

Preventive Force in US National Security Strategy

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In September 2002, the Bush administration unveiled its National Security Strategy, offering its blueprint for how the United States would pursue its global interests in the post-11 September 2001 world. Although the strategy was far ranging, much of the attention at home and abroad focused on what appeared to be a novel, broad assertion of the right to use force to *prevent* latent threats from emerging, particularly threats associated with terrorism and nuclear, biological or chemical weapons. For the Bush administration, this was no abstract principle – but rather the underpinning of its decision, just six months later, to launch an invasion of Iraq in response to what the administration claimed was a vigorous nuclear, biological and chemical weapons programme that might someday be used against the United States, or put in the hands of terrorist enemies of the United States.

The administration justified the need for an expansive doctrine of preventive force by pointing to the risks of inaction in a world full of increasing and shadowy dangers:

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

Its critics immediately denounced the doctrine as dangerous and destabilising. Although the decision to articulate a formal doctrine of preventive

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force was a departure, the use of preventive force – and the debates over its legality and wisdom – predates the Bush administration’s post-11 September 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.

A historical 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 the Second World War. The charter’s principal preoccupations were strengthening collective defence against aggression, which was seen as the pre-eminent threat to peace and security, and enshrining restrictions on countries’ interference in other nations’ internal affairs in the context of decolonisation. Article 2.4 of the charter proscribes the use of force, stating ‘all 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’.² There are two exceptions 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 in the face of threats to international peace and security authorised by the Security Council under Chapter 7 of the charter.

Although the charter explicitly limits the right of self-defence 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 the natural law theory of the seventeenth-century philosopher Hugo Grotius and the *Caroline* case.³ Although this interpretation is not universal, it has been endorsed by the current UN secretary-general in a recent report.⁴

There are good arguments for limiting the legitimate use of force to actual or imminent threats. In the absence of such constraints, states will be tempted to act preventively to forestall a potential attack by an adversary, increasing the frequency that ‘political’ conflicts will become military ones. The competitive mobilisations that helped bring on the First World War illustrate the danger of fostering an environment in which each side feels compelled to accelerate its resort to force in order to avoid surprise. There can also be the danger, in a nuclear context, that 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 by the difficulty of distinguishing between offensive and defensive capabilities – it is no accident that the United States typically calls its nuclear capability a ‘deterrent’ even though the United States sees the possession of nuclear weapons by at least some countries as a ‘threat’. This latter concern is reinforced by the difficulty of judging intentions, because of both the inherent limitations of assessing future intentions and 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 air-strikes against Russian missiles in Cuba in 1962 and Chinese nuclear facilities in 1963–64.⁵ In at least one dramatic case – the 1981 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 authorised by the Security Council) began to erode significantly in the post-Cold War period. Several 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 conflict, making the risk of acting preventively more acceptable.⁷ Secondly, the failure of the Security Council to react effectively to the grave humanitarian crises of the 1990s in Rwanda and Bosnia led countries to consider the need to expand the substantive justification for using force (the growing recognition of the legitimacy of ‘humanitarian intervention’) and to consider alternatives to action by the Security Council even in cases where there was no direct threat against them.

A third factor was the concern about the new threats to security in the post-Cold War environment – the proliferation of nuclear, biological and chemical weapons, and terrorism. In 1994, US Secretary of Defense 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 – a clear threat of ‘preventive force’ for counter-proliferation goals. In August 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 US embassies in Africa earlier that month. The administration also attacked the terrorist-training facilities near Khost

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in Afghanistan; one goal of the strike was to kill potential attackers and destroy their facilities. Months later, the Clinton administration again used preventive force, this time against suspected nuclear, biological and chemical-related targets in Iraq (*Operation Desert Fox*), to deprive Iraq of elements of its capability following the end of the inspection regime established at the end of the first Gulf War.

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 11 September 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 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 vs traditional state adversaries); the *characteristic of the threat* (clandestine weapons programmes) 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

Counter-terrorism

The Clinton administration engaged in the preventive use of force against terrorists; instances of such action included the attacks on the training camps near Khost in 1998 and the forcible 'rendition' of suspected terrorists to third countries. The Bush administration has used similar tactics, as in the case of the *Predator* strike against suspected terrorists in Yemen in 2002. Other examples 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 are prepared to resort to suicide attacks, it is reasonable to judge that they are truly not deterable. Secondly, it is difficult to apply a test of imminence, since the nature of the activity makes it difficult to assess imminence with regard to the time and place of attack. As the 11 September attacks show, there are high potential costs of waiting too long and catastrophic results if terrorists act, even if they lack nuclear, biological or chemical weapons. 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 favour of arbitrary judgements of 'guilt'. The use of force in this context risks legitimising the extrajudicial use of force by any state that asserts that the actions of third parties represent a threat to its security. 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.

Thus, 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.

Eliminating dangerous capability

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; the 1994 threat against the Yongbyon facility in North Korea and the attacks against al-Shifa and Iraq's nuclear, biological and chemical weapons capacities in 1998 also fall into this category.

There are a number of plausible arguments in favour of such preventive actions. Most compelling is that in some cases, the mere possession of a dangerous capability may be judged unacceptable, either because it frees a state to act more dangerously, believing that the possession of nuclear, biological or chemical weapons insulates it against attack, or because it might lead others to seek similar capabilities, leading to destabilising proliferation. In this case, intention is irrelevant, so the traditional tests are inapt. Secondly, 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. Thirdly, some elements of dangerous intent may be hard to detect, such as, for example, the transfer of nuclear, biological or chemical weapons from a state to a terrorist organisation – so in the case of states with ties to terrorists, possession may be the closest one can get to a warning. Similar considerations were adduced in

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support of the use of force against the Soviet missile deployment in Cuba in 1962 – 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 weapons facilities might have limited collateral damage 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 nuclear, biological or chemical weapons capabilities voluntarily – South Africa, Ukraine, Belarus and Kazakhstan as well as Argentina and Brazil's nascent nuclear programmes. The use or threat of force against nuclear, biological or chemical weapons capabilities could have the unintended consequence of speeding up the efforts of others to acquire such capabilities 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. Even if effective, they could have severe collateral consequences through, for example, the release of deadly chemicals or pathogens. The use of force under these circumstances could provoke retaliation, which could worsen security. Attacking facilities of a rogue regime could have the unintended consequence of rallying support for a government which might otherwise be unpopular with its own citizens, thus strengthening its hold on power. There are also problems of consistency, since in some cases the acquisition of nuclear, biological or chemical weapons has not triggered the preventive use of force – for example, in the case of India and Pakistan. Moreover, as the Iraq case so vividly illustrates, 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 availability of intelligence and the difficulty of making a good cost–benefit calculation under the circumstances. In the al-Shifa case, the factual evidence strongly pointed to the presence of precursor chemicals for chemical weapons, yet the inconclusive debate over whether the facility was a chemical weapons plant demonstrated that there were public relations costs accompanying the decision to hedge against the perceived risk.

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 nuclear, biological or chemical weapons, 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.

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 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.¹¹ But it is possible to imagine other cases where the internal policies of countries pose other kinds of threats – the failure to handle an infectious disease outbreak, for example, where there could be pressure for a forceful intervention to protect other countries from the disease's spread.¹²

Arguments for these kinds of interventions are typically moral, although in the case of genocide there is a legal basis. 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, before the feared harm is underway, whether the state will live up to its obligations. 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, and the uncertainty of success (consider the United States' 19-year presence in Haiti in the early twentieth century).

The preventive use of force to effect regime change

A fourth category of the use of preventive 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 (although this also had an element of retaliation for 11 September, in addition to its primary purpose of preventing further attacks) 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 analogue possible as well – that the regime's human-rights violations, or its inability to protect its own people, justify its replacement by force.

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-à-vis the Taliban). In the case of Iraq, some argued that the failure of Iraq to meet its obligations pursuant to the 1991 ceasefire and accompanying Security Council resolutions, notwithstanding more than a decade of sanctions, 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, notwithstanding the assertions of the Bush administration, that deterrence or containment can be effective; most rogue leaders relish their hold on power. Secondly, it is difficult to establish the factual predicate concerning 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 1961 Bay of Pigs invasion) forceful regime change. The use of force to change governments could undermine the broad prohibition against aggression. Perhaps most tellingly, the high costs in blood and treasure of military intervention, and the uncertain outcome, makes it difficult to make a convincing judgement that the attacker will be better off after a regime change. Even in the case of possession of nuclear, biological or chemical weapons, there is no guarantee that the successor regime will not pursue such capabilities, and in any event, as Iraq shows, the fallout 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

Toward a new consensus on the preventive use of force

Some threats do require a rethinking of criteria for the preventive use of force. The question, then, is how to expand permissible use but minimise risks.

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

The report of the UN secretary-general's High-Level Panel on Threats, Challenges and Change was one such effort to address this problem. It acknowledges that new types of threats had emerged since the adoption of the charter, where the use of preventive force in both the security and humanitarian contexts would justify the preventive use of force. The report 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 is warranted. It suggested that the Security Council was the appropriate authority to authorise such use of force, and argued that if the 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 might legitimately resort to force even if the Security Council continued to refuse to act.¹³

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 nuclear, biological or chemical weapons) 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 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 security 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 for both terrorists and states who feel threatened by the United States' more proactive policies (such as the intervention in Iraq).

In these cases, the benefits (or conversely, the risks of inaction) to the United States may appear to outweigh the costs associated with preventive action identified above. But for states that do not feel so directly threatened,

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the systemic destabilising effects of a more expansive use of preventive force may seem to outweigh the speculative and indirect dangers posed by non-imminent threats.¹⁴

This resistance to endorsing 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. For some states, accepting the precedent may appear to pose a direct danger, as for example in China's 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 organisations. 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 the alliance began to use force.

Regional organisations 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 regarding 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 a regional organisation might be little more than a pawn of a dominant member. One need only think of the decision of the Association of Eastern Caribbean States to endorse the 1982 US intervention in Grenada, the role of Russia in the CIS, or to a lesser extent, the role of Nigeria in the Economic Community of West African States. Regional organisations may also suffer from the same problem of asymmetry as the Security Council (consider the problem facing the OSCE in Kosovo). In some cases, the 'problem' state may itself be a member of the organisation (as in the case of the OSCE and Russia with respect to Chechnya), which has led some to argue in favour of 'consensus minus one' to handle such circumstances. Finally, in some cases there may be no meaningful regional organisation.

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.¹⁵ There are two principal arguments in support of this approach. First is the idea that legitimisation 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 judgement. 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-Level Panel took this approach by arguing that in reaching decisions, the Security Council should rely on five 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.¹⁶

There is relatively broad agreement on the relevance of some version of these just war principles, but considerable scepticism as to the degree that they really represent limiting factors. Because each is 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 nuclear, biological and chemical weapons arena, it could be argued that repeated violations of the Non-Proliferation Treaty might represent a similar, internationally agreed norm justifying action. The existence of 12 conventions against terrorism could also fall into this category. 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.¹⁷ 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.

There is a 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 twofold. 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. Secondly, there is a 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.

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 vs non-declaratory policy choice: covert means help minimise 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 covert action being disclosed. In any covert action, the restricted circle involved in the decision-making may exclude important information or full consideration of the issues. It may also make action more likely out of a belief that adverse consequences can be avoided. Because covert action is likely to be unilateral, and certainly without institutional endorsement, it has problems of legitimacy. For the most part, though, the arguments for covert action against terrorists are the strongest.

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 there are costs and risks to acting preventively, the calculation may still be favourable in light of the alternatives.

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-à-vis states that harbour or support terrorists, 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.

For rogue regimes, in some cases, there do appear to be viable alternatives. There is reason to believe that deterrence continues to have value against most states, however roguish, in particular with regard to nuclear, biological or chemical weapons. It most likely also applies to the willingness of rogue states to transfer nuclear, biological or chemical weapons 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 provider, is likely to outweigh the benefits of the transfer, particularly since any regime that might be tempted to transfer would also worry about the weapons being used against it! This deterrent effect can be enhanced by improving the technology of attribution (the ability to trace the source, for example, of 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 harbouring 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 US intentions, capabilities and will, or if it was 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 Hizbullah, 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 programmes, 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 nuclear, biological or chemical weapons 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.

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However, the successes in achieving denuclearisation without force (most notably, South Africa, but also Ukraine, Belarus and Kazakhstan, as well as the proto-nuclear programmes 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 programme, but were directed at the regime and therefore had a similar effect). Containment can also be buttressed by providing security guarantees to neighbouring 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 is 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 programmes 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). Interdiction could be considered a preventive use of force, though if the use of force happens in transit, particularly in international waters, the costs and risks may be less than an attack 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 programme, and to a lesser extent, in connection with the Agreed Framework between the United States and North Korea, governing North Korea's nuclear programme (the plutonium programme was effectively suspended, but North Korea appears to have proceeded with a clandestine uranium enrichment programme). In the case of Libya, the key elements were a combination of pressure (sanctions) and incentives (normalisation); 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, 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 legitimisation of bad regimes (in most cases, the regimes that seek to acquire nuclear, biological or chemical weapons also oppress their own people, and are often involved with terrorists, international criminals and drug dealers) and providing incentives to bad behaviour (both for the country in question, as in the case of North Korea, and for others who might seek to emulate the strategy).

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It seems clear that despite the highly polarised debate around the issuance of the 2002 National Security Strategy, followed by preventive war in Iraq, 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 favour of great caution are particularly strong. The threat or use of preventive force is neither a magic bullet nor anathema; but the Bush 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 truly should be seen as an *in extremis* policy choice.

Notes

- 1 The White House, *The National Security Strategy of the United States of America*, September 2002.
- 2 Charter of the United Nations, Chapter I, Article 2.4, available at <http://www.un.org/aboutun/charter/>.
- 3 Analysts often point to Book II of Grotius's 1625 work *De Jure Belli ac Pacis* (On the Law of War and Peace). Carefully qualifying the conditions under which an imminent threat justifies the use of force, the book states, 'the danger must be immediate, which is one necessary point. Though it must be confessed, that when an assailant seizes any weapon with an apparent intention to kill me I have a right to anticipate and prevent the danger.' Hugo Grotius, *On the Law of War and Peace*, trans. A.C. Campbell (Ontario: Batoche Books, 2001), p. 64. The Caroline case involved the 1837 destruction of the American steamer *Caroline* (on US soil) by British forces based in Canada on the grounds of self-defence, asserting that considering its previous history, they anticipated that the steamer would be used to aid Canadian rebels opposing their authority. An exchange of letters took place in 1842 between US Secretary of State Daniel Webster and Britain's Lord Ashburton with Ashburton stating that in the interest of self-defence, 'a strong overpowering necessity may arise, when this great principle [*respect for the inviolable character of the territory of independent nations*] may and must be suspended' and Webster acknowledging that 'exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the "necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation"'. Hunter Miller, 'Webster-Ashburton Treaty', *The Avalon Project*, <http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm>.
- 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', A/59/2005, <http://www.un.org/largerfreedom>, p. 33.
- 5 Francis J. Gavin, 'Blasts from the Past: Proliferation Lessons from the 1960s', *International Security*, vol. 29, no. 3, October 2004. 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/0/6c57312cc8bd93ca852560dfo0653995?OpenDocument>.
- 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*, 25 June 1999, p. A1; 'Russia's "Key Role" in Kosovo', BBC News, 7 April 1999, <http://news.bbc.co.uk/1/hi/world/europe/313939.stm>; 'Sources: U.S. suspects Russia feeding info to Belgrade', CNN, 19 April 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.
- ⁸ Bush, 'Remarks by the President'.
- ⁹ *The National Security Strategy of the United States of America*, Cover Letter
- ¹⁰ *Ibid.*, p. 6.
- ¹¹ 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.
- ¹² I am indebted to Stephen Stedman for this idea.
- ¹³ *A More Secure World: Our Shared Responsibility* (New York: United Nations, 2004).
- ¹⁴ 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 are 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' behaviour in the Security Council, at least to this point. Iran and North Korea represent potentially important tests of this proposition.
- ¹⁵ Ivo Daalder and James Lindsay, 'An Alliance of Democracies: Our Way or the High Way', *Financial Times*, 6 November 2004.
- ¹⁶ Condoleezza Rice, *A Balance of Power that Favors Freedom* (New York: Manhattan Institute, 2002).
- ¹⁷ Abraham D. Sofaer, 'On the Necessity of Pre-emption', *European Journal of International Law*, vol. 14, 2003, pp. 209–26. He doesn't explicitly call them 'charter-based interventions' but argues for them.