is too broad, there is a risk either that the United States will be drawn into using force when other tools might be more appropriate, or if force is not used, that credibility is undermined. If too narrow, there is a danger that adversaries will inadvertently cross red lines that might have been avoided if the line was clearer.

An example of these difficulties can be seen in the on-going non-proliferation policy challenges of North Korea and Iran. It can be argued that the quasi-declaratory policy of Secretary Perry in 1994 caused North Korea to refrain from reprocessing the plutonium at Yongbyon, and the lack of declaratory policy by the Bush Administration led the North Koreans to feel that they could do so with little risk that force would be used. At the same time, the assertions that North Korea’s development of nuclear weapons is “unacceptable” poses problems of credibility in light of the failure to act decisively. Solving the problem by saying that “force is an option” helps obviate some of these difficulties, but lends little value either to those who have to implement the policy or the intended targets of the message. Nonetheless, the costs associated with the preventive use of force, coupled with the danger of undermined credibility, suggests that broad declaratory policies are undesirable, and “threats” should be tailored to specific situations rather than broad declarations of policy.

The second broad consideration is the choice between overt and covert means of preventive force. Because of the norms against using force preventively, and the possible adverse consequences, it will be tempting in many cases to resort to covert tools, particularly in the cases of terrorists and measures to eliminate dangerous capabilities. In some ways, this is the flip side of declaratory v. non-declaratory policy choice: covert means help minimize the precedential effect of the action compared with an acknowledged use of force, and may make it possible for the target to avoid being drawn into a series of escalatory responses that neither side desires. Nonetheless, there are many familiar drawbacks to covert action, beyond those associated with a covert action becoming disclosed. As with all covert actions, the restricted circle involved in the decision-making may exclude important information or full consideration of the issues; it may unduly lower the barrier out of a belief that adverse consequences can be avoided; and because it is likely to be unilateral, and certainly without institutional endorsement, it has the problems of legitimacy discussed above. For the most part though, the arguments for covert action against terrorists are the strongest.

5. Alternatives to the Preventive Use of Force.

In judging the legitimacy and appropriateness of the preventive use of force, it is important to consider the question “as opposed to what?” Although the earlier sections highlight the costs and risks of acting preventively, the calculation may still appear more favorable in light of the alternatives. It is useful here to return to the framework presented in Section 2, above

Terrorists: The alternatives to preventive use of force against (committed) terrorists, especially those prepared to resort to suicide tactics, are very limited. Almost by definition, deterrence has limited value (it could have some value vis a vis states that harbor or support them, though the case of the Taliban demonstrates that even this is not guaranteed). The “law enforcement” approach – relying on the threat of punishment – is particularly unattractive in the case of catastrophic terrorism, given the high cost of waiting until the terrorist strikes (or is about to strike), as well as the uncertainty about the likelihood and extent of punishment. Preventive detention is another option, but, as the experience in Guantanamo and Afghanistan shows, there are serious difficulties in holding potential terrorists indefinitely: even if procedural safeguards are put in place, the factual showing to establish “dangerousness” (as opposed to guilt for a specific act) is problematic and also risks creating a class of martyrs who inspire terrorist acts by others (either to free or avenge those detained). Of course, long-term counter-terrorism strategies need to address the recruitment and motivation of future terrorists, and here the non-forceful measures may prove less counter-productive than force, but they do little to address the urgent near-term danger.

Rogue Regimes: Here, there do appear to be viable alternatives, at least in some cases. There is reason to believe that deterrence continues to have value against most states, however “roguish.” This would seem to apply with particular force to deterrence against use of WMD. It most likely also applies to the willingness of “rogue” states to transfer WMD to terrorists: although such transfer might take place clandestinely, the risk that the transfer will be either detected as it takes place, or attributed after the fact, leading to the use of force against the transferrer, is likely to outweigh the benefits of the transfer, particularly since any regime that might be tempted to transfer would also worry about the WMD being used against it! This deterrent effect can be enhanced by improving the technology of attribution (the ability to trace the source of e.g. fissile material or pathogens) and by deemed attribution (i.e. announcing in advance that a particular state will be held responsible by acts of particular group of terrorists even in the absence of specific evidence of transfer) .

Deterrence may also work to some degree against states harboring terrorists. However, the example of the Taliban suggests that there are limits to this argument: It is difficult to know whether the Taliban simply misjudged U.S. intentions, capabilities and will, or if it was simply prepared to sacrifice the regime for the sake of “principle.” Similarly, the failure of the United States or others to take measures against Pakistan as a result of the actions of A.Q. Khan suggests that some states might conclude that they could escape

responsibility for “rogue actors” within their borders. And Iran and Syria continue to support Hizballah, with limited consequences and to date no use of force against them.

Deterrence against acquisition is more problematic. Given the track record to date (the international community’s acquiescence in the case of the Indian, Pakistani and now North Korean nuclear programs, compounded by the international backlash against the intervention in Iraq), it would be reasonable for a would-be acquirer to assume that there is little likelihood that force would be used to forestall or eliminate WMD capabilities. Moreover, the sanctions fatigue, and collateral humanitarian costs associated with sanctions in Iraq suggest that coercive measures short of force may not be very effective.

However, the successes in achieving denuclearization without force (most notably, South Africa, but also Ukraine, Belarus and Kazakhstan, as well as the proto-nuclear programs in Argentina and Brazil) suggest that at least over time, there is an alternative, namely, containment, in effect, waiting either for regime “change” (South Africa, Brazil, Argentina) or for circumstances to change the acquirer’s cost-benefit calculations. Waiting can be coupled with other measures that affect cost-benefit calculations, such as sanctions (the sanctions against South Africa were not imposed because of the nuclear program, but they were directed at the regime and therefore had a similar effect). Containment can also be buttressed by providing security guarantees to neighboring countries, thus lessening the blackmail effect and therefore the adverse costs of acquiescence. Here the credibility of the security guarantees will be crucial.

“Denial” strategies (preventing bad actors from acquiring dangerous capabilities) are also an important alternative. The case for this approach is particularly compelling in the nuclear context, where the need to acquire fissile material and the technology to produce it, are still a major barrier to nuclear capability. In the biological and chemical context, denial strategies are increasingly futile, as the know-how and materials have become so widespread that supplier regimes and control of material are not likely to be of much use, other than providing a normative framework for justifying the use of force (e.g. countries that are developing clandestine programs outside agreed frameworks, such as the Chemical Weapons Convention, might provide a predicate for the use of preventive force).

Denial includes supplier regimes (Wassenaar, Nuclear Suppliers, Australia Group, etc.) as well as interdiction (e.g the Proliferation Security Initiative). Arguably interdiction should be considered a preventive use of force, in the same way as the attack on Osirak or Desert Fox, though, to the extent that the use of force happens in transit, particularly international waters, the costs and risks associated may be less than if attacking within the “country of concern.” But even if the interdiction is during transit, there remain some risks, as the US interdiction of the Chinese ship Yin He, (mistakenly) suspected of carrying chemical weapon components to Iran, illustrates.

The final alternative is conditional engagement, used to good effect to bring an end to the Libyan nuclear program, and to a lesser extent, in connection with the Agreed Framework between the U.S. and North Korea, governing North Korea’s nuclear

program (where the plutonium program was effectively suspended, but North Korea appears to have proceeded with a clandestine uranium enrichment program). In the case of Libya, the key elements were a combination of pressure (sanctions) and incentives (normalization); some would argue that the Iraqi invasion also implicitly raised a threat of force as part of the mix. In the case of North Korea, the threat of force was more explicit in the mix, ranging from the warnings by Secretary Perry to the preliminary force deployments that gave credibility to the threat. The benefits of the approach are apparent; the costs include legitimization of bad regimes (in most cases, the regimes that seek to acquire WMD also oppress their own people, and are often involved with terrorists, international criminals and drug dealers) and providing incentives to bad behavior (both for the country in question, as in the case of North Korea, and for others who might seek to emulate the strategy).

Conclusion

It seems clear that despite the highly polarized debate around the issuance of the 2002 National Security Strategy, the underlying logic in support of accepting the carefully limited use of preventive force in appropriate contexts is not only compelling, but had already become entrenched in practice, if not in “black letter” international law. All of the policy tools available in international relations have costs as well as benefits, as the rich literature on economic sanctions shows. It is appropriate that the use of force under any circumstances should come only after a very careful consideration of all the alternatives, and in the case of preventive force, the arguments in favor of great caution are particularly strong. The threat or use of preventive force is neither a magic bullet nor an anathema; but the Administration is correct in asserting that some threats simply cannot be addressed by waiting until they become actual or “imminent” as traditionally understood. The stronger the institutional mechanisms, and the broader the political support for a given use of force, the more likely it will not only be seen as legitimate, but also that the adverse consequences can be limited. The unilateral use of preventive force therefore should truly be seen as an *in extremis* policy choice.