

Non-State Actors, Nuclear Next Use, and Deterrence
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Abstract

The deterrence we are most familiar with, from the Cold War era, was rooted in the sharply realist aspects of that era, including the notion that international politics is a realm of anarchy. Having an international legal framework for dealing with nuclear proliferation and possible nuclear terrorism that imposes serious coordinated responsibilities on states means starting to establish a kind of international politics in which the role and conduct of deterrence is significantly altered. One unchanging feature, however, is the great difficulty of deterring deeply motivated terrorists or other non-state actors. A strong legal framework, effectively implemented, can strengthen the impact of deterrence efforts against those who facilitate terrorist and other dangerous activities, helping to isolate and eventually suppress terrorists and other perpetrators. However, both centrally directed multilateral endeavors along these lines and those implemented in largely decentralized ways are always very complex and unevenly effective, detracting from the effectiveness of deterrence.

This paper is about what might be said, from a deterrence (in international politics) perspective, about deterring non-state actors from undertaking nuclear-proliferation related activities when deterrence is pursued with a framework of mandated state efforts to curb terrorist and nuclear proliferation activities including the possible application of universal jurisdiction. Thus it is about the potential deterrence effect of a legal regime, and of deterrence efforts beyond but associated with that regime. This topic reflects the profound concerns now in evidence about nuclear proliferation and, in particular, the possible involvement of non-state actors in promoting nuclear terrorism

Deterrence in International Politics

Some background on deterrence theory and deterrence in international politics is necessary. In international politics deterrence has typically involved states, rather than non-state actors. When deterrence theory was finally developed in the 1950s and 1960s it was assumed that the actors involved were states. For purposes of this paper the most important aspect of deterrence in international politics is that it was developed for actors who operated in what is typically termed an environment of anarchy and deterrence developed as it did because of that anarchy. “Anarchy” here refers to the absence of any overall government of the international system, leaving states as the ultimate authority with respect to their own behavior. Such a situation was assumed to lead to a Hobbesian world in which every actor had to see to its own security because there was no higher authority to provide it. That meant states had to be prepared to fight to defend themselves if necessary and, hopefully, to deter when faced with possible attacks. While they could create alliances to add to their protection, anarchy meant that there was no way to compel the allies to help.

In brief, deterrence was conceived of and conducted as a *self-operated punishment activity*. Involved was administering punishment, and therefore threats of punishment, to prevent or at least contain harmful physical behavior by other actors, particularly the harm from military attacks.¹ Deterrence was always deeply embedded in the Western states' system, and came to be considered inherent in any system of autonomous actors. For instance, deterrence was envisioned as a major component of any balance of power arrangement, under which when a state accumulates greater power others move to offset it so as to deter attempts by that state to use its power to make gains at their expense. Thus the major function of many alliances was to deter attacks on the members.

While there have always been many subtle aspects to the practice of deterrence the basic idea is very simple and crude. While a legal framework of sorts emerged with respect to war in the Westphalian system, little of this had to do with deterrence per se. In addition, that legal framework had only a relatively limited effect on the use of force in international politics. Instead, since the fundamental characteristic of the system was the autonomy/sovereignty of the primary members, deterrence was a *self-operated* punishment and threats of punishment system. Sovereign states threatened each other with harm as a central part of the process of trying to prevent being harmed. Like the old west, the actors were armed and dangerous because there was little law and order.

When deterrence theory was finally developed in first two decades of the Cold War, analysts focused on the way in which deterrence was fundamentally an effort to exercise influence over the decision making of another actor. More specifically, it was described as seeking to alter the cost-benefit calculations of an opponent contemplating an attack by elevating the prospective costs that the opponent would experience. That could be done by threatening to inflict significant harm in response to any attack via mounting a vigorous defense, by retaliating quite painfully for the attack, or by a harsh combination of both defense and retaliation. Deterrence was steps to make an attack seem not worthwhile to the potential attacker. Also emphasized was the way in which practicing deterrence against one possible attacker could, at the same time, readily produce the same effect on others so that a deterrence effort had to be undertaken with both the specific target in mind and in thinking about future targets. It could even be the case that it was the future opponents that were the real target of a deterrence operation. Deterrence could even be used to keep other states from ever choosing to become targets.

In discussing classic deterrence thinking and practice during the Cold War, it is important to emphasize a second, quite different strand of deterrence that emerged as a result. Early on, analysts and governments realized that in the midst of an intense conflict in which a major war could be catastrophic, extreme reliance on deterrence made it terribly important to explore how that deterrence might fail. In theoretical terms, this

¹ Deterrence was, and is, widely used to prevent other sorts of harm as well. Examples include the harm (or threat of future harm) from an actor's development of a nuclear weapons production program or cheating on an arms control agreement or pursuing a particularly dangerous delivery system. Or a state might want to deter the formation by its opponents of an alliance, or an opponent taking control of a valuable strategic position.

was the “stability problem.” Stable deterrence was deterrence that was working or seemed quite likely to work when needed, while a loss of stability would mean that deterrence had failed and serious challenges or attacks occurred. Analysis of how deterrence might fail led to two major conclusions. First, while sometimes failure was due to having an opponent simply too determined to attack, often both parties in conflict situations wanted to avoid war (particularly in the nuclear age) because for each war might involve unacceptable costs and harm. Second, there were ways in which deterrence between opponents could be made more stable if they cooperated in implementing them. This meant that opponents might would have very good reasons, strong incentives, to *cooperate* even as their conflict continued and, in effect, *because* their conflict would continue. This meant that they should explore how to cooperate to keep their competition and the underlying conflict safe. They should agree on how to cooperate to avoid errors, misperceptions, accidents, crises, etc. that might cause deterrence to break down. This perception was applied mainly to analysis of the dynamics of mutual deterrence relationships, but considerable attention to stability concerns was soon displayed in decisions on each side about political-military plans and postures as well - for example, on weapons design or accident-prevention and anti-theft devices on weapons, or nuclear technology transfers to third parties.

Deterrence was undertaken primarily on behalf of the self-interest of sovereign actors. With the actors preoccupied with their survival in a supposedly anarchical system, the ultimate threats would be those that would put sovereignty at risk, or national existence, or the continuation of the regime and the survival of its political leadership. And the ultimate expression of sovereignty was the capacity to militarily uphold it against attackers, both at home and abroad, particularly against opponents who mounted those ultimate threats. Deterrence rested on the *relative power* of one’s components and uses of military influence, compared with those of opponents, to shape the latter actors’ decisions and behavior when it came to

- 1) getting them to support what the deterrer wanted;
- 2) and especially getting them to not attack the deterrer.

Deterrence, Non-state Actors, and Nuclear Proliferation

What happens if states replace anarchy with various norms of proper conduct as well as legal regimes based on them, and if non-state actors become significant, even the primary, opponents? In particular, what happens to the relevance and effectiveness of deterrence? First we have to keep in mind that the deterrence described above was designed to work in the absence of, and due to the absence of, potent norms and legal regimes. The deterrence was for use in the absence of government and community, or at least a notable underdevelopment of community among the actors which therefore precluded the emergence of successful transnational government.

This is very important when it comes to the role of deterrence. Within any established community, deterrence of wrongdoing and particularly very harmful behavior is shifted, one way or another, out of the control of individual members into the hands of duly designated representatives. The objective is to get deterrence, particularly retaliation,

away from members acting independently so that it can be exercised in a regularized fashion on behalf of the community.² In the presence of meaningful legal regimes for promoting significant norms, deterrence is primarily used to uphold that community and those norms, with actors taking steps to do so individually or collectively – but only in ways that the community has authorized - or through some suitable community organization created for that purpose (police, the courts). The punishment for attacks is no longer self-operated in that sense, except when a member attempts to resist curbs of a community on his behavior. It is not that deterrence in the presence of a community works differently so much as that it is used differently. One involves an effort to uphold an actor's security when there is little community in evidence and, perhaps, even to ensure that no such overarching community comes into existence (such as when deterrence is used in the protection of classic sovereignty). The other is in support of a community or in resistance to the community's effort to ensure compliance with its norms.

An international security community, complete with norms and a legal framework, seeks to protect its members and that can involve deterrence. In that sense, the function of deterrence is not changed when going from a national community to an international one. What changes is the focal point of that deterrence, which shifts to some extent toward the international community. Protecting national communities is fine and continues to be important, but the ultimate purpose of deterrence begins to shift more toward:

displaying and reaffirming the existence and interests of the *international* community in particular – national interests are of importance primarily as integral parts of, and because they are compatible with and reinforce, the international community's interests; forestalling challenges to those community interests; and helping inculcate acceptance of those interests – and norms – so as to diminish challenges to them.

This shift in the context for deterrence is therefore potentially critical. Cold War deterrence was the dominant security regime of that era; it was the main concern, the thing on which security was believed to rest. To a considerable extent this was also true of traditional international politics stretching back to its origins – it was a deterrence-driven sort of security management of international politics that was involved. But in an international political system where a considerable degree of community has developed, where established norms are important for security, legal regimes are an important component of what makes for security. Deterrence is therefore in service to those norms and legal regimes – they do much of the work in generating security in the system and deterrence reinforces them. Although important, deterrence has a more subordinate role to play.

² In communities where there are blood feuds conducted among tribes, clans, or families it is normally the case that 1) these groups are the prime focus of the loyalties of their members – are the main communities in which their members live – not the state, and 2) the heads of these groups are responsible for controlling the conflict and deterrence activities of the members.

One aspect of the possible emergence of this in international politics has been anticipated by Lawrence Freedman. He envisions an international system in which deterrence is particularly intended to internalize restraints on engaging in threatening behavior. The ultimate objective is to get actors to *understand and accept* the restraints on their behavior that the community insists upon. In effect, actors come to constrain themselves. Thus the nature of deterrence shifts as the level of community rises and the strength of community grows in an international system.

Security management in international politics still has a long way to go when it comes to using deterrence, norms, and legal instruments. However, as noted above, there was a notable shift in the functions of deterrence as the Cold War was carried over many years. In that era deterrence initially reflected the near absence of community, particularly in the dominant political axis in the international system, the East-West struggle. But deterrence also contributed greatly to the emergence of a modest but significant degree of community of a specialized sort, a community in the midst of hostility. This led to developing various kinds of bilateral and collective cooperation, as well as unilateral contributions by individual governments, that would promote deterrence stability and also other steps to keep the peace. These developments eventually generated extensive management pertaining to many aspects of security via arms control treaties, efforts to prevent accidents and other inadvertent or unauthorized use of nuclear weapons, strengthening command and control arrangements, nonproliferation restrictions, suppression of conflicts in sensitive areas, thinking about crisis management, early warning systems, steps to keep allies and associates in line, etc. In other words, deterrence actually contributed, to some degree, to the development of a certain level of community in international politics, both in relations between the superpowers and in broader efforts at arms control. This was somewhat surprising. Throughout the Cold War there was a tendency to see deterrence as usually having the opposite effect: reinforcing fear and hostility, intensifying security dilemmas, and therefore undermining efforts to reduce conflict and promote peace.

That history strongly suggests that deterrence of the classical sort is not irrelevant when it comes to dealing with threats of nuclear terrorism or other problems associated with non-state actors. The difficulty lies in figuring out how to make deterrence apply to such problems, how to adjust it to help contain or eliminate them. Special attention must be given to the nature of such problems in a world where many forces are now promoting the further development of the global community.

The non-state actor threat in connection with nuclear weapons appears to now exist primarily in the form of possible terrorist incidents involving those weapons. For some time the overall likelihood of a nuclear war or other uses of nuclear weapons has been declining. Relations among the major states are now relatively benign when it comes to the depth and intensity of their conflicts. They no longer keep large portions of their nuclear arsenals on high alert, they have no expectations of serious warfare with each other in the near future, and therefore deterrence among them is relatively recessed. They have high levels of peaceful interaction of many kinds, including a fairly high and rising degree of interdependence and multiple patterns of communication. Most of the

concern about the possible next use of nuclear weapons, as far as states being involved, pertains to governments like North Korea or Pakistan, and conflicts like the ones on the Korean peninsula, in South Asia, or the Israeli-Iran relationship. The United States is the great power most involved with conflicts of this sort around the world, and it has now come close to adopting a no-first-use posture on its nuclear weapons and has indicated that it envisions using nuclear weapons only under very extreme circumstances if at all. To this we can add that outright warfare in general among states at any level has become relatively rare. As a result, the longstanding concern that the most likely road to a nuclear war is the escalation of a conventional one has been dampened considerably.

On the other hand there is widespread agreement that the threat of nuclear terrorist attack inflicted, or at least facilitated, by a non-state actor has risen, and this is in keeping with the increased concern about the terrorism threat in general. Some analysts contend that it is only a matter of time before a major disaster of a nuclear sort inflicted by a non-state actor takes place. What can we say about the utility of deterrence in connection with this problem, particularly if it is approached via development of a legal regime that includes extraterritorial jurisdiction?

Deterrence in association with such a regime is a major shift away from the nature of Cold War deterrence, and deterrence in general, in international politics. Unfortunately, the nature of the threat has shifted in the other direction. It would be hard to find kinds of actors less suitable as targets for deterrence than many contemporary terrorist groups and individuals. Various analysts have noted how terrorists have shifted from a desire to do enough harm to have a psychological and political effect to wanted to do the maximum amount of harm, sometimes for the sheer joy of inflicting it. Therefore, it is hard to imagine how to make the costs of launching a nuclear attack too great to terrorists that are seeking to smash evil, have no fear of death, envision punitive responses to their attack as widening and deepening hatred toward their target(s), and have no accumulated assets at risk like states and political regimes. One of the basic aspects of deterrence that is often neglected is that the strength or intensity of the opponent's motivation to attack is a crucial variable affecting the chances of success in deterrence efforts. The higher that is, the greater the difficulty of deterring an attack, and unfortunately, terrorists are normally very high in motivation, particularly suicide terrorist individuals and organizations.

In addition, in this and other ways many terrorists display behavior widely considered irrational, and the irrational attacker has long been the worst sort of adversary envisioned by deterrence practitioners and theorists. Against such attackers the normal recourse is either a much greater response in kind, like the strategy of massive retaliation during the Cold War, or extreme emphasis on deterrence by defense - trying to make a successful attack so difficult that opponents turn to other kinds of activities that are less damaging. But the former is completely at odds with emerging international norms, and the latter is very difficult to achieve with fatalistic, suicidal, or deeply motivated terrorists.

Defenses against terrorists themselves seem entirely too porous. One result is that a good deal of attention has been given to trying to deter non-state actors and activities that somehow facilitate terrorism, deliberately or inadvertently. The targets would be individuals or groups that facilitate the acquisition of materials for a nuclear attack, or the financing, or the transportation involved. The list could include states that facilitate these things as well, including key officials in those states. This is potentially a more effective remedy and is particularly relevant to the topic of this paper, about which more is said below.

This is attractive for another reason as well. Cold War deterrence offered threats of retaliation in the form of nuclear responses to a nuclear attack, and eventually this was presented as something that could occur in an uncontrolled, *possibly irrational*, fashion. It was not only the threat of a response in kind to a nuclear attack but was also offered as a possible response to a major conventional attack. Today, while this might be secretly planned by nuclear armed governments, it is hard to imagine them (other than north Korea) publically offering those kinds of threats in pursuit of deterrence while being important members of an international community seeking to move toward a greater role for norms and legal frameworks. One reason is that a legal regime trying to do away with nuclear proliferation and nuclear terrorism has to also support norms against any use of nuclear weapons and in favor of nuclear disarmament. Another is that an intense collective effort to prevent nuclear proliferation and the next use of nuclear weapons can hardly countenance a third use of nuclear weapons as the proper response to a non-state actor's creation of the second. That would simply compound the damage done to what has been referred to as the "tradition of nonuse of nuclear weapons" or the "nuclear taboo."

A third reason is that there is no clear way to explain how a promised nuclear response would be an effective *deterrent* response against non-state actors of the most difficult sort. After all, they will appear to be irrational or at least beyond motivating by the use of threats, and thus impervious to deterrence. In addition, a nasty problem that beset deterrence theorists in the Cold War was that if a government practiced nuclear deterrence in order to avoid a nuclear attack, and was then subjected to that sort of attack, what was the point of a nuclear response – particularly if the opponent still had the capability to make further nuclear attacks in a counterretaliation? Once its deterrence failed in this fashion a government would face a new situation and need to consider turning to a new strategy. Its former problem called for threatening nuclear retaliation to *avoid* an attack; having been attacked anyway would change that situation. Thus it would face quite a different problem and the old response might no longer seem appropriate. In fact, this was such a difficult problem conceptually that in order to reinforce the credibility of nuclear deterrence the eventual solution was to stress that a government attacked by nuclear weapons might lose all control and simply lash out in a massively destructive way – there could be no guarantee that a nuclear armed state would remain rational after an attack and therefore nuclear weapons posed an existential threat of awful retaliation. When facing a seemingly irrational opponent bent on launching a nuclear attack, the utility of deterrence theory and a strategy of deterrence disappears.

Finally, a government could anticipate being able to detect the fact that a specific nuclear power had launched the attack – to recognize where the attack came from. Threatening a massive conventional-level military response to non-state actor nuclear terrorism would be a possibility but it would possibly face serious uncertainty as to just who to retaliate against, as well as norms against doing vast harm unnecessarily, etc. The promise of a more measured conventional response could have both greater appeal and a modicum of effectiveness. This could take the form of an indirect approach. Some kinds of cancer cells strongly resist direct efforts to wipe them out, but are vulnerable to measures that starve them of nourishment. Much of the antiterrorism effort today is designed along similar lines, trying to disrupt the flow of funding to terrorists, or their ability to recruit new members, or to damage their support network.

One aspect of this is the threat of tracking down not only those associated directly with terrorism and any nuclear proliferation, but also many of those *indirectly* involved and subjecting them to criminal prosecution. This would involve a very different approach to deterrence than has been typical in international politics, but one quite familiar in domestic deterrence efforts. It is not just the emphasis on an indirect approach for practical reasons. A society's stake in deterrence of, for instance, criminal activity is not just to discourage the people involved in a crime from doing it again, or to make it physically impossible for them to do so (such as by execution, imprisonment), but – much more importantly – to deter others from doing it and engaging in other types of criminal activities. Deterrence is meant to support the legal order's credibility and legitimacy. This would be the proper role of deterrence in operating with an international legal regime against nuclear terrorism and nuclear proliferation

It is relatively easy to understand how would have to be done to make this international effort have a serious impact. Studies of domestic deterrence efforts, and some studies of international deterrence as well, indicate that the effectiveness of deterrence comes primarily from confronting the potential attacker with a high probability of capture and punishment. Certainty (or nearly so) of apprehension and punishment is more important than the scale of the punishment. Threats of a massively harmful response or severe punishment do not seem to have a decisive effect against specific attackers when they believe there is only a low probability they will be caught. This appears to be the major problem in trying to deter cyberattacks today; it is not that the punishments are often mild, but that the chances of getting caught are too low.

It is hard to know if a high probability of criminal prosecution can be achieved. Efforts to inhibit WMD have grown significantly and are more sophisticated today, spurred on by the terrorism threat. However, the terrorists are roughly equivalent to the young men drawn into American gangs in their indifference to the threat of being caught and facing fairly high probability of being killed. Against these sorts of targets deterrence is too likely to fail, whether it is threats of a tough defense or an awful retaliation.

The better way for deterrence to make a contribution would be, as noted above, going after those who facilitate nuclear proliferation and terrorism. The best analogy is

the classic strategy for dealing with insurgents: cut them off from resources, including people who can be of help, so that they are increasingly isolated and more likely to be exposed because their entire environment has become much more unsupportive or hostile. If a high likelihood of intercepting a planned terrorist nuclear attack can be generated that would provide somewhat better deterrence than the classic Cold War approach for those that would otherwise be involved in preparing such an attack. In the same way, if an international legal regime eventually helps stimulate a broader disrespect for terrorists and terrorism, that isolates them and maximizes cooperation against them, this might in turn shrink the sympathy and support that facilitate such attacks by lowering their perceived legitimacy and heroic status and thereby generate a greater likelihood the intended attacks would eventually be uncovered and foiled. Such a regime might bring much stronger pressure to bear on governments that have been, or might be, inclined to be sympathetic with terrorism and even abet it. Evidence suggests that this would particularly true if those arrested included high officials who were charged with crimes for their involvement.

Studies also show that deterrence threats are more effective when accompanied by incentives and reassurance efforts. The possible effects of incentives need little explanation. If potential attackers or those who sympathize with them have their incentives altered not only by threats but by rewards that make the status quo more tolerable, the odds that they will participate in or assist in shaping attacks will decline. As for reassurance, attacks are often planned and mounted out of perceptions that if they are not carried out seriously harmful consequences will ensue. Early in the development of deterrence theory it was pointed out that if a retaliatory threat is to be effective, it must not only be potent and convincing but accompanied by a credible *reassurance* that compliance with it will not lead to the threatened harm, or some other form of serious harm, being inflicted anyway. Thus reassurances can be valuable – reassurances that individuals that would otherwise be targeted for aiding and abetting terrorism or proliferation will not be subject to arrest, trial, and punishment.

But it is not easy to describe what potent reassurances would look like. Both state and nonstate actors associated with terrorism and WMD proliferation are usually driven by motives that spring from perspectives and objectives that are widely unacceptable. Both governments and their publics might be averse to dealing with terrorists and proliferation participants in this fashion. And a legal framework might introduce more rigidity as to what could be done as well.

It seems best to aim the deterrence efforts associated with a legal regime at officials and others who are important or even vital ancillary contributors to terrorist and proliferation activities – in financing, supplying, transporting, etc. They will be easier to catch and easier to induce to cooperate. Convictions and punishment of such individuals would also have the highest likelihood of helping inculcate the underlying norms involved, which is the most desirable way of curbing the undesirable behavior that poses the worst threats.

However, the chief problem with terrorism, and with trying to instill self-deterrence domestically, is that some of the most important targets reject the entire legitimacy of the officials, governments, international organizations, or norms and laws involved. This is very typical of extreme terrorists. And it is certainly the problem with a government like North Korea which has supported terrorist activities in the past. In such cases of potential terrorist activity with nuclear devices, it will probably be necessary to combine the threat of legal action against individual leaders with threats to eliminate the existence of the political regime and possibly the entire state. That is the proper punishment for a regime launching, or inciting, or cooperating/collaborating in the development of a nuclear attack – in a terrorist mode or some other fashion and should therefore be cited in deterrence efforts.

A similar problem exists with respect to nuclear proliferation. Various governments seemingly do not take nuclear proliferation seriously because it is not believed to pose grave threats or risks for them. There are still governments today that either actively promote nuclear (or other WMD) proliferation or look the other way, particularly if doing so is lucrative.

Final considerations

An important problem would be how to treat states that do not wish to subscribe to the legal framework and to developing vigorous efforts to apply their laws to the problem of terrorism, particularly nuclear-related terrorism, even if they have officially agreed to do so. (How to deter lackadaisical or even corrupt or unsympathetic deterrers.) And what about those who never agree to do so? What about cases where states or particular state officials (or relevant private citizens, corporations) are guilty essentially of mistakes of omission, or inept application of nonproliferation practices?

International cooperation is particularly important about preparations for terrorist attacks, particularly involving nuclear weapons. This is because attack preparations by non-state actors are likely to be particularly difficult to detect, in comparison with those by states. This reduces the chances of deterrence via effective defenses, defense by effective defenses, and successful identification of attacks for purposes of retaliatory steps. And it is difficult to keep up intense defensive efforts indefinitely when there is no ready way to determine how immediate and how serious the problem is.

Finally, the sorts of efforts discussed in this paper will almost certainly breed complex responsibilities for various multilateral organizations, new or already existing. Such organizations are exceedingly difficult to utilize for rapid, decisive action in many instances. Part of the appeal of UNSC 1540 and UNSC 1373 is that much of the resulting action is to take place at the level of the various states, and not through the endlessly complex operations of the UN or other international organizations. But this allows states to prevaricate, drag their feet, or in other ways fail to meet their obligations. Some thought will be required with regard to the problems multilateral organizations pose if deterrence is to have the best possible impact in dealing with the nuclear terrorism problem.