

The Use of Force in a Changing World – US and European Perspectives

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Abstract

This article examines the different approaches of European and US policy makers to the use of force in a changing world. The truths and fallacies pertaining to these approaches lead the author to believe that the absence of a common view among the permanent members of the Security Council on what constitutes a threat to international peace and security in order to use force can have a debilitating effect on international security. For this reason the author argues that, rather than endlessly debating how old rules should be applied to new threats, what is needed is a determined effort on both sides of the Atlantic to forge a new framework for the use of force.

Key words

Use of force; pre-emptive strike doctrine; terrorism; sovereignty; globalization

I. INTRODUCTION

The eight-week Security Council debate leading to the passing of Resolution 1441 on Iraq was less about how to ensure that Baghdad lives up to its UN obligations than about who should decide whether and when force can be used in this and other circumstances. France spoke for many in Europe when it argued that the use of force must be both a very last resort and legitimized through explicit authorization by the UN Security Council. The United States, while willing for political reasons to give the United Nations a role, essentially argued that today's threats make the early – possibly even pre-emptive – use of force necessary, and refused to subordinate its ability to do so to an explicit future decision by the Council. This, of course, is not a new debate. Four years ago, France and the United States also argued about the appropriate role of the UN Security Council in authorizing the use of force to prevent Serbia from committing gross violations of the human rights of its citizens in Kosovo. Then, expediency won, with an agreement that force was necessary to prevent a great humanitarian emergency. The passing of a unanimous resolution on Iraq last November merely deferred the questions of whether, when, and how

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force might be used – as the subsequent debate about a second resolution made clear.

These differences about when force should be used and, especially, about who should decide are partly due to a disparity in power – the United States can essentially do what it wants and therefore wants to retain its freedom of action, while others, lacking that capacity, have a natural interest in constraining the ability of the United States to go it alone. But the more important reason is that the existing framework for deciding questions about the use of force is less and less applicable to the vastly and rapidly changing circumstances of today's world. The existing rules on the use of force, as codified in the Charter of the United Nations, are based on traditional notions of state sovereignty. The rules applied to an era in which states had an absolute monopoly on organized violence and in which force was of consequence only when it was used by one state against another. The right of non-interference in the internal affairs of other states was absolute. Accordingly, the use of force was justified only in cases of individual or collective self-defense or as a consequence of a decision by the UN Security Council when there was a clearly identified threat to international peace and security.

Sovereignty in today's ever-changing world is more limited than this traditional notion suggests. States no longer have a monopoly on organized violence. Terrorists can inflict massive damage on a country, even one as powerful as the United States. Organized crime syndicates and narco-traffickers now possess military-style arsenals equivalent to many a small nation's army. And insurgent movements of various stripes have been able to challenge government control over vast swathes of territory – sometimes even including the territory of more than one state. Sovereignty has also become more limited as a result of rapid globalization, which has increasingly called into question the operational validity of distinguishing between a state's internal and external affairs. It is also becoming more evident that some developments within states – from providing a safe haven or training grounds to terrorist groups to developing or failing to secure weapons of mass destruction – can have a negative impact on the security of others. Finally, the growing demand for and acceptance of democracy and human rights has increasingly pitted the rights of individuals and their communities against those of the state.

The 1990s witnessed an increasingly heated international discussion about humanitarian intervention and what obligations states had to secure the rights of individuals in cases where governments systematically sought to deny even the most basic human rights to life, food, or shelter. The present debate about how to deal with the threat posed by catastrophic terrorism – the combination of terrorists, tyrants, and technologies of mass destruction – is in many ways an extension of this earlier discussion. Both highlight the pressing need to devise a new framework for determining when and how and by whom force can be used. The old rules, which were designed to minimize the use of force, are clearly no longer adequate to deal with many of the new threats. But the new rules suggested by the Bush administration's doctrine of pre-emption, while enhancing the possibility that force can be used in ways that deal effectively with the new threats, ignore

the need to legitimize the use of force, which for the purposes of maintaining a viable international order remains as vitally important as ensuring greater effectiveness in its application. The challenge, therefore, is to craft new rules that enhance both the effectiveness and the legitimacy of the use of force. It is a challenge that can be met only if the United States and its major international partners, especially its friends in Europe, work together on devising new rules to deal with new threats.

2. TWO MODELS OF THE USE OF FORCE

The UN debate about Iraq revealed two very different models of the use of force. France (supported by Russia, China, and a majority of other Security Council members) argued that the use of force in the case of Iraq had to be explicitly authorized by the Council in a new vote. As French President Jacques Chirac put it, 'In the modern world, the use of force should only be allowed in the case of legitimate defense, or by decision of the competent international authorities', meaning in this case the UN Security Council.¹ Last autumn neither France nor any other Security Council member aside from the United Kingdom and the United States was prepared to authorize the use of force against Iraq. In contrast, the United States insisted that it had the inherent right to use force against Iraq no matter what the UN Security Council decided. As Secretary of State Colin Powell contended, 'even though we're talking about resolutions and we are trying to get the collective will of the United Nations through the Security Council behind this resolution, the president still retains all of his options to act in any manner that he believes is appropriate to protect American interests and American lives'.²

The difference between these two approaches to the use of force is, as Robert Kagan has so eloquently argued, partly the result of a disparity in power.³ The United States has the ability in many instances in which military force may be necessary to use it on its own. It is therefore understandably reluctant to subject a decision to use force to a decision by other countries, not all of whom share its perspective on a threat or the necessity for using force to deal with it. In contrast, for a country like France, maintaining the primacy of the UN Security Council (in which it is, not coincidentally, one of only five veto-wielding members) is essential to ensuring its continued influence in international affairs.

But the difference also reflects the differing world views of the two sides in the debate about the use of force. For many in Europe, the consistent application of agreed-upon rules and norms is essential to maintaining international order. If everyone does as he pleases, the world will be a jungle in which life would truly be nasty, brutish, and short. With regard to the use of force, there are clear, universal rules in the UN Charter on how decisions like these must be made, and it

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1. Quoted in Glenn Kessler and Walter Pincus, 'Fear of US Power Shapes Iraq Debate', *Washington Post*, 30 Oct. 2002, A16.
 2. 'Interview on CNN's Late Edition', 15 Sept. 2002, available at: <http://www.state.gov/secretary/rm/2002/13481.htm> (accessed Nov. 2002).
 3. Cf. Robert Kagan, 'Power and Weakness', *Policy Review*, June/July 2002, 3–28.

is incumbent on all to follow the rules in order to avoid the anarchy that would otherwise be attendant. To many Americans, the international system looks indeed like a Hobbesian world. There are tyrants out there, who have little regard for rules and norms, but rather thrive on violating them at will. There are terrorists to whom the rules do not even apply. And the vast destructiveness that can now fall more easily into the hands of these tyrants and terrorists bent on denying the efficacy of a rule-based system, makes continued reliance on such rules for the safety and security of the United States and its allies and friends around the world unwise. Whence, as the Bush administration's new National Security Strategy argues, the need for pre-emptive action: 'Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first.'⁴

2.1. European truths and fallacies

Though vastly different in their content and implications, both perspectives hold important truths. Both also contain critical fallacies. Europeans are surely right that order depends on the existence of a set of agreed rules to underpin a normative framework – especially when it comes to the use of deadly force. And this fact is widely recognized, even in the current situation concerning Iraq and the war on terrorism. In the case of Iraq, a succession of UN Security Council resolutions has provided the essential framework for action ever since Iraq invaded Kuwait in August 1990 – up to and including UN Resolution 1441, which, while declaring Iraq in material breach, gave it one final opportunity to comply with its disarmament and other obligations. As for the war on terrorism, the UN Security Council passed historic resolutions after the 11 September 2001 attacks enlisting all states in a proactive effort to combat international terrorism – an effort that has led to an uncommonly productive cooperation among the vast majority of member states.

At the same time, the existing framework for deciding and implementing many of the rules no longer provides a fully adequate guide for addressing many of the new threats and problems that have arisen in recent years. The UN Charter was drawn up at a time when inter-state conflict – that is, war between states – was the central concern of the framers. Its main purposes were to advance peaceful relations among states and to provide a framework for addressing serious infractions of that central purpose. It thus recognized the right of individual and collective self-defence in case of an armed attack – and it vested in the Security Council the authority to act in case of threats to or breaches of international peace and security.

It was only after the Cold War that this construct was allowed fully to come into its own – and it did so, ironically enough, precisely in the case of Iraq. Saddam Hussein's invasion of Kuwait was a textbook case for the application of the UN Char-

4. *The National Security Strategy of the United States of America* (Washington, 2002), 15, available at <http://www.whitehouse.gov/nsc/nss.pdf> (accessed November 2002).

ter, and the UN Security Council worked as intended in the months immediately following the invasion – ultimately authorizing member states to use ‘all necessary means’ to evict Iraq from Kuwait and restore international peace and security in the region. But when the world confronted a new set of less traditional challenges – from genocide in Rwanda to wholesale ethnic cleansing in Kosovo – problems with the construct became more evident. The Charter’s underlying assumption was that member states, and particularly the five permanent members of the UN Security Council, would have a similar view as to what constituted threats to international peace and security, and thus when the use of force would be appropriate. Kosovo demonstrated that this was not necessarily the case. While Serbia’s actions against its own citizens were deemed a threat to international peace and security by the UN Security Council on two separate occasions, two of the five permanent members (supported by many other UN members) believed that military or other interventions violated the principle of non-interference in the internal affairs of a state and therefore rejected attempts to authorize the use of force to enforce demands made by the Council in these earlier resolutions. Had NATO been guided by the notion that only the Security Council could authorize the use of force and thus foregone an intervention that ultimately ensured that hundreds of thousands of people could safely return home, the world would hardly have been a better place. This point was well made by UN Secretary-General Kofi Annan some years ago:

To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might say: leave Kosovo aside for a moment, and think about Rwanda. Imagine for one moment that, in those dark days and hours leading up to the genocide, there had been a coalition of states ready and willing to act in defense of the Tutsi population, but the council had refused or delayed giving the green light. Should such a coalition then have stood idly by while the horror unfolded?⁵

The absence of a common view among the five permanent members of the Security Council on what constitutes a threat to international peace and security sufficient to require the use of force can therefore have a debilitating effect on international security. To be sure, the lack of consensus can often be a useful prod to find compromises that serve the interests and reflect the views of the many over the few – as was evidently the case most recently during the debate over the new Iraq resolution. But it nevertheless remains a strange definition of world order – indeed of legitimacy – to believe that consensus (or at least acquiescence) among five quite disparate countries is its prerequisite. Is it really the case that legitimacy is possible only if these five countries agree on the use of force in circumstances other than self-defence? The case of Kosovo – and, indeed, potentially of Iraq – suggests that it is not. Absent a developing consensus among the big powers (not to speak of the many other members of the international community) an alternative means for securing legitimacy must be created.

5. Kofi Annan, ‘Two Concepts of Sovereignty’, *The Economist*, 19 Sept. 1999.

2.2. American truths and fallacies

The Bush administration has now proposed such an alternative. It has rightly concluded that old rules need to be adapted to deal with new threats. Those threats include not only the wanton violation of human rights by governments, but also the growing danger that, as advanced technologies proliferate, weapons of mass destruction may fall into the hands of those willing to use them for purposes other than deterrence. Traditional measures for dealing with these threats – including preventive efforts such as diplomacy, arms control, and export constraints, as well as containment and deterrence – can only offer so much. The vast diffusion of technology, coupled with the strong desire of some to acquire the means to fashion weapons of mass destruction, mean that determined efforts are bound to succeed sooner or later. And while deterrence may be operable in some instances (though clearly not in the case of suicidal terrorists bent on mass destruction), the risks and consequences of it failing suggest that sole reliance on the ability to inflict unacceptable damage in response is not very a wise policy either.

It is this set of circumstances that has led the Bush administration to argue in favour of its doctrine of pre-emption. While recognizing that different circumstances may require different policy responses, the administration argues that the ‘greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.’⁶ The legal justification for this doctrine resides in the concept of anticipatory self-defence – that is, the notion, long recognized in international law, that states can take defensive action even before an attack has occurred if the threat is truly imminent (traditionally when an opposing force mobilizes in anticipation of an attack). The classic example is Israel’s pre-emptive attack that started the 1967 war, which came in response to the imminent threat of invasion by its Arab neighbours. What makes the current situation different from previous instances is the need, as the Bush administration sees it, to ‘adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries’ – that is, terrorists and tyrants armed with weapons of mass destruction.⁷ Since it cannot be known when a state or terrorist organization that possesses weapons of mass destruction will use them and since weapons like these can be delivered without warning, the administration argues that rogue states pose an ‘imminent threat’ when they seek to acquire technologies necessary to build these weapons, and especially nuclear weapons.

The promulgation of this new doctrine has been met with concern at home and abroad – and not without reason. The doctrine suffers from considerable conceptual confusion. Most importantly, it conflates the notion of prevention with that of pre-emption. *Preventive* war refers to a premeditated attack of one state against another, which is not provoked by any aggressive action of the state being attacked against the state initiating the conflict. In contrast, a *pre-emptive* attack is launched only after

6. *National Security Strategy*, *supra* note 4, 15.

7. *Ibid.*

the state being attacked has either initiated or has given a clear indication that it will initiate an attack.⁸ A war against Iraq that is justified by the belief that Baghdad will soon acquire nuclear weapons which it then may use to threaten the interests of others would be a preventive war; an attack against an al-Qaida cell believed to be plotting a terrorist strike would be a pre-emptive strike. While the latter can readily be justified on the basis of self-defense, the former, especially if launched by a single state on its own accord, raises profound questions about the legitimacy of the contemplated action.

The doctrine of pre-emption is also strategically imprudent. If taken seriously by others, it will exacerbate the security dilemma among hostile states, by raising the incentive of all states to initiate military action before others do. The result is to undermine whatever stability might exist in a military standoff. Fearing that the other state might initiate an attack, the incentive will be strong to go first instead – a dynamic that naturally repeats itself within all the countries involved. As a result, the use of force will increasingly be viewed as a first resort, thus undermining whatever moderating influence diplomatic intervention might otherwise have. Moreover, even if this dynamic does not necessarily apply in any situation involving the United States, the public promulgation of a pre-emption doctrine will invariably lead other states to embrace arguments in its favour as a cover for settling their own national security scores. As Henry Kissinger has argued, 'It cannot be either in the American national interest or the world's interest to develop principles that grant every nation an unfettered right of preemption against its own definition of threats to its security.'⁹

The Bush administration recognizes this problem, and in its National Security Strategy warns other countries not to 'use preemption as a pretext for aggression'.¹⁰ But that is easier said than done. The administration, while arrogating to itself the right to use force whenever and wherever it believes the pre-emption of potential future threats warrant it, has made no effort to define the line separating justifiable pre-emption from unlawful aggression. And that may well be the gravest flaw of the new doctrine. For by presuming that the concept of self-defence now includes pre-emption (as broadly defined), the administration has erased any viable distinction between the offensive and defensive purposes of military action. Yet the legitimacy of using force depends crucially on a clear and agreed understanding of precisely this distinction.

3. FORCE AND LIMITED SOVEREIGNTY

For all their differences, the two models of using force have one major element in common – both view the issue of using force from a statist perspective. European insistence on the central role of the Security Council and the continued validity of

8. I borrow the distinction from Bernard Brodie, *Strategy in the Missile Age* (Princeton, 1959), 225 n.241.

9. Quoted in James Harding, 'Albright laments "rash exuberance" over Iraq', *Financial Times* (US edn), 27 Sept. 2002, 2.

10. *National Security Strategy*, *supra* note 4, 15.

long-standing rules as the basis for ensuring the legitimacy of using force presumes that states are the only actors able to use force. Similarly, the American preference for enhancing the effectiveness of force in dealing with new threats by stretching the concept of self-defence to include pre-emption presumes that only states can use force legitimately.

What both these perspectives ignore, however, is that the traditional notion of state sovereignty no longer matches current realities. Globalization in all its dimensions has increasingly eroded the distinction between the internal and external affairs of the state. Sudden currency fluctuations of the Thai baht ripple through economies as far apart as those of Brazil, Russia, and Indonesia. Excessive releases of greenhouse gases by the United States this past century helped increase global temperatures, raising the sea level and causing killer floods in a country such as Bangladesh, which contributes very little to global warming. A computer hacker in the Philippines can temporarily shut down e-commerce in Seattle. And terrorist training camps in Afghanistan prepare suicide killers to launch devastating attacks against the World Trade Center in New York.

Equally important, today's world is one where the number of actors in international politics far exceeds the number of nation-states. Multinational corporations transfer capital, goods, and services in ways well beyond the control of even the most powerful governments. Non-governmental organizations have created transnational networks of cooperation and pressure that severely limit the power of governments – including in such critical areas as maintaining control over their own populations. And terrorist groups with global reach are able to strike with devastating effectiveness against targets as widely dispersed as a US embassy in Tanzania, a naval warship off the coast of Yemen, a tourist hang-out in Bali, and the Pentagon on the outskirts of Washington DC – killing many hundreds at almost every turn.

Finally, the march of human rights has reached the point at which states are increasingly called to account internationally for the way in which they treat their own citizens. When the rights of individuals are violated by the state, the right of the state to do as it wishes will be curtailed. As Kofi Annan argued:

State sovereignty, in its most basic sense, is being redefined – not least by the forces of globalization and international cooperation. States are now widely understood to be instruments at the service of their peoples, and not vice versa. At the same time individual sovereignty – by which I mean the fundamental freedom of each individual, enshrined in the Charter of the UN and subsequent international treaties – has been enhanced by a renewed and spreading consciousness of individual rights. When we read the charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.¹¹

The transformation and limitation of sovereignty has had a profound effect on the potential utility of force by loosening the bonds constraining its use in many instances. Since the end of the Cold War, there has been mounting pressure forcefully to breach state sovereignty not just for narrow, self-interested reasons, but also

11. Annan, *supra* note 5.

increasingly in support of the common good. There have been interventions for humanitarian purposes in Somalia, the Balkans, Haiti, and East Timor, anti-terrorist interventions in Afghanistan and Sudan, and counter-proliferation strikes in Iraq (with more to come). Aside from their purpose, what each of these uses of force had in common was their pre-emptive nature. Thus, quite apart from using force for purposes of individual or collective self-defence, the circumstances justifying pre-emption are arguably much broader than even the Bush administration has suggested. They could include the following:

- *Preventing the acquisition of weapons of mass destruction.* In 1992, the UN Security Council recognized that the proliferation of nuclear, chemical, and biological weapons constituted a threat to international peace and security,¹² suggesting both that states do not have an automatic right to acquire such weapons even through their own internal efforts and that force might be appropriate for preventing their spread. Israel's attack against the Iraqi Osirak reactor in 1981 and the US cruise missile strike against a pharmaceutical firm in Sudan in 1998 on suspicion it was producing a precursor for the VX nerve agent are two instances of the pre-emptive use of force for this purpose.
- *Foiling acts of genocide or other large-scale or systemic abuses of human rights.* The interventions in northern Iraq in 1991, Somalia in 1992–3, the Balkans from 1992 onwards, Haiti in 1994–6, and East Timor in 1999 were all justified as humanitarian emergencies requiring forcible responses that, if necessary, could be launched without the approval of the government concerned. The failure to launch a similar operation in time to prevent the genocide in Rwanda remains a large black mark on this record (although France eventually did intervene unilaterally to establish a humanitarian safe haven in parts of the country).
- *Protecting 'global public goods'.* These include key arteries/choke points of global commerce, telecommunications (including the Internet), and transportation, as well as outer space. Maintaining the freedom of the high seas has been a basic principle of international law for centuries. New modes of transportation and information transmission – from the Internet to satellite uplinks to outer space – have become at least as important to global prosperity as freely navigating the oceans was during the height of the British Empire.
- *Forestalling less malignant acts or even inadvertent threats.* Examples are large-scale epidemiological outbreaks or environmental disasters that states fail to address responsibly or in a timely manner. Using force to control the spread of an infectious disease or halting the irresponsible burning of rainforests may seem far-fetched, but once these problems become a sufficiently grave threat to a large number of other people forcible intervention may well be deemed desirable or even necessary.

12. 'Note by the President of the Security Council', S/23500 (31 Jan. 1992).

The case for pre-emptive uses of force in these circumstances is arguably just as valid and strong as in the case of anticipatory or pre-emptive self-defence. Therefore, although the Bush administration is right in arguing that 'we must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries', the logic of its argument calls for acknowledging a much broader set of threats beyond that posed by terrorists and rogue states. At the same time, such a broad extension of the right of pre-emption cannot be enunciated as solely a US prerogative. Nor, as a practical matter, can it be implemented unilaterally by the United States. Instead, the legitimacy and utility of pre-emptive uses of force like these depend critically on obtaining broad international support for the effort. And here lies the challenge for the international community – and especially for the United States and Europe. Rather than endlessly debating how old rules should be applied to a new threat, what is needed now is a determined effort on both sides of the Atlantic to forge a new framework for the use of force – one that acknowledges both the utility, even the necessity, of its use in clearly defined circumstances and the need to ensure that any use of force enjoys broad legitimacy.

This is not the place for developing such a framework in detail. But its key elements are clear. First, as state sovereignty is transformed and, to some extent, eroded, military force will have a role to play in a greater number of circumstances than was true before. In addition to self-defence, force may now be required to counter the proliferation of weapons of mass destruction, defeat terrorism and its supporting infrastructure, prevent genocide and gross violations of human rights, and protect global public goods. Second, the effective use of force will in many of these circumstances require that it be employed earlier rather than later. To consider force as a last resort is appropriate when trying to settle inter-state conflict, but when it comes to protecting human rights, preventing the proliferation of weapons of mass destruction, or defeating terrorism, waiting too long to employ force can both increase the cost and reduce the effectiveness of its use. Finally, the legitimacy of using force depends crucially on three factors: the purpose for which it is being employed, the manner in which force is used, and who decides on its use. The purpose must be one everyone agrees to be just. The manner of its use has to be discriminate in its impact. And the decision to use force has to be an international one, which may be the Security Council or some other competent international body.

None of these issues will be easily resolved – the decision-making authority is one issue that will be critically important, yet very difficult to resolve. But the time has come to end the debate among Europeans and Americans about when, how, and by whom force is to be used – and to begin the crucial task of forging a new framework appropriate to the realities of the twenty-first century.