

**POWER AND SUPERPOWER:  
GLOBAL LEADERSHIP IN THE 21<sup>ST</sup> CENTURY**

**DRAFT June 21, 2006**

**Force and Legitimacy in the Post 9/11 Era:  
What Principles Should Guide the United States?<sup>1</sup>**

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**PART ONE – The world has changed; should the traditional rules constraining  
when to use force change with it?**

**I. The traditional doctrine limiting the use of the force in international relations**

The debate over when and under what circumstances the United States should use force has taken on a new intensity with the end of the Cold War, and in particular, following the terrorist attacks of 9/11. Throughout our history, American leaders have ritually repeated as declaratory policy that the United States should not and would not use force except in response to an armed attack or the threat of imminent attack against the United States or its citizens, although our actual experience is more complex.<sup>3</sup> As the United States became part of formal alliances and took on collective security responsibilities after World War II, this criterion was expanded to include attacks on others to whom the United States had treaty obligations [Article 5 of the North Atlantic Treaty that established the North Atlantic Treaty Organization (NATO), bilateral security agreements

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<sup>1</sup> An earlier version of this paper appeared in *Survival* (“Preventive Force in US National Security Strategy,” December 2005–06: *Survival* Volume 47, Number 4).

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<sup>3</sup> For a classic, recent statement of this view see the op-ed by Arthur Schlesinger, “Bush’s One Thousand Days”, *Washington Post*, April 24, 2006, p. A17. For an argument that the United States has been more open to the preventive use of force in practice, see 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).

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with Japan, Korea, Thailand, etc.] or as part of signatories' responsibilities under Chapter VII of the UN Charter.

The formal rule is enshrined in the UN Charter itself, which prohibits the use of force in international relations [Article 2(4)], with two exceptions: it is permitted either pursuant to a decision by the UN Security Council acting under Chapter VII in response to threats to international peace and security<sup>4</sup> or, under Article 51, for self-defense.<sup>5</sup>

The rationale for these limitations is deeply rooted in a conviction that arose out of the experience of two world wars: that aggression poses the principal threat to peace and security. As a result, international law has sought to de-legitimize the use of force by an individual state acting on its own, except to defend against aggression. Implicit in this view is a belief that internal arrangements within a state, however repugnant, posed little threat to the security or well-being of others, so long as that state did not forcibly venture beyond its borders. Legitimacy was defined primarily in this status quo-preserving sense – it was legitimate to resist the encroachment of others, but not to encroach on others, irrespective of the reason for encroachment.

Chapter VII of the Charter expanded the permissible justification for using force, but sought to hedge against the danger of too easy resort to force by establishing a high procedural hurdle – approval by the Security Council. Legitimacy in this case springs more from the legitimacy of the “deciders” than from the substantive justification for using force.

The idealized model of the Charter never fully corresponded to how policymakers thought about the international system – for most of our history, the United States did

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<sup>4</sup> The Charter does not define what constitutes a threat to international peace and security; in practice, the members of the Council are free to decide this question as they choose.

<sup>5</sup> Although the Charter refers to actual attack, most, but not all analysts accept that an imminent attack also falls within Article 51, largely because customary international law has long accepted the use of force in response to an imminent attack. Analysts especially often point to Book II of Grotius' 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*, A.C. Campbell trans., Batoche Books, Ontario, 2001, p. 64. The Caroline case involved the 1837 destruction of the American steamer ship *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/britian/br-1842d.htm>).

“care” about the internal affairs of others who were important to us, either because of their geographic proximity (such as in the case of US attitudes toward governments in the Western Hemisphere) or because of their real or perceived strategic significance. But most of the time, policymakers sought to couch these interventions in the agreed doctrinal framework (or conducted them through covert or indirect means), even if it seemed to stretch beyond recognition the plain meaning of the words.

## **II. The changing international environment in the post-Cold War, post-9/11 world**

By the 1990s, the basic disconnect between international reality and the principle of non-intervention became clear enough to force a re-examination of the traditional declaratory doctrine itself. The impetus came from two distinct directions: a growing uneasiness with a principle of international law that appeared to require states to acquiesce in gross violations of human rights; and a recognition that a nation might act in ways that pose unacceptable security risks to others, even in the absence of an overt use of force against its neighbors. The experiences in the Balkans and Rwanda provided the text for the first critique of the traditional rules; the growing concern about nuclear proliferation and states that harbor or support terrorism, particularly post-9/11, the second.

The violent ethnic conflict that followed the breakup of Yugoslavia highlighted two inter-related challenges concerning the use of force in the post-Cold War conflict: what are legitimate grounds for using force, and who has the right to decide to use force?

The first issue concerned when it was legitimate for states to use force. The violence in the Balkans was not a classic case of state aggression (although once the international community began to recognize the individual components of the Yugoslav federation as independent states, there were elements of cross-border intervention). Rather, the international community’s attention was driven by a combination of humanitarian concerns about the extent of the killings, coupled with a growing sense that failure to address the conflict could contribute to the spread of instability throughout southeastern Europe and undermine the credibility of transatlantic institutions (both NATO and the European Union) as effective tools for managing conflict in the wider European space.

The second question was who had the right to decide whether to use force. Although there was some debate among international lawyers, most accepted that the Security Council could authorize the use of force for a broad range of “threats to international peace and security” even in the absence of cross-border aggression. But Russian opposition to intervention barred the door to Security Council authorization both in Bosnia (and later in Kosovo) – so the question that starkly remained was whether force might be used in the absence of aggression when the Security Council refused to act.

Initially, both the EU states and the United States were reluctant to intervene, in part because the crisis failed to meet the standard international legal criteria for the use of force. But underlying this rather lawyerly concern was a more pragmatic consideration – first, would intervention set an undesirable precedent, which might be invoked by others (particularly in the context of the unfolding drama of the dissolution of the Soviet

Union)? Second, would military intervention be effective in establishing stability in what was seen by many as an inter-ethnic civil war fueled by “ancient hatreds”? But the manifest costs associated with the reluctance to intervene set in train a set of actions, which not only led to the use of force without formal Security Council decisions in both Bosnia and Kosovo, but also to a fundamental challenge to the basic rules of the game. Although many countries attempted to limit the precedential reach of NATO’s decision to intervene in Kosovo,<sup>6</sup> the door had been opened to the idea that a regional organization could legitimately employ force if and when the Council failed to act in a crisis.

The terrorist attacks of 2001 also led to a debate over the continued validity of the traditional rules on the use of force (both on the questions of when and who decides). President Bush argued, in a series of speeches and later in his first National Security Strategy Report, that in a world characterized by “rogue” states and existential terrorist groups, the United States must be willing to use force preventively, acting alone if necessary, to guarantee its security. The Bush Administration argued that the very nature of the threat made it difficult to determine in advance whether a threat was imminent: in its colorful language, “the smoking gun – that could come in the form of a mushroom cloud.”<sup>7</sup> Moreover, given the magnitude of the potential danger posed by terrorists or rogues using weapons of mass destruction (WMD), the United States (and, implicitly, any nation) is justified in using force unilaterally if necessary to eliminate such an existential threat.<sup>8</sup> In the Bush Administration’s view, the stakes are simply too high to entrust to others a judgment about the degree of peril. The National Security Strategy thus embraced a new declaratory strategy of “pre-emption” – the preventive use of force,

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<sup>6</sup> The most heated debate over NATO’s new Strategic Concept (which was being debated during the course of the Kosovo war), was whether to acknowledge the legitimacy of the use of force in circumstances where the Council had not acted. Initially, France had pushed for an explicit bar on such actions; in the end, the concept merely limits the use of force to actions “consistent with the UN Charter”. See “The Alliance’s Strategic Concept,” *NATO Press Release NAC-S(99)65*, April 24, 1999 (<http://www.nato.int/docu/pr/1999/p99-065e.htm>).

<sup>7</sup> George W. Bush, “Remarks on Iraq,” Cincinnati, OH, Oct. 7, 2002. Then National Security Advisor Condoleezza Rice had a month earlier also said on *CNN’s “Late Edition With Wolf Blitzer”*: “We don’t want the smoking gun to be a mushroom cloud.”

<sup>8</sup> 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.” (See George W. Bush, “Remarks by the President at 2002 Graduation Exercise of the United States Military Academy,” West Point, NY Jun 1, 2002). He subsequently added, “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.” (See *The National Security Strategy of the United States of America*, p. 6)

exercised unilaterally if necessary – with respect to these new threats, breaking with centuries of old doctrine, if not practice.<sup>9</sup>

Although these considerations drove the US intervention in Afghanistan, that action raised little international concern, since the intervention was accepted both by the Security Council and more widely as a legitimate act of self-defense by the United States. In Iraq, however, the new approach was put to its test – this was an intervention not sanctioned by the Security Council, based primarily (at least in the formal justifications prior to war) on an emerging, but not imminent, threat posed by Iraq’s WMD programs.

Although many criticized the announcement of the new doctrine, even some critics acknowledged that preventive force might be more necessary in the new international environment, a conclusion buttressed by the Clinton Administration’s own resort to force in 1998 against Iraq’s WMD program (Operation Desert Fox) and a suspected chemical weapons facility in Sudan linked to Osama bin Laden (al-Shifa).

Three conclusions seemed to emerge from the conflict in the Balkans and the 9/11 terrorist attacks. First, the concept of threats to international peace and security justifying the use of force had to be expanded beyond narrowly defined acts of aggression (or imminent acts of aggression). Second, at least in extreme cases, grave humanitarian crises could justify the use of force irrespective of whether they also threatened international peace and security. Third, while there might be a preference – indeed a very strong preference – for Security Council authorization for the use of force in cases where there was no actual or imminent attack, the absence of Council action by itself could not be an absolute bar to action. While the first of these conclusions was arguably consistent with the UN Charter (since the Charter did not substantively define threats to international peace and security that could trigger Security Council action), the second and third seemed clearly inconsistent with the text, if not the spirit, of the Charter.

The first two conclusions have now been broadly accepted, not only in the US, but also by the wider international community. In the Report of the High Level Panel on Threats, Challenges and Change, appointed by the Secretary General in advance of the UN’s 60<sup>th</sup> anniversary summit, a broad-based group of international leaders specifically endorsed two very sweeping, and arguably revolutionary, propositions – that force could legitimately be used to address security threats that fell short of actual or imminent aggression, and that, in some cases, humanitarian crises could justify intervention even in the absence of threats to international peace and security. The Panel left ambiguous its view on the third issue – whether force could ever legitimately be employed (either in response to a non-imminent threat or a humanitarian crisis) when the Security Council failed to act. Rather, the Panel underscored a strong preference for deferring to the Council, while leaving open the possibility that action might be justified if the Council failed to act and other non-military avenues were exhausted.<sup>10</sup> Within the United States

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<sup>9</sup> Analysts usually distinguish between “pre-emptive” use of force (action taken in the face of an imminent attack) and “prevention” (action taken in the absence of an imminent threat). The Bush Administration used the term preemption to apply to what is commonly understood to be prevention.

<sup>10</sup> *A More Secure World: Our Shared Responsibility* (New York: United Nations, 2004).

there is broad acceptance, reflected in the discussion of this issue during the 2004 elections that the Security Council cannot be allowed to exercise a veto on the use of force when the United States concludes that important national security or humanitarian issues are at stake.

### **III. How far should we go in changing our approach to the use of force?**

Thus the way has now been cleared for considering a broader range of circumstances that might justify the use of force – on both humanitarian and security grounds – by the United States. But following the intervention in Iraq, there has also been renewed attention to the desirability of placing limits on this expansive view. The debate has often been divided into questions of legitimacy<sup>11</sup> and those of effectiveness, although in practice the two are so deeply intertwined as to be practically indistinguishable.<sup>12</sup> And now that the bright lines governing the legitimate use of force have become blurred by the changed international environment and emerging humanitarian norms, there is a need to provide greater clarity to what considerations should govern the use of force. Broadly speaking, these considerations can be divided into four questions:

- when should force be used;
- what kind of force should be used;
- what are the alternatives; and
- who should decide?

A. **When should force be used?** : The substantive criteria or “predicates” for the use of force.

The contemporary debate now centers primarily on four kinds of circumstances (beyond aggression), which might justify the resort to force: 1) military operations against terrorists; 2) stopping the spread of WMD; 3) humanitarian crises; and 4) interventions in the case of state failure.

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<sup>11</sup> For international lawyers, there is a further division of this question into whether the use of force is “lawful” as well as legitimate. Without unduly disparaging the fine points involved in this distinction, it is not clear how significant this consideration is or should be. If an action is perceived as legitimate, it seems likely that international law will evolve over time to “legalize it”, at least under customary if not “black letter” international law. Nonetheless, it remains true that some actions may widely be seen to be legitimate (the intervention in Kosovo), yet cause considerable debate over whether they are legal (a problem which troubled some of the NATO European countries lawyers, but ultimately proved no barrier to their decision to act.) So for this purposes of this paper, I will limit the discussion to the “legitimacy” rather than “legality” of the action.

<sup>12</sup> There is fairly broad consensus that when the use of force is perceived to be legitimate, it is likely to be more effective in achieving its objectives (at least in the long term), for several reasons. A legitimate use of force is more likely to gain the cooperation of others, and less likely to result in costs being imposed on the user.

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

In the wake of 9/11, the Bush Administration has emphasized the importance of being willing to use force to thwart terrorism, criticizing the Clinton Administration as excessively wedded to a “law enforcement” model for dealing with this threat. In fact, however, the Clinton Administration had already embraced a more proactive use of force against terrorists, including the attacks on al Qaeda training camps near Khost in Afghanistan in 1998 and the forcible “rendition” of suspected terrorists to third countries. The Bush Administration too has used force this way, such as in the case of the Predator strike against suspected terrorists in Yemen in 2002 as well as a significant number of renditions and attacks on terrorists in Afghanistan and Pakistan. Other recent examples include the Israeli government’s stated policy of using targeted assassination against suspected terrorists, and Russia’s military operations in Chechnya.

There are several powerful arguments in support of the legitimacy of using 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 truly cannot be deterred by the prospect of punishment after the fact.<sup>13</sup> Second, it is difficult to apply the traditional test of imminent threat, since the nature of terrorist activities makes it difficult to assess imminence, at least with respect to the time and place of attack. Third, as the 9/11 attacks have shown, there are high potential costs of waiting too long and catastrophic results if terrorists act, even through attacks using conventional means, much less WMD. Fourth, the alternatives are poor, since it is impossible to protect every potential target of attack or to interdict an attack once underway. More generally, attacks against terrorists seem very close to the well-accepted principle of self-defense.

There are, however, a number of countervailing costs and risks. Given the limitations of intelligence, the factual predicate that establishes an individual or group as a legitimate target is inevitably uncertain, risking the killing of innocent individuals. The fact that these determinations are not made in a systematic way with “due process” safeguards risks undermining the rule of law in favor of arbitrary judgments of “guilt.” The use of force in this context risks legitimizing the extrajudicial use of force by any state who asserts that the actions of third parties represent a threat to their security. 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.

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<sup>13</sup> The Israelis have attempted to restore deterrence against suicide attacks to some degree by targeting the families and communities of the terrorists, through, for example, destroying homes and other reprisals. It is questionable how effective this tactic has proven, in part because it may have the effect of creating even more “martyrs”, and in part because international objections to punishing innocent civilians undercut Israel’s ability to gain international sympathy and support in its fight against the suicide terrorists.

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.

2. *Counter-proliferation: eliminating dangerous capability especially WMD.*

In recent years there have been a growing number of examples of the use (or threatened use) of force to deprive a potential adversary of the capability to attack. The classic example, of course, is the 1981 Israeli attack on Iraq's Osirak nuclear reactor. The 1994 threat by then Defense Secretary William Perry against nuclear facilities in North Korea; and the Clinton Administration's actual attack against the al-Shifa chemical plant in Sudan and Iraq's WMD capacities in 1998 (Operation Desert Fox) also fit into this category.<sup>14</sup> More broadly, the Bush Administration's rationale for intervention in Iraq was primarily predicated on its view that nothing less could halt Iraq's eventual acquisition of WMD, most particularly, nuclear weapons. The Bush Administration's Proliferation Security Initiative (PSI) is also built around an assertion of the right to interdict, forcibly if necessary, nuclear materials transiting in international waters.

There are a number of plausible arguments in favor of using force in the case of nascent WMD capabilities. Most compelling is that in some cases, the mere possession of such a dangerous capability may be judged unacceptable: either because it frees the possessing state to act more dangerously towards its people or towards others, believing that the possession of WMD insulates it against attack; or because it might lead others to seek similar capabilities, leading to destabilizing proliferation. In this case, intention is irrelevant, so the traditional test of "imminent threat of attack" is irrelevant to the danger. Second, the threat of the use of force may help to deter a potential acquirer from pursuing the dangerous capability in the first place, or lead it to the negotiating table, as was arguably the case with North Korea in 1994. Third, some aspects of imminent danger may be hard to detect, such as, for example, the transfer of WMD from a state to a terrorist organization – so in the case of states with ties to terrorists, possession may be the closest one can get to a warning.

There are also important reasons for caution. First, using force may not be the only way to stop proliferation; over the past decades, a number of states have given up WMD capabilities voluntarily – South Africa, Ukraine, Belarus and Kazakhstan as well as Argentina's and Brazil's nascent nuclear programs.<sup>15</sup> Second, the use or threat of force against WMD capabilities could have the unintended consequence of persuading others that they should *speed up* their efforts to acquire such capabilities to gain a measure of protection against attack, or lead them to conceal dangerous facilities. Third, these attacks could be of limited effectiveness if facilities are hidden or dispersed or if the country has

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<sup>14</sup> There are of course, a number of earlier cases where the preventive use of force against wmd threats was debated although never acted on, including the Cuban missile crisis and the nascent Chinese nuclear program.

<sup>15</sup> See the general discussion of the availability of alternatives, below.

the ability to rapidly reconstitute them. Fourth, even if effective, they could have severe collateral consequences through, for example, the release of deadly chemicals, radioactive material or pathogens. Fifth, the use of force under these circumstances could provoke retaliation, which could worsen security. Sixth, attacking facilities of a rogue regime could have the unintended consequences of rallying support for a dangerous government, which might otherwise be unpopular with its own citizens, thus strengthening its hold on power. (If the intelligence is considered flawed or the action widely considered illegitimate, the attack could also lead to support – though probably just rhetorical – for the regime from other countries, which might not have otherwise been forthcoming). Seventh, there are also problems of consistency, since in some cases the acquisition of WMD has not triggered the preventive use of force – for example in the cases of India and Pakistan. Eighth, as the Iraq case so vividly illustrates (but also the controversy over the suspected North Korean facility at Kumchang-ri in 1998-99, as well as the post-facto debate over the bombing of the al-Shifa plant in Sudan), there is the danger that the intelligence on the basis of which the country attacks will be challenged, with all of the adverse consequences that has been shown to bring. Even if the pre-attack intelligence appears to be sound, “after the fact” questions can undermine the credibility and legitimacy of the decision to use force.

All these considerations come into play in the current crisis with Iran. There are powerful reasons to fear the consequences of an Iranian nuclear weapons capability, including the effect on regional stability, the danger that it will promote further nuclear proliferation and the risk that the weapons, or weapons-grade material might fall (intentionally or unintentionally) into the hands of terrorist groups. Yet all of the dangers identified above could be realized if the US (or others) decides to use preventive force against the Iranian enrichment program.

Thus, the bottom line suggests that preventive force must be part of the policy mix in dealing with the acquisition of dangerous capabilities, especially WMD, but the wisdom of its use is highly fact-dependent and requires a very careful balancing of the real benefits to be achieved against likely costs.

### *3. Humanitarian intervention*

Over the decade and half since the end of the Cold War, there has been growing acceptance that under some circumstances, a government’s mistreatment of its own people may be sufficient to justify forcible intervention by others. The experiences of the Balkans and Rwanda have been generalized into the concept of a state’s “responsibility to protect”<sup>16</sup> its own citizen, and a concomitant right of others to intervene to provide that protection. Although the primary motivation is moral, there is a good case to be made that cases of grave humanitarian abuses can have serious implications for the security of neighbors as well (witness the spill-over of the conflict in Rwanda and Sudan, and the feared consequences of the ethnic cleansing in the former Yugoslavia on all of south-eastern Europe). Humanitarian intervention can take many forms, ranging from the

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<sup>16</sup> See the Axworthy Commission Report, “The Responsibility to Protect”, 2001 [www.iciss-ciise.gc.ca](http://www.iciss-ciise.gc.ca)

creation of militarily-enforced safe havens to the replacement of the offending government.

While the principle is now fairly widely accepted,<sup>17</sup> its application in practice remains problematic for several reasons. First, what humanitarian abuses are sufficiently grave to justify such intervention? At the extreme, there is wide agreement that genocide is a proper grounds for intervention, in part because of the widespread adoption of the Genocide Convention (which not only outlaws genocide, but also obliges states to take unspecified action to counter it), but, in individual cases, whether a policy constitutes genocide is hotly debated. Short of genocide, there is a continuum of humanitarian abuses, with no clear bright lines about what should trigger intervention. This leads to accusations of double standards (Balkans v. Rwanda, Iraq v. North Korea) and suspicions that humanitarian intervention is a cover for other, more political, objectives. Even where there is consensus that the abuse should be stopped by force if necessary, there are questions about what kinds of force are effective – the “safe haven” strategy in the Balkans was ineffective, while ousting the offending regime may only begin, rather than resolve, the problem of how to establish a stable alternative regime—as the intervention in Haiti demonstrated clearly. There is also a deep problem of “when” to intervene – early action is most likely to be effective, yet at the early stages of a humanitarian crisis, it may be difficult to judge how grave the problem might become or whether measures short of force might be sufficient, or even to gain consensus about the need to intervene at that stage.

#### *4. Interventions in the case of state failure*

The previous three circumstances embrace the most common arguments for the use of force in the contemporary international debate. But new challenges may be looming on the horizon. One class of problems concerns the case of state failure, where intervention is designed to remove a potential threat that the state in question cannot or will not handle. Hostage rescue cases fall into this category.<sup>18</sup> 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 like avian flu or SARS, for example, where there could be pressure for a forceful intervention to protect other countries from the disease’s spread.<sup>19</sup> Another potential example is intervention to secure dangerous material – for example, fissile material or nuclear weapons themselves – in cases where breakdown of government authority might risk the material falling into dangerous hands (this issue has been debated recently in relation to Pakistan).

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<sup>17</sup> UN Secretary General Kofi Annan articulated this view in 2000: “But surely no legal principle—not even sovereignty—can ever shield crimes against humanity... Armed intervention must always remain the option of last resort, but in the face of mass murder it is an option that cannot be relinquished.” Millennium Report of the Secretary General, UN Document A/54/2000, p. 48.

<sup>18</sup> 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.

<sup>19</sup> I am indebted to Stephen Stedman for this idea.

This is largely uncharted territory, where the more limited interventions are likely both to be more effective and less stabilizing, but the unforeseen consequences also great. Somalia was a case of intervention in the face of state failure to deal with famine; yet what began as a limited intervention proved more complex in execution.

### **B. What Kind of Force should be applied?**

Once the case has been made for using force, the question then arises about what kind of force should be applied. Broadly speaking, this can be divided into two categories: targeted use of force against particular dangerous individuals or capabilities; or “total war/regime change” – although in practice there is something of a continuum.

At first blush, it would seem easier to justify the targeted use of force. Killing known or suspected terrorists, destroying or interdicting WMD capabilities, providing a militarily-enforced safe haven for victims of humanitarian abuse seem to fit the traditional just war considerations of proportionality and limiting collateral harm.

Yet there are circumstances where a more far-ranging use of force – regime change – may be justified, largely on the grounds of necessity. In the case of terrorists, the demonstrated willingness of a state to harbor dangerous individuals and groups could provide an appropriate predicate, as near-universal support for the invasion of Afghanistan demonstrates. With respect to WMD, the ability of a regime to conceal capabilities, or to reconstitute them quickly following a more limited attack, could provide a rationale for using force to eliminate the regime. This was a consideration in the case of Iraq (in light of its repeated failures to comply with UN Resolutions on disarmament), and for some, the only solution for Iran and North Korea. In the case of state failure, there may be a need to impose control amounting to trusteeship. Finally, in cases of grave humanitarian abuse, only eliminating the offensive regime may end the harm – as was arguably the case with Milosevic’s Serbia, Rwanda under the Hutus in the mid-1990s, Liberia under Charles Taylor, and Sudan under the current government.

There are obviously strong prudential arguments against the use of 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’s first National Security Strategy Report in 2002, that deterrence or containment can be effective; most rogue leaders relish their hold on power. Second, there are substantial differences among rogue states, which makes it hard to generalize about 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 there. The use of force to change governments could have the effect of creating a much more violent international environment, eroding the constraints against aggression. Perhaps most important, the high costs in blood and treasure of military intervention to bring about regime change, and the uncertain outcome, makes it difficult to make a convincing judgment that the attacker will necessarily be better off after a regime change. Even in the case of WMD

possession, there is no guarantee that the successor regime will not pursue 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 there is good reason to conclude that the use of force to bring about regime change is highly problematic and should be reserved for cases of grave risk where all other measures have clearly been exhausted, and almost never unilaterally.<sup>20</sup>

Irrespective of whether the proposed use of force is limited or "total", there is a question of whether the use of force should be overt or covert.<sup>21</sup> 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. The covert use of force helps minimize the precedential effect of the action compared with an acknowledged use of force, and may make it possible for the target to avoid being drawn into a series of escalatory responses that neither side desires. Nonetheless, there are many familiar drawbacks to covert action, beyond those associated with the hand behind the 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 or visible allies, it has the problems of legitimacy discussed below (under "who decides"). Thus the basic considerations that lead to a highly restrictive set of rules governing unilateral preventive action apply with even greater force to unilateral covert action.

For the most part, the arguments for covert action against terrorists are the strongest since overt action is almost inherently ineffective except in massive operations like the invasion of Afghanistan, although similar considerations could play a role in interdicting WMD capabilities.

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<sup>20</sup> There is an interesting question about whether there should be rules limiting unilateral intervention to support, rather than replace a regime. International law has largely accepted that states may call on others to help in the case of insurgency, etc. Yet recent history is rife with examples of problems with this approach, from Vietnam to Sri Lanka. The best case is one in which the requesting government is democratically elected and resisting either insurgency or coup, yet in these cases there is likely to be the greatest likelihood of gaining broad international support for military action – as was the case in Haiti.

<sup>21</sup> Covert needs to be distinguished from secret or clandestine action. In the case of covert action, the state denies involvement if the action becomes public; secret actions seek to avoid public disclosure but accept responsibility if revealed.

### C. Are there alternatives?

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 substantial costs and risks to acting preventively, the calculation may still be favorable in light of the alternatives.

Irrespective of which kind of force is chosen, there is a widely-shared understanding that the decision should be based on a convincing conclusion that alternatives other than force would not be effective in achieving the stated goal. Virtually no one argues that force is just one of many tools in the policy kit; from both a moral and practical standpoint, there is a strong presumption that the use of force should be a last resort.

To some degree there has been a tendency in recent years to downplay the potential effectiveness of alternatives to the use of force; in particular, questions about the effectiveness of sanctions and their collateral humanitarian costs have complicated the question of how hard and fast the last-resort rule should be.

The general preference treating force as a last resort clearly does not mean that in all cases all other alternatives must actually have been tried and failed – in some cases, it may be apparent that nothing else would do, and in some cases, the speed with which a danger is unfolding and the danger of a *fait accompli* may make formal exhaustion of alternatives impractical. But there is a danger that alternatives—such as containment, or sanctions or diplomacy – will be too easily discarded based on previous failures of these policy tools or a particular administration’s attitude about their effectiveness more generally. Given the costs associated with the decision to use force, there should be a high burden on those proposing to use force to show that other alternatives have been tried and failed or that they would necessarily prove ineffective or counter-productive.

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. The “law enforcement” approach – relying on the threat of punishment – is particularly problematic 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 highly elastic 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 their use of WMD. It may also apply to the willingness of “rogue” states to transfer WMD to terrorists: although such transfers 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, could outweigh the benefits of the transfer, particularly since any regime that might be tempted to transfer these capabilities would also worry about the WMD being used against it. This deterrent effect can be enhanced by improving the technology of attribution (the ability to trace the source, for example, of fissile material or pathogens) and by “deemed” attribution (i.e. announcing in advance that a particular state will be held responsible for acts of a particular group of terrorists even in the absence of specific evidence of transfer); although in the latter case there is a risk that an unsuspected group or individual will commit an act with the expectation/hope that responsibility will be deemed to the “usual suspect(s)”.

There has been considerable discussion about “smart” sanctions (such as targeting the assets and travels of leaders, or criminal indictments) as an alternative both to force and broad economic sanctions. Although these can clearly be positive additions to the policy toolkit, it is questionable how effective these will be in dealing with regimes and leaders which are already deeply isolated (such as North Korea).

Deterrence may also work to some degree against *states harboring terrorists*. However, the example of the Taliban suggests that there are limits to this argument: it is difficult to know whether the Taliban simply misjudged 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 Hezbollah, with limited consequences, and to date there has been no use of force against them.

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

However, the successes in achieving denuclearization without force (most notably, South Africa, but also Ukraine, Belarus and Kazakhstan, as well as the proto-nuclear programs in Argentina and Brazil) suggest that, at least over time, there is an alternative, namely, containment – in effect, waiting either for regime “change” (South Africa, Brazil, Argentina) or for circumstances to change the acquirer’s cost-benefit calculations. Waiting can be coupled with other measures that affect cost-benefit calculations, such as sanctions (the sanctions against South Africa were not imposed because of its nuclear

program, but were directed at the regime and therefore had a similar effect). Containment can also be buttressed by providing security guarantees to neighboring countries, thus lessening the blackmail effect and therefore the adverse costs of acquiescence. Here the credibility of the security guarantees will be crucial.

“Denial” strategies (preventing bad actors from acquiring dangerous capabilities) are also an important alternative. The case for this approach is particularly compelling in the nuclear context, where the need to acquire fissile material and the technology to produce it is still a major barrier to acquiring a 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. against a country that is developing clandestine programs in violation of agreed frameworks, such as the Chemical Weapons Convention, whether or not the country is a signatory to the agreement.)

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

The final alternative is conditional engagement, used to good effect to bring an end to the Libyan nuclear program, and to a lesser extent, in connection with the Agreed Framework between the US and North Korea, governing North Korea’s nuclear program (the plutonium program was effectively suspended, but North Korea appears to have proceeded with a clandestine uranium enrichment program). In the case of Libya, the key elements were a combination of pressure (sanctions) and incentives (normalization); some would argue that the Iraqi invasion also implicitly raised a threat of force as part of the mix. In the case of North Korea, the threat of force was more explicit, 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 of this approach include legitimating bad regimes (in most cases, the regimes that seek to acquire WMD also oppress their own people, and are often involved with terrorists, international criminals and drug dealers) and providing incentives to bad behavior (both for the country in question, as in the case of North Korea, and for others who might seek to emulate the strategy).

Alternatives to the use of force in the case of humanitarian crises are difficult to assess. The examples of Haiti, the Balkans, and today Sudan, does not suggest that measures of diplomatic isolation or economic sanction have a high probability of success in the face of a determined regime, and run the risk of harming the very people the policy is designed to help. In the case of state failure, there may be no “there” there to target, the

very weakness of the state may make it incapable of responding effectively even if it wants to.

#### **D. Who Should Decide?**

The preceding discussion shows that the contemporary international environment requires a rethinking of criteria for when to use force – beyond the narrow circumstances currently endorsed by conventional international law. But if each country is free to decide for itself when these expanded criteria are met, there is a serious danger that the bar to using force will be dramatically lowered, increasing the dangers of international anarchy. The question, then, is how to respond to the emerging threats but minimize the risk associated with more expansive criteria for the use of force.

The underlying premise of the UN Charter was that, except in the relatively narrow case of self-defense against aggression, the decision to use force should be reserved exclusively for the Security Council. The Secretary General's High Level Panel acknowledged that the world had changed since the end of World War II, justifying the use of force in a broader category of circumstances, but largely accepted that the only acceptable way to confront these new dangers was under the aegis of the Council.

There are very good reasons why Security Council approval is highly desirable in almost any case where force is contemplated. Where the exercise of force is seen to be legitimate, it is easier to gain support in the military action itself, thus lessening the financial and human costs, reducing the risk that others will feel the need to retaliate or otherwise impose costs on the user of force, and reduce the likelihood that the use of force will have the unintended effect of strengthening the regime it was seeking to constrain. It is not surprising therefore that even the Bush Administration was driven to seek Security Council approval (the “second resolution”) for its intervention in Iraq.

Although expanding the scope of Council action is certainly a valuable step, recent history powerfully suggests that this will not obviate the need for using force when the Council fails to act. 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 broader range of threats 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. This was clearly the case in the Balkans, for example, in the 1990s, and with respect to Iraq in 2002-03. Conversely, other members of the Council may believe that endorsing action under these circumstances could establish a precedent that could be used against them or their interests – again, the view of Russia and China during the Balkan conflicts; or that for them, the collateral costs of using force are greater than the benefits – the view, for example, of France concerning Iraq in 2003.

There are other reasons to question the appropriateness of allowing the Council to be the final arbiter of the decision to use force. Although the UN carries the aura of legitimacy associated with the circumstances of its founding and the lofty principles of the Charter,

the reality is more complicated. It seems reasonable to question why an authoritarian government in Beijing, which seeks to insulate itself against intervention by outsiders in its internal affairs, should be allowed to block a humanitarian intervention in the Balkans. Similarly, should the Russian government with its long history of cozy financial dealing with Iraq, be allowed to shield a regime that was believed by most to be actively pursuing dangerous WMD programs?

Thus in some sense, the fact that the Council failed to act doesn't per se mean that the use of force was unjustified.

This has led to a search for alternatives to Security Council authorization that preserve some of the "legitimacy" benefits of collective action, focusing on the role of regional (e.g. NATO, African Union) or other multilateral organizations. This approach has the virtue of avoiding the potential arbitrariness and other dangers of unilateral or ad-hoc coalition action, while avoiding likely stalemates in the Council. The model for this kind of action is NATO's action in Kosovo, initiated without explicit authorization by the Security Council

Regional organizations are particularly appealing for decision-making on the use of force. When all of the countries in the region reach a similar conclusion regarding the necessity and efficacy of using force, there is a greater chance that there is a strong case for acting (both as to the seriousness of the danger and the necessity of acting). Of course, there is a danger that the regional organization 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 Commonwealth of Independent States, or to a lesser extent, the role of Nigeria in the Economic Community of West African States. Regional organizations may also suffer from the same problem of asymmetry as the Security Council (consider the problem facing the Organization for Security and Co-operation in Europe in Kosovo, when Russia's interests clearly differed dramatically from most other members of the organization). In some cases, the "problem" state may itself be a member of the organization (as in the case of the OSCE and Russia with respect to Chechnya), which has led some to argue in favor of "consensus minus one" to handle such circumstances. Finally, in some cases there may be no meaningful regional organization.

An alternative to regional groupings is the use of "like-minded" groupings to legitimate decision-making on the use of force. For example, some have suggested that the Community of Democracies might be an appropriate forum for deciding on the use of force.<sup>22</sup> There are two principal arguments in support of this approach. First is the idea that legitimacy of the action stems from the greater legitimacy of each of the individual governments making the decision. 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

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<sup>22</sup> Ivo Daalder and James Lindsay, "An Alliance of Democracies: Our Way or the High Way," *Financial Times* Nov. 6, 2004.

argument is prudential: because democracies are more accountable to their people, who bear the cost in blood and treasure of military action, they are therefore less likely to use force arbitrarily. This is to a considerable extent an empirical judgment. It could be argued that the recent US policy, which advocates an expansive use of force, is inconsistent with this view, but the proposition can only be tested over the long term.

Further along the spectrum are ad-hoc coalitions. Indisputably, the fact that more than one country has agreed on the necessity of using force adds some legitimacy in comparison with the decision of an individual nation, but the effect is limited when the mission defines the coalition, rather than vice versa. Whether there is significant additional legitimacy from a “coalition of the willing” depends in part on who the members are – if the “followers” are heavily dependent on the lead country, such as the United States, there will be questions about whether the agreement on the necessity to act is coerced.

At the far end of the spectrum is unilateral action. The Bush Administration’s National Security Strategy Report caused great controversy in part because it seemed to elevate the legitimacy of unilateral action far beyond what is likely to prove necessary, since in almost every case the United States is likely to get at least some backing from others. The point of this rather extreme articulation appeared to be an effort to establish that the only constraint on the use of force by the United States was domestic law. And even there, the Administration has stoked controversy through a very far reaching interpretation of the Presidential authority to act even without the agreement of Congress, in furtherance of his responsibilities as Commander in Chief.<sup>23</sup>

Where a proposed use of force fails to gain broad-based backing (through the UN Security Council, regional organizations etc.), the legitimacy of the action can be buttressed by linking it to broadly-agreed norms. Thus in Iraq, the United States pointed to Iraq’s repeated violations of Security Council resolutions as a justification for using force, and excused the lack of Council action as institutional failure, rather than a reason to question the legitimacy of the coalition’s action. Similar arguments could be made in connection with the potential use of force against countries such as North Korea or Iran building nuclear weapons capability in violation of their NPT obligations, whether or not the Security Council acts.<sup>24</sup>

In a recent article, Professor Robert Keohane has proposed an interesting approach to impose some accountability on the unilateral use of preventive force –the requirement that there be some form of post hoc accountability to the international community for the

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<sup>23</sup> Of course, the assertion of inherent Presidential authority did not begin with President Bush, and in the most important uses of force post 9/11, the President has sought and received the support of Congress. But in a number of cases the President and his principal legal counsel have advocated a view of the “unitary Executive” which goes beyond assertions of his predecessors.

<sup>24</sup> Former State Department Legal Advisor Abe Sofaer has argued in favor of the idea of what might be called “Charter-based” interventions to justify the use of force when the Council fails to act. Abraham D. Sofaer, On the Necessity of Pre-emption, *Eur J Int Law* 2003 14: 209-226; doi:10.1093/ejil/14.2.209

decision Although the basic strategy is appealing, there is an inherent problem: this approach will tend to reward success rather legitimate justification; when things go well, it may appear that the end justified the means; while the fact that things go badly may not by itself mean that the decision was not reasonable at the time it was taken. There are certain analogies here to both the benefits and costs of a “strict liability” approach to accountability in domestic legal systems

### **PART C: Putting it all together – the use of force in the Twenty First Century**

The preceding discussion suggests that there are four broadly complementary criteria governing the use of force – the nature of the harm to be prevented; the degree to which force is likely to be successful in preventing the harm, taking into account the new dangers that the use of force might unleash; the availability of alternatives and the costs and likely success of their use; and the degree of support (international and domestic) for the decision to act. This can be seen as a four-by-four matrix, where the best case for the use of force is one where the danger is high, the likelihood of success reasonable, the alternatives poor, and the support for the decision broad-based, both at home and abroad. Conversely, the weakest case is one where the danger is speculative or disputed, the outcome of the use of force is uncertain or even potentially counter-productive, non-violent measures that might mitigate the harm have not been tried or considered, and the action is unilateral or supported only by a small, ad-hoc group.

The toughest questions fall in the messy middle, where there are important trade-offs. If the danger is high, there may be a greater justification for unilateral action – this was the Bush Administration’s justification for intervention in Iraq. Where there is broad consensus on the appropriateness of acting, the test of “necessity” is less stringent.

Not surprisingly, these considerations mirror to a considerable degree the well-known criteria underlying just war theory – a conclusion reached by the Secretary General’s High Level Panel, which urged that, in deciding whether to use force, the Security Council should take into account five criteria: seriousness of threat; proper purpose; last resort; proportional means; and balance of consequences.<sup>25</sup>

Even if there is a case for a modest enlargement of the legitimate use of force to respond to new threats, there is an important question of whether the United States should adopt a declaratory policy that goes beyond the traditional limits of the Charter, or whether these cases are so rare that they should be treated as exceptions to a broadly-applicable rule.

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<sup>25</sup> Although it received little attention, the Bush administration appeared to back a similar approach: In a speech just a few days after the release of the 2002 National Security Strategy, then National Security Advisor Condoleezza Rice said “The number of cases in which [the resort to preventive force] can 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.” See Condoleezza Rice, “A Balance of Power that Favors Freedom,” New York: Manhattan Institute, Oct. 1, 2002.

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. If, for example a state believes that harboring terrorists or building clandestine WMD programs may subject it to unilateral attack, it may desist from following that course. The downsides are threefold. First, as the preceding discussion shows, it is difficult to articulate with any specificity when force would be used, given the highly fact-based nature of many of the examples. Second, 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 its credibility will be 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. Finally, a declaratory policy along these lines by the United States would give a green light to others to adopt such a policy. For example, following the issuance of the National Security Strategy Report, a senior Russian general announced that Russia had the authority to go anywhere using force to thwart terrorists. If broadly accepted as a principle, this could dramatically lower the threshold against the use force, leading to more conflict and instability.<sup>26</sup>

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 a 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 adopted as a broad declaratory policy.

## **Conclusion**

It seems clear that despite the highly-polarized debate around the issuance of the 2002 National Security Strategy, followed by preventive war in Iraq, the underlying logic in

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<sup>26</sup> Some argue that any precedent set by the United States (for good or ill) has little or no impact on other states – if the United States chooses to live by more restrictive rules on the use of force it will not constrain others who feel the need to act in their perceived national interest, and if the United States adopts more permissive rules, it may still be possible to constrain others by incentives or costs that the United States can impose as the dominant superpower. The argument in this paper for a carefully limited preventive use of force in this paper does not depend on how this argument is resolved. Even if other countries don't adopt the limiting criteria set forth here, these rules would nonetheless be in our interest. Conversely, if precedent does matter, the United States could live in a world where every other country adopted a similar approach. Although we might not agree in every case with the decisions that others make in applying these principles, they represent a realistic accommodation of legitimate national exigencies with an attempt to move toward widely accepted principles of international law.

support of accepting the carefully-limited use of preventive force in narrow 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 unilateral, preventive force, the arguments in favor of great caution are particularly strong. The threat or use of preventive force is neither a magic bullet nor an anathema, 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, but unwise in elevating this concern to declaratory doctrine. The stronger the institutional mechanisms, and the broader the political support for a given use of force, the more likely it will not only be seen as legitimate, but also that the adverse consequences can be limited. The unilateral use of preventive force therefore should truly be seen as an *in extremis* policy choice.