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Pre-emptive military action and the legitimacy of the use of force

Remarks from a European perspective

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

But whether Iraq should really be part of this debate or not can be questioned. It can be argued that the present dispute over Iraq is more a case of securing the

¹ "The National Security Strategy of the United States". September 2002.
www.whitehouse.gov/nsc/nss.html.

implementation of resolutions adopted by the UN Security Council under Chapter 7 of the UN Treaty.

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

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

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

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

European inclination to support an approach through multilateral institutions like the UN is based on the recognition that neither the European Union, nor any other international actor, has the broad-based power or the strategic patience to sort out major and difficult international issues all by itself. Thus, an amount of coalition-building is always called for, and the broader the international consensus that can be established, the greater are the possibilities of bringing the endeavour in question to a successful conclusion.²

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

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

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

The concept of state sovereignty is generally seen to have been established as the basis of the international order by the Treaty of Westphalia. Orderly states were to be the building blocs of the international order. The United Nations isn't really built on

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

nations coming together, but on state doing it. State sovereignty remains the most important building bloc of the modern international system.

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

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

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

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

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

“It has taken almost a decade for us to comprehend the true nature of the threat. Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have done in the past. The inability to deter a

potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first."

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

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

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

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

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

The real difficulties starts with how such a doctrine can be implemented in the messy reality of handling the day-to-day challenges of an evolving international situation.

Here, it is instructive to look at the different occasions when the issue has been confronted in the past.

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

It is highly likely that serious consideration has also been given in the Soviet Union at different times to the possibility of pre-emptive military strikes in order to neutralize perceived WMD threats. The Soviet leadership had every reason to view the appearance of a Chinese nuclear force with deep apprehensions. After having failed to block it by withholding technology and assistance in different ways, it is entirely logical that the option of pre-emptive military strikes against Chinese nuclear facilities were seriously studied.

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

In all of these cases, the final decision not to use pre-emptive military power was in all probability motivated by the extreme difficulty of being certain that a military strike would neutralize all or the overwhelming parts of the nuclear warheads and the corresponding weapon systems. In the Cuban case, plans revealed that there was a high likelihood that some missiles could not be hit during the first wave of strikes, and that there was then the possibility that they could be fired before they could be located and hit by a second wave of strikes. In the Chinese and North Korean cases,

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

the target set must have included not only key parts of the different production facilities for nuclear weapons, but also missile facilities and bomber bases, and must have taken account of the risks that nuclear warheads had been dispersed in different ways extremely difficult to detect.

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

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

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

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

When the old UNSCOM inspection regime in Iraq was given up in 1998, it was said that its aims could probably be achieved as well by a combination of air surveillance and air strikes. There seemed to be the belief that surveillance systems could

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

produce a reasonable accurate picture of on-going activities, and that the facilities associated with these could then be “revisited” by air power in the way that happened at repeated occasions during the 1990’s.

Clearly, this has not proved to be the case. There are numerous press stories circulating in the US on different ways in which Iraqi WMD activities could have been concealed, ranging from mobile vans to floating barges and vast underground complexes. If these stories don’t show anything else, they at the least illustrate the great uncertainty, the difficulty of actually tracking activities like these and the near-impossibility of dealing with them through selective and pre-emptive military strikes.

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

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

It is thus difficult to avoid the conclusion that any preventive or pre-emptive attack trying to deal with a perceived WMD program in any country in all likelihood will have to be in the form a of military attack aimed at first regime removal and then the setting up of a new regime that can give sufficient guarantees that remaining WMD

⁵ “Many CW and BW production capabilities are hidden in plants that are virtually indistinguishable from genuine commercial facilities. And the technology behind CW and BW are spreading.” DCI George Tenet, Senate Select Committee on Intelligence, February 6, 2002.

capabilities are not used to restart programs. Anything less than this is unlikely to result in more than just a repetition of the lessons of the Osiraq attack.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁸ An important contribution to this debate is “The Responsibility to Protect”, which is the report of the Canadian-sponsored International Commission on Intervention and State Sovereignty. www.dfait-maeci.gc.ca/iciss-ciise. For a more specific discussion on the different issues raised by the Kosovo intervention, see “Kosovo and the Challenge of Humanitarian Intervention” by the UN University in Tokyo at www.unu.edu/p&g/kosovo_full.htm.

This debate will come back. There is also an important connection between the issues of humanitarian intervention, the increasing problem of how to deal with failed states, the enormous challenges in any effort at state building⁹, the tendency of terrorist organisations to seek “safe havens” or training grounds in certain areas and the need to deal with the spread of certain WMD capabilities.

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

⁹ As I have argued elsewhere, the term nation building, which appears often in the US debate, isn't really appropriate. It's more relevant to speak about state building, since what we are trying to help building in the relevant cases are state structures rather than nations. We ought, accordingly, to talk about state building rather than nation building, although we should recognise that the distinction between state and nations that is obvious to most Europeans is far less clear-cut from a US point of view. Nevertheless, the term state building more appropriately described what it is really about.