

A DUTY TO PREVENT¹

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Under what conditions is the use of force “legitimate”? This is a question that has had many answers through the centuries. Force was once legitimate when used in a just cause according to Catholic doctrine, when used to expand an empire, or when used to unite a nation. The drama of the 20th century, from an international legal point of view, is the effort for the first time actually to outlaw the use of force except when used in self-defense, and to transfer the legitimate use of force to a multilateral institution. That is the signal legal achievement of the UN Charter, the structure created by the combination of Article 2(4), Article 51, and Chapter VII.

Today these rules need to be rewritten, or at least amended. The Charter rules were written for the last war – for a classic inter-state conflict waged by standing armies of identifiable soldiers. As horrific as the invasion of Poland or the attack on Pearl Harbor was, the world had time to respond before irrevocable damage was done, and time, indeed, to anticipate and forestall the attack by collective action. The most dangerous security threat facing nations in the 21st century is a possible terrorist attack using a nuclear or biological weapon capable of killing hundreds of thousands or indeed millions of people at a stroke.

Neither deterrence nor defense offer adequate protection against this possibility. We must instead be able to identify the would-be attackers and stop them before they can strike. President Bush has proclaimed a doctrine of unilateral preemption, whereby individual nations that perceive themselves to be at risk can strike first. Secretary General Kofi Annan has rejected unilateral preemption, but has nevertheless recognized the gravity and unprecedented nature of the threat and called upon the Security Council to consider “early authorization of coercive measures.” Such authorization will require a revision or at least a reinterpretation of what constitutes a “threat to the peace” under Article 39. It will also require a new consensus on when and how the Security Council should respond.

For many years, a small but determined group of regimes has pursued the nuclear option and other weapons of mass destruction in spite of the international rules barring WMD proliferation and, to a certain extent, without breaking them. Some of these nations cooperate with one another, for example, trading one state’s comparative advantage in missile technology for another’s in uranium enrichment. Their cooperation, dangerous in and of itself, creates incentives for others to develop a nuclear capacity in response. These regimes can also provide a ready source of weapons and technology to individuals and terrorist organizations that are actively seeking to acquire and use WMD. The threat is gravest when the state pursuing weapons of mass destruction is a closed society headed by a ruler or rulers who menace their own citizens as they much as they do their neighbors and potential adversaries.

I. New Guiding Principle: A Duty to Prevent

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In the area of humanitarian protection, the International Commission on Intervention and State Sovereignty, co-chaired by Gareth Evans and Mohammed Sahnoun, proposed a new “guiding principle” to govern the international community’s response to large-scale humanitarian crises – massive violations of human rights, genocide, even famine or the human costs of anarchy. That principle was “the responsibility to protect.” As articulated by the Commission, UN member states have a responsibility to protect the lives, liberty, and basic human rights of their citizens. If they fail or are unable to carry out this responsibility, the international community has a responsibility to step in.

We propose a similar guiding principle to govern responses to a new generation of threats to global security. The international community, acting through the United Nations, should adopt a collective duty to prevent nations run by rulers without internal checks on their power from acquiring or using weapons of mass destruction. In cases where such regimes have already acquired weapons of mass destruction, the first responsibility is to halt these programs and to prevent the regimes from transferring WMD capabilities or actual weapons. The duty to prevent would also apply where a state sponsor of terror is pursuing weapons of mass destruction.

Under the Charter, the Security Council may take action when it determines the existence of a threat to international peace and security. Nothing now prevents the Security Council from identifying the possession or effort to acquire weapons of mass destruction by a government with no internal checks on its power as a threat to the peace, and taking measures accordingly. But articulating and acknowledging a specific duty to prevent such governments from acquiring weapons of mass destruction will shift the burden of proof from suspicious nations to suspected nations and create the presumption of a need for early and, therefore, more effective action.

Why the emphasis on the absence of internal checks on a government’s power? We are not simply trying to distinguish between “good” governments and “bad” governments, much less between democracies and non-democracies. It is not that governments that do have internal checks on their behavior always obey international law. They have the same obligations to abide by international agreements restricting the development and use of weapons of mass destruction as anyone else, and their compliance must be monitored. However, in an open society their behavior is open to scrutiny, criticism, and countermeasures by opponents, both domestic and foreign and the existing set of nonproliferation agreements can either circumscribe their behavior or, if political circumstances change dramatically, as they did, say, in South Africa in 1989 and Argentina and Brazil in the 1990s, they can provide a path for states to give up their nuclear ambitions or in the case of Pretoria, even their weapons.

In a closed society with no opposition, however, the international community may only discover a danger when it is too late. In such cases, the standard diplomatic tools are simply not up to the job. We argue that the greatest potential danger to the international community is posed by rulers whose power over their own people and territory is absolute – such that no matter how brutal, aggressive, or irrational they become, no force within their own society has the capacity to stop them. Moreover, they have typically reached such a position by destroying internal opposition and terrifying, brainwashing, and isolating their populations. Indeed, one of the ways that they subdue domestic opposition is to “close” their societies, controlling as many inflows of

information as possible. Such leaders may seek simply to consolidate their power and be left alone. But if they choose to menace other countries or to support terrorist groups, it is far more difficult to find out what they are doing and to take effective measures to stop them.

II. *Caveats and Qualifications*

The recognition of a collective duty to prevent as outlined above would be a bold and strong step toward updating the Charter regime governing the use of force to face a new generation of threats. As a guiding principle, however, the duty to prevent would operate *together with* the existing non-proliferation regime. It would have to be carefully applied on a case by case basis. And perhaps most importantly, it must be applied through a process of collective deliberation, preferably through the UN Security Council.

A. *The Duty to Prevent Would Supplement the Existing Non-Proliferation Regime*

The nuclear nonproliferation treaty, the cornerstone of international efforts to prevent the spread of weapons of mass destruction, has been effective at stanching nuclear proliferation in the overwhelming majority of cases. It has also provided a pathway for states seeking to terminate their nuclear programs. Post-Apartheid South Africa's decision to end its nuclear program in 1989 and join the NPT, the first case of a nation with nuclear weapons on its soil voluntarily giving them up, is the leading example.

But the NPT did not prevent a small group of determined states, including Iraq, North Korea, and Iran from traveling down the nuclear path. Indeed, each of these nations, operating in some cases within the legal limits of the treaty, managed to develop advanced nuclear programs or, in the case of North Korea, the material for actual nuclear weapons.

How did this happen? The problem is that in the interests of fairness and due process, the agreement does not make it possible to meaningfully distinguish between nations that are members of the treaty in good standing and nations with clear nuclear designs. Only when clear evidence of a breach emerges can members take action against a member state -- at which point the options have narrowed and it is too late.. The duty to prevent would thus apply to cases where the underlying set of agreements restricting WMD programs -- the Nuclear Nonproliferation Treaty, the Biological Weapons Convention, and the Chemical Weapons Protection -- has not prevented a regime without internal checks from pursuing dangerous weapons, or when such a state withdraws from its obligations or cheats on them, or when a gap in existing rules needs to be filled to prevent such a regime or leader from acquiring WMD or the means to deliver them.

B. *Application of the Duty to Prevent Would Be Tailored to Individual Cases*

Just as the responsibility to protect cannot practically apply to all regimes that abuse their citizens' human rights, the duty to prevent cannot apply to all closed societies with WMD programs. To be practical the duty has to be limited and applied when it can produce beneficial results. It will obviously be easier for the international community to take preventive measures regarding the acquisition or deployment of nuclear or biological weapons in a relatively small

country rather than a major regional or global power. Absolute consistency of application is desirable, but the best cannot be the enemy of the good. At the same time, however, the emphasis on prevention means that the international community must act early in order to be effective and develop a menu of potential measures aimed at a particular government or governments, particularly measures that can be taken well short of any use of force.

C. The Duty to Prevent Should be Exercised by a Global or Regional Organization

The most contentious issue raised by a duty to prevent is who decides when and how to use force. No one nation can or should shoulder the obligation to prevent a repressive regime from acquiring WMD capabilities alone. Alternatively, a power as potentially far-reaching as a duty to prevent should not be vested in one nation alone.

The Security Council is still the preferred destination when collective action is necessary. The legitimacy and weight of preventive measures endorsed by the UN will make it easier to carry them out and make them more likely to be effective. It will also make it much harder for the targeted government to play politics as usual. When the international community is divided, nations pursuing weapons of mass destruction exploit the fissure, and states pursuing the nuclear option buy time to advance their WMD programs. The Security Council itself should consider the consequences when it fails to confront the tough issues, leaving it to individual nations to take matters into their own hands, and further eroding the stature and credibility of the United Nations.

Given the prospect of Security Council paralysis, however, other alternatives must be considered. The next stop should be the regional organization that is most likely to be affected by the emerging threat. Failing consensus there, the next best option would be another regional organization, such as NATO, that may have less direct connection to the targeted state but that has a broad enough membership to permit serious deliberation over the exercise of a collective duty. Only after these options are tried in good faith and exhausted should unilateral action or coalitions of the willing be considered.

If force is needed certain “precautionary principles” apply. All non-military measures to achieve the same ends must be tried, unless they can be reasonably said to be futile. The scale, duration, and intensity of force used must be the minimum necessary to achieve the objective; further, the objective itself must be reasonably attainable when measured against the likelihood of making matters worse. Finally, any use of force should be governed by rules of engagement that reflect the fundamental principles of the law of war: proportionality, necessity, and discrimination between combatants and civilians.

III. Would It Work?

Would recognition of a collective duty to prevent actually work to reduce the combined threat of terrorism and weapons of mass destruction? Or, as many skeptics are likely to suggest, would it be one more paper promise more likely to paralyze the Security Council than energize it? The best answer is to canvass some concrete examples.

Consider, how the recognition of a duty to prevent could have changed the debate over Iraq. Under existing law, the Bush administration could only make the case for intervention by relying on the present existence of WMD in violation of Security Council resolutions. Even in a case where Saddam Hussein’s Iraq was subject to special Security Council restrictions in light of its past nuclear program and use of chemical weapons, the United States could not make the obvious point regarding Saddam’s potential threat, given his absolute power, his past behavior,

and his expressed intentions. Yet if the international community had not treated his regime as a special case over the past ten years, that is, had it pursued the policies advocated by Russia and France during the 1990s, the world would have likely faced a nuclear Iraq in 2003, as it nearly did in 1991 at the time of the first Gulf War.

On the other hand, suppose that in March 2003 the U.S. and the UK had accepted a proposal by France, Germany and Russia to blanket Iraq with inspectors as an alternative to the use of force. Presumably those inspectors would have found what U.S. forces now seem to be finding – a capacity and intention to build weapons of mass destruction, but no existing stocks. Would the appropriate response then have been to send the inspectors home and leave Hussein's regime intact? The better answer would have been to recognize the combined threat of the nature of Hussein's regime and his determination to acquire and use WMD from the beginning. The Security Council could have sought his indictment and prosecution for crimes against humanity back in the 1980s, at the same time as we were blanketing the country with inspectors. The duty to prevent would thus focus attention on specific states as subjects of special concern.

And in the wake of the invasion of Iraq, consider the progress made on uncovering and dismantling nuclear programs in both Iran and Libya. In both cases determined action to *prevent*, rather than to remove, has yielded results. Iran is a particularly important example, as it reflects a collective effort by the United Nations through the mechanisms of the NPT, but backed up by a new resolution to see the process through. Both cases have also revealed that the pathways of proliferation lead through many nations, both developed and developing, all of which must be both engaged in and possibly subject to the duty to prevent.

In sum, the security threats facing individual nations and the world at large in an era of both terrorism and the proliferation of weapons of mass destruction, particularly nuclear and biological weapons, require a proactive rather than reactive set of responses. The risk of letting a nation get all the way down the road to the actual creation of such a weapon in a political system that blocks information to the outside world and cannot restrain a leader's decision either to use it or to sell it to other nations or terrorist groups is too great. The international community, acting through the United Nations, must recognize a collective duty to prevent such an eventuality by acting as early and as expeditiously as possible.