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## **PRE-EMPTIVE MILITARY ACTION AND THE LEGITIMATE USE OF FORCE**

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**SUMMING UP BY  
FRANÇOIS HEISBOURG**

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# PRE-EMPTIVE MILITARY ACTION AND THE LEGITIMATE USE OF FORCE

## WORKING PAPER No. 11 OF THE EUROPEAN SECURITY FORUM

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## CHAIRMAN'S SUMMING UP

FRANÇOIS HEISBOURG\*

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The eleventh meeting of the European Security Forum focused on what is becoming known as the Bush doctrine. The proceedings were underpinned by three particularly penetrating papers, which should be read at leisure, as a brief summing-up will not suffice to convey their full scope.

Walter Slocombe, in his oral presentation, emphasised the need to handle the prevention/pre-emption debate as distinct from the unilateralism/multilateralism discussion: although they intersect, they are analytically separate. Conversely, he tied the prevention/pre-emption debate to the specific requirements of non-proliferation, while noting that prevention/pre-emption tend to be a limited element of non-proliferation policy given the inherent difficulties of implementation: it is easier to assert a policy of pre-emption than to execute it effectively. Walt also underscored the elements of continuity of the National Security Strategy (NSS) of the United States with US and international law.

Carl Bildt recalled that prevention/pre-emption could be tied to contingencies other than those mentioned by President Bush, such heading off a genocide. In his statements, he also made a distinction which turned out to be one of the key elements of whatever conclusion can be drawn from the discussion: the possible war in Iraq should not be considered as prevention or pre-emption but as an enforcement operation. He also questioned the premise that deterrence doesn't work against a rogue state, a premise on which much of the new US doctrine is based. Like Walter Slocombe, he emphasised the difficulties of implementation: indeed, there was no example where countries had been forcefully deprived of their weapons of mass destruction (WMD) without regime change; the only successes in terms of eliminating WMD had implied regime change (as in South Africa). In other words, pre-emption/prevention without regime change would probably not work and even then, it is possible to wonder about the attitude of a post-Saddam regime in Baghdad towards the renunciation of WMD in the face of persisting efforts by Iran and their possession by Israel. Carl recalled that one of the favourite examples of the fans of pre-emption/prevention, i.e. the Cuban missile crisis, had not witnessed a forceful pre-emptive strike. This option had deliberately been discarded at the time. In conclusion, he underlined the danger of the pre-emption rhetoric which could be seen as a licence by others to do the same – or to go nuclear.

Vladimir Nikitin reminded us, *inter alia*, of the Kosovo precedent: this was presented at the time as an operation destined to prevent human rights violations, regional destabilisation, etc..., not requiring a specific mandate legitimising the use of force. But Kosovo also demonstrated the importance of regional organisations in legitimising such forceful operations, with NATO in Kosovo (1999), and the Caribbean Community (CARICOM) in Grenada (1983). Vladimir also underlined the Russian reluctance to “doctrinalise” prevention/pre-emption, with Moscow preferring to use it *de facto* without formalising it since formalisation could reduce strategic freedom of manoeuvre.

Gareth Evans of the International Crisis Group (ICG), who had been asked to respond to the three paper-givers, kicked off by confirming the Chairman's suggestion that greater care needed to be made in distinguishing between pre-emption (with its element of time pressure, of imminence) and prevention (with the Osirak bombing as a case of prevention, and the Six-

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Day War as an example of pre-emption). He also noted that the anticipatory use of force – a notion covering both prevention and pre-emption – does not necessarily imply imminence, notably when the risk of genocide is involved. He concurred with Slocombe's and Bildt's analysis of the difficulties of using force against WMD successfully while stopping short of regime change. As head of the International Crisis Group, he underscored the importance of the notion of consent as a legitimiser. Consent figures in the work of the ICG on the legitimisation of the use of force on the basis of “just war” principles (although any explicit reference to St. Thomas of Aquinas is avoided, out of deference to Muslim sensitivity).

In the general debate, the Israeli attack against the Osirak reactor in June 1981 was discussed. The view was widely expressed that although the attack may have had the perverse effect of driving the Iraqi nuclear programme deeper underground, it did lead to a substantial gain in the time available before Iraq could go nuclear. Prevention was also mentioned by a Russian participant, who indicated that Russian officials had considered preventive action against the Taliban regime in May 2000. He confirmed the Russian aversion towards making a principle of what is a strategic option for use in the near-abroad.

Carl Bildt made the point that pre-emption (tied as it is to imminent threat in international law) should not be considered as being somehow more readily acceptable than prevention: there are all too many wars in which the first country to open fire has claimed a right to pre-emption.

Anticipatory action thus requires rules, and calls were made for its codification. In this respect, humanitarian intervention was yet again cited as an area where anticipatory action could be called for.

On the question of deterrence, the point was made by a number of participants that this continued to be viable vis-à-vis state actors, and that there was a questionable trend in the US of presenting deterrence, if not as a dirty word, but at least as a poor second best against the Soviet threat. This drew the caveat that deterrence can deter nuclear attacks, but probably not proliferation; indeed, it was highly unlikely that deterrence would play against the sale by North Korea of its WMD wares on the international market. Furthermore, in the case of North Korea, it isn't only, or maybe not even primarily, Pyongyang's nuclear capability that inhibits us from acting forcefully, but the huge conventional firepower threatening the Seoul metropolitan area.

Indeed, in some ways, the state of reflection for criteria (e.g. in the ICG) on the use of anticipatory force in humanitarian contingencies seemed to be more advanced than its application to non-proliferation, notably in current US thinking.

Indeed, on the reactions of doctrines based on prevention and pre-emption outside of the US, the point was made by a European participant that in the EU, the real contention vis-à-vis the NSS was not the mention of prevention, but the fact that it was considered as the basis for a national, not a multilateral strategy.

The use of force for enforcement of international obligations was also discussed, with reference being made to the illegal reoccupation of the Rhineland by the Wehrmacht in 1935. This was a contingency in which the use of force could have paid off handsomely. As the discussion went into historical analogies – with Walter Slocombe drawing a parallel between the Rhineland case and the Iraqi situation – a reminder was made by a participant that it is fine to have criteria for legitimising a military operation; but that one still had to ask the question: “Is it wise?”

In his concluding remarks, V. Nikitin indicated that there was no clear confirmation in history that the preventive/pre-emptive use of force was the better option, citing in this regard the counterfactual question: What if Kennedy had retained the strike option against Cuba?

C. Bildt for his part, harking back to the Guns of August 1914, emphasised the need to be careful about making pre-emption a popular concept. Enforcement, including in the Iraqi case, is a more fruitful approach. He did not discard the option of prevention, with the building up of a international regime.

W. Slocombe reaffirmed the link between the use of force and WMD proliferation. The non-proliferation regime is in crisis and will collapse if we do not resolve the issue of enforcement.

G. Evans reminded us that the credibility of the UN system was the strongest case that could be made for war against Iraq – but that is a matter for the UN system to decide upon, not a single member. The question then becomes: What is the evidence, and how big is the threat?

# PRE-EMPTIVE MILITARY ACTION AND THE LEGITIMACY OF THE USE OF FORCE: A EUROPEAN PERSPECTIVE

CARL BILDT\*

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The present debate about the legitimacy of pre-emptive military action was triggered by the new National Security Strategy of the United States and it has been fuelled by the discussion concerning the legitimacy of taking armed action against Iraq. Thus, I will focus this paper primarily on the questions of the pre-emptive use of military force that were brought to the forefront of the international debate through this.<sup>1</sup>

But it can be debated whether Iraq should really be part of this debate. It can be argued that the present dispute over Iraq is more a case of securing the implementation of resolutions adopted by the UN Security Council under Chapter 7 of the UN Treaty.

UN Security Resolution 1441 – adopted unanimously – decided that “Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687”. It also recalled, that “in its resolution 687 the Council declared that a ceasefire would be based on the acceptance by Iraq on the provisions of that resolution, including the obligations on Iraq contained therein.” In spite of this, Iraq was given “a final opportunity” to comply, and the Council recalled that the country “will face serious consequences as a result of its continued violations of its obligations.”

These are tough words. The first serious assessments of whether the country has taken this “last chance” or not will be done when UNMOVIC and IAEA reports to the Security Council at the end of this month. Since the resolutions that Iraq could then be declared to be in additional material breach of are resolutions under Chapter 7 of the Charter of the UN, it cannot be described as inappropriate if also armed action is then considered to rectify the situation.

Although rhetoric has often sounded different, it remains a fact that in the case of Iraq, the United States so far has acted through and within the framework of the United Nations. It has certainly presented its case with considerable assertiveness, not shying away from saying that the issue is a test for the UN as much as it is for Iraq, but there is nothing that prevents other nations from stating the views they might have with equal assertiveness.

From the European point of view, there are strong arguments in favour of securing the continued handling of the Iraq issue within the framework of the United Nations. With four major EU members on the Security Council – Germany and Spain in addition to the UK and France – there should be the possibility of establishing a European consensus at the least on this important point. But it should be recognised that keeping the issue within the United Nations system requires accommodating the very strong views and interests expressed by the United States.

European inclination to support an approach through multilateral institutions like the UN is based on the recognition that neither the European Union, nor any other international actor, has the broad-based power or the strategic patience to sort out major and difficult international issues all by itself. Thus, an amount of coalition-building is always called for,

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\* UN Special Envoy for the Balkans and former Prime Minister of Sweden.

<sup>1</sup> “The National Security Strategy of the United States”, September 2002.

and the broader the international consensus that can be established, the greater are the possibilities of bringing the endeavour in question to a successful conclusion.<sup>2</sup>

From the US point of view this is sometimes less obvious. With unrivalled military power, and increased relative economic strength, the temptation to think that one can sort out all issues only with US power is strong. Multilateralism and coalition-building can be portrayed as fettering the power of the US in chains and preventing it from taking the action needed to reorder the world in accordance with its values. If the aim is set, coalitions are welcome to assist in their execution. But it's the purpose that defines the coalition – not the other way around.

Although Europeans in most cases are in basic sympathy with the motives driving US actions, there is a fear that if the tentative international regime that exists is jeopardised, the resulting uncertainty might also be utilised by powers and for purposes with which most Europeans would feel far less sympathy. The short-term advantages of breaking the established order could then rapidly be outweighed by the long-term disorder resulting in other areas and on other issues.

Prior to September 11<sup>th</sup> and the renewed attention given to the situation in Iraq, issues of state sovereignty and pre-emptive military action were debated primarily from other points of view.

The concept of state sovereignty is generally seen to have been established as the basis of the international order by the Treaty of Westphalia. Orderly states were to be the building blocks of the international order. The United Nations isn't really built on nations coming together, but on states doing it. State sovereignty remains the most important building block of the modern international system.

But increasingly state sovereignty had come to be questioned. The debate prior to September 11<sup>th</sup> centred almost exclusively on the question of when state sovereignty should be set aside in the interest of protecting human rights, preventing humanitarian disasters or, at worst, stopping or preventing genocide. In the wake of the non-intervention in Rwanda and the intervention in Kosovo, a large debate started on which principles to apply and the consequences this would have for the international system as a whole.

This debate had hardly reached any conclusions when the events of September 11<sup>th</sup> transformed the international scene, and subsequently the issues associated with WMD and terrorism have overtaken the debate.

The action against the non-recognised Taliban regime of Afghanistan was an example of the right of self-defence under Article 51 of the Charter of the United Nations. Under the relevant Security Council resolutions, there seems to be room for military action also against other states if these are clearly supporting or protecting the structures of terrorism responsible for the September 11<sup>th</sup> attack.

No European government has been able to detect any sign of any clear or even likely link between Iraq and the al-Qaeda terrorist networks. During recent months, occasional US attempts to do so have become increasingly feeble. The link between the issues of terrorism post-September 11<sup>th</sup> and Iraq is thus a highly indirect one.

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<sup>2</sup> In the conclusions of the Copenhagen European Council, the declaration on Iraq stressed that “the role of the Security Council in maintaining peace and security must be respected”. While an urge to respect the resolutions of the SC would be aimed at Baghdad, it is difficult to read an urge to respect the role of the SC as not aimed at Washington.

In more general terms, the link between international terrorism and WMD is described by the United States as strong, and it is this that has led to the new prominence given the possibility of pre-emptive military action. In the words of the National Security Strategy:

It has taken almost a decade for us to comprehend the true nature of the threat. Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have done in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first.

Each of the three arguments advanced in favour of this position can be debated.

Although a terrorist organisation like al-Qaeda can hardly be dealt with primarily through a classical posture of deterrence, there is far less to support the notion that so-called rogue states can not be deterred to a significant degree. Even the regimes of the so-called axis of evil have been deterred from pursuing policies of overt external aggression.

In terms of the immediacy of these threats, there is no doubting this when it comes to the threat of international terrorism, nor is there any reason to doubt that these organisations are actively seeking different weapons of mass destruction. Whether there is an immediacy to threats coming from state actors is more doubtful, and again the issue of whether deterrence works or doesn't needs to be addressed.

As to the magnitude of the harm that could be done by these weapons, there is no doubting the potential of WMD. But the only country capable of destroying most of the United States within 30 minutes remains the Russian Federation. It will take decades until even China will acquire a nuclear arsenal with the destructive power and global reach of even the much reduced Strategic Rocket Forces of the Russian Federation of today. As for chemical weapons, their potential for mass destruction remains more limited. Biological weapons have, on the other hand, a potential for mass terror that should in no way be discounted.

Thus, one can see how the doctrine of pre-emption – “We cannot let our enemies strike first” – has developed, although a discussion on the basis for it reveals that the arguments are not always as clear-cut as they are presented.

The real difficulties start with how such a doctrine can be implemented in the messy reality of handling the day-to-day challenges of an evolving international situation. Here, it is instructive to look at the different occasions when the issue has been confronted in the past.

The Cuban missile crisis illustrated most of the issues of this debate already in 1962. At the time, the US Joint Chiefs of Staff advocated a policy of pre-emption both when it came to dealing with the concrete issue of the deployment of Soviet MMRBs and IRBMs in Cuba and, particularly in the case of the Strategic Air Command, overall in its approach versus the Soviet Union and its evolving ICBM force. But the conflict was defused by a more graduated use of a blockade in combination with direct as well as back-channel diplomacy. While “regime change” was certainly also a goal of US policy at the time, it had to be downgraded in order to achieve the withdrawal of the Soviet nuclear missiles.<sup>3</sup>

It is highly likely that serious consideration has also been given in the Soviet Union at different times to the possibility of pre-emptive military strikes in order to neutralise perceived WMD threats. The Soviet leadership had every reason to view the appearance of a

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<sup>3</sup> The probably most comprehensive description of the debates over these issues then is to be found in Lawrence Freedman's *Kennedy's Wars – Berlin, Cuba, Laos and Vietnam*, Oxford, 2000.



Chinese nuclear force with deep apprehension. After having failed to block it by withholding technology and assistance in different ways, it is entirely logical that the option of pre-emptive military strikes against Chinese nuclear facilities was seriously studied.

In more recent times, the US seriously studied the possibility of pre-emptive military strikes against North Korea in 1993-1994, in order to deprive the Pyongyang regime of its possibilities of developing also as a nuclear power.

In all of these cases, the final decision not to use pre-emptive military power was in all probability motivated by the extreme difficulty of being certain that a military strike would neutralise all or the overwhelming parts of the nuclear warheads and the corresponding weapon systems. In the Cuban case, plans revealed that there was a high likelihood that some missiles could not be hit during the first wave of strikes, and that there was then the possibility that they could be fired before they could be located and hit by a second wave of strikes. In the Chinese and North Korean cases, the target set must have included not only key parts of the different production facilities for nuclear weapons, but also missile facilities and bomber bases, and must have taken account of the risks that nuclear warheads had been dispersed in different ways that were extremely difficult to detect.

The only case in which a pre-emptive military strike has been undertaken in order to deprive a state of its WMD capability is the June 1981 Israeli attack on the Osiraq nuclear reactor in Iraq. While undoubtedly a tactical success since the reactor was destroyed, the strategic effects of the strike were more doubtful.<sup>4</sup>

The Iraqi nuclear programme was not stopped, but instead re-directed in ways that brought it very close to producing nuclear weapons without being detected either by different intelligence agencies or by international monitoring arrangements. Before the Gulf War, two possible nuclear weapons-related facilities had been detected in Iraq. After the war, UNSCOM found no less than 21 different nuclear weapons-related facilities, with the air campaign during the Gulf War having had only a very limited effect on them. The Osiraq attack might have delayed the Iraqi nuclear weapons programme, but it certainly did not deter Iraq from continuing its nuclear programmes.

Thus, a look at the practical experience with pre-emptive military strikes against nuclear weapons capabilities of different sorts illustrates the difficulties with the concept. In most cases, serious consideration of the option has led to the conclusion that it could not be carried out with a reasonable certainty of success. In the one case where it was carried out, it proved to be a tactical success but with strategic effects that were either non-existent or counterproductive.

The present situation with both Iraq and North Korea also illustrated these difficulties.

When the old UNSCOM inspection regime in Iraq was given up in 1998, it was said that its aims could probably be achieved as well by a combination of air surveillance and air strikes. There seemed to be the belief that surveillance systems could produce a reasonably accurate picture of on-going activities, and that the facilities associated with these could then be "revisited" by air power in the way that happened at repeated occasions during the 1990s.

Clearly, this has not proved to be the case. There are numerous press stories circulating in the US on different ways in which Iraqi WMD activities could have been concealed, ranging from mobile vans to floating barges and vast underground complexes. If these stories don't show

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<sup>4</sup> It might be noted that the UN Security Council – including the US – condemned this attack as "a clear violation of the Charter of the United Nations and the norms of international conduct."

anything else, they at the least illustrate the great uncertainty, the difficulty of actually tracking activities like these and the near-impossibility of dealing with them through selective and pre-emptive military strikes.

In the case of North Korea, the difficulties are even more pronounced. While the nuclear facilities that have been under IAEA monitoring are well known, there are indications that facilities associated with the efforts to get highly enriched uranium are far more concealed and protected. In addition, there is the near-impossibility of knowing with any certainty the location of the nuclear weapons that North Korea might already have built. The large number of weapon systems that could carry any of these warheads adds enormously to the complexity of the issue.

My discussion in these cases relates only to the question of nuclear weapons. Of the weapons of mass destruction, these are the ones which are the by far most difficult to develop, produce and deploy. Thus, they are the ones that should be the easiest to detect, and thus to deal with through selective pre-emptive military strikes. But with the nearly insurmountable difficulties that are there when it comes to nuclear weapons, any serious discussion on the possibility of dealing effectively with chemical or bacteriological weapons capabilities through selective military strikes becomes far more difficult.<sup>5</sup>

It is thus difficult to avoid the conclusion that any preventive or pre-emptive attack trying to deal with a perceived WMD programme in any country in all likelihood will have to be in the form of a military attack aimed at first regime destruction and then the setting up of a new regime that can give sufficient guarantees that remaining WMD capabilities will not be used to restart programmes. Anything less than this is unlikely to result in more than just a repetition of the lessons of the Osiraq attack.

Experience suggests that a regime determined to pursue a WMD programme is extremely difficult to deflect from that course purely through different measures of coercion – even when those instruments are available and possible to use. In fact, there are no known cases of any country abstaining from WMD efforts of any sort because of different instruments of coercion being applied against them.

In the world today, we are faced with a situation in which different WMD are available to a growing number of states. According to the US State Department, 12 nations at present have nuclear weapons programmes, 13 have biological weapons programs, 16 programmes for chemical weapons and 28 that have more or less credible capabilities in terms of ballistic missiles. No one could even contemplate dealing with all of them by military means.

Thus, apart from the difficulties with pre-emptive military actions to deal with real or perceived WMD threats in individual cases, the sheer magnitude of the problem that we face when dealing with WMD proliferation makes it impossible to consider pre-emptive military actions as anything more than something that will only be considered in extreme cases.

In spite of the perception created, this is likely to be the de facto policy of the United States as well. During more than half a century of struggling with the issue, in the concrete cases the United States has never found the arguments for such a course of action more compelling than the arguments against. The urgency of the war against terrorism is unlikely, in the concrete cases, to have fundamentally altered the balance between the arguments.

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<sup>5</sup> “Many CW and BW production capabilities are hidden in plants that are virtually indistinguishable from genuine commercial facilities. And the technology behind CW and BW are spreading.” Testimony by George Tenet, the US Director for Central Intelligence, before the Senate Select Committee on Intelligence, 6 February 2002.

This notwithstanding, there is reason to be concerned with the recent upsurge in rhetoric concerning the possibility of pre-emptive military action to deal with WMD or other issues. First, there is a risk that this will be seen as a licence by other powers to take some such action, and second, there is the risk that states that feel threatened by action of this kind will start acting in destabilising ways.

North Korea illustrates some of these dangers. And the recent swing in US policy from a rhetoric that talked about the possibility of war in both Iraq and Korea to a posture that emphasises diplomacy, also through the UN system, and opens for direct talks with Pyongyang should probably be seen as a result of the recognition of these dangers.

Iran is and will remain a major policy challenge in these regards. All indications point to ambitions across the entire WMD range in combination with a ballistic missile programme.<sup>6 7</sup> Here, it seems unlikely that anyone will seriously contemplate pre-emptive military actions other than in very extreme situations. But the perceived possibility of such action being contemplated against Iran obviously risks complicating efforts to facilitate a dialogue aiming both at facilitating change inside the country and resolving issues like Iranian support for terrorism. Thus, the rhetoric of pre-emption runs the risk of becoming counterproductive across a broader range of issues.

The situation between India and Pakistan is a particular case for concern. Here, the rhetoric of pre-emption risks becoming profoundly dangerous. If there is a perception in Islamabad that New Delhi believes that there is an international climate that tends towards tolerating pre-emptive strikes against nuclear facilities, the threshold against Pakistan using its nuclear weapons against India during a crisis or confrontation might be lowered substantially. Thus, rhetoric aimed at reducing the risk of WMD being used might in this part of the world end up increasing the likelihood of this actually happening.

This discussion on the possibility of using pre-emptive military action in order to deal with the threat of proliferation of WMD thus points at the severe limitations, as well as dangers, of such an approach except in isolated and extreme cases.

Although it would be foolish to completely rule out those cases, it must be recognised that pre-emptive military action that does not aim at “regime change” risks being of little long-term value in such cases. And – although this leads into another and no less important debate – it should be recognised that a strategy of “regime change” in order to be successful needs to be able to execute not only the first phase in the form of “regime destruction”, but to be able to master the more complex task of “regime creation” that has to follow.

To this might in individual cases also be added other factors. It does, for example, not seem implausible that a post-Saddam Hussein regime in Baghdad, while being ready to honour its commitments to the UN to abstain from WMD capabilities, might seek to link this to more concerted international actions against the existing nuclear weapons capabilities of Israel as

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<sup>6</sup> In issue No. 1 of *Russia in Global Affairs*, Major General Vladimir Dvorkin, Head of Research at the Center for Strategic Nuclear Forces, writes on the ambitions of Iran: “In Iran, a missile armament program has been in the process of implementation since the early 1980s. Currently, the main emphasis is on setting up an infrastructure to produce medium-range ballistic missiles. The aim is to build up a most powerful missile capability by 2010-2015. It is an aim that is facilitated also by Iran's cooperation with China and North Korea. The capacity of the assembly line that turns out Shahab-3 missiles (range up to 1,000 km) may reach 100 rockets a year.”

<sup>7</sup> In its open assessment to the US Senate last February, George Tenet described Iran's efforts and programmes in far more concrete and worried terms than he used for Iraq: “Iran remains a serious concern because of its across-the-board pursuit of WMD and missile capabilities. Tehran may be able to indigenously produce enough fissile material for a nuclear weapon by late this decade.”

well as the WMD ambitions of Iran. Issues of security policy will always have to be addressed in a regional perspective.

With these limitations and difficulties thus being obvious, the main thrust of the necessary policies to counter not only the threat of terrorism but also the spread of the weapons of mass destruction should focus on the building of as strong and as broad an international counter-proliferation legal and political regime as possible. It's when there is a law that it also becomes clear who is an outlaw.

This is essential in order to be able to take action, of whatever sort that might be, in individual cases, and assures the broadest possible support for such action. As both Iraq and North Korea illustrate, there is very little that in fact can be done if there is not a more or less broad international support. The broad international networks of cooperation that such an international regime constitutes is also the only realistic way of dealing with the risks of WMD technologies being spread also to terrorist organisations by theft, smuggling and different trans-national criminal networks.

Thus, it seems appropriate to focus attention and activity on the other parts of the strategy for dealing with the threat of WMD outlined in the National Security Strategy:

We will enhance diplomacy, arms control, multilateral export controls, and threat reduction assistance that impedes states and terrorists seeking WMD, and when necessary, interdict enabling technologies and materials. We will continue to build coalitions to support these efforts, encouraging their increased political and financial support for non-proliferation and threat reduction programs.

From the European point of view, an appropriate reaction would seem to be to seek to augment support for policies along those lines, thus reducing the likelihood that we will be confronted with the isolated and extreme cases in which the question of the pre-emptive use of military force will be raised, and strengthening the overall international regime against WMD.

With there being no disagreements in principle between the countries of the European Union on this, one should discuss if there are institutional or other steps that need to be taken to strengthen the common European capabilities in this regard. Such a policy approach is likely to have a more significant long-term impact on reducing the WMD threat than any discussion on pre-emptive military options.

Prior to September 11<sup>th</sup>, the discussion concerning intervention in other states centred on the issues mentioned initially, triggered by most recently by the 1999 NATO air campaign against Yugoslavia over the issue of Kosovo, but fuelled by the perceived double standard of the intervention against the relatively limited fighting in Kosovo pre-intervention versus the non-intervention against the genocide in Rwanda.<sup>8</sup>

This debate will come back. There is also an important connection between the issues of humanitarian intervention, the increasing problem of how to deal with failed states, the enormous challenges in any effort at state building,<sup>9</sup> the tendency of terrorist organisations to

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<sup>8</sup> An important contribution to this debate is the report of the Canadian-sponsored International Commission on Intervention and State Sovereignty, "The Responsibility to Protect". For a more specific discussion on the different issues raised by the Kosovo intervention, see "Kosovo and the Challenge of Humanitarian Intervention" by the UN University in Tokyo.

<sup>9</sup> As I have argued elsewhere, the term nation building, which appears often in the US debate, isn't really appropriate. It's more relevant to speak about state buildings, since what we are trying to help building in the relevant cases are state structures rather than nations. We ought, accordingly, to talk about state building rather

seek “safe havens” or training grounds in certain areas and the need to deal with the spread of certain WMD capabilities.

Here, the European Union should seek to develop both its policies and its instruments. Often stressing the more all-encompassing nature of its so-called soft powers versus the dominating hard powers of the United States, it needs to demonstrate that these powers can indeed be applied to prevent situations from emerging that will call for pre-emptive hard interventions.

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than nation building, although we should recognise that the distinction between state and nations that is obvious to most Europeans is far less clear-cut from a US point of view. Nevertheless, the term state building more appropriately described what it is really about.

# PRE-EMPTIVE MILITARY ACTION AND THE LEGITIMATE USE OF FORCE: A RUSSIAN VIEW

ALEXANDER I. NIKITIN\*

The approach of the Russian political establishment towards legitimate use of military force has significantly changed during the last decade after the creation of the new independent states on the ruins of the Soviet Union. In Soviet times, while supporting international law and United Nations rhetorically, Communist rulers considered ideological justifications of the use of “revolutionary” or “socialist” force as a legitimate excuse for violating some principles of international law.

A new Russia, obviously a weaker power than the former Soviet Union, tends much more to stress and to use (diplomatically) norms of international law and procedures of democratic decision-making in the international community. What Moscow formerly obtained through bilateral “balance of power” talks with Washington, it tries now to reach in many cases through using the legitimising/de-legitimising mechanism of UN Security Council resolutions, the right of “veto”, and the requirement of strict observance of international legal procedures. This overlay of the “legitimacy” issue could be seen in Moscow's stand regarding the 1999 bombings of Belgrade by NATO in the absence of a UN mandate and in current debates around the use of force against Iraq.

The Russian National Security Concept (its current form reformulated and adopted in 2000) names as one of the major sources of external threats to Russian national security “attempts of certain states and inter-state alliances to diminish the role of existing mechanisms of international security, first of all of the United Nations and OSCE”. By “diminishing” the role of international mechanisms, the doctrine means attempts to make crucial forceful actions by the US or NATO on the basis of their decisions, circumventing or ignoring the absence of consensus in international organisations.

More than that: the official National Security Concept (formulated soon after the 1999 crisis in Russian-Western relations caused by the use of force against Yugoslavia) openly proclaims as a threat to Russian security in military sphere “NATO's practice of use of (military) force outside the zone of responsibility of the alliance and without sanction of the United Nations Security Council”. Formally that means that any use of force on behalf of the international community or its part in cases of absence of consensus at the UN SC will be automatically considered by Russia as a military threat.

At the same time, while the notion of “pre-emptive military actions” is absent in both the National Security Concept and the Military Doctrine of the Russian Federation, it could be found in both documents “between the lines”. The National Security Concept, for example, allows “realisation of operational and long-term measures aimed at *prevention and neutralisation* (author's emphasis) of internal and external threats” and in other context speaks of the necessity for the Russian Federation in the name of national security interests “to react to crisis situation in as early as possible stage”. Criticism of “out-of-area operations” is somewhat balanced by justification of “necessity of military presence of Russia in some strategically important regions of the world”, including deployment of “limited military contingents (military bases, naval forces)...”

It is worth mentioning that far before the September 11th events and the crises over Iraqi and North Korean WMD capabilities, the Russian National Security Concept proclaimed

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“commonality of interests of Russia and other states...on undertaking counter-actions against proliferation of weapons of mass destruction...and fight against international terrorism...”

During the past decade, Russia started four military operations abroad of involvement into regional and local conflicts in the absence of UN Security Council mandates: namely, operations of Russian military interference in South Ossetia/Georgia and in Transdnestria/Moldova (both in 1992) were started on the legal basis of bilateral inter-state agreements with the Presidents of Georgia and Moldova, and operations in Abkhazia/Georgia (started in 1994) and in Tajikistan (1992-2000) were undertaken on the basis of mandates by the CIS (Commonwealth of Independent States), but not the UN. In all four cases, there was sometimes silent, sometimes formalised “blessing” from the UN (and later even small groups of UN or OSCE observers were stationed in areas of mentioned conflicts to “supervise” Russian operations).

Formally Moscow insisted that in all four cases operations were undertaken with the consent of the legitimate government of the state on whose territory a conflict occurred, and thus, the use of force went under Chapter VI (so called “soft peacekeeping”) or Chapter VIII (use of force by regional organisations) of the UN Charter, and not under Chapter VII, which would require a UN SC resolution as a “must”.

Legally this “juggling” of UN Charter chapters is really important, because, indeed, if use of military force is undertaken by the international community against the will of the legitimate rulers of a state in conflict, then it necessarily requires the consent of the UN Security Council and a formal UN mandate for the use and limits of use of force. Moscow stresses that this has been and remains a principal difference between the use of force by Russia in Georgia, Tajikistan and Moldova on the one hand (where request for foreign involvement from the state side of local conflict was present), and, on the other hand, use of force by the Western community against Milosevic, the Taliban or Hussein, where obviously state leaders of conflict areas opposed international involvement, and thus such involvement has become subject to strict coordination through the UN Security Council.

Russia is not at all “foreign” to the concept and practice of the use of national or international military force outside its own borders. In recent years an average of 10,000 to 12,000 Russian military personnel have been stationed and acting outside Russia. Figures varied in different years, but there were rotating contingents of about 1,500 Russian peacekeepers in Bosnia and about same quantity later in Kosovo; in Tajikistan above 7,000 officers and soldiers of the Russian MOD plus up to 10,000 Russian border-guards on the Tajik-Afghan and Tajik-Chinese borders, about 1,700 Russian peacekeepers under CIS mandate in Abkhazia, and between 500 and 1,000 Russian military in South Ossetia and Transdnestria.

While the military presence in Georgia and Moldova was reduced after 1999-2000, the geography of military presence expanded: in 2002, some Russian contingents were relocated from Georgia to Armenia, and the creation of the Central Asian Rapid Deployment Forces (under the Organization of Collective Security Treaty uniting six countries) expanded the presence and military exercises of the Russian military from Tajikistan to neighbouring Kyrgyzstan.

It is worth remembering that Russia opposed the use of military force by NATO against Yugoslavia only during that period of 11 weeks when the UN SC mandate was absent. After such mandate was finally coordinated and adopted, the Russian military hurried “to jump” into the NATO-led operation which had become a UN action (Russian troopers headed by Gen. Zavarzin rushed at night to capture the airport of Pristina and thus to obtain a role and sector of responsibility within operation).

Already in Bosnia from 1996 and later in Kosovo from summer of 1999 the level of cooperation and inter-operability between Russian and Western (mostly NATO) peacekeepers was positive and high. Russia not only supported the practice of creating *ad-hoc* military coalitions for dealing with international crises, but tried to practically participate in most of them (one recent manifestations of that tendency was its sending a symbolic contingent of Russian military to support international operations in Sierra-Leone).

Russia's most significant practical role in recent international military campaigns was played in 2001-2002 in the course of operations against the Taliban regime by providing serious military support (armaments, instructors) to the Northern Alliance of Afghanistan and by cooperating with the US military (reconnaissance data, air-corridors, etc.) in the framework of the anti-terrorist coalition. But it should be clearly understood that the short "brotherhood in arms" between Russia and the US regarding the overthrow of the Taliban was tactical rather than strategic. It was not (or at least not only) caused and cemented by trafficking values and principles of international interference, but rather by a coincidence of geostrategic pragmatic interests of two powers regarding the rogue regime in Afghanistan. Russia and CIS states were seriously concerned about endless insurgence of armed groupings, arms and drugs from Afghanistan to Central Asia, and they had own pragmatic reasons to support US actions. Such a unanimity would be much more difficult to repeat in cases of potential forceful actions against Iraq (or, even more so, against Iran or North Korea).

The very notion of a "pre-emptive strike" was in past decades widely used and debated in nuclear doctrines and policy. But in that context pre-emption had a much more clear-cut sense. Nuclear massive strike, or mechanical preparations for such a strike are clearly located in space and time, and could be clearly attributed to somebody's state policy and state decisions. If pre-emption today is "replanted" to general political strategy of use of conventional force against growing external threats, then international community is dealing with the much more amorphous situation of "strike against tendency" rather than "strike against clear-cut dangerous actions". And tendency is always hard to estimate, for there is much room for subjectivity and hidden side-interests.

The war against the Taliban was in a sense a pre-emptive action. And the issue was already then raised: In which format should proof be collected and produced to the international community regarding the "guilt" of a certain political regime? In principle such proof should be in time and in all clearness presented to the international community embodied in the UN and its Security Council, but still that would mean a decision "behind closed doors", the decision subjected to various lobbying and attached side-interests of powers, especially of the "big Five".

A more democratic procedure would require governments, parliaments and, preferably, the general public of major (if not all) states to become acquainted with information that qualifies the "death penalty" for certain political regimes and for a significant part of the population with it (Hussein wouldn't die alone).

Even in the case of the war against the Taliban, that was not done. Revealing limited information regarding (by that time not fully clear) connections between terrorist attacks in the US and the political regime in Afghanistan to heads of states of big powers (including the Russian President) was done by US authorities "under big secret", behind closed doors, without the intention to make the information subject to debate in parliaments and at the very last moment before already prepared and inevitable US military action. This cannot be considered the appropriate way of legitimising the "death penalty".



The mechanism of legitimising decisions regarding Iraq (through IAEA international inspections with further presentation of findings to the UN SC and followed by the UN resolution) seems much more formally appropriate from the point of view of most representatives of the Russian political elite. At the same time there are voices in the Russian (as well as Western European) politico-academic community that a UN mandate as such is very initial and very formal. The UN resolution fixes a temporal (sometimes tactical) consensus of major powers at certain concrete moment of international crisis, while the very political situation and the situation in the war theatre changes constantly.

An analysis of UN peace operations in conflict areas shows that in too many cases a UN mandate (as well as mandates of regional organisations) serves as a *carte blanche*, justifying the beginning of an operation but lagging far behind events in the course of it. The routine UN practice of renewing mandates for military operations every six months is obviously too slow for mobile campaigns like another “Desert Storm” or the Afghan war. But attempts to diplomatically coordinate a new consensus among the big powers every week in the course of dynamic operations will not work for numerous reasons as well. In 1993, for example, when the CSCE for the first (and last) time in its history coordinated a mandate for CSCE peacekeeping operations for Nagorny Karabakh, consensus among mandating powers collapsed before troops and finances for operations were collected. As a result, elements of *carte blanche* are always present in mandates for UN or coalitions operations, and the less concrete and more “empty” the mandate sounds, the easier it is to reach a consensus on it.

The issue of “pre-emptive use of force” on behalf of the international community requires clarification of *who* exactly uses the force and *on whose behalf* (legally and politically). One of the international tendencies of the 1980s and 1990s was a shift from UN interference in crises towards *interference by regional interstate organisations* on the basis of their own decisions.

In 1983, the Organisation of American States (OAS) mandated military interference in Grenada (in the absence of consensus in the UN).

The Organisation of African Unity (OAU) and ECOWAS on the African continent mandated and practically undertook several regional collective military interferences in crises areas (including, for example, large-scale joint military operations of military contingents from seven African states on the territory of the Central African Republic).

In Eurasia, the Commonwealth of Independent States (CIS), as mentioned above, mandated and practically undertook the use of military force on behalf of regional organisation in Tajikistan and Abkhazia/Georgia (the Tajik operation lasted for eight years with multiple renewed mandates, the Abkhaz operation is still not finished after eight years).

In East Asia, the ARF (Asian Regional Forum – the conflict-resolution “arm” of ASEAN) initiated sanctions against Vietnam when it was in conflict with Campuchea.

In Europe, the CSCE/OSCE created a precedent of mandating regionally abortive military operations for Nagorny Karabakh, and NATO (while formally denying status of regional security organisation under UN Charter Chapter VIII) mandated and performed the use of force against Belgrade.

A little bit earlier, the Western European Union (WEU), separate from the EU at that time still adopted its doctrine of involvement in conflict resolution which stated that the WEU could interfere in conflicts using military force not only by UN decision, but on the basis of its own decision of group of participating states.

Such a tendency of “regionalisation” of the use of collective force was not opposed by the UN. On the contrary, the United Nations, over-burdened with unfinished operations in numerous conflict areas applied in the 1990s to regional organizations and *ad hoc* coalitions of states to volunteer to deal with regional and local crises and conflicts.

The last decade also de facto legitimized the practice of *delegating* the authority to use force on behalf of the international community to *ad hoc* coalitions of states or strong organisations. The decade of the 1990s started with the Desert Storm operation where the UN mandate delegated the lead and command of operations against Iraq to the US military machine. This culminated in delegating the leading authority in the Bosnian operation to NATO (IFOR/SFOR) after the collapse of the UN-led UNPROFOR, and ended with operations in East Timor, where the Australian military got a UN request and blessing for doing the main job on the conflict site.

Though in each such case, wide coalitions of 20- to 30-plus states were formally created, obviously, the chief “contracted” power exerted enormous influence (militarily and politically) on the course, direction and outcome of operation.

Both visible tendencies (regionalisation of conflict resolution and delegation of use of real force authority to available strong national or regional military machines and coalitions) mean further distortion of the “theoretically neutral” United Nations model of interference. In fact, what is now done in the name of the world community, very rarely represents the world community in an operational sense. And in the case of hypothetical “pre-emptive” strikes, such tendencies create even more concerns. Instead of democratisation of decision-making regarding such a thin matter as international interference into crises, in reality we observe opposite tendencies: a narrowing of the circle of actual decision-makers, and narrowing (and hierarchisation) of the circle of “executors” of the “will of the international community”.

Currently three new international “actors” have been formed in the sphere of international use of force. Firstly, the European Union is finishing the creation of a Rapid Reaction Force of some 60,000 military personnel representing EU nations. Secondly, after the reorganisation of the Collective Security Treaty between six CIS nations, the Rapid Deployment Forces for Central Asia were created with participation of Russia, Kyrgyzstan, Tajikistan and Kazakhstan. Thirdly, after the Prague summit, NATO started the process of creating a 20,000-strong mobile force not to lag behind the US in out-of-area operations of an Afghan or (potentially) Iraqi type.

There are very limited attempts to coordinate “fire brigades” structures even between EU and NATO, and no attempts at all to launch a doctrinal, operational or inter-operability dialogue between them and the CIS. At the same time, it is clear that in case of any military activities around Iraq all the three of them would be brought in high military readiness and relocated to close proximity with each other. How could international community speak of a “collective coordinated pre-emptive action” if the three military rapid reaction machines trained for such actions don't talk to each other? The same problem manifested itself in course of operations in Afghanistan when NATO as a collective structure was de facto marginalised by the US military, and most of coordination between US-UK, US-Russia, and even Russia-Uzbekistan, Russia-Kazakhstan (on air-corridors and use of bases by Americans) was done on a “semi-closed” bilateral basis, without any real involvement of UN, NATO or CIS channels and mechanisms.

To sum up, how could a potential Russian stance on pre-emptive use of force on international arena be modelled?

First, at a general political level, Moscow seems not to welcome doctrinalisation of pre-emptive use of force. Previous “coding formula” for current interference needs of big powers (which was “anti-terrorist counter-actions”) was easily and willingly supported by Moscow because it allowed a reconsideration of Western attitudes towards Russian actions in Chechnya. But “pre-emptive use of force” doesn’t supply Moscow with any extra capabilities in the sphere of its vital interests while it may pose hard choices regarding former or current semi-friends (North Korea, Iraq, Iran, Cuba, etc.)

Secondly, at the level of legal decisions and legitimisation, Moscow insists on strictly following procedural formalities: coordination of the essence and wording of UN SC resolutions mandating use of force by the international community. As in the cases of the operations in Bosnia and Kosovo (and several other less controversial cases), whenever “the voice of Moscow” was heard and taken into consideration during open and closed debates in the UN SC, and whenever the West and Russia compromised on a certain decision, then Moscow became a loyal partner in implementation of such a decision. Another period of “brotherhood-in-arms” tactical alignment thereby starts.

Thirdly, behind the level of formalities and legal principles lays the layer of pragmatic geostrategic, political and economic interests of the great powers. Having or not having access to WMD is a thin matter. The US, Russia and half a dozen other influential states are “guilty” themselves. Russia does not want to de-nuclearise, and nobody is ready, for example, to “punish” India, Pakistan or Israel for obtaining access to nuclear weapons. Thus, motivation, time frame, conditions and format of pre-emption of WMD proliferation remain a matter for political bargaining where nothing is clearly pre-defined. International law doesn't help much behind the thin fence of the requirement to have a UN SC resolution on any such pre-emptive use of force. And the economic interests of the big powers already couldn't be put aside in the cases of Iraq, Iran, etc., as they were in the case of the Taliban (which was economically irrelevant to almost all states). Thus, the matter of pre-emptive use of force in the international arena against “unreliable” political regimes becomes an arena for serious balance of pragmatic interests of big powers with all the associated consequences.

Fourthly, at the level of internal politics, public opinion, propaganda and the media in Russia, the concept of pre-emptive use of force remains and will remain a source of criticism and contradictions. Public opinion will obviously be split and a significant portion of the public will find in the “pre-emptive strikes” approach another manifestation of the “plot of the West against Russia and developing countries”. But as long as loyalty to the current President and his administration remains high among the political establishment and the majority of the public, voices of criticism would be deterred or silenced, if Russian political leadership announces an extension and continuation of its “strategic partnership with the US and the West” on this “pre-emption” matter.

Thus, all discussion is brought back to focus on the third conclusion: the key to any decision on matters of pre-emption lays neither in UN corridors, nor in domestic public opinion, nor even in “behaviour” of the “questionable” states and regimes themselves, but rather in pragmatic balance of interests of great powers regarding these states and regimes.

# PRE-EMPTIVE MILITARY ACTION AND THE LEGITIMATE USE OF FORCE: AN AMERICAN PERSPECTIVE

WALTER B. SLOCOMBE\*

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*The United States will do what we must to defend our vital interests including, when necessary and appropriate, using our military unilaterally and decisively.*

United States National Security Strategy

No question has more preoccupied discussions of international law and international relations than that of the legitimacy and wisdom of the use of force. From the “just war” doctrines of the Middle Ages to the Westphalian concept of a sovereign state's “right” to wage war for whatever ends the sovereign judged right to the contorted efforts of 19th century legal scholars to avoid the problems of the legitimacy of “war” by defining all kinds of military operations as something other than “war” to the futile efforts of the League of Nations and the Kellogg-Briand Pacts to – with various reservations and ambiguities – “outlaw” war to today's discussion of the distinctions between preventive and pre-emptive use of force and the rise of “humanitarian intervention” as a politically correct form of warfare, practical political and military leaders, as well as legal scholars and scholars of international relations, have wrestled with the question of when the use of military force is a legitimate instrument of statecraft.

It remains sadly the case that cannons are still the last argument of kings. Not the sincere efforts of leaders and citizens to substitute international institutions and international diplomacy for military power, not the terrible costs of two massive European-based world wars, not those of countless smaller internal and international wars throughout the world since 1945, not even the potential consequences of war fought with nuclear, chemical and biological weapons, as well as the massively increased potential lethality of conventional technology, have fundamentally changed the fact that the threat and use of force are the ultimate instruments of international relations.

Moreover, it is a necessary qualification to the proposition that diplomacy is preferable to force, that where vital interests, or at least conflicts over perceived vital interests, are at stake, and where willingness to provide inducements is not unlimited, diplomacy and negotiation are unlikely to succeed unless there is seen to be a real cost to refusal to compromise. The consequences that can be imposed by other means of pressure are puny compared to those of military force. The states (not to mention non-state actors) whose actions are the most dangerous and most essential to be constrained are the least likely to be much affected by “international opinion.” In such states, the prospects of affecting regime action by appeals to the good sense or innate caution of the citizenry are minimal simply because the regime will have been careful to insulate itself very thoroughly from such public pressures. Even the most powerful international instrument of pressure short of military force – economic sanctions – has a very feeble potential for deflecting such states' actions.<sup>1</sup>

Indeed, it is, in some sense too simple even to say that it is an absolute principle that force is a last resort. Certainly, the risks and costs of military force make it both prudent and moral to

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<sup>1</sup> “Covert” action is similarly not often a viable alternative to military force. In any event, used on a significant scale, “covert” action *is* use of force, though perhaps delivered through a different state agency and with different methods.

refrain from its use while there is a reasonable prospect that other means may be effective. But the principle of using force only after exhausting non-military alternatives necessarily implies a willingness to recognise that, at some point, they have been exhausted, and that waiting too long may mean waiting until military options are no longer effective at acceptable costs.

In the limited time and space available, rather than try to cover the whole huge field, it seems appropriate to focus on two specific questions<sup>2</sup> that have come to the fore in the face of fundamental changes in the international security environment since the end of the Cold War:

- When is the use of force justified? (herein of pre-emption)
- Who can legitimately decide on the use of military force? (herein of unilateralism)

### **Unilateralism, multilateralism, and international decision-makers**

Of the two issues, the second, “unilateralism,” is relatively the easier, because the dichotomy between “unilateralism” and “multilateralism” is to a large degree an illusory one.

To be sure, there are today a few in the United States who prefer – or at least affect to prefer – unilateral action as a matter of both principle and expediency. They see American military power as so overwhelming that there is no need for the assistance of others. Equally important, they see American purposes as so noble and the perspectives of other governments as so narrow, even craven, that it is not only possible, but necessary, for the United States to ignore their views. The conclusion these “unilateralists by preference” draw is that involvement of other nations in decision-making about American use of force is unwise in that it risks diluting the clarity of American purposes, while involving other nations in actual operations is pointless because they can add nothing significant to American capabilities and including them merely complicates operations.

Conversely, there is a sharply contrary view that decisions on the use of military force must always and only be made on a multilateral basis, and indeed, must be made by international institutions, preferably, and perhaps exclusively, by the United Nations. There are some in the United States – and there appear to be many more in other countries – who insist, or at least affect to insist, that only formal approval by the United Nations can legitimise the use of military force, except perhaps in the case of immediate defence by a certifiably innocent victim against direct military attack across a recognised international border by acknowledged forces of a foreign state.

There is, however, in international law – and more in international practice – widespread acceptance of the concept that, in the end, all decisions on use of military force are unilateral, in the sense of being made by nation states, but those decisions must, for reasons of both prudence and principle, be made in the light of the opinions and interests of others so as to gain their support. The great weight of American opinion takes a view that can fairly be

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<sup>2</sup> This limitation leaves out several issues that have in the United States been major elements of the discussion of use of force – including the magnitude of American interest sufficient to justify use of military force and the degree of popular support required (and the closely related question of the relative roles of Congress and the President in domestic US decisions on use of force). Suffice it to say, as to the first, that only important interests justify military action, but many interests are “important” in this sense without involving immediate direct threats to the US homeland. As to the second, no democracy, and certainly not the United States, can fight a war on any scale without public and parliamentary support, but where there is clear national interest and a coherent strategy for advancing it and a convincing rationale for using force to do so, the American public is prepared to sustain significant burdens and run significant risks, and Congress is prepared to support the Executive branch, or at any rate to acquiesce in its decisions.

described as “unilateral if necessary, but multilateral if possible – and multilateral should almost always be possible.”

To begin with the first element – the reservation of the ultimate right of unilateral action – the current US administration is by no means the first to espouse the notion that the United States has the right, even the duty, to act alone if the nation's vital interests are at stake, and that, in the end, it is the United States and no one else that makes that decision. The quotation at the top of this paper is indeed from a National Security Strategy document, but it is drawn from that of President Clinton in 1999, not that of President Bush in 2002.

Nor is the idea that decisions on military force are ultimately national decisions confined to superpowers. Indeed, it seems very likely that, in extremis, every country would take that position. Certainly, even those, like the current German government, who are most enthusiastic in theory for multilateral decisions on use of force, insist on reserving the right to make a separate national decision on whether a multilateral approval of military action is sufficiently justified – or sufficiently serves their own nation's goals and principles – to require actually participating in the action. And there are numerous examples of nations that, in general, regard themselves as adherents of a multilateral approach but which have proven nonetheless ready to use their military forces for their national aims without bothering much about international opinion, as Spain did last summer over the occupation of a disputed Mediterranean island. To point this out is not accuse Germany or Spain or anyone else of hypocrisy or even to call into question the soundness, much less the sincerity, of their general commitment to multilateral decision-making, but only to observe that it has its limits.

But if unilateralism in theory is all but universal, unilateralism in practice is very hard even for a superpower on a matter of any difficulty. First, in most situations, there may not be much of a practical option of truly unilateral action. American military operations are almost always greatly facilitated by having the cooperation and support of others. The US may have overwhelming capability in many, perhaps most, forms of military power, but the direct military contributions of other nations remain highly useful. The military capability gap is real, but it is not infinite, and many allies can make very helpful contributions, in specialised areas like special operations forces, in capabilities where cutting-edge technology is not required, and increasingly also where other nations are, albeit on a smaller scale, approaching American capabilities in fields such as precision strike or naval forces. Even setting aside direct military contributions, the United States is, in almost all circumstances, heavily dependent on other countries for bases, overflight rights, and access, and usually for even more direct support in the form of intelligence, cooperation in applying economic and political instruments, and, very importantly, in dealing with the aftermath of conflict. Certainly that was the case in Afghanistan. The Bush administration's National Security Strategy may exaggerate a little when it says, “There is little of lasting consequence that the United States can accomplish without the sustained cooperation of its allies and friends in Europe,” but the basic point is correct – and not just about Europe.

And, of course, there are powerful political and psychological dimensions to international support. America, however patriotic, even jingoistic and ostensibly disdainful of foreigners our popular culture may seem, is far from unilateral by preference when it comes to military operations. Opinion polls consistently show – in a variety of contexts – that public support for American military operations is far higher where the United States has the support of its allies than where it would be alone. In part, this reaction is no doubt the sensible one that Americans like others to share the costs and risks, but it also appears to reflect a more complex judgment about international affairs: The American public has more confidence that the decisions of our government are right if they are shared and supported by other countries, as evidenced both

by their formal positions and statements and by their willingness to send their own military forces to join in.<sup>3</sup>

Moreover, in most situations, it is not that hard for the United States to garner international support. This is in part the consequence of the obvious fact that the United States has a wide variety of levers of influence and persuasion at its disposal. And the United States need not shy away from using those levers. Accepting that the use of military force requires – or is at any rate immensely helped by – international support does not require the United States to be neutral about whether that support is forthcoming. Forced to choose between the United States and its adversaries, most countries will, whatever their misgivings, realise that their interests counsel considering the consequences of opposing the United States on an issue so important to it that the use of military force is an issue.

But the proposition that, in the end, the United States can usually count on the support of those countries that matter does not rest simply – or, I would argue, even primarily – on the proposition that frustrating the Americans would have a price. At bottom, those interests of the United States that plausibly could involve the use of American military force are also the interests of much of the rest of the world. An American diplomacy geared to exhausting non-military alternatives as a means of meeting fundamental challenges will, if non-military means fail after being seriously applied, in most cases, also convince many other countries that resort to military force is not only justified, but required in their own interest, not just that of the United States.

However, to say that international support for the use of military force is, in most cases, both necessary and obtainable, is not necessarily to say that the only legitimate source of international support is action by the United Nations. The interesting and much-disputed legal issues of how the UN Charter, in particular Article 51 (reserving the inherent right of individual and collective self-defence against armed attack) should be interpreted – and what, to a practicing lawyer is an equally important issue – who has the legitimate authority to interpret it authoritatively are matters more for scholars than practitioners of international relations.

Of course, formal UN support is desirable, both for its own sake, and for its impact on the actions and attitudes of individual countries whose support may be essential. But insofar as the issue is legitimacy, it is hard to make the case that only UN action suffices. In practice, whether “the United Nations” has given its sanction for use of military force means, as a practical matter, whether there is a Security Council resolution that can plausibly be read as authorising military force.<sup>4</sup> That, in turn, means whether there is a negative vote by Russia or China. Strictly speaking, of course, the UK or France could also veto, and, in theory, a UN Security Council resolution authorising the use of military force could fail by reason of not having the affirmative votes of a majority of the Security Council, even if no permanent

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<sup>3</sup> The political/psychological importance of other countries’ direct military participation has an effect that – perhaps fortunately for the United States – the contributors may not fully realise: Those countries that do provide forces to US-led military operations, however much they may have to defer to US leadership of the overall direction of the military operation, can absolutely reserve a veto over what their own forces do – and at the same time exert an influence on the American military and, still more, on American political decision-making related to the conflict out of all proportion to the objective significance of their military contributions.

<sup>4</sup> During the Cold War, when the USSR could be relied on to veto any UNSCR it deemed inconsistent with its interest, the United States argued that a “uniting for peace” resolution of the General Assembly could carry the same UN authority. With the changes in the composition of the General Assembly making it very hard to assemble a GA majority – and the end of the Cold War confrontation with Russia making it more possible to get Perm 5 consensus – this doctrine has fallen into desuetude.

member voted against it. As a realistic proposition, however, it is indeed hard to imagine a use-of-force situation where a resolution to which none of the “Perm 5” objected enough to use a veto could not get a majority (even if one or more permanent members abstained) – and it is still less plausible that France – not to mention the UK – would exercise a veto in a situation where Russia and/or China would not (always laying aside the – presumably not very unlikely – case like Suez in 1956 where the interests of France or the UK were uniquely at issue.) It follows that to require United Nations approval as an absolute condition of legitimate use of military force is to say that no military action of which Russia or China (or, in principle, France, Britain, or, indeed, the US) strongly disapproves is legitimate, no matter how broadly the action is otherwise supported, or how well justified in other international legal or political terms. To illustrate the point – NATO could legitimately point to various UNSC resolutions as supporting its intervention to reverse Milosevic-led Serbia's expulsion of the ethnic Albanian population of Kosovo in 1999. There was, however, no authorising action by the Security Council in classic “all necessary means” words, and it is not clear that had one been sought, Russia (or China) would have withheld a veto. That intervention was, nonetheless, broadly regarded as legitimate, whether as a “humanitarian intervention” or as a means of forestalling a spreading conflict in a region of Europe that has bred a host of wars in living memory.

Would a failed attempt to get a formal Security Council authorisation really have changed things? For most of the world, the Kosovo intervention was legitimate and would still have been so had a UNSC effort produced a veto.<sup>5</sup> For to say that a UNSCR is essential amounts to saying that – not “the international community” – but Russia, China – and, in principle the other permanent members or alternatively, a majority-blocking group of the non-permanent members – are the absolute custodians of the legitimacy of international force. In these terms, the choice between “unilateral” action and “multilateral” is not between a strictly national decision and a UN Security Council Resolution, but one between efforts to garner as much support from other countries as possible, and an insistence, even a preference, for acting alone. In such efforts, the actions of formal regional institutions like NATO and of informal ad hoc groups like the coalition that fought the first Gulf War (admittedly with UNSCR blessing) and may fight a second one, count for as much as a UN Security Council hamstrung by a veto.

### **Pre-emption: When does the right to self-defence arise?**

The question of “pre-emption” is a much more difficult issue. The concept that “defence” is legitimate, while “offence” – more pejoratively “aggression” – is not, lies deep in all discussions of use of military force. In practice, the distinction has always been hard to draw. Indeed, a good deal of effort has been spent – without notable success or general acceptance in practice – in attempting to abolish the distinction by aspiring to abolish force entirely as a means of settling disputes – by a sort of “no fault” renunciation of force. But the principle of “self-defence” has survived, and is, in fact, formally and explicitly recognised in the UN Charter as an “inherent” right, not one created by the Charter.

Lurking in the concept of “self-defence” is the question of at what point the right arises, of where on the spectrum of prevention, pre-emption, and response, military action is justified. The American government has, especially but not exclusively since the attacks of September

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<sup>5</sup> To be sure, some take the position that the Kosovo operation was “proper” because it served legitimate international purposes but not “lawful,” because it was not explicitly authorised by a UN Security Council resolution. That distinction says more about attitudes toward “international law,” than about norms of international conduct.



11<sup>th</sup>, stressed the right of pre-emption in certain circumstances, specifically against terrorists and against rogue states threatening to acquire nuclear and other mass destruction weapons.

So far as the United States striking at terrorists is concerned, the issue is hardly one of pre-emption. Once hostilities have been started by others, it is no longer “pre-emption” for the victim to seek to destroy the source, not just to frustrate specific attacks in the future from the same source. The United States has already been – indeed was years before September 2001 – the victim of attack by the coordinated terrorist groups that are the targets for American attacks today. And, beginning at least with the embassy bombings in 1998, the United States was prepared to use force to destroy al Qaeda operations and leadership where there was sufficient intelligence of their location, entirely independent of any indication that a specific new attack was being planned. There are, to be sure, many difficult legal, moral, political and practical issues raised by the “war” on terrorism, and by the American determination to, in the words of President Bush's National Security Strategy, “destroy the threat before it reaches our borders.” For example, since terrorists are non-state actors, the sovereignty of other countries is, by definition, involved in American attacks on them. Countries in whose territory terrorists are operating have a responsibility to suppress the operations, and the Administration has declared that it will regard countries that give sanctuary to terrorists as subject to military attack just as much as the terrorists themselves. The sovereignty questions raised by this position – and other issues of legality and legitimacy – are real and sometimes difficult issues, but they are not about pre-emption, but about the conduct of a “war” that does not fit traditional patterns.

The Bush Administration has, however, squarely relied on pre-emption in also enunciating a potentially more far-reaching doctrine of anticipatory action against rogue states that are in the process of acquiring nuclear, chemical, and biological weapons. The NSS says, “We must be prepared to stop rogue states ... before they are able to threaten or use weapons of mass destruction against the United States, our allies, or friends.” To an important degree, this doctrine is less innovative than either its advocates or its critics profess to believe. Perhaps most important, it is, in its terms, limited to the particular issue of rogue states seeking to acquire WMD; it is not a claim to use force pre-emptively (and unilaterally) whenever the American government judges US interests to be at stake.

Critics, however, argue that the Administration is claiming that self-defence is not limited to “pre-emption” in the sense of forestalling an imminent attack, but “preventive war,” in the sense of using military force where the only threat is a vague and uncertain one of possible conflict at some indefinite point in the future. Such “preventive” war, it is argued, is not only in violation of international law, but an unbounded invitation to the use of force on mere suspicion of the ambitions or intent of another nation, and indeed a negation of the very concept of international law.

However, far from ignoring international law, the United States government has advanced a sophisticated legal argument for the legitimacy of its position regarding pre-emption against rogue state WMD that is squarely based on international law principles. The argument begins with the proposition that international law unquestionably recognises a right of self-defence and moreover acknowledges that exercising that right of self-defence does not require absorbing the first blow. As the NSS puts it, under long-recognised international law principles, “nations need not suffer an attack; they can lawfully take action to defend themselves against forces that present an obvious danger of attack”.

The classic and widely accepted formulation of that right was stated by Daniel Webster, as American Secretary of State in the 1840s, during negotiations about a British cutting-out

operation in American waters in Lake Ontario against the American ship *Caroline* that was being used to supply rebels in Canada. He wrote the British Minister, Lord Ashburton, that a nation has a right to act first where the “necessity of self-defence is instant, overwhelming, and leaving no choice of means, no moment for deliberation.” The Administration argues that Webster’s formulation must be “adapted to the capabilities and objectives of our adversaries.” The traditional concept of “imminence” assumed a context where the need for mobilisation and other preparation meant that there was a realistic prospect of warning of an attack. Stressing that its claim of a right to pre-empt is limited to action “to eliminate a specific threat to the US or our allies and friends,” the administration argues for a standard of “necessity” that recognises that terrorists and rogue states with WMD would have at their disposal “weapons that can be easily concealed, delivered covertly, and used without warning”. Accordingly, it is lawful to “take anticipatory action to defend ourselves, even if uncertainly remains as to the time and place of the enemy’s attack”.

On balance, the administration has the better of the legal argument: Webster’s formulation – which was adopted in the course of a protest against, rather than a defence of, a pre-emptive operation and therefore takes a restrictive view – speaks of a “necessity of self-defence” that is “instant, overwhelming,” etc. Critics argue that only an immediate prospect of specific attack can meet that standard. But, in Webster’s formulation, it is the “necessity” that must have those characteristics, and such a necessity may exist without an immediate prospect of attack. The right of anticipatory self-defence by definition presupposes a right to act while action is still possible. If waiting for “imminence” means waiting until it is no longer possible to act effectively, the victim is left no alternative but to suffer the first blow. So interpreted, the “right” would be illusory. The administration is accurate when it points out that once a rogue state has achieved a serious WMD capability, effective action to eliminate the capability may well have become impossible. The problem is not so much that WMD could be used with little warning – attacks with conventional weapons have all too often achieved tactical surprise – but that surprise use could be decisive and that the capability can be so successfully concealed that pre-emption is operationally impossible even if warning were available. On this basis, a strong case exists that the right of “self-defence” includes a right to move against WMD programmes with high potential danger to the United States (and others) while it is still feasible to do so.<sup>6</sup>

The problems with pre-emption, unfortunately, are not lack of legal legitimacy, but operational practicality. A right of pre-emption is one thing; a meaningful capability to pre-empt is quite another. Exercising the right pre-supposes, both logically and practically, that there is some military operation that will achieve the desired result of eliminating the WMD capability that is targeted at an acceptable cost, taking into account the enemy’s possible reactions.

The first operational issue with pre-emption is whether the proposed operation will actually eliminate the WMD capability targeted. The problem is not (usually) whether there is a means of executing a pre-emptive attack once targets are identified, but knowing what and where to strike. Precision weapons require precision intelligence, and pre-emption requires that intelligence be comprehensive as well as precise. Too much attention to action movies and too little to the realities of intelligence collection have tended to obscure the difficulty of knowing enough about a nation’s WMD programmes to have much confidence of eliminating them by

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<sup>6</sup> In the particular case of Iraq and North Korea, of course, there may be an entirely independent legal basis for action that each is in breach of its obligations as a party to the NPT (and in both cases also of other commitments not to have or seek nuclear weapons). It is certainly arguable that other states are entitled to resort to force to compel compliance with such obligations.

pre-emption. Still more difficult operationally is dealing with what the enemy may do in response, even if his WMD capability has been successfully negated.

The contemporary cases of Iraq and North Korea illustrate the operational problem in some of its dimensions, as discussed below.

In the Korean case, there is no question about the location of the plutonium-production reactor and the re-processing facility at Yongbyon, and, as former Secretary of Defence William Perry has written, the United States military has the capability to destroy them quickly and without causing release of radioactive materials. Such an attack would block the prospect of North Korea extracting some half-dozen bombs worth of plutonium within the next year. But it would not eliminate the North Korean nuclear programme, much less Pyongyang's ability to respond with devastating force. Even with regard to North Korea's nuclear programmes, the Yongbyon facilities are only part of North Korea's potential. There has been no claim that the United States knows the location of either the plutonium that was extracted in 1991-92 or of the couple of bombs for which that plutonium may have supplied the fissile material. Nor is there a claim that the United States has the detailed knowledge required for high-confidence targeting of other elements of the North Korean programme – notably its incipient uranium-enrichment facilities – much less its extensive chemical weapons capabilities. But the real problem with pre-emption in the North Korean case is that the North Korean capability to respond and escalate does not (so far) rest on its WMD, but on its massive conventional forces – and there is no chance that that capability could be eliminated pre-emptively, even by a massive effort. Of course, the problem will only grow worse if North Korea is able to expand its nuclear potential, and at some point, if diplomacy fails, it may be the wiser course to act militarily, accepting the limits on American capability to preempt and relying on deterrence and defence to block or blunt a conventional attack in response. But it is the risks of such a course that have made not just South Korea, but the United States as well, so uneager to press the case for military confrontation.

In a sense, the case for dealing with the Iraqi WMD programmes by military force now may be said to be the case for not letting Iraq reach the point Korea is at now. Essentially the argument for eliminating Saddam Hussein's WMD by military force if he will not eliminate them himself under UN monitoring is that, despite the real risks, if the capability is not stopped now, it will be too late – and the world and the region will have to deal with a Saddam regime armed with a powerful WMD capability that can neither be pre-empted nor confidently defended against. But it is significant that the military option being considered against Iraq today is pre-emptive only in the strategic, not the operational, sense. The military option is not to strike at the WMD programmes directly but to replace the regime, as the only confident means of eliminating its WMD programmes. This is not the product of over-ambition, but of operational reality. Intelligence of a granularity and comprehensiveness necessary for an effective pre-emption limited to the WMD programmes themselves is no more available in the Iraqi than the Korean case. Indeed, in the Iraqi case there is not even an equivalent to Yongbyon, that is, a single key facility whose destruction is militarily feasible and would at a stroke deeply set back the WMD efforts. It is this lack of a military option able to eliminate the WMD that makes a campaign to oust the regime the only military option if UN disarmament efforts fail. Happily, Saddam Hussein has less formidable responsive options than does Kim Jong Il because his military is relatively weak and his ability to strike rapidly at high-value targets is much less. The American assessment is that none of his potential responses is anything like as significant as the North Korean potential to wreak immense destruction on South Korea, and that the risks entailed by what he can do can be reduced to acceptable levels – and are in any event better run now than faced later when his

WMD programmes are far more developed. But Iraq has some potentially very destructive responses, and their potential use is a major complication for military planning – and a major source of the reluctance of many to support an invasion.

In short, the contrasting cases of Iraq and North Korea today may be said to illustrate both the conceptual strength of the administration's doctrine of pre-emption against rogue state WMD, and its limitations in practice. There will, unfortunately perhaps, still be plenty of scope for military operations and capabilities aimed at deterrence and for defence if deterrence fails.

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The Centre for European Policy Studies (CEPS) and the International Institute for Strategic Studies (IISS) joined forces late in the year 2000, to launch a new forum on European security policy in Brussels. The objective of this *European Security Forum* is to bring together senior officials and experts from EU and Euro-Atlantic Partnership countries, including the United States and Russia, to discuss security issues of strategic importance to Europe. The Forum is jointly directed by CEPS and the IISS and is hosted by CEPS in Brussels.

The Forum brings together a select group of personalities from the Brussels institutions (EU, NATO and diplomatic missions), national governments, parliaments, business, media and independent experts. The informal and confidential character of the Forum enables participants to exchange ideas freely.

The aim of the initiative is to think ahead about the strategic security agenda for Europe, treating both its European and transatlantic implications. The topics to be addressed are selected from an open list that includes crisis management, defence capabilities, security concepts, defence industries and institutional developments (including enlargement) of the EU and NATO.

The Forum has about 60 members, who are invited to all meetings and receive current information on the activities of the Forum. This group meets every other month in a closed session to discuss a pre-arranged topic under Chatham House rules. The Forum meetings are presided over by François Heisbourg, Chairman of the Geneva Centre for Security Policy. As a general rule, three short issue papers are commissioned from independent experts for each session presenting EU, US and Russian viewpoints on the topic.

**The Centre for European Policy Studies (CEPS)** is an independent policy research institute founded in Brussels in 1983, with the aim of producing sound policy research leading to constructive solutions to the challenges facing Europe.

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