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The concept of preventive war and its consequences for international relations

Report
Political Affairs Committee
Rapporteur: Mr Lluis Maria de PUIG, Spain, Socialist Group

Summary

Council of Europe member and observer states should reject the unilateral recourse to preventive war, as it is unlawful under international law, it entails considerable risks for the maintenance of international peace and security and undermines the relevance, credibility and legitimacy of the United Nations Security Council in these matters.

On the other hand, the risk of the unilateral recourse to preventive war highlights the urgency of finding an agreement on the reform of the United Nations Security Council, with a view to restoring its legitimate and unique role in deciding over responses to threats to peace and security in a rapid and efficient manner.

Similarly, the reform of the United Nations should enable the Security Council to act more swiftly and effectively to prevent or stop gross human rights violations, genocide or ethnic cleansing where a country is unable or unwilling to protect its own population. In this context, the Assembly fully endorses the "principle of the responsibility to protect".

A.   Draft resolution

1.   Since the end of the Second World War, a norm has taken root in international law that, with the exception of legitimate defence, states should not engage in military action unless explicitly sanctioned by the United Nations Security Council (UNSC). After September 11, in the new context of the global war against terrorism, the United States justified *Operation Enduring Freedom* in Afghanistan as an act of self-defence against the state harbouring, supporting and sponsoring Al-Qaida terrorist camps. However, in 2003 the United States tried to overstretch the concept of self-defence by invoking the doctrine of preventive war to strike against Iraq, in order to pre-empt future attacks by a "rogue state" in possession of weapons of mass destruction (WMD).

2.   The Parliamentary Assembly reiterates its long-standing commitment to multilateralism and to the principle of collective response to global threats, as opposed to unilateralism. It is more than ever convinced that a multilateral system founded on the United Nations and its Charter is the only way to meet the complexity of today's challenges, including old and new threats to international peace and security, such as those posed by terrorism or the proliferation of WMD.

3.   It should be acknowledged, however, that unilateral actions purportedly justified under the doctrine of preventive war do take place in practice. Moreover, sometimes these actions are supported explicitly or tacitly by a number of countries, including Council of Europe member states, as they are considered "the lesser of two evils", especially in the light of the difficulty for the United Nations system of collective security to react swiftly and promptly, even in the case of major threats to peace and security.

4.   The Assembly is convinced that, even where allegedly justified by the urgency of averting an imminent threat, unilateral recourse to preventive war, in addition to being unlawful under international law, entails considerable risks for the maintenance of international peace and security in the long-term, as it could be invoked as a precedent by a growing number of countries. In addition, as force is resorted to in order to prevent threats that have not yet materialised, it is difficult to prove its compliance with the legal requirements of necessity and proportionality. Above all, the unilateral use of force undermines the relevance, credibility and legitimacy of the United Nations Security Council in these matters.

5.   The Assembly notes, moreover, that conventional war does not always produce the desired results in the context of the fight against terrorism, a task for which the armed forces are not intended and for which they do not have the basic training, especially as, in this type of situation, there is a grey area where international conventions, such as the 1949 Geneva Conventions on international humanitarian law and their protocols, and traditional military ethics are not necessarily applied.

6.   On the other hand, the risk of unilateral recourse to preventive war highlights the urgency of finding an agreement on the reform of the United Nations Security Council, with a view to restoring its legitimate and unique role in deciding over responses to threats to peace and security in a rapid and efficient manner, and making it fully representative of the current geopolitical reality of international relations.

7.   Similarly, the reform of the United Nations should enable the Security Council to act more swiftly and effectively against the risk of the population of a country being subjected to gross human rights violations, genocide or ethnic cleansing as a result of deliberate state action, state neglect or a failed state situation. In this context, the Assembly fully endorses the duty of assistance to peoples in danger as described in Security Council Resolution 688, a concept also known as the right of interference, which is currently developing into the more general "principle of the responsibility to protect".

8.   The Assembly, therefore, calls on Council of Europe and observer states to:

8.1.   reject the principle of unilateral preventive war, considered as unlawful and illegitimate under international law, and take into account the disastrous results of the application of the notion of preventive war in the recent past and in current times;

8.2.   always act within a multilateral framework and by privileging political and diplomatic action vis-à-vis international crises and conflicts;

8.3.   refrain from any unilateral use of force outside the cases allowed by international law and in particular by the United Nations Charter;

8.4.   intensify their diplomatic efforts to finalise an agreement on the reform of the United Nations Security Council; and

8.5.   support the principle of "the responsibility to protect" and the right of the United Nations Security Council to act to prevent or stop gross human rights violations, genocide, ethnic cleansing or crimes against humanity taking place in a country which is unwilling or unable to protect its own population.

B.   Explanatory memorandum, by Mr Lluis Maria de Puig, rapporteur

I.   Introduction

1.   Preventive war is a concept as old as history itself. Nevertheless, it is also a concept that threatens to seriously disrupt the stability of the international system as we know it today. After the Second World War, the world's leaders decided to renounce their respective right to engage in war unilaterally. Whether they succeeded in adhering to their decision is another matter; in any case, the idea has taken root - and has become part of international law - that states shall not engage in aggressive military action under any circumstances unless expressly sanctioned by the United Nations. In 2002, this assumption was officially challenged for the first time by the United States, which one year later proceeded to put its new doctrine, the so-called "Bush doctrine", to the test in the case of Iraq.

2.   This report seeks to:
- illustrate the doctrine of preventive war, especially as developed by the current Bush administration. In doing so, I will dwell on the case of the war against Iraq;
- consider arguments in favour of or against this doctrine, as well as its possible side-effects;
- describe the principle of the so-called "responsibility to protect";
- suggest how the forthcoming reform of the UN, in particular of the Security Council, should take account of these developments to make the Organisation capable of reacting promptly and flexibly to the challenges of today's world, be they terrorism, the proliferation of weapons of mass destruction or serious human rights violations against the population of a country which is unable or unwilling to protect them.

3.   I would like this work to be seen as a contribution to the ongoing debate on the relevance of multilateralism as a means to solve international disputes and preserve peace and security. It is a natural follow-up to Assembly's previous reports concerning the United Nations, the war in Iraq and euro-Atlantic relations. It is particularly timely in consideration of the possible reaction to Iran's nuclear policy.

4.   In this report I will adhere to the traditional definition of preventive war, even when referring to texts and statements using different terms.[1]

- Thus, I shall refer to **preventive war** when describing *an attack or war launched by one country in order to prevent a second country from developing the capacity to eventually inflict grievous harm on the first country*. It should be noted that, in this case, the immediate threat has not yet materialised.

- Such a preventive war – or preventive attack – must be clearly distinguished from the concept of a **pre-emptive war**. The latter is usually justified as <u>*a reaction to a significant, immediate and unavoidable threat*</u>. For this reason, pre-emptive attacks are often also referred to as "anticipatory self defence," in that the attacking country has no choice but to fight if it is to defend itself.

5.   Several experts maintain that the distinction between a pre-emptive and a preventive war is an artificial, or at best a highly subjective one, and that the only difference between the two types of wars lies in the conclusiveness of the evidence a country has that it is about to be attacked, which is bound to be interpreted differently depending on who is conducting the analysis.

6.   As it is apparent from the definition, the goal of preventive war is self-defence. However, one must first determine **what "self" means**. Some political analysts and scholars have proposed that the

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[1] Much of this report will deal with the 2003 war against Iraq. In an effort to be consistent in the use of terminology, this report will refer to the war in Iraq as a *preventive* war, even if the current National Security Strategy of the United States of America arguably folds the notion of preventive war into the overall concept of a pre-emptive war, thereby permitting policy makers to refer to the war in Iraq as a pre-emptive one. See Michael E. O'Hanlon and Susan E. Rice and James B. Steinberg, "The New National Security Strategy and Pre-emption," Policy Brief #113,of the United States of America, September 2002, The Brookings Institution (available online at http://www.brook.edu/comm/policybriefs/pb113.htm) p.15.

promotion of human rights, the spread of democracy, or even access to free markets worldwide might be considered as national interests so fundamental to a particular nation that anyone who threatened these goals might elicit a reaction of "self-defence". Other authors have advocated ~~for~~ the extension of the right of self-defence to cover also humanitarian goals, such as the "right" of the United Nations to overthrow a dictator in order to save the lives of those adversely affected by his/her harsh policies. In general, such expansions of the notion of self-defence have been rejected; however some policy experts, including the United States Department of Defence, have been keen to expand the list of crucial national security interests which merit a "self-defence" reaction if threatened by another country.[2]

7.   Given the almost infinite possibilities for expanding the definition of the "national self", this report will adhere to the more traditional understanding of the concept which holds that **self-defence is limited to the proportionate and necessary reactions to imminent threats against "the territorial integrity or political independence of any state"** – as defined by article 51 of the United Nations Charter.[3]

8.   International law is clear in that preventive war against another sovereign nation is unlawful. Article 51 of the United Nations Charter allows for the use of military force only in response to "an armed attack". Although Article 51 does not explicitly mention pre-emptive attack, recourse to pre-emptive attacks does happen in practice, although such claims are extremely rare and usually controversial. Thus pre-emptive attack is generally considered the narrow outer limit of the self-defence exception to the **general prohibition against the use of force in international law**. Such a prohibition is set out in Article 2.4 of the United Nations Charter: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations." Only a minority of analysts argue that countries can define self-defence however they wish, based only on their perception of the tactical realities of the potential threats facing them. Even most supporters of preventive war recognise that the policy represents a break from traditional international law.

9.   The report "A more secure world: our shared responsibility"[4], by the United Nations High Level Panel, published in December 2004, later endorsed by the then Secretary General of the UN, does not favour the rewriting or reinterpretation of Art. 51. The Security Council, according to the same report, should consider whether to authorise military force on the basis of <u>five criteria</u>:

-      seriousness of threat;
-      proper purpose;
-      last resort;
-      proportional means;
-      balance of consequences.

10.   The report of the High Level Panel advocates that the question "is not to find alternatives to the Security Council as a source of authority but to make it work better than it has".

II.   Humanitarian intervention and responsibility to protect

11.   So far I have described preventive interventions launched by a state to avert an imminent threat against itself or its population. The question remains whether there is a right to undertake military operations in order to avoid serious danger against **another state's population**, for instance genocide, ethnic cleansing and crimes against humanity.

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[2] Department of Defence, "Quadrennial Defence Review" (Washington, D.C.: U.S. Government Printing Office, 30 September 2001), p.2 (available online at http://www.defenselink.mil/pubs/qdr2001.pdf).
[3] In fact, the most recent Clinton National Security Strategy published in 1998, divides American national interests into "vital interests," "important national interests," and "humanitarian and other interests." According to this division, only a threat affecting American "vital interests" could prompt an American reaction of self-defence. A National Security Strategy for a New Century, The White House, October 1998, pp.5-6 (available at http://clinton2.nara.gov/WH/EOP/NSC/html/documents/nssr.pdf).
[4] In Larger Freedom: Towards Development, Security and Human Rights for All, March 2005.

12.   The debate on this question became lively in the 90s, as a result of events in Somalia (1993), Rwanda (1994) and the former Yugoslavia. Before the massacres of great numbers of civilians in these domestic conflicts, the question arose whether, given the inaction of the United Nations Security Council, some states had a right of intervention to prevent or stop a major humanitarian catastrophe or, as it was often said at that time, a right to interfere with what, with a traditional approach, might have been considered as "**the internal affairs of a sovereign country**".

13.   This was the language of the Parliamentary Assembly's Committee of Legal Affairs and Human Rights when, in 1992, it referred to the "right of interference" as a new emerging right developed from Resolution 688 of the United Nations Security Council of 5 April 1991[5]. This UNSC Resolution, in fact, asked Iraq to allow immediate access by international humanitarian organisations to all those in need of assistance in all parts of Iraq. However, it was interpreted by some states, including the United States, the United Kingdom and France, as giving them an implicit authorisation to set up and enforce a no-fly zone in northern Iraq, in order to protect the work of international humanitarian organisations providing relief and shelter to Iraqi Kurds, victims of the regime's persecutions. The report by the Committee on Legal Affairs and Human Rights stated that "A new phase in the development of international law is thus being adumbrated which attempts to reconcile in law a supreme political imperative (the full independence of the nation state) with a moral requirement (the desire to save thousands of human beings threatened with extermination)".

14.   Despite this prominent precedent, states have proved to be rather reluctant to rely on a formal right of intervention. For instance, the NATO intervention in Kosovo in 1999 was justified as a means to protect the Kosovo Albanian population of the Province from serious human rights violations and ethnic cleansing at the hands of the Serbian majority population and state authorities. However, the legal argument put forward by a number of NATO members – including the United States and the United Kingdom - was that the Security Council had **implicitly authorised** the intervention by condemning the repeated failures of Serbia to comply with previous UNSC resolutions. No state mentioned a formal **principle of humanitarian intervention**, even if in various statements the humanitarian motive behind the military intervention was clear.

15.   Under the impact of contrasting experiences such as Rwanda – where neither the United Nations nor states intervened to stop the butchery – and Kosovo, former United Nations Secretary-General Kofi Annan urged member states to come up with a new consensus on the challenge posed by humanitarian intervention. Lloyd Axworthy, who was Canadian Minister of Foreign Affairs at the time, responded to the challenge by setting up the International Commission on Intervention and State Sovereignty (ICISS), a reflection group formed of independent experts, academics and politicians. The outcome of the ICISS's work was the first conceptualisation of the **doctrine of the "responsibility to protect"**. The shift of language – from humanitarian intervention – was due to the fact that sovereignty should be seen as a matter of "responsibility": every sovereign state is responsible for the protection of the people under its jurisdiction.

16.   The **formal endorsement** of the doctrine of the responsibility to protect came in 2005 with Kofi Annan's report *In Larger Freedom*. This report included a call to governments to embrace this doctrine as a basis for collective action: of course, the responsibility to protect its own population lay first and foremost with each individual state; but if a state was unable or unwilling to do so, the responsibility to protect should be shifted to the international community. The means available to this end would include the use of diplomatic and humanitarian methods; should these prove to be insufficient, the United Nations Security Council should have the right to take action under the Charter, including the threat or the recourse to force as a last resort.

17.   With a spirit of self-criticism, it should be acknowledged that despite the theoretical development of the principle of the responsibility to protect, Europe and the West have not always been able to intervene to avoid extreme situations of human rights violations, or even genocides. Among the missed opportunities of this kind one should recall some very recent cases such as Congo, or Darfur (Sudan), where, in the latter, an unprecedented humanitarian catastrophe is taking place right now.

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[5] Report by the Committee on Legal Affairs and Human Rights on the Establishment of an international court to judge war crimes (rapporteur : Mrs Haller), Doc. 6587.

III.   The war in Iraq as a case of preventive war

18.   The arguments advanced in 2002 by the United States as well as a number of their allies in Europe, to justify the recent war against Iraq presents many similarities with the Israeli attack against the Osirak nuclear reactor in Iraq, in 1981. Although Israel labelled the strike as a pre-emptive strike, most scholars have since argued that the attack was instead of a preventive nature. At that time, Israel justified the attack by arguing that had Iraq been allowed to acquire nuclear weapons, it would have posed an existential threat to Israel and other Middle Eastern states. Israel considered this threat – although not yet fully matured – as significant enough to justify a unilateral, preventive action. Prime Minister Menachem Begin considered Israel's diplomatic options as fruitless, and worried that prolonging the decision would lead to a fatal inability to act, especially in light of the upcoming elections. Thus, Israel launched the surprise attack which it claims set Iraqi nuclear ambitions back by at least ten years.

19.   The similarities are obvious (and bear a striking resemblance to those which are being put forward now as regards a possible intervention against **Iran**):

-    the attack was against what Israel considered to be a "**rogue state**" (Iraq); and
-    it aimed at preventing the deemed "rogue state" from acquiring **weapons of mass destruction**.

20.   Under international law, the 1981 attack was generally considered unlawful. At least ostensibly, the international reaction to Israel's action seemed to articulate this view, although Antony D'Amato, Professor at Northwestern School of Law, offers three possible ways of arguing that Israel's action was justified.

-    The first common interpretation is that Israel's attack on Iraq was one of "anticipatory self-defence" – in other words a pre-emptive attack as it is described in Article 51 of the United Nations Charter. However, with reference to preventive war, D'Amato claims it would be doing "violence to language" to claim that the attack on Iraq could be justified as self-defence, since Iraq was still years away from developing an offensive nuclear capacity.

-    The second interpretation refers to the attack as a legitimate part of an ongoing war between Iraq and Israel, since Iraq had never signed the 1949 Armistice Agreement between Israel, Egypt, Jordan, Lebanon and Syria. D'Amato responded to this argument by noting that this is a purely legalistic reasoning and that, de facto, the attack against Osirak was indeed a breach of the peace.

21.   The same two grounds were also raised by the United States to justify the war in Iraq. As mentioned above, the Bush doctrine also describes the war against Iraq as a pre-emptive, rather than a preventive war. In addition, State Department lawyers have justified the invasion of Iraq on the grounds that Iraq violated the United Nations ceasefire agreements after the first Gulf War in 1991. Similarly to the Israeli justifications for striking the Osirak nuclear reactor in 1981, both of these arguments for war have been largely dismissed by international commentators.

22.   D'Amato instead offers a third alternate justification for the Israeli strike that is quite relevant to today's discussion of preventive war, namely that Israel's strike was justified **as "a proxy for the international community."**   Referring to customary international law, D'Amato argued that its purpose is "to create the precondition for peace and human rights," and that consequently, the massive destructive potential of nuclear weapons means that "many of the old rationales for these rules…" which were crafted with conventional weapons in mind "…no longer apply." Thus, for the sake of "global survival," D'Amato argued that there could be a narrow justification for preventive war if the following conditions were met:

.   "The [preventive] strike has to be against a nuclear weapons facility, and not against any other kind of weaponry;
.   "The target state must be a rogue state in the sense that it is unstable and is likely to use its nuclear weapons for international blackmail and aggrandisement;

. "The [preventive] strike must be limited to the nuclear facility and must be carried out with the least possible loss of life; and

. "The international community must be *de facto* disabled from carrying out the strike itself, thus implicitly authorising an attack state to act as a proxy for the international community"

23. This line of argument is extremely relevant to the contemporary debate over preventive war: as D'Amato said, after the 1981 crisis the international community offered at best a "gentle pat on the wrist" to Israel while secretly "breathing a collective sigh of relief."[6] Making a parallel with other cases, there may be situations in which the "constraints" of international law make it impossible to respond to a major danger collectively – for instance due to a paralysis of the Security Council stemming from the exercise of the veto right. In these cases, should the international community stand by and watch a major problem become even greater? Or, rather, would it be justified for one country having the military capability to do so, to intervene as proxy of a number of other countries?

IV.   The arguments against preventive war

24. A review of the outcome of some preventive wars which were actually carried out will suffice to illustrate the arguments against preventive war, namely that:

- preventive wars remain unlawful under international law;
- they are strategically risky; and
- they are extremely damaging to long-term international stability.

i.   International law concerns

25. As Paul Schroeder, the conservative professor emeritus of international history at the University of Illinois at Urbana-Champaign, writes:[7]

> *"Norms, rules, standards of conduct, understandings about what is and is not permissible still count in international relations, now more than ever. They govern the expectations and calculations of statesmen; they influence public opinion and play a major role in the struggle for hearts and minds, increasingly important in this age of rising democracy, mass participation in politics, and instantaneous global communication. They form a central component of essential values in international politics – those universal values we consistently claim to be defending against the enemies of humankind…"*

26. The importance of Schroeder's words should be self-evident to members of a political institution such as the Council of Europe. Schroeder shares the concerns of many other commentators who believe that any nation which declares a policy of preventive war risks fatally undermining the foundation for international law, which is sovereignty and an aversion for violence.

27. As it stands today, international law does not permit preventive war unless – as quoted above – we were to "do violence to language." Nevertheless, it is difficult to dissuade powerful states from pursuing a policy which is in their national interest. Therefore, if it is to remain relevant, international law must ultimately be flexible enough to reflect any changed *de facto* circumstances on the ground. For instance, American concerns about weapons of mass destruction (WMD) and their potential use by rogue states and terrorists are shared by other countries, who might well be relieved at the United States taking unilateral action to prevent an escalation of the threat. A too rigid interpretation of international law could even be counter-productive, as it would run the risk of delegitimising the authority and relevance of international law where this is clearly against the interest of preserving peace in the long-term.

ii.   Strategic / military concerns

28. Military strategists often doubt the military wisdom of using preventive attacks as part of a national military strategy. Steven R. Prebeck, who served as a missileer in the US Air Force, writes

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[6] Anthony D'Amato, "Israel's Air Strike against the Osiraq Reactor: A Retrospective."
[7] Paul W. Schroeder, "Iraq: the Case Against Pre-emptive War" The American Conservative, 21 October 2002 (available at http://www.amconmag.com/10_21/iraq.html).

that "preventive attacks are politically untenable and are not militarily possible."[8] Writing in 1993, and using the example of North Korea, Prebeck concludes that the United States simply did not have the military technology or the intelligence necessary to completely destroy *both* the manufacturing capacity as well as the warheads of a "rogue state" aspiring to acquire nuclear weapons. Instead, Prebeck argues that any such attack will inevitably lead to retaliation by the attacked country and a sustained war to "finish the job". Prebeck's writings seem sadly predictive of the events in Iraq, which revealed huge shortcomings, both in the accuracy of American intelligence and post-war management, and which has also ultimately led to a sustained war of attrition through terrorist actions.

iii.   Political concerns

29.   Even for those preventive attacks which did not eventually end in military defeat, the long-term security impacts of such actions remain unclear. One need only look at the extremely negative image of the United States across Latin America and the Middle East to understand the political risks for a superpower bent on pursuing a proxy-war policy against its rivals. Similarly, few commentators on the Middle East would argue that Israel's preventive action against Iraq's nuclear ambitions won it many friends in the Arab world, even though other countries potentially threatened by an Iraqi nuclear programme such as Iran, Saudi Arabia and Kuwait also arguably profited handsomely from Israel's action. Instead, preventive action in these cases only served to increase suspicion of the attacking party.

30.   Many commentators have argued that such widespread popular suspicion of a powerful country naturally results in **fertile ground for radical anti-establishment movements** to take hold. The argument is that populations who perceive themselves as victims of a neo-imperialistic policy from outside countries often tacitly or overtly support terrorist organisations such as Al Qaida or Hezbollah who dedicate their resources to finding ways of destabilising the countries they accuse of imperialism.

31.   Other commentators have argued that the logical result of a policy of preventive action must necessarily lead to a neo-imperialistic **policy of constant war**. Once one powerful country demonstrates its determination to counteract the emergence of even potential threats to its security using military means, any rational potential target state would develop plans to prevent such attacks on its territory, if necessary by means of itself trying to pre-empt what it sees as in impending attack. Other countries that see themselves in the same position as a country which had been the target of a preventive attack, might be tempted to accelerate their own weapons of mass destruction "deterrence" strategies, thereby decreasing world stability. Ironically, it is precisely this doomsday scenario that many current-day advocates of preventive intervention use to support their ideas.

32.   In political terms, preventive attacks undermine the unity of the members of international organisations. In Iraq, for instance, the unilateral nature of the preventive war decided on by the United States against the will of other states, and without the consent of the United Nations **undermined the credibility of the UN**, the legitimacy of the operation and, above all, the unity of the states fighting terrorism. The decision by the United States to lead a coalition including, in particular, Poland, the United Kingdom and Australia, caused serious divisions in NATO and the EU, as demonstrated, for instance, by the letter signed by eight European countries calling for a united front against Iraq in January 2003.

33.   In contrast, **Operation Enduring Freedom in Afghanistan** in 2001, which was decided upon jointly, not unilaterally, was backed by United Nations Security Council Resolutions 1368, 1373 and 1378 and involved a united front of NATO members, Muslim countries and local armies (Pashtuns of the Northern Alliance, General Dostom's Uzbeks, etc). Leaving aside the continuing Taliban resistance, this operation has avoided the break-up of Afghan society and politics and has not undermined the unity and effectiveness of the coalition members in their desire to work for stability in the region. Above all, its lawfulness as an act of self-defence by the United States and its allies, following the terrorist attacks in American territory, was never disputed by members of the Security Council themselves.

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[8] Steven R. Prebeck, Preventive attacks in the 1990s, 1993.

34.   Other commentators – among them conservative commentators from the United States – worry that an American policy of preventive intervention would lead to the ultimate decay of all international order, since other countries would ultimately react to and/or follow the American policy with their own preventive intervention strategies. Many scholars, including the majority of European commentators, have warned of the dangerousness of such a situation, and point to the multitude of potential crisis points around the world which might be subject to such preventive attacks by one or more parties, including the conflict between India and Pakistan, China and Taiwan, South and North Korea, etc. In short, the long-term risks of a policy of preventive intervention is nothing short of total anarchy, somewhat akin to Hobbes' "State of Nature."

V.   A history of United States' policy

35.   Since so much of this debate comes either implicitly or overtly as a reaction to recent shifts in US policy, a brief examination of the history of American policy is justified at this point. During the **Cold War**, the United States relied primarily on a **policy of deterrence and containment** to protect its national interests vis-à-vis the Soviet Union. In essence, its purpose was to make clear that the cost of aggression against the United States or its allies was so devastating that no rational country would dare to attack. This policy, known as "mutually assured destruction theory", relied heavily on the overwhelming threat posed by nuclear weapons and intercontinental ballistic weapons technology. The existence of great numbers of such weapons in both the Soviet Union and the United States, combined with a conscious decision to freeze both countries' efforts to develop effective anti-ballistic missile technologies, made the notion of launching a preventive attack against either country futile, since enough of the weapons would inevitably survive the initial attack to destroy not only the original aggressor country, but also probably most other forms of life on the planet.

36.   Former President Ronald Reagan was the first US President to genuinely challenge the deterrence model that had proved so stabilising during the Cold War. On 23 March 1983, President Reagan gave his now-famous "**Star Wars**" speech, which caused Soviet analysts to worry that the United States might be trying to break the "mutually assured destruction" balance and launch a new arms race. Two years later, he outlined what would be known as the "**Reagan doctrine**," which entailed dramatic increases in military spending and active support for anti-communist movements worldwide. Indeed, the notion that the United States might move beyond containment and launch into a new arms race put tremendous political, technological, and economic strains on the Soviet Union and marked a noticeable weakening in the Soviet negotiating position and – as some analysts suggested – the beginning of the Soviet decline. In response to a 1986 nightclub bombing in Berlin, in which the US suspected Libyan involvement, President Reagan also launched an attack on Libya. The US argued that it had attacked Libya in order to prevent future terrorist attacks from happening. Fifteen years later, the US again used similar logic to justify its attack on Afghanistan after the September 11, 2001 terrorist attacks in New York and Washington, but this time with the approval of a great number of countries.

37.   President Reagan was succeeded by **George W. H. Bush**, whose term of office witnessed the fall of the Berlin wall, the collapse of the Soviet Union, and the American-led multilateral invasion of Iraq. These events took place in a moment of post-Cold War political euphoria, prompting a prominent scholar to write of "the end of history."[9] The United States emerged from the Cold War as the world's remaining superpower, and it looked as though the doors of the world were being thrown open to democratic change. However, serious challenges still remained, and the Bush administration had to come to terms with the radically changed security situation worldwide. The spectre of WMD proliferation, failed states, and ethnic warfare threatened to tarnish the optimistic spirit of the day, and prompted yet other observers to warn of a coming "clash of civilizations"[10] that would replace the old bipolar cold-war confrontation with a new one based on ethnic rivalries.

38.   In response to these threats, some of the more "hawkish" strategists in the Bush administration argued for a revision of the traditional US policy of containment and deterrence. They argued that, as the world's sole remaining superpower, the United States should proactively defend its position of military pre-eminence. In a leaked set of internal Pentagon military guidelines, Paul Wolfowitz argued that preventive war was the only solution to the proliferation of weapons of mass

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[9] Francis Fukuyama, The End of History and the Last Man (1992).
[10] Samuel P. Huntington, "The Clash of Civilizations," Foreign Affairs. v72, n3, Summer 1993.

destruction. He argued that America's "right" to pursue preventive wars arose, not out of an imperialist quest for power, but rather out of an **"exceptional" American responsibility to promote democracy and open markets worldwide**. The first venue in which these hawks argued for such a preventive war was Iraq. However, at the time, President Bush and the Chairman of the Joint Chiefs of Staff, Colin Powel, overruled the text as both inappropriate and imprudent.

39.   During the **Clinton administration**, the issue of preventive intervention continued to be the topic of active debate. Indeed, many supporters of the current Bush doctrine argue that the idea of pre-emptive war was actually partially adopted by President Clinton himself, notably in late 1993 with the introduction of the "**Counter proliferation Initiative**." Although not overtly referring to the idea of preventive war, this policy nevertheless flirted with the idea of "locate[ing], neutralise[ing], or destroy[ing] others' weapons of mass destruction before they could be used"[11] In a 1997 speech, President Clinton argued that the United States "simply cannot allow" Saddam Hussein to acquire weapons of mass destruction.[12] In fact, in 1998, the Clinton administration even implemented two preventive military strikes against suspected weapons of mass destruction production sites – once against a suspected Sudanese chemical weapons plant, and again against suspected Iraqi chemical, biological and missile production plants. However, neither of these two attacks were successful. The suspected weapons factory in Sudan actually turned out to be a pharmaceuticals factory. As for the attack in Iraq, specialists argued that reconstructing a chemical or biological weapons programme is a simple process once a programme has already been in existence, and as we now know, American intelligence about Iraqi weapons of mass destruction programmes was seriously flawed, so it is unclear whether Iraq possessed such programmes at the time of the military operations against it. Thus, according to the criteria outlined above, both of these preventive attacks failed because of flawed intelligence (as in the case of Sudan and – as we now know after the most recent war against Iraq – also in the case of Iraq) and because of their futility from a military/strategic perspective.

40.   As mentioned above, the issue took centre stage in 2002, with the publication of the Bush National Security Strategy, also known as the "**Bush doctrine**." In many ways, this document represents the fulfilment of the neo-conservative policy recommendations as they were originally advocated, during the first Bush administration, by Paul Wolfowitz. By making reference to the threat posed by "rogue states" possessing weapons of mass destruction who may at the same time co-operate with terrorist organisations bent on the destruction of the United States, the NSS-2002 announces a policy of pre-emptive intervention (which – as described above actually includes action that would otherwise be labelled as preventive) to eliminate such threats. Behind the doctrine is the belief that the United States policy is somehow exempt from "normal" international law, both because of its unrivalled power and also because of what they see as a unique American moral mission to spread democracy and peace – if necessary by force, since no other force in the world is capable of doing so effectively. As if designed specifically to apply to Iraq, the policy was immediately put to the test in 2003, in the war against Saddam Hussein.

41.   **Destabilisation of Iraq and the Middle East:** As preventive wars are almost always met with incomprehension among the people concerned and regarded as unfair, the United States has quickly become increasingly unpopular in Iraq and throughout the Muslim world. In the case of the war in Iraq, where the doctrine of preventive war has been applied from 2003, the consequences have been disastrous. The intervention has destroyed the country's entire political, economic and religious structures and spread chaos and civil war between the Sunnis, who used to hold political power, and the Shias, who make up the majority of the population but were persecuted under Saddam Hussein. The fragile balance between the religious traditions has been shattered and Iraqis' lives are now punctuated by bloody attacks by Sunni rebels against their Shia opponents or American forces.

42.   Moreover, as the policy of preventive war in Iraq has not met with the approval of most states in the region, unlike the situation, for instance, during the first Gulf War, it has upset the geopolitical balance in the Middle East between consenting states (Kuwait, Saudi Arabia) and hostile states (Syria, Iran), which are forming opposing fronts. Lastly, the tensions between Palestinians, the standstill in the Middle East peace process and the political instability in Lebanon, are also indirect consequences of this climate of tension caused by the coalition's intervention in Iraq.

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[11] Henry D. Sokolski, "Mission Impossible." Bulletin of the Atomic Scientists, v57, n2, March/April 2001, pp.62-68 (available at http://www.thebulletin.org/issues/2001/ma01/ma01sokolski.html)
[12] Steven R. Weisman, "Doctrine of Pre-emptive War Has its Roots in Early 1990s," New York Times, 24 March 2003. (available at http://www.iht.com/articles/90747.html)

VI.   Some "side-effects" of the US policy on preventive war

43.   Leaving aside completely for the moment the practical and military outcome of America's preventive war in Iraq, several international ramifications of the new Bush doctrine can already be identified.
- The first is the adoption by a host of other nations of their own version of America's preventive strike doctrine.
- The second outcome is a noted hardening in the positions of those remaining "rogue states," which possess or are thought to be developing nuclear arsenals – notably Iran and North Korea.

i.   The proliferation of the recourse to the preventive attack doctrine

44.   The conservative historian, Paul Schroeder, warned in 2002 that one of the logical outcomes of America's announcement of a preventive intervention policy would be that other countries would emulate it. Indeed, Schroeder's prediction has proven to be entirely justified. After the Bush administration started advocating for a preventive war in Iraq, other countries quickly joined the debate, announcing (or threatening to announce) their own policies of preventive intervention regarding their particular national security threats. Thus, on 1 December 2002, Australian Prime Minister John Howard announced Australia's "right" to preventive action in South East Asia to counter terrorist threats, much to the dismay of neighbouring countries there. He was joined on 9 April 2003 by Yashwant Sinha, Indian External Affairs Minister, who sparked howls of protest from neighbouring Pakistan when he argued that India's case for preventive war against Pakistan was much better than America's case against Iraq. One month later, Japanese Minister Junichiro Koizumi, announced his country's right to the pre-emptive option, in a statement directed largely towards the North Koreans. In October, Russian President Vladimir Putin, announced his country's right to pre-emptive strikes, citing specifically the North Korean crisis as well as the precedent for such a policy set by the United States. After the terrorist attacks in Beslan, he also declared that Russia has the right to strike against terrorism "anywhere in the world". At that time, the French were also considering a shift in their nuclear policy, and Jacques Chirac announced the possibility of using pre-emptive strikes against "rogue states". And – to close off the year – Israeli Defence Minister, Shaul Mofaz, in December threatened Iranians with a preventive strike along the lines of their 1981 action against Iraq's Osirak reactor if Iran continued to develop its nuclear weapons programme. Clearly, other countries do not share the view of some American commentators that America is so exceptional that *only it* can engage in a policy of preventive intervention.

ii.   The proliferation of weapons of mass destruction: Iran and North Korea

45.   Many analysts believe that the most serious threats to nuclear proliferation are India and Pakistan. Both countries are known sources of weapons technology proliferation, however both have been treated with "courtesy" by American diplomacy, especially when compared with the American policy towards Iraq. In return for their co-operation in the war on terror, both India and Pakistan have been "excused" for developing their nuclear arsenals by the United States. And North Korea, which re-launched its nuclear weapons programmes after being included as a member of US President Bush's famed "axis of evil", has since been the object of an intense, multilateral diplomatic effort to avoid a nuclear stand-off on the Korean peninsula. In recent months, international attention has been focusing on Iran, with the Security Council being seized by the issue and several high ranking American officials not excluding the possibility of military intervention aimed at preventing Iran from acquiring technology that could be used for producing weapons of mass destruction.

46.   Ironically, this difference of treatment seriously undermines the incentive for states to refrain from attempting to acquire nuclear weapons. As Jonathan Schell wrote in The Nation: "The lesson so far? Exactly the opposite of the intended one: If you want to avoid "regime change" by the United States, build a nuclear arsenal – but be sure to do it quietly and fast..., because then you get negotiations, and not military action."[13]

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[13]   Jonathan Schell, "the Case Against the War," The Nation, 3 March 2003 (available at http://www.thenation.com/doc.mhtml?i=20030303&s=schell).

VII.   Alternatives to preventive war

47.   Given the historically demonstrated precedent for powerful countries to either overtly or tacitly employ policies of preventive war, policy makers must still address a fundamental question: namely, do they wish to take an idealist and principled view on preventive war (arguing either for or against preventive war and subsequently demanding universal adherence to this position), or do they wish to take a realist view?

48.   According to Robert Kagan[14], the traditional European understanding of "multilateralism" implies a rigid adherence to the literal texts of international law – irrespective of a country's short-term national interests (**principled multilateralism**). The American understanding of the term, Kagan argues, is focused more on a desired result, such as the United States would, for various diplomatic and political reasons, attempt to find multilateral solutions to its problems first, while always reserving the option of unilateral action if a coalition could not be built (**instrumental multilateralism**).[15] Assuming that the American interpretation of "multilateralism" represents a "realistic" option, those concerned about the many dangerous and negative impacts of preventive war must seek to develop a multilateral framework which will provide a legal framework to govern the use of preventive war, but which will also discourage, to the maximum extent possible, the necessity for states to resort to such an option.[16]

i.   Regional Integration

49.   The first recommendation for dealing with the emerging threats of the post-cold war era is for the international community to support regional integration. The European post-WWII experience must serve as a dynamic example of how a region devastated by war can come together and form a neighbourhood of sovereign yet mutually monitoring states. Today, it is highly unlikely that one Western European country would mount a military threat against one of its neighbours. This is the result of a long history of integration beginning in 1949 with the creation of the Council of Europe and in 1952 with the creation of the European Coal and Steel Community, which ultimately led to the European Union of twenty-seven member states that we know today.

50.   Many of the world's most threatening "rogue states" are primarily regional, rather than global threats. North Korea poses a threat primarily to South Korea and Japan. Iran and Iraq also both pose(d) primarily regional threats. According to some, even Nazi Germany in 1936 could have been thwarted had there been a less divided and apathetic regional approach to renewed German expansionism. A forward-looking policy **to encourage regional solutions to regional problems** could advance not only the non-proliferation of dangerous weapons, but also human rights, democracy promotion, economic development, global integration, and the promotion of ethnic tolerance. Such an effort could feasibly be spearheaded by the United Nations as part of a long-term strategy to decentralise and regionalise conflict prevention efforts, making them less vulnerable to the political deadlock endemic to global intergovernmental organisations, while at the same time still respecting local customs, sensitivities, and concerns. Such a strategy could potentially form the essential first defence against emerging threats that might otherwise provoke another country to consider a preventive intervention.

ii.   Sanctions

51.   Article 41 of the United Nations Charter provides a mechanism whereby the Security Council can call on United Nations member states to enforce sanctions against a certain country. Such multilateral sanctions have been imposed fourteen times in the United Nations' history, and five

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[14] Robert Kagan, "Multilateralism, American Style" The Washington Post, 13 September 2002 (available at http://www.newamericancentury.org/global-091302.htm) also see Richard Falk, "Les Nations unies prises en otage," Le Monde Diplomatique, n.585, dec. 2002 p. 1, 23" in which the concept is described as *"multilateralisme de façade"*.

[15] With regards to such transatlantic divergences in opinion, the Political Affairs Committee of PACE has approved a report on the Relations between Europe and the United States (Doc. 10353), which goes into more detail about the possible origins for such a divide, and possible ways to counteract it.

[16] The Political Affairs Committee of PACE has approved a report on Strengthening the United Nations (Doc. 10120), in which it explores possible ways of reforming the United Nations to make them more efficient and responsive to the needs of their constituent members.

countries remain under sanctions today. [Sanctions on the government of Sudan are currently being considered in response to the crisis in Dharfour.[17]] Arguably the biggest "success story" was the multilateral use of sanctions against the Apartheid regime in South Africa. Of course, countries can also impose unilateral sanctions on a particular country, but the evidence tends to suggest that, unless the sanctioning country enjoys a disproportionate trade monopoly over a particular product vital to the target-country's well-being (oil or cash-crop export goods for example), unilateral sanctions generally result only in shifting trade patterns. Furthermore, many dictators have found the existence of unilateral sanctions to be a convenient justification for stalled or failed reforms at home. Nevertheless, even unilateral sanctions can have a beneficial effect, as was the case for American sanctions against Uganda's brutal Idi Amin dictatorship in 1978.

52.   *Diplomatic:* The least costly form of sanctions (in terms of economic disruption and potential lives disrupted or lost) are diplomatic sanctions. Diplomatic sanctions seek to publicly marginalise a state; to "embarrass" it into compliance with a particular policy. These sanctions seem to work especially well in democratic and open societies. . However, recourse to diplomatic sanctions obviously implies a belief in the value of multilateralism and norm-based politics, which some countries have demonstrably questioned.

53.   *Economic:* Economic sanctions are generally considered when diplomatic sanctions failed. They are a quite controversial topic, since quite often economic sanctions lead to hardships among the most vulnerable parts of the population which cause economic chaos, poverty, and even death. Again, Iraq can serve as an example of all that is problematic about sanctions. After the first American-led war against Iraq in 1991, the United Nations imposed sanctions against Saddam Hussein to force him to get rid of his weapons of mass destruction. Although they were originally intended as a temporary tool to force Iraq into compliance with United Nations Security Council resolutions, these sanctions lasted for over thirteen years, and critics argued that the people of Iraq, rather than its leadership, bore the brunt of these sanctions. A detailed discussion of economic sanctions is beyond the scope of this report. Nevertheless, a whole body of literature exists suggesting ways to design "smarter sanctions" that target more accurately those individuals responsible for breaches of the peace, rather than the population at large.[18]

iii.   Limited unilateral operations

54.   One final way in which countries can counteract proliferating "rogue" regimes is by openly sponsoring and supporting opposition groups to the current government. Obviously, such policies are highly political in nature, and countries pursuing such policies can rarely avoid being accused of an interventionist policy. However, if the choice is between fighting a preventive war and supporting a perhaps repressed and underrepresented political movement that promises to better respect universal international values, many governments might chose the latter of the two interventionist policies, especially if there was a coalition of countries supporting (both morally and materially) the opposition party.

VIII.   Conclusions

55.   I believe that an organisation such as the Council of Europe, devoted amongst other things to the promotion of the rule of law, should oppose any behaviour which is contrary to international law, including the unilateral and preventive use of force by a state or coalition of states, without an explicit decision of the United Nations Security Council.

56.   It should be acknowledged, however, that unilateral actions justified under the doctrine of preventive war, do take place. Moreover, these actions are often supported explicitly or tacitly by a number of countries, as they are considered "the lesser of two evils", especially in light of the difficulty for the United Nations system of collective security to react swiftly and promptly.

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[17] United Nations Security Council Resolution 1556 (2004), imposes an arms embargo, and Resolution 1591 (2005), establishes the Sudan Sanctions Committee.
[18] See for example the practical Manual for Design and Implementation of sanctions produced by the Swiss Government and the Watson Institute for International Studies at Brown University. Thomas Bierstecker, et al., Targeted Financial Sanctions: A Manual for Design and Implementation, 2001 (available at http://www.smartsanctions.ch/interlaken_manual.htm).

57.   I do think that unilateral actions undermine the authority and credibility of the United Nations and that they have the potential to create further instability and threats to peace. Council of Europe member states and observers should commit to multilateralism and to the principle of collective response to global threats, as opposed to unilateralism.

58.   In line with previous Assembly positions, I think that the solution is a strengthening of the United Nations in terms of its relevance, credibility and legitimacy. The reform of the United Nations Security Council, in particular, is of the utmost urgency: not only should it be more representative of current geopolitical realities, but it should also become more efficient and capable of reacting in order to prevent threats to peace and international security, including terrorism and the proliferation of weapons of mass destruction.

59.   In addition, the Security Council should have the instruments to enforce the doctrine of "the responsibility to protect" civilians, even preventively, from gross human rights violations, genocide, ethnic cleansing and crimes against humanity. At the same time, Europe should find the political will to intervene in extreme situations of human rights violations and genocides, which affect populations whose states are unable or unwilling to protect.

60.   Finally, the Council of Europe, given its authority in the defence of human rights, should be a well-placed institution to exercise a mediation role in the prevention and resolution of conflicts. This possibility deserves to be carefully explored.

Doc. 11293

Reporting Committee: Political Affairs Committee.

Reference to Committee: Ref. No. 2969 of 21 June 2004

Draft resolution unanimously adopted by the Committee on 22 May 2007

Members of the Committee : Mr Abdülkadir Ateş (Chairman), Mr Konstantion Kosachev (Vice-Chairman), Mr Zsolt Németh (Vice-Chairman), Mr Giorgi Bokeria (Vice-Chairman), Mr Miloš **Aligrudić**, Mr Birgir Ármannsson, Mr Claudio Azzolini, Mr Andris Bērzinš, Mr Alexandër Biberaj, Ms Raisa Bohatyryova (alternate: Ms Olena **Bondarenko**), Mr Luc Van den Brande, Ms Cornelia Cazacu, Mr Lorenzo Cesa, M. Muro Chiaruzzi, Ms Elvira Cortajarena (alternate: Ms Maria **Aburto**), Ms Anna **Čurdová**, Mr Noel Davern, Mr Dumitru Diacov, Mr Michel Dreyfus-Schmidt, Ms Josette **Durrieu**, Mr Joan Albert Farré Santuré, Mr Pietro Fassino (alternate: Mr Pietro **Marcenaro**), Mr Per-Kristian Foss (alternate: Mr Vidar **Bjørnstad**), Ms Doris Frommelt, Mr Jean-Charles **Gardetto**, Mr Charles Goerens, Mr Andreas Gross, Mr Jean-Pol Henry, Mr Serhiy **Holovaty,** Mr Joachim Hörster, Mrs Sinikka Hurskainen, Mr Tadeusz **Iwiński**, Mr Miloš Jeftić, Mrs Corien W.A. Jonker, Ms Darja Lavtižar-Bebler, Mr Göran **Lindblad**, Mr Younal Loutfi, Mr Mikhail Margelov, Mr Tomasz **Markowski**, Mr Dick Marty, Mr Frano Matušić, Mr Murat **Mercan**, Mr Jean-Claude Mignon, Mr Marko Mihkelson, Ms Nadezhda Mikhailova, Mr Aydin Mirzazada (alternate: Mr Sabir **Hajiyev)**, Mr João Bosco Mota Amaral, Ms Natalia **Narochnitskaya**, Mrs Miroslava Nemcova, Mr Grygoriy **Nemyrya**, Mr Fritz Neugebauer, Mr Theodoros Pangalos, Ms Elsa Papadimitriou, Mr Christos Pourgourides, Mr Gordon Prentice (alternate: Mr John **Austin**), Mr Gabino Puche (alternate: Mr Pedro **Agramunt**), Mr Lluís Maria **de Puig**, Mr Jeffrey Pullicino Orlando, Mr Andrea **Rigoni,** Lord **Russell-Johnston**, Mr Oliver Sambevski, Mr Ingo Schmitt, Ms Hanne **Severinsen***,* Mr Samad Seyidov, Mr Leonid **Slutsky**, Mr Rainder Steenblock, Mr Zoltán **Szabó**, Baroness Taylor of Bolton, Mr Mehmet Tekelioğlu, Mr Tigran Torosyan, Mr Mihai Tudose (alternate: Mrs Florentina **Toma**), Mr José Vera Jardim, Ms Biruté **Vesaité**, Mr Björn Von Sydow, Mr Harm Evert Waalkens, Mr David **Wilshire**, Mr Wolgang Wodarg, Ms Gisela Wurm, Mr Boris **Zala**, Mr Krzysztof Zaremba (alternate: Mr Karol **Karski**).

Ex-officio: MM. Mátyás Eörsi, Tiny Kox

N.B.: The names of the members who took part in the meeting are printed in **bold**

Head of the Secretariat: Mr Perin

Secretaries to the Committee: Mrs Nachilo, Mr Chevtchenko, Mrs Sirtori-Milner, Mrs Pieter, Mr Alarcón