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The Preventive Use of Force: A Cosmopolitan Institutional Perspective

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States have frequently resorted to preventive force: the use of force in the absence of evidence that an attack has occurred, or is imminent. States using preventive force may allege that an attack is being planned by the target state, or they may merely cite the dangers of letting the target state become too powerful. Preventive use of force involves the initiation of military action in anticipation of harmful actions that are neither presently occurring nor immediately impending.

The preventive use of military force by states, without collective authorization by the United Nations Security Council, is generally regarded as prohibited in contemporary international law. Article 2 (4) of the United Nations Charter requires “all states” to refrain “from the threat or use of force against the territorial integrity or political independence of any state,” unless pursuant to authorization by the Security Council (Articles 39, 42, 48) or in self-defense against an armed attack (Article 51). The self-defense exception has a long history in customary international law. Indeed, United States Secretary of State Daniel Webster elegantly stated the terms of this exception in 1842, with respect to a dispute with Great Britain over a British raid on a steamer in New York State in 1837. “Exceptions growing out of the great law of self-defense…should be confined to cases in which the ‘necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.’” Webster’s statement has been interpreted as implying that force may be used not only against an attack that has already produced harm, but also to interdict an attack that has been launched but not yet damaged its target, as when missiles have been fired but not reached their destination, but not so as to legitimize preventive action as defined above.
The existence of state rulers with contempt for human rights and non-state groups dedicated to inflicting harm on innocent persons through acts of terrorism, and the spread of the capacity to produce or procure weapons of mass destruction and deploy them covertly and suddenly, have led to a renewed debate about the preventive use of force. Many commentators have challenged what we call the current “international law perspective” on preventive force: that it is only permissible if authorized by the Security Council, acting subject to the permanent member veto. To these observers, international law is too restrictive.

Such criticism of course has a long history in doctrines of the “national interest”: that a state may do whatever is necessary on behalf of the interests of the state, as interpreted by its leadership. In this view, leaders of states may disregard universal moral principles, if they conflict with the national interest.¹

The new National Security Strategy of the United States, issued by the Bush Administration in September 2002, articulates a third position. It expands the definition of self-defense to include preventive action. “While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country.”²

The Bush Administration’s national security strategy asserts that the right of self-defense,

properly understood in the light of current realities, entitles a state to take preventive action, regardless of whether this is prohibited by the UN Charter.

In our judgment, none of these three views provides an acceptable basis for the use of preventive force under present conditions. The international law perspective is too restrictive of military action, creating the danger that inaction will be very costly, when timely measures could save many lives and protect basic human rights. The blanket prohibition the international law perspective endorses also hinders coercive diplomacy by making the threat of preventive action less credible due to its illegality.

In contrast, the national interest perspective is incompatible with respect for the basic human rights of all persons, because it holds that even the most basic rights of foreigners may be disregarded if doing so is conducive to the national interest. In practice, it is too permissive, empowering opportunistic and self-interested regimes to attack other states virtually at their own discretion, according to their own estimate of what their national interest requires, and without any external checks on their exercise of judgment.

The expanded self-defense perspective is also too permissive. Allowing states to use force on the basis of their own estimate that they may be attacked in the future, without adequate provision for checks on the reliability and sincerity of that judgment, would make the use of preventive force too subject to abuse and error. In addition, to limit the discussion of whether to relax the existing international prohibition on preventive force to the question of self-defense unduly narrows the frame of normative discourse. While we believe, for reasons that will become clear below, that there are circumstances in which it would be justifiable for a state to use preventive force to
protect the basic human rights of its own citizens, we will argue that there also could be conditions under which preventive force to protect the basic human rights of others would be justified.

All three perspectives share serious flaws from the standpoint of incentives. Under the international law perspective, states seeking to evade their moral responsibilities can rationalize their behavior by solemn professions of commitment to the rule of international law. At the same time, fear of illegality may discourage states from acting to prevent massive violations of human rights. Both the national interest and expanded self-defense perspectives could induce states bent on aggression to provoke a threat or manufacture evidence of a threat, in order to justify aggression.

Both of the latter views, if accepted as a basis for preventive action, also create incentives that can distort other states’ responses to proposals for preventive action. Even when a state proposing preventive action does so from commendable motives and on the basis of an accurate assessment of the harm to be prevented, other states may refuse to support the action. They may withhold support because of suspicions that the intervening state is misrepresenting the facts upon which the justification of preventive action depends, or they may feign such suspicions to disguise the fact that they are shirking their obligations to protect human rights.

The shortcomings of the international law, national interest, and expanded self-defense perspectives point the way toward a more satisfactory position on the use of preventive force. International society needs rules governing preventive force that are justifiable from a cosmopolitan perspective, a coherent moral position committed to protecting the basic human rights of all persons. But by themselves, rules are insufficient;
they must be institutionalized in such a way as to (1) evidence a proper respect for the judgments of others, (2) increase the probability that the decision to use preventive force will be made on the basis of accurate information, with an accurate assessment of risks and benefits, and (3) create incentives for states to pursue policies that both respect and protect human rights. While we acknowledge that it is sometimes justifiable to use preventive force in self-defense, our analysis implies that the conditions under which the Bush administration’s national security strategy would authorize preventive action do not meet the standards for responsible decision-making from a cosmopolitan perspective.

In this paper we articulate the links between the cosmopolitan perspective, three very general principles of institutional design, and standards that decisions to use preventive force should meet.

For the most part, the substantive standards we believe should be satisfied if preventive force is to be justified are not novel. They include *jus in bello* principles of proportionality, noncombatant immunity, and avoidance of excessive force borrowed from traditional just war theory. On our view, the deficiency of just war theory lies not in its principles, but in the failure to institutionalize them in a way that provides agents with incentives to apply them impartially and on the basis of good information, and that provides sanctions for noncompliance.⁴

We argue that preventive force can be justified, under some conditions, from a cosmopolitan perspective, if the decision to undertake preventive action is taken in within an appropriate rule-governed, institutional framework. The key principle on the basis of which these rules and institutions would be constructed is that of *accountability*. Our

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⁴ Some just war theorists hoped that just war principles would be effectively institutionalized by the Christian church or the papacy, but this hope was not realized.
central argument is that procedures assuring accountability can render preventive force justifiable on the basis of cosmopolitan moral principles, which aim to protect the basic human rights of all persons, not giving exclusive priority to the rights of members of a particular country.\(^5\)

In Part I we lay out the *prima facie* argument for the permissibility of preventive war from a cosmopolitan perspective. We then refute two objections to this argument: that preventive use of force violates the human rights of people in the target state because they have not yet acted aggressively, and that a blanket prohibition on preventive force is necessary in light of the especially high risks that attend preventive action. Rebutting these arguments both clarifies the nature of the basic ethical case for prevention and prepares the way for our constructive proposals.

In Part II we argue that mechanisms for *ex ante* and *ex post* accountability for the use of preventive force, consistent with cosmopolitan ethics, should be developed. We show how institutionalizing appropriate rules would create incentives for state action that would be more consistent with the cosmopolitan principles we espouse than state action under any of the three doctrines that we criticize.

Part III sketches and compares three alternative institutional arrangements for cosmopolitan accountability regarding the use of preventive force. Because this is not a “policy paper,” we do not attempt to provide a conclusive argument for any of the three options. We do suggest, however, that in the short run at least, one of the models—the

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5 The position we endorse is sometimes called Moderate Cosmopolitanism, which allows one to give a limited priority to the interests of one’s own nation. Moderate Cosmopolitanism does not require strict impartiality. Our point is that a moderate Cosmopolitanism calls for a framework for preventive force that recognizes that partiality to the interests of one’s own nation must be limited by respect for the basic human rights of all persons. In the present paper we do not attempt to develop a philosophical justification for the assumption that there are human rights. See, Chapter Three, Human Rights, in Allen Buchanan, *Justice*,
one that represents the most incremental approach to institutionalizing cosmopolitan accountability—is the most feasible.

I. The Cosmopolitan Justification for Preventive War

We begin with the assumption that it can be morally permissible to use force to stop presently occurring massive violations of basic human rights. We then argue from this assumption to the conclusion that there is at least a prima facie case for the moral permissibility of using force to prevent massive violations of basic human rights. The core justification for using force to stop rights-violations as they are occurring—the need to protect basic human rights—also can justify the use of force to prevent rights-violations.6

We can use two scenarios to help flesh out the prima facie case for this proposition. In the first scenario, a group is already in the process of releasing a “weaponized”, extremely virulent, lethal virus into the heart of a major city. Surely, it would be justifiable to intervene forcibly to stop them from releasing more of the deadly concoction.

Now consider a situation in which the question of preventive force arises. The intelligence agencies of state S have consistent information, from multiple, reliable sources, that a group that has deliberately killed civilians in the past has in its possession a “weaponized,” extremely virulent lethal virus in a particular location and plans to use it against a civilian population. Suppose that the current location of the virus is known but

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6 By beginning with the assumption that the use of force is sometimes permissible to stop massive violations of basic human rights already underway, we are of course implicitly rejecting the absolute
the city in which it is to be released is not and that once the virus leaves its present location it will be very difficult to track it. Suppose also that the current location of the virus is in a remote stronghold of the group and that a preventive strike can destroy the virus without killing any innocent persons. Under these circumstances, the need to protect basic human rights supports preventive action, regardless of whether the rights endangered are those of our fellow citizens or foreigners. Reflection on such examples supports the conclusion that preventive action can be ethically permissible.

This *prima facie* justification for preventive force does not apply to all cases where a harm may be prevented, but only to situations in which there is a significant risk of sudden harm on a massive scale. Such a risk is inherent in weapons of mass destruction, but not exclusive to them. In some cases genocides may erupt suddenly, as in Rwanda in 1994. In situations characterized by incrementally increasing violence, as in the Former Yugoslavia, the case for preventive war is much less compelling, since action to respond to aggression or acts of ethnic violence can feasibly be taken, with less uncertainty regarding the need to act, after the first human rights violations have occurred. Thus the *prima facie* argument’s force is limited and focused. It does not purport to show that force may be used whenever it is likely to stop massive violations of basic human rights.

**Two objections: Preventive Force Is Different**

Opponents of the preventive use of force, including those who believe that the current international legal prohibition on it ought to be upheld, could point out that our *prima facie* argument ignores two crucially different features of prevention. First, in the

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pacifist view that the use of military force is never justified because it inevitably involves harm to innocent persons. We share this assumption with the three perspectives that we criticize.
case of prevention, force is being used against someone who has not committed a wrong. Thus preventive action violates the rights of its target. The second objection is that because the grounds for prevention are by their nature speculative, prevention carries especially grave risks of abuse and error, and for that reason should be strictly prohibited.

**Prevention as a Violation of the Target’s Rights**

There is, trivially, a right not to be attacked *unjustly*; but to assume that this includes the right not to be attacked unless one has already committed a wrongful harm is to beg the question at issue, namely, whether preventive force can ever be morally justified.

Reflection on the law of conspiracy—and our moral responses to it—suggests that using force against someone who has not yet committed a wrongful harm need not violate his rights. The elements of conspiracy include a “specific intention” to do wrongful harm and an “agreed plan of action” to produce the harm. The “specific intention” requirement rules out mere unfocused malevolence as a trigger for criminal liability, while the requirement of an “agreed plan of action” satisfies the condition that a crime must include an act, not merely a guilty mind--an act of agreeing on a plan, if not the act of creating a plan as well.

Of course, one can have moral reservations about the way in which a particular statute defines either or both of these elements or about the way in which the law is applied in a particular context. But there seems to be nothing morally repugnant about the idea of using force against conspirators simply because they have not yet performed the act they have planned. Once we acknowledge that the conspirator has performed an act—agreeing to a plan to produce wrongful harm—we can dismiss the simplistic
allegation that it cannot be right to use force against him because “he hasn’t done anything.”

The reason that it can be justifiable to use force against someone who has a “specific intention” and an “agreed plan of action” to do wrongful harm is that he has *wrongfully imposed a risk of serious harm on others*. It is a wrongful imposition of risk if those put at risk have neither voluntarily accepted the risk nor deserve to be subjected to it. (Those upon whom the risk is imposed might deserve to be subjected to it, for instance, if they had wrongfully threatened the party now imposing the risk on them or in some other way egregiously provoked them).

Enforcing the law of conspiracy involves the preventive use of force against those who have not yet performed a harmful act; yet there seems to be nothing inherently wrong with laws against conspiracy. Moreover, there is a coherent explanation of the moral intuition that it can be justifiable to act preventively against conspirators: they are wrongfully imposing a serious risk of others. And this explanation also provides the basis for a justification for preventive military action, at least in circumstances that are morally analogous to cases of conspiracy.

The crucial point is that when someone has wrongfully imposed a risk, it can become morally permissible to do things to alleviate the risk that would otherwise be impermissible. This is not to say, of course, that one may do whatever is necessary to alleviate the risk. As with other uses of force, one is obligated to observe the principle of proportionality, to avoid excessive force, and to show a proper regard for the rights of innocent persons.
The analogy with the law of conspiracy takes us only so far, because it only suggests that that if similar conditions were satisfied in the case of a state or a terrorist group, it would be justifiable to use force to arrest them and punish them. The further conclusion that it can be justifiable to use deadly force against them depends on the additional assumption that has framed our inquiry from the beginning: that the wrongful act they plan to commit will be sudden and will cause massive violations of human rights. In such cases, the use of military force, rather than police power, often will be necessary to alleviate the threat that a state or nonstate group will use weapons of mass destruction.

Of course one might object that the idea of alleviating an unjustly imposed risk by preventive action only justifies inflicting harm on the one who has imposed the risk, whereas preventive action will inevitably involve a risk of harm to others. As we have already acknowledged, preventive military action (unlike ordinary law enforcement) will almost invariably risk harm to the innocent; but this is equally true of intervention to stop a presently occurring genocide and of interdiction--and of the least controversial cases of self-defense against an aggressive attack as well. Unless one is willing to embrace an absolute pacifist position that rules out the use of military force in self-defense, the fact that a preventive response to the wrongful imposition of dire risk may involve harm to innocent persons does not render it morally illegitimate.

Given that military action, even of a fairly limited sort, typically involves much greater risk of harm to innocent persons than ordinary policy action against conspirators, the threshold of expected harm needed to justify preventive military action should be high. From a cosmopolitan perspective, an appropriate threshold is massive violations of basic human rights. By ‘basic human rights’ we mean the most widely acknowledged
rights that are already recognized in the major human rights conventions. These include the right to physical security of the person, including the right against torture, and rights against at least the more damaging forms of discrimination on grounds of religion, gender, race, or ethnicity, as well as rights against slavery, servitude or forced labor, and the right to the means of subsistence.

We conclude that the first objection to the thesis that preventive military action can be ethically permissible—the charge that prevention violates the rights of the target of prevention—cannot stand scrutiny. If military force is needed to counter the wrongful imposition of a risk of massive violations of basic human rights, its use need not violate the rights of the target of intervention.

**Blanket Prohibition Superior to the Exercise of Judgment**

The second objection to our *prima facie* argument for the use of preventive force is that prevention carries special risks that are not present in the case of armed responses to actually occurring attacks. In this view, the appeal to hypothetical examples such as that of the virulent virus glosses over an important distinction between the justification of a particular action and the justification of a rule that would allow that type of action. Even if preventive action would be morally justified when certain highly ideal conditions are satisfied, it does not follow that we should abandon the existing blanket prohibition on preventive force or replace it with a more permissive rule.

The cosmopolitan case for preventive action asserts that it may be undertaken to remove or mitigate a wrongfully imposed dire risk. However, for a dire risk to become actual, a long causal series of events must typically be completed. Even if the probability of each event in the causal series is high, the probability of the harm will be much lower,
since it is the product of all the probabilities of the events in the series. Thus suppose that
the causal series anticipated by the potential preventor consists of events A, B, C, and D
and that each event has a probability of .8. The anticipated harm (the massive violation
of basic human rights) will occur only if the whole series of events transpires; but the
probability of this is the product of the probabilities of each of the members of the series:
.4096. If the probability of individual events is lower, the joint probability is
dramatically reduced: for instance, if the probability of each of four events is 0.6, the
joint probability of four events is 0.1296. Furthermore, if events are uncertain – that is,
probabilities are unknown – it is impossible to calculate precise probabilities.

According to this second objection it is not enough to show, as we have done, that
there are some circumstances in which preventive action would be morally justified. If
these cases are few and if there is a significant risk that those contemplating preventive
action may err in determining whether those circumstances obtain, a blanket prohibition,
a “bright-line” rule, will be the most responsible policy.7

In the absence of appropriate institutional arrangements, this second objection
has a good deal of force. Permitting states to decide unilaterally whether to engage in the
preventive use of force could lead to frequent abuse and error. A bright-line prohibition
can prevent many precipitous military actions that would be very harmful to world peace
and human rights. All things considered, preserving a bright-line prohibition may well be
a better choice than creating a permissive environment for preventive military action on a
unilateral basis.

7 In one sense, this objection points out the obvious: that tradeoffs exist in policy between timely action and
certainty about the necessity of action. The longer one waits, the more information one is likely to gain; but
by the same token, one’s ability to affect the situation may be reduced. Britain and France had better reason
However, a blanket prohibition seems less attractive when we consider alternatives other than the unconstrained unilateral use of force. A blanket prohibition requires states to stand idly by when relatively little force could avert a major humanitarian disaster, as was the case in Rwanda in 1994. Yet one of the lessons from the failures of UN humanitarian intervention in Rwanda and in Bosnia -- until NATO began serious bombing in August 1995 -- is that forceful action early in a crisis is often the most effective way to deal with it.

For most states, most of the time, illegality is viewed as a cost, if only because of damage to reputation. Hence, if preventive force is illegal, states will be less likely to use it. Adhering to a “bright line” rule can therefore preclude actions that are most likely to be effective at the least ethical cost.

A “bright line” rule also tends to reduce the effectiveness of coercive diplomacy, which may often be the most promising means of preventing terrible harm as a result of foreseeable future aggression. Coercive diplomacy can be defined as “bargaining accompanied by threats designed to induce fear sufficient to change behavior.”

It includes deterrence but is more comprehensive, since it also incorporates what Thomas Schelling once called “compellance” – inducing an adversary not merely to refrain from some action, but to engage in an action that it would not otherwise undertake.

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diplomacy is often the best option. By making preventive force illegal, the blanket prohibition raises the cost of engaging in it, and this lowers the credibility of the threat of preventive action, thus limiting the opportunities for effective coercive diplomacy.

The risks of unrestrained unilateral discretion can be avoided at lower cost by embedding a more permissive rule within a well-designed institutional framework. Such a framework would combine rigorous criteria for using force with effective procedural safeguards. In Section II we articulate the principles that should guide the design of institutions to supply the needed safeguards and show how they are grounded in the cosmopolitan perspective. Before proceeding to that task we must first explain more carefully the risks of preventive action that these safeguards are to intended to mitigate.

**The Risks of Preventive Action**

Preventive military action carries two risks that also attend the use of force in self-defense and for stopping presently occurring violations of basic rights. The first is the risk that preventive action will cause unacceptable harm to noncombatants or otherwise violate important moral constraints on the use of force (including the use of excessive force against combatants). The second is the risk that preventive action will lead to a wider conflict with greater harm to innocent persons.

The risk of unacceptable harm to noncombatants is a grave consideration, but as we have already emphasized it is in no way peculiar to the preventive use of force. A responsible decision-maker must take it into account whenever the use of military force is contemplated. The second risk—of escalation to a wider conflict—may be great in some

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10 Admittedly, the conditions for successful coercive diplomacy are demanding and it has often failed. But when it succeeds, as in the Cuban missile crisis of 1962, it can achieve the objective—in this case the disarmament of weapons of mass destruction—without the costs of war.
cases of preventive action, but it may not be so in others, and again there is no reason to think this risk is generally greater in the case of preventive action. So, assuming that the use of force in self-defense or to stop presently occurring violations of others’ basic rights is sometimes justifiable, these two risks do not warrant a blanket prohibition on preventive force.

There are, however, two other risks that are of special concern in the case of preventive action, even if they are not unique to it. The first is that self-interest, masquerading as concern for the common good, may lead to decisions that are not in fact justifiable. The second is that preventive action will undermine existing beneficial institutional norms constraining the use of force. Each of these risks may be greater for preventive action than for the use of force in response to an attack that is already underway, simply because in general predictions that violence may occur are more subject to error and bias than observations that it is already occurring.

Whether these risks are so great as to rule out preventive action for the protection of basic human rights will depend upon whether there are safeguards in place that reduce the risks to acceptable levels. Our argument thus far already suggests one important safeguard: requiring a high threshold of anticipated harm. From a cosmopolitan perspective, the expectation of massive violations of basic human rights seems to fit the bill.

However, the assessment of risk involves not only an estimate of the magnitude of harm, but also of its probability. How high the probability of massive violations of basic human rights must be before preventive action would be justified will depend upon how effective the other safeguards for responsible decisionmaking are. Other things being
equal, the more effective the other safeguards are, including the requirement the
magnitude of the harm to be prevented must be very high, the lower the probability of
harm that is needed justify action. In the next section we propose a robust set of
institutionalized safeguards, in addition to the threshold requirement of a risk of massive
violations of basic human rights. This reliance on other safeguards takes the sting out of
the fact that there is no unique, nonarbitrary threshold of probability of harm needed to
justify prevention.

Requiring a high threshold of harm and relying on other safeguards are ways of
reducing the risks of preventive action. Given the risk of inaction—the likelihood that
large-scale violations of basic human rights will occur unless force is used to prevent it—
the goal is not to reduce the risk of preventive action to zero, but to mitigate it
sufficiently. Our institutional analysis in the next section is designed to show that this can
be achieved.

II. Cosmopolitan Institutions for Accountability

In this section we outline two crucial features that institutions for the preventive
use of force should possess. They should exemplify certain “design principles” that are
grounded in the cosmopolitan perspective and they should ensure accountability for
adherence to cosmopolitan moral principles.

Cosmopolitan Principles of Institutional Design

We suggest three principles of cosmopolitan institutional design for institutions
governing the use of preventive force. The first of these is that of effectiveness: the
institution should effectively promote the responsible use of force to prevent massive
violations of basic human rights, regardless of whose rights are threatened. One way to achieve this is to ensure that decisions to use preventive force are made by morally reliable agents, and to give these agents the right incentives.

The goal of selecting morally reliable agents could be furthered if only those states that have decent records regarding the protection of basic human rights were allowed to participate in institutional processes for controlling the use of preventive force. The point here is not that decision-makers must have perfectly “clean hands,” but rather that those who have demonstrated respect for human rights over a considerable period of time are generally more reliable decision-makers regarding the use of force for protecting human rights than those who have not. We call this the comparative moral reliability criterion.

Even agents that are morally reliable, comparatively speaking, need to operate under incentives that induce states both to make intervention decisions on the basis of the best available information, and to take actions that are consistent with cosmopolitan principles. The design principle of effectiveness requires the right incentives. In particular, incentives are needed to counter the tendency of those proposing the use of preventive force to overestimate the risk to be averted and the tendency of others to shirk responsibilities to protect basic human rights.

Our second design principle also flows from a core commitment of the cosmopolitan ethical perspective: mutual respect for all persons. Being willing to help protect the basic human rights of all persons is one important way in which we show respect. Showing respect also entails being willing to justify one’s actions to others.
Arrogant dismissal of others’ views, without providing reasons and evidence, is inconsistent with cosmopolitan ethical principles.

Within democratic societies, this principle of mutual respect means that people wielding power, and especially force, must respond to queries about such uses of power from those who ultimately must authorize these actions – members of the society in question. For Cosmopolitans, who try to honor the commitment to respecting all persons, power-wielders must also offer justifications of their actions to people outside their societies who are affected by them. In the words of the Declaration of Independence, they must have “a decent respect to the opinions of Mankind.” The second cosmopolitan design principle for international institutions, therefore, is that practices of mutual respect must be built into the institutional arrangements.

Our third principle of institutional design, inclusiveness, reflects the values both of effectiveness and mutual respect. From the standpoint of mutual respect, institutions should be as inclusive as is feasible, given their goals. Since the goal of the institution in question is the responsible protection of the basic rights of all, based on the recognition that all are entitled to equal regard, there is at least a presumption in favor of maximal inclusiveness.

In many cases effectiveness, mutual respect, and inclusiveness will point in the same direction. But it is worth noting that there can be a conflict between ensuring effectiveness by selecting agents that enjoy comparative moral reliability, and inclusiveness. Inclusiveness argues for giving all states access to participation in institutional processes for controlling the use of preventive force, whereas the need to enlist agents who have a sincere commitment to and a sound understanding of human
rights favors restricting participation. In section III we address the issue of trade-offs between inclusiveness and comparative moral reliability.

**The Concept of Accountability and the Preventive Use of Force**

No single state, no matter how internally democratic, can be counted upon fully to take into proper account the interests of others, particularly when considering the use of military force. On cosmopolitan principles, however, preventive military action could only be justified on the basis of regard for the human rights of all, not solely on the basis of national interest or the human rights of members of a given society or small set of societies. To understand how the demands of cosmopolitan accountability should inform the design of institutions for controlling the preventive use of force, it is first necessary to explicate a more general concept of accountability.

Standard definitions of accountability emphasize both information and sanctions. “A is accountable to B when A is obliged to inform B about A’s (past or future) actions and decisions, to justify them, and to suffer punishment in the case of eventual misconduct.” Inclusion of sanctions (including punishments) is crucial, since the requirement to answer questions and provide justifications is relatively empty unless those to whom the action is justified have some ability to sanction those in power. In addition, accountability requires standards to which an agent is to be held accountable, and willingness on the part of the agent to provide information and answer questions.

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about its behavior. An accountability system also requires a specification of to whom agents should be accountable.

In a cosmopolitan perspective, the most fundamental standard of accountability is that states must act in ways that are designed to respect and protect the human rights of all persons. They are only to use force or to authorize its use for the sake of preventing violations of human rights. In addition, justified preventive action must include standards for how preventive force is to be applied that reflect the cosmopolitan commitment to basic human rights.

Prominent among the substantive standards for how preventive action is to be conducted will be the traditional *jus in bello* principles: harm to innocents is to be minimized, force must be proportional to the end to be achieved, excessive force is to be avoided, and unnecessary suffering is not to be inflicted on enemy combatants. Institutionalizing these standards means creating mechanisms to help ensure that they are applied correctly and that there are effective sanctions to increase compliance with them. Traditional just war theory, in contrast, simply addresses these principles to the conscience of the actor—an actor who is liable to bias and error, and often prone to opportunism. Our goal is to make just war principles more effective by embedding them in appropriate institutions that provide checks on actors’ judgment and enforce accountability on their conduct.

To determine whether these standards are met, information is required. Thus the second component of a cosmopolitan accountability system is provisions for the sharing of information. The state proposing to use force must share its information about the risks of large-scale human rights violations that would result from inaction as well as the risks
of action, especially regarding harm to innocent persons. The information that it provides must be sufficient for other states to make independent judgments on the costs and benefits of the preventive use of force.

A major reason for procedures to ensure information-sharing is to establish appropriate incentives for action. Without such procedures, states could pretend to be using preventive force to protect human rights while in fact acting to preserve their hegemony in a region, to protect weak regimes with which they were allied, or to gain economic advantages. The requirement of information-sharing is designed, therefore, not only to correct false beliefs but to reduce opportunism disguised as concern for human rights. Hence information-sharing is required by the design principle of effectiveness. It is also required by the principle of mutual respect, since mutual respect is evidenced by a willingness to share information with equals rather than to demand deference from those regarded as inferior in the capacity to understand issues and make decisions.

The third element of an accountability system is the most difficult to institutionalize: sanctions for violation. Different societies hold different values, and states are likely to privilege their own interests; accordingly, it is not feasible to rely, in world politics, on voluntary compliance. World politics is often seen as a “self-help” system, with each state responsible for its own security. Without sanctions, rules for the regulation of the use of preventive force would almost certainly be ineffective. Unless there are sanctions for violations of the requirement to share information, some states will misrepresent the facts, exaggerating the probability of the harm that they propose to prevent. Unless there are sanctions against those who use excessive force, states are

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likely to discount the harm their forceful actions will inflict on others. Without effective sanctions, the institutions will be ineffective, since in the absence of sanctions, “the strong do what they can and the weak suffer what they must.”

Standards, information, and sanctions are all crucial to accountability, but they leave open the question, “accountability to whom?” To whom should agents who are considering wielding military force be held accountable? We have already suggested that a cosmopolitan perspective grounds a presumption in favor of inclusiveness. In addition, the design principle of mutual respect creates a presumption that participation in institutional processes for the use of force to protect the human rights of all should be open to all. This presumption could be rebutted, however, if the effectiveness of the accountability regime requires restricting participation to those agents that are comparatively morally reliable. Later we show how alternative institutional models for embodying cosmopolitan accountability strike different tradeoffs between inclusiveness and comparative moral reliability.

Accountability operates both ex ante and ex post. Those states that propose to use preventive force must, under cosmopolitan principles, consult with other states and make their intentions known to international society more generally before using force. Having used force, they must provide information, answer questions, and subject themselves to sanctions according to rules that have been established in advance.

**Ex Ante Accountability**

*Ex ante* cosmopolitan accountability requires agreement on the use of preventive force as a result of rational persuasion: the use of argument, without the threat of force

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and independently of side-payments. This much is implied by the design principle of mutual respect. Rational persuasion is also principled, and this means that parties speaking in favor or against preventive military action must acknowledge that their decisions will have precedential value for future decisions. Thus both the party contemplating intervention and those who must ratify its decision will have an incentive to follow principles they would be willing to have applied to themselves and others on future occasions, regardless of who is the potential intervenor and who is the target of intervention. In this sense, the expectation that current decisions will have precedential value for future decisions serves as a kind of veil of ignorance, making the procedure conducive to fairness and therefore to mutual respect.

Second, mutual respect requires that all participants in the process of deciding on the use of preventive force must have equal standing to pose questions to the potential intervenor and offer arguments against intervention. In addition, there is at least a strong presumption against according weighted votes or veto power to some participants.

Third, the process of deliberation ex ante must involve the participation of a group of states with diverse interests. Too much uniformity of interests among the participants would run the risk of bias, perhaps even turning the regime for accountability into a tool for domination. Protection of the human rights of all requires diversity of perspectives.

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Ex Post Accountability

It is quite possible that what is discovered after even a successful military attack will not justify the actions that were taken. *Ex ante* accountability is therefore not sufficient; provisions for *ex post* accountability are also essential. The attacking states must come back to the body that authorized their actions, with a full report. They must also allow inspectors from that body to have free and timely access to all places in the country controlled by the attacking states in the course of the preventive action. That is, they must facilitate the generation and publicizing of the best available impartial information about the actual effects of preventive use of military force.

Evaluation of the results of the preventive military action would focus on the consistency of the acting states’ behavior with the statements they made in the *ex ante* accountability process. Two aspects of such consistency are particularly important:

1) Was the information gained *ex post* about the risk-imposing actions of the target consistent with the statements made by the states proposing action *ex ante*?

2) Were the military actions of the attacking states consistent with their assurances *ex ante* that their actions would be proportional to the objectives being attained? The justification of military action on the basis of risk only justifies action necessary to remove or significantly reduce the risk. It ultimately should be up to the authorizing body, not to the attacking states, to decide how far military action needs to go to attain the agreed objectives.

With respect to the justification of an attack, two contrasting inferences might be drawn from information gathered after the war: 1) On the whole, the *ex post*
investigations support the assessments of risk made before the attack; or 2) on the whole, the *ex post* investigations fail to corroborate those assessments. Of course, there would be gradations of judgment between these two poles.

If the situation corresponds more closely to situation 1), the attacking states would indeed have performed a public service for the world, by eliminating or reducing the threat that weapons of mass destruction would be used or that large-scale violations of basic human rights would be inflicted by some other means. They would not have further obligations. Indeed, it would be presumed that other states, which had not shouldered the risk of preventive military action, would be primarily responsible for peacekeeping and financial support for rebuilding the target country, if the use of preventive force causes extensive damage. That is, they would be sanctioned as “free-riders,” who were informed about the threat but refused to act in a timely matter. The economic burdens on such free-riders should, in this situation, be *greater* than those imposed on states that supported the military action in the first place.

However, if information gained *post facto* does not corroborate prior expectations, the attacking states and their supporters would be held accountable. They would have to face sanctions for their actions, just as states violating international trade law are liable for sanctions for their infringements of the trade regime. Conversely, when military action turns out to have been justified, the intervenor should be offered the opportunity to have a greater say in any subsequent institution-building and should be liable to lesser
costs. Expensive follow-up action would be principally financed by states that did not make substantial investments, material or in human terms, in the war effort.15

In some cases, preventive action may result in serious damage to a country’s political infrastructure. If the ex post review concludes that the preventive action was unjustified, the intervening party should be barred from any significant role in the political reconstruction. Otherwise, there is a danger that they could be rewarded for their misdeeds. If states know ex ante that this will occur, this will also diminish incentives for opportunistic interventions aimed at domination rather than protection of human rights.

If the ex post review determines that the preventive action was not justified, the intervenor should be required to compensate those who suffered harm from the preventive action and to provide full financial support for a collective operation restoring infrastructure and making possible a return to effective indigenous governance. The magnitude of such support would be determined by an impartial independent commission.

Here it might be objected that the strongest states might agree ex ante to pay compensation if an ex post review found their preventive actions to be unjustified, but simply fail to pay up. To avoid this problem, assets could be escrowed ex ante.17

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15 The analogy of conscientious objection may be helpful. Conscientious objectors may avoid military service, but are expected to subject themselves to at least equivalent burdens and risks as those who do carry arms, for example, by serving as medics.

16 It could be argued that the injustices imposed by the unilateral interventions by the United States in the Dominican Republic (1965), Grenada (1983) and Panama (1989) were ameliorated by their subsequent return to democratic practices. This argument would be stronger, however, if the United States had not been so intimately involved in selecting the successor governments.

17 Such an arrangement was used in the agreements that ended the US-Iran hostage crisis in 1981 and that established the US-Iran Claims Tribunal. See Robert Carswell and Richard Davis, “Crafting the Financial Settlement,” in Warren Christopher et al., American Hostages in Iran: The Conduct of a Crisis (New
One striking attraction of the requirement of *ex post* accountability is that it provides the intervening state with a powerful incentive to comply with the just war principle of using the minimum of force sufficient to achieve the goal of prevention. The *ex post* accountability requirement places the burden of evidence on the intervening state: it must be able to show that its *ex ante* judgments in support of preventive action were valid, and this requires that evidence to substantiate those judgments be available for all to see *ex post*. Were the intervenor to use excessive force, this could destroy the needed evidence. Thus *ex post* accountability institutionalizes an important just war principle in such a way as to create incentives for compliance with it.

Similarly, the knowledge that its actions will subject to an impartial review would give the intervening state an incentive to minimize harm to noncombatants, especially if significant penalties would follow upon a finding that harm to noncombatants was excessive. These would primarily consist of compensation to those harmed or their families, but might include other sanctions as well.

The key to this mechanism of accountability is a *contingent contract* that applies *both* to states seeking to use military force in a preventive way and to states opposing the use of force. States would agree that after the conflict they would abide by the judgments of the authorizing body on the validity of their *ex ante* arguments. They would also agree that if this judgment went against them, and an independent commission determined a level of compensation, they would pay such compensation (subject perhaps to an appeals procedure). It should be emphasized that states opposing preventive action would also be at financial risk, if *ex post* discoveries confirmed the claims made by *ex ante* by the states.

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advocating preventive action and disconfirmed their own *ex ante* objections. In other words, the contract is double-sided, not discriminatory against potential intervenors.

Another advantage of this contractual arrangement is that it would limit abuses of victory in a preventive war. In cases where prevention results in large-scale damage, decisions about how to reconstruct the country, including those relating to its political-economic system and control of its resources, would have to be made in consultation with the authorizing body. When the states engaged in preventive military action had succeeded in their objective – eliminating the risks for which they claimed to go to war – they would have to subject their plans for postwar reconstruction and prevention of recurrence of the risks to the authorizing body.

**III. Alternative Institutional Models for Accountability**

Our central argument has been that appropriate institutions can make the preventive use of force morally justifiable on cosmopolitan grounds. In this section we discuss some alternative arrangements that might reasonably satisfy the requirements of cosmopolitan accountability. We explore a graded range of alternative arrangements, beginning with those that would require the least modification of existing international institutions, and proceeding to those that would require greater institutional innovation.

**Institutional model 1: Fleshing out Article 51**

The least radical institutional exemplification of cosmopolitan accountability would provide needed content for Article 51 of the UN Charter and extend its scope beyond self-defense against presently occurring attacks. Article 51 states that Members of the United Nations that respond to an armed attack shall “immediately” report their
actions to the Security Council. There is no provision, however, for mechanisms to ensure the accuracy of the report, nor any articulation of criteria for evaluating the report, nor any mention of penalties to follow a negative evaluation of the report.

On this first model, the Security Council would have to approve military action by the procedures currently in the Charter (subject to the potential for a veto by any of the five Permanent Members). The Council would appoint an impartial body to determine whether the intervenor’s *ex ante* justification for preventive action is confirmed *ex post*, instead of simply relying on the intervenor to report.

Such an arrangement might reduce the likelihood that vetoes would be used, since those states reluctant to endorse preventive action would at least have the assurance of impartial reporting of the results, with provisions for penalties in the case of malfeasance. To that extent, the first model’s provisions for accountability would alleviate the problems that the veto poses. However, for *ex post* accountability to work, it would also be necessary for the Council to create suitable penalties to be applied in the case of a negative evaluation *ex post*.18

Model 1 calls for reporting practices that are already available to the Security Council to be developed and institutionalized.19 It has three advantages over the alternatives to be discussed below. First, the United Nations already exists as an

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18 This necessity raises the problem of an *ex post* veto by the intervening state or states of the findings of the impartial commission or penalties implied by those findings. This problem could be solved by adapting a suggestion recently made by Professor Thomas Franck, who points out that Article 27 provides that “decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.” That is, on procedural matters, the veto is inapplicable. *Ex ante* the Council could decide that votes on the composition and report of the impartial commission, and on any recommendations for penalties, would be considered procedural. (Professor Franck’s proposal concerns specification of what constitutes a “material breach” regarding UN resolutions concerning Iraq. See his “inspections and their enforcement: a modest proposal,” *American Journal of International Law* 96: 899-900 (October 2002).

19 For a specific application of these ideas to the war by the United States and coalition forces against Iraq, see an op-ed in the *Financial Times*, March 31, 2993, p. 15, by Robert Keohane.
institution. It is almost universally recognized as the body to which issues of war and peace should be brought. Secondly, the United Nations is inclusive; any recognized sovereign state may join and almost all of the world’s peoples live in states that are members of the UN.20 From a cosmopolitan perspective, as we have already noted, it is preferable, other things being equal, that a body authorizing preventive action be universal or at least represent all states, both to minimize bias and to foster a sense of legitimacy, which in turn promotes compliance. Third, model 1 would not require a formal change in the Charter. Given the difficulty of the amendment process, this makes the first alternative more feasible than the more radical proposals to follow.

Nevertheless, even the measures proposed in model 1 seem to be costly for the leader of a coalition for prevention. Why should the coalition leader accept these constraints if it is to bear the principal costs of military action? The answer is that only by accepting constraints, \textit{ex ante}, could the coalition leader make credible its justification for preventive force and its own promises regarding its conduct during and after the conflict. Credible promises, in turn, are essential to induce other members of the Security Council to grant authorization for the use of preventive force.

**Institutional model 2: accountability without the permanent veto**

The second option requires greater institutional innovation: in addition to including mechanisms for \textit{ex ante} as well as \textit{ex post} accountability, it removes decisions about preventive force from the scope of the Council’s permanent veto. Model 2 does not assume that the veto would be dropped in all Council deliberations; it concerns only the decision to use preventive force.

\footnote{There are exceptions, such as the resident’s of Taiwan and of the Territories occupied by Israel.}
States seeking authorization for preventive action would make their case to the Security Council. If nine members voted in favor, preventive action could go forward, subject to an impartial *ex post* review process. The requirement of nine votes in favor would ensure that states from a variety of areas of the world, with a range of cultural and political orientations, would have to agree to the action.

There are two points in favor of dropping the veto. The first is that it has no ethical standing, being a political artifact of the era in which the UN was founded, and arbitrarily gives disproportionate power to some states, thereby offending against the presumption of equality that the design principle of mutual respect implies. The second is that removing the veto removes an objection to Model 1: that it would likely lead to failures to use preventive force under conditions in which its use would be morally compelling.

Another advantage of model 2 is that it would encourage states that are resistant to the use of preventive force to propose constructive alternatives. The lack of a veto would make it necessary for states to persuade others that preventive action is not necessary and in some cases this would require presenting viable alternatives to force.

Model 2 is obviously less feasible than model 1, because it requires those who possess the permanent veto to relinquish it. Quite apart from issues of feasibility, model 2 is subject to another criticism: allowing preventive force to be authorized by nine votes of the Council may fall short of the ideal of rational persuasion. If the state proposing preventive action is a powerful one, as it typically will be, weaker members of the Council may be pressured into voting in favor, either by the fear that the powerful state will penalize them or by the inducement of side-payments. Nevertheless, we think
model 2 merits serious consideration, because it builds on existing UN institutions, while dispensing with veto, a feature of the current arrangements which is, strictly speaking, at odds with the cosmopolitan perspective and likely to block beneficial preventive action.

**Institutional model 3: a liberal-democratic coalition**

Given the forgoing problems with both of the preceding models for basing a system of cosmopolitan accountability on the UN, it is reasonable to ask whether other institutional arrangements might be superior. One alternative would be especially attractive, at least from the standpoint of the criterion of comparative moral reliability introduced in section II: a rule-governed, treaty-based, liberal democratic coalition whose functions would include the authorization of preventive force. For cosmopolitan reasons, its membership would not be restricted geographically (as is the case with NATO or the European Union). It would instead be open to any state that meets specified standards for the observance of basic human rights norms, including minimally democratic governance.  

Apart from the problem of gaining agreement on the standard for observance of human rights norms and minimally democratic governance, the most obvious difficulty with this third option is that it would have to be created from scratch, unlike the UN-based models 1 and 2. However, assessing the comparative merits of models 2 and 3 may be more complex than first appears. Because the liberal-democratic coalition would presumably include at least three of the permanent members of the Security Council, they might be more likely to support it than to give up the veto as model 2 requires. So model 2 avoids the problems of the veto, but at the price of being less likely to gain support of
the permanent members than model 3. Model 3 scores high on the criterion of comparative moral reliability of the participants in the decision process, but does less well on the criterion of inclusiveness, while requiring greater institutional innovation than the two UN-based models. In addition, one might argue that the liberal-democratic coalition option is riskier, on the grounds that a relaxation of the existing blanket legal prohibition on preventive force that occurs within the UN framework is less dangerous than one that by-passes it.

On the other hand, developing the option of a liberal-democratic coalition for preventive force might be worthwhile all things considered. Having such an alternative to the UN-based system could provide incentives for veto-holding members of the Security Council and other UN members to agree to reform the UN system, in order to avoid its obsolescence.

Our purpose is not to opt decisively for one of the institutional models sketched above; as we have already suggested, this is not a “policy paper,” but rather an attempt to challenge the framework of assumptions within which the policy debate over preventive action has been taking place. However, from a cosmopolitan standpoint, institutional model 1 should be viewed only as a first step, because it relies on a very problematic feature of the existing system, the permanent member veto.

It is unlikely that the cosmopolitan accountability principles we propose would be adopted all at once. More feasible might be an incremental process. A first step might be to implement model 1, presented as an effort to flesh out Article 51. This would allow some of our *ex post* accountability arrangements, such as review by an impartial

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commission, to be put into place with minimal institutional change. A second step might be for permanent members of the Security Council to agree not to use the veto when considering the use of preventive force, except in cases of paramount national interest.22

Conclusion

Three distinct positions dominate the debate on preventive military action: what we have called the national interest, international law, and expanded self-defense perspectives. All three positions are inconsistent with the cosmopolitan ethical perspective we have developed in this paper. The national interest view allows too much latitude for abusive or erroneous behavior by states, by exclusively privileging the interests of their own citizens. The international law view is unduly restrictive of military action that could avert humanitarian disasters at acceptable costs and undermines the effectiveness of coercive diplomacy for the protection of basic human rights. The view that preventive force is sometimes justifiable for the sake of self-defense is consistent with the cosmopolitan perspective—at least if self-defense is understood as including a state’s response to threats against the basic human rights of its citizens. But proposals to expand the right of self-defense to cover preventive action ignore the special risks involved in prevention, and include no institutional safeguards to mitigate these risks.

This paper, by contrast, has explored the permissibility of preventive war from a genuinely cosmopolitan normative perspective, a moral position that recognizes the basic human rights of all persons, not just one’s own fellow citizens. Our normative argument

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22 Such an agreement would resemble the so-called “Luxemburg Compromise in the European Community in 1966, by which states reserved the right to veto proposals in the Council, but only in
hinges on the claim that inaction can be as unacceptable as action from a cosmopolitan standpoint. The costs of inaction provide a weighty argument against “bright-line” rules prohibiting preventive war. Yet it would be disastrous for world order simply to authorize preventive war whenever some states regarded it as being in their interests or as necessary for their self-defense. If a bright-line, blanket prohibition is abandoned, effective substantive and procedural constraints on preventive force will be needed: constraints that are tight enough to prevent their opportunistic abuse, but sufficiently flexible to prevent deadlock.

We have argued that the concept of accountability is crucial in thinking about such procedures. States advocating preventive war should be subjected both to ex ante and ex post accountability. Ex ante, they must be able to persuade other states, under conditions conducive to rational persuasion, of the merits of their case for military action. Ex post, their actions must be subjected to scrutiny and potential sanctions, as they are compared with the claims that were made ex ante to justify the use of force.

The key idea is that states proposing preventive war would have to enter into a contingent contract with the diverse body of states authorizing their actions according to institutional procedures and standards grounded in a cosmopolitan ethical perspective. If the warnings of those seeking authorization to use preventive force turn out to be correct, they would be honored and the reluctant free-riders would be the ones to pick up the pieces; but if their warnings were exaggerated or wrong, or their actions disproportionate, they would be sanctioned.

Any practical system of accountability will be far from perfect. Yet contemporary
ternational law is even more imperfect, since it rules out actions that could be essential
for the protection of fundamental human rights. Simply ignoring the existing legal
structure and permitting unilateral actions by powerful states on the basis of their
conceptions of national interest, or according to an expanded right of self-defense, would
be exceedingly dangerous.

Some might worry that if implemented our view might be seen as so constraining
that states would be deterred from engaging in justifiable prevention. We do not deny that
this is a possibility. But here is it crucial to emphasize that our argument is
comparative—we have argued that institutionalizing cosmopolitan accountability is
superior both the international legal status quo (the blanket prohibition on preventive
action) and to the discretionary, unaccountable uses of preventive force now threatening
it.

Institutionalized cosmopolitan accountability would pose less risk of the under-
utilization of preventive force than the current blanket legal prohibition, for two reasons.
First, if the accountability regime were incorporated into the international legal order,
states using preventive force within its constraints would avoid the costs associated with
acting illegally. Second, even the most powerful states need allies when undertaking
military action. By meeting the requirements of the cosmopolitan accountability regime,
a state proposing preventive action would gain credibility, by allaying the suspicions of
other states that the justification given for prevention was not sound or that prevention
was a pretext for conquest. The cosmopolitan accountability regime should be attractive,
then, not only to those wishing to constrain states bent on preventive action, but also to
those seeking to engage in it. Establishing an institutionalized system of accountability for preventive war would constitute a progressive step in international governance.