

**Report of the Task Force on Peace and Security
United Nations Association, National Capital Area
June 17, 2003**

The U.S. Doctrine of Preemptive Attack – Real Problem, Wrong Answer

Summary

This report of the Task Force on Peace and Security of the United Nations Association, National Capital Area, evaluates the Bush administration's doctrine of preemptive attack, sometimes referred to as the "Bush Doctrine."

Careful study has led to the recognition that, with this doctrine, the administration is trying to cope with a potentially very serious new threat to U.S. security -- possible terrorist or "rogue state" use of weapons of mass destruction against the U.S. -- but that the method which the administration has chosen to deal with this threat, "preemptive" attack, has major flaws that are likely to recur in future cases. The main defect is the administration's reliance in justifying its case for military action on a series of assumptions and conjectures, some of which may be baseless. Specifically, the policy is based on forecasts that certain adverse developments may take place in future; however, this may not be the case. Second, unavoidably, given the nature of the problem -- secret weapons development -- the policy is based mainly on intelligence that is difficult to collect and that may be incomplete or inaccurate. These built-in problems and the resulting chance for error can be mitigated only by pooling the information and judgment of several governments. In the case of Iraq, this "credibility gap" blocked the road to a majority vote in the Security Council, partially isolated the U.S. and UK in terms of international opinion, and caused deep divisions among America's allies. To avoid another future situation which could paralyze the entire non-proliferation regime, the U.S. should go back to the Security Council and try to achieve agreement among its permanent members to take decisive action in the early stages of proliferation. Given that there will always be some opening for terrorism despite improved defenses, the U.S. should also place increased emphasis on actions undermining motivation for proliferation and terrorism.

END SUMMARY

Extending the Right of Self-Defense to Cover Possible Future Actions of Hostile States or Groups

The administration's doctrine of preemptive attack has been used to justify the U.S.-UK attack on Iraq in March, 2003; but it has also been presented as a general strategy for possible U.S. actions in other times and places. The doctrine, described in the administration's report of September 2002 on "The National Security Strategy of the United States of America," is based on the concept that "weapons of mass destruction" (acronym: WMD -- nuclear, chemical or biological weapons) in the hands of "rogue states" or transferred to terrorist groups, are so threatening to the security of the United States and its allies that it is justifiable to use armed force to deal with this especially dangerous form of WMD proliferation. Moreover, as happened in Iraq, it is justifiable to launch an anticipatory military attack on the state believed to be producing these weapons; the attack can take place early on, even before the weapons are produced, used, or transferred to terrorist groups. The administration's policy is based on the right of self-defense anchored in customary international law and the UN Charter, but it extends this right to cover prevention of hostile actions which may take place in the future, sometimes the fairly remote future, in addition to actions that pose a visible, immediate threat to U.S. security.

"Preventive Attack" is the Better Definition

The administration designates this policy as "preemptive," a word that normally refers to actions designed to head off a pending or imminent attack that has already taken definite form. We share the view of several commentators who suggest that the right term for this policy should not be preemptive but "preventive" action.¹

These commentators have pointed out that the attack the administration wishes to head off could be based on weapons which may not yet be ready for use and also on a decision to use them for attack on the U.S. which may not have been taken or contemplated by the suspect state. In short, U.S. action would prevent a possible future attack, not preempt an imminent attack already being prepared. President Bush made a similar point in his ultimatum speech to Saddam Hussein on March 17, 2003. The president said, "We are acting now because the risks of inaction would be far greater. In one year or five years, the power of Iraq to inflict harm on all free nations would be multiplied many times over."

The administration argues that weapons of mass destruction are so dire and so rapid in their effects that no government could afford to await their actual use. The administration also argues that rogue state governments and terrorists are so motivated by hatred for the U.S. and its allies and so willing to sacrifice their own lives in an attack that they cannot be deterred by the threat of retaliatory action. WMD in such hands therefore pose an enormous threat to U.S. security. Consequently, the administration concludes, anticipatory military action to preclude attacks like this is required in self-defense.

¹ Robert Litwak, "The New Calculus of Preemption," *Survival*, Winter 2002-03; Joseph Nye, "Before War," *Washington Post*, March 3, 2003. The word "preventive" in this context refers to the administration's motives, not to the success of the preventive action itself.

These factors are weighty and they must be taken seriously. The question is whether they are so weighty that they justify armed attacks that without them could be called acts of aggression, as some governments have characterized the U.S.-UK attack on Iraq.

How Big a Threat is the “Axis of Evil”?

Weapons of mass destruction are not new. What is new is the theory that terrorists might gain possession of them and use them in the United States or against U.S. allies. Even though al Qaeda did not use weapons of mass destruction in its September 2001 attacks on the Trade Centers and the Pentagon, the nature and method of these attacks made the possibility of WMD attack on the U.S. credible.

The WMD threat is real. But the dimensions of the threat must also be seen in perspective. There has never been an attack on U.S. territory by an international terrorist group using weapons of mass destruction. Moreover, although attack on the U.S. with biological or nuclear weapons could bring staggering loss of human life (less so with chemical weapons), the threat the U.S. now faces is not the possibility of fatalities and destruction on the scale of a nuclear exchange of Cold War dimensions. Such an attack could have brought the obliteration of most of the U.S. population, or even of the human species. In the present case, most of the structure of U.S. government and armed forces would survive the attack and could seek to cope with its effects and with the attacker. Consequently, the potential rogue state-terrorist-WMD threat should not be treated as an ultimate one involving the life or death of the entire nation.

Of the countries composing the “axis of evil” before the U.S.-UK attack on Iraq – Iraq, Iran, North Korea -- none now has or had delivery systems that could strike the continental United States directly, although North Korea is working on a long-range ballistic missile. Further, contrary to claims that they are “undeterrable,” historical evidence indicates that all three governments have on one occasion or another been deterred by fear of retaliation from directly attacking their regional enemies – Iraq and Iran from attacking Israel and North Korea from attacking South Korea.² Moreover, in the face of threats of dire consequences from the Bush administration before the March 2003 U.S.-UK attack on Iraq, the Iraqi government and its subordinate officers were deterred from using WMD in that conflict.

As regards rogue state links with terrorists, although the rogue state governments of Iraq and North Korea have in the past developed weapons of mass destruction or are engaged in doing so, it is highly improbable that these regimes would transfer these highly valued weapons to terrorist groups operating beyond their control. North Korea has carried out terrorist acts against South Korea, but has used its own trusted intelligence personnel to do so. The secular, socialist Baath Party of Iraq and Osama bin Laden were deadly enemies; Saddam Hussein was the prototype of Arab political leaders whom Osama believed should be executed for leading the Arab people astray. Moreover, up to now, al Qaeda is the only terrorist group with genuinely global reach. It has been severely damaged by U.S. strikes in Afghanistan and by police action and financial controls throughout the world. Other terrorist groups are regional in scope, although some, like Hezbollah, have carried out serious operations against U.S. servicemen. It is questionable that at

² An article by John Mearsheimer and Stephen Walt, “An Unnecessary War,” *Foreign Policy*, January/February 2003 describes how Iraq has been deterred over the years.)

this stage al Qaeda could develop weapons of mass destruction from the ground up, although it may gain such knowledge in future years.

The “Credibility Gap”

These assessments, widely shared throughout the world, create a large credibility gap as to whether the seriousness of the threat from Iraq or other rogue states does justify preventive armed attack on a foreign country.

In addition to the unconvincing character of these specific claims about Iraq and other rogue states, the preventive attack concept suffers from a generic credibility gap – in actuality, two of them. First, the basic administration case rests on estimates that another government hostile to the U.S. may have developed, is developing, or may develop weapons of mass destruction, and on the theory that this government may in the future decide to use these weapons against the U.S. or that it may decide to give them to terrorists for use against the United States. These are all hypothetical future developments that may or may not take place: The hostile government may not succeed in developing or obtaining weapons of mass destruction; it may be deterred by fear that the U.S. will retaliate; it may have other priorities and may not decide to attack the U.S. even if it has possession of WMD. It may or may not decide to transfer these weapons to terrorist groups.

Prevention policy has a second built-in credibility problem which intensifies its uncertainties. Of necessity, the policy is based on information about clandestine developments that is usually held in extreme secrecy by the suspected government or group. The resulting intelligence evaluations may well be inaccurate, as, for example, was the U.S.-UK claim that Iraq had tried to obtain uranium ore from Niger. Comments following the U.S.-UK military action in Iraq have raised questions as to the quality and motives of the human sources whose information was cited by the U.S. or UK, as well as about pressures applied to U.S. and UK intelligence analysts to come up with conclusions supporting the U.S.-UK case against Iraq.

The net result of all these uncertainties is a credibility gap that is extremely difficult to overcome. In early 2003, even with best efforts on their part to convince others, U.S. and UK claims about the dangers from Iraq were not fully credible to other Security Council members except for Spain and Bulgaria.

Secretary General Annan summed up the problems of preventive policy in a press conference on January 14, 2003. The Secretary-General distinguished between preemptive military action, where the threatened country sees a force arrayed against it with a visible threat, ready to attack - - and war of prevention, “where the threat is not imminent and the evidence is not obvious. It becomes a very murky area to deal with -- of course, the evidence is usually only with the one who is making the strike. Often, others may claim that it is not verifiable or that the evidence is not convincing.”³

These uncertainties have been intensified in the case of Iraq by post-conflict failure to discover stockpiles of prohibited WMD. But even if discovery occurs, it may be difficult to

³ Press Release SG/SM/8581, <http://www.un.org/News/Press/docs/2003/SGSM8581.doc.htm>

prove that continued inspections could not have revealed the same evidence or that the anticipatory use of force was necessary to prevent their use. Moreover, resolution of uncertainties in the case of Iraq would not eliminate the credibility gap in other cases, for example, that of Iran, with the same outcome of acute international disagreement.

The Case of North Korea: Exception to Prevention Doctrine

North Korea has been included by the administration in the Axis of Evil. However, the administration has not as yet applied the prevention doctrine to North Korea, despite the fact that North Korea has insisted that it is guilty of proliferation. Instead, the administration handled North Korea completely differently from Iraq, starting with North Korea's admission in October, 2002 to U.S. Assistant Secretary Kelly that it was moving to produce enriched uranium for weapons. Instead of arguing for preventive attack as it did in Iraq, the administration insisted that the North Korean issue be handled by negotiation, in fact, by multilateral negotiation, and, preferably, by the Security Council. The administration's emphasis on negotiation is explained by the hair-trigger exposure of Seoul to North Korean attack. The administration's emphasis on a multilateral approach and resort to the Security Council is explained in turn by the administration's belief that the United States should not have entered the 1994 agreement with North Korea alone, without the participation of North Korea's neighbors – China, Japan, Russia and South Korea, which now should share responsibility in the current crisis with North Korea. The administration may wish at a later stage to resort to use of armed force against North Korea, but until that point arrives, if it does, the U.S. emphasis will be on multilateral action – in practice, the opposite course from unilateral preventive action.

Implementing the Preventive Attack Policy Requires Difficult Judgments

Leaving aside the case of North Korea, given the multiple uncertainties involved in the prevention doctrine, implementing the doctrine in proliferation emergencies requires a very difficult exercise of judgment with serious consequences for error. Although the proliferation threat may lie in the future, and may never take the form of actual attack, armed attack by U.S. forces on a foreign state takes place in the present and has irrevocable consequences in deaths and destruction. Moreover, when the country exercising this judgment is the world's most powerful state with a reputation for favoring unilateral action and reaches its conclusion largely on its own without formal or informal constraint from the community of nations, an adverse reaction occurs, both inside and especially outside this country.

These immediate negative consequences of applying prevention policy have to be balanced against the possibility that the government of a rogue state will succeed in developing WMD, will obtain adequate delivery systems, and will decide to use them against the U.S. or will succeed in linking with a dependable, effective terrorist group capable of delivering the weapons -- and also that no alternative means of deflecting this attack can be found in the interim. The deadly balance in preventive attack is therefore between the nearly certain deaths of many U.S. servicemen and foreigners, probably mainly civilians, if the U.S. attacks a rogue state or group, and the possible death of many Americans, mainly civilians, if there is no preventive action and a terrorist-WMD attack takes place.

Even if preventive attack does not take place again, the announcement of the doctrine and its use in Iraq have already had the negative consequence of creating a precedent justifying

unilateral attack by other governments. The governments of Russia, India and Australia have indicated that they wish to adopt a prevention policy. Both the announcement of the prevention policy and its application to Iraq may have caused would-be proliferators to intensify their efforts to develop WMD capabilities to defend against possible future U.S. pressures against them. This seems already to have taken place in North Korea and Iran. (See Annex for details.)

Conclusions and Recommendations

Our first conclusion is that blocking proliferation of weapons of mass destruction and their possible use is so essential to world peace that it does justify the use of armed force as a last resort in extreme situations. Second, however, a decision to undertake preventive military action designed to preclude negative WMD developments that may or may not take place in future is unavoidably based on so many uncertainties and imponderables that the decision should not rest on the judgment of one or two governments, no matter how powerful, but should rest on the judgment of several governments whose combined assessments can reduce the chance of error.

The obvious organ for reaching this judgment is the UN Security Council. If the Council cannot achieve this agreed judgment in a given case, then the circumstances must be further examined by the Council until clarity is reached. This is the process that the U.S. and the UK broke off through their military action against Iraq. It should have been continued, if necessary through introduction of a large United Nations peacekeeping force to complete the inspection process throughout Iraq to the full satisfaction of all members of the Security Council.⁴

We have four further suggestions:

- 1) Authorization of the use of armed force against WMD proliferators by the U.S. Congress or the United Nations Security Council should also be dependent on meeting certain previously agreed criteria for evaluating the behavior of a suspect state and for establishing the quality of information that has caused the activities of this state to come under suspicion;
- 2) The political, economic and human costs of near-unilateral U.S. action in Iraq will make it very difficult for the U.S. to launch similar interventions in the future. At the same time, U.S. criticisms and attacks on the UN, on the Security Council, and on the inspection process have severely weakened the multilateral non-proliferation regime. As the U.S. has already shown in its approach to the North Korean problem, if the U.S. nevertheless wishes to pursue an active non-proliferation policy, it will have to place renewed emphasis on Security Council agreement and on the classic fundamentals of non-proliferation, such as enhanced IAEA effectiveness and prohibiting the production of fissile material.
- 3) Human Rights Intervention – With confusing, random frequency, the U.S. shifted its rationale for attacking Iraq from (a) preventing WMD attack on the U.S. by Iraq; to (b) ending Saddam Hussein's brutal repression of the Iraqi people; to (c) democratizing the whole Near East by establishing democracy in Iraq. The post-conflict period will be an

⁴ Action in self defense if an attack actually occurs is justified by Article 51 of the UN Charter, and preemptive attack by a government acting in its own self-defense is also still legal and acceptable under customary international law, but the threat has to be clear and immediate and not lie in a future possibility.

appropriate one for tackling the issue of humanitarian intervention. What is needed is agreement in the Security Council on types of situations which justify at least preventive action by the Council.

- 4) A strong case can be made that not even the best defensive net will be able to block all terrorist attacks. Therefore, we need a long-term campaign against proliferation and terrorism which focuses on eroding and changing the motivation for both actions -- an educational campaign aimed at undermining the premises of terrorist ideology and a second campaign of education and publicity aimed at strengthening norms against use of WMD and encouraging individuals to report WMD activity.

END REPORT

Annex to Report of the Task Force on Peace and Security, UNA/NCA, on the U.S. Doctrine of Preemptive Attack

This annex contains discussion of the proposed alternatives in more detail and a discussion of the background and difficulties of preemption doctrine.

A. The Alternatives in More Detail

1. Seek previously, multilaterally agreed criteria as requirements for Congressional or Security Council authorization of the use of force.

In a useful op-ed article,⁵ former Secretary of State Henry Kissinger argues that the Bush administration is right, that the combination of WMD and terrorism does change the nature of the threat to the U.S. and its allies and justifies preemptive action. But, Dr. Kissinger points out with considerable foresight, attempts by the world's most powerful country, the United States, to promote its own unilateral definitions of preemption won't work. "Our allies will not acquiesce in leaving the definition of preemption to an ally, however close and powerful – the solution to this dispute is to seek to develop together some principles of preemption." In other words, Dr. Kissinger is urging the administration to seek multilateral agreement on preemption policy, at least between the United States and its closest allies.

Our report suggests reviewing and updating international law to provide for multilateral rules for preemption or prevention, starting perhaps with an updated, multilaterally agreed definition of the concept of "immediate" as applied to preemptive action. Even if we do not agree with administration views on preventive action, it must be said that the speed and scope of possible sudden attack has changed radically since the doctrine of preemptive action was developed in 1837 with the case of the *Caroline*, a Canadian brig destroyed by American military personnel with the aim of preventing its use in an attack against the United States. This fact seems to justify efforts to update the concept of "imminent" in current international law.

Prevention, Not Preemption

Robert Litwak of the Wilson Center makes a similar proposal in an excellent article in *Survival*.⁶ As we have done in this report, Litwak makes a clear distinction between preemption of imminent attack and prevention of possible future attack. He says that what is really needed is a new agreement among permanent members of the Security Council about the collective use of armed force, but he argues that it is premature to seek an agreement like this from Russia and China now. (The Task Force believes, to the contrary, that it is desirable to try for such an agreement now – see below.) Litwak suggests that, instead, the U.S. should seek a new multilateral agreement on the idea of "imminent," in imminent attack. He suggests that an agreed definition of "imminent" would have to be based on agreed criteria, including, for example: accurate knowledge of the hostile character of the suspect regime; the regime's use of WMD in the past; and whether the suspect regime is in current violation of Security Council resolutions. However, Dr. Litwak's criteria, which of course all apply to the case of Iraq, make clear that his

⁵ "A Dangerous Divergence," *Washington Post*, December 10, 2002, p. A29.

⁶ Litwak, op. cit.

definition of imminent attacks really refers to possible future attacks and thus to preventive action as we have defined the phrase earlier in this report, rather than to preemptive action.

In an op-ed article, Joseph Nye of the Kennedy School of Government at Harvard⁷ says that President Bush's national security strategy makes a "plausible general argument for preventive war." Nye suggests that the requirement for moving from traditional views of preemptive attack under imminent threat to prevention is "some form of collective legitimation, preferably under Chapter VII of the UN Charter, . . . Multilateral preventive war may be justified when unilateral preventive war is not. *Otherwise, the awful lessons of the first half of the 20th century would be lost and any state could set itself up as judge, jury and executioner*" (emphasis added).

Professor Nye's criticism is a more pointed version of Dr. Kissinger's comment. It captures the essence of criticisms of unilateral action raised against the U.S. by foreign governments in connection with the Iraq issue. Dr. Nye also suggests that a careful checklist of multilaterally agreed criteria is needed to limit the number of future cases. Iraq, he says, meets these criteria.

Pulling together the criteria proposed by both authors, they would include: (1) well documented evidence of the possession of WMD; (2) evidence of the hostile nature of the suspect regime; (3) regime use of WMD in the past; (4) failure by the regime to implement Security Council resolutions; (5) a history of aggression; (6) state sponsorship of terrorism; and (7) absence of a pluralistic political system with constraints on the government. We would add: (8) refusal to accept multilaterally approved verification systems like the IAEA Additional Safeguards Protocol; (9) refusal to accept additional inspections or to destroy WMD stockpiles once identified; (10) threats to use WMD, or preparation for launch of delivery systems for WMD.

Nearly all of these criteria were in fact invoked by the Bush administration in making its case against Iraq prior to taking military action. However, the failure of the majority of the Security Council to accept the U.S. case against Iraq indicates that it probably will not be feasible to reach advance agreement among permanent members of the Security Council which would provide for automatic action in some new proliferation crisis when agreed criteria are met. The uncertainties of information, timing, and motivation involved in cases of prevention, together with strong support by most Security Council members and UN members for national sovereignty, protected by Article 2 of the UN Charter, make such advance agreements unlikely. Nevertheless, it would be desirable in future to hold repeated discussions among Security Council members of possible criteria for preventive action – not with the aim of seeking actual agreement on a specific set of criteria or formula, but to familiarize Council members with concepts for discussion of future cases.

For firm agreement in the Security Council to act decisively against proliferation, a general political understanding between the United States, China, Russia, France and the UK would be essential. This possibility is discussed in the next alternative.

⁷ "Before War," *Washington Post*, March 14, 2003.

2. Tackle the Fundamentals: Bring the Non-Proliferation Regime to Preventive Effectiveness

The whole Iraq affair, what is going on today in Iran, the direct challenge to the Non-Proliferation Treaty from North Korea, and what has happened in recent years in India, Pakistan and Israel on nuclear weapons, all lead to the unavoidable conclusion that the non-proliferation regime, the ensemble of treaties against WMD, together with implementing organizations and measures, is on the verge of collapse.

The United States was right to insist on decisive action in Iraq. The non-proliferation regime cannot be allowed to bleed to death. But the final military remedy implemented by the United States and the UK was not only without legitimation by the Security Council, it was too costly in lives, money, and political damage to be repeated as a remedy for other proliferation emergencies. As a result, now that the military action in Iraq is over, the U.S. may be stalled in position as regards action against proliferation. At the same time, the multilateral non-proliferation regime has been crippled by the dispute over Iraq, including U.S. attacks on the UN and on the inspection process. Consequently, after the fighting ended in Iraq, it is possible that international action against proliferation may also have reached a dead end.

However, the Bush administration is deeply concerned over the possibility of WMD proliferation and WMD attack on the United States. Dedicated to maintaining U.S. military superiority, the administration also realizes that even small nuclear-armed states can undermine that superiority. Therefore, once the U.S. and other UN member states have taken stock of the declining situation of the non-proliferation regime and have seen how dangerous it is for everyone, they should conclude that they must seriously tackle the problem of proliferation of nuclear and biological weapons in the Security Council, which is the final instance for implementation of the international treaties prohibiting WMD.

This process has to start with realization by the United States that it cannot do the job alone. The United States must overcome its reluctance to deal with the UN and to engage in fundamental political dialogue with China, Russia and France in order to win these permanent members of the Security Council to cooperation against all aspects of proliferation. It will have to do this in any event if it hopes for Security Council endorsement of future action against North Korea. If the administration believes the UN, and especially the Security Council, must be reformed in order to do the job effectively, then it has to make specific proposals to this end and form a coalition to back these proposals and put them through. But the Council mechanism can work as it now stands. For their part, the other permanent members of the Security Council and elected Council members must come to realize that proliferation of nuclear and biological weapons is a potentially catastrophic danger facing us all and that they must learn to work together to deal with it systematically.

The result should be unwavering emphasis by a unified Security Council on genuinely preventive steps. This approach is far preferable to enforced compliance after the damage of proliferation is done. These preventive steps should include universal application of the IAEA's additional safeguards protocol to all NPT states, perhaps by means of a Security Council resolution justified by the danger of proliferation. It should include establishment of a permanent corps of UN weapon inspectors with obligatory access to inspected states when decided by the Security Council, with a mandate to stay in-country as long as necessary. It should include an Executive Council of member states of the NPT, possibly also of the Biological and Chemical

Weapons conventions, to monitor implementation of these treaties and respond to non-compliance, working with the Security Council, the UN Inspection Corps, and the International Atomic Energy Agency. The Executive Council will keep other countries engaged in the non-proliferation task over the long term.

The preventive steps should include rapid agreement on a treaty to end the production of fissile material for weapons and, in order to secure China's acceptance of this necessary agreement, agreement on a five-year moratorium on weaponization of space while the spacefaring states cooperate to see whether they can develop effective verification. The steps should include verified limits on the nuclear arsenals of the six states with nuclear weapons that do not now have any limits – China, UK, France, India, Pakistan, and Israel, obligatory reporting of nuclear arsenals to the UN Arms Register by these governments as well as the governments of the U.S. and Russia, and decisive movement toward the elimination of their arsenals by all of the states with nuclear weapons.

The steps should include Chinese, Russian, American, Japanese, and South Korean cooperation in making North Korea a disarmed but also a viable state – none of these countries wants the collapse of North Korea now, although a faction in the U.S. administration is pressing for regime change. And the steps include dealing with Iran's security needs in a way which will make nuclear weapons appear unnecessary for the Iranian leadership. This might be done in part through a regional security agreement for the Persian Gulf.

3. Human Rights Intervention

Slowly, the concept of supporting and protecting human rights has gained ground over the past century. The Westfalian concept of protecting national sovereignty has faded in the same period, although it has definitely not disappeared. The Bush administration and its UK ally claimed liberation of the Iraqi people from Saddam Hussein's repression as one motive for their attack on Iraq in March, 2003.

Here, the problem is similar to that of preventive military intervention to deflect possible use of WMD. There is no standing legal basis for such human rights intervention, although the Security Council found the chaotic situation in Haiti and Somalia was a threat to international peace and security under Article VII of the Charter and authorized military intervention in both countries. The problem with a human rights motivation for the U.S.-UK attack on Iraq is the same as with the WMD motivation for their attack: It cannot be left to a single government or one or two governments to decide that another country's human rights practices are so intolerable that they justify armed intervention.

The solution of the problem is also the same as with possible WMD threats -- resort to the Security Council on the basis of previously discussed standards. To avoid the controversies that accompanied NATO intervention in Kosovo, the Security Council should move step by step toward the establishment of agreed standards for outside intervention inside countries under the auspices of the UN or a regional security organization in order to prevent genocide, crimes against humanity, and other gross violations of human rights. The standards could be based on the following premises:

- Sovereignty resides in the people;

- Governments are stewards of popular sovereignty and of the welfare and rights of their people;
- Governments are accountable to their people for their conduct of this stewardship; owing to their signature on the UN Charter and to international human rights covenants, they are also accountable to the international community;
- If a government neglects or abuses its stewardship of the welfare and rights of its people in an extreme way, the population is justified in opposing this and the international community has a responsibility to be prepared to intervene in some form to end the abuse or neglect.
- The form of intervention should be decided on a case by case basis by the Security Council or regional security organizations. (Criteria for this “responsibility to protect” are described in more detail in the report of the International Commission on Intervention and State Sovereignty, www.idrc.ca.)

It will be difficult to gain the advance agreement of permanent members of the Security Council – the key to Council agreement in most cases – for any automatic decision to use armed force against human rights violators. This is especially so for China, given the numerous foreign invasions suffered by China and China’s sensitivity to criticism of its authoritarian government and the Tiananmen Square repression. However, advance discussion of these issues may gain the support of China and other permanent members of the Council for preventive action in individual cases so that these governments can avoid being confronted later with the painful necessity of taking a position on a request for military intervention.

5. Move Toward a Worldwide Change in Values Based on Enhanced Support for the Concept of Justice

Question Regarding the Use of Force as Prevention

A minority of members of our Task Force rejects use of armed force, even in the severely limited form suggested here, as an ultimate method for preventing the possible use of weapons of mass destruction by rogue states and terrorists. They consider that use of armed force is counterproductive and will ultimately only increase the use of force by terrorists. They also consider that terrorist attack on the United States, in particular with biological weapons, is nearly inevitable and cannot be prevented by use of armed force, immigration checks and import controls, however structured.

They believe that the best way of coping with this danger is to place far more emphasis on, and to devote far more resources to, programs aimed at weakening the motivation for rogue state proliferation and terrorist activities. In their view, covert proliferation of weapons of mass destruction by nations can be ended only with the establishment of an equitable and widely accepted system for complete elimination of these weapons from all states, including the United States. However, complete elimination of the capacity to produce biological weapons may not be feasible given the dual use nature of much of biotechnology. Reliance on whistleblowers and large monetary rewards for reporting on those who try to manufacture WMD may be the only rational and pragmatic approach. Similarly, terrorism of the al Qaeda type will end only when the quality of governance and the living standards of the Mid East approach those of Western countries, Japan and South Korea, when Islam has been able to effectively disavow terrorist

misuse of some of the tenets of Islam, and when there is a widely accepted solution of the Israeli-Palestinian problem.

Specifically, they believe that the increasing availability and affordability of biological weapons to nearly anyone with a hostile agenda makes it increasingly and profoundly clear that alternative means of dealing with human grievances are needed. Detailed analysis of modern trends in the development and use of biological weapons will eventually kill Americans (intentionally or accidentally) and that our most prudent course of action is to increase our capacity for early detection and rapid response that includes public education.

Ineffective U.S. experience at stopping nature's pathogens from entering our nation, even pathogens we are aware of and actually looking for (West Nile, SARS, AIDS, TB, Malaria), suggest that efforts to "prevent" them from entering our country are prohibitively expensive, economically or politically. Real prevention begins at a more fundamental level of human security. The same is true for "preventing" terrorism.

The majority of members of the Task Force do not accept this minority approach because doing so would undermine efforts to make the existing non-proliferation regime more effective, something which can and should be done. However, all members of the Task Force join in endorsing the following steps as valuable:

Policies Incorporating Justice as Necessary for Prevention

1. *Seek to build state cooperation and popular cooperation for peace policies that incorporate high standards of justice and the rule of law.* Reduce the number of people choosing or supporting terrorist actions and mass violence by strengthening civil society and political party support for institutional solutions that embody principles of justice. These solutions might involve domestic change, as in democracy building and conflict reduction programs, and international institutions such as the International Criminal Court. Wide public support for good government that embodies the rule of law and principles of justice, combined with police enforcement, will isolate terrorist organizations and their funding. Long-term suppression of terrorism must rely on the identification of individuals and groups who use, condone or support terrorism and WMD, by other citizens who see real alternatives for resolving grievances.

Policy A. Support the program recommendations found in the UNA-NCA Task Force on Peace and Security Report on Terrorism of March, 2002. One key recommendation is to expand modern secular education in the Middle East as an alternative to "fundamentalist" ideology which urges the use of mass violence and terrorist actions to achieve political change. Such secular education programs could be facilitated and supported by an independent Education Foundation of the United Nations, which would be led by educators from Middle Eastern countries.

Policy B. Support domestic and international public education programs that increase understanding about disarmament and arms control. The UN program for disarming Iraq of weapons of mass destruction appealed to Iraqi scientists and other citizens to assist the UN with information. This precedent for involving citizens in assisting enforcement of disarmament through inspections and other technical means should be encouraged and

expanded. More effective non-proliferation regimes will need expanded citizen support to achieve their goals, especially with regard to the potential of bio-weapons.

2. *Promote support by U.S. national educational and social institutions for a global ethic with universal values*, as expressed in the Universal Declaration of Human Rights and the UNESCO Charter – the concept of inalienable rights. Support U.S participation in support of the UN Decade for Education for a Culture of Peace.

B. Background of the Preemption Issue

For over forty years, the Soviet Union was the main threat to the security of the United States and the main justification for the size and structure of U.S. armed forces. In 1991, following the collapse of the Soviet Union, Les Aspin, President Clinton's first Secretary of Defense, developed the theory of possible regional wars arising from actions of three "rogue states," Iraq, Iran and North Korea, as the justification for the size and structure of post-Cold War armed forces of the United States. When Aspin resigned under fire of criticism for ineffective leadership in the Somalia peacekeeping fiasco, his successor as Secretary of Defense, William Cohen, placed heavy emphasis on the dangers to the U.S of possible use of weapons of mass destruction by these rogue states and also by terrorists. Part of the motivation for these frequent statements was genuine concern. Part of it was the desire to present to the U.S. public a convincing justification for the U.S. defense budget.

Then came the al Qaeda attacks of September 11, 2001. President Bush responded with armed attacks on the Taliban and al Qaeda units in Afghanistan. In late December, 2001, came the administration's Nuclear Posture Review, leaked, apparently deliberately, in January 2002. The Review suggested possible use of U.S. nuclear weapons against those who attacked the U.S. and its allies with chemical or biological weapons, as well as with nuclear weapons and named the rogue states as possible targets for U.S. nuclear weapons.

The president took a very crucial step in his State of the Union address of January 29, 2002, when he linked rogue states and their possible WMD in an "Axis of Evil" with international terrorists to whom the rogue states might transfer WMD. The link made by the president between rogue regimes and a terrorist group which had recently launched a devastating attack on the United States vastly increased the credibility of dangers from rogue states, who, it was warned, could now attack the United States with WMD through their rogue terrorist allies. In the perspective of the U.S. public, this step also transformed terrorist groups that had mainly used conventional explosives and whose peak effort had been to hijack four passenger aircraft and to use them as bombs, into ruthless wielders of even more destructive weapons.

In his June 1, 2002 West Point speech, President Bush said that the combination of rogue states, WMD proliferators and terrorist groups posed such an acute danger that it justified "preemptive action by the United States against rogue state proliferators as well as terrorist groups."

In September, 2002, the administration issued its congressionally mandated report on "The National Security Strategy of the United States of America," which presented the doctrine of preemption in some detail. This was followed in December, 2002 by the administration

statement on a “National Strategy to Combat Weapons of Mass Destruction” which developed the preemption doctrine still further.

The National Security Strategy of the USA

The administration’s report on “The National Security Strategy of the United States of America” makes explicit that the U.S. has adopted a policy of preemption: The U.S. must act against emerging threats “before they are fully formed” (page 2, paragraph 2). “Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today’s threats and the magnitude of potential harm that could be caused by our adversaries potential choice of weapons, do not permit that option. We cannot let our enemies strike first” (page 15, paragraph 1). “While the U.S. 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” (page 6, paragraph 5). Preemption is mentioned and justified at several other points in the report (page 15, passim; page 16, paragraph 1). The Report makes the explicit point that the possible use of weapons of mass destruction by terrorist groups requires a change in international law. “We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.” (Report, p. 15.)

“A National Strategy to Combat Weapons of Mass Destruction,” December, 2002, restates the preemption argument: “we will not permit the world’s most dangerous regimes and terrorists to threaten us with the world’s most destructive weapons” (page 1). “Because deterrence may not succeed, and because of the potentially devastating consequences of WMD use against our forces and civilian population, U.S. military forces and appropriate civilian agencies must have the capability to defend against WMD-armed adversaries, including in appropriate cases through preemptive measures. This requires capabilities to detect and destroy an adversary’s WMD assets before these weapons are used” (page 3).

Meanwhile, the administration had identified Iraq as the most dangerous rogue state with weapons of mass destruction. On September 12, 2002, President Bush appeared before the UN Security Council to indict Saddam Hussein not only as an unprincipled proliferator, but one with close links with al Qaeda as well as other terrorist groups. The Security Council responded with Resolution 1441 declaring Iraq guilty of material breach of the obligations to eliminate its weapons of mass destruction it undertook in 1991 at the end of the Gulf War.

There followed the step by step deployment of over 200,000 U.S. and UK military personnel in the Gulf region. It was evident that Iraq was to be the first target of U.S preemptive defense.

The indictment of the Saddam Hussein regime presented in the President’s September 12, 2002, speech before the UN and in subsequent statements by the President, Secretary Powell and Secretary Rumsfeld, sought to make the case that Iraq continues to produce and possess weapons of mass destruction, that Saddam Hussein is fully capable of using these weapons again as he has before, and that Saddam Hussein has close links with terrorist organizations, including al Qaeda. The administration argued that to let this situation continue without taking action against it increasingly risked Iraqi or al Qaeda attack with WMD against the United States, its forces, or its allies.

The core of the administration case is the right of self-defense. In his press conference of March 6, 2003 on Iraq, President Bush made eighteen references to the right or obligation of self-defense in a forty-five minute conference and he emphasized this theme again in his ultimatum speech of March 17, 2003 and in his brief March 19 announcement that hostilities had begun.

Status in International Law and the UN Charter

There is no authority in international law or under the U.N. Charter for military action under the preventive attack concept.

The general principle against the use of force is set forth in Article 2, Section 4 of the Charter, which provides that “all members shall refrain in the international relations from threat of 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.” This is one of the basic principles set forth in the Charter, a treaty which is the law of the land in the United States.

As an exception to this general rule, the right of self defense is recognized in Article 51 of the U.N. Charter and in customary international law. The Charter recognizes that the victim of an actual attack has the right to defend itself. Beyond this, customary international law also recognizes that the intended victim of a pending attack has the right to strike first to preempt or deflect the attack. However, the Charter, which redefines customary international law, gave the Security Council the primary responsibility for maintaining international peace and security, preserving the right of the State to act unilaterally only in cases of armed attacks which have taken place or are in progress. So that, in practice, even preemptive action against imminent attack is not covered by the Charter. In any event, the Security Council did not declare Iraq a case of self defense for the U.S. and UK, and in Resolution 1441 did not authorize the use of armed force against Iraq for violation of Security Council disarmament decisions.

In sum, neither the Charter nor customary international law recognizes the right of self-defense through preventive attack on an opponent who appears to be developing weapons of mass destruction that he might ultimately use against the attacking state at some future time. Christopher Weeramantry, former judge of the International Court of Justice, currently president of the International Association of Lawyers Against Nuclear Arms, said on February 14, 2003, “There is no precedent in international law for the use of force as a preventive measure when there has been no actual or imminent attack.”⁸ Peter Weiss of the same organization said “Preemptive war, attacking a force that is about to attack you, is okay. Preventive war is military action to fight a danger that might come at some time in the future. There is no precedent and no justification in international law for a preventive war.”⁹

In the 1986 “Nicaragua Case” against the United States before the International Court of Justice, the United States argued that its use of armed force against Nicaragua was preemptive self defense on the part of the U.S. and its ally, the government of El Salvador, because Nicaragua had provided weapons and supplies to Salvadoran rebels who would use them in

⁸ www.lcnp.org/global/LawyersandJuristsAppeal.htm

⁹ www.lcnp.org; the UNA/USA Global Issues Survey 2003 on “The Use of Force, Legitimacy and the UN Charter,” contains a useful summary on this issue.

future to attack Salvadoran government forces. However, the International Court held that supplying weapons was not the same thing as an armed attack and that, when a state is threatened by force not amounting to armed attack, it must resort to measures less than armed self-defense or it must seek explicit Security Council authorization to do more. Thus, preventive attack as undertaken by the U.S. against Iraq is not covered by the ordinary definition of self-defense.

The U.S. and UK also argued in connection with their attack on Iraq that they and other UN members had ongoing authority in Security Council Resolutions 678 and 687 dating from the Gulf War to take military action against Iraq if it failed to disarm. However, by far the greatest emphasis in U.S. statements is on the right of self-defense. If the Security Council had in fact agreed to authorize the use of force against Iraq, the main legal justification for U.S.-UK military action would presumably no longer have been self-defense, but violation of the Security Council resolutions ordering Iraq to disarm.

Does the New Situation Justify or Require a Change in International Law?

The administration argues that the nature of weapons of mass destruction, plus the emergence of international terrorist groups that may strike suddenly and without warning, radically changes the situation with regard to defining imminent attack and can justify preventive attack. International law should be adjusted accordingly. On this point, the National Security Strategy report argues that, “We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries” (page 15).

The immediate and hugely destructive character of nuclear weapons is not in dispute. Biological weapons have the capacity to kill or incapacitate large numbers of people where a contagious agent is used, although many conditions, among them weather, make this weapon far less certain in its effects than nuclear weapons. Chemical weapons have still less capacity, requiring dissemination of very large amounts if the target is to go beyond a single city. For its part, the al Qaeda terrorist group has demonstrated ruthlessness, international reach and capacity for complex planning, although, at present, it is the only terrorist group with a truly international reach.

This line of thought is the main component of the Bush administration’s justification for attacking Iraq on grounds of self-defense. However, the administration has not as yet made a serious effort to move toward new international law or interpretations covering these issues. We have suggested relevant actions in the recommendations section of this paper.

Knowledge that an Attack May be Imminent is Usually Incomplete

Countries hold their WMD activities and military intentions as secretly as they can. Outside knowledge of these activities is usually covertly collected intelligence information. It is often incomplete and sometimes inaccurate and could lead to unjustified action. This is even more the case where preventive attack with its orientation on the future is involved. For example, in his report on Iraq before the UN Security Council on February 7, 2003, IAEA Director Mohammed ElBaradei said that information on possible Iraqi efforts to buy uranium from Niger given the IAEA by UK authorities was based on a fabrication. UNMOVIC Director Hans Blix complained that intelligence leads given him by the U.S. had not led to any discoveries of Iraqi WMD.

The Danger Which Preventive Action Seeks to Counter is Seldom Imminent

Preemptive action requires that the danger it seeks to frustrate be immediate or imminent. To meet the standard of imminent danger in order to justify preemptive action, the opponent must have the demonstrated means, the intention and the opportunity to do harm. In addition, the defender must have no other option for counteraction than the use of force. However, by its nature, the danger that preventive action seeks to frustrate, such as the development of a WMD weapon or delivery system, is not often immediate and often remote. Moreover, there is no automatic connection between the development of a weapon and its possible use. Nuclear weapons have thus far been used by only one country, although at least eight countries have them. A few countries have used chemical weapons since World War I. However, a score of countries are believed to have both chemical and biological weapons without having used them. Thus, the country contemplating preventive action may be wrong both about the opponent's weapon developments and his intentions. Decisions to go to war should not rest on such an insubstantial basis.

Political and International Implications of U.S. Adoption of Preemption As Official Policy

Among the negative implications of U.S. adoption of preemption policy as official doctrine is intensification of the image of the United States as an international bully. The image is of the world's most powerful country threatening to use its immense military strength as it sees fit without the advice and consent of the international community.

In its most general sense, the prevention doctrine potentially lowers the barriers to war by creating new grounds for military action which could be easier to meet than the normal standards for self-defense, especially if the evidence of hostile intent is distorted or manipulated.

The publication of the U.S. preemption doctrine may have been intended to have general deterrent effect on possible proliferators. However, it actually appears to have encouraged possible proliferators like Iran and North Korea to intensify and accelerate their efforts. In a March 2003 interview with the *Washington Post*, Ambassador Javad Zarif, permanent representative of Iran to the United Nations, confirmed that Iran had accelerated and kept secret its nuclear energy program, which the administration fears may be a precursor for production of nuclear weapons, in order to counteract possible U.S. interference.¹⁰ North Korea reopened its sealed Pyongyang reactor, resumed construction of two larger reactors there, and started reprocessing stored fuel rods for weapons-grade plutonium as the U.S. and UK pressed in the Security Council for military action against Iraq and moved on to start their actual campaign. After learning of U.S. preemption policy, unknown proliferators all over the world may have accelerated their efforts to develop nuclear weapons.

The claim of self-defense through preemptive attack can be abused and can become a cover for aggression. This is even more the case with preventive attack. Hitler justified his World War II invasion of Belgium, Norway and the Soviet Union with the claim that the German attacks were needed to foil pending attacks on Germany by these other countries.

¹⁰ *Washington Post*, March 12, 2003.

These are historical examples. One area of damage from U.S. adoption of preemption strategy is the encouragement this precedent may give to further states to adopt preemption arguments today as a justification for military action against others. In October, 2002, Russia declared a policy of preemption against Chechen terrorists. In December, 2002, after the bombing of a night club in Bali by Muslim extremists, Australian Prime Minister Howard declared a policy of preemptive action against terrorists. In April, 2003, Indian Foreign Minister Yashwant Sinha argued that Pakistan's nuclear weapons and support for Kashmiri terrorists made Pakistan a more suitable target for preemptive strike than Iraq. Before the Iraq war started, Turkey declared a desire to move armed forces into the Kurdish area of northern Iraq to "preempt" Kurdish moves to establish a separate government.

Preemption and Iraq

Although the administration has presented preemption doctrine as a general principle of U.S. policy, the main function of the doctrine appears to have been to justify U.S. military action against Iraq. All the general problems of preemption apply to the case of Iraq.

In particular, the "credibility gap" showed up strongly in the Iraq case. The evidence regarding Iraqi violations and complicity with al Qaeda presented to the Security Council by the U.S. and UK failed to convince a majority of the Council or UN member states. As the U.S. and UK decided to withdraw their draft resolution from the Council in March, 2003, only Spain and Bulgaria stated that they were convinced by U.S.-UK arguments that Iraq was secretly developing weapons of mass destruction that would never be discovered by UN inspectors, so that armed force was the only means to stop Iraq. The credibility gap was illustrated most dramatically in the confrontation between Secretary of Defense Rumsfeld and German Foreign Minister Fischer at the Wehrkunde meeting in Munich on February 8, 2003. After Secretary Rumsfeld had summarized the administration's case against Iraq, Minister Fischer stated flatly, "I am not convinced. That is my problem. I cannot go the public and say that these are the reasons, because I will not believe in them."¹¹

Comments following the U.S. ultimatum of March 17 and the beginning of U.S.-UK military action in Iraq showed that the majority of Security Council members considered the U.S.-UK action in Iraq not to be covered by the UN Charter or international law and as a severe blow to the authority of the UN Security Council and to the overall non-proliferation regime, as well as undermining U.S. relations with Europe and the NATO alliance. Unless there are significant post-conflict WMD finds in Iraq, and probably even if there are such finds, the U.S. will not be able to avoid the consequences of these assessments, as well as negative reaction from Islamic opinion which may weaken moderate Islamic regimes and motivate further terrorist attacks on the United States.

Final Thoughts

On balance, the negative aspects of the administration's policy of preemptive attack on WMD proliferators appear considerably to outweigh its potential security gains. Preventive attack is the wrong method to deal with a new security problem, the possibility of WMD attack

¹¹ "Munich Conference Opens With Sharp Differences Over Iraq," *Current Affairs*, www.DW-World.com, February 8, 2003.)

on the United States by a rogue state or terrorist group. However, this threat must be taken seriously. Better ways must be found short of preventive military action to implement the international treaty prohibitions of WMD. These ways should include more effective, comprehensive inspection methods.

The UN Security Council is the real operating authority for the anti-WMD treaties, and the Council must become more effective in this area. For this to happen, the United States must seek a much closer political understanding with the other permanent members of the Council – Russia, China, and France, as well as the UK -- on the dangers from further proliferation both to them and to world peace. Military action against possible proliferants, including preventive action, must be a last resort, with decisions taken multilaterally.

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The following members of the UNA/NCA Task Force on Peace and Security and of the Young Professionals for International Cooperation played an active role in working on this report. Since many were able only to attend a few Task Force sessions, listing their names here does not mean that each member of the Task Force necessarily agrees with the full report or every point in it.

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