

# A NEXT RWANDA? A NEXT IRAQ? MILITARY INTERVENTION IN THE 21ST CENTURY

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## I. INTRODUCTION

This essay addresses the conditions under which reactive and pre-emptive military intervention are ethical, and whether adjustments can and should be made in international law and institutions to establish the parameters of their legality and to ensure that they are authorized by legitimate authority. Both types of intervention can be multilateral or unilateral, and each needs to be addressed in relation to the three major issues on the contemporary agenda: mass killing within the borders of a state, international terrorism, and the illegal spread of weapons of mass destruction (WMDs). The essay also re-examines the balance of authority and action among states, regional organizations, and the United Nations (U.N.) in matters of military intervention and suggests how to clarify their respective roles and responsibilities.

## II. RECOMMENDATIONS

This essay recommends that the Secretary Council and General Assembly endorse the following principles and rules and take appropriate action to give them effect.

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### *A. Mass Killing*

That reactive multilateral military intervention authorized by a regional organization, the Security Council, or, failing these, the General Assembly under the Uniting for Peace procedure, is justified to halt mass killing within a state when the state itself is the cause of the killing or is unwilling or unable to stop it.

That pre-emptive multilateral intervention authorized by one of the foregoing institutions is justified if there is abundant, well-corroborated, clear and convincing evidence that mass killing is imminent and the state is unwilling or unable to prevent it.

That reactive unilateral intervention by a state or coalition is justified to halt mass killing underway in another state, if it is evident that efforts to secure multilateral intervention or authorization are too slow or ineffective, provided that post-facto authorization is sought promptly from the proper institution.

### *B. Intervention Against States and Terrorist Organizations*

That reactive intervention, whether multilateral or unilateral, is justified in cases such as Afghanistan in which a state has sheltered terrorists who have mounted a series of international attacks.

That pre-emptive action against terrorist organizations is justified on the authorization of the Security Council or a regional organization, failing the cooperation of the state where terrorists are located.

That unilateral pre-emption by a state or coalition is justified when there is abundant, well-corroborated, clear and convincing evidence that an attack by an international terrorist organization sponsored by a state, or by a state itself, against one's own territory is imminent and no multilateral institution is willing and able to prevent it; as an extension of self-defense, pre-emptive action must be proportionate and aimed solely at frustrating the attack.

That unilateral pre-emptive intervention is justified when necessary, by means of clear and convincing evidence, to safeguard the lives of one's nationals in another state and to evacuate them if appropriate.

### *C. Intervention Against Illegal Nuclear and Other WMD Programs*

That pre-emptive military intervention authorized by the Security Council or the General Assembly (under the Uniting for Peace procedure) is justified to frustrate or otherwise neutralize the transfer to a terrorist organization of nuclear weapons, and in many cases will also be justified in the case of chemical and biological weapons.

That pre-emptive military intervention authorized by the Security Council is justified as a last resort to neutralize an illegal program by a state to acquire nuclear weapons.

### III. FUNDAMENTAL REALITIES

Physical power simply exists in the world; it is there. One has to deal with it, not act or think as if it were not present. It is always present. And it is, at bottom, human power, enhanced by weapons and tools and technology made and used by humans. It is primarily military power, including control over communications and intelligence-gathering technology and systems. The other basic reality one encounters always and everywhere is that human beings want to live in a world that combines justice and order, at least enough both to safeguard their lives and limbs and to enable them to work, learn, raise families, worship and do other ordinary things on a reasonably predictable day-to-day basis.

Looking at the world from above, as if from a point in space, the scene is of over 190 individual authority communities-states-each possessing some quantity of power. The leaders of one state can, if they wish, use their power against another state, and groups of state leaders can pool their resources to do the same. Power, and its potential for use at any time, often appears to be the central reality in interstate relations.<sup>1</sup>

But even looked at from above, it is clear that the human desire for order and justice is also part of the picture. This desire is as real as power. To live in a world of justice means living in a world of law, which expresses the practical meaning of justice in clear terms, and where those who hold power act in accordance with law. To bring law from paper to life, institutions link power with law. Today we need to add something to the existing architecture of institutions and law, and it can be accomplished without amending the Charter.<sup>2</sup>

### IV. MASS KILLING

Massacres occur because a regime or group believes that the world will be a better place without certain people; they believe that the target group is the main obstacle to creating a superior society or that it must be wiped out as

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1. Physical power is of course not the same thing as influence. Some small states having little physical power are able to exercise considerable influence in world affairs, that is, to affect the course of events and the outcome of issues. Examples include Ireland, Costa Rica, Senegal and Ghana. It is important to keep this in mind even while studying ways to channel and control military power.

2. It is not necessary to amend the Charter to accomplish such purposes. This has been emphasized by many observers. See, e.g., MINH-THU D. PHAM, THE UNITED NATIONS FOUND., THE UNITED NATIONS & THE NEW THREATS: RETHINKING SEC. 12-14 (2004), [http://www.un-globalsecurity.org/pdf/reports/rome\\_conference\\_rep.pdf](http://www.un-globalsecurity.org/pdf/reports/rome_conference_rep.pdf).

punishment for past crimes. Intervention to stop mass killing faced formidable opposition in the 1960s through the 1980s in such places as Uganda, East Pakistan, and Cambodia. Most states either kept silent or actually criticized the intervention, because a fundamental principle of world order was being breached: borders must not be crossed by military force except in self-defense or to carry out a U.N. Security Council resolution under Chapter VII. Most states saw their own survival jeopardized by acceptance of any intervention that could be used as a precedent against themselves. "Order by borders" was for them the main guarantee of their own sometimes recently-won independence, and even for long-established states, the fact that two world wars had broken out when borders were violated had embedded the view that the inviolability of frontiers was the best safeguard of peace.

This began to change, fitfully, in the 1990s, as the conscience of humankind was newly shocked by the killing of Kurds in northern Iraq following the first Gulf War and the subsequent slaughters in Bosnia-Herzegovina and Rwanda. In Rwanda, the horrific result of the Security Council's paralysis led to a strong movement in many countries to search for ways to apply enough flexibility to the principle of inviolability of state borders to save the lives of the human beings whose security was the ostensible reason for those very borders in the first place. People began to reason that the wall of sovereignty must be strong enough to prevent aggression, but not so rigid as to protect mass slaughter within it. Just as within a polity there is a need for public authority to safeguard lives, there is also a need for authority on a broader plane to do this when domestic authority fails or disappears or turns homicidal.

It is not difficult to argue that the purpose of self-determination, the right of a people to "freely determine their political status and freely pursue their economic, social and cultural development" (Article 1 (1) of both International Covenants on Human Rights), is to enable a people to provide for the security of their lives and to achieve, progressively, the multidimensional fullness of life through their own laws, policies and institutions.<sup>3</sup> Going further, one could argue that self-determination has rational limits, specified first by its intrinsic purposes and second by the principle of subsidiarity. If a government itself becomes murderous or if it simply cannot provide a minimum of personal security, it fails to achieve the first purpose of self-determination. In this situation, larger entities of which this state is a part as a member of the international community, can and should come to the people's rescue. Intervention should be limited to situations in which lives are actually being taken on a large scale or there is clear and convincing evidence that such killing is about to commence.

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3. International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, art. 1, § 1 993 U.N.T.S. 5; International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 1, § 1 999 U.N.T.S. 173.

The issue has been cogently presented by the International Commission on Intervention and State Sovereignty in its report, "The Responsibility to Protect."<sup>4</sup> Released in December 2001, this is a document that merits close attention by the United Nations. The Commission rightly affirms the existence of a responsibility to protect human life even in the face of the important norm of nonintervention, and that appropriate action to carry out this responsibility should be recognized as legal.

This paper stands in agreement with the first "just cause" criterion for military intervention proposed by the Commission, namely "large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation."<sup>5</sup> However, the second proposed criterion is problematic: "large scale 'ethnic cleansing,' actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape."<sup>6</sup> The latter amounts to authorizing the use of lethal force against acts for which police, in most countries, are not authorized to use lethal force. The phrase "carried out by killing" is already included in the first criterion, so it is the other elements we must evaluate: evictions and rape, both of which are terrible crimes but not, in the view of this writer, justifiable grounds for summarily killing the perpetrators, and vague "acts of terror."

Intervening forces arrive with weapons and the authority to use them to kill, if necessary, in order to stop the practices that led them to intervene. If rape and illegitimate eviction are made bases for military intervention, they would become in effect capital crimes under international law, punishable summarily by death at the hands of intervening forces. This seems excessive, unwise and unnecessary. The International Criminal Court can prosecute and try rapists and those responsible for expelling people, or national courts can try them under applicable extradite-or-prosecute provisions of international law.

Further over-stretching the limits of a rational responsibility to protect, the Commission asserts that "situations of state collapse" and "overwhelming natural or environmental catastrophes" are to be included in the two just-cause criteria as "conscience-shocking situations" justifying military intervention.<sup>7</sup> This merely creates pretexts for intervention. It would lead to a fundamental weakening of the principles of international order, in a way that accepting intervention only to halt large-scale killing would not. In a later passage, the Commission perhaps recognizes that: "[i]t is a real question ... where lies the most

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4. THE INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 32 (2001) [hereinafter RESPONSIBILITY TO PROTECT].

5. *Id.*

6. *Id.*

7. *Id.* at 33.

harm: in the damage to international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered while the Security Council stands by."<sup>8</sup> Only human life is mentioned here. This is the right standard.

Moreover, the Commission endorses pre-emption, but unambiguously limits it to lifesaving situations:

Military action can be legitimate as an anticipatory measure in response to clear evidence of likely large-scale killing of civilians or other noncombatants. Without this possibility of anticipatory action, the international community would be placed in the morally untenable position of being required to wait until genocide begins, before being able to take action to stop it.<sup>9</sup>

As the Commission elsewhere makes clear that in its view intervention must be authorized by the United Nations or an established regional or sub-regional organization, it follows that its endorsement of anticipatory action does not encompass unilateral pre-emption.

The reference to "clear evidence" takes us to the question of imminence and with it, to the reliability of intelligence. Here the Commission steps back a bit and acknowledges that "[i]t is difficult to conceive of any institutional solution to the problem of evidence, of a kind that would put the satisfaction of the 'just cause' criterion absolutely beyond doubt or argument in every case."<sup>10</sup> Despite the straw-man second clause, the recognition of a problem with evidence is a bright yellow light, a powerful argument for great caution in following the Commission's call to take "anticipatory action." If the standard of evidence were set at abundant, well-corroborated, clear, and convincing, this would at a minimum require information from multiple reliable sources, pointing unambiguously at the same conclusion. While there can never be 100 percent certainty or comprehensive knowledge about a developing situation, a responsibility to protect must be exercised by decision-makers within a framework of substantiated fact and professional analysis. There is no substitute for this.

## V. POWER AND INTERNATIONAL INSTITUTIONS

To imagine what it would take to structure a world where power would be used only to serve justice requires following two distinct but interdependent lines of thought. The first would seek to articulate, in terms as close as possible

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8. *Id.* at 55.

9. RESPONSIBILITY TO PROTECT, *supra* note 5, at 33.

10. *Id.* at 35.

to a universal consensus, what justice means within and among political societies, and for this we do not need to start from scratch. We already have principles and norms that enjoy universal or near-universal acceptance. We find them in the U.N. Charter, the Genocide Convention, the Universal Declaration of Human Rights, the two Covenants on Human Rights, and other landmark documents adopted by the international community either as treaties or as standards of conduct. Two relevant examples of the latter are the Declaration on the Elimination of Religious Discrimination and Intolerance and the Declaration on the Rights of Persons Belonging to Minorities.

The second path invites us to design structures within which power can be used in clearly bounded channels. Absent such channels, we are left with a situation in which those who actually have power can use it as they wish unless constrained by other power-holders, i.e., the world before 1945. To succeed, these structures must represent an aggregation of strength that can come only from the shared recognition by the powerful of a common interest in ensuring that the use of power must be managed within a particular set of rules and structures. The League of Nations demonstrated that commitments on paper are not sufficient for this purpose, and the U.N. was designed to remedy that defect. The U.N. can now make improvements in the design.

Some have argued that it is crucial to invest the U.N. with standing armed forces to enable the Security Council to deal swiftly and decisively with mass killing and other threats to peace and security. The current practice of building every U.N. force from scratch, from voluntary ad hoc contributions, would give way to a speed and regularity of application of appropriate force when and where needed. Some massacres and even wars could probably be deterred, others halted just after their outbreak.<sup>11</sup> In time, the existence of an effective standing multilateral armed force might allow some states to reduce their own military establishments and rely for their security on the international force, a huge saving that would permit unprecedented progress toward development.

Establishment of such a force in the near term would require a political will that does not yet exist among the members of the Security Council, although it might be possible to agree on steps to implement or expand the pre-positioning of specialized logistical and communications staffs, facilities and supplies, to further strengthen U.N. headquarters monitoring and early-warning capabilities, and to broaden participation in standby forces. It might even be possible to infuse life into the Charter provisions for a Military Staff Committee. Even

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11. Had a standing United Nations force existed in 1994, the Rwanda tragedy could have been stopped in its first phase. Moreover, on the Iraq issue, it is arguable that a robust standing U.N. force would have added credibility to the Council's various pre-2003 resolutions, and might have induced Saddam Hussein to cooperate with the U.N. much earlier than he did, thereby forestalling the U.S.-United Kingdom decision to take matters into their own hands.

perennial recommendations that cannot be put into place immediately should be revisited from time to time, as political will evolves. But the most promising avenue of near-term progress might lie in a different direction.

Intergovernmental activity takes place at four main levels: directly between states, and through sub-regional, regional, and global institutions. These official channels are complemented by transnational nonofficial networks of labor unions, multinational corporations and banks, human rights organizations, political federations, and criminal and terrorist organizations. But states have almost all of the military power and remain the fundamental authority communities in the system. They and only they can commit themselves and their resources to specific purposes, including creation of binding laws and law enforcement structures. Today, their attention and energy are focused increasingly on the regional level.

The wave of nationalism, although still strong, is giving way to regionalism in most parts of the globe. Regional economic integration and federation are already well-advanced, but what is new is that states within a region are now increasingly willing to engage in military cooperation and coordination within their area. This is another example of subsidiarity in action. One finds within a region a greater commonality of culture and approach than in a global body. A view can develop that it is better for "us" to resolve our own problems together than for "us" to allow them to get worse or to invite the possible intervention of extra-regional powers.<sup>12</sup>

The Security Council could capitalize on the regionalist trend by granting regional security institutions more decision-making autonomy to deal with crises as they arise. The evolving Darfur and Congo crises are examples of the potential usefulness of a regionalist approach, a solution that Africans have turned to in other recent crises, notably in West Africa (Sierra Leone, Ivory Coast, Liberia). The actual force can be sub-regional, but should be authorized (even post-facto) by the African Union. In the Western Hemisphere, the Organization of African States (OAS) has authorized and managed successful interventions in several crises of the last two decades.

NATO intervention in Bosnia and Kosovo has demonstrated its ability to act effectively in humanitarian crises. In Afghanistan, NATO's post-conflict role demonstrates the utility of further developing its collective security potential under the U.N. umbrella. The European Union is well on the way to developing an analogous capability. The Security Council should work with both organizations to develop clear rules and procedures for future out-of-area involvement.

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12. See MARTA DASSU & ROBERTO MENOTTI, ASPEN INSTITUTE-ITALIA, COLLECTIVE RESPONSE TO CRISIS SITUATIONS: THE EU, NATO, AND UN AND MORE EFFECTIVE INTERVENTION (2003–2004), [http://www.un-globalsecurity.org/pdf/Dassu\\_paper\\_collective\\_response.pdf](http://www.un-globalsecurity.org/pdf/Dassu_paper_collective_response.pdf).



In general, the Security Council should encourage the expanding security role of regional institutions by adopting resolutions interpreting Chapters VII and VIII in such a way as to establish specific criteria under regional inter-governmental organizations, designated in advance by the Council, would be authorized to intervene without advance Council authorization in cases of mass killing of civilians and noncombatants.<sup>13</sup>

The Security Council could draft and approve a set of principles and procedures for regional action that would include advance authorization for the pre-designated regional intergovernmental organizations to act at once in response to an outbreak of large-scale killing (or to clear and convincing evidence that such killing is about to begin) and seek subsequent Council approval for that action. The language of Articles 47 and 53 of the Charter seem to offer enough flexibility for this purpose, particularly when taken together with Articles 33, 34, and 39. This would codify what has largely developed as accepted practice in recent years, and it would arm the international community with instruments that could be activated quickly to save lives, as an alternative to unilateral or coalitional action. The advance authorization would commit the regional institutions to certain obligations to the Council in the areas of reporting, time limits, and ongoing coordination.

Would this be legal? Since the end of the Cold War, the Security Council has interpreted its responsibilities for international peace and security to include things never before thought to be encompassed within the meaning of those terms. On occasion the Security Council has, acting on its own authority under Chapter VII, taken temporary charge of state administration, including police, prisons, and judicial institutions, organized and conducted elections, assisted in the writing of constitutions and in general overseeing the reshaping of political life and law. It has, in short, acted in these situations as a kind of international legislature, in the process taking on new powers to meet urgent humanitarian requirements where there was no other solution at hand. In addition, recent Council resolutions on terrorism (1373) and WMDs (1540) impose on all states obligations to take specific actions to confront these problems, via legislation, law enforcement and prosecution. Although some critics have warned that a continuation of this legislative trend could erode state sovereignty, it is currently the case that decisions of the Council under Chapter VII stand as law.

Checks and balances are crucial to the success and justice of any system of governance. In the Security Council, the principal checks are the super-majority requirement for substantive decisions, the veto power of the five permanent members, and the fact that the non-permanent members turn over so

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13. This paper does not advocate giving regional organizations authority to deal with every kind of threat to peace and security. In the case of a state that is developing or otherwise acquiring nuclear weapons, responsibility must remain with the Security Council.

frequently that the General Assembly could possibly reverse a prior decision of the Council by electing enough new non-permanent members who oppose the decision, assuming no veto of the override by a permanent member. Given these checks, this paper endorses the view that the need to fill the gap in international responsibility to protect human life outweighs the risk of abuse of power in cases of mass killing.

The "Responsibility to Protect" Commission recommends that in cases where no regional agency has acted and the Security Council has failed to deal with a situation of mass killing, the General Assembly's "Uniting for Peace" procedure should be invoked.

In granting a carefully delimited general advance authorization to regional agencies to intervene to halt or prevent mass killing, the Security Council would retain authority to overrule a regional decision to intervene and could even demand withdrawal of an intervening force or its replacement by another force.

## VI. TERRORISTS AND PRE-EMPTIVE INTERVENTION

U.S. officials have argued, before and after the Iraq intervention, that the apocalyptic power of WMDs, combined with the growth of anti-Western terrorist organizations, justifies and even requires governments to act pre-emptively to defend the lives and fundamental rights of their people.

Except for a subway attack with poison gas in Japan, terrorists have not yet employed WMDs, but they have tried to obtain the weapons themselves and their key components from certain states and criminal networks.<sup>14</sup> That a group might succeed in acquiring such a weapon was put forward as justification for unilateral pre-emption against a prospective supplier state. It was argued that Saddam Hussein might use WMDs to attack the U.S. (although there was no evidence that he had the required delivery capability), or his neighbors (since he had done so before), and that he would have incentive to hand over WMDs to terrorists.<sup>15</sup> It was thought that he could, for instance, supply terrorists with enough nuclear material to wrap around a conventional explosive to make a "dirty bomb" and kill thousands via radiation. The absence of evidence at the time of any meaningful Iraqi links with Al-Qaeda was glossed over, apparently on the assumption that the two could not possibly pass up a chance to collaborate. The U.S. concluded that something must be done, that the Security Council was hamstrung, and that once the U.S. had taken charge of Iraq, the

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14. Al-Qaeda used four airliners as flying bombs to kill thousands of people in the United States, and they carried out earlier attacks with conventional weapons on the World Trade Center, U.S. embassies and the U.S.S. Cole, and have continued to strike in different parts of the world since September 11, 2001. For instance, they have attacked in parts of Indonesia, Spain, and Saudi Arabia.

15. See e.g., H.J. Res. 14, Joint Resolution to Authorize the Use of the United States Armed Forces Against Iraq, 116 Stat. 1498 (2002) (The Bush Administration's request for authorization to use force in Iraq).

proof of Iraqi WMD programs and Al-Qaeda ties would come to light. The subsequent public record shows quite clearly that these conclusions were based on extremely faulty intelligence collection and analysis, but even had they been accurate there would remain the question of whether military intervention would be justified.

For purposes of analytical clarity it is useful to look at how one can confront terrorist organizations as distinct from states. Terrorist organizations are groups of volunteers, analogous to crime syndicates, not to states. A state is not a voluntary organization; all kinds of people, most of whom have nothing to do with terrorists, live within its borders under a common authority and go about their lives in all kinds of normal ways. The population may include terrorists (every terrorist group is located within some state) but it is vital to remember that they are not identifiable with the state or with the general population. In almost every state, the authorities look upon terrorist groups as problems to be solved.<sup>16</sup>

Conventional military operations (tanks, artillery, bombers, large infantry units) are generally less effective in disrupting terrorist organizations than other means. On its own territory, a country first needs to strengthen its domestic intelligence, investigative and law enforcement capabilities, including especially control of its borders. Second, it needs to cooperate with as many others as possible in the same ways, including information-sharing and joint operations. None of this involves unilateral pre-emptive intervention or raises legality issues, because states are free to deal with each other on such matters, as for instance in the ongoing U.S.-Pakistan and U.S.-Philippines campaigns.

Conventional military intervention to fight terrorists makes sense if a country is sheltering terrorists who have mounted previous international attacks, because one must first defeat the sheltering state's armed forces in order to get at the terrorists (as in Taliban Afghanistan). The main question becomes whether intervention can be unilateral or must be multilateral. As the Afghan case was one of self-defense by the U.S. against the manifest danger of renewed attacks by Al-Qaeda operating under Taliban protection, unilateral intervention was justified; the Security Council agreed. Pre-emption arose only in the sense that there was a moral certainty of new attacks from the same source, and that these attacks must be pre-empted by disrupting the organization. If there had been no previous attack, but there was well-corroborated, clear and convincing evidence that a group was preparing an imminent attack, pre-emption would also be justified –preferably with multilateral authorization, but unilaterally if time constraints so required. Note that whether or not the terrorists possessed WMDs was irrelevant in the actual Afghan case and would be irrelevant in the hypothetical case just described.

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16. The Taliban regime in Afghanistan was a notable exception.

Coalitions of the willing formed for pre-emptive purposes, as in the U.S./U.K. coalition that invaded Iraq, are equivalent to unilateral pre-emption and need to meet the same criteria for justification. While a coalition provides a framework for interchange of perspectives and rational deliberation between analysts and leaders of two or more states and is therefore more likely than a single state to base its actions on established facts and agreed analyses, coalitions are not officers of the law unless authorized to act as such. Unauthorized unilateral or coalitional pre-emption tends to undermine the network of laws that states have imposed on themselves to regulate their interactions, and to undermine respect for law itself. Coalitional intervention, whether reactive or pre-emptive, must be limited to rare cases of extreme emergency when no other solution is available, as outlined elsewhere in this essay.

It is also important to note that any force combating terrorism must make every effort to maintain respect for internationally-recognized basic human rights, above all those that are non-negotiable even in situations of national emergency (Article 4 of the International Covenant on Civil and Political Rights). In the 1970s and early 1980s, some governments confronting critical situations tried to control terrorists by sweeping aside respect for all human rights standards and killing and torturing suspects at will, claiming that terrorist violence justified any and all methods to defeat them. But when terror becomes state policy, a government loses legitimacy, and it can also lose focus, as some of the regimes just described soon failed to distinguish between terrorists and nonviolent political opponents.

## VII. STATES AND WMDs

A state has many channels of ongoing contact and communication with another state, legal, political, diplomatic, economic, social, technological, official and private, bilateral and multilateral. They are all channels of influence through which states deal with each other, and they do not exist in the relationship between a state and a terrorist organization. These channels do not exclude the reality of power; rather, they presuppose, discipline and channel it. They do not exclude the possibility of military intervention.

Every rational government takes measures to defend its people, and those of its allies, from external attack. Governments discharge this task through a defense establishment, diplomatic and intelligence services, border controls and alliances. Professionals must tell policymakers frankly what they know for sure about a particular threat and what they don't know, how certain they are as to what it means, and why they reach the conclusions they do. But it is policymakers who have to decide what to do about it, and when to wait for more information before deciding on a course of action, understanding that it is never

possible to know everything about a developing situation and that time for decision can be very short.<sup>17</sup>

Regarding imminence, it is widely accepted that a state has a right, as a logical extension of self-defense, to use military force to defend itself against an imminent attack. Classically, this has meant that the pre-empting state had abundant, well-substantiated, clear and convincing information that a neighbor whose forces were massed along the border had gone into final preparation for immediate attack; tanks and infantry were in position to move, warships entering territorial waters were in battle formation, planes were in the air and headed in your direction.<sup>18</sup> During the 2002 U.S. Congressional debate on whether to authorize the use of military force against Iraq, proposals were introduced to restrict the President's authority. The Administration and its supporters replied that in today's world, technology has made traditional notions of imminence obsolete, and that an attack with a WMD would most likely take place without warning.<sup>19</sup>

Admittedly, there are difficulties with imminence as a criterion. On an individual level, there are situations in which it is unmistakable that an armed individual is about to attack another with lethal intent. Police officers and crime victims face these situations frequently, and there are times when it would be irrational not to shoot first to save one's own life or the life of another immediately threatened person. In state-to-state situations, one needs solid facts about intentions, capabilities and actions in progress. There is the danger that the doctrine of pre-emption in the face of imminent attack can be stretched to a point where it blends seamlessly into a strategic doctrine of preventive war: "strike first as soon as possible and gain the advantage of surprise and the momentum of offense, because sooner or later they will probably make war on us anyway." This thinking characterized both pre-war strategic planning and the last-minute crisis phase of the outbreak of the First World War.<sup>20</sup>

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17. In Iraq's case, time was not this limited, as onsite inspections were producing valuable information, onsite monitoring equipment was being repaired or installed, and conventional missiles were being destroyed when the decision was made to invade.

18. In American diplomatic history, the classic formulation of criteria for imminence is by Secretary of State Daniel Webster protesting a British attack on the *Caroline*, which was carrying a cargo of arms toward Canada. Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1920, 1634-35 (1984). Oral introduction of the 12th quarterly report of UNMOVIC Executive Chairman Hans Blix, UN Secretary Council 7 March 2003, [www.un.org/Depts/unmovic/SC7asd/tdelivered.htm](http://www.un.org/Depts/unmovic/SC7asd/tdelivered.htm). Also daily UNMOVIC IAEA Press Statements on Inspection Activities in Iraq, March 10-17, 2003, UN News Service, [www.un.org/apps/news/printinfocusnews](http://www.un.org/apps/news/printinfocusnews).

19. This rested on the claim that Iraq was working hand in glove with Al-Qaeda and similar groups, who would carry out the attack through their yet undetected agents in the U.S.

20. In the planning phase, both France and Germany had decided well before 1914 that war between them was sufficiently probable that, in light of modern developments in weaponry, transportation and communications, it would be crucial to strike with full force as rapidly as possible once hostilities began.

During the Cold War, for both NATO and the Soviet Union attack was always “imminent” in the sense that both sides were ready and able to mount an attack with just a few minutes notice; hostility and capability were givens, and the only questions were about short-term intent and the meaning of specific moves by the other side. World War III did not break out because both sides developed formal structures of round-the-clock communication, and a code of conduct that ensured that any given action by one side was explained to the other in a way that the intent and meaning were clear. During this period, when everyone lived with the knowledge that modern weaponry and means of delivery could destroy nations in an hour, a structure of communication and a code of conduct promoted transparency and helped to manage the problem.

Fear that a state might use a WMD against another country is still focused mainly on nuclear weapons and their means of delivery, despite the fact that chemical weapons have been used in recent decades as well as in World War I. Biological and chemical weapons are thought to be difficult to use in interstate war, in that they are so unstable that in certain conditions they are as likely to kill those who use them as their intended victims. Also, most states do not regard acquiring chemical or biological weapons as a prestigious accomplishment. On the other hand, some states suspected of clandestine nuclear weapons programs already have or are on the way to obtaining transcontinental delivery capabilities, and there is also rapidly growing recognition of the difficulty of preventing the smuggling of a “dirty bomb.”

Nuclear weapons are produced by states. IAEA Director General Mohammed El-Baradei told that organization’s General Conference in September 2004 that the agency has reason to believe that some forty states have or are on the way to developing the means to produce weapons-grade nuclear material or actual weapons, and that this means that substantial improvement is needed in existing international controls on nuclear proliferation. He pointed out that slippage in the nonproliferation regime has undeniably occurred since the end of the Cold War, and that strengthening it is one of the most urgent tasks of the international community.<sup>21</sup> As noted above, possession of missiles by a state that is found to be developing or has developed a nuclear weapon further complicates the problem.

In most and perhaps all countries the facilities that produce, use, and store nuclear material are under government control. It is good security procedures

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They thereupon began to train, equip and position their forces to carry out this strategy. In the last-minute crisis, multiple mobilizations on the continent persuaded all major powers that attack was imminent; it was only misperception and fear caused the false perception to become real.

21. *Id.* (discussing several gaps in the existing system, assessing the strengths and weaknesses of recent efforts to close them, and recommending new multilateral legal initiatives and institutional controls, accompanied by a shift in aspects of U.S. nuclear weapons policy).

that will prevent the theft of this material, good police work that will investigate any theft, good intelligence, and international cooperation that will halt its transport across borders.

If a terrorist organization is found to have acquired a nuclear weapon or the components of a nuclear weapon, the Security Council, acting under Chapter VII, or the General Assembly acting under Uniting for Peace, should regard this fact as an imminent threat to international peace and security and take immediate action to neutralize the threat, including military action if necessary, with or without the cooperation of the state where the terrorists and the weapons are located. If neither the Council nor the Assembly is able to act in a timely or effective way, a state that has suffered previous attacks by the same terrorist organization would have the right in self-defense to seize or destroy the nuclear weapon(s) or components. Terrorists acquisition of biological or chemical warfare agents demands appropriate and immediate Security Council action under Chapter VII, with General Assembly action under Uniting for Peace as an alternative in case the Council is unable to act promptly or with effect. The Council must also take appropriate measures against any state that is found to have supplied a WMD to a terrorists group.

The quality of intelligence supporting the conclusion that terrorists have acquired nuclear weapons or other WMDs is a key determinant of whether pre-emptive action is warranted. Mere suspicion is not enough, as all have seen in the case of Iraq. As has been said elsewhere in this essay, the evidence must be abundant, well-corroborated, clear and convincing. This requires multiple reliable sources and as wide a circle of cross-checking and joint assessment among national services as is consistent with security requirements for intelligence sources and methods.