



DIIS · DANISH INSTITUTE FOR INTERNATIONAL STUDIES

NEW THREATS AND THE USE OF FORCE

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DANISH INSTITUTE FOR INTERNATIONAL STUDIES

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Graphic design: Carsten Schiøler

Print: Gullanders Bogtrykkeri A/S, Denmark

ISBN 87-7605-088-2

Price: 120.00 DKK (VAT included)

This publication can be ordered online at

www.netboghandel.dk

It can be downloaded free of charge from

the DIIS homepage.

Wholesale for booksellers:

Nordisk Bog Center A/S

Bækvej 10-12, 4690 Haslev, Denmark

Tel: +45 56 36 40 40

Fax: +45 56 36 40 39

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| CIA | Central Intelligence Agency. US central (foreign) intelligence service |
| CTC | Counter-Terrorism Committee |
| DIIS | Danish Institute for International Studies |
| DUPI | Danish Institute of International Affairs |
| ELN | Ejercito de Liberación Nacional de Colombia. National Liberation Army of Colombia |
| ESS | European Security Strategy |
| ETA | Euzkadi Ta Askatasuna. Basque Fatherland and Freedom |
| FARC | Fuerzas Armadas Revolucionarios de Colombia. Revolutionary Armed Forces of Colombia |
| Hamas | Harakat al-Muqawamah al-Islamiyya. The Islamic Resistance Movement (Palestine) |
| HEU | Highly enriched uranium |
| IAEA | The International Atomic Energy Agency |
| ICISS | The International Commission on Intervention and State Sovereignty |
| ICJ | International Court of Justice |
| LEU | Low enriched uranium |
| NATO | The North Atlantic Treaty Organisation |
| NPT | Treaty on the Non-Proliferation of Nuclear Weapons (1968) |
| NSS | US National Security Strategy (2002) |
| UK | The United Kingdom of Great Britain and Northern Ireland; British |
| UN | United Nations |
| US | USA; American |
| WMD | Weapons of mass destruction |

This report was commissioned by the Danish Government on 3 December 2003 from the Danish Institute for International Studies (DIIS). The Government's mandate to DIIS was contained in a letter from the Minister of Foreign Affairs, Per Stig Møller, to the Chairman of the Board of DIIS, Professor Georg Sørensen. The mandate reads as follows:

On behalf of the Government, and as a follow-up to the Danish Parliament's resolution of 20 November 2003 in connection with the debate on proposal F 7, I request DIIS to take charge of producing an extension to the Institute's report on humanitarian intervention from 1999.

The 1999 report analysed the political and legal aspects of the possibilities for intervention in situations where states that are disregarding provisions of international law cause conflicts which, because of their far-reaching humanitarian consequences, affect the international community as a whole. The extension should focus in particular on the political and legal aspects of the possibilities for military intervention in situations where the new threats in the shape of, among other things, global terrorism or the proliferation of weapons of mass destruction threaten international peace and stability. Particularly the question of developing criteria for collective military intervention as a last resort without the consent of the country in question should be examined in more detail.

Since the present report is meant to serve as an extension of the 1999 report on humanitarian intervention, the general reflections articulated in the 1999 report on the relationship between order and justice, legality and legitimacy, the interface between politics and law, and the relationship between international law and state practice are also used as a basis for this report.

The mandate has been interpreted to mean that the report should focus on military intervention only and not discuss non-military instruments such as diplomatic and economic sanctions. As for the legal aspects of the potential for military intervention, the report focuses on the right to resort to force (*jus ad bellum*), but does not address the rules in international humanitarian law relating to the conduct of war (*jus in bello*). In its discussion of the right to resort to force, the report establishes the scope of the right to self-defence, as well as the possibility of using force for preventive purposes.

In accordance with the mandate, the report focuses on the new threats to international peace and security. Consequently it does not address old military threats such as inter-state war or non-military threats such as poverty, infectious diseases, environmental degradation, climate change, natural disasters and transnational organised crime, even though these clusters of threats are increasingly interrelated.¹ The report will, however, touch upon developments relating to the potential for using force to protect human rights in the context of internal conflicts since the publication of the 1999-report as these developments have a bearing on the potential for using force against the new threats.

The examination requested of the prospects for developing criteria will cover the use of force both with and without Security Council authorization, as the development of criteria will have an influence on both scenarios.

The report was prepared in DIIS's Department of Conflict and Security Studies by Peter Viggo Jakobsen, Head of Department, and Jens Elo Rytter, Associate Professor, Faculty of Law, University of Copenhagen. Simon Chesterman, Adjunct Professor of Law, Executive Director of the Institute for International Law and Justice, New York University School of Law, Tonny Brems Knudsen, Associate Professor, Department of Political Science, University of Aarhus and Martin Mennecke, Ph.D. candidate, DIIS, have commented on drafts throughout the writing process.

The report has been discussed with individual members of the DIIS Board and the research group on a number of occasions and at two meetings of the entire Board. In accordance with the law establishing DIIS, the report is submitted on the responsibility of the Board.

The members of the Board, who are appointed in their personal capacity, are the following: Georg Sørensen, Professor, Department of

Political Science, University of Aarhus (Chairman); Holger Bernt Hansen, Professor, Chairman of the Board of Danida (Vice-Chairman); Michael Borg-Hansen, Senior Advisor, Prime Minister's Office; Kristian Fischer, Head of Department, Ministry of Defence; Poul Holm, Professor, Institute of History and Civilization, University of Southern Denmark; Henrik Secher Marcussen, Professor, Department of Geography and International Development Studies, Roskilde University; Ole Nørgaard, Professor, Department of Political Science, University of Aarhus; Helle Munk Ravnborg, Senior Researcher, DIIS; Marianne Rostgaard, Associate Professor, Department of History, International and Social Studies, Aalborg University; Carsten Staur, Ambassador, Ministry of Foreign Affairs and Marlene Wind, Associate Professor, Department of Political Science, University of Copenhagen; and Frede P. Jensen, Senior Researcher, DIIS (substitute).

The report was approved for publication by the Board in April 2005.

Chapter I

Introduction

I. From humanitarian intervention to preventive military action

The 1999 report on humanitarian intervention published by the Danish Institute of International Affairs (DUPI) addressed the dilemma arising in situations in which the United Nations (UN) Security Council is incapable of authorising military intervention to stop an emerging genocide, mass killings, ethnic cleansing or other forms of gross and systematic maltreatment of civilians. Earlier that year the North Atlantic Treaty Organisation (NATO) had faced this dilemma in the crisis over Kosovo and decided to take military action to stop the Serb persecution of the Albanian population in Kosovo without a UN mandate. The NATO operation split the international community in two. Some states denounced it as a violation of international law and a threat to the international legal order, while others perceived it as legitimate since it saved thousands of civilian lives. The DUPI report took the view that both camps had a point, arguing that humanitarian intervention without a UN mandate was illegal, but that such action could nevertheless be considered legitimate on political and moral grounds in exceptional circumstances.² DUPI outlined four general strategies for the international community to consider, making the case for an *Ad Hoc-Strategy*, which maintains that humanitarian intervention is illegal without a UN mandate, but holding open an “emergency exit” for legitimising humanitarian interventions on moral and political grounds in exceptional circumstances. It was pointed out that the strategy could be coupled with a set of criteria to enhance its legitimacy and limit the scope for abuse, but this was not provided.

The *Kosovo Report* published in 2000 by the Swedish-sponsored Independent International Commission on Kosovo echoed the find-

ings of the DUPI report. It concluded that the Kosovo intervention was “illegal but legitimate” and made the case for the establishment of criteria for humanitarian intervention. Like the DUPI report, however, it refrained from suggesting such a list.³

This challenge was finally picked up by the International Commission on Intervention and State Sovereignty (ICISS), which was established by the Canadian government with the explicit objective of building a global consensus for the use of humanitarian intervention in exceptional circumstances. Rather than addressing the dilemma in terms of the controversial “right to humanitarian intervention”, the ICISS framed the question in terms of “a responsibility to protect”. Following this logic, while a sovereign state has the primary responsibility for protecting its own people from serious harm, this responsibility is transferred to the international community, if it proves unwilling or unable to honour this obligation. The *Responsibility to Protect* report proposed a set of criteria for the conduct of humanitarian intervention derived from the Just War tradition that can serve to legitimise the use of force in situations in which the Security Council is prevented from acting.⁴ The hope was that this would make it easier for the Council to agree to launch humanitarian interventions. At the same time, the report also argued that strict adherence to these guidelines would serve to legitimise humanitarian interventions in situations in which the Security Council failed to honour its responsibility to protect. Thus, the Responsibility to Protect report essentially follows the *Ad Hoc Strategy* outlined in the DUPI report.

From the perspective of building a new consensus on humanitarian intervention, the timing of the *Responsibility to Protect* report could hardly have been worse. By the time of its publication in December 2001, the challenge of humanitarian intervention had been completely overshadowed by the September 11th attacks on New York and the Pentagon. These attacks changed the strategic landscape, shifting the focus of the Western countries, which had led most of the humanitarian interventions launched in the 1990s, from humanitarian intervention towards the fight against terrorism. Progress with respect to enhancing the international consensus on humanitarian intervention has been slow, and the dilemma posed by unauthorised humanitarian intervention has, at least for now, been overshadowed by the disagreements and dilemmas that have arisen as the international community has sought

to devise effective ways to counter the new threats posed by the proliferation of weapons of mass destruction (WMD) and mass casualty terrorism.

The US Administration has made the case that the new threats increase the risk that terrorists and “rogue” states may employ WMD without warning. This creates a need to prevent these actors from striking first, because it too risky to allow states or terrorists who may use WMD for offensive purposes to acquire such a capacity. The 2002 US National Security Strategy (NSS) consequently outlined a strategy justifying the use of force against “emerging threats before they are fully formed”. Such use of force has traditionally been defined as preventive and is illegal under current international law unless it is carried out with UN authorisation. The use of prevention thus creates a dilemma similar to that which NATO was facing in Kosovo in 1999: what happens if the Security Council is paralysed by disagreement and unable to authorise a preventive use of force against a non-imminent WMD threat in a situation where it is perceived as warranted by most states? Do you respect the law and seek to address the threat by non-military means, or do you break the law and use force rather than risk an attack with WMD at a later stage? It is the legal-political aspects of this dilemma that this report has been tasked to address.

2. The legal framework of the UN Charter concerning the use of force

For the purposes of this report, the use of force may be defined as military action by states against (targets in) another state without the consent of the government of that state.

The UN Charter contains the basic norms of international law concerning the use of force. It should be noted, however, that the relevant provisions of the UN Charter may be reinterpreted, supplemented or amended through state practice concerning the use of force, provided such state practice establishes new rules of customary international law, that is, if it secures general recognition in the international community as the expression of a legal right (*opinio juris*).⁶

Article 2(4) in the UN Charter lays down the fundamental principle that any threat or use of force between states is prohibited under international law:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

The UN Charter provides for only two exceptions to this general prohibition.

First, according to Article 51, states retain the right of individual or collective self-defence against an armed attack, until such time as the Security Council has taken the necessary collective measures:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of the right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Secondly, under Chapter VII, Articles 39 and 42, the Security Council may authorise the use of force to maintain or restore international peace and security if military force is deemed necessary to counter a threat to the peace, a breach of the peace or an act of aggression:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Should the Security Council consider that [non-military] measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

3. Legality versus legitimacy in the use of force

Decisions to use force are never made solely on the basis of legal considerations. While the latter play an important role, decisions concerning the use of force also involve moral and political considerations. Decision-makers may conclude that the use of force is justified on moral and political grounds even if it is not legal, and the process by which the Security Council takes decisions concerning the use of force beyond self-defence is inherently political. The permanent members may fail to agree on the use of force in a situation where a clear threat to international peace and security exists because of diverging national interests, or agree not to take military action to counter a threat because none of them perceive an interest in doing so. The Kosovo conflict in 1999 is an example of the first situation, and few would dispute that the 1994 genocide in Rwanda provides a clear illustration of the second.

In the DUPI report on humanitarian intervention, these different considerations related to the use of force were analysed by means of the distinction between legitimacy and legality. This report will adopt the same approach, defining legitimacy as determined mainly on political and moral grounds, while legality is understood solely in legal terms. Whereas the legality of a given action can be determined by asking whether the use of force in a given situation is lawful under international law, in order to determine its legitimacy, one must also ask whether it can be justified on moral and political grounds. As a general rule the degree of legitimacy is highest if the use of force is both lawful and justifiable on moral and political grounds, it will be lower if the use of force is deemed illegal but legitimate on political and moral grounds, and lower still if it is deemed both illegal and illegitimate.⁹

The question of legality is determined by means of a legal analysis of the norms of international law, primarily treaty law and customary law. The purpose of the legal analysis is to determine whether a specific act is legal or illegal, and although the precise limitations of the law change over time in response to changes in state practice, this can be done with a relatively high degree of precision.

The concept of legitimacy is less precise than legality. It will often be contested, and critics may claim that legitimacy is ultimately a ques-

tion of moral and political preference. A set of widely, if not universally, accepted criteria for judging whether the resort to force is just and whether force is being used in a just manner can be derived from the Just War tradition. The Just War tradition is the name given to a diverse literature on the morality of war and warfare, which can be traced back to the writings of St Thomas Aquinas in the thirteenth century.¹⁰ Just War criteria have not only had a pervasive influence on the formulation of international law, as mentioned above they have also been part and parcel of attempts to formulate criteria for the conduct of humanitarian intervention. The six criteria proposed to guide the conduct of humanitarian operations in the *Responsibility to Protect* report – right authority, just cause, right intention, last resort, proportional means and reasonable prospects – are copied directly from the Just War tradition.¹¹ The report from the High-level Panel on Threats, Challenges and Change also relies on these criteria in its attempt to build a consensus that can make it easier for the Security Council to agree on the use of force against the new threats that are the principal focus of this report. These criteria will therefore guide the discussion of the political and moral aspects relating to the use of force against the new threats and form the basis of the examination of the possibilities for establishing criteria for the collective use of humanitarian intervention and prevention.

The analysis of the moral, political and strategic aspects of using force against the new threats takes the option of unilateral and unauthorised prevention as its starting point. This option has been at the heart of the academic and political debate concerning the use of force against the new threats, and it was its destabilising potential and the disagreement it triggered among UN member states that prompted the UN Secretary General to task his High-level Panel to come up with a reform package that could give the UN collective security system a new lease of life.¹²

The use of preventive force against WMD targets in the past will be examined in order to determine how often the preventive use of force is likely to be regarded as a feasible option against the new threats. It is the actual use of military prevention that will determine its impact on international law, the UN and the prospects for building an international consensus on the use of force against the new threats. If military prevention is used frequently, it might well have the destabilising con-

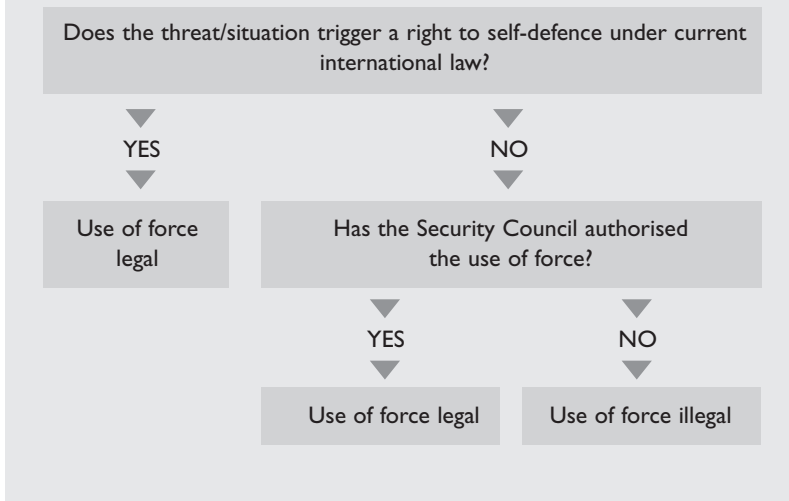
sequences that its critics fear. If, on the other hand, it is reserved for exceptional circumstances, it may have a positive effect on international peace and security.

4. Differences between humanitarian intervention and preventive action

As was the case with humanitarian intervention, the legal challenge posed by prevention is one of developing international law without demolishing it, that is, to devise a way of allowing the effective use of force against the new threats that does not undermine the general prohibition on the use of force contained in the Charter of the United Nations. However, the potential risk that unauthorised prevention against the new threats may demolish the foundations of the UN Charter is far greater than is the case with humanitarian intervention. While the scope for humanitarian intervention is limited to situations in which genocide, mass killings, ethnic cleansing or other forms of gross and systematic maltreatment of civilians are imminent or already taking place, the far more proactive nature of prevention means that the scope for action is much broader. In addition, use of unauthorised prevention against the new threats might evolve into a broader doctrine of unauthorised prevention, which could be used to justify any military action, since it is difficult to think of a use of force which could not be defended under some conception of threat prevention. The risk of abuse is therefore far greater.

The legal challenge posed by prevention against the new threats also differs fundamentally from that addressed in the DUPI report on humanitarian intervention. Unlike the use of force for humanitarian purposes, the use of force against the new military threats is lawful without a Security Council mandate if it is covered by the right of self-defence, although it is generally desirable and also foreseen in the Charter that the Security Council should take action and authorise the use of force in self-defence too. A mandate from the Security Council is only necessary beyond the limits of self-defence. A use of force to counter the new threats that does not trigger the right to self-defence is only legal provided that it is authorised by the Security Council in accordance with Chapter VII, Articles 39 and 42. The legal issues arising from the use of prevention are illustrated graphically in Figure 1.

Figure 1
The legal issues arising from the use of prevention



5. New threats: new rules or new consensus?

Two main schools of thought can be identified in the international debate concerning how the dilemmas relating to humanitarian intervention and the use of preventive force against the new threats should be addressed. Supporters of “new rules” argue that new threats require new rules. This position has frequently been articulated by supporters of both humanitarian intervention and prevention. In both cases the principal argument has been that the rules governing the use of force in the UN Charter are inadequate for the new challenges, which were not foreseen when the Charter was signed in 1945.¹³ This is also the position adopted in the NSS, which makes the case for an extension of the right of self-defence to include the preventive use of force against the new threats.

Supporters of a “new consensus” do not regard the rules as a problem or take the view that they are impossible to change. In the view of this school, international law is flexible enough to meet the new challenges, whether in the form of humanitarian intervention or prevention against the new threats. The challenge consequently consists in building a new consensus in the international community that will reduce the risk of paralysis in the Security Council and permit it to take effec-

tive military action to protect human rights and prevent WMD attacks. UN Secretary General Kofi Annan has been a leading figure in this school, and the ICISS and the High-level Panel were both established with consensus building in mind.¹⁴

While there is an emerging consensus that the new threats require new thinking and a more proactive approach to the use of force, it remains unclear how the the new rules versus new consensus debate will be resolved. It is likely to continue for a considerable period of time, precisely as has been the case with the debate on humanitarian intervention. This report will consequently stick to the approach employed in the DUPI report on humanitarian intervention and conclude its analysis by outlining four possible legal-political strategies:¹⁵

Status Quo Strategy. Outside the current scope of self-defence, preventive military action will only be taken after prior authorisation by the Security Council. This strategy has no ambition to create new exceptions to the prohibition on the use of force, including a manifest expansion or redefinition of the current right of self-defence. However, it may involve an ambition to enhance the willingness of the Security Council to take preventive action in cases which fulfil the five general criteria presented by the High-level Panel (*Status Quo + Strategy*). These are: serious threat, proper purpose, last resort, proportional means and balance of consequences.

Ad Hoc Strategy. Outside the current scope of self-defence, and if the Security Council is blocked by a Great Power veto, actual or anticipated, unauthorised preventive action may be considered as an exceptional emergency exit from international law and justified on political and moral grounds only in accordance with the five general criteria of legitimacy proposed by the High-level Panel (+ three additional criteria: a blocked Security Council, alternative forum of legitimacy and multilateral action). The perceived legitimacy of preventive action is not invoked to support a claim of legality under international law, but may support a plea of extenuating circumstances mitigating the formal breach of the law. Whereas this strategy keeps open an exceptional option for preventive action, at the same time it seeks to preserve the existing legal framework on the use of force and the legal monopoly of the Security Council to authorise the preventive use of force.

Subsidiary Right Strategy. Outside the current scope of self-defence, and if the Security Council is blocked by a Great Power veto, actual or anticipated, a subsidiary legal right of unauthorised preventive action is invoked in accordance with the five general criteria of legitimacy (+ three additional criteria). The perceived legitimacy of preventive action is thus invoked to support a claim of legality. Whereas this strategy does not challenge the primacy of the Security Council, it does challenge the Council's legal monopoly to decide on preventive action.

General Right Strategy. Outside the current scope of self-defence, a general legal right of preventive action is invoked in accordance with the five general criteria of legitimacy. The perceived legitimacy of preventive action is thus invoked to support a claim of legality, most likely as an expansion of the current right of self-defence. This strategy challenges not only the legal monopoly of the Security Council to decide on preventive action, but even the primacy of the Council in this respect.

6. The central political-legal issues

Following the logic of the legal framework (see Figure 1 above), the analysis in this report of the legal and legal-political aspects of the potential for using force against the new threats is structured around the following three questions:

- 1) To what extent does the right of self-defence allow states to use force against new military threats? Has the doctrine been adjusted since September 11th?
- 2) To what extent is the Security Council competent to authorise the preventive use of force, not covered by the right of self-defence, against non-imminent military threats from terrorists or WMD? If so, on what conditions? What minimum criteria of legitimacy should apply?
- 3) May the preventive use of force, not covered by the right of self-defence, against non-imminent military threats from terrorists or WMD be justifiable even without Security Council authorisation? If so, on what conditions? What minimum criteria of legitimacy should apply? And if so, should this lead to new rules of international law rendering even unauthorised preventive action lawful?

7. The structure of the report

Chapter 2 will examine the moral, political and strategic aspects of preventive military action against new threats.

Chapters 3 to 5 will address the central legal and legal-political issues concerning the use of preventive action.

Chapter 3 will determine the extent to which the right of self-defence allows states to use force against new military threats and examine whether this right has been adjusted after September 11th.

Chapter 4 examines the question of whether the Security Council is competent to authorise the preventive use of force, not covered by the right of self-defence, against non-imminent military threats from terrorists or WMD, and it also discusses what criteria of legitimacy should apply.

Chapter 5 discusses whether unauthorised preventive use of force against the new threats may arguably be justifiable, and if so, what criteria of legitimacy should apply. Bringing the moral, political and legal aspects together, this chapter also discusses the benefits and drawbacks of the four legal-political strategies which may be pursued regarding unauthorised preventive action.

Chapter 6 will summarise the conclusions of the previous chapters and discuss the future prospects for both humanitarian intervention and the preventive use of force.

Preventive Use of Force and the New Threats: Necessity and Feasibility

The prospects of unilateral and unauthorised use of preventive force against the new threats is seen by critics as a serious threat to international law, peace and stability. Proponents regard it as a just and necessary instrument to counter the new threats emanating from the spread of weapons of mass destruction (WMD), transnational mass casualty terrorism and failing states. This chapter approaches this debate by asking how often preventive military action is likely to be taken against the new threats without a UN mandate? The necessity and feasibility of such action will determine the frequency of its use, which in turn will influence the prospects for building an international consensus that would enable the Security Council to authorise preventive use against new threats, thereby reducing the need for unauthorised action.

The analysis is divided into seven parts. The rise of the new threats is described first. The second part presents an overview of the principal non-military measures taken by the international community to counter the new threats. The third part describes the debate over pre-emption and prevention, outlining areas of international agreement and disagreement respectively. The fourth part analyses the prospects of deterring “rogue” states and terrorists from using WMD in order to establish the need to use force preventively. Part five examines the record of past attempts to take preventive military action against WMD targets to determine the feasibility of this option. Part six uses this analysis as a basis for assessing how often military prevention is likely to be employed in practice against the new threats. The main conclusions are summed up in a conclusion at the end.

I. The new threats: what has changed?

The new threats did not suddenly appear out of nowhere. The new terrorism, with its global reach, the proliferation of WMD and failed or

weak states, were recognised as threats before the attacks on the World Trade Center and the Pentagon, but they were not accorded greater priority than a host of other threats, such as transnational organised crime, internal conflicts and international conflicts. September 11th changed all that. Since then these three threats have served as a compass guiding strategic thinking and practice in much the same way as the struggle between communism and capitalism during the Cold War. The sense of strategic confusion that had followed the fall of the Berlin Wall was replaced by clarity and a new sense of direction. Thus, the US National Security Strategy (NSS), the EU's Security Strategy (ESS) and the report from the UN Secretary General's High-level Panel all identify these threats as presenting a clear and present danger demanding new thinking and urgent action concerning the use of force.¹⁶

1.1. The new terrorism

Following the High-level Panel, terrorism is defined as action carried out with the intention to "cause death or serious bodily harm to civilians or non-combatants, when the purpose of such action, by its nature or context, is to intimidate a population, or to compel a Government or an international organisation to do or to abstain from doing any act".¹⁷ The new form of terrorism that Al Qaida has pioneered differs from older versions in five ways.¹⁸ First, operations are not restricted to the national or regional level, as has been the case with most of the traditional groups. Al Qaida has a global reach, as evidenced by its ability to plan and carry out attacks in fourteen countries on four different continents.¹⁹

Second, Al Qaida has a global rather than national or regional agenda. Unlike traditional "political" terrorists such as ETA or the IRA, who have been motivated by specific political objectives like political autonomy or independence, Al Qaida has been driven by religious and more abstract objectives, which have taken the form of a global *jihad* waged on "non-believers" in order to restore the rule of God. These non-believers not only include the United States and the West, but also Islamic regimes like Saudi Arabia.

Third, the ideology of Al Qaida is transnational, and the message of global *jihad* has appeal for Islamist groups and individuals across the world, which may have very different motives for resorting to terrorism. This is also reflected in its members, who come from a variety of countries, including Western ones.

Fourth, it is it organised transnationally. Al Qaida is made up of a core group, which has always been small (numbered in the hundreds), and a broader network made up of satellite terrorist cells worldwide, a conglomerate of Islamist political parties, and largely independent terrorist groups that the core group draws on for logistical and operational support.²⁰ Although Al Qaida built up its original strength in Sudan and later Afghanistan, its network structure and its ability to use the latest information technology to communicate, spread its ideology and raise funds, enables it to operate without a fixed territorial base. While it is unclear how much of the core group remains intact and how much control Usama bin Laden continues to wield over his operatives and the wider network, Al Qaida is far from having been defeated. Al Qaida activists are believed to be active in insurgencies in the Afghan-Pakistan and Bangladesh-Myanmar border areas, Chechnya, the Pankishi Valley in Georgia, Somalia and Yemen, and to be cooperating closely with other Islamist groups such as Jemma Islamiya (Southeast Asia), al-Ittihad al-Islami (Horn of Africa), al-Ansar Mujahidin (Caucasus), Tunisian Combatants Group, Jayash-e Mohammad (South Asia), and the Salafi Group for Call and Combat (North Africa, Europe and North America).²¹ In addition, the example set by Al Qaida will continue to inspire other terrorist groups for a long time to come. Al Qaida has set a new standard for terrorist attacks that other terrorists are likely to follow and even try to surpass in their attempt to attract attention to their cause.²²

Finally, the new terrorism does not fit Brian Jenkins' much cited dictum that "terrorists want a lot of people watching, not a lot of people dead". September 11th suggested that the new terrorists want a lot of people watching *and* a lot of people dead.²³ Their intention to inflict mass civilian casualties is further underlined by the fact that Al Qaida has threatened to use and sought to acquire WMD. It has sought to acquire highly enriched uranium (HEU), which can be used to build nuclear bombs, on two occasions, and it was apparently engaged in experiments with biological and chemical substances in Afghanistan.²⁴ This interest in WMD, coupled with the intent demonstrated on September 11th to cause mass civilian casualties and its maximalist, religious and global agenda, create a picture of a terrorist network that can be assumed to be willing to use WMD if given an opportunity to do so.

1.2. WMD proliferation

It is therefore not surprising that the risk of WMD proliferation has been viewed with increased concern since September 11th. The risk of proliferation is generally perceived as growing because the diffusion of WMD technology is expected to make such weapons easier to acquire. At least forty countries have the capability to develop nuclear weapons at relatively short notice,²⁵ and the renewed interest in nuclear energy means that this number is likely to grow. Chemical agents are already widespread and relatively easy to acquire and weaponise. According to the US Defense Department, more than 24 states or non-state actors either have, or have an interest in acquiring, chemical weapons. Twelve countries are believed to have biological warfare programmes,²⁶ and advances in the biotechnology sector will increase opportunities for the development of deadly new biological weapons.

Terrorists have already planned and conducted several small-scale attacks using chemical and biological agents in recent years. The Aum Shinrikyo cult in Japan created enough sarin to kill an estimated 4.2 million people. Fortunately it failed to find an effective way to disseminate the sarin, but the example suggests that determined and well-resourced non-state actors are likely to be able to overcome the barriers involved in producing chemical weapons capable of inflicting mass casualties.²⁷

The barriers to the development of nuclear weapons are higher, and opinion is divided on the question of whether non-state actors can overcome them. While some regard it to be beyond the capabilities of non-state actors, others warn that terrorists might be able to build a simple nuclear gun-type device similar in design to the one that was exploded over Hiroshima during World War Two. It is therefore a matter of concern that terrorists are likely to be able to obtain the HEU required for such a bomb.²⁸ It is feared that terrorists might succeed in either stealing or buying HEU from Russia by exploiting problems created by endemic corruption and poorly secured storage sites.²⁹ Pakistan is also seen as a potential source, as two nuclear scientists belonging to the Khan network, which supplied Iran, North Korea, Libya and possibly a fourth unknown customer with nuclear technology and know-how, are known to have held meetings with Al Qaida.³⁰ Given Pakistan's recognised potential for state failure and the sympathy that exists for Al

Qaida in large segments of the Pakistani population, it is not hard to imagine a worst case scenario in which Al Qaida might be able to obtain either nuclear material or even weapons from Pakistani sources.

1.3. Weak and failing states

The Pakistani case brings us to the problem posed by weak and failing states, i.e. states which are incapable of controlling their own territory and preventing terrorists from operating on their soil. Before September 11th weak and failing states were primarily seen as a humanitarian problem, not a security threat of the first order. This changed because terrorists may exploit their weakness to establish safe havens where they can recruit and train terrorist operatives, plan attacks, raise funds through the exploitation of natural resources and/or criminal activities such as smuggling and drug trafficking, and seek refuge from counter-terrorist campaigns. Even if weak states do not directly support terrorist organisations, they may still be unable to prevent terrorists from bribing their officials or infiltrating their institutions to obtain passports and other official documents, buy weapons, obtain intelligence about potential targets, information about counter-terrorist campaigns etc.³¹ Finally, weak state governments may also enter into direct cooperation with terrorists, and even come to depend on their support to stay in power, as was the case with the Taliban in Afghanistan.

Although the threat posed by such states is usually discussed under the heading of “failed states”, terrorists generally prefer weak states and states on the “brink of failure” to completely failed states. The latter offer no protection from outside interference from other states, and the anarchic conditions within them are not conducive to the establishment of the elaborate infrastructure that a terrorist network like Al Qaida needs in order to sustain its worldwide activities. This explains why Al Qaida did not return to Afghanistan until the Taliban had established control over large parts of the country, and why the organisation did not establish a new base in Somalia after the fall of the Taliban, as many feared it would.³² Instead, a comprehensive analysis of Al Qaida’s activities in 2002-2003 suggests that it relied mainly on Saudi Arabia, Yemen, the Philippines, Pakistan and Indonesia to sustain its activities. Afghanistan, Egypt, Algeria and the Sudan also remained important sources of support, even though their significance

declined significantly after 2001. Morocco, Tunisia, Malaysia, Thailand, Kuwait, Uzbekistan and Tajikistan played important roles in terms of recruitment, transit, communications and access to resources, while Georgia, Chechnya, Djibouti, Kenya, Somalia, Sierra Leone and Liberia were significant in terms of logistics, transit and access to resources.³³ The majority of these states can be characterised as willing but unable to take effective action against the terrorists operating on their territory, and it will be a major and probably an impossible task to enable them to do so in the foreseeable future.

2. Non-military responses to the new threats

The initial response to September 11th was characterised by almost universal solidarity and sympathy, which translated into unprecedented international cooperation to combat global terrorist threats and the spread of WMD. The attacks were condemned as barbaric and unjustified by both the UN General Assembly and the Security Council, and the latter swiftly adopted Resolution 1373, which imposed legal obligations on UN members to take steps against all activities associated with terrorism. The Resolution also established a Counter-Terrorism Committee (CTC) to monitor compliance and facilitate the provision of technical assistance to states requiring it to meet the new obligations. All 191 member states submitted first-round reports to the CTC explaining their efforts to comply with the resolution, the rate of ratification of the two main UN anti-terror conventions increased dramatically, and \$112 million in alleged terrorist funds were frozen in the first three months after September 11th.³⁴

The UN thus emerged as the principal international forum for establishing norms and cooperation to counter the new threats, and Resolution 1540 of 28 April 2004 represents another milestone in this respect. Resolution 1540 is similar to 1373 in the sense that it imposed legal obligations on states to prevent the spread of WMD and associated delivery mechanisms to non-state actors, and it also established a committee to oversee compliance and facilitate the provision of technical assistance.

The initiatives taken by the UN have been supplemented by a large number of initiatives by other international organisations and states in

order to counter the new threats. With respect to preventing WMD from falling into the wrong hands, three other multinational initiatives stand out. The first is the Global Partnership Against the Spread of Weapons and Materials of Mass Destruction, launched by the G-8 in June 2002.³⁵ This involves a commitment to raise \$20 billion in the course of ten years to speed up the destruction of chemical weapons, the dismantling of decommissioned nuclear submarines, the disposition of fissile materials and finding employment for former weapons scientists. The initiative is initially directed at Russia, but it may also be used to fund projects in other countries.³⁶

The second is the American Proliferation Security Initiative (PSI) of 31 May 2003. This seeks to impede and stop shipments of WMD, delivery systems and related materials going to or from states or non-state actors of proliferation concern. Nineteen states, including the G-8, have joined the initiative as core partners and have put an operational experts working group in charge of its implementation. According to the US, eighty countries have expressed support for the initiative, and the High-level Panel called on all states to join the initiative.³⁷ The UN Secretary General supported this call in his follow-up report in March 2005.³⁸

The third and most recent initiative is the American Global Threat Reduction Initiative (GTRI) launched on 26 May 2004, which is intended to prevent HEU and radiological materials from falling into the hands of terrorists. It involves an American pledge to spend up to \$450 million dollars over the next decade to return US- and Russian-origin fuel to its sources from over forty countries around the world and convert all research reactors to run on low enriched uranium (LEU). The plan also includes an important commitment by the United States to convert all domestic research reactors to LEU by 2013.³⁹

While these and all the other initiatives adopted after September 11th to reduce the new threats have made life more difficult for terrorists and WMD proliferators, they do not solve the problems. The CTC estimates that as many as seventy states are incapable of honouring the obligations stipulated by resolution 1373, and twenty countries are deemed to be unwilling to do so. This decreases the effectiveness of the CTC's work significantly, since some of the unwilling states are characterised as being "in the frontlines of the battle against terrorism". The G-8 and GTRI initiatives are widely seen as being too slow and too

small to address the threat posed by the Russian stockpiles of nuclear material,⁴¹ and the freezing of terrorist funds has all but ceased. Only \$24 million have been frozen since 2002, and use of the informal hawala remittance system and money laundering schemes has ensured a constant flow of money to Al Qaida and other terrorist organisations.⁴² These weaknesses are part of the reason why there is a general consensus that force will have to be used to counter the new threats in some circumstances.

3. Use of force against the new threats: the pre-emption/prevention debate

The debate on the use of force against the new threats has to a large extent been shaped by the NSS published in September 2002 and the US-led war against Iraq the following year, which critics perceived as an implementation of the pre-emptive strategy presented in the NSS.⁴³ The ESS and the UN High-level Panel report were written after the NSS, and they are consequently useful with respect to gauging state opinion on the use of force against the new threats. The ESS represents the compromise that the EU members could agree on, whereas the UN document provides an indication of state opinion more generally.

The NSS is a broad grand strategy document which makes it clear that the war on terror will be fought on all fronts and that the United States will employ all the instruments at its disposal: diplomatic, economic and military. In relation to the new threats, the main argument put forward by the NSS is that the old reactive strategies of self-defence, containment and deterrence that proved effective during the Cold War offer inadequate protection against the new threats. The increased risk that “rogue” states and terrorists may acquire and use WMD offensively without warning against civilian targets makes it too dangerous to allow these actors to get in a position to strike first. The new technologies not only make it easier to acquire such weapons, but the development of more advanced delivery systems and the increased risk of unconventional attacks similar to September 11th reduce the warning time to such an extent that effective defence may become impossible. The problem of timely detection is particularly acute with respect to transnational terrorist networks, which may plan an attack in one country, prepare it in a second, and carry it out in a third.

Conceptual overview of the military strategies discussed

Containment: The creation of strategic alliances in order to check the expansion of a hostile power or force it to negotiate peacefully.

(Self-)Defence: Use of force in response to a hostile act or armed attack.

Deterrence: Use of threats and specific actions aimed at discouraging adversaries from taking certain action (e.g. use WMD).

Deterrence through denial: Action taken in advance to deny a certain action from achieving its objective (e.g. ensure that use of terrorism and WMD fail).

Deterrence through punishment: Threat/action taken to inflict unacceptable pain on the opponent if a certain action is carried out (e.g. retaliation in response to a terrorist/WMD attack).

Dissuasion: discourage adversaries from even considering military competition with, or hostile action against, the United States through the maintenance of overwhelming military superiority (e.g. discourage use of terrorism and WMD acquisition in the first place).

Pre-emption (classical): Use of force initiated in a crisis on the basis of incontrovertible evidence that an enemy attack is imminent.

Pre-emption (NSS definition): Use of force initiated against emerging threats before they are fully formed.

Prevention: Use of force initiated in the belief that military conflict, while not imminent, is inevitable, and that to delay would involve greater risk.

The response in the NSS is to supplement the existing arsenal of non-military and military instruments and strategies with a strategy of dissuasion and a strategy of pre-emption. It is the latter strategy that has

attracted most of the attention because it may involve the preventive use of force against the new threats if prevention by non-military means fails to have the desired effect. The strategy of pre-emption is narrowly conceived. It only applies to “rogue” states (Iraq and North Korea are identified as such by the NSS) and terrorists with global reach who are seeking to acquire and use WMD, and it is defined as an option of last resort in exceptional circumstances.⁴⁴

According to the NSS, pre-emption is an “old” option, as the United States “has long maintained the option of preemptive actions to counter a sufficient threat” to its national security.⁴⁵ This is correct. The Clinton administration launched pre-emptive strikes against targets on many occasions in the no-fly zones in Iraq in the course of the 1990s and in Afghanistan and Sudan in 1998, and it came very close to launching a preventive attack on North Korea’s nuclear programme in 1994.⁴⁶ But two differences between the statements and actions taken by the two administrations explain the concern generated by the NSS. The first is that the Clinton administration refrained from using force to prevent North Korea from acquiring nuclear weapons, whereas the Bush administration decided to do so to prevent Saddam Hussein from acquiring such a capability.⁴⁷ The second is that the Clinton administration refrained from making pre-emption part of its official security strategy and made clear that pre-emption only would be used if intelligence indicated an imminent threat against American or allied troops in the field.⁴⁸ Defined in this way, pre-emption is widely seen as legitimate by other states, and Israel’s attack on the Egyptian air force, which marked the beginning of the Six Day War in June 1967, is regarded by many states as a classical case of legitimate pre-emption.

The NSS not only made the option of military pre-emption part of official US security strategy, it also employed a definition of pre-emption that was much wider than the traditional one. The NSS argues that the traditional understanding of imminent threat has to be widened to allow effective defence against actors that may use WMD without warning and in a concealed manner. The NSS consequently defines pre-emption in such a way that one can use military force against “emerging threats before they are fully formed”.⁴⁹ Such use of force has traditionally been seen as preventive. It is illegal under current international law and has traditionally been regarded as illegitimate. Unlike pre-emption, which is limited to instances where an attack is imminent, the preven-

tive use of force is employed to prevent a threat from becoming imminent sometime in the future. It is based on the premise that armed conflict is unavoidable and that it is better to fight now than to wait until the adversary has become stronger. Examples of preventive use of force include the British bombardment of Copenhagen and seizure of the Danish fleet in 1807, the Japanese attack on Pearl Harbor in 1941, the Israeli attack on Iraq's nuclear reactor at Osirak in 1981, and the American-led overthrow of Saddam Hussein in 2003.

It is widely accepted that the new threats have created a grey zone where it may be hard to distinguish between the pre-emptive and preventive use of force. The ESS agrees with the NSS that a new conception of self-defence is required and that the use of force may occasionally be required against the new threats.⁵⁰ Similarly, several governments, including Australia, France, Japan and Russia, have reacted to September 11th and subsequent terrorist attacks on their own citizens by declaring their intention to use force pre-emptively against the new threats in situations where the risk of an attack is imminent. These states thus support pre-emption in the classic understanding of the strategy.⁵¹ Finally, the High-level Panel and the UN Secretary General agree with the NSS that it may be necessary to carry out not only pre-

Figure 2

The relationship between self-defence, pre-emption and the preventive use of force

| Level of military threat | Threat of an attack invented | Real, but non-imminent threat of enemy attack | Imminent threat of enemy attack | Actual enemy attack |
|---|------------------------------|--|---------------------------------|---------------------|
| Classical definitions of the use of force | Military aggression | Preventive use of force | Pre-emptive use of force | Self-defence |
| NSS definitions of the use of force | Military aggression | Pre-emptive use of force permitted against non-imminent threats emanating from "rogue" states and terrorists | | Self-defence |

emptive but also preventive military action against the new threats before they become imminent, and it urges the Security Council to be more proactive in addressing the new threats.⁵²

It is consequently not the pre-emptive/preventive option presented in the NSS per se that has been the principal source of international disagreement and concern. The most contentious issue revolves around how pre-emption and prevention should be implemented and who should take the legal and legitimate decision to employ such action. It is the prospects of unilateral and unauthorised use that has given rise to concern. This concern has two sources. First, it has been created by the statement in the NSS that the United States will “not hesitate to act alone, if necessary, to exercise our right of self-defence by acting pre-emptively”,⁵³ which has been seen as a clear indication of America’s willingness to use force. Second, the coupling of pre-emption with the right of self-defence and the call for a widening of the understanding of imminent threat suggest that the NSS is seeking to create a right of pre-emption that would make it legal to use pre-emptive and preventive force in self-defence. This would pose a direct challenge to the UN and the strict limitations on the use of force in the UN Charter (see Chapter 3). The 2003 Iraq War and the American and Israeli threats to use force to destroy the Iranian nuclear programme have served to reinforce these two sets of concerns and tended to crowd out the assurances in the NSS that unilateral military action will only be employed as a last resort in exceptional circumstances.

The need for multilateral action and UN authorisation of the use of force is emphasised in both the ESS and the High-level Panel report. One of the strategic objectives of the ESS is to create an international order based on “effective multilateralism”. International cooperation is not seen as an option but a “necessity”, and the UN Charter is described as the “fundamental framework for international relations”.⁵⁴ The message is clear: the new threats should be addressed multilaterally, and the use of force beyond self-defence should be authorised by the UN Security Council.⁵⁵

The High-level Panel report is more explicit in this regard, arguing that the use of force against non-imminent threats has to be authorised by the Security Council to be legal and legitimate, and adding that the establishment of a right of unilateral preventive military action would pose an unacceptable risk to global order. Allowing one state to carry

out unilateral preventive military action “is to allow all”, as the report puts it.⁵⁶ This concern has also been expressed by several analysts and governments. The sharpest criticism has come from the French President Jacques Chirac, who reacted to the publication of the NSS by characterising it as “extraordinarily dangerous”:

*As soon as one nation claims the right to take preventive action, other countries will naturally do the same. What would you say in the entirely hypothetical event that China wanted to take pre-emptive action against Taiwan, saying that Taiwan was a threat to it? How would the Americans, the Europeans and others react? Or what if India decided to take preventive action against Pakistan, or vice versa?*⁵⁷

Similar criticisms were expressed by the Malaysian Prime Minister, Mahathir Mohamad, and high-ranking EU officials.⁵⁸ It was also acknowledged by the drafters of the NSS, who therefore inserted a warning to other states not to “use pre-emption as a pretext for aggression”.⁵⁹ The criticism and concern triggered by the 2003 Iraq War has to be understood against this background, since it was perceived by critics as setting a precedent that would make it easier for other states to legitimise the use of preventive military action.⁶⁰

Summing up, there is international understanding and acceptance of the American position that force may have to be used more proactively in some circumstances to counter the new threats. It is the prospects of unilateral use that generate concern, suggesting that the prospects for establishing a security consensus on the use of pre-emption and prevention to a large extent depend on how often preventive force is used unilaterally against the new threats. If it is used frequently, it might well have the destabilising consequences that its critics fear. If, on the other hand, it is reserved for exceptional circumstances and employed multilaterally, the effect on international peace and security might be positive. To assess how often preventive military force is likely to be employed against the new threats in the future, the effectiveness of deterrence and the feasibility of preventive military action will be examined next.

4. Deterrence and the new threats

The strategy of deterrence seeks to discourage opponents from taking certain action (in this case launching a WMD attack or transferring

WMD to terrorists) by taking countermeasures that will prevent such an attack from achieving its objective (deterrence through denial) and by threatening to inflict unacceptable pain on one's enemies if such an attack is carried out (deterrence through punishment). The NSS is based on the premise that deterrence through punishment offers insufficient protection against the new threats. "Rogue" state leaders are seen as more willing to take risks than ordinary state leaders, and the new terrorists are considered undeterrable because their statelessness and willingness to die for their cause renders the threat of retaliation impotent.⁶¹

Opinion is divided on the relative effectiveness of deterrence vis-à-vis the new threats. The argument that "rogue" states are much harder to deter than other states has been a topic of considerable debate, and there is also grounds for believing that deterrence may have some effect against some, but not all, types of terrorists. This debate has important implications for the future use of prevention, because this will depend on the extent to which use of WMD can be deterred. The problems of deterring states and terrorists will be discussed separately below because states are regarded as easier to deter than terrorists.

4.1. Deterring state from WMD use

The argument that "rogue" or irresponsible states are much harder to deter from WMD use than other states hinges on the belief that their leaders are less risk-averse and more prone to miscalculation than ordinary state leaders. While WMD in the hands of "rogue" states with a record of international aggression and/or revolutionary ideologies is a source of real concern, there is no logical reason why deterrence should not work as well against "rogue" states as it has done against "ordinary" states. Like other states, "rogue" states have territory vulnerable to retaliation and leaders who generally display a strong interest in self-preservation. Deterrence also appears to have worked against states described as "rogue" by the United States, including Iraq. The often mentioned argument that deterrence failed when Iraq invaded Kuwait in 1990 is incorrect since no attempt was made to deter Iraq at the time. Western policy was characterised by an attitude of conciliation, and the invasion took both Arab and Western countries by surprise.⁶²

Kenneth M. Pollack, who made the most sophisticated case for the 2003 Iraq War, made a different argument. His main point was that Saddam Hussein had to be stopped because of his proneness to miscal-

ulation. Since the Iraqi dictator had already miscalculated twice and led his country into two disastrous wars (Iran 1980-88 and the 1991 Gulf War), Pollack considered him likely to make the same mistake again. Therefore, he had to be stopped before he acquired nuclear weapons. In addition, there was the concern that a nuclear-armed Saddam Hussein would be free to intimidate his neighbours and engage in nuclear blackmail without fear of American or Israeli retaliation.⁶³

Considering the way in which North Korea has used its WMD as an effective bargaining chip to extract economic assistance from South Korea and the United States, the risk that “rogue” states might use WMD to blackmail their neighbours cannot be discounted. But in the case of North Korea deterrence has still served its principal purpose of deterring a war of aggression against South Korea. Similarly, the United States also succeeded in deterring Saddam Hussein from using WMD against the coalition and Israel during the 1991 Gulf War. Critics question this assessment, pointing out that Saddam Hussein had authorised his field commanders to use chemical and biological weapons against the coalition if it marched on Baghdad, and that he was not deterred from attacking Israel with Scud missiles armed with conventional warheads. However, this criticism does not affect the overall conclusion that he did not use those WMD that he had at his disposal. What it does suggest is that “rogue” state leaders are most likely to use their WMD to deter others from attacking them or as a last minute gesture of defiance if all else is lost.⁶⁴

This logic also applies with respect to the risk highlighted in the NSS and in official US statements that “rogue” states might transfer WMD to terrorists. This risk is not considered high in the literature, and the Central Intelligence Agency (CIA) reportedly views a deliberate transfer by a state as “the least likely route to a terrorist nuclear weapon”.⁶⁵ Two factors explain this threat assessment. First, a “rogue” state would have no assurance that the terrorists would not turn the weapon against itself. Second, the transfer would be very difficult to keep secret. The state sponsors behind previous terrorist attacks on US targets have usually been identified, and the isotopic signature of a nuclear device can be traced to its country of manufacture. A “rogue” regime deliberately providing such weapons to terrorists would consequently sign its own death sentence.⁶⁶ This suggests that the risk of

unauthorised WMD transfers is higher than authorised ones, as deterrence would not work against them. WMD stockpiles in weak and failing states with poor control over their WMD would thus seem to constitute a greater threat of WMD transfers than “rogue” states with effective control measures in place.

The American success with respect to reducing state sponsorship of terrorism since the 1980s provides another indication that deterrence is likely to work against “rogue” states. Fear of retaliatory action had already led Libya, Iran and Iraq to stop sponsoring attacks on American targets before September 11th.⁶⁷ Since then US has sought to make state sponsorship of terrorism even harder to conceal, and these efforts (deterrence through denial) seem to be paying off, as state sponsorship of terrorism continues to drop. According to the US State Department’s 2003 overview of state-sponsored terrorism, Libya and Sudan have stepped up their counter-terrorist cooperation with Western intelligence services considerably and appear to have cut most of their known ties with terrorist organisations. North Korea has not been linked to a terrorist attack since 1986, and Cuba, Iran and Syria continue to support terrorists but have distanced themselves from Al Qaida. Cuba continues to support the Basque terrorist group ETA and two Columbian groups, ELN and FARC, but appears to have no links with Islamist groups. Similarly, Iran and Syria continue to support groups that fight Israel (Hamas, Hizbollah, the Palestine Islamic Jihad, the Popular Front for the Liberation of Palestine-General Command and the Popular Front for the Liberation of Palestine), but have taken steps against Al Qaida.⁶⁸ Iran has refused to hand over detained Al Qaida operatives for interrogation and trial, however, and US officials have claimed that members of Al Qaida in Iran were involved in the May 2003 bombings of three residential compounds in Saudi Arabia.⁶⁹

4.2. Deterring terrorists from WMD use

Deterrence is much harder to use effectively against terrorists than states for two reasons. First, terrorists, unlike states, do not have territory that is vulnerable to retaliation. It is simply not possible to respond to a WMD attack by responding in kind. Second, some terrorists, unlike governments, see death as an end in itself. Not all terrorists are suicidal, however, and it is the goals, not the means, employed by a terrorist organisation that determines whether it can be deterred or not.

Terrorists can be placed on a continuum with apocalyptic terrorists at one end and political terrorists at the other. Apocalyptic terrorists have insatiable demands, and no concession will stop them from continuing their use of terrorism. In contrast, political terrorists are driven by pragmatic political goals and can be expected to stop their use of terrorism when their grievances have been addressed or they become convinced that it is futile or counterproductive to continue.⁷⁰ In the real world, terrorist groups are likely to have both political and apocalyptic elements, and terrorist groups may also move from one end of the spectrum to the other in the course of their struggle. But the continuum is useful in showing that some terrorists pose greater threats than others, and that there is greater scope for negotiation and compromise the closer we get to the political end of the continuum.⁷¹

The hard core of Al Qaida, with its maximalist global agenda, belongs to the apocalyptic category, whereas groups with local or separatist agendas, such as ETA, the IRA and the Palestinian groups, belong to the political end of the continuum. Whereas apocalyptic terrorists must be considered undeterrable, it should be possible in the short term to deter political terrorist groups from cooperating with Al Qaida and seeking WMD by convincing them that the costs of such actions outweigh the benefits. The focus on Al Qaida and WMD significantly enhances the risk that such activities will be discovered (deterrence through denial), in which case punishment in the form of US attacks or support to the government that the terrorists are fighting can almost be taken for granted. In addition, association with Al Qaida or WMD terrorism is also likely to result in stigmatization and loss of international support. The conflict in Chechnya is a case in point. The association of the Chechen rebels with Al Qaida and other radical Islamist terror groups has reduced sympathy for their cause in the West and made it easier for Russia to employ ruthless measures against them. The Madrid bombing carried out in March 2004 by Al Qaida associates had the same effect of reducing public sympathy for the terrorist campaign conducted by ETA. Links between the Palestinian groups and Al Qaida would be likely to hurt the Palestinian cause in the same manner. Just as deterrence has helped to reduce state sponsorship of terrorism, it may help to isolate Al Qaida from political terrorist groups and deter the latter from seeking to acquire and use WMD.⁷²

In the longer term, deterrence may help to drive terrorists out of

business by contributing to strategic failure. While hard core apocalyptic terrorists will continue until they are caught or killed, their recruitment pool may gradually dry up if it becomes clear that their struggle is failing to produce results. A lack of results (deterrence through denial) and the increased risk of US retaliation (deterrence through punishment) explain the decline in state-sponsored terrorism referred to above. Similarly, the dramatic rise in the use of suicide terrorism since the early 1980s can be explained by the fact that the method works. Suicide attacks thus produced concessions from their targets in six of the eleven suicide terrorist campaigns that were completed during 1980-2001.⁷³

Summing up, the NSS seems to underestimate the effectiveness of deterrence in relation to the new threats. There is no inherent reason why deterrence should be less effective with respect to deterring stable “rogue” states from using WMD against the United States, its allies and its friends or from transferring it to terrorists than it was with respect to deterring the superpowers from using force against each other during the Cold War. WMD use or transfer to terrorists only makes sense for “rogue” state leaders if they come under attack or as a last gesture of defiance in a situation when all else is lost. Weak or failing states seem to constitute greater risks of WMD use or transfer to terrorists than stable “rogue” states.

Deterrence is much harder against terrorists than states but not impossible. The scope of deterrence depends on the goals and motivations of the terrorists. Politically motivated terrorist groups with local agendas may be deterred from acquiring WMD and from cooperating with Al Qaida. Al Qaida, on the other hand, appears to be undeterrable and likely to use WMD against Western targets if given an opportunity to do so.

It follows that there is a strong case for using force preventively against Al Qaida and other terrorist groups seeking to acquire WMD. The case and need for using prevention against “rogue” states is weaker because deterrence is more likely to work. The good news that deterrence appears to be more effective against the new threats than the NSS assumes may serve to reduce the actual use of military pre-emption and prevention in the future. This said, deterrence is not fail-safe. Governments occasionally considered the use of preventive military action against WMD targets prior to September 11th and must be

expected to do so again in the future in relation to the new threats. To a government contemplating the use of preventive military action, the question of feasibility will play a major role in the decision whether or not to use force. It is to this question we now turn.

5. Prevention in past practice: considerations and complications

Declaring a policy of prevention is one thing, implementing it quite another. To assess how often preventive military action is likely to be seen as a feasible option against “rogue” states and terrorists seeking to acquire WMD, this section examines the historical record and the current debate in order to obtain a better understanding of when preventive action is likely to be considered, how such action is likely to be carried out and to what effect. Although the new threats and the end of the Cold War have altered the calculus of prevention, the practical considerations and complications affecting its use remain essentially the same.

A state that feels sufficiently threatened to contemplate preventive military action has to consider three sets of complications: whether the intelligence is good enough to ensure operational success (is the target list complete/reliable?); whether operational success is achievable at an acceptable cost (collateral damage and casualties); and how the target and the international community will react (retaliation, escalation, diplomatic isolation, increased use of prevention by other states). This calculus will differ from case to case and will depend on the nature of the target – whether it is a great power, a small state or a terrorist organisation. It makes a crucial difference whether the target is a state with a WMD programme or a terrorist organisation seeking to buy or steal WMD. First, it is likely to be easier to locate fixed WMD sites than small groups of terrorists on the move, and small-scale attacks are likely to be enough to capture or kill terrorists whereas major operations are likely to be required to eliminate state-run WMD programmes. Second, attacks on terrorists are likely to be regarded as more legitimate than attacks on states because in most cases they can be justified as pre-emption in the traditional sense of the term, i.e. as military action to prevent an imminent attack. Moreover, attacks on Al Qaida and affiliated groups may be seen as self-defence because Al Qaida has been engaged

in a war against the US, its allies and its friends since 1993, when it began to attack US targets.⁷⁴ Attacks to eliminate state-run WMD programmes are more controversial because they are more likely to fall into the prevention category and because the inherent risk of escalation and long-term destabilization of the international system is greater. The use of prevention against states and terrorist organisations will therefore be dealt with separately in the analysis below.

5.1. Preventive use of force against WMD states

The complications of attacking WMD facilities have limited the number of such attacks significantly in the past. Dan Reiter has identified sixteen attacks against WMD states during 1942-2003: seven allied attacks against the German and Japanese WMD programmes (1942-1945), culminating in regime change, two Israeli and one Iranian attack against the Iraqi nuclear programme (1979-81), Iraqi air strikes against the Iranian nuclear programme (1980-88), an Iraqi attack against the Israeli programme (1991), and the US-led attacks against the Iraqi WMD programmes (1991-2003), culminating in regime change.⁷⁵

This list reveals two interesting things: only five state programmes have been targeted, and most attacks have been carried out in the context of an ongoing war. The number of preventive attacks launched for the sole purpose of stopping WMD programmes during peacetime is very small indeed. The only attacks belonging in this category are the two Israeli attacks against the Iraqi nuclear programme and the two US campaigns targeting the Iraqi WMD programmes after the end of the 1991 Gulf War – Operation Desert Fox in 1998 and Operation Iraqi Freedom in 2003, the latter culminating in regime change.

The reluctance to launch preventive attacks during peacetime to stop WMD programmes is further underlined by the occasions where states have considered such action but decided against it. The United States contemplated preventive WMD action against the Soviet Union in the early 1950s and China in the early 1960s, against Cuba during the Cuban missile crisis in 1962 and against North Korea in 1994. Similarly, India considered taking preventive action against Pakistan's nuclear programme in the 1980s, the Soviet Union considered attacking China's nuclear programme in 1969, and Egypt contemplated military action against Israel's Dimona nuclear reactor in the 1960s.⁷⁶

The combination of poor intelligence, doubts concerning the

prospects of operational success and fear that a limited attack might trigger a major war explain why prevention was rejected in these cases. The importance of these complications is further demonstrated in Dan Reiter's analysis of the sixteen attacks against state-run WMD programmes that did take place during 1942-2003. He found that limited military attacks generally failed to stop or significantly delay WMD programmes, that full-scale wars and regime change were required to end them, and that the target and the international community may impose significant costs on the state launching the preventive attack.

Three factors account for the limited effectiveness of limited attacks. First, the intelligence picture is usually incomplete. Poor intelligence meant that American efforts to eliminate the Iraqi WMD programmes (1991-2003) had little impact, even though most of the known targets were successfully destroyed. The CIA report on Iraqi WMD released in September 2004 showed that Iraq had abandoned all its active WMD programmes by the mid-1990s.⁷⁷ It also concluded that Iraq appears to have destroyed all its biological and chemical weapons after the 1991 war. The intelligence used to guide the air strikes conducted against Iraqi WMD installations since the mid-1990s was, in short, wrong. The attacks on the German and Japanese WMD programmes during World War II were also hampered by poor intelligence, and the US was even unaware that it had put an end to the embryonic Japanese nuclear programme in a bombing raid on Tokyo in April 1945.⁷⁸

Second, effectiveness may be limited by the fear that the release of biological and chemical agents or nuclear radiation might result in significant civilian casualties. This concern played a role in the Clinton administration's decision not to launch a preventive attack on North Korea in 1994, suspected Iraqi chemical and biological sites were not attacked for this reason during Operation Desert Fox in 1998, concern about collateral damage led to the removal of one building from the target list later that year when the US launched cruise missiles against a chemical plant suspected of producing chemical weapons in the Sudan, and the US also refrained from attacking the sites where Al Qaida was suspected of developing biological and chemical weapons during the war in Afghanistan.⁸⁰

Third, the effectiveness of limited attacks is limited by their very nature. The Israeli attack on the Osirak reactor in 1981, which is wide-

ly seen as the prototype of a successful limited attack on a WMD program, is illustrative in this respect. The Israelis were acting on the basis of good intelligence, the reactor was successfully destroyed in a single air raid, the level of collateral damage was minimal, and Israel suffered no casualties during the operation. But the attack did not achieve its strategic objective, as it neither stopped Iraq's nuclear programme nor significantly delayed it. On the contrary, it led Saddam Hussein to accelerate, diversify and conceal his nuclear programme. The Osirak attack demonstrates the inherent problem involved in limited attacks: that they leave the decision whether or not to terminate WMD programmes to the target. Nothing prevents the target from continuing the effort to acquire WMD, and a successful attack may even have the counterproductive effect of speeding up and enlarging the WMD programme it sought to end, as happened, according to the sources quoted by Reiter, in the Osirak case.⁸¹

The impossibility of coercing Saddam Hussein into abandoning his WMD ambitions was one of the reasons why the US opted for regime change instead. This option holds out greater promise of lasting success by enabling the preventer to destroy an ongoing WMD programme completely and install a friendly regime without WMD ambitions. It worked remarkably well in Germany and Japan after World War II and is now being attempted in Afghanistan and Iraq. The problem with regime change is, of course, that it is extremely costly. The experiences of Germany and Japan suggest that long-term success hinges on the establishment of a stable democratic regime and long-term military deployments, and the current difficulties in Afghanistan and Iraq, as well as the problems encountered by the UN, the EU and NATO in the Balkans since the mid-1990s, demonstrate that successful democratization is very difficult, very costly and very slow.⁸²

The need to engage in full-scale war to stop WMD programmes militarily is illustrative of the third complication that has limited the number of preventive attacks in the past: fear of the consequences. Unwillingness to fight a major war had a strong deterrent effect on decision-makers during the Cold War, and it also played an important role in the US decision not to attack North Korea in 1994. The Clinton administration was worried that North Korea might react to a limited preventive strike by attacking Seoul or launching an all-out invasion of South Korea. According to Pentagon estimates, a conventional war in

Korea would result in 500,000 casualties in the first ninety days alone, and the total number of casualties was put at one million military and civilian casualties, including 100,000 American dead.⁸³

On top of the likely costs imposed by the target, a state contemplating prevention must add the possible costs that the international community may impose. Good evidence of a WMD threat (capability and intent), multilateral support and a successful military operation conducted in accordance with the rules of war are generally seen as the minimum requirements for legitimising preventive WMD operations.⁸⁴ Credible evidence of a threat and of the inevitability of war will be easier to produce the closer the target is to launching an actual attack. In other words, the further one moves from pre-emption in the traditional sense towards prevention, the harder it will be for the preventer to convince others of the threat and to mobilise support for military action. From a moral as well as a strategic point of view, it is easier to justify military action to forestall an imminent attack than against a threat that may or may not become imminent sometime in the future. It is difficult to show that war is indeed inevitable months or years from now, and equally difficult to argue that force is being used as a last resort in such circumstances. Making a morally defensible case for prevention is thus much harder than making one for pre-emption in the traditional sense of the word.⁸⁵

At the same time it is not impossible. Two cases involving Iraq make the point: the Israeli attack on Osirak, and the American invasion of 2003. Israel was able to make a plausible case that the Iraqi nuclear programme constituted a serious threat to its national security since Iraq had stated publicly that it was directed against the “Zionist enemy”.⁸⁶ Israel’s case was bolstered by the fact that Iran also perceived the Iraqi programme as a threat and had made an unsuccessful attempt to destroy it. The Israeli attack was timed to destroy the reactor before it came operational in order to minimise the risk of collateral damage, it was limited in scope and duration, it focused exclusively on destroying the reactor and it achieved complete operational success with a minimum loss of life.

The attack was condemned by a united UN Security Council as a violation of international law, but there was no mention of punishment in the resolution, and no state apart from the United States, which delayed the delivery of four F-16s, took any practical steps to punish

Israel for the attack. After the Gulf War and the discovery of the Iraqi military nuclear programme by UN weapons inspectors, there was widespread recognition that the attack had been justified, and the US Secretary of Defense, Dick Cheney, publicly thanked Israel for having prevented Iraq from having nuclear weapons at the time of the Gulf War.⁸⁷ While it is debatable whether the Israeli attack had this effect, it is indisputable that Israel was relatively successful in legitimising a unilateral preventive attack against a threat that was regarded as real but not imminent.

From a strategic perspective, the important thing for the preventer is to avoid other states taking steps to punish it, and in this sense Israel was remarkably successful. This success is somewhat surprising because the attack failed to meet the requirement of multilateralism that is generally seen as crucial in legitimising the use of force beyond self-defence, which is not authorised by the Security Council.⁸⁸ This suggests that the perceived seriousness of the threat, the scale of the operation, its low costs in terms of collateral damage and casualties and its successful outcome may be more important.

A comparison of the Osirak attack with the 2003 Iraq War supports this conclusion. On the face of it, in some respects the US had a better case than Israel. The threat posed by the Iraqi regime was generally not perceived as lower when the war broke out: Iraq was generally assumed to have a biological and chemical weapons capability, as well as the intention to acquire a nuclear capability; a united Security Council had determined that Iraqi non-compliance with UN resolutions constituted a threat to international peace and security; unlike Israel, the US involved the UN Security Council; and the attack was more multilateral, as the US was supported by a number of allies.

What makes the attack different is its scale, the failure of the coalition to win the peace following its swift defeat of the Iraqi military, the subsequent disclosure that the intelligence on the Iraqi WMD programmes was wrong, and the widespread concern that the US might impose regime change on other states as well. This led several states to impose costs on the US by denying it legitimacy and practical support, and Iran and Syria have reportedly been supporting the insurgency against the US-led coalition in an attempt to deter the United States from attacking them next.⁸⁹ These costs have been compounded by the failure of the coalition to establish basic security in all of Iraq or pre-

vent the outbreak of the insurgency. More than anything else, the Iraqi case underlines the importance of bringing military operations to a quick and successful conclusion. Had the coalition been equally successful with respect to winning the peace as it was with respect to defeating the Iraqi military, the operation would probably have been viewed as more legitimate by the international community.

5.2. Preventive use of force against WMD terrorists

Preventive military action against terrorist WMD facilities has so far not been taken very often, in fact only twice: in 1998, when the US used cruise missiles to destroy a factory suspected of producing chemical weapons for Al Qaida in Sudan; and in the Afghanistan war, which served the same purpose by destroying Al Qaida's limited WMD facilities there.⁹⁰

The prevention calculus looks very different in relation to terrorists compared to states. The problem of obtaining reliable intelligence is greater. Terrorist WMD facilities are likely to be smaller, more primitive and hence harder to locate. In addition, terrorists may also speed up the acquisition process by buying or stealing WMD from state sources, leaving less time for detection and preventive action. This creates an incentive to capture or kill operatives belonging to apocalyptic terrorist organisations when the opportunity arises. The American counter-terrorism campaign targeting Al Qaida and affiliated groups has done precisely that. The US military has been involved in a continuous campaign against Al Qaida in Afghanistan since the invasion in 2001, provided military support for governments fighting Al Qaida and affiliated groups on their own territory and killed six Al Qaida operatives with a Predator drone armed with Hellfire missiles in Yemen in November 2002, while an armed US team captured an Al Qaida operative in Mogadishu and took him out of Somalia for questioning in March 2003.⁹¹ The latter two operations were the result of a policy which tasks US agents and Special Forces to track, capture or kill Al Qaida operatives in countries with which the US is not openly at war, and a new military base in Djibouti has been set up to facilitate such operations throughout the Horn of Africa.⁹²

Limited military action of this nature, targeting Al Qaida operatives and their supporters in weak and failing states that are incapable of preventing terrorists from operating or hiding on their soil, is far easier to

legitimise than preventive action against states. It can be justified as self-defence or as pre-emption in the classic sense, i.e. as the use of force to prevent an imminent attack, because the threat of new Al Qaida attacks causing mass casualties is ever present. After September 11th many states tolerate and even support such action, even though its legality is questionable if it takes place without the consent of the local government. There is an emerging consensus that it may be legitimate to take military action against terrorists in states that are either unwilling or unable to meet their legal obligations under UN Resolution 1373 to prevent terrorists from using their territory as launching pads for attacks on other countries. These requirements also enhance the likelihood that governments will allow other states to carry out limited military operations against terrorists on their territory. The Hellfire attack on Al Qaida operatives in Yemen is a case in point, as it was carried out with the consent of the Yemenite government.

Limited military action against terrorists is thus a far more attractive option than taking preventive action against states. It is more likely to succeed and there is no need to worry about escalation, since the terrorists are already trying to inflict the maximum damage. The risk of casualties and collateral damage is limited since the operations will typically be small in scale, and the political costs are likely to be low since many states, including all the great powers, consider such action legitimate, provided that the laws of war are respected. Failure to comply with these laws is likely to trigger criticism, however. This was the case with the Hellfire attack in Yemen, which was perceived by its critics, both within and outside the United States, as a summary execution.⁹³ It is the intelligence requirement that constitutes the principal obstacle to the use of limited force against terrorists, and the difficulty of obtaining such intelligence is likely to limit the scope for such action significantly.

6. The future of prevention

The future does not look particularly bright for preventive military action against “rogue” states and terrorists with WMD. Preventive action of this sort against states is unlikely to be regarded as an attractive option very often since it is a high-risk, high-cost undertaking with limited scope for operational success. Preventive wars involving regime change are difficult to legitimise and entail high costs, suggesting that

this option will continue to be used in exceptional cases only. Limited attacks are more likely, as American and Israeli threats of preventive strikes against the Iranian nuclear programme illustrate.⁹⁴ The United States is less constrained than was the case during the Cold War, when such action could always escalate into military confrontation with the Soviet Union, and the unparalleled superiority of US airpower enhances the likelihood of American air strikes against “hostile” WMD facilities, as the retaliatory capacity of the “rogue” states is relatively limited. North Korea stands out as the exception to the rule in this regard. That said, the practical and political difficulties associated with such attacks must still be expected to have a deterrent impact on decision-makers contemplating such action.

The Osirak attack complicated the task of conducting successful limited attacks. It taught not only Iraq but all states determined to acquire WMD of the need to conceal, disperse and build redundancies into their WMD programmes to make them less vulnerable to limited attacks and sabotage. Iraq succeeded remarkably well in doing this, as the poor results obtained in the attacks conducted by the United States in the first Gulf War demonstrate. Successful North Korean concealment and dispersal of its nuclear programme helped to deter the Clinton administration from launching a preventive attack in 1994, and there is a general consensus that Iran has made its nuclear programme difficult to destroy from the air.⁹⁵

Further complicating the use of prevention against states is the risk that such action may induce other states to follow suit and make the preventive use of force more frequent. In light of the difficulties and risks identified in the course of this analysis, this risk should not be overstated. States, as we have seen, generally think twice before launching preventive attacks against other states, and the 2003 Iraq War has probably reinforced this reluctance. The US and Israel remain the only two states to have declared an official policy permitting unilateral, military prevention against states with WMD.⁹⁶ Australia, France and Japan have only expressed support for the pre-emptive use of force against imminent attacks, i.e. anticipatory self-defence or traditional pre-emption, which is generally seen as far more legitimate.⁹⁷ They do not subscribe to the new interpretation of pre-emption in the NSS. Russia moved closer to the NSS position after the Beslan massacre in September 2004, when it declared its willingness to conduct preventive

strikes against terrorist bases in neighbouring countries, but this shift in policy did not extend to states as well.⁹⁸ There is, in short, nothing to suggest that preventive military action against states will become any more frequent in the foreseeable future than it has been in the past. It seems most likely to remain an option reserved for exceptional circumstances.

The same cannot be said for the use of preventive military action against terrorists. Intelligence permitting, this option will probably be used more often to kill and capture terrorist operatives hiding in, or conducting attacks from, weak states that are unable to control their own territory. This option is low-cost and low-risk compared to major military operations, and limited preventive military actions against Al Qaida in weak states have generally been met with acceptance, if not outright support, from the international community. In many cases such operations can be expected to take place with the consent of the local government, as was the case with the Predator attack in Yemen. In cases where consent has not been granted, limited operations are still likely to be seen as legitimate, since states have a Chapter VII obligation to prevent terrorists from using their soil as launching pads for terrorist attacks on other states.

7. Conclusion: positive implications for international law and stability

Unilateral preventive use of force against WMD states rarely succeeds. Obtaining the intelligence required for operational success has been a problem in most cases, limited military attacks have a poor track record as they rarely significantly delay or stop WMD programmes, and the consequences in the form of escalation and international isolation may be costly. Still, the Israeli attack on Osirak is proof that the international reaction may be limited to verbal condemnation, provided that hostile intent can be demonstrated, the attack is limited in time and scale, it achieves operational success and the loss of life is reduced to a minimum. Regime change is likely to be more effective with respect to terminating WMD programmes than limited attacks, but it is a high-risk, high-cost operation that is very difficult to legitimise in peacetime.

The fact that unilateral military prevention against states looks so unattractive from a strategic perspective eases the political-legal dilemma that unauthorised military prevention poses to international law,

peace and stability. It gives all states a strong interest in bolstering efforts to prevent the spread of WMD by peaceful means; it means that deterrence is likely to be regarded as a viable alternative in more cases than the NSS seems to imply; and the implication is that unilateral prevention against states is likely to be employed in exceptional circumstances only.

Although preventive military action is likely to be taken more frequently against terrorists, this does not appear to pose major problems for international law or international peace and stability. All the major powers, the EU and the UN Secretary General's High-level Panel share the American view that military action may be required to counter the new threat emanating from apocalyptic terrorist groups with global reach seeking to acquire WMD. Most attacks on terrorists can be legitimised as self-defence or pre-emption, both of which may be legal under current international law, as the next chapter will show. The use of force against terrorists will generally be small in scale and of limited duration, and take place in weak states that are unable and/or unwilling to prevent terrorists from operating on their soil. They are consequently unlikely to have major destabilising consequences for international peace and security.

The risk of unilateral and unauthorised prevention is, in short, not likely to become as threatening to international law and international stability as many have feared.

Chapter 3

Use of Force in Self-Defence

Under international law, only the right of self-defence provides a legal basis for states acting individually or collectively to use force against another state without prior authorisation from the Security Council. Consequently, self-defence is the natural starting point in assessing the options available to states confronted with military threats, including threats from international terrorism and the proliferation of WMD. The scope of the right of self-defence also defines the basis on which states assembled in the Security Council or the General Assembly should react to unauthorised use of force, whether to condemn it as an unlawful act of aggression or condone it as a lawful exercise of the right of self-defence.

The right of states to use force in self-defence has long been recognised in state practice and is also affirmed as an “inherent right” in Article 51 of the UN Charter. Today, self-defence provides one of only two exceptions to the general prohibition on the use of force embodied in Article 2(4) of the UN Charter, the other exception being the use of force authorised by the Security Council (see Chapter 1).

The exact scope of the right of self-defence remains controversial, although the concept of self-defence does have a generally accepted core as well as some outer limits. States and scholars disagree, with powerful states generally inclined towards a broader scope for self-defence than weaker states, and many American scholars, joined by some British ones, have traditionally been in favour of a broader definition of self-defence than other scholars.

This controversy can partly be explained by the fact that the law on self-defence may evolve through the practice of UN organs and states in meeting new challenges to national and international security. On most contentious issues, controversy seems to concern not so much whether specific actions involving the use of force may be politically

justifiable, but whether such actions and the international reaction to them have expanded the right of self-defence by way of customary international law.

This chapter is structured as follows. First, the legal basis and general content of the right of self-defence is set out (Section 1). Second, the conditions of self-defence that are of special relevance to the present report are discussed in more detail: the character and object of the threat (Section 2), its source (Section 3) and its actuality (Section 4). Third, the conclusion assesses the adequacy and limits of the current right of self-defence as a framework for confronting new threats to international peace and security emanating from international terrorism and the proliferation of WMD (Section 5).

I. The right of self-defence: its legal basis and general content

I.1. Self-defence in customary international law prior to 1945

Until the twentieth century, war was not generally prohibited as a means of international politics. However, there was a compulsion among states and writers to justify any use of force against another state on moral and political grounds. In the seventeenth and eighteenth centuries, the classical writers in international law, relying on natural law philosophy, considered the right of self-defence to be a natural right of self-preservation and self-protection, inherent in state sovereignty. It was described as the right to protect the lives and property of the state and its subjects against actual or imminent injury inflicted by another state in violation of its legal or moral obligations. The right of self-defence was but one element in defining the causes of “just war”. Other forms of forcible self-help were also considered justified, such as the use of force to secure redress or enforcement of rights or to inflict punishment against a state violating its legal or moral obligations.⁹⁹

In state practice, the *Caroline Case* has come to be regarded as the classic expression of the doctrine of self-defence, and indeed the very source of self-defence as a legal doctrine.¹⁰⁰ The issues involved in this old case have many parallels in current international debates. It concerned an incident in 1837 in which British forces entered US territory

and destroyed the American steamboat *Caroline*, which was being used to transport supplies by American armed bands assisting in the Canadian rebellion against the British Crown.¹⁰¹

The Caroline Incident

The Canadian rebellion of 1837 against the British Crown aroused active support among American citizens along the Canadian border. The US Government took steps to prevent American partisans from taking part in the Canadian rebellion, but was unable to do so. Urged on by refugee Canadian insurgents, American citizens in Buffalo, armed and equipped for battle, volunteered by the hundreds to assist the Canadian rebellion. This armed band invaded Navy Island, an island in British possession situated in the Niagara River between the American and Canadian mainland, and subsequently used the island as a base for military operations against the Canadian shore and British boats. The American rebels were constantly reinforced with men and military equipment supplied from the American shore. The American steamboat *Caroline* played a crucial role in this supply. The British forces in Canada considered that the destruction of the *Caroline* would both prevent further reinforcements and supplies from reaching the rebels on Navy Island and deprive the rebels of their means of access to the Canadian mainland. Consequently, on the night of 29 December 1837, a British expedition boarded the *Caroline*, docked at Fort Schlosser, and, after forcing the crew to escape, set her on fire and sent her adrift down the Niagara River. Two American citizens were killed by British forces in the incident.

What made the *Caroline* a historic case was the diplomatic notes subsequently exchanged between the US and British authorities. The US Secretary of State, Daniel Webster, in a famous letter, called upon the British Government to show a:

necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation.... [and also] that the local authorities of Canada,

*even supposing the necessity of the moment authorized them to enter the territories of The United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.*¹⁰²

Lord Ashburton, in his reply, proposed to justify the Caroline incident in accordance with the criteria formulated by Webster, adding regret that the action taken had necessitated a violation of American territory and an apology that such regret had not been expressed earlier.¹⁰³ Webster accepted the apology¹⁰⁴ and there the case ended.

When in the early twentieth century initiatives were taken to limit the right to resort to war, self-defence was not an issue. Neither the Covenant of the League of Nations of 1919, limiting the right to resort to war, nor the Pact of Paris of 1928 (the Kellogg-Briand Pact), renouncing war as an instrument of national policy, even mention the right of self-defence. However, this was only because the right of states to defend themselves against attack was universally recognised as a natural right, inherent in state sovereignty.¹⁰⁵

The Nuremberg Military Tribunal, in its judgment of 1946 on war crimes committed by members of the German Nazi regime during the Second World War, confirmed not only the customary right of self-defence, but also the Caroline formula as reflective of its content.¹⁰⁶

In conclusion, it is beyond contention that a right of self-defence had been firmly established in customary international law prior to 1945, and most agree that this right was defined and limited in accordance with the principles defined in the *Caroline Case*.¹⁰⁷ The controversial issue is the impact of the UN Charter on this customary right of self-defence.

1.2. Article 51 of the UN Charter

A major achievement of the UN Charter was the general prohibition on the use of force between states in Article 2(4). During the preparations of the UN Charter, some took the view that the Security Council should have exclusive competence to use force against a state, and that consequently, Security Council enforcement action should be the only exception to the prohibition on the use of force. However, since the Security Council might not always be able to act, most states considered it necessary to preserve the right of self-defence.¹⁰⁸ So Article 51 was inserted.

Apart from self-defence, the UN Charter abolished any right of forcible self-help arguably recognised under customary international law prior to 1945.¹⁰⁹

Obviously, this makes crucial the scope of the right of self-defence. Article 51 provides that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

A primary purpose of Article 51 was to recognise explicitly a right of collective self-defence and to make self-defence subject to the primary competence of the Security Council.

The right of self-defence includes individual as well as collective self-defence (Article 51). Individual self-defence may be conducted by a state that is a victim of an armed attack. Collective self-defence may be conducted by other states on behalf of the victim state, provided that the latter has declared itself to be the victim of an attack and, in the absence of a prior agreement,¹¹⁰ has specifically requested the assistance of those states.¹¹¹

The right of self-defence is temporary, existing only “until the Security Council has taken the measures necessary to maintain international peace and security” (Article 51). In principle, it is for the Security Council to decide whether the measures it has taken have the consequence of terminating the right of self-defence. In the absence of such a decision, the victim state may initially rely on its own assessment.¹¹² Furthermore, any exercise of the right of self-defence “shall be immediately reported to the Security Council” (Article 51). While a failure to report to the Security Council does not exclude the lawfulness of action taken in self-defence, it does create a certain presumption against the state subsequently relying on the right of self-defence as a justification for military action.¹¹³

As regards the basic conditions of self-defence, it is controversial

whether Article 51 simply confirmed customary law prior to 1945 allowing self-defence against an imminent attack, or intended to limit the right of self-defence to situations where an armed attack has already occurred. This issue of anticipatory self-defence is dealt with below (Section 4.2).

In any case, it is clear that Article 51 has not altogether superseded customary international law on self-defence as it existed prior to 1945, if only because Article 51 does not regulate all aspects of the right of self-defence, including the requirements of necessity and proportionality.¹¹⁴

Action in self-defence must not exceed what is necessary and proportionate to respond to the attack.¹¹⁵ These requirements are hugely important in state practice, since most cases turn on their observance or non-observance. At the same time, however, their exact content is subject to debate. According to the Caroline formula, action taken in self-defence must involve “nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it”.¹¹⁶ The International Court of Justice has described the requirements as follows: “self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it”.¹¹⁷

In any event, the right of self-defence, like any use of force, is subject to the rules of international humanitarian law applicable in armed conflict, including those governing the means of weaponry and methods of warfare (“the Hague Rules”) and those governing the protection of victims of armed conflict (“the Geneva Rules”).¹¹⁸

In conclusion, although controversy exists as to whether Article 51 was intended to limit the right of self-defence to cases where an armed attack has already occurred, it is settled that the pre-Charter customary principles on self-defence continued to apply after 1945 to the extent that they are compatible with Article 51 of the UN Charter.

1.3. The relevance of state practice after 1945

Whatever may be the better view in the controversy over the interpretation of Article 51, this provision is itself an expression of state practice reflecting the state of the law in 1945. The law on self-defence, like international law in general, is not necessarily static. Subsequent state practice may expand the right of self-defence beyond the scope of

Article 51, provided that state practice invoking a broader concept of self-defence has been supported by a vast majority of states as a legal right. Sources of state practice on the right of self-defence include notably: International declarations on the use of force, cases where states have used force while invoking the right of self-defence, and the international reaction to such claims. In other words, even a narrow interpretation of Article 51 allowing a right of self-defence in the case of an actual armed attack only would not preclude that, today, the right of self-defence might include, for example, the use of force against imminent attacks, or even the use of force against the threat of possible future attacks, if such a right had been recognised in state practice as an expression of customary international law on self-defence.

2. Character and object of the threat: armed attack against a state

An “armed attack” is what triggers the right of self-defence (Article 51).¹¹⁹ Article 51 does not define an “armed attack”, nor does a universal definition exist, although the core of the concept is not disputed. The attack must be directed against a state.

The right of self-defence concerns only international armed attacks. Acts of violence and terrorism conducted within the territory of a state without external support and the response of the authorities to such acts does not fall under this meaning of self-defence.

An “armed attack” within the meaning of Article 51 does not include lawful resort to force, i.e. either in self-defence against an armed attack (there is no right of self-defence against self-defence), or in accordance with a prior authorisation from the Security Council.

2.1. “Armed attack”: a qualified use of armed force

An armed attack signifies a qualified form of the use of force. As stated by the International Court of Justice, it is “necessary to distinguish the most grave forms of the use of force [constituting an armed attack] from other less grave forms”.¹²⁰ Whether specific military action is sufficiently grave to amount to an armed attack depends on its “scale and effects”.¹²¹ According to the Court, this would normally exclude “a mere frontier incident”,¹²² presumably, however, that depends on the scale of the frontier incident.¹²³ Furthermore, a series of minor incidents might

arguably cumulate to constitute an armed attack.¹²⁴ On the contrary, the Court does not exclude that “the mining of a single military vessel might be sufficient to bring into play the “inherent” right of self-defence”.¹²⁵ The term “armed attack” implies, at a minimum, resulting human casualties and/or serious destruction of property.¹²⁶

There is thus no symmetry between Article 2(4) and Article 51.¹²⁷ Whereas Article 2(4) prohibits any threat or use of force between states, Article 51 confers on a victim state a right of self-defence only if the use of force amounts to an “armed attack”. Nevertheless the 1970 *Declaration on Friendly Relations*,¹²⁸ which elaborates on the prohibition on the use of force, may provide some guidelines as to the kind of action which may, given a sufficient scale or with sufficiently grave effects, constitute an armed attack.

As it denotes a qualified form of the use of force, an “armed attack” is more similar to the concept of an “act of aggression”, only for it to be an armed attack, the aggression must be armed.¹²⁹ Consequently, the 1974 *Definition of Aggression*¹³⁰ has proved a source of inspiration in defining what constitutes an “armed attack”. It contains in Article 3 a non-exhaustive list of acts of aggression, including notably: invasion; attack; bombardment; blockade of the ports or coasts of another state; an attack on the land, sea or air forces of another state; allowing another state to use territory placed at its disposal for acts of aggression; and the sending of armed bands, groups, irregulars or mercenaries to carry out acts of armed force against another state of such gravity as to amount to an act of aggression. Article 2 even states that any first use of force in contravention of the UN Charter should be considered *prima facie* evidence of an act of aggression. However, all the examples just mentioned are subject to the general condition that (the Security Council may decide that) an act of aggression has not been committed if “the acts concerned or their consequences are not of sufficient gravity” (Articles 2 and 3).

2.2. Against a state: state territory, armed forces or nationals and assets abroad

Although Article 51 does not define what should be the object of an armed attack, self-defence undoubtedly involves armed attack against a state.

The right of self-defence undoubtedly applies to armed attacks

directed against state territory or the armed forces of a state (cf. the 1974 *Definition of Aggression*).

One controversial issue is whether self-defence may also be invoked to protect nationals and property abroad from an armed attack or to rescue nationals abroad from imminent danger. This is particularly relevant to acts of international terrorism, which have most often been aimed at nationals or assets abroad rather than at the territory of the state being targeted. A right to use force to protect nationals abroad had become recognised in state practice prior to 1945.¹³¹ After 1945, several states, including the USA, UK, France, Belgium and Israel, have continued to invoke such a right as a matter of self-defence.

First, this right has been relied on to justify the forcible rescue of nationals imperilled in failed states (e.g. Belgium in the Congo, 1960; the USA in the Dominican Republic, 1965) or taken hostage by terrorists (e.g. Israel in Uganda, 1976; the USA in Iran, 1980) in situations where the state responsible was unwilling or unable to protect them. In such cases, the necessity of rescue is evident. Provided the operation is strictly limited to rescuing the state's own nationals, it is therefore regarded by many as a lawful exercise of the right of self-defence; if not formally legal, most states have at least refrained from condemning such limited actions.

Second, the right has been relied on to justify a forcible response to armed attacks against nationals or assets abroad for the purpose of deterring/preventing further such attacks, whether in case of a state attack (e.g. the USA against Iran, 1987-88) or a terrorist attack, directing the response against the terrorists as well as the state allegedly harbouring them (e.g. the USA against Libya, 1986; the USA against Iraq, 1993; the USA against Afghanistan and Sudan, 1998). Such forcible responses have provoked controversy due to the delicate issue of distinguishing lawful self-defence from unlawful reprisals (see Section 4.2).

The International Court of Justice in the *Tehran Hostages Case* referred to the taking of hostages on the US Embassy in Tehran as an "armed attack".¹³² In the *Oil Platforms Case* concerning attacks on a US warship and a US tanker in the Persian Gulf allegedly conducted by Iran, the Court seems implicitly to recognise that, in principle, an armed attack against a merchant ship may in itself trigger the right of self-defence.¹³³

The Security Council in 1992, in condemning the terrorist act of 1988 at Lockerbie, which destroyed a civilian aircraft, and the conspiracy of Libya, while not explicitly referring to self-defence, affirmed “the right of all States, in accordance with the Charter of the United Nations and relevant principles of international law, to protect their nationals from acts of international terrorism that constitute threats to international peace and security”.¹³⁴

In conclusion, the right of self-defence applies not only in the case of an armed attack against a state’s territory or armed forces, but presumably also in the case of armed attacks on its nationals and assets abroad. In any event, necessary and proportional action to protect nationals and assets abroad is likely to be considered justified by most states.¹³⁵

3. Source of the threat: attack by or from a state

Responding to attacks by regular state forces is at the core of the right of self-defence. A controversial issue, and crucial in the context of international terrorism, is the extent to which the right of self-defence also extends to attacks conducted by non-state actors.

3.1. Direct state attack: a state attack with regular armed forces

The traditional armed attack involves the use of a state’s regular armed forces against another state, whether in the form of an invasion and subsequent occupation or annexation, bombardment or other substantial use of force against its territory, a blockade of its ports and coasts, or an attack on its land, sea or air forces. The Iraqi invasion of Kuwait in 1990 is an example of such a classic armed attack in the form of an invasion.

3.2. Indirect state attack: a state supporting attacks by non-state actors

Although direct armed attacks with regular forces still occur, indirect forms of state attack have become more common, bringing into focus the question of the level of state involvement required to make the attack imputable to the state.

Infiltration of armed bands, irregulars etc.

State infiltration of irregulars etc. into the territory of another state was a common phenomenon during the Cold War, and continues to be used today in many parts of the world.

The 1974 *Definition of Aggression* recognises that military action carried out by irregulars etc. on the territory of another state may amount to aggression on the part of the state who sent them. Article 3(g) includes under the definition of aggression:

The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to [an act of aggression], or its substantial involvement therein.

The International Court of Justice in the Nicaragua Case, recognising the 1974 *Definition of Aggression* as reflecting customary international law, made the natural inference from its Article 3(g) that an armed attack conducted by irregulars etc. triggers the right of self-defence of the victim state, if “substantial involvement” by another state can be shown.¹³⁶ In the Court’s view, this formula did not include in the concept of an armed attack the mere assistance to rebels in the form of provision of weapons, logistical or other support.¹³⁷

The Court’s definition of armed attack in the form of infiltration¹³⁸ has been criticised by some as being too narrow, including Judge Jennings dissenting in the Nicaragua Case, questioning whether, by applying the Court’s standard, any state involvement short of direct attack by regular forces may trigger the right of self-defence.¹³⁹

Support of or acquiescence in territory being used as a base for attacks by non-state actors

As regards self-defence against international terrorism, a crucial issue involves states sponsoring or tolerating international terrorist organisations operating from their territory.

The 1974 *Definition of Aggression* recognises that a state allowing its territory to be used by another state to carry out acts of aggression against a third state will be complicit in that act of aggression. Article 3(f) includes under the definition of aggression:

The action of a State in allowing its territory, which it has placed at the disposal of

another State, to be used by that other State for perpetrating an act of aggression against a third State.

As regards the harbouring of non-state actors, including terrorist organisations, whereas the 1974 *Definition of Aggression* is silent, the 1970 *Declaration on Friendly Relations*¹⁴⁰ on the prohibition on the use of force states that:

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

Here states have a duty to protect other states from acts of terrorism emanating from its territory. Furthermore, the natural inference of this statement is that the right of self-defence applies against the acquiescing state, provided that the terrorist acts resulting from the activities it is harbouring amount to an armed attack on another state. This, however, would lower the threshold of the acquiescing state's complicity as defined by the 1974 *Definition of Aggression* and the International Court of Justice, since, clearly, a state's harbouring of or acquiescence in terrorist activities does not equal "substantial involvement".

State practice prior to 11 September 2001

In state practice, the right of self-defence has been invoked in numerous cases in the fight against international terrorism. No one has done this as consistently as Israel in its fight against Palestinian terrorism allegedly sponsored by its Arab neighbours, though on many occasions Israel's conduct has been condemned in the Security Council. However, the political context of Israel's actions is quite unique, and in many cases the lawfulness of Israel's response could be questioned because many of these terrorist acts originated in territory occupied by Israel.¹⁴¹ Furthermore, it has often been unclear whether Israel was condemned because of insufficient evidence of state involvement or because the counter-force used was considered an unlawful reprisal (see also Section 4.1.2) or simply disproportionate in scale.¹⁴²

The USA has invoked a right of self-defence against state-sponsored

terrorism prior to 11 September 2001, in circumstances warranting closer attention:

USA – Libya 1986. On 5 April 1986 a bomb exploded in a discotheque in Berlin, killing one US soldier and wounding many others. This terrorist act was believed to be part of a campaign of Libyan state-sponsored terrorism headed by the Libyan leader Colonel Gadhafi. As a response, on 14 April 1986 the US launched air strikes against several targets in Libya, including Tripoli, killing 37 people, mostly civilians. In a letter to the Security Council, the US invoked the right of self-defence by referring to “an ongoing pattern of attacks by the Government of Libya” and the need to deter future terrorist attacks.¹⁴³ In the Security Council, most states rejected the US response as disproportionate, but the US, UK and France joined to veto a motion of condemnation.¹⁴⁴ The US action was condemned in the General Assembly by 79 votes to 28, with 51 abstaining.¹⁴⁵

USA – Iraq 1993. The Iraqi leadership had allegedly given orders to the Iraqi intelligence service for the assassination of US President Bush Senior by way of a terrorist act to take place on 14 April 1993, an attempt which, however, failed. As a response, on 26 June 1993 the US carried out a missile attack against the headquarters of the Iraqi intelligence service in Baghdad. In a letter to the Security Council, the US invoked Article 51 in stating among others that: “as a last resort, the United States has decided that it is necessary to respond to the attempted attack and the threat of further attacks by striking at an Iraqi military and intelligence target that is involved in such attacks”.¹⁴⁶ In the Security Council, the US action met with widespread support and understanding; the UK and Russia explicitly supported the legality of the action, and only China explicitly condemned it.¹⁴⁷

USA – Afghanistan and Sudan 1998. On 7 August 1998 the US embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, were the targets of terrorist attacks, killing almost 300 people, including 12 US citizens, and injuring thousands. The terrorist attacks were strongly condemned by the Security Council, which called for the perpetrators to be brought swiftly to justice.¹⁴⁸ In response, on 20 August 1998 the US fired cruise missiles against “terror facilities” believed to be connected with the

attacks, namely a paramilitary training camp in Afghanistan belonging to the terrorist organisation Al Qaeda, which was allegedly responsible for the attacks, and a chemical plant in Sudan, which was allegedly being used to produce chemical weapons to be used in terrorist attacks.¹⁴⁹ The US invoked Article 51, referring to the need to prevent and deter further attacks: “These attacks were carried out only after repeated efforts to convince the Government of Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the Bin Laden organisation. That organisation has issued a series of blatant warnings that “strikes will continue everywhere” against American targets, and we have convincing evidence that further such attacks were in preparation from these same terrorist facilities. The United States, therefore, had no choice but to use armed force to prevent these attacks from continuing”.¹⁵⁰ The US action was condemned by the Non-Aligned Movement, some Arab states and Russia. The UK and France recognised the right of self-defence, whereas others who expressed support of the US did not explicitly adopt the US justification of self-defence.¹⁵¹

USA and Others in Afghanistan 2001

On 11 September 2001 an unprecedented terrorist attack was directed against the USA. Foreign terrorists hi-jacked civilian aircraft and used them as fuelled bombs against the World Trade Center in New York City, and the Pentagon in Washington D.C., killing more than 3,000 people, mostly civilians, including the nationals of 81 countries, and destroying property worth billions of dollars. The world was shocked and appalled by the tragedy.

Evidence pointed in the direction of Al Qaeda as being responsible for the attacks, a terrorist organisation headed by Usama Bin Laden and operating from Afghanistan with the agreement and support of the Taliban regime (the de facto government of Afghanistan). President Bush vowed to attack Afghanistan if its authorities failed to close down Al Qaeda’s terrorist camps and extradite its leaders. These US demands were rejected by the Taliban.

The US Congress, referring to the right of self-defence, authorised President Bush to use all necessary force against the perpetrators of the attacks and those who harboured them in order to prevent any further acts of international terrorism against the United States.¹⁵²

The Security Council, in Resolution 1368 of 12 September 2001, unanimously and for the first time recognised the right of self-defence in response to terrorist attacks,¹⁵³ while also indicating that state complicity in the form of support and harbouring was involved:

*The Security Council,
Reaffirming the principles and purposes of the Charter of the United Nations,
Determined to combat by all means threats to international peace and security
caused by terrorist acts,
Recognizing the inherent right of individual or collective self-defence in accordance with the Charter,*

1. *Unequivocally condemns in the strongest terms the horrifying terrorist attacks on 11 September 2001 in New York, Washington D.C. and Pennsylvania and regards such acts, like any act of international terrorism, as a threat to international peace and security*
2. (...)
3. *Calls on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable.*

NATO, on 12 September 2001, for the first time in its existence, invoked Article 5 of the Washington Treaty, the “Musketeer Oath” of collective self-defence, on one condition only: that it be determined that the 11 September terrorist attack against the USA had been directed from abroad:

*The Council agreed that if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all.*¹⁵⁴

Against this background, on 7 October 2001 the US initiated Operation Enduring Freedom in Afghanistan, with support from the UK as well as other NATO allies, including Denmark. On the same day, the US and UK reported the operation to the Security Council, invoking Article 51 and stating the purpose of the operation. The US stated among others:

The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organisation have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organisation as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organisation continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad.

In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan. In carrying out these actions, the United States is committed to minimizing civilian casualties and damage to civilian property.¹⁵⁵

The UK, along the same line, stated among other things that:

forces have now been employed in exercise of the inherent right of individual and collective self-defence following the terrorist outrage of 11 September 2001, to avert the continuing threat of attacks from the same source.... Usama Bin Laden and his Al-Qaeda terrorist organisation have the capability to execute major terrorist attacks, claimed credit for past attacks on United States targets, and have been engaged in a concerted campaign against United States and its allies. One of their stated aims is the murder of United States citizens and attacks on the allies of the United States.

This military action...is directed against Usama Bin Laden's Al-Qaeda terrorist organisation and the Taliban regime that is supporting it. Targets have been selected with extreme care to minimize the risk to civilians.¹⁵⁶

Operation Enduring Freedom was an extensive military operation involving months of air bombings and a massive presence of troops on the ground. The operation led to the fall of the Taliban regime and the installation of a new provisional government in Afghanistan. Throughout, there has generally been broad international support for the operation.

The fact that the Taliban regime was forcibly removed from power

is noticeable. In previous cases, states supporting terrorism were merely deterred by force. The drastic step of violently overthrowing a government would traditionally be regarded as exceeding proportionate self-defence to deter a state from continuing to harbour terrorists.¹⁵⁷ The question is thus whether, in these particular circumstances, the right of self-defence also extended to the forcible removal of the Taliban regime. Security Council Resolution 1368 (2001) stressed in ambiguous terms that “those responsible for aiding, supporting or harbouring the perpetrators, organisers and sponsors of these acts will be held accountable”. However, the letters from the USA and UK to the Security Council clearly indicated that the military operation would also be directed against the Taliban regime. While not explicitly setting out the aim of forcibly removing the Taliban from power, there is no doubt that this was an explicit objective of the USA, whereas the UK officially recognised regime change only as a possible and legitimate consequence of military action.¹⁵⁸ In any event, the Taliban was overthrown as a result of the military operation in Afghanistan, and there was (almost) no international objection to this outcome. This would suggest that, in these particular circumstances, the forcible removal of a foreign regime was regarded as a necessary and proportionate measure of self-defence. There had been close and long-standing ties between the Taliban and Al Qaeda, and the Taliban had for years ignored international condemnation of its policy¹⁵⁹ and had apparently been unaffected by efforts of deterrence.¹⁶⁰ Furthermore, the status of the Taliban as a *de facto* government, not internationally recognised as the legitimate government of Afghanistan and isolated in the international community, might well have promoted international acceptance of its forcible removal.

Assessment

Prior to 11 September 2001, the right of self-defence against attacks by non-state actors, including terrorist attacks, was only clearly established in the case of “substantial” state involvement in the attack.¹⁶¹ However, some saw in state practice a tendency to allow self-defence against states that were merely harbouring or tolerating terrorist activities on their territory.¹⁶²

The question is whether events following 11 September 2001 have lowered the threshold of self-defence against complicit states from “substantial” state involvement to a mere requirement of “harbouring”

of or even just “acquiescence” in terrorist activities. Security Council Resolution 1368 (2001) is subject to various interpretations in this respect. Interpreted narrowly, the established threshold of substantial state involvement has not been lowered, since the Taliban in fact met this threshold.¹⁶³ Interpreted more broadly, the threshold has been lowered to harbouring terrorist activities.¹⁶⁴ Both the wording and background to the adoption of Resolution 1368,¹⁶⁵ the formal US and UK justifications of Operation Enduring Freedom in letters to the Security Council and the broad international support for that operation suggest the broad interpretation.

In conclusion, events after 11 September 2001 have presumably affirmed that the right of self-defence applies against states harbouring terrorists who are responsible for attacks against another state. Furthermore, it can be argued that measures of self-defence in such cases may exceptionally also include the forcible removal of the complicit regime, if, as in the case of the Taliban, in the particular circumstances, this is the only means of preventing further terrorist attacks.

3.3. Private attack: attack by non-state actors without state involvement

A controversial issue is whether the right of self-defence may also extend to purely private armed attacks conducted or directed from the territory of another state, but without any support or acquiescence from the host state.¹⁶⁶

Although Article 51 does not limit the right of self-defence to armed attacks by another state, state attack was undoubtedly what was being considered when Article 51 was written,¹⁶⁷ and it has also been the focus of subsequent declarations, including the 1974 *Definition of Aggression*, which only refers to various forms of direct and indirect aggression by states. Therefore, the position that the right of self-defence also extends to purely private armed attacks, including terrorist attacks,¹⁶⁸ has been and remains controversial.¹⁶⁹

State practice prior to 11 September 2001

State practice includes only a few cases where the right of self-defence was invoked in response to armed incursion or terrorist acts emanating from a state which did not support the activities being conducted from its territory, but was unable to prevent the attacks:

Caroline. The classic Caroline incident, mentioned earlier, concerned purely private attacks. The British Government relied on a right of self-defence to respond to cross-border attacks by private US citizens joining in the armed Canadian rebellion against British rule, without the US government being able to prevent them from doing so.¹⁷⁰

Turkey and Iran in Iraq 1995-96. In response to continuing cross-border attacks by Kurdish terrorist groups (the PKK) based in northern Iraq, Turkey and Iran both conducted military operations against Kurdish positions, Iran expressly invoking the right of self-defence. Neither Turkey nor Iran blamed the government of Iraq, which in no way supported the Kurdish attacks, but was unable to exercise authority in the north of the country because of the no-fly zone imposed on Iraq by the USA and others in order to create a safe Kurdish haven from Iraqi oppression. The Iraqi complaint of Turkish aggression was not addressed in the United Nations. The Arab League condemned Turkey, whereas the USA expressed support.¹⁷¹

USA in Afghanistan 2001

As indicated above, the terrorist attacks against the USA on 11 September 2001 was a case of armed attack supported by a state, the Taliban regime in Afghanistan. However, it may be argued that the international reaction to 11 September supports the view that even purely private terrorist attacks without any state involvement may trigger the right of self-defence:

Security Council Resolution 1368 (2001), in recognising the right of self-defence in response to the terrorist attacks (preamble and para. 1), does not make that recognition conditional on Taliban complicity, although it subsequently indicates that this existed (para. 3). NATO's response subjects the invocation of collective self-defence to the condition only that the armed attack "was directed from abroad".

Assessment

It is not clear why self-defence must be restricted to armed attacks in which a state is involved. Thus, even in 1992, the Security Council,¹⁷² in condemning the terrorist act at Lockerbie in 1988 and the conspiracy of Libya in that attack, although not explicitly endorsing a right of self-defence against private terrorism, stated its deep concern with

the world-wide persistence of acts of international terrorism in all its forms, including those in which States are directly or indirectly involved, which endanger or take innocent lives, have a deleterious effect on international relations and jeopardize the security of States... [and affirmed] the right of all States, in accordance with the Charter of the United Nations and relevant principles of international law, to protect their nationals from acts of international terrorism that constitute threats to international peace and security.

After 11 September 2001, some still reject the notion that purely private terrorist attacks may trigger the right of self-defence, including the International Court of Justice, which, in its advisory opinion on the West Bank Wall, stated that Article 51 only applies “in the case of an armed attack by one State against another State”.¹⁷³ Others express uncertainty in the light of post-September 11 events,¹⁷⁴ whereas others find that Security Council Resolution 1368 and NATO’s response have affirmed that the right of self-defence applies to any armed attack against a state, including terrorist attacks, even in the absence of any state involvement.¹⁷⁵ It may thus be argued that the right of self-defence also applies to purely private attacks.

However, in the absence of any state involvement, defensive use of force by the victim state will in most cases be unnecessary, since, presumably, the state that is unwillingly hosting the terrorists responsible for the attack will itself act promptly against them. Self-defence against purely private attacks will only be relevant if the host state is unwilling or unable to eliminate the threat of further attacks effectively.¹⁷⁶ Furthermore, if the host state was not involved in the attack, the principles of necessity and proportionality require that the defensive use of force be directed exclusively against the terrorists responsible for the attack, not against the state unwillingly hosting them; the host state, for its part, must accept the limited violation of its territorial integrity that this requires.¹⁷⁷

4. Actuality of the threat: actual, imminent or potential future attack?

When an attack occurs, one important issue is whether the right of self-defence may also apply after the attack has been completed. A further crucial issue is whether and to what extent the right of self-defence may

also apply even prior to the actual initiation of an attack; there may be several stages at which the threat of a future attack appears more or less imminent and the eventual attack more or less certain, from situations where an attack is manifestly underway and will take place within hours, through situations where an attack seems highly likely within days, to situations where an attack seems probable sometime in the future.

4.1. Ongoing or completed attack: “reactive self-defence”

The core of self-defence is the right to respond to an armed attack which has already been launched (Article 51). However, in terms of the need to resort to force, it makes a big difference whether the attack is still ongoing or has already been completed.

4.1.1. Ongoing attack: obvious necessity of a forcible response

No one questions the right of a state to use force in self-defence against an actual and ongoing armed attack against it (Article 51). This classic right of self-defence against an ongoing attack continues to apply where the armed attack takes the form of an invasion leading to the occupation or annexation of another state.

In the case of an ongoing armed attack, there is normally no question of whether the use of force is necessary to respond to it. The right of self-defence includes the use of military force necessary and proportionate to halt and repel the attack. In this case, the requirement of necessity would seem to override the requirement of proportionality, since, presumably, what is necessary to halt and repel the armed attack will also be deemed proportionate. Self-defence against a massive ongoing attack may thus necessitate the waging of an all-out-war, ultimately resulting in the forcible removal of the aggressive regime.¹⁷⁸

Iraq’s invasion of Kuwait in 1990 illustrates the classic invocation of the right of self-defence. After Iraq had successfully invaded and annexed Kuwait, the Security Council, having already condemned the invasion, affirmed in Resolution 661 “the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter”.¹⁷⁹ In early 1991 an international coalition assisted Kuwait in forcing Iraq out of Kuwait, thus reestablishing the *status quo ex ante*.¹⁸⁰

4.1.2. Completed attack: punishment or necessary prevention/deterrence?

On the one hand, it would arguably defy common sense for a state which is the victim of (continuous) pin-prick attacks not to be allowed to respond by military force against the aggressor to prevent further attacks. Notably, this would often leave a state that was the victim of terrorist attacks defenceless in terms of military force. On the other hand, when an armed attack has been completed, the necessity of self-defence is less obvious,¹⁸¹ and in any event involves different standards than in the acute circumstances of an ongoing attack. Thus, the use of force in response to a completed armed attack brings into focus the crucial but difficult distinction between lawful self-defence and unlawful reprisals.

Article 51 does not provide much guidance, stating only that the right of self-defence applies “if an armed attack occurs”. Indeed, this could be interpreted as prohibiting as well as permitting the use of force against an armed attack which has already occurred.

The International Court of Justice seems to recognise that, in principle, the right of self-defence may also apply *after* an armed attack has occurred. In the *Nicaragua Case*, the Court stated that “the right of collective self-defence presupposes that an armed attack has occurred”.¹⁸² In the *Oil Platforms Case*, the USA had destroyed Iranian oil platforms in response to previous attacks on US ships. The Court did not reject the US invocation of self-defence on the basis that the attacks against the United States had already occurred. On the contrary, it stated that, “in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that attacks had been made upon it for which Iran was responsible”.¹⁸³

The crucial question is one of necessity. When there is no longer an actual attack to repel, how can it be argued that the use of force in self-defence is, nevertheless, necessary? Certainly, it would not suffice to invoke the necessity of equalising the harm done to the victim state by a proportional response against the aggressor, although such an argument involving revenge may correspond to a basic human instinct. In the past, the use of force often took the form of reprisals in response to a breach of international law. However, the overriding concern of the UN Charter is to maintain peace, not to enforce justice.¹⁸⁴

Consequently, current international law prohibits, without exception, reprisals involving the use of force. This is emphatically spelled out in the 1970 *Declaration on Friendly Relations* interpreting the prohibition on the use of force: “States have a duty to refrain from reprisals involving the use of force”.¹⁸⁵ This view is supported by the International Court of Justice,¹⁸⁶ the International Law Commission,¹⁸⁷ the great majority of legal scholars,¹⁸⁸ and also by the practice of the Security Council (notably, but not exclusively, relating to Israel).¹⁸⁹ The delicate question is where to draw the line between self-defence and reprisals.¹⁹⁰

If there is to be room for the use of force in self-defence as a response to an armed attack that has already occurred, it must be justified by the necessity of preventing or deterring likely further attacks in the (near) future, the previous armed attack being only relevant as (insufficient) evidence of the existence of a continuing threat of future attacks. The crucial point to arguably distinguish lawful post-attack self-defence from unlawful reprisals has nowhere been more aptly stated than by the British Foreign Office in a report from 1839 justifying the already mentioned Caroline incident:

*the grounds on which we consider the conduct of the British Authorities to be justified is that it was absolutely necessary as a measure of precaution for the future and not as a measure of retaliation for the past. What had been done previously is only important as affording irresistible evidence of what would occur afterwards.*¹⁹¹

Thus, the minimum requirement of post-attack self-defence is that it must be future-oriented, its necessity depending on convincing evidence of a continuing threat of further attacks.¹⁹² To show urgency, the response must come within a reasonable time after the original attack.¹⁹³ As regards the purpose of post-attack self-defence, there may be some difference between responding to a state attack and to attacks by non-state actors, including terrorist groups.

Deterrence of further state attacks

In case of a completed attack by another state, the necessity of self-defence is clearly absent should the aggressor state excuse the attack and offer reparation.¹⁹⁴ On the other hand, if evidence suggests a continuing threat of further attacks, a necessity of self-defence arguably exists.

However, self-defence against an aggressor state actually to prevent

the threat of future attacks by eliminating its capacity to strike again requires the use of force on a scale which would be considered by many as disproportionate to the original attack,¹⁹⁵ although arguably not to the threat. Therefore, although actual prevention is more easily compatible with a necessity of self-defence than deterrence, which has the colour of a reprisal, a limited response to deter further attacks may be deemed an acceptable alternative.¹⁹⁶ In the case of such deterrence, proportionality becomes essential. The deterrent response must be carefully calibrated to be proportionate to the original attack.¹⁹⁷

Statements by the International Court of Justice in the *Nicaragua* and *Oil Platforms* cases seem to support the view that post-attack self-defence in response to state attacks may in principle be lawful¹⁹⁸ even for the purpose of deterring further attacks, provided that 1) the need to use force in self-defence is based on a risk of further attacks;¹⁹⁹ 2) options for eliminating that risk by peaceful means have been exhausted;²⁰⁰ 3) the use of force is proportionate in scale and effects to the previous attacks;²⁰¹ and 4) there is a causal link between the target of self-defence and the (risk of further) attacks.²⁰²

Prevention of further terrorist attacks

As mentioned earlier, it has been recognised that the right of self-defence also applies to terrorist attacks, arguably even in the absence of state involvement in them (see above Section 3.2-3.3). Terrorist attacks most often take the form of pin-prick assaults leaving the victim state unable to repel the actual attack. In addition, experience shows that terrorists are likely to strike again. Therefore, if a terrorist attack has already occurred, the right of self-defence to prevent likely further attacks becomes crucial. In the case of terrorist attacks as opposed to state attacks, the obvious purpose of post-attack self-defence is actually to prevent future attacks, rather than merely deter them, by eliminating the threat through targeted action against the terrorists responsible.²⁰³ In case of state complicity in the terrorist attacks, a deterrent use of force against that state may also be relevant.

In state practice, the classic Caroline incident, mentioned earlier, concerning the use of force in response to private attacks from abroad was justified as self-defence to prevent further attacks. Israel has consistently relied on the right of self-defence to respond to terrorist attacks. These actions have often been condemned in the Security Council, on

occasion with explicit reference to the unlawfulness of forcible reprisals.²⁰⁴ As stated earlier, the political context in Israel is unique and the legal issues complex. However, there are other cases, mentioned earlier (see Section 3.2-3.3), where the right of self-defence has been invoked to justify a post-attack military response to terrorist acts, including the USA in Libya (1986), the USA in Iraq (1993), Turkey and Iran in Iraq (1995-96), and the USA in Afghanistan and Sudan (1998). These instances were not met with international condemnation, but rather with sympathy, when the response was deemed necessary and proportionate. Prior to 11 September 2001 the legal implications of this state practice were controversial. Some writers saw it as merely confirming settled law conferring on victim states a right of post-attack self-defence provided the primary purpose is deterrence or prevention of further attacks.²⁰⁵ Others regarded it as basically incompatible with the principle of necessity and the prohibition of forcible reprisals, while recognising that in some instances such actions had received widespread international understanding.²⁰⁶ In between was the view that state practice showed increasing international tolerance for forcible countermeasures against international terrorism, possibly reflecting an emerging recognition of its lawfulness as self-defence.²⁰⁷

Security Council Resolution 1368 (see above Section 3.2), which unanimously condemned the terrorist attacks of 11 September 2001 and recognised the right of self-defence, has unequivocally affirmed that the right of self-defence includes the use of the force required to respond to previous terrorist attacks. Resolution 1368, when referring to “threats to international peace and security caused by terrorist acts”, clearly indicates that the right of self-defence is conditioned upon the existence of an ongoing threat of further attacks. The letters from the USA and UK to the Security Council invoking Article 51 justify the use of military force in Afghanistan accordingly. The US letter referred to an “ongoing threat to the United States and its nationals” and stated the purpose of the action as being to “prevent and deter further attacks on the United States”,²⁰⁸ while the UK letter stated that the purpose of self-defence is “to avert the continuing threat of attacks from the same source”.²⁰⁹

Assessment

The unanimous Security Council Resolution 1368 (2001) and subsequent events, notably the US and UK justifications of Operation

Enduring Freedom in Afghanistan, the course of this operation and the general international support for it, have clearly affirmed that the right of self-defence includes the use of force in response to previous terrorist attacks if this is necessary to prevent or deter likely further attacks from the same source. The right of self-defence thus depends on a continuing threat of further attacks from the terrorists responsible and on the host state being unwilling or unable to eliminate that threat. In such circumstances the right of self-defence includes measures necessary to eliminate, if possible, the terrorist threat, including preventing or deterring any state supporting or harbouring the terrorists from continuing to do so.

4.2. Imminent (threat of) attack: “anticipatory self-defence”

In legal doctrine on self-defence, no issue has attracted more controversy than the question of whether the use of force to counter an imminent threat of armed attack continues to be lawful – so called anticipatory self-defence. Presumably, anticipatory self-defence will be relevant, notably where a state is preparing a regular attack against another state, as indicated by extraordinary troop movements, the fuelling of missiles etc., and possibly combined with official threats, whereas terrorists tend to strike without warning of time and place, their preparations for attack presumably most often being “invisible” until it is too late.

As mentioned earlier (Section 1.1), customary international law prior to 1945 recognised a right of anticipatory self-defence against an imminent threat of attack,²¹⁰ based on the formula of the leading *Caroline Case*²¹¹ that there be “a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation”.

The controversial issue is whether this customary right of anticipatory self-defence survived the adoption of the UN Charter, which stipulates a general prohibition on the use of force between states in Article 2(4). Article 51, however, preserves the right of self-defence, while stating its scope in somewhat ambiguous terms: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs...”. The opening phrase, “nothing in the present Charter shall impair the inherent right of self-defence”, when read in isolation, suggests that Article 51 did not remove the customary right of self-defence, but it provides further that the right of self-defence applies “if an armed attack occurs”.²¹²

Some scholars find that Article 51 did not terminate the customary right of anticipatory self-defence, holding that the reference to an actual armed attack is not decisive in this context, the primary purpose of the Article being to establish a right of collective self-defence and determine the relationship between self-defence and collective security, not to narrow the scope of self-defence in other respects.²¹³ A statement in the *travaux préparatoires*, by the committee in San Francisco dealing with the provision on the prohibition on the use of force (Article 2(4)), according to which “the use of arms in legitimate self-defence remains admitted and unimpaired”,²¹⁴ is said to support this view.²¹⁵

Other scholars argue that Article 51 has narrowed the customary right of self-defence, since according to its wording – and in accordance with the overall purpose of the UN Charter to restrict any unilateral use of force – it allows a resort to self-defence only in cases of actual armed attack.²¹⁶

It would seem unlikely that the words “if an armed attack occurs” were added by the committee dealing with the right of self-defence (Article 51) out of mere accident or lack of thought for the consequences.²¹⁷ Indeed, evidence shows that the wording of Article 51 was deliberately chosen to exclude anticipatory self-defence, on the initiative of the USA.²¹⁸

Even if the wording and history of Article 51 would seem to exclude anticipatory self-defence, it cannot be denied that powerful arguments from necessity and common sense speak in its favour, not least in light of the destructive power of modern weaponry, including weapons of mass destruction (WMD), which arguably makes it not only unrealistic but also unreasonable to require that a state faced with an imminent threat of attack should remain idle until the attack has been launched. As Bowett aptly suggests: “No state can be expected to await an initial attack which, in the present state of armaments, may well destroy the state’s capacity for further resistance and so jeopardize its very existence”.²¹⁹

The High-level Panel also recognises the continued legality of anticipatory self-defence: “a threatened state, according to long established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate”.²²⁰ The UN Secretary General, Kofi Annan, has adopted the view of the High-level Panel.²²¹

State practice

In any event, the wording of Article 51 could not exclude state practice after 1945 from affirming the continuance of anticipatory self-defence as a customary right. Some states have explicitly supported such a right, including the USA, UK, Israel, Canada, Japan and Iraq.²²² However, formal invocations of anticipatory self-defence have been rare, states apparently preferring to rely on a broad interpretation of the term “armed attack” in Article 51.²²³

USA – Soviet Union/Cuba, 1962 (The Cuban Missile Crisis). On 22 October 1962, the USA imposed a naval “quarantine” on Cuba to compel the removal of secretly deployed Soviet missiles on the island, which were said to pose an imminent threat to US security. However, the USA did not invoke a right of anticipatory self-defence under Article 51. In any event, since the US quarantine was actually a case of preventive action, it will be dealt with below (Section 4.3).

Israel – Egypt, Jordan and Syria, 1967 (The Six Day War). Israel’s successful military action in early June 1967 to pre-empt an apparent imminent Arab invasion is regarded by many as the textbook example of anticipatory self-defence. However, Israel formally (although according to most scholars unconvincingly²²⁴) relied on self-defence against an actual armed attack, characterising the previous blockade by Egypt of the Tiran Strait as in itself an act of war and further claiming that its Arab neighbours had in fact attacked first.²²⁵ Although Israel therefore did not formally invoke anticipatory self-defence, it was nevertheless the imminent danger of extinction facing Israel due to the military build-up on the Arab side, combined with statements by Egypt’s President Nasser, that Israel should be destroyed, and the recent withdrawal of the UN emergency force which dominated the Israeli statement in the Security Council.²²⁶ Once the war had erupted, the Security Council called for an immediate ceasefire, without condemning either party,²²⁷ a Soviet proposal to condemn Israel gathering only four votes. In the General Assembly, while some states rejected a right of anticipatory self-defence, others supported Israel’s actions; no condemnation resulted.²²⁸

The Six Day War

On 18 May 1967 Egypt (UAR) requested the UN Secretary General to withdraw the UN emergency force which had served as a buffer between Israel and Egypt since the war of 1956. On the withdrawal of UN forces, Egypt immediately occupied the former buffer zone and declared the Gulf of Aqaba and the Strait of Tiran closed to Israeli shipping. At the same time Palestinian irregular forces increased infiltration along the border between Israel and Syria. Egypt's President Nasser declared that Israel should be destroyed, and similar statements were made by other Arab leaders. A massive Arab invasion of Israel seemed imminent. On June 5 both Israel and Egypt informed the Security Council that they had been the victim of an armed attack by the other. On June 6, Israeli military aircraft bombed airbases in Egypt, Jordan and Syria, destroying in a swift action almost the entire air strike capability of its neighbours. The ensuing Arab attack was therefore quickly repelled by Israel, who forced the enemy to retreat and occupied parts of enemy territory on 7 June. In the days that followed cease-fire agreements were negotiated. A formal peace was not concluded until 1979 between Israel and Egypt or until 1994 between Israel and Jordan. Technically, Israel and Syria are still in a state of war today.

Iraq – Iran (1980). In 1980 Iraq invaded Iran, first invoking a right of anticipatory self-defence, with allegations that Iran was preparing to invade Iraq, but quickly shifting position by invoking self-defence against a prior armed attack by Iran. Iraq was not condemned in the UN at the time.²²⁹ However, in a 1991 report the UN Secretary General concluded that Iraq had initiated the war in contravention of international law.²³⁰

Israel – Iraq, 1981 (Osirak). Israel explicitly relied on a right of anticipatory self-defence to justify its targeted military action against Iraq in destroying the Osirak-type nuclear reactor, which Israel suspected had been built to develop nuclear weapons for use against Israel. Israel's action was unanimously condemned in the Security Council.²³¹

However, since this is, in substance, an example of preventive action, it will be dealt with below (Section 4.3)

Assessment

A right of anticipatory self-defence in response to an imminent threat of attack was long established in customary international law prior to 1945. However, the wording of and background to Article 51 of the UN Charter and the fact that such a right has only been invoked rarely since 1945 and has been explicitly supported by only a few states makes the current status of the doctrine controversial.²³² In the 1986 *Nicaragua Case* the International Court of Justice explicitly refrained from taking a stand on the continued lawfulness of anticipatory self-defence under customary international law.²³³ It remains to be seen whether events following 11 September 2001, which affirmed a right of post-attack self-defence to prevent further likely attacks (see Section 4.1.2), may also have increased international acceptance of a right of anticipatory self-defence, even in the absence of previous attacks. The doctrine of anticipatory action may evidently be subject to abuse. At the same time, given compelling evidence of a truly imminent threat against a state (the Caroline formula), that state cannot reasonably be expected to remain idle. In such cases it is to be presumed that most states, if not recognising anticipatory action as a lawful exercise of self-defence, will at least accept it as justified on moral and political grounds, the imminent threat of attack constituting extenuating circumstances mitigating the formal breach of international law.²³⁴

The concept of an “imminent threat of attack” and the underlying Caroline formula requiring a “necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation” holds some limited room for discretion and flexibility, including taking into account the nature of the new threats. However, even where a potential attack would have grave consequences, the requirement of imminence cannot be ignored.²³⁵ To justify anticipatory action, the threat of attack must not only be real, e.g. actual possession by a state of WMD, combined with evidence of that state’s hostile intent directed against (a) specific state(s).²³⁶ At least as regards state threats, there must also be factual evidence that the attack is imminent, whereas as regards terrorist threats, which by their nature materialise without prior warning and against which other measures of prevention appear

useless in advance, the mere existence of a credible threat directed against (a) specific state(s) may arguably be considered an imminent threat of attack.

4.3. Potential future (threat of) attack: “preventive self-defence”?

Whereas a right of anticipatory self-defence against an imminent threat of attack, although controversial, may reasonably be invoked, it has generally been agreed that the right of self-defence does not include the use of force to counter potential future threats, especially in the absence of previous attacks or of an imminent threat of attack – so-called *preventive action*.

The Caroline formula of anticipatory self-defence clearly does not cover such preventive military action. The Nuremberg Military Tribunal, in its judgment of 1946 on war crimes committed by members of the German Nazi regime, rejected the defence that Germany’s invasion of (neutral) Norway was justified as preventive self-defence in order to forestall an Allied invasion. Finding on the facts that, at the most, the purpose of the German attack was possibly to “prevent an Allied occupation at some future date”, the Tribunal stated, quoting directly from the Caroline formula: “It must be remembered that preventive action in foreign territory is justified only in cases of “an instant and overwhelming necessity for self-defence, leaving no choice of means and no moment for deliberation” (The *Caroline Case*, ...)”.²³⁷ Equally, legal doctrine, if even considering the option, has rejected preventive action as having no legal basis in current international law.²³⁸

State practice

State practice after 1945 contains only a few instances of military force that might arguably be labelled preventive military action:

USA – Soviet Union/Cuba, 1962 (The Cuban Missile Crisis). On 22 October 1962 the USA imposed a naval “quarantine” on Cuba to compel the removal of secretly deployed Soviet missiles, arguing that they posed an imminent threat to US security. However, the USA did not invoke a right of preventive self-defence under Article 51, but relied on regional peace-keeping (under the Inter-American Treaty of Reciprocal Assist-

ance of 1947) in accordance with Article 52.²³⁹ The “quarantine”, involving the interception by US naval forces of Soviet ships carrying missiles destined for Cuba, was a use of force in contravention of international law, the necessity of which can be assessed only in political terms, taking into account the aggravated Cold War climate prevailing at the time. The incident clearly forms no precedent for preventive action under international law.

Israel – Iraq, 1981 (Osirak). On 7 June 1981 Israel conducted a targeted air attack against an Iraqi nuclear research plant, destroying a nuclear reactor suspected by Israel of being a facility for the development of nuclear weapons to be used against itself. Israel explicitly relied on anticipatory self-defence as justification.²⁴⁰ However, since in any event there was clearly no imminent threat of attack, Israel’s attack was, in fact, an instance of preventive military action to eliminate a potential future threat of nuclear attack. A unanimous Security Council strongly condemned Israel’s action as a “clear violation of the Charter of the United Nations and the norms of international conduct”.²⁴¹ The USA subsequently stated that its condemnation was only motivated by Israel’s failure to exhaust peaceful means.²⁴²

Osirak 1981

On 7 June 1981 nine Israeli aircraft carried out targeted bombings against the Tuwaiti nuclear research centre near Baghdad, Iraq, destroying the “Osirak” nuclear reactor. According to Israel, the reactor was in its final stages of construction and was intended for the development of nuclear weapons, which could be operational by 1985, and which, in light of the hostile rhetoric of Iraqi leaders against Israel, were likely to be used in a future nuclear attack against Israel. According to Israel, it was necessary to act now before the reactor turned “hot”, in which case its destruction would result in a massive radioactive fallout over Baghdad, endangering thousands of lives. Iraq being a party to the 1968 Non-Proliferation Treaty, the nuclear plant had been subjected to international control and inspection by the IAEA, which, at the time, had not found any indications that nuclear

weapons were being developed, nor experienced any lack of cooperation on the part of Iraq. The Security Council, in condemning Israel's attack in Resolution 487 (1981), stressed this fact, recognising the sovereign right of Iraq to develop a peaceful nuclear capacity and calling upon Israel to subject itself to IAEA control by adhering to the 1968 Treaty. Israel, however, claimed that Iraqi purchases of uranium etc. were more compatible with weapons production than with peaceful use, and argued that IAEA inspections were easy to circumvent.

USA, UK and others – Iraq, 2003. On 20 March 2003 the USA, assisted by the UK, Australia and other countries, including Denmark, launched Operation Iraqi Freedom, a comprehensive military invasion designed to disarm Iraq, which was suspected of possessing WMD, and to remove its leader, Saddam Hussein. However, neither the USA²⁴³ nor the other states involved in the military action formally invoked a right of preventive self-defence under Article 51, relying instead on previous Security Council resolutions as the legal basis for the use of force. Therefore, in legal terms, the 2003 war in Iraq provides no precedent for preventive action.

The 2002 US National Security Strategy of “preemptive action”

Following 11 September 2001, President Bush launched a new doctrine of national security in order to prevent, by military force if necessary, threats against the United States emanating from terrorists and “rogue” states with (aspirations to acquire) WMD. This so called “Bush doctrine” was formalised in the US National Security Strategy (NSS) of September 2002.²⁴⁴

The basic rationale of the 2002 NSS is that “rogue” states and terrorists must be prevented from threatening the USA and others, notably with WMD; that deterrence is useless against “rogue” states and terrorists; and that exclusive reliance on a reactive response is unacceptable in light of the magnitude of the potential damage.²⁴⁵ The alleged legal basis of the new doctrine is the right of anticipatory self-defence. It is argued that the concept of an “imminent threat” must be adapted to the realities of the new threats:

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of pre-emption on the existence of an imminent threat – most often a visible mobilization of armies, navies, and air forces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists do not seek to attack us using conventional means. Instead, they rely on terror and, potentially, the use of weapons of mass destruction – weapons that can be easily concealed, delivered covertly, and used without warning. [...] The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively. The United States will not use force in all cases to pre-empt emerging threats, nor should nations use pre-emption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world’s most destructive technologies, the United States cannot remain idle while dangers gather. We will always proceed deliberately, weighing the consequences of our actions. To support preemptive options, we will

- *build better, more integrated intelligence capabilities to provide timely, accurate information on threats, wherever they may emerge;*
- *coordinate closely with allies to form a common assessment of the most dangerous threats; and*
- *continue to transform our military forces to ensure our ability to conduct rapid and precise operations to achieve decisive results.*

*The purpose of our actions will always be to eliminate a specific threat to the United States or our allies and friends. The reasons for our actions will be clear, the force measured, and the cause just.*²⁴⁶

However, despite its label of “pre-emption” and its reference to anticipatory self-defence, the “Bush doctrine” also envisages purely preventive action against potential threats of future attacks.²⁴⁷ Acting against “emerging threats” from “rogue states” and terrorists “before they are able to threaten or use weapons of mass destruction”²⁴⁸ goes far beyond any conceivable right of anticipatory self-defence under current international law.²⁴⁹ For its part, the High-level Panel rejects the notion that

the right of anticipatory self-defence extends to situations “where the threat in question is not imminent but still claimed to be real: for example the acquisition, with allegedly hostile intent, of nuclear weapons-making capability”.²⁵⁰

Furthermore, very few states have so far been willing to support the “Bush doctrine” explicitly as a justified expansion, or rather reinterpretation, of the right of self-defence;²⁵¹ Israel has for long adhered to a similar doctrine itself. The Australian government has indicated some support for the “Bush doctrine” as a necessary adaptation of the right of anticipatory self-defence to modern realities in the context of non-state terrorism,²⁵² but the UK government has taken the position that the current right of anticipatory self-defence is flexible enough to address the most imminent of the new threats.²⁵³ Russia has asserted a right of self-defence if necessary to eliminate the threat from terrorists operating out of Georgia,²⁵⁴ but since Russia refers to several previous attacks by these terrorists on Russian territory, Russia is not relying on a right of purely preventive action, but rather on the legality of post-attack self-defence against terrorists as recognised by Resolution 1368.

Assessment

Under current international law, the right of self-defence does not include purely preventive action. In the absence of a previous armed attack or the imminent threat of such attack, the use of force to prevent potential future threats of armed attack, including threats emanating from states with WMD and from terrorists, is not covered by the right of self-defence.²⁵⁵

The NSS, despite its label of “preemptive action” and references to anticipatory self-defence, in substance also envisages purely preventive action.²⁵⁶ It asserts a right to use military force against threats emanating from “rogue” states that are suspected of possessing or developing WMD as well as their terrorist clients, even before that threat has fully emerged, let alone become imminent. In this respect the NSS has no legal basis in current international law on self-defence. Furthermore, only a few states have so far been willing to support it explicitly.

5. Conclusion

The right of self-defence, long-established in international law, allows a state to use military force necessary and proportionate to counter an

armed attack, until the Security Council has taken the measures necessary to restore international peace and security (Article 51 of the UN Charter). The following remarks sum up the basic conditions of self-defence only, before turning to an assessment of the scope and limits of the current right of self-defence as a framework for addressing new threats from international terrorism and states possessing WMD.

The right of self-defence: basic conditions

The right of self-defence of every state has its legal basis in Article 51 of the UN Charter, as well as in long-standing principles of customary international law. For the right of either individual or collective self-defence to apply, the following minimum conditions must be met:

Armed attack. An “armed attack” (Article 51) denotes a qualified form of the use of force which, due to its scale and effects, amounts to an act of armed aggression. Presumably, several minor incidents in total may amount to an armed attack.

Directed from abroad. The attack must be directed from abroad, by another state or by foreign non-state actors. As regards attacks conducted by non-state actors, the conventional requirement is that there must be “substantial” state involvement in the attack. However, events following 11 September 2001 seem to affirm that the threshold has been lowered so that merely harbouring non-state actors responsible for the attack is sufficient to establish state complicity and thus warrant self-defence. Arguably, the right of self-defence applies in general to attacks by non-state actors, even in the absence of state involvement.

Against a state. The attack must be directed against a state. This notably includes attacks against a state’s territory or armed forces. Presumably self-defence may also be invoked to respond to attacks against nationals and assets abroad; in any event such action, if limited to protective purposes, is likely to be considered legitimate by most states.

Actuality of the (threat of) attack. Reactive self-defence, responding to an armed attack which has already been launched, is at the core of the right of self-defence (Article 51). If the attack is ongoing, the need for a military response is evident. If the attack has already been completed,

the necessity of self-defence depends on a continuing threat of further attacks from the same source and the necessity of preventing or deterring such further attacks.

The status of anticipatory self-defence, or the use of force to preempt an imminent (threat of) armed attack, is controversial. Whereas this right was well established prior to 1945, Article 51 provides only for a right of self-defence “if an armed attack occurs”. States have been reluctant to rely on anticipatory self-defence in concrete cases, preferring a flexible reading of Article 51. However, several states maintain a right of anticipatory self-defence, and strong arguments of common sense and necessity speak in its favour. A credible legal argument may thus be made for a right of anticipatory self-defence in cases where there is compelling evidence of the existence of an imminent (threat of) attack. In any case, anticipatory action in such circumstances will presumably be regarded by most states as legitimate.

Preventive action, i.e. the use of force to eliminate a perceived potential threat of future attack, in the absence of previous attacks or an imminent threat of attack is not covered by the current right of self-defence. Neither Article 51 nor state practice provide any basis for invoking self-defence on the basis that a state or a non-state actor is likely to strike sometime in the future, somewhere in the world. The NSS, to the extent that it includes purely preventive action, has no legal basis in international law; only a few states have so far explicitly supported such a right.

Self-defence and international terrorism

To the extent that the use of military force may be an effective response to the threat posed by international terrorism, the current scope of the right of self-defence, as adapted by events following 11 September 2001, to a large extent provides a suitable framework.

Most terrorist attacks are pin-prick actions, leaving the victim state unable to respond on the spot. Resolution 1368 (2001) and subsequent events have affirmed that the right of self-defence applies to terrorist attacks and continues to apply even after a terrorist attack has occurred, if it is necessary to prevent likely further terrorist attacks from the same source. A state regime which has knowingly harboured the terrorists responsible can also be targeted by proportionate measures of deterrence. If deterrence has proved useless, the forcible removal

of the regime may arguably be considered lawful exceptionally, although this is controversial. It can be argued that the right of self-defence against terrorist attacks is independent of any state involvement, in which case, however, the terrorists responsible must be the sole target of action in self-defence, and only if, exceptionally, the state unwillingly hosting the terrorists proves unwilling or unable (as with failed states) to eliminate the threat itself.

The issue of anticipatory self-defence against an imminent threat of attack is unlikely to arise often in the context of international terrorism, since, presumably, in the absence of previous attacks, the actual intent of attack as well as its time and place will most often remain concealed from the outside world until it is too late.

For the same reason, the issue of purely preventive action against terrorists is unlikely to be very relevant, since international terrorist groups or organisations will most often appear as such only after they have attacked, in which case the right of self-defence will provide a legal framework for hunting down the relevant group or organisation. However, should it be that a private group or organisation without a previous record of terrorist attacks made credible threats of attack against (a) specific state(s), a case for the existence of an imminent threat of attack and thus a right of anticipatory self-defence might reasonably be argued.

Self-defence and threats emanating from states

As regards threats emanating from one state against another state, the right of self-defence applies in case of an ongoing armed attack in order to repel the attack, and presumably also after the attack has been completed if it is necessary to prevent or deter further attacks, i.e. if there is evidence of an ongoing threat of further attacks from the aggressor state. The latter may not be the case as often as in the context of terrorist attacks. More relevant in the context of state attacks, is that a credible legal argument can be made for a right of anticipatory self-defence on compelling evidence of an imminent (threat of) state attack.

However, purely preventive action against states that are perceived as a threat is not covered by the current right of self-defence. This holds true even if the relevant state possesses or is developing WMD, and even if the regime is considered irresponsible by many states.

Concluding assessment

To sum up, the current right of self-defence covers military action necessary to respond to an armed attack which has already occurred or, at the most, to an imminent threat of attack. Although the concept of an imminent threat entails some element of discretion, the right of self-defence clearly does not cover purely preventive action against potential future threats in the absence of prior attacks or a truly imminent threat of attack against a specific state. Whereas the right of self-defence, including post-attack self-defence, seems overall to provide a suitable framework for combating international terrorism, the absence of a legal basis for purely preventive action may in some cases be considered problematic as regards “rogue” states with (aspirations to acquire) WMD. However, under the current system, preventive military action against general threats to international peace and security, whether emanating from terrorists or states with WMD, is a matter not of self-defence but of collective action by the Security Council.

Chapter 4

Preventive Use of Force Authorised by the Security Council

The right of self-defence is not the only legal basis in international law for the use of force against external threats. The Security Council, in exercising its primary responsibility for the maintenance of international peace and security, may, if necessary, authorise the use of force to eliminate an existing threat to international peace. The following survey examines whether this is an adequate and sufficient framework for confronting new threats to states and the international community at large emanating from, notably, international terrorism, “rogue” states and the proliferation of weapons of mass destruction (WMD). In particular, it analyses the issue of criteria of legitimacy for Security Council authorisation of preventive action.

An authorisation from the Security Council is only legally required if the use of force to eliminate an external threat is not already covered by the “inherent” right of self-defence (see Chapter 3). Clearly, a Security Council authorisation would also be preferable as a basis for post-attack preventive action and action to pre-empt an imminent threat of attack, due to the somewhat controversial status of post-attack self-defence and, in particular, of anticipatory self-defence. In legal terms, however, a prior Security Council authorisation is only certainly required in the absence of a previous attack or an imminent threat of such attack directed against a specific state, i.e. in a case of purely preventive action to eliminate a perceived potential threat. Such purely preventive action is the focus of this chapter.

The chapter is structured as follows. First, the legal basis and exclusive character of the Security Council’s authority is set out (Section 1). Second, the general scope of the Security Council’s competence is discussed, notably the concept of a “threat to the peace” in relation to broad (potential) threats to international peace and security (Section 2). Third, the status in international law and in the practice of the

Security Council of, respectively, international terrorism (Section 3) and WMD (Section 4) is examined. Fourth, five general criteria of legitimacy for the preventive use of force to be authorised by the Security Council are identified and elaborated (Section 5). Finally, a conclusion is offered, including an assessment of the five criteria as they apply to, respectively, threats emanating from international terrorism and from states with WMD (Section 6).

I. Security Council enforcement action: legal basis and exclusive authority²⁵⁷

Under current international law, in cases not covered by the right of self-defence the Security Council has exclusive power to authorise the use of force, if necessary to maintain or restore international peace and security (Articles 39 and 42 of the UN Charter).

The UN Charter confers upon the Security Council primary responsibility for the maintenance of international peace and security (Article 24(1)). In the exercise of this responsibility, the Security Council is empowered to make recommendations or take the enforcement action necessary if it determines the existence of any “threat to the peace, breach of the peace or act of aggression” (Article 39). Security Council enforcement action may include non-military measures of a diplomatic or economic nature (Article 41) or, if such measures would be or have proved inadequate, military action (Article 42). Since standing forces have never been made available to the Security Council as envisaged in Article 43, the Security Council has authorised the use of force on its behalf by willing member states or regional organisations in specific cases.²⁵⁸

The General Assembly has no subsidiary power to authorise military action. Whereas the Security Council has merely a primary responsibility for international peace and security, the subsidiary responsibility of the General Assembly and its power to make recommendations (cf. Articles 10-11 and the 1950 *Uniting for Peace* Resolution), does not extend to the authorisation of the use of force which would otherwise be illegal. Similarly, whereas the UN Charter envisages a crucial role for regional organisations and agencies, they cannot lawfully take military enforcement action without prior Security Council authorisation (Article 53).

2. New threats and the concept of a “threat to the peace” in Article 39 of the UN Charter

The existence of a threat to the peace under Article 39 is the minimum condition of Security Council enforcement action under Chapter VII. This notion is also the most relevant to potential threats to international security, since the notions of a “breach of the peace” or an “act of aggression” imply that the threat has already developed into action. The term “a threat to the peace” is not defined in the UN Charter but clearly refers to international peace (Articles 1(1), 24(1) and 39 i.f.). The questions are: What may constitute a threat to the peace? What should be the response? Who makes the decision?

The (almost) unlimited discretion of the Security Council

The UN Charter, by leaving the determination of a threat to the peace to the Security Council and by refraining from defining the term in any way, has left it to the political discretion of the Security Council to determine whether a threat to the peace exists.²⁵⁹

The Security Council, in exercising its discretion under Article 39, is, as ever, bound to act in accordance with the principles and purposes of the UN Charter (Article 24(2)). In principle, therefore, the discretion of the Security Council is not unlimited, although there is a presumption that when the Council acts it has the competence to do so. Most importantly, however, there are no effective judicial guarantees in the UN Charter against conceivable *ultra vires* action by the Security Council, the International Court of Justice having no general powers to review decisions by other UN organs.²⁶⁰

Character of the threat

External military threats to international peace and security are clearly at the heart of the original understanding of “a threat to the peace”.²⁶¹ This is clear, among other things, from the other situations in Article 39 warranting enforcement action: a “breach of the peace” and an “act of aggression”. The threat of military force against another state in contravention of Article 2(4) would be an obvious example of a situation likely to constitute a “threat to the peace”.

Threat and violations of international law

Is enforcement action a political measure or a sanction? In principle, it is the objective existence of a threat to the peace which justifies Security Council enforcement action. It is not an express condition that any state has violated its international obligations, and the purpose of enforcement action is not to punish violators but to maintain international peace. However, the distinction between enforcement to safeguard the peace and sanctions to punish violators is not so clear in practice, since enforcement action, especially non-military action, will often take the form of sanctions. Presumably a violation of international law will most often be involved when a threat to the peace is deemed to exist, although the violation may not in itself be sufficient to establish the threat. Conversely, by determining that specific conduct constitutes a threat to the peace, the Security Council may, in fact, make new law by prohibiting specific conduct that did not previously constitute a violation of international law.²⁶²

Source of the threat

Traditionally, international peace means the absence of armed conflict between states, and a “threat to the peace” is a threat of aggression by one state against another or the real risk of interstate armed conflict in some other form.²⁶³ The overall purpose of the Charter was thus to uphold and police the peaceful *status quo* among sovereign states.²⁶⁴ However, it was also clear from the beginning that the Security Council might determine the existence of a threat to the peace, even if it did not emanate from a state, but from private groups.²⁶⁵

Urgency of the threat

On the one hand, a threat to the peace must include situations of potential armed conflict, since cases where an act of aggression or other military force has already occurred are already covered by the aggravated terms of “breach of the peace” and “act of aggression”.

On the other hand, a threat to the peace, when interpreted in the context of the UN Charter as a whole, would seem to imply a threat of some gravity and urgency. For if there is merely a situation “the continuance of which is likely to endanger the maintenance of international peace and security” (Article 34), then Chapter VI on Pacific Settlement applies, and the Council may only make recommendations (Article 36).²⁶⁶

However, since it is for the Security Council to decide what constitutes a threat to the peace, it may also, by such a determination, choose to address a situation under Chapter VII rather than Chapter VI if it finds that the situation requires enforcement action rather than a recommendation of pacific settlement. Whether a situation has reached the requisite threshold warranting the label of “a threat to the peace”, rather than merely a potential threat, which if continued “may endanger the maintenance of international peace and security”, is thus basically a matter for the political discretion of the Security Council.

Enforcement action against threats

The decision whether to take enforcement action and the kind of action to be taken, including the choice between non-military and military means, is basically left to the discretion of the Security Council, although the use of military force should always be the last resort (Articles 39, 41 and 42).²⁶⁷ As regards external military threats (as opposed to internal conflicts and humanitarian crises), the Security Council has on several occasions adopted, under Chapter VII, non-military sanctions against states responsible for the threat as well as general preventive measures. However, so far the Council has never specifically authorised the use of force to eliminate such a threat.²⁶⁸

Conclusion

The concept of a “threat to the peace” in Article 39 was designed for situations where a military threat to international peace and security has not yet unfolded in forcible action.

On the face of it, therefore, this notion provides a suitable framework for preventive action against threats emanating from international terrorism and the proliferation of WMD.²⁶⁹ The Security Council is basically free to determine at its discretion what constitutes a threat to the peace and what measures, if any, should be taken to eliminate it.

The real limit to Security Council action emanates from its decision-making procedure: a decision requires a qualified majority of 9 votes in favour (out of 15 Members) and that none of the Permanent Members – the USA, UK, France, China and Russia – vetoes the decision (Article 27(3) of the UN Charter), as supplemented by established practice that abstention by a Permanent Member does not veto a decision.

The challenge, therefore, is to create an international consensus regarding effective countermeasures against the new threats. In the words of the UN Secretary General, Kofi Annan: “we must forge a new consensus on how to confront new threats”.²⁷⁰

3. International terrorism

Most states have undertaken international obligations to combat and punish terrorism, and states which support or harbour international terrorists are in violation of international law.²⁷¹ Furthermore, the Security Council has stated that all acts of international terrorism constitute a threat to international peace and security.

3.1. Conventions on international terrorism

There is currently no universal definition of “terrorism”, although there seems to be a broad consensus that, in general terms, terrorism includes any act intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act.²⁷² Furthermore, a comprehensive multilateral convention on terrorism so far does not exist due to, among other things, the disagreement on aspects of a general definition of terrorism.²⁷³ Nevertheless, existing conventions on terrorism, combined with customary international law, the Geneva Conventions and the Rome Statute, prohibit virtually all forms of terrorism.²⁷⁴

There are twelve major multilateral conventions and protocols on states’ responsibility for combating terrorism, some of which have been ratified by the vast majority of states.²⁷⁵

Terrorist conventions and protocols

- *Convention of Offences and Certain Other Acts Committed on Board Aircraft (1963)*
178 states have ratified (as of 8 February 2005)
- *Convention for the Suppression of Unlawful Seizure of Aircraft (1970)*
178 states have ratified (as of 8 February 2005)

- *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971)*
180 states have ratified (as of 8 February 2005)
- *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973)*
153 states have ratified (as of 8 February 2005)
- *International Convention against the Taking of Hostages (1979)*
145 states have ratified (as of 8 February 2005)
- *Convention on the Physical Protection of Nuclear Material (1980)*
110 states have ratified (as of 8 February 2005)
- *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1988)*
148 states have ratified (as of 8 February 2005)
- *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988)*
115 states have ratified (as of 8 February 2005)
- *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (1988)*
104 states have ratified (as of 8 February 2005)
- *Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991)*
114 states have ratified (as of 8 February 2005)
- *International Convention for the Suppression of Terrorist Bombings (1997)*
132 states have ratified (as of 8 February 2005)
- *International Convention for the Suppression of the Financing of Terrorism (1999)*
133 states have ratified (as of 8 February 2005)

In addition, UN organs have in recent years made recommendations or adopted binding measures to strengthen the fight against international terrorism.²⁷⁶

3.2. Security Council practice on international terrorism

The Security Council has affirmed on several occasions that any act of international terrorism constitutes a threat to international peace and security. On that basis, under Chapter VII the Council has adopted general non-military measures to strengthen the fight against international terrorism. In specific cases the Council has also adopted, under Chapter VII, non-military sanctions to induce regimes to stop sponsoring terrorism, but so far has never authorised the use of military force to combat or prevent international terrorism.

Acts of international terrorism: a threat to international peace and security

The Security Council has repeatedly stated that it regards acts of international terrorism as a threat to international peace and security.

The Security Council made its position clear long before 11 September 2001. In Resolution 731 (1992), it stated that it was “deeply disturbed by the world-wide persistence of acts of international terrorism in all its forms, including those in which States are directly or indirectly involved, which endanger or take innocent lives, have a deleterious effect on international relations and jeopardize the security of States”, and it also referred to “acts of international terrorism that constitute threats to international peace and security”. In Resolution 748 (1992) the Council, in the same vein, stated its conviction that “the suppression of acts of international terrorism, including those in which a State is directly or indirectly involved, is essential for the maintenance of international peace and security”. In Resolution 1189 (1998) the Council stated that acts of international terrorism “have a damaging effect on international relations and jeopardize the security of states” and expressed its conviction that “the suppression of acts of international terrorism is essential for the maintenance of international peace and security”. In Resolution 1269 (1999) the Council expressed concern at the increase in acts of international terrorism “which endangers the lives and well-being of individuals worldwide as well as the peace and security of all States”, reaffirmed that “the suppression of acts of international terrorism...is an essential contribution to the maintenance of international peace and security”, and expressed its readiness “to take necessary steps in accordance with its responsibilities under the

Charter of the United Nations to counter terrorist threats to international peace and security”.

Following the devastating terrorist attacks on 11 September 2001, the Security Council has reaffirmed and further sharpened its position. In Resolution 1368 (2001), the Council stated with reference to the 11 September attacks that it regarded such acts “like any act of international terrorism, as a threat to international peace and security”, and it expressed its determination “to combat by all means threats to international peace and security caused by terrorist acts”. The Council reaffirmed this position in Resolution 1373 (2001) and expressed its “determination to prevent all such acts”. In Resolution 1377 (2001) the Council even declared that “acts of international terrorism constitute one of the most serious threats to international peace and security in the twenty-first century”. In several subsequent resolutions the Council has reaffirmed its position on international terrorism.²⁷⁷

General preventive measures adopted under Chapter VII

After 11 September 2001, in Resolution 1373 (2001) the Security Council, acting under Chapter VII, adopted a comprehensive regime of measures to be taken by all states in order to prevent and suppress the financing and preparation of terrorist acts on their territory. These included the criminalisation of terrorist funding, the freezing of funds relating to terrorism and the duty to exchange information with other states relevant to the investigation of terrorism. In Resolution 1377 (2001) the Council, while taking no new measures under Chapter VII, adopted a “Declaration on the global effort to combat terrorism”, calling on all states to adhere to the relevant international conventions on terrorism and to implement fully Resolution 1373. In Resolution 1566 (2004) the Security Council, acting under Chapter VII, again called upon all states urgently to become parties to the relevant international conventions on terrorism and to implement fully Resolution 1373, and it adopted additional organisational measures to enhance the global fight against terrorism.

Non-military sanctions adopted under Chapter VII

In some cases the Security Council has adopted non-military enforcement measures under Chapter VII to induce regimes sponsoring international terrorism to discontinue this policy. So far, the Security Council has not authorised the use of force.

Libya 1991 (terrorist act at Lockerbie 1988). In Resolution 731 (1992), the Security Council condemned the 1988 terrorist act that destroyed a civilian aircraft at Lockerbie, Scotland, and Libya's complicity in the attack. It deplored Libyan non-co-operation in the prosecution of those responsible (extradition of suspects) and urged Libya to respond immediately to international demands. Two months later, when Libya had still not meet international demands for the extradition of suspects, the Security Council determined in Resolution 748 (1992) that "the failure by the Government of Libya to demonstrate in concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests in Resolution 731 (1992) constitute a threat to international peace and security". On that basis the Council, acting under Chapter VII, adopted a binding airline and weapons embargo as well as diplomatic sanctions against Libya. Libya finally extradited the terrorist suspects in 1999.

Terrorist acts at Nairobi and Dar es Salaam (1998). In Resolution 1189 (1998) the Security Council strongly condemned the terrorist bombings of 7 August 1998 in Nairobi, Kenya and Dar es Salaam, Tanzania. However, in this case, while it referred to such acts as a threat to international peace and security, the Council adopted no enforcement measures.²⁷⁸

The Taliban's harbouring of and support for terrorists in Afghanistan (1998-2000). In Resolution 1193 (1998) the Security Council expressed concern at the continuing presence of terrorists in Afghanistan and demanded that Afghan factions refrain from harbouring and training terrorists. In Resolution 1214 (1998) the Council stated its deep concern over "the continuing use of Afghan territory, especially areas controlled by the Taliban, for the sheltering and training of terrorists and the planning of terrorist acts", and it demanded that "the Taliban stop providing sanctuary and training for international terrorists and their organisations". Since the Taliban did not abide by this demand, in Resolution 1267 (1999) the Security Council deplored the fact that the Taliban was continuing to provide a safe haven to Usama bin Laden and allowing him to run terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base for international terrorist operations. The Council determined that the failure of the Taliban authorities to respond to the demands of Resolution 1214 con-

stituted a threat to international peace and security. The Council further demanded that the Taliban turn over Usama bin Laden to the United States on indictment for, among others, the terrorist bombings on 7 August 1998. To enforce this demand, the Council, acting under Chapter VII, required all states to implement an airline embargo against the Taliban and to freeze all funds relating to them. In Resolution 1333 (2000) the Council determined that the continued failure of the Taliban to meet the demands of Resolutions 1214 and 1267 constituted a threat to international peace and security. Acting under Chapter VII, the Council adopted additional sanctions against the Taliban, including an arms embargo and diplomatic sanctions. Despite these comprehensive sanctions, the Taliban never responded to the Security Council's demands.

Al Qaeda's terrorist attacks against the United States on September 11th, 2001. Shortly after the terrorist attacks on September 11, the Security Council convened and, in Resolution 1368 (2001), stated that it "unequivocally condemns in the strongest terms the horrifying terrorist attacks on 11 September 2001 in New York, Washington D.C. and Pennsylvania and regards such acts, like any act of international terrorism, as a threat to international peace and security". However, on this occasion the Council took no enforcement action under Chapter VII, recognising, instead, the "inherent right of self-defence in accordance with the Charter".²⁷⁹

Presumably, had the right of self-defence not applied, the Security Council would in this case have been ready to authorise the use of military force.

4. WMD

The potential danger to international peace and stability, indeed to humanity, inherent in the existence of WMD, notably biological (bacteriological), chemical and nuclear weapons, has long been recognised by the international community. International conventions have been adopted prohibiting completely biological and chemical weapons and prohibiting the proliferation of nuclear weapons. The Security Council has stated that the proliferation of WMD constitutes a threat to international peace and security.

4.1. WMD conventions

No general principles of international law limit the permissible level of a state's armaments. This was confirmed by the International Court of Justice in its Nicaragua Judgment of 1986. The Court regarded the argument advanced by the USA to justify intervention in and the use of force against Nicaragua that the militarization of that country was excessive and in itself proof of its aggressive intentions as "irrelevant and inappropriate...since in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception".²⁸⁰

However, international conventions have been adopted in order to eliminate WMD completely or at least prevent their proliferation.

General Prohibition on Biological and Chemical Weapons

The Biological Weapons Convention (1972) and the Chemical Weapons Convention (1993)²⁸¹ lay down a complete prohibition on, respectively, biological and chemical weapons. Both conventions have been ratified by the vast majority of states.

The Biological and Chemical Weapons Conventions

*Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (1972).*²⁸²

- Ratified by 152 states (as of 8 February 2005)
- Including among others: China, North Korea, France, India, Iran, Iraq [1991], Libya, Pakistan, Russia, Sudan [2003], UK and USA.
- Excluding among others: Israel and Syria

*Convention on the Prohibition of the Development, Production and Stockpiling of Chemical Weapons and on Their Destruction (1993).*²⁸³

- Ratified by 167 states (as of 8 February 2005)
- Including among others: China, France, India, Iran, Libya [2004], Pakistan, Russia, Sudan, UK and USA.
- Excluding among others: North Korea, Iraq, Israel and Syria.

As regards biological and chemical weapons, the concern is to obtain and uphold universal adherence to these conventions²⁸⁴ and ensure their effective implementation. States that are parties to these conventions have retained the right to withdraw from their obligations.²⁸⁵

Non-proliferation of nuclear weapons

As regards nuclear weapons, a similar general prohibition still does not exist. However, the Treaty on the Non-Proliferation of Nuclear Weapons (NPT, 1968) obliges states to prevent the further proliferation of nuclear weapons and to negotiate a treaty on general and complete nuclear disarmament.²⁸⁶ With a few, notable exceptions the NPT enjoys universal adherence:

Treaty on the Non-Proliferation of Nuclear Weapons, NPT (1968)²⁸⁷

Ratified by 188 states (as of 8 February 2005).

- Including among others: China [1992], France, Russia, UK and USA (the five original nuclear-weapon states and Permanent Members of the Security Council); Iran, Iraq [1969], Libya, Sudan, South Africa [1995] and Syria (states which at some point have been suspected of seeking to acquire nuclear weapons).
- Excluding: India, Pakistan and Israel (the three other states which are known to possess nuclear weapons); North Korea (withdrew in January 2003 and declared itself a nuclear-weapon state).

Non-proliferation. To prevent the further proliferation of nuclear weapons, nuclear-weapon states under the NPT undertake not to transfer to or in any other way assist non-nuclear-weapon states that are parties to the treaty in manufacturing or acquiring nuclear weapons (Article I), whereas non-nuclear weapon states that are parties to the treaty undertake not to receive, manufacture or otherwise acquire nuclear weapons (Article II) and to accept international control and inspection by the International Atomic Energy Agency (IAEA) (Article III).

Obligation to negotiate a treaty of general and complete disarmament. To ensure the long-term objective of complete nuclear disarmament, including the cessation of the manufacture of nuclear weapons and the liquidation of existing stockpiles of nuclear weapons, states that are parties to the NPT undertake “to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control” (Article VI). The latter obligation, of course, pertains especially to nuclear-weapon states. The obligation in NPT, Article VI, was considered by the International Court of Justice in its Nuclear Weapons Opinion to be a general obligation under customary international law.²⁸⁸ In connection with this finding, the Court also stated, in quite unfamiliar political terms: “In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons. It is consequently important to put an end to this state of affairs: the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result”²⁸⁹.

However, although since 1946 the UN General Assembly has repeatedly called for general and complete disarmament in the field of nuclear weapons and has been joined by the Security Council,²⁹⁰ this objective is not in sight. Similarly, although the General Assembly has repeatedly stated that the use of nuclear weapons would be illegal,²⁹¹ the International Court of Justice, in its 1996 *Nuclear Weapons Opinion*, unanimously held that there is in neither conventional nor customary international law any comprehensive and universal prohibition on the threat or use of nuclear weapons.²⁹²

Legal Status. The legal situation today remains that whereas most states have an international obligation to prevent the proliferation of nuclear weapons, the possession of such weapons by the original nuclear weapon states (USA, Russia, China, UK and France) is not prohibited by the NPT, nor is it illegal for other states that are not parties to the NPT but are known to possess nuclear weapons (India, Pakistan, Israel and possibly North Korea). Other states too may lawfully choose to withdraw from the NPT.²⁹³ It is certainly crucial to ensure universal adherence to the NPT.²⁹⁴ However, in the absence of a general and complete

prohibition on nuclear weapons, not even that would alter the legal fact that existing nuclear-weapon states are under no obligation to abolish their nuclear weapons, whereas non-nuclear states are prohibited from developing or acquiring nuclear weapons of their own.

4.2. Security Council practice on WMD

The Security Council has stated in general terms that the proliferation of weapons of mass destruction constitutes a threat to international peace and security. The Council has adopted general measures to prevent the proliferation of such weapons to non-state actors. On some occasions the Council has adopted non-military sanctions under Chapter VII against a state suspected of developing weapons of mass destruction. So far, however, it has never specifically authorised the preventive use of military force to eliminate a threat to international peace and security emanating from WMD, although it seriously considered doing so in the case of Iraq in 2002-2003.

WMD:

a threat to international peace and security?

In Resolution 1540 (2004) the Security Council affirmed in general terms that the “proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security”. This indicates that the Council would regard any proliferation of such weapons as a threat to the peace under Chapter VII and consider enforcement action to eliminate it, whether or not the state responsible had adhered to the international conventions on biological, chemical and nuclear weapons.

Unsurprisingly, the Security Council has not stated in similar general terms that the mere possession of WMD constitutes a threat to international peace and security. However, it has indicated that in certain regions of the world affected by continuous conflict the mere existence of WMD may be a threat to international peace and security. In Resolution 687 (1991), referring to the Middle East, the Council stated its consciousness of “the threat that all WMD pose to peace and security in the area and of the need to work towards the establishment in the Middle East of a zone free of such weapons”. Again, this assessment was independent of the actual adherence of Middle East states to the conventions on weapons of mass destruction.

General preventive measures adopted under Chapter VII

In the above-mentioned Resolution 1540 (2004), the Security Council affirmed its “resolve to take appropriate and effective actions against any threat to international peace and security caused by the proliferation of nuclear, chemical and biological weapons and their means of delivery, in conformity with its primary responsibilities, as provided for in the United Nations Charter”. Gravely concerned by the risk that non-state actors may acquire weapons of mass destruction, the Council, acting under Chapter VII, adopted general measures requiring states to refrain from supporting such weapons and to take measures to prevent non-state actors from acquiring them.

Non-military sanctions and preventive measures adopted under Chapter VII

South Africa 1977 (nuclear weapons). In Resolution 418 (1977) the Security Council recognised “that the military build-up by South Africa and its persistent acts of aggression against the neighbouring States seriously disturb the security of those States...”, and it strongly condemned the attacks. The Council expressed grave concern that South Africa was “at the threshold of producing nuclear weapons”. The Council considered the policy of apartheid and South Africa’s actions to be “fraught with danger to international peace and security”. Consequently, the Council adopted an arms embargo, including an obligation that “all States shall refrain from any co-operation with South Africa in the manufacture and development of nuclear weapons”. At the time, South Africa was not a party to the 1968 NPT.

Iraq 1991 (WMD). Following Iraq’s invasion of Kuwait in August 1990 and the successful military operation authorised by the Security Council to force Iraq out of Kuwait,²⁹⁵ the Security Council adopted Resolution 687 (1991) in which, acting under Chapter VII, it required Iraq to disarm completely as regards WMD. The direct background to this demand was Iraq’s invasion of Kuwait, “reaffirming the need to be assured of Iraq’s peaceful intentions in the light of its unlawful invasion and occupation of Kuwait”. However, the Council also referred to Iraq’s past record of using and threatening to use WMD, being “conscious also of the statements by Iraq threatening to use weapons in violation of its obligation under [the 1925 Geneva Protocol], and of its

prior use of chemical weapons, and affirming that grave consequences would follow any further use by Iraq of such weapons”.²⁹⁶ The Council also expressed its concern at reports “that Iraq has attempted to acquire materials for a nuclear-weapons programme contrary to its obligation under [the NPT]”. Against this background, and acting under Chapter VII, the Council adopted a comprehensive policy requiring Iraq’s disarmament, including the destruction of all chemical or biological weapons and related components and facilities, as well as all ballistic missiles with a range exceeding 150 km (para. 8) and an undertaking by Iraq not to use, develop, construct or acquire biological, chemical or nuclear weapons in the future (paras. 10 and 12). All these obligations upon Iraq were made subject to international control and on-site inspection (paras. 9-10 and 13).

On the preventive use of force under Chapter VII

Iraq 2002-2003 (non-compliance with disarmament obligations). In the years following the adoption of Resolution 687 (1991) requiring Iraqi disarmament in the field of WMD, Iraq on numerous occasions obstructed international efforts to verify its compliance with its obligations. In the fall of 2002, international patience was running out and the option of using military force was seriously considered by the Security Council (cf. Resolution 1441 (2002) warning Iraq of “serious consequences” in the event of continued non-compliance with its international obligations). Thus, despite the fact that ultimately no fresh authorisation could be obtained from the Security Council in the case of Iraq 2003, and despite the ensuing controversy over the possible legal basis of Operation Iraqi Freedom in previous Resolution 678 (1990), what remains relevant in this context is that in late 2002 and early 2003 the Security Council seriously considered authorising preventive military force against Iraq as a last resort to remove a perceived threat from WMD. The concern of all states engaged in taking this decision was that Iraq was continuing to develop such weapons in contravention of its international obligations.

5. Criteria of preventive use of force, especially against the new threats

If the Security Council authorises the preventive use of force to eliminate a threat to international peace and security, such use of force is legal under international law. However, legality is not enough. Collective action also needs legitimacy in order to sustain and strengthen the international legal order.²⁹⁷ The moral perspective is that the action taken must be generally accepted as just and necessary. The political perspective is that agreed criteria of legitimacy will presumably not only enhance consensus within the Security Council and international support for the Council's decisions, but also minimise the risk of individual states bypassing the Security Council.²⁹⁸ Recently, efforts have therefore been made to define general criteria of legitimacy for Security Council authorisation of the use of military force.

5.1. Five general criteria of legitimacy

The 2001 report of the International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, and the 2004 report of the High-level Panel on Threats, Challenges and Change, *A more secure world: Our shared responsibility*, seem to reflect a broad consensus on five criteria of legitimacy relevant to the collective use of force in general.²⁹⁹ The High-level Panel defines these minimum criteria as follows:³⁰⁰

In considering whether to authorize or endorse the use of military force, the Security Council should always address – whatever other considerations it may take into account – at least the following five basic criteria of legitimacy:

(a) Seriousness of threat. *Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify prima facie the use of military force? In the case of internal threats, does it involve genocide or other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended?*

(b) Proper purpose. *Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved?*

(c) Last resort. *Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed?*

(d) Proportional means. *Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?*

(e) Balance of consequences. *Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?*

The High-level Panel suggests that these criteria should be embodied in declaratory resolutions of the Security Council and General Assembly and also advocates that member states should subscribe to them.³⁰¹ The UN Secretary General, Kofi Annan, has adopted the High-level Panel criteria and recommended that the Security Council adopt a resolution setting out these criteria and expressing the intention of the Council to be guided by them in future decisions concerning the authorisation of the use of force.³⁰²

5.2. Vagueness of the criteria

It is not difficult to agree to these five criteria in their general form. They are based on considerations of necessity and proportionality, which already permeate international law on self-defence as well as UN Charter Chapter VII on collective enforcement action. It should therefore be possible to rally international support behind these criteria. Although universal agreement on these very general criteria would provide a useful starting point, one may nevertheless question how much would have been achieved.

The really controversial issue is the specific contents of the criteria: how should they be applied to specific issues in actual cases? In this respect, two criteria which stand out as the most crucial are arguably also the most difficult to define exactly:

Seriousness of threat: the threshold criterion

When is there a threat to international peace and security of such a kind, reality and gravity as *prima facie* to warrant the collective use of

military force? As regards non-imminent threats, this question is difficult to answer in the abstract and is likely to be controversial.

There is a marked difference here between intervention to halt or avert humanitarian catastrophes and the use of force to eliminate external threats to international peace and security. As regards the former, as the High-level Panel stated, there seems to be widespread agreement that the threshold is a situation of “genocide or other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended”.³⁰³ No similar “objective” threshold exists as regards external non-imminent threats, including threats from international terrorism and the proliferation of WMD.

Last resort: the essential criterion of necessity

When is it reasonable to believe that measures other than military force will not succeed?

As regards non-imminent threats, this question is difficult to answer in the abstract and is likely to be controversial in specific cases.

Here too, there is a marked difference between intervention to halt or avert humanitarian catastrophes and the use of force to eliminate external threats to international peace and security. As regards the former, since the agreed threshold is an imminent humanitarian catastrophe, the immediate necessity of using military force as a last and only resort will presumably be evident in most cases. The same “objective” urgency does not exist as regards external, non-imminent threats, including threats from international terrorism, “rogue states” and the proliferation of WMD; there is, by definition, time to explore non-military alternatives.³⁰⁴

Consequently, whereas there is “an enormous amount of common ground”³⁰⁵ concerning the conditions of legitimate humanitarian intervention, this is not the case as regards preventive military action. As regards the preventive use of force against non-imminent external threats, including threats from international terrorism and the proliferation of WMD, there is no clear definition of the two crucial criteria, namely the threshold criterion of a sufficiently serious threat, and the essential necessity requirement that military force must be the last resort. On the contrary, there is ample room here for discretion and thus also controversy and arbitrariness.

5.3. Elaborating the criteria

The High-level Panel admits that: “The guidelines we propose will not produce agreed conclusions with push-button predictability”.³⁰⁵ This is quite an understatement. The challenge is therefore to elaborate the five criteria further, especially the two crucial criteria of serious threat and last resort, in order to discuss the circumstances in which these conditions may arguably be met in the context of threats emanating from international terrorism and the proliferation of WMD. In this respect, the previous practice of the Security Council (cf. Sections 3-4) may provide some guidance.

1) *Serious threat*

General Considerations

Any threat from international terrorism or proliferation of WMD in order to justify the preventive use of force must, as a minimum, genuinely pose a “threat to international peace and security” within the meaning of Article 39 and Security Council practice. Relevant factors in this respect are the character, source, gravity and proximity of the threat.

The threat must be so real and serious that, although the right of self-defence under current international law does not apply, it would be too dangerous for the international community to stand idly by waiting for the threat to become imminent.

The importance of reliable information on the character of the threat is obvious (Iraq 2003), including informed estimates regarding the probability from a technical point of view that a potential threat will in fact develop into an actual threat.

However, also more complex and/or political factors will often be relevant, such as the past conduct of the regime or group which is the source of the threat, aggressive statements from the relevant state or group, the perceived accountability of the responsible regime or group in the international community and the geo-strategic position of the state or group.

Although a serious threat will often involve violations of international obligations (e.g. South Africa 1977, Iraq 1991), a violation of international law is not a necessary condition for determining that a serious threat exists (e.g. Security Council Resolution 687 on WMD in the Middle East).

International terrorism

International terrorism is universally regarded as a serious threat to international peace and security (cf. also Security Council Resolution 1368). In some cases it may be controversial to label acts of force as terrorism, due to the absence of and controversies over a universal definition of “terrorism”. Presumably, however, in most cases it will not be contested that acts of international terrorism constitute such a serious threat that the use of military force may be necessary in the last resort, including against states supporting or harbouring the terrorists. The risk of arbitrariness is not high. To a large extent, whatever its source, whoever are its sponsors and however it appears, a terrorist threat is a terrorist threat.

However, Security Council authorisation of the collective use of force may not be a very relevant option to counter international terrorism. Presumably, most threats from international terrorism will only become apparent once acts of terrorism have occurred. In that case, the right of self-defence will presumably cover the use of force necessary to prevent the ongoing threat of further attacks, providing the host state is either unwilling or unable to eliminate the threat. Even in the absence of previous attacks, the right of self-defence arguably applies in the case of an imminent threat of terrorist attack directed against a specific state (see Chapter 3).

Conceivable threats from international terrorism which may *prima facie* justify the use of force but which are not covered by the right of self-defence would include:

- 1) A situation in which a private (terrorist) group or organisation threatens to strike some time in the future without identifying any specific state(s) as its victim.
- 2) A situation in which a private (terrorist) group or organisation seeks to acquire WMD.

Since no legitimate purpose might justify the acquisition of WMD by non-state actors, the mere fact that the group is seeking to acquire such weapons may arguably in itself constitute a threat to international peace and security warranting, in the last resort, the use of force.

States and WMD

The issue of states possessing WMD is more complex. The possession of WMD is not prohibited by general international law, although most states have adhered to the two conventions prohibiting biological and chemical weapons, and almost all states have adhered to the convention prohibiting the proliferation of nuclear weapons and aiming at complete nuclear disarmament. As regards nuclear weapons in particular, in the absence of a general prohibition, the problem is that some states lawfully possess them, either because they are original nuclear-weapon states or because they have not adhered to the NPT, whereas others have undertaken not to acquire them. The situation is further complicated by the freedom of each state to withdraw from its obligations under the WMD conventions.

Although it could nevertheless be argued that, due to the magnitude of harm and destruction which would result from their use, the very existence of WMD is a serious threat to international peace and security, such a position is not realistic from a political point of view. Unsurprisingly, the Security Council has never made such a general statement.

In Resolution 1540 (2004), however, the Security Council has affirmed in general terms that the “proliferation of nuclear, chemical and biological weapons constitutes a threat to international peace and security”, and it has also taken certain enforcement measures to prevent proliferation to non-state actors. However, the general statement would seem to cover states too. And this is where the sweeping statement arguably becomes problematic, at least in so far as it may imply the use of military force in the last resort.

Evidently, the absence of a general prohibition on nuclear weapons, combined with the fact that five state parties to the NPT already possessed nuclear weapons and continue to do so today (USA, Russia, China, UK and France), and, in particular, that other states that are not parties to the NPT have also developed a nuclear-weapons capability (India, Pakistan, Israel and possibly North Korea), makes more complex the question of whether the proliferation of nuclear weapons to other states could arguably constitute a threat to international peace and security. Whether or not the relevant state is a party to the NPT, that state might argue that its acquisition of nuclear weapons was merely a legitimate defensive precaution against perceived threats from neighbouring states already in possession of nuclear weapons.

As an example, it would thus seem difficult to justify in principle why Iran's development of nuclear weapons should constitute a serious threat warranting the preventive use of force in the last resort when Israel's possession of such weapons does not, regardless of the legal fact that, unlike Iran, Israel is not a party to the 1968 NPT.

There is a precedent in Security Council practice that the development by a state of nuclear weapons may constitute a threat to the peace, even though that state has not adhered to the 1968 NPT and therefore is not in violation of its international obligations (South Africa 1977). Conversely, in the case of Iraq the Security Council also referred to Iraq's non-compliance with its international obligations not to develop WMD (Iraq 1991). However, the common feature in these two cases was that these were regimes with a record of aggression against neighbour states (as well as an internal policy of oppression). The rationale underlying these cases seems to be that the development of WMD by aggressive and unreliable regimes constitutes a threat to international peace and security which may warrant the use of force in the last resort (Iraq 2002-2003). However, the political factor inherent in labelling certain states as irresponsible possessors of WMD is obvious. Selective action against WMD threats will not enhance the legitimacy of the Security Council.

2) *Proper purpose*

Presumably, the Security Council decision-making process will in itself guarantee that the preventive use of force is not abused in the pursuit of the national interests of individual states. It cannot be ruled out that states that are willing to participate in military action may also have other motives than altruistic concern for international peace. However, this is not problematic as long as the Security Council affirms that there is a proper purpose overall.

3) *Last resort*

General considerations

The collective use of military force must always be the last resort (Article 42, providing for military force if non-military measures "would be inadequate or have proved to be inadequate"). The question of whether and when the preventive use of force is the last resort is perhaps at the very heart of the current international debate. The High-level Panel arguably lowers the Charter threshold somewhat by requir-

ing only that there be “reasonable grounds for believing” that other measures will not succeed. This impression is reinforced by a central remark in the High-level Panel Report:

In the world of the twenty-first century, the international community does have to be concerned about nightmare scenarios combining terrorists, weapons of mass destruction and irresponsible states, and much more besides, which may conceivably justify the use of force, not just reactively but preventively and before a latent threat becomes imminent.... The Security Council may well need to be prepared to be much more proactive on these issues, taking more decisive action earlier, than it has been in the past.³⁰⁷

It is clear that the state or group responsible for the serious threat must be unwilling or unable to eliminate it, despite international pressure and (the prospect of) sanctions. The question is how far the international community must pursue non-military measures before deeming them useless, and for how long it can reasonably afford to put its trust in non-military sanctions while, in the meantime, the threat is growing. There is no general answer to this question, which depends above all on the source of the threat and, in the case of state complicity, the nature, past record and perceived responsibility of the regime. In any event, the preventive use of force against non-imminent threats presupposes a concept of necessity different from the traditional one. As regards purely preventive action, the assessment of necessity can hardly be subjected to the usual objective criteria of imminence; rather, it involves a combination of factual, discretionary and purely political elements.

International terrorism

As mentioned earlier, while purely preventive military action against terrorism may not be so relevant, after a terrorist attack has occurred the right of self-defence will apply. Even so, the option of preventive military action against terrorism is at least conceivable.

If the host state is unwilling to eliminate the threat, it is to be expected that its behaviour may be influenced by non-military measures dissuading the regime from supporting or harbouring terrorists. Some regimes may prove immune to international pressure and sanctions. However, only experience can justify the conclusion that non-military measures will not work. And, in the case of non-imminent

threats, there is by definition time to try alternatives to military force.³⁰⁸ However, the amount of time available may be uncertain, because the threat is unpredictable and may in fact be imminent. Therefore, the patience the international community is required to show is presumably relatively short.

If the host state is unable to prevent terrorist activities emanating from its territory because it does not have the capacity to do so or because the central government has fallen apart (anarchy), non-military sanctions against the state will not eliminate the threat. In this case, the use of military force will arguably be the only option to eliminate the terrorist threat.

States and WMD

Generally, it is to be expected that the behaviour of states may be influenced by non-military measures, including economic sanctions to dissuade a regime from developing WMD. Only experience can justify the conclusion that non-military measures will not work because a particular regime is immune to pressure; and in the case of non-imminent threats, there is by definition time to try alternatives to military force.³⁰⁹ The patience that the international community will be required to show will depend, among other things, on the proximity of an actual WMD threat, that is, on a technical estimate of when such weapons may become operational.

4) *Proportional means*

General considerations

Proportionality is inherently a vague concept, although it does have a strong position in international law on the use of force (see Chapter 3). The core of proportionality is that any use of force should be reduced to the minimum necessary to eliminate the threat.

International terrorism

To the extent that threats emanating from international terrorism may be effectively countered at all by the use of military force, such use of force will typically take the form of targeted pin-prick action against terrorist camps and bases abroad. The scale and duration of such action is not likely to come into conflict often with the requirement of proportionality.

As regards states supporting terrorists, if targeted operations against the terrorists are able to eliminate the specific threat, it may arguably be disproportional to remove a regime which has so far supported or harboured them. However, it could also be argued that a regime supporting terrorists will be likely to continue doing so, even after the immediate threat has been eliminated. If such a regime does not respond to international demands for a change in its policy, including non-military sanctions, its forcible removal may arguably be both necessary and proportionate in order to prevent the likely emergence of new terrorist threats.

States and WMD

Once the use of military force has become necessary as the last resort, presumably, targeted action will not suffice to remove the threat. States developing such weapons will presumably have taken steps to ensure that their WMD capability is not vulnerable to pin-prick attacks by spreading and hiding the research facilities, weapons and means of delivery in different locations. Therefore, an all-out invasion and forcible regime change may be the only military options available to remove the threat, in which case they are also proportionate.

5) *Balance of consequences*

Assessing whether military action is likely to be successful in eliminating the threat and whether the consequences of an action will not be worse than the consequences of inaction is clearly a highly complex exercise. First of all, the assessment is based on presumptions and estimates concerning future events, which are by definition uncertain. And what kind of time frame should provide the basis of the assessment: one year, ten years? Secondly, the balancing of harmful and benevolent consequences is inherently subjective, especially as regards external threats, where the harm done by acting may be of a quite different character than the threat that has been removed.

5.4. Criteria and decision-making procedure

Even though the five criteria of legitimacy may thus to some extent be elaborated on the basis, among others, of Security Council practice, norms of international law and common sense, inevitably a wide scope for political discretion remains as to whether the threat to

international peace and security justifies the use of military force and justifies it now.

However, whereas this may be a strong argument against any doctrine of the preventive use of force by individual states (see Chapter 5), the decision-making procedure in the Security Council is presumably a strong guarantee against any outright abuse of preventive military force, since it ensures not only legality of action, but also that action will only be taken if this is both just and necessary.³¹⁰ In other words, the Security Council's procedural safeguards compensate for the inherent vagueness of criteria.

6. Conclusion

Security Council enforcement action: legal basis and scope

Security Council enforcement action differs fundamentally from the right of self-defence. First, whereas self-defence is an individual right of the state victim of an armed attack, the Security Council has a general responsibility for the maintenance of international peace and security (Article 24(1) of the UN Charter), which in the case of a threat to peace includes the option of military enforcement action (Articles 39 and 42 of the UN Charter). Second, whereas the right of self-defence is conditional upon the occurrence or imminent threat of an attack, the competence of the Security Council to authorise the use of force also extends to broader threats to international peace and security, including threats that have not (yet) been directed against any specific state(s) and have not yet become imminent. There are, in fact, no legal limits on the freedom of the Security Council to determine the existence of a threat to the peace and to decide that military action is necessary to meet it.

International terrorism

Most states have undertaken international obligations to combat and punish terrorism in accordance with the twelve major UN conventions and protocols on terrorism, and states which support or harbour international terrorists are in violation of international law. The Security Council has stated that all acts of international terrorism constitute a threat to international peace and security. On that basis, under Chapter VII the Council has adopted general non-military measures to strength-

en the fight against international terrorism, as well as non-military sanctions against regimes sponsoring terrorism. So far, the Council has never authorised the use of military force to combat or prevent international terrorism.

WMD

The potential danger to international peace and security inherent in the very existence of WMD has long been recognised. International conventions have been adopted prohibiting biological and chemical weapons and the proliferation of nuclear weapons. The Security Council has stated in general terms that the proliferation of WMD constitutes a threat to international peace and security. Under Chapter VII the Council has adopted general measures to prevent the proliferation of such weapons to non-state actors, as well as non-military sanctions against states suspected of developing WMD. So far, the Council has never specifically authorised preventive military action to eliminate a threat emanating from WMD, although it seriously considered doing so in the case of Iraq in 2002-2003.

Five criteria of legitimacy relevant to the authorisation of preventive military action

If the Security Council has authorised the preventive use of force to eliminate a threat to international peace and security, including threats from international terrorism or the proliferation of WMD, such use of force is legal. However, collective action also needs legitimacy to sustain and strengthen the international legal order. The five general criteria of legitimacy identified in the 2004 Report of the High-level Panel appointed by Kofi Annan seem to reflect a broad international consensus:

- 1) *Serious threat*. There must be a serious threat *prima facie* justifying the use of force.
- 2) *Proper purpose*. The primary purpose of military force must be to avert the threat.
- 3) *Last resort*. There must be reasonable grounds for believing that non-military sanctions will not succeed in eliminating the threat.
- 4) *Proportional means*. The use of military force must include only the minimum necessary to avert the threat.

- 5) *Balance of consequences.* There must be a reasonable prospect that the military action will succeed and will not do more harm than good.

Although universal agreement on these very general criteria would provide a useful starting point, one may nevertheless question how much would have been achieved. In particular, the threshold criteria of a serious threat and the crucial necessity requirement of last resort are inherently vague as regards preventive military action. The general criteria leave ample room for discretion, controversy and arbitrariness. An attempt to elaborate further the five criteria as regards international terrorism and states with WMD is summed up below.

Preventive military action against international terrorism

Security Council practice supports the view that military enforcement action against threats from international terrorism is an option. However, an authorisation by the Security Council of the collective use of force may not be a very relevant option to counter international terrorism. Presumably most threats from terrorism will only become apparent once terrorist attacks have occurred, in which case the right of self-defence covers necessary responses to prevent the ongoing threat of further attacks. A Security Council authorisation will only be legally required where preventive action is considered even in the absence of previous terrorist attacks. This may be relevant exceptionally in the following circumstances:

Serious threat. Preventive action may arguably be prima facie justified, notably if a private (terrorist) group or organisation acquires or seeks to acquire WMD, or threatens to strike against the international community without identifying any specific victim state(s).

Last resort. If the host state seems unwilling to eliminate the threat, it is to be expected that its behaviour may be influenced by non-military measures. Only experience can justify the opposite conclusion, but considering the nature of the threat, the respite available will be brief. If the host state is unable to prevent terrorist preparations on its territory, non-military sanctions are obviously useless, and only military force will succeed in eliminating the terrorist threat.

Proportional means. Specific terrorist threats may often be eliminated by targeted pin-prick action against terrorist camps and bases abroad, that are not likely to conflict with the requirement of proportionality. If a regime supporting terrorists proves persistently unwilling to abide by international demands for a change in its policy, the forcible removal of the regime may arguably be both necessary and proportionate to prevent the likely emergence of new terrorist threats.

Preventive military action against states with WMD

There is a precedent in the Council's practice for the view that, if necessary, military action against threats from states developing WMD is an option. An authorisation by the Security Council of preventive military action would seem more relevant to state threats than to terrorist threats, since a state threat may well be perceived as both apparent and real, even though it has not yet materialised in an armed attack or an imminent threat of attack that would trigger the right of self-defence. At the same time, however, preventive action against threats from WMD states is not only more controversial, but the stakes involved are also higher than as regards military action against terrorists. A Security Council authorisation is necessary to conduct purely preventive action against states possessing or developing WMD. Such an action may be relevant in the following circumstances:

Serious threat. It is difficult to define in general terms the conditions which may arguably justify purely preventive action against a state that is suspected of possessing or developing WMD. As regards nuclear weapons especially, it may be problematic to regard the proliferation of such weapons to new states as in itself constituting a threat to international peace and security, since, unlike private groups, such states may invoke legitimate defensive purposes by referring to the possession of nuclear weapons by certain other states. Only a universal prohibition on nuclear weapons would remove this ambiguity. To establish a real and serious threat, the evidence of a state possessing or developing WMD should arguably be supplemented by indications that the relevant regime may well be willing to use such weapons for aggressive purposes (hostile intent). Relevant indications would be that the regime has previously used WMD, has previously committed aggression against other states and has made credible threats. Saddam Hussein's

regime in Iraq had such a record, and in 2002-2003 the Security Council therefore considered the use of military force as a last resort to disarm Iraq.

Last resort. Generally, it is to be expected that the behaviour of states may be influenced by non-military measures. Only experience can justify the opposite conclusion, and as regards non-imminent threats, there is by definition time to try alternatives to military force. In the case of Iraq, the Security Council could not agree that in March 2003 the time had come to resort to force as a last resort to disarm an Iraq suspected of the possession of WMD.

Proportional means. Presumably, targeted pin-prick action will most often not suffice to remove a threat from a state in possession of WMD, which in any event may well resurface. An all-out invasion and forcible regime change may be the only effective, and thus arguably proportional, measure available.

Concluding remarks

Preventive military action authorised by the Security Council is legal. The five general criteria of legitimacy are inherently vague, whether further elaborated or not. However, the decision-making procedure of the Security Council, in requiring a qualified majority of 9 votes in favour (out of 15 Members) and the absence of a Great Power veto, is presumably a strong guarantee that the collective option of preventive military action will not be abused. However, inherent in the same decision-making procedure is the inevitable risk that, due to a Great Power veto, the Security Council may fail to act preventively even in those exceptional cases where, according to the five criteria and the prevailing opinion among member states, there were sound and compelling reasons to do so. If so, individual states or regional organisations may be inclined to consider bypassing the Council and acting alone (see Chapter 5).

Chapter 5

Preventive Use of Force not authorised by the Security Council

Strong states in particular may be willing to undertake purely preventive action, even if the Security Council is blocked, to counter what they conceive to be a serious threat to their own national security or to international security in general, especially those emanating from international terrorism or the proliferation of WMD. The legality and justifiability of such unauthorised preventive military action is the subject of the present chapter.

The chapter is structured as follows. In the absence of Security Council authorisation, the purely preventive use of force has no legal basis in current international law (Section 1). As with unauthorised humanitarian intervention the questions are whether, in exceptional circumstances, the preventive use of force may nevertheless be justifiable on moral and political grounds (Section 2) and, if so, under what conditions and criteria (Section 3), and what legal-political strategy should be pursued with regard to unauthorised preventive action? (Section 4). The chapter ends with a conclusion (Section 5).

I. The absence of a legal basis

Purely preventive military action against non-imminent threats is illegal in the absence of a prior authorisation from the Security Council. The right of self-defence does not apply; no other organ than the Security Council can legally authorise the use of force; and the customary defence of necessity is not available in the case of preventive military action.

I.1. The right of self-defence does not cover preventive action

Unilateral use of force is allowed in self-defence only in accordance with Article 51 of the UN Charter. Apart from the right of self-defence, any

more far reaching right of forcible self-help against another state which might have been recognised in state practice prior to 1945 did not survive the UN Charter, which in Article 2(4) stipulates a general prohibition on the use of force by states.³¹¹ Although the limits of the current right of self-defence are controversial, it is clear that, in the absence of a previous attack, purely preventive action to counter non-imminent threats falls outside the right of self-defence (see Chapter 3).

1.2. The Security Council has exclusive powers to authorise preventive action

Collective action, or the use of force authorised by the Security Council under Chapter VII, Articles 39 and 42, is legal and may include purely preventive military action beyond the limits of self-defence. If, due to the lack of a qualified majority or a veto by a Permanent Member, the Security Council cannot authorise the use of force, no alternative forum exists for legally authorising an otherwise illegal use of force (see Chapter 4).

1.3. Preventive action as a legal necessity?

Preventive military action cannot be legally justified under the defence of “necessity”. “Necessity” is recognised under international law as an exceptional legal defence precluding the wrongfulness of an act that is not in conformity with an international obligation, with the result that a state does not incur international responsibility for actions justified by necessity.³¹²

Article 25 in the ILC Draft Articles on State Responsibility concerning “necessity”, which broadly reflects customary international law,³¹² provides that:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act

(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) the international obligation in question excludes the possibility of invoking necessity; or

(b) the State has contributed to the situation of necessity.

Furthermore, necessity may not be invoked to justify conduct not in conformity with a peremptory norm of international law, i.e. *jus cogens* (Article 26).

The “essential interest” which must be endangered for a situation of necessity to exist may be an essential interest of either the invoking state or the international community as a whole.³¹⁴ A threat to international security may thus be a valid ground for invoking necessity.

However, to justify the defence of necessity, that interest must also be faced with a “grave and imminent peril”. The peril must be objectively established and must be proximate or in any event inevitable.³¹⁵ Since preventive military action against non-imminent threats is characterised by the absence of an imminent threat, the crucial and indispensable condition of invoking necessity – the imminence and urgency of the threat – is missing. This suffices in itself to conclude that the defence of necessity is in any event not applicable to preventive action. It is therefore not necessary in this context to assess whether necessity may ever be invoked to justify the use of military force.³¹⁶

2. Illegal but legitimate?

If a Security Council authorisation for preventive military action cannot be obtained, especially if this is due to a Great Power veto, as with humanitarian intervention the question arises whether preventive action may nevertheless be justifiable on political and moral grounds in exceptional circumstances. However, as has already been shown in Chapter 4 (Section 5), the basis for arguing legitimacy and necessity is fundamentally different when it comes to preventive military action as compared with humanitarian intervention. Whereas there is a widespread consensus in the international community that humanitarian intervention is legitimate, if necessary even without the blessing of the

Security Council, there is no common ground as to whether and when preventive action may be legitimate.

2.1. The dangers of unauthorised preventive military action

Unlike in the case of humanitarian intervention, there is no international consensus on the circumstances in which, if ever, preventive military action to counter a perceived threat is justifiable (cf. Chapter 4). This makes it difficult to claim in any specific case that, by refraining from authorising preventive action, the Security Council has “failed to act”. It may thus be said that, whereas a doctrine of humanitarian intervention may be subject to abuse, a doctrine of preventive military action invites abuse. In fact, it seems hard to imagine any military action which could not be defended under some concept of threat prevention.³¹⁷

The subjectivity of identifying potential threats

The question of what kind of situation arguably constitutes a threat to international peace and security sufficiently serious to warrant consideration of the use of military force to eliminate it is inherently subjective, since it involves speculating on future events and intentions. In the case of non-imminent threats, including threats from international terrorism and the proliferation of weapons of mass destruction (WMD), there is thus no “objective” standard to rely on. The assessment required is by its nature political. It is therefore bound to be controversial, and it encourages abuse for motives of national interest.

The relative necessity of preventive action

Preventive action, by definition, cannot be justified with reference to actual, urgent necessity. The necessity of preventive action is political and subjective. Whereas self-defence and humanitarian intervention are justified by an imminent threat (as a minimum), preventive action is not an emergency measure but rather a political instrument, involving the application of military force as a precautionary measure of risk management to prevent a development which is deemed prejudicial to the interests of national and/or international security. That is why it is difficult to label inaction by the Security Council a “failure to act”, since, when the Security Council does not authorise preventive action, this may well be due to legitimate disagreement among its members as

to the necessity of using military force now, rather than waiting to see whether non-military means will succeed in eliminating the threat.

The vagueness of conditions makes the absence of procedural safeguards critical

The inherently vague basis for and subjective character of assessing that there is a serious threat to international peace and security, and that, although the threat is not yet imminent, the use of force is necessary now to eliminate that threat, makes the absence of procedural safeguards such as those involved in Security Council decision-making critical in terms of claims to legitimacy. Whereas Security Council preventive action may be presumed to be legitimate – i.e. motivated by a real threat, intended only to eliminate that threat, and based on a shared assessment that military force is the last resort – unilateral preventive action is likely to be met with a presumption of wrong intentions and motivations of self-interestedness.

The risk of wrong assessment or intelligence

The political price of conducting preventive action unilaterally will be high if it turns out that intelligence concerning the existence and gravity of a military threat on which the initial decision to resort to force was based was incorrect, and that, therefore, the case for preventive action was in fact weak.

The prerogative of strong states

Preventive action, even more so than humanitarian intervention, is destined to be a prerogative of strong states, since only strong states have the military muscle required and, above all, the strength to afford the risks involved. If a state is the target of preventive action, it is likely to be a relatively weak state.

The real risk involved in demolishing the international legal order

The preventive use of force by individual states is at odds with the very rationale of the UN Charter, which builds on the non-use of force between states, except in self-defence against an armed attack, and a system of collective security. Once a doctrine of preventive action is invoked by one state,³¹⁸ it is to be assumed that other strong states will follow if they consider that their security or other interests will be best

served by doing so.³¹⁹ And, due to its vagueness, a doctrine of preventive war can hardly be restricted to a set of specific and narrowly defined circumstances. Consequently, a doctrine of preventive action is likely to erode, if not entirely demolish, the authority of the principle of the non-use of force, with the likely consequence that armed conflict will increase markedly.

2.2. The possible justifiability of unauthorised preventive military action

Despite these obvious dangers, it may not be entirely ruled out that, exceptionally, preventive action could arguably be justifiable on political and moral grounds, even without a Security Council authorisation, and that a majority of states would indeed accept such action as justified in the specific circumstances. This may be the case especially as regards preventive action against international terrorism and states with WMD.

A threat may be real and grave, although not yet imminent

A serious threat to states and the international community at large may exist, even though the threat has not yet become imminent. There is a precedent in Security Council practice that even non-imminent threats, such as the proliferation of WMD, may constitute “a threat to international peace and security” (see Chapter 4).

Some threats may not be eliminated by non-military means

Many non-imminent threats may presumably be eliminated without resorting to the use of military force, bringing, instead, political and economic pressure to bear on the state responsible for the threat. However, in some cases non-military sanctions may not suffice. Some regimes may prove immune to them.

Some threats may not be deterred by the threat of retaliation

Traditionally it has been assumed that states threatening others may at least be deterred from giving effect to the threat by the prospect of overwhelming retaliation. However, this strategy is based on the rational behaviour of international actors and may not work against regimes with a bad international standing, so-called “rogue states”, or against private terror cells or organisations without a national interest to protect.³²⁰

Necessity to act because to wait would be too risky

If a potential threat is real and grave, and it seems clear beyond reasonable doubt that it will not be possible to remove it by non-military means, the use of force to eliminate the threat may arguably be justifiable, even though the threat has not yet become imminent. The cost of waiting may be unacceptable, since it may no longer be possible to act once the threat has fully emerged, or at least it may have much more severe consequences to wait until it has. This is especially obvious with regard to threats emanating from the development of nuclear weapons,³²¹ but it may also apply to terrorist threats.³²² There is a precedent in Security Council practice, namely Iraq in 2002-2003, that the use of force may be an option even against non-imminent threats such as the proliferation of WMD (see Chapter 4).

Enforcement of international law

An additional argument in favour of preventive action is the necessity of backing international obligations by credible enforcement even in the event of a paralysed Security Council. As was seen in Chapter 4, a threat to international peace and security will most often also constitute, or at least involve, one or several serious violations of international norms.

2.3. Preliminary assessment

Given the evident dangers to the international legal order and to international peace inherent in unauthorised preventive action, there is presumably little room, if there is any, for convincing the international community in a particular case that unauthorised preventive action is both just and necessary. If contemplated at all, unauthorised preventive action remains a hard choice and a political decision which can only prudently be made in concrete circumstances. Unauthorised preventive action is not only unlawful, states conducting such action must also expect international condemnation. Exceptionally, however, the majority of states may tolerate or excuse preventive action on political and moral grounds if the threat it seeks to eliminate is regarded as sufficiently real and grave, and if other means than military force are deemed useless.

3. Criteria of possible legitimacy in exceptional cases

Chapter 4, on the use of force authorised by the Security Council, identified five general criteria of legitimacy relevant to the collective use of preventive force.³²³ Obviously, the same five criteria are also relevant to the unauthorised use of preventive force. However, it is equally clear that the function of legitimacy is different and the application of the five criteria becomes more controversial in cases of the unauthorised use of force:

Since preventive action authorised by the Security Council is legal under international law, in this context the “only” function of criteria is to strengthen the legitimacy and consistency of Security Council action by enhancing consensus on the issue of when the Security Council should and should not act preventively. Furthermore, as regards the preventive use of force with Security Council authorisation, it was asserted that the inherent vagueness of the five criteria of legitimacy is compensated for by the procedural safeguards built into Security Council decision-making, which provide a strong guarantee against abuse (see Chapter 4).

Conversely, unauthorised preventive action is illegal under current international law, and the function of criteria of legitimacy is therefore to provide a moral and political justification for bypassing, if necessary, the Security Council, even if this means violating existing norms of international law. In other words, as opposed to authorised action, a claim to moral and political legitimacy is the only basis for justifying unauthorised use of force. Furthermore, in the absence of procedural safeguards similar to those associated with Security Council decision-making, the inherent vagueness of the five criteria calls for controversy in specific cases, especially as regards the two crucial criteria of a serious threat (threshold) and last resort (necessity of military force), as well as allegations of abuse.

It follows, first, that strict observance of the *five criteria* of legitimacy is arguably even more crucial in the case of the unauthorised use of preventive force (section 3.1). Secondly, if the Security Council is blocked, this being the *sixth criterion* (section 3.2), it seems necessary to consider, as a *preferable seventh criterion*, possible alternatives to Security Council authorisation which may strengthen the moral and political

legitimacy of preventive action by providing international support and limiting the risk of unilateral abuse (section 3.3). Finally, a further *preferable eighth criterion* is that unauthorised military action should be conducted multilaterally by the broadest possible coalition of states (section 3.4).³²⁴

3.1. The five general criteria of legitimacy

The five general criteria of legitimacy have already been described in Chapter 4. In the present context, it is therefore only necessary to add some considerations of specific relevance in the absence of Security Council authorisation. To some extent, the following remarks are influenced by considerations similar to those applicable to unauthorised humanitarian intervention.³²⁵ However, as mentioned earlier, whereas there is a high degree of international consensus concerning the conditions for legitimate humanitarian intervention,³²⁶ the criteria for legitimate preventive action against non-imminent threats are much more vague and their specific application likely to be much more controversial.

1) *Serious threat*

As mentioned in Chapter 4, this is the crucial threshold criterion, a minimum condition of resort to preventive military force, but also an inherently vague criterion. As regards the legitimacy of unauthorised action, it would therefore clearly be preferable, although it cannot be an unconditional requirement, that such action is based on a prior determination by the Security Council that the situation constitutes “a threat to international peace and security” within the meaning of UN Charter Chapter VII. There is a precedent in the practice of the Security Council in the sense that both international terrorism and the proliferation of WMD are regarded as threats to international peace and security.

2) *Proper purpose*

As mentioned in Chapter 4, decision-making in the Security Council contains an overall guarantee that action will only be taken with the overall right intention. As regards unauthorised action no such guarantee exists; instead there is a real risk that the use of preventive force will not be conducted for the right reasons.³²⁷ Therefore, unauthorised

action should preferably be endorsed by an alternative international forum or agency (section 3.3) and should be carried out by the broadest possible coalition of states (section 3.4) in order to preclude, among other things, allegations of national self-interestedness. Although it is essential to avoid force being abused for reasons of the national interest of individual states, the complete disinterestedness of intervening states cannot realistically be expected.³²⁸

3) *Last resort*

As mentioned in Chapter 4, this is the crucial necessity criterion – justifying the use of force as a measure of last resort – but also an inherently vague criterion as regards preventive action against non-imminent threats. When the threat has not yet become imminent, the urgent necessity of a resort to force is likely to be controversial, since there is at least time to try alternatives. It is therefore more problematic in the case of preventive action than as regards humanitarian intervention to label inaction by the Security Council an objective “failure to act” justifying unauthorised action. However, the case of Iraq in 2002-2003 does show that preventive military action may, in exceptional circumstances, be considered by the Security Council as a measure of last resort to eliminate non-imminent threats.

4) *Proportional means*

The action taken should be clearly restrained as to the means, scale and duration of military force necessary to eliminate the threat and proportionate to the gravity of that threat. An objective minimum is respect for the rules of international humanitarian law. The requirement that only necessary and proportionate force be used should arguably be even more strictly adhered to in the case of unauthorised military action. However, in the case of unauthorised action the restraints and control mechanisms normally accompanying Security Council action are missing, and the risk of excessive force is therefore greater.³²⁹

5) *Balance of consequences*

Whereas the assessment and weighing of the likely consequences, both benevolent and harmful, of military action must necessarily be undertaken prior to action, the perceived legitimacy among states of unauthorised preventive action will also depend upon the ultimately suc-

cessful outcome of the action taken, and presumably to a much greater extent than in respect of lawful action authorised by the Security Council.³³⁰

3.2. The Security Council is blocked

Respect for the UN Charter collective security system and the primacy of the Security Council requires that, prior to undertaking unauthorised military action, Security Council authorisation must have been sought in vain.

In terms of legitimacy it is crucial that inaction on the part of the Council should be due to a Great Power veto, in which case it may reasonably be said that the Council is “blocked”. Under the current practice of the Security Council, where draft resolutions are circulated among members before being brought formally before the Council, it cannot be excluded that a “blocking” may be demonstrated without the matter being put to a vote, if it is clear from statements made outside the Council that a Great Power veto must be anticipated.³³¹ However, it is clearly preferable that in future cases a request for Security Council authorisation should always be formally brought before the Council and put to a vote so that any “blocking” by a Great Power veto is laid open for all to see.³³²

If, on the other hand, a request for authorisation fails to gather even the requisite qualified majority of 9 members in the Security Council, it cannot reasonably be asserted that the Council is “blocked”.

The primacy of the Security Council also makes it natural to require that any unauthorised resort to force should immediately be reported to the Council.

3.3. Preferable use of an alternative forum of legitimacy

In the event the Security Council is blocked, it is highly preferable that alternative forums should be approached for political support to enhance the legitimacy of preventive action and preclude allegations of abuse. The best alternative to the Security Council is the General Assembly, but even a (sub-)regional organisation or agency may provide some legitimacy to the action. Ultimately, however, it cannot be ruled out that even unilateral preventive action conducted without the support of any universal or regional organ might exceptionally be considered justifiable in its own right.

The General Assembly. Under the UN Charter the General Assembly has a subsidiary responsibility for the maintenance of international peace and security. Although it has no legal powers to authorise an otherwise illegal use of force when the Security Council is paralysed (see Chapter 4), obviously a declaration of support from the General Assembly³³³ would immensely strengthen the invoking states' claim to moral and political legitimacy.³³⁴

Regional or sub-regional organisations or agencies. No regional organisation can provide legitimacy for preventive action in the way that the UN can, especially the Security Council, and secondarily the General Assembly.³³⁵ Nevertheless, although regional arrangements have no legal power to authorise an otherwise unlawful use of force (see Chapter 4), conducting preventive action through or with the support of a regional or sub-regional organisation of agency like NATO, the OSCE, the EU or the African Union (AU), does strengthen the claim that such action is justifiable on moral and political grounds.³³⁶

Action without UN or regional support. Preventive action conducted by an ad hoc coalition or an individual state without the support of the General Assembly or a (sub-)regional organ is more likely to be condemned than in cases where such support has been obtained. Nevertheless, although states are generally highly critical of unilateralism, it cannot be entirely excluded that even unilateral action may exceptionally be accepted as justifiable by a majority of states if the substantial conditions of legitimacy are considered to have been clearly met.³³⁷

3.4. Preferable use of multilateral action

The use of force should preferably be carried out by the broadest possible coalition of the willing to preclude allegations of national self-interestedness and other forms of abuse.³³⁸ It is evident that the case for legitimacy is stronger if preventive action is conducted multilaterally rather than by an individual state. In principle, however, even unilateral action by a single state may exceptionally be regarded by a majority of states as justifiable if it is seen to clearly meet the above criteria and has been conducted successfully.³³⁹

4. Choice of legal-political strategy

Having discussed the possible legitimacy or justifiability of unauthorised preventive action and the relevant criteria of legitimacy, the time has come to address the available legal-political strategies for preventive action and their respective benefits and drawbacks.

4.1. Four conceivable strategies

As with unauthorised humanitarian intervention,³⁴⁰ there are basically four conceivable legal-political strategies regarding unauthorised preventive action against non-imminent threats:

Status Quo Strategy. Outside the current scope of self-defence, preventive military action will only be taken after prior authorisation by the Security Council. This strategy has no ambition to create new exceptions to the prohibition on the use of force, including a manifest expansion or redefinition of the current right of self-defence. However, it may involve an ambition to improve the willingness of the Security Council to take preventive action in cases which fulfil the five basic criteria of legitimacy (*Status Quo + Strategy*).

Ad Hoc Strategy. Outside the current scope of self-defence, and if the Security Council is blocked, unauthorised preventive action may be considered as an exceptional emergency exit from international law justified on political and moral grounds only, in accordance with the six (+ two preferable) criteria of legitimacy mentioned above. The perceived legitimacy of preventive action is not invoked to support a claim of legality under international law, but may support a plea of extenuating circumstances mitigating the formal breach of the law. Whereas this strategy keeps open an exceptional option for unauthorised preventive action, at the same time it seeks to preserve the existing legal framework regarding the use of force, including the monopoly the Security Council has to authorise the preventive use of force.

Subsidiary Right Strategy. Outside the current scope of self-defence, and if the Security Council is blocked, a subsidiary legal right of unauthorised preventive action is invoked in accordance with the six (+ two preferable) criteria of legitimacy mentioned above. The perceived legitimacy

of preventive action is thus invoked to support a claim of legality. Whereas this strategy does not challenge the primacy of the Security Council, it does challenge the Council's legal monopoly to take decisions regarding preventive action.

General Right Strategy. Outside the current scope of self-defence, a general legal right of unauthorised preventive action is invoked in accordance with the five general criteria of legitimacy. The perceived legitimacy of preventive action is thus invoked to support a claim of legality, most likely as an expansion of the current right of self-defence. This strategy challenges not only the legal monopoly of the Security Council to take decisions regarding preventive action, but even the primacy of the Council in this respect.

4.2. Assessing the feasibility and consequences of the four strategies

The *Status Quo Strategy*, with its exclusive reliance on the Security Council as regards preventive action, is a reasonable starting point. The criteria of legitimacy of preventive action are vague, and their specific application is bound to spur controversy and dispute in the absence of a generally accepted procedure such as Security Council decision-making. Assuming that the Security Council will in fact be able to agree on preventive action in cases where such action may exceptionally be called for, this forum is clearly preferable for reasons of legitimacy and, above all, in order to preserve the international legal order and the prohibition on unilateral military force. The risk of inaction involved in relying on the Security Council may not generally be detrimental to the essential security concerns of states, since the most urgent and immediate threats to state security are already covered by the right of self-defence. However, in light of the current international security environment, combined with the build-in uncertainty that the Security Council will indeed act on occasion, it may be wise not to rule out entirely and from the outset an option for unauthorised preventive action in exceptional cases. Keeping a back door open may also enhance consensus in and effective action by the Security Council (*Status Quo + Strategy*).

The General Right Strategy and the *Subsidiary Right Strategy* seem neither feasible nor recommendable. First, they both suffer from the fact that it is hardly conceivable that an international consensus could be

achieved on a legal right of preventive action beyond the scope of self-defence against imminent threats. Generally states do not favour expanding the right of unilateral resort to force. Indeed, if a legal right of unauthorised humanitarian intervention is controversial,³⁴¹ so *a fortiori* is a legal right of unauthorised preventive action, the latter doctrine being much more far-reaching and vague than the former.³⁴² Apart from the USA and Israel, it would seem that no other states support a right of unauthorised preventive action,³⁴³ which is without internationally recognised precedent in post-Charter state practice.³⁴⁴ It thus seems very likely that asserting a new legal right of preventive action would only serve to weaken international law, not to amend it.

Secondly, the absence of an international consensus concerning clearly defined criteria for the legitimacy of preventive action and the likelihood that clear criteria are indeed impossible to define in itself would seem to speak against any legal right strategy. Thus, whereas a legal doctrine of humanitarian intervention may be subject to abuse, a doctrine of preventive action could be said to invite abuse, due to the absence of clear criteria. Thirdly, due to its open-ended and potentially far-reaching character, the danger that invoking a legal right of preventive action poses to the existing legal order and to international stability is therefore immense. Claiming a legal right of preventive action without a Security Council mandate challenges the exclusive competence of the Security Council under current international law to deal preventively with international threats, thus potentially undermining not only the UN Charter system of collective security, but also the general prohibition on the use of force.

Obviously, the *General Right Strategy*, which would presumably take the form of an enhanced reinterpretation of the right of self-defence,³⁴⁵ is most harmful in this respect, since it challenges not only the monopoly but even the primacy of the Security Council to act preventively, this being a cornerstone of the existing legal order.

First, such a legal doctrine of preventive action is clearly subject to abuse, hardly being distinguishable from a mere “policy of force”³⁴⁶ and therefore likely to erode completely the general prohibition on the use of force.³⁴⁷ As the High Level Panel aptly stated:

in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for

*the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one is to allow all. We do not favour the rewriting or reinterpretation of Article 51.*³⁴⁸

Secondly, it is questionable whether, even from a legal-political point of view, preventive action could be squared with the concept of self-defence. Even if one may challenge, on legal-political grounds, the current scope of the right of self-defence being limited only to actual or, at the most, imminent attacks against a state, and the acute necessity of self-defence which that traditional conception of self-defence implies, there seems to be no way round the defining feature of self-defence: It is a right conferred upon a state that is the victim of or is being targeted by (the threat of) an attack, to respond individually or collectively to that (threat of) attack. Thus, the very concept of self-defence seems to be incompatible with any doctrine of preventive action extending also to more general threats to international peace and security, including those from international terrorism and the proliferation of WMD.

This leaves the *Ad Hoc Strategy* as a possible way of reconciling the exceptional political-moral necessity of preventive action with the long-term interest in preserving the international legal order. As with humanitarian intervention, the *Ad Hoc Strategy* keeps open the option of preventive action against manifest security threats if the Security Council is blocked, justified on moral and political grounds only, in accordance with the criteria listed above. The *Ad Hoc Strategy* is flexible and seems to fit the reality of preventive action. The general criteria are inherently vague. Furthermore, international tolerance of unauthorised preventive action is likely to depend on the concrete circumstances, including complex factors, such as the historical record and the political context, which may be relevant to the concrete justifiability of preventive action but are not susceptible of general definition in a set of criteria. In this sense, any political justification of preventive action against military threats is basically an *ad hoc* challenge, more genuinely so than is the case with humanitarian intervention, where, although an *ad hoc* justification may be chosen for reasons of legal politics, the underlying doctrine is rooted in an age-old and broad, if not uncontested, consensus regarding the general conditions of the legitimacy of intervention. Presumably, however, the space for a claim to the legitimacy and necessity of preventive action without the

Security Council is much narrower than in respect of humanitarian intervention, because the right of self-defence already covers the most urgent external threats to the security of states, and because unauthorised preventive action has the potential to erode the existing legal order entirely. Resort to preventive action without the Security Council must in any case remain rare and exceptional; if it is not, the existing legal order will not only be undermined, it is likely to be completely demolished.

4.3. Recommendation

On the premise that an international legal order concerning the use of force must be preserved, it is recommended that the *Status Quo (+) Strategy* should be the clear rule, i.e. relying exclusively on the Security Council to counter non-imminent threats with force if necessary, while working to make the Security Council more effective in responding with resolve to emerging threats. If at all, this strategy should be combined with only a very distant readiness to use the *Ad Hoc Strategy* as a highly exceptional basis for unauthorised preventive action that is justified on moral and political grounds only, should the Security Council fail to act due to a veto, actual or anticipated, in circumstances which, in the general opinion of states, fulfil the general criteria of legitimacy. When justifying unauthorised preventive action on political and moral grounds only, one recognises that such action is not in conformity with international law and that it should remain so. However, if the specific political and moral justification finds favour in the international community, it might be regarded as constituting extenuating circumstances which mitigate the wrongful nature of the formal breach of the law.³⁴⁹

5. Conclusion

No legal basis

Under current international law, purely preventive military action to counter non-imminent threats, including threats from international terrorism and WMD, is illegal without the prior authorisation of the Security Council. Neither the right of self-defence nor the defence of necessity provide a legal basis for purely preventive action.

Illegal but legitimate/justifiable?

Whereas a doctrine of humanitarian intervention may be subject to abuse, a doctrine of preventive action almost invites abuse. Since there are no clear and accepted conditions for preventive action, its necessity is inherently speculative and subjective. Therefore, the danger posed by unauthorised preventive action to the international legal order is much more serious than is the case with humanitarian intervention. Unauthorised preventive action challenges the very foundations of the existing legal order, opening the door to a policy of force which, for all practical purposes, might do away with the principle of the non-use of force. Consequently, the room for arguing that unauthorised preventive action is legitimate or justifiable is presumably much narrower than in the case of humanitarian intervention. Even so, it cannot be entirely ruled out that a majority of states may regard unauthorised preventive action as a legitimate and necessary measure in exceptional circumstances.

Criteria of possible legitimacy

This chapter has identified six “hard” criteria of legitimacy (1-6) + two “preferable” criteria (7-8), observance of which may exceptionally support a claim that the preventive use of military force is justified even without prior authorisation from the Security Council (1-5 are the same five criteria which are also relevant for action by the Security Council):

- 1) *Serious threat*. There must be a serious threat *prima facie* justifying the use of force.
- 2) *Proper purpose*. The primary purpose of military force must be to avert the threat.
- 3) *Last resort*. There must be reasonable grounds for believing that non-military action will not succeed in eliminating the threat.
- 4) *Proportional means*. Military force must include only the minimum necessary to avert the threat.
- 5) *Balance of consequences*. There must be a reasonable prospect that the military action will succeed and will not do more harm than good.
- 6) *The Security Council is blocked*. The Security Council must have failed to authorise the use of force due to a great power veto (actual or anticipated).

- 7) *An alternative forum of legitimacy is preferable.* A declaration of support should be sought from the General Assembly; if this is not feasible, endorsement or support from a (sub-)regional organisation or agency should be sought.
- 8) *Multilateral action is preferable.* In any event, the action should preferably be conducted by the broadest possible coalition of states to avoid allegations of abuse for motives of national interest.

On the abstract level, these criteria for the possible legitimacy of unauthorised preventive action are identical to those that are relevant to unauthorised humanitarian intervention. However, the question of whether and, if so, under what specific circumstances preventive action against non-imminent threats could arguably be considered legitimate or justifiable is much more controversial than in the case of humanitarian intervention. As regards the latter, there is widespread common ground on the specific contents of, in particular, the threshold criterion of a serious threat, as well as the essential necessity criterion of using force as the last resort, which, in the case of an impending humanitarian catastrophe, will normally be “objectively” evident. Conversely, as regards preventive action against non-imminent threats there is no similar age-old common ground to rely on; the criterion of a serious threat is inherently vague and, above all, the criterion of force as the last resort depends by definition on a subjective assessment and is therefore bound to be controversial (cf. Chapter 4). In the absence of the procedural safeguards of Security Council decision-making, this inherent vagueness of the crucial criteria makes any claim to legitimacy controversial.

The choice of legal-political strategy

A strategy of invoking a new legal doctrine of preventive action, whether as a general right expanding the current right of self-defence or as a subsidiary right conditioned upon the failure of the Security Council, is not only fraught with danger to the very foundations of the existing international legal order, but also has no prospect of gaining support in the international community. Such a strategy would serve only to weaken international law, not to amend it. Realistically, therefore, the choice is whether to adopt an *Ad Hoc Strategy* of unauthorised preventive action when the Security Council is blocked from taking action.

It is argued that the *Status Quo (+) Strategy*, which relies on the legal and political or moral authority of the Security Council while working to make it more effective in terms of firm responses to emerging threats, will in almost every case presumably be preferable.

If at all, this strategy should only be combined with a very distant readiness to consider the *Ad Hoc Strategy* on an exceptional basis, conducting unauthorised preventive action justified in the specific circumstances on moral and political grounds only, in cases where the Security Council is blocked despite the existence of circumstances which, in the opinion of a broad majority of states, fulfil the general criteria of legitimacy and thus call for preventive action. An *Ad Hoc* approach may also take into account context-specific factors which may often be relevant, but which are not susceptible of abstract definition in a set of criteria. When justifying unauthorised preventive action on political and moral grounds only, one recognises that the action is in violation of international law and that it should remain so. However, if the justification finds favour among states, it might be regarded as constituting extenuating circumstances mitigating the wrongful character of the formal breach of the law.

Conclusions and Prospects for the Future

This report is an extension of the DUPI report of 1999 on humanitarian intervention. The original report focused on the dilemma that arises when the Security Council is unable to authorise the use of force to stop genocide, ethnic cleansing or gross and systematic maltreatment of civilians. It was this dilemma that NATO was confronted with in Kosovo. The new threats emanating from the interaction of apocalyptic terrorist organisations with global reach, the spread of WMD and failed and weak states create a similar dilemma, which was put on the international agenda by the terrorist attacks on September 11th, 2001. What does one do if the Security Council is unable to authorise a preventive use of force in order to counter a WMD threat that is non-imminent but nevertheless judged real by most states?

The use of force for preventive and humanitarian purposes requires a mandate from the UN Security Council to be legal. A veto from a permanent member can consequently make military action illegal in situations where a good case for either humanitarian intervention or preventive action against the new threats exists. In most other respects, the preventive use of force against the new threats raises different and more fundamental challenges for international law, peace and stability than humanitarian intervention.

The potential risk that unauthorised prevention against the new threats may demolish the foundations of the UN Charter is far greater than is the case with humanitarian intervention. While the scope for humanitarian intervention is limited to situations in which genocide, mass killings, ethnic cleansing or other forms of gross and systematic maltreatment of civilians are imminent or are already taking place, the far more proactive nature of prevention means that the scope for action is much broader. In addition, unauthorised prevention against the new threats might evolve into a broader doctrine of unauthorised preven-

tion, which could be used to justify any military action, as it is hard to think of use of force which could not be defended under some conception of threat prevention. The risk of abuse is therefore far greater.

The legal challenge posed by prevention against the new threats also differs fundamentally from that addressed in the DUPI report on humanitarian intervention. Unlike the use of force for humanitarian purposes, that against the new military threats is lawful without a Security Council mandate if it is covered by the right of self-defence, although it is generally desirable and also foreseen in the Charter that the Security Council should take action and authorise the use of force in self-defence too. A mandate from the Security Council is only necessary beyond the limits of self-defence.

This report has addressed these challenges from the legal, moral, political and strategic perspectives and assessed the possibilities for developing criteria that might help to reduce the risk that the Security Council will fail to authorise the use of force in situations where most states consider such use as warranted. Like the DUPI report on humanitarian intervention, this analysis is based on a fundamental distinction between legality and legitimacy. Decisions concerning the use of force are never made solely on legal grounds: moral and political considerations are also part of the equation and crucial with respect to determining the legitimacy of such decisions.

The actual analysis is structured around four questions. The challenges to international law, international peace and stability are initially examined from the moral, political and strategic perspectives, with an emphasis on the latter, by asking how often preventive military action is likely to be taken against the new threats without a UN mandate. The more preventive military action is used in this way, the greater is the threat to international law, the UN and international stability.

The legal analysis has answered the three questions that follow from the legal framework described above and the mandate from the Danish government tasking DIIS to analyse the prospects of developing criteria for collective military action against the new threats:

- 1) To what extent does the right of self-defence allow states to use force against new military threats? Has the doctrine been modified since September 11th?
- 2) To what extent is the Security Council competent to authorise the

preventive use of force, not covered by the right of self-defence, against non-imminent military threats from terrorists or WMD? If so, under what conditions? What minimum criteria of legitimacy should apply?

- 3) Is preventive use of force, not covered by the right of self-defence, against non-imminent military threats from terrorists or WMD justifiable even without Security Council authorisation? If so, under what conditions? What minimum criteria of legitimacy should apply? And if so, should this lead to new rules of international law rendering even unauthorised preventive action lawful?

I. Preventive use of force and the new threats: need and feasibility

The new threats produced by the convergence of WMD proliferation, the new terrorism with global reach and weak and failing states are real and worrying. The proliferation of WMD technology, know-how and materials is likely to make it easier for both states and terrorists to obtain such weapons. In addition, there seems little doubt that apocalyptic terrorist groups like Al Qaida would use WMD if given an opportunity to do so.

The significant intensification of international cooperation to fight terrorism and the spread of WMD since September 11th is therefore welcome news. Many diplomatic and economic initiatives have helped to reduce the risk of WMD falling into the wrong hands, but there is general agreement that non-military measures cannot stand alone. Use of military force will, on occasion, be required to defeat the new threats, and it is the use of force beyond self-defence, which creates the challenge for international law, peace and stability, that is at the heart of this report.

The option of using force preventively as a last resort against “rogue” states and terrorists to prevent them from acquiring and using WMD is central to the international debate on how the new threats should be addressed. The reason for this is that the US National Security Strategy of 2002 (NSS) suggests that it should be possible to use preventive force as a last resort in exceptional circumstances because the new threats significantly increase the risk of surprise attacks with WMD. Since it is impossible to deter “rogue” states and

terrorists from WMD use, the NSS argues, it should be possible to use military force to prevent these actors from acquiring such weapons before the risk of a WMD attack becomes imminent.

The use of military force against non-imminent threats has traditionally been regarded as “preventive”, and such action is illegal according to current international law without authorization from the Security Council. The American proposal consequently seeks to legalise the preventive use of force by broadening the existing right to anticipatory self-defence/pre-emptive use of force to include the preventive use of force against “rogue” states and terrorists. Anticipatory self-defence/pre-emption is already considered legal by many states and by the UN Secretary General in situations in which the threat of a military attack is imminent.

There is widespread international agreement that the new threats have served to blur the traditional distinction between the pre-emptive and preventive use of force, and that it may be necessary to use force in situations where the threat of a WMD attack is real but non-imminent. The principal source of international disagreement has centered on the questions of how preventive force should be used, and who should take the legal and legitimate decision to employ such action.

The American proposal to expand the right of self-defence to include the preventive use of force against “rogue” states and terrorists seeking to acquire WMD has very little international support. The EU, the Non-Aligned Movement, the UN Secretary General’s High-level Panel and the Secretary General himself are of the opinion that the preventive use of force should be multilateral and authorised by the Security Council in order to minimise the destabilising consequences and to ensure that the UN and international law are not undermined.

The prospects for creating a new international consensus on the preventive use of force against the new threats will depend on how often states are likely to feel compelled to resort to this option without a mandate from the Security Council. The strategic chapter in the report therefore asks how often the need for preventive military action is likely to arise and how often states are likely to consider such action as feasible.

The analysis suggests that the preventive use of force will be used more often against terrorists than states. The case for using force against apocalyptic terrorist groups seeking to acquire WMD is strong. Apocalyptic terrorists are much harder to deter than states because they

have no fixed territory that is vulnerable to retaliation and tend to be prepared to die for their cause. Such terrorists are likely to continue their terrorism until they are captured or killed, and there is little risk of escalation because they are already trying to inflict mass casualties on their enemies. If actionable intelligence can be obtained, the preventive use of force can be effective with respect to destroying bases and killing or capturing terrorist operatives. Such attacks are likely to be small-scale, limited in scope and duration, and conducted in countries which are either unable or unwilling to prevent terrorists from operating on their soil. Even though the number of such attacks can be expected to grow, the destabilising consequences are likely to be small because most states consider such attacks legitimate after September 11th.

The strategic case for using force preventively against states that are seeking to acquire WMD is less compelling. Deterrence is more likely to work and the risks and costs of preventive action are far greater, since the scale of the operations will typically be much greater too. The record with respect to deterring states from using WMD in attacks on other states with a credible capacity for retaliation is good. Saddam Hussein's Iraq, the state in recent history that has used WMD (chemical weapons) most frequently, was effectively deterred from using them against coalition forces and Israel in the first Gulf War. States are also unlikely to transfer WMD to terrorists because they would be unable to control what the terrorists might do with them and because of the high risk that such transfers would be discovered. States are consequently most likely to use WMD or transfer them to terrorists as a last line of defence or as a final gesture of defiance if all else is lost. Unauthorised WMD transfers to terrorists carried out by rogue elements out of central control in weak and failing states already in possession of WMD seem more likely than transfers from governments in control of their WMD.

The preventive use of force against WMD states has had a low rate of success in the past. Limited military action in the form of air strikes and commando raids has generally failed to stop WMD programmes. Their effectiveness has been hampered by the difficulty of obtaining adequate intelligence, the fear of causing collateral damage and casualties, and the fear of escalation. Full-scale military operations culminating in regime change have a greater rate of success but are very costly and very difficult to carry out.

The dangers and difficulties associated with the preventive use of force against WMD states have generally induced governments to think twice before resorting to this option in the past. The number of preventive operations has proved low, and this is likely to remain the case. Iraq has served to underline the problems that regime change by force may involve and thus helped to ensure that the threshold for such operations remains high. Limited military operations in the form of air strikes are more likely, but their number is also likely to remain low due to their limited effectiveness.

The fact that a preventive use of force will rarely be regarded as a feasible option eases the intensity of the political-legal dilemma that unauthorised military prevention poses to international law, peace and stability. First, it gives states a strong incentive to work harder to ensure that the need for military prevention does not arise in the first place. The logical way of doing this is to enhance the effectiveness of the existing control regimes aimed at preventing WMD proliferation. Secondly, it is likely to make it easier for the Security Council to agree on authorising a preventive use of force in situations where a good case for such action can be made. Preventive military action against states is likely to seem more palatable if it reserved for exceptional cases only.

2. Preventive use of force and the right of self-defence

Under international law, only the right of self-defence provides a legal basis for states to use force against another state without prior authorisation from the Security Council. Consequently, self-defence is the natural starting point for assessing the options available to states confronted with threats emanating from international terrorism and WMD proliferation. The right of self-defence allows a state, whether acting individually or collectively, to use military force that is both necessary and proportionate to counter an armed attack until the Security Council has taken the measures necessary to restore international peace and security (Article 51 of the UN Charter).

Reactive self-defence, that is, responding to an attack which has already been launched, is at the core of the right of self-defence (Article 51). In the case of an ongoing attack, the necessity of a military response is evident. If the attack has already been completed, the right of self-defence depends on the existence of a continuing threat of fur-

ther attacks from the same source and the necessity of preventing or deterring such further attacks.

The status of anticipatory self-defence, that is, the use of force to pre-empt an imminent (threat of) attack, is controversial. Whereas such a right was well established prior to 1945, Article 51 provides only for a right of self-defence “if an armed attack occurs”. States have been reluctant to rely on anticipatory self-defence in concrete cases, preferring instead a flexible reading of Article 51. However, several states maintain a right of anticipatory self-defence, and strong arguments based on common sense and necessity speak in its favour. A credible legal argument may thus be made for a right of anticipatory self-defence in cases where there is compelling evidence of the existence of an imminent threat of attack. In any case, anticipatory action in such circumstances will presumably be regarded by most states as legitimate.

“Preventive self-defence”, that is, the use of force to eliminate a perceived potential threat of future attack in the absence of previous attacks or an imminent threat of attack against (a) specific state(s), has no legal basis in current international law. Neither Article 51 nor state practice provides any basis for invoking self-defence on the grounds that a state or a non-state actor is likely to strike sometime in the future, somewhere in the world.

Self-defence and international terrorism by non-state actors

To the extent that the use of military force may be an adequate response to the threat posed by international non-state terrorism, the current scope of the right of self-defence, as adapted by the events following 11 September 2001, to a large extent provides a suitable framework.

Most terrorist attacks are pin-prick acts, leaving the victim state unable to respond on the spot. Resolution 1368 (2001) and subsequent events have affirmed that the right of self-defence applies to terrorist attacks and continues to apply even after a terrorist attack has occurred if this is necessary to prevent further likely terrorist attacks from the same source. It also seems to have been established that the threshold of state complicity in attacks by non-state actors has been lowered from the previous standard of “substantial involvement”, so that a regime which has knowingly harboured the terrorists responsible can also be targeted by forcible measures of self-defence. It can be argued that the right of self-defence against terrorist attacks is independent of state

involvement, in which case, however, the terrorists responsible must be the sole target of action in self-defence, and only if, exceptionally, the state unwillingly hosting terrorists proves unwilling or unable to eliminate the threat itself.

The issue of anticipatory self-defence against an imminent threat of attack is unlikely to arise often in the context of international terrorism, since presumably, in the absence of previous attacks, the risk of attack will most often remain concealed until it is too late. For the same reason, the issue of taking purely preventive action against terrorists is unlikely to be very relevant, since international terrorist groups and organisations will most often appear as such only after they have made an attack, in which case the right of self-defence provides a legal framework for hunting down the relevant group or organisation. However, should it be the case that a private organisation or group without a previous record of terrorist attacks has made credible threats of attack against (a) specific state(s), a case for the existence of an imminent threat of attack and thus a right of anticipatory self-defence might reasonably be argued.

Self-defence and threats emanating from states

As regards threats emanating from states, the right of self-defence applies in the case of an ongoing attack. Presumably, the right of self-defence also applies after the attack has been completed if there is evidence of an ongoing threat of further attacks from the aggressor state. The latter may not occur as frequently as in the context of terrorist attacks.

More relevant as regards attacks by another state is the fact that a credible legal argument can be made for a right of anticipatory self-defence on compelling evidence of an imminent (threat of) attack. However, purely preventive action against states perceived as a threat is not covered by the current right of self-defence. This holds true even if the relevant state possesses or is developing WMD and even if the regime is considered irresponsible by many states. Thus, the 2002 US National Security Strategy, to the extent that it advocates purely preventive action of this sort, has no legal basis in current international law.

The general limit of self-defence

In sum, the right of self-defence does not cover preventive action against potential future threats in the absence of prior attacks or a truly

imminent threat of attack against (a) specific state(s). Under the current system, preventive military action against general threats to international peace and security, whether emanating from terrorists or states with WMD, is a matter not for self-defence but for collective action by the Security Council.

3. Preventive use of force with Security Council Authorisation

Security Council authorisation is the only legal option available to a state wanting to launch a preventive attack against a non-imminent threat emanating from terrorists or the proliferation of WMD. Nothing in the Charter prevents the Security Council from authorising the preventive use of force against a non-imminent threat arising from e.g. WMD. The Security Council seriously considered such preventive action in the case of Iraq in 2002-2003, the concern of all states engaged in the decision-making being that Iraq was continuing to develop such weapons in contravention of its international obligations. Ultimately, however, no fresh authorisation could be obtained in March 2003, since Council members disagreed as to whether or not military force had become warranted as a measure of last resort. In this case, the governments supporting the US-led Operation Iraqi Freedom claimed that the use of force against Iraq had a legal basis in previous Security Council Resolution 678 of 1990.

A Security Council authorisation requires nine votes in favour (out of 15) and no vetoes from the five Permanent Members. However, obtaining these votes is likely to be difficult in most situations because of the controversial nature of preventive attacks. Indeed, it is likely to be much harder to obtain a Security Council mandate for the preventive use of force than has been the case with respect humanitarian intervention. Other things being equal, it will be harder to prove that a threat in time may become imminent than to document gross and systematic violations of human rights. Recently, therefore, efforts have been made to define general criteria that would make it easier for the Security Council to identify situations in which the use of force is legitimate. The five general principles of legitimacy offered in the 2004 Report of the High-level Panel appointed by Kofi Annan seem to offer the best hope of building an international consensus in this area because they

are based on the age-old doctrine of a just war that states have relied on to justify their use of force for centuries:

- 1) *Serious threat*. There must be a serious threat *prima facie* justifying the use of force.
- 2) *Proper purpose*. The primary purpose of military force must be to avert the threat.
- 3) *Last resort*. There must be reasonable grounds for believing that non-military measures will not succeed in eliminating the threat.
- 4) *Proportional means*. Military force must include only the minimum necessary to avert the threat.
- 5) *Balance of consequences*. There must be a reasonable prospect that the military action will succeed and will not do more harm than good.

These criteria are inherently vague. However, the decision-making procedure of the Security Council is presumably a strong guarantee that the option of preventive collective military action will not be abused. The five criteria will, almost by definition, be hard to meet with respect to the preventive use of force, since in most cases it is likely to prove difficult for states that are in favour of taking preventive action to make a convincing case that the threat is sufficiently serious to warrant military action, that force is being used as a last resort and that it will not do more harm than good.

This is not to say that it is impossible. The size of the problem should not be exaggerated.

First, as pointed out above, the problem is not likely to be great in relation to terrorists. This is partly because terrorist groups seeking to acquire WMD are seen as a deadly threat by all states, and partly because in most situations military action against terrorists will be covered by the right to self-defence (see above). It follows that the problem of obtaining Security Council authorisation for the preventive force is essentially limited to the threat posed by states seeking to acquire WMD.

Secondly, most states view the threat posed by WMD proliferation as a source of real and growing concern. At the same time, however, military prevention against states is not an option that is undertaken lightly. As already noted, states usually think twice about using prevention against other states because this is an option fraught with dangers and

difficulties. Military prevention is never a first choice option and is therefore unlikely to be seriously contemplated and brought before the Council unless the state(s) doing so perceive the WMD threat emanating from the state in question to be real, and unless non-military measures have first been tried and found wanting.

Even so, it is still likely to be difficult to reach agreement in the Security Council in many cases. This does not necessarily mean that the Security Council has failed, however. “Failure” to authorise the use of (preventive) force in a situation in which a majority of Council members are opposed to such action, state support for such a step outside the Council is limited and the above criteria are not met is likely to enhance the legitimacy of the Security Council rather than weaken it. If, on the other hand, the Security Council fails to act due to a Great Power veto, even though there is broad international consensus that the criteria are met, then it may be legitimate for regional organisations or coalitions of the willing to consider bypassing the Security Council and taking action on their own.

4. Preventive use of force without Security Council authorisation

Nonetheless, even if the Security Council fails to act in the face of broad international agreement that the criteria are met, the preventive use of force without Security Council authorisation is likely to be difficult to legitimise. Because the preventive use of force against the new threats threatens to erode, if not entirely demolish, the authority of the principle of the non-use of force except in self-defence, even strict adherence to the principles discussed above is unlikely to buy states bypassing the Security Council much legitimacy. In the absence of procedural guarantees against abuse such as those built into Security Council decision-making, the inherent vagueness of the criteria and the absence of an international consensus concerning the specific conditions of legitimate preventive action makes any claim to the legitimacy of preventive military action much more controversial than is the case with respect to humanitarian intervention.

Even so, it cannot be entirely ruled out that a majority of states would tolerate, or accept, a preventive attack as a justified measure in exceptional circumstances. This report consequently identifies six “hard” crite-

ria (1-6) + two “preferable” criteria (7-8), observance of which may exceptionally support a claim that the preventive use of military force is justified even without prior authorisation from the Security Council:

- 1) *Serious threat*. There must be a serious threat *prima facie* justifying the use of force.
- 2) *Proper purpose*. The primary purpose of military force must be to avert the threat.
- 3) *Last resort*. There must be reasonable grounds for believing that non-military will not succeed in eliminating the threat.
- 4) *Proportional means*. Military force must include only the minimum necessary to avert the threat.
- 5) *Balance of consequences*. There must be a reasonable prospect that the military action will succeed and will not do more harm than good.
- 6) *The Security Council is blocked*. The Security Council must have failed to authorise the use of force due to a great power veto (actual or anticipated).
- 7) *Alternative forum of legitimacy is preferable*. A declaration of support should be sought from the General Assembly. If this is not feasible, endorsement or support should be sought from a (sub-)regional organisation or organ.
- 8) *Multilateral action is preferable*. In any event, action should be conducted by the broadest possible coalition of states to avoid allegations of abuse.

However, even when a majority of states view these criteria as fulfilled, it is still likely to prove difficult to justify purely preventive military action on moral and political grounds. These difficulties grow as one moves from the pre-emptive use of force against imminent threats towards the preventive use of force against non-imminent threats.

The best way to avoid ending up in a situation where unauthorised preventive action has to be considered is to ensure that it does not arise in the first place. The Security Council can do this by acting earlier and more decisively in the relevant cases (*Status Quo + Strategy*). Since the possibility that the Council may still fail to act against the new threats cannot be ruled out, consideration may be given to coupling this strategy with a distant readiness to carry out unauthorised preventive operations that are justified on moral and political grounds only, in the highly

exceptional situations in which there is general international agreement that all the criteria of preventive action have been fulfilled (*Ad Hoc Strategy*). When justifying unauthorised preventive action on political and moral grounds only, one recognises that the action is in violation of international law and that it should remain so. However, if, exceptionally, the specific political and moral justification finds favour in the international community, this might be regarded as constituting extenuating circumstances which mitigate the wrongfulness of the formal breach of the law. However, pursuing a strategy of legalising unauthorised preventive action under international law (*General or Subsidiary Right strategies*) is not to be recommended. Not only would such a policy have potentially devastating consequences for the international legal order, it would also hold out no prospect of succeeding in a change of international law. Unauthorised preventive action enjoys very little international support. Currently, only the United States and Israel unequivocally support a doctrine of unauthorised preventive military action, although Australia and the UK have indicated some support for a flexible concept of anticipatory self-defence to deal with specific terrorist threats.

5. Preventive use of force and humanitarian intervention: looking towards the future

The challenges posed by humanitarian intervention and WMD prevention are similar in the sense that they had not been anticipated when the UN Charter was written. Both challenges require innovative responses and new thinking with respect to the collective use of force. It took remarkably little time for a practice of UN-authorised humanitarian intervention to emerge. While unauthorised humanitarian intervention remains controversial and will continue to be so for the foreseeable future, it is now widely accepted that the UN may authorise the use of force with the explicit purpose of stopping mass killings, genocide and ethnic cleansing. Even though the Security Council's responses to humanitarian disasters leave much to be desired, as the unfolding disaster in Darfur demonstrates, it has nevertheless been able to agree on a reinterpretation of the principle of sovereignty that allows it to authorise military intervention in internal conflicts for humanitarian purposes.³⁵⁰ A norm of humanitarian intervention is clearly emerging, and the criteria outlined above are likely to reinforce this development.

In less than two decades, we have moved from a situation in which humanitarian intervention in any form was considered both illegal and illegitimate to one in which UN-authorized humanitarian intervention is standard practice and unauthorized humanitarian intervention is likely to be seen as legitimate on political and moral grounds by many states provided that the criteria proposed by the High-level Panel are met. This is no mean achievement in terms of international consensus-building, since humanitarian intervention in the early 1990s was seen by many states as an “explosive doctrine” in much the same way as the unauthorized preventive use of force is today.³⁵¹ At the same time, however, there is very little support for creating a legal right of unauthorized humanitarian intervention because this would pose a threat to the current legal order. In this sense the *Ad Hoc Strategy* recommended by the DUPI report on humanitarian intervention still stands.

At present there is no sign that a similar development will take place with regard to the unauthorized preventive use of force. Unauthorized military prevention hardly enjoys any support at all, and the principles proposed by the High-level Panel will do little to change that in the short term because such action is seen as a direct challenge to the ban on the use of force in the UN Charter. Therefore, the recommendation in terms of political-legal strategy must be that military prevention should only be resorted to with Security Council authorization (*Status Quo + Strategy*), and that unauthorized use should be a distant option reserved for highly exceptional cases (*Ad Hoc Strategy*) and be guided by the eight principles outlined above.

Much of the writing on the preventive use of force and humanitarian intervention has been characterised by doom and gloom since the launch of the 2003 war in Iraq. To put things in perspective, it may therefore be useful to end this report by highlighting two factors which suggest that the negative fallout from the war is likely to be less damaging than many observers seem to think. First, even though the Bush administration to some extent sought to legitimise the war on preventive grounds, it did not create a legal precedent for preventive war because the legal rationale for the war was based on Iraqi non-compliance with UN resolutions.

Secondly, the doctrine of unilateral prevention currently articulated by Israel and the United States is very narrow, in fact much narrower than the doctrine of humanitarian intervention, which could be used to

justify military intervention in several countries. This would obviously change if the doctrine was broadened to allow the use of force for other purposes as well. This seems highly unlikely, however, because the narrow doctrine has so few supporters, and because it would not be in the interest of the single remaining superpower, which will have a determining influence on the future evolution of the doctrine. Finally, the risk of a broader doctrine is reduced by the fact that prevention is seldom an attractive option. It was for this reason that Bismarck, who was no stranger to the use of force, characterised preventive war as “suicide from fear of death”.³⁵²

That the preventive use of force in the form of regime change is a high-cost, high-risk option which is likely to be used only rarely not only gives states a much greater incentive to deflect the need for military prevention in the first place, it also gives them a greater incentive to seek Security Council authorization and multilateral solutions so that the risks and the burdens become less heavy if things go wrong. These factors, which are not based on moral or legal considerations but on naked self-interest, suggest that prevention will be used less often than humanitarian intervention.

The preventive use of force is consequently unlikely to make it impossible to launch new humanitarian interventions. The fear that this might happen has been very visible in the international debate on humanitarian intervention since September 11th.³⁵³ This fear is exaggerated for two reasons. Firstly, humanitarian interventions are far more legitimate than the preventive use of force and they enjoy strong public support in the Western countries. Secondly, the need for humanitarian intervention will continue to be far greater than the need for preventive military action against the new threats. The number of states that are potential targets for humanitarian intervention far exceeds the number that constitute likely targets for military action to prevent the future use of WMD. Humanitarian crises will consequently continue to trigger calls for military intervention on a regular basis and they cannot simply be dismissed with the argument that all military resources have to be held in reserve for fight against terrorism. The current debate on the possibility of a humanitarian intervention in Darfur is an example of this dynamics at work, and it will become more forceful, as the international forces currently deployed to Iraq begin to withdraw and are freed up for operations elsewhere.

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- 2 DUPI (1999) *Humanitarian Intervention: Legal and Political Aspects* (Copenhagen: Danish Institute of International Affairs).
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- 5 The White House (2002a) *The National Security Strategy of the United States of America* (Washington, DC), p. ii.
- 6 See DUPI (1999), pp. 25-26.
- 7 On the general and customary character of the prohibition, see DUPI (1999), pp. 81-84.
- 8 Security Council authorisation to coalitions of states has become the relevant form of collective military action, since forces have never been made available to the Council as envisaged in Article 43 UN Charter, see DUPI (1999), pp. 58-60.
- 9 For an elaboration of this point see DUPI (1999), pp. 23-25.
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 - 16 European Union (2003) *A Secure Europe in a Better World: A European Security Strategy* (Brussels: The European Council); United Nations, High-level Panel on Threats, Challenges and Change (2004) *A more secure world: Our shared responsibility* (New York: United Nations); The White House (2002a) *The National Security Strategy of the United States of America* (Washington, DC: September).
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 - 18 These characteristics are drawn from Schneckener, Ulrich (2004) "Transnationale Terroristen als Profiteure fragiler Staatlichkeit", *SWP-Studie*, S 18 (Berlin: Stiftung Wissenschaft und Politik), pp. 15-16; and Staan, Jørgen (2004) "Den ny terror. En globaliseret, netværksbaseret terror med potentiel adgang til masseødelæggelsesvåben", *DIIS Report*, No. 5 (Copenhagen: Danish Institute for International Studies).
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 - 20 Byman, Daniel L. (2003) "Al-Qaeda as an Adversary. Do We Understand Our Enemy", *World Politics*, Vol. 56, No. 1 (October), p. 149.
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- 107 Cf. among others Bowett (1958), pp. 188-189. On the contrary, Brownlie, Ian (1963) *International Law and the Use of Force by States* (Oxford: Clarendon Press), p. 274, argues that Article 51 broadly reflects the status of customary international law in 1945.
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- 112 Clearly, the right of self-defence does not terminate simply because the Security Council takes some enforcement measures under Chapter VII UN Charter, cf. Cassese (2001), p. 305; Franck (2001), p. 841. This is confirmed by Security Council Resolution 1373 (2001) in which the Security Council, following 11 September 2001, adopted under Chapter VII a comprehensive

- regime of measures to combat international terrorism, while affirming the (continuing) right of self-defence of the USA.
- 113 Cf. ICJ Reports (1986), para. 235.
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- 117 Cf. ICJ Reports (1986), para. 176.
- 118 Cf. ICJ Reports (1996), paras. 74 and 95; Dinstein, Y. (2001), p. 195.
- 119 Cf. ICJ Reports (1986), paras. 195 and 211.
- 120 ICJ Reports (1986), Merits, para. 191. Jf. ICJ Reports (2003), para. 51.
- 121 ICJ Reports (1986), Merits, para. 194.
- 122 ICJ Reports (1986), Merits, para. 194. This view has been criticised by, among others, Dinstein, Y. (2001), pp. 175-176.
- 123 Cf. also Gray, C. (2004) *International Law and the Use of Force*, 2nd ed. (Oxford: Oxford University Press), p. 146, finding that the distinction is “one of degree not of kind”.
- 124 ICJ Reports (1986), para. 231; ICJ Reports (2003), para. 64; Cf. Dinstein (2001), pp. 182 and 203; Gray, C. (2004), pp. 147-148.
- 125 ICJ Reports (2003), para. 72.
- 126 Cf. Dinstein, Y. (2001), p. 174.
- 127 This is criticised by many scholars on legal-political grounds, e.g. Randelshofer, Albrecht (2002) “Article 51” in Bruno Simma (ed), *The Charter of the United Nations. A Commentary*, 2nd ed. (Oxford: University Press), pp. 792-793; Franck, T. M. (2002), p. 110.
- 128 General Assembly Resolution 2625 (XXV) *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, adopted by consensus on 24 October 1970.
- 129 The term “armed attack” in the French version is “aggression armée”.
- 130 General Assembly Resolution 3314 (XXIX) *Definition of Aggression* (Annex), adopted by consensus on 14 December 1974.
- 131 Cassese, A. (2001), p. 233.
- 132 ICJ Reports (1980) *United States Diplomatic and Consular Staff in Tehran*, Merits, p. 3, paras. 57 and 91.
- 133 ICJ Reports (2003), paras. 51-62 (although ultimately rejecting the US response against Iran as unlawful in the absence of evidence that Iran was, indeed, responsible for the attack). Gray, C. (2004) pp. 118-119, considers it doubtful that an attack on a merchant ship abroad could trigger the right of self-defence.
- 134 Security Council Resolution 731 (1992), adopted unanimously.

- 135 See Bowett, D. W. (1958), pp. 87-105 (lawful); Dinstein, Y. (2001), pp. 176-181 and 203-207 (lawful); Harhoff, Frederik (2003) "Krigens folkeret" in O. Espersen, F. Harhoff and O. Spiermann *Folkeret* (Copenhagen: Christian Ejlers' Forlag, pp. 271-300), pp. 276-277 (lawful); Franck, T. M. (2002), p. 96 (lawful or at least legitimate); Cassese, A. (2001), pp. 315-316 (lawful, but only to save nationals); Gray, C. (2004), pp. 126-129 (unlawful, but legitimate if limited to rescue purposes); Brownlie, I. 1963, p. 433 (lawfulness "very doubtful").
- 136 ICJ Reports (1986), para. 195.
- 137 ICJ Reports (1986), para. 195.
- 138 According to Gray, C. (2003) "The Use of Force and the International Legal Order", in Malcolm D. Evans (ed.) *International Law* (Oxford: Oxford University Press), p. 602 the formula "clearly requires a significant degree of government involvement". For support of the Court's approach, see Cassese, A. (2001), p. 311; Brownlie, Ian (2003) *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press), p. 700.
- 139 Dissenting Opinion of Judge Sir Robert Jennings, ICJ Reports (1986), p. 543. In approval Dinstein, Y. (2001), p. 182.
- 140 The International Court of Justice has held that the Declaration is an expression of customary international law, cf. ICJ Reports (1986), paras. 188 and 191. This view is supported by Security Council Resolution 748 on international terrorism sponsored by Libya (adopted 1992, with 10 votes to none, 5 abstentions), reaffirming the position of the 1970 Declaration as being in accordance with Article 2(4).
- 141 See Gray, C. (2004), p. 113. For a somewhat different assessment, see Franck, T. M. (2002), pp 57 et seq. Most recently, the International Court of Justice, in its Advisory Opinion of 9 July 2004 on the *Legal Consequences of The Construction of a Wall in the Occupied Palestinian Territory* (ICJ Reports 2004), in reply to Israel's claim that its construction of a "wall" on the territory of the West Bank was an act of self-defence against terrorist attacks, held that since the terrorist threat against Israel originated from occupied territory, reliance on self-defence was in any event excluded (para. 139).
- 142 See e.g. Security Council Resolution 262 (1968) on Israel-Lebanon - Israel condemned unanimously, Lebanon entitled to redress; Security Council Resolution 270 (1969) on Israel-Lebanon - Israel condemned without a vote for "military reprisals"; Security Council Resolution 425 (1978) on Israel-Lebanon - calling for Israel to cease military action and withdraw, with 12 votes, Czechoslovakia and USSR abstaining; Security Council Resolution 509 (1982) on Israel-Lebanon - unanimously demanding that Israel withdraw; Security Council Resolution 573 (1985) on Israel-Tunesia - Israel condemned by 14 votes, the USA abstaining, for "armed aggression", Tunisia entitled to reparations. In all these cases, the USA accepted Israel's views in principle, see Gray, C. (2004), pp. 161-162.
- 143 Letter of 14 April 1986 from the American Representative to the Security Council, UN Doc. S/17990.
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- 146 Letter of 26 June 1993 from the American Representative to the Security Council, UN Doc. S/26003.
- 147 Security Council meeting on 27 June 1993, UN Doc. S/PV.3245. See also Franck, T. M. (2002), p. 94; Gray, C. (2004), p. 162.
- 148 Security Council Resolution 1189 (1998).
- 149 Subsequently, considerable doubt has arisen as to whether the chemical plant destroyed was really a chemical weapons factory, cf. Brownlie, I. (2003), p. 713; Franck, T. M. (2002), p. 96; Gray, C. (2004), p. 163 with footnote 21.
- 150 Letter of 20 August 1998 from the American representative to the Security Council, UN Doc. S/1998/780.
- 151 Cf. Franck, T. M. (2002), pp. 94-96; Gray, C. (2004), p. 163.
- 152 Authorization for Use of Military Force, Joint Resolution of Congress, 18/9 2001, Public Law 107-40, 115 Stat. 224, Section 2 (a): "That the President is authorized to use all necessary and appropriate force against those nations, organisations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11th, 2001, or harboured such organisations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organisations or persons".
- 153 The recognition was reaffirmed in Security Council Resolution 1373 (2001).
- 154 Statement of the North Atlantic Council, 12 September 2001, Press Release 124 (2001). NATO Secretary General, Lord Robertson, subsequently confirmed the invocation of Article 5 referring to conclusive evidence presented by the USA that Al Qaeda, protected by the Taliban, were responsible for the attacks, cf. Statement by NATO Secretary General, Lord Robertson, 2 October 2001, Brussels. Similar statements were made by the Organization of American States (OAS), the Australian-New Zealand-US Security Alliance (ANZUS) and the EU.
- 155 Letter of 7 October 2001 from American Representative to the Security Council, UN Doc. S/2001/946.
- 156 Letter of 7 October 2001 from the British Representative to the Security Council, UN Doc. S/2001/947.
- 157 Brownlie, I. (2003), p. 714 stating in the context of Operation Enduring Freedom: "It is difficult to bring forcible regime change within the concept of self-defence or the principle of self-determination. Would the process of occlusion [of future terrorism] justify a regime of occupation unlimited in time?". See also Gray, C. (2004), p. 190, referring to the traditional view that a violent overthrow of a government is illegal in the absence of Security Council authorisation.
- 158 See Gray, C. (2004), pp. 190-193. In legal terms, the different formal positions of the USA and UK may not be decisive. According to the International Court of Justice, what matters is the likely result of military action, rather than express intent, cf. ICJ Reports (1986), para. 241.

- 159 See Security Council Resolution 1193 (1998), 1214 (1998), 1267 (1999) and 1333 (2000).
- 160 Greenwood, Christopher (2002) "International law and the 'war against terrorism'", *International Affairs*, Vol. 78, No. 2 (April), pp. 311-314.
- 161 Cassese, A. (2001), p. 311.
- 162 Franck, T. M. (2002), pp. 64-68 and 96.
- 163 The Security Council had repeatedly condemned the Taliban regime for continuing to provide a safe haven and training to Al Qaeda, Security Council Resolution 1193 (1998), 1214 (1998), 1267 (1999) and 1333 (2000).
- 164 Cf. Franck, T. M. (2001), pp. 840-841; Ratner, Steven R. (2002) "*Jus ad Bellum and Jus in Bello* After September 11", *American Journal of International Law*, Vol. 96, No. 4, p. 906.
- 165 During the Security Council meeting on 12 September 2001, adopting Resolution 1368, only the statement by the American representative may contribute to the interpretation of this passage. Mr Cunningham stated: "We will make no distinction between the terrorists who committed these acts and those who harbour them", UN Doc. S/PV.4370, pp. 7-8.
- 166 Although the host State may not be complicit in the terrorist attack in terms of self-defence, it may be held legally responsible if it has not exercised due diligence in preventing such acts contrary to the rights of other states, cf. ICJ Reports (1949), p. 22; Dinstein, Y. (2001), pp. 214-215; Crawford, James (2002) *The International Law Commission's Articles on State Responsibility* (Cambridge: Cambridge University Press), p. 82 (concerning Art. 2 of *International Law Commission's Articles on State Responsibility*).
- 167 Brownlie, I. (1963), pp. 278-279; Gray, C. (2003), p. 604.
- 168 Prior to September 11th, 2001 the view has been defended by, among others, Bowett, D. W. (1958), p. 64: "this extended jurisdiction over aliens committing acts abroad detrimental to a state's independence and security is not only reflected in the actual practice of States, but also based on the principle of self-defence"; Dinstein, Y. (2001), pp. 192 and 213-218, labelling this kind of self-defence "extraterritorial law enforcement".
- 169 Cf. the traditional concept applied by, among others, Brownlie, I. (1963), pp. 278-279; Cassese, A. (2001), pp. 311 et seq, and (implicitly) also by the International Court of Justice in the *Nicaragua Case*, ICJ Reports (1986), para. 195.
- 170 Cf. also Jennings, R.Y. (1938), pp. 82 et seq; Bowett, D.W. (1958), pp. 55 et seq; Dinstein, Y. (2001), p. 218 et seq.
- 171 See Gray, C. (2004), pp. 115-117; Franck, T. M. (2002), pp. 63-64
- 172 Security Council Resolution 731 (1992), adopted unanimously.
- 173 ICJ Reports (2004), para. 139. See also Brownlie, I. (2003), p. 713.
- 174 See Gray, C. (2004), pp. 171-172
- 175 Greenwood, Christopher (2003) "International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq", *San Diego International Law Journal*, Vol. 4, pp. 17-18; Franck, T. M. (2001), p. 840.

- 176 Dinstein, Y. (2001), p. 217.
- 177 Dinstein, Y. (2001), p. 220; Bowett, D. W. (1958), p. 60.
- 178 Dinstein, Y. (2001), p. 209.
- 179 Security Council Resolution 661 (1990).
- 180 The legal basis of Operation Desert Storm was not collective self-defence, but the specific authorisation for the use of force provided by the Security Council in Security Council Resolution 678 (1990).
- 181 Cf. for a critical view Cassese (2001), p. 305-306; Gray, C. (2004), pp. 121-126.
- 182 ICJ Reports (1986), para. 232.
- 183 ICJ Reports (2003), Merits, para. 51.
- 184 This fact has been criticised by many scholars on legal-political grounds, cf. e.g. Franck, T. M. (2002), p. 110, holding that the gap between law and justice may become so wide as to erode the legitimacy of the legal order.
- 185 General Assembly Resolution 2625 (XXV), *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, Annex, adopted by consensus on 24 October 1970.
- 186 ICJ Reports (1986), para. 249.
- 187 International Law Commission Articles on State Responsibility, Article 50(1): "Countermeasures shall not affect: (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations", cf. Crawford, J. (2002), pp. 288-289.
- 188 See Bowett, D. W. (1958), p. 13; Brownlie, I. (1963), p. 281 with further references; cf. also (but not in agreement) Dinstein, Y. (2001), p. 198.
- 189 See notably UN Security Council Resolution 106 (1955), 111 (1956), 171 (1962), 188 (1964), 262 (1968), 270 (1969), 316 (1972), 332 (1973), 573 (1985) and 1322 (2000).
- 190 Even scholars holding that all armed reprisals are prohibited by Article 2(4) admit that the distinction between self-defence and reprisals may sometimes be difficult in practice, Brownlie, I. (1963), p. 282; Gray, C. (2004), p. 122. According to the 1970 *Declaration of Friendly Relations*, the prohibition on the use of force, including forcible reprisals, "shall [not] be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful".
- 191 British Foreign Office report of 25 March 1839, quoted from Jennings, R. Y. (1938), p. 87 (emphasis in original).
- 192 Greenwood, C. (2003), p. 23; Dinstein, Y. (2001), pp. 199-200 and 220; O'Connell, Mary E. (2002): "The Myth of Preemptive Self-Defense", *ASIL Task Force Papers*. American Society of International Law, Task Force on Terrorism, August 2002, p. 9.
- 193 Dinstein, Y. (2001), pp. 198 and 220; O'Connell, M. E. (2002), p. 9.

- 194 Cf. Skubiszewski, Krzysztof Jan (1968) "Use of Force by States. Collective Security. Law of War and Neutrality", in Max Sørensen (ed) *Manual of Public International Law* (London: Macmillan), p. 753; Dinstein, Y. (2001), p. 198.
- 195 Unless the original attack – or a series of attacks – has such scale and effects that an all-out war could be justified as a necessary and proportionate means of self-defence, see Dinstein, Y. (2001), pp. 207 et seq.
- 196 Dinstein, Y. (2001), pp. 199-200, labelling this form of self-defence "defensive armed reprisals", writes that: "To be defensive, and therefore lawful, armed reprisals must be future oriented, and not limited to a desire to punish past transgressions. In fine, the issue is whether the unlawful use of force by the other side is likely to repeat itself. The goal of defensive armed reprisals is to "induce a delinquent to abide by the law in the future", and hence they have a deterrent function". For a similar view see Schachter, Oscar (1984) "The right of States to Use Armed Force", *Michigan Law Review*, Vol. 82, p. 1638; Tucker, R. W. (1972) "Reprisals and Self-Defense: The Customary Law", *American Journal of International Law*, Vol. 66, p. 591; Skubiszewski, K. J. (1968), p. 754.
- 197 Dinstein, Y. (2001), pp.197-198, requiring as imperative "some symmetry or approximation between the dimensions of the lawful counter-force and the original (unlawful) use of force"; Skubiszewski, K. J. (1968), p. 753.
- 198 Although the Court in both cases rejected US claims of self-defence on the facts. In the *Oil Platforms Case*, three judges explicitly labelled the action taken as unlawful reprisals, see Gray, C. (2004), p. 123, with footnote 113.
- 199 ICJ Reports (1986), para. 237.
- 200 ICJ Reports (2003), para. 76.
- 201 ICJ Reports (1986), para. 237; ICJ Reports (2003), para. 77.
- 202 ICJ Reports (2003), paras. 74-76.
- 203 Dinstein, Y. (2001), pp. 213-221, labelling this form of self-defence "extraterritorial law enforcement".
- 204 See e.g. Resolution 270 (1969) on Israel - Lebanon - Israel condemned without a vote for "military reprisals". For further examples of condemnation, see above footnote 50. After September 11th, 2001, Some of Israel's forcible actions in response to terrorism have continued to be criticised by many states as disproportionate and retaliatory, cf. Gray, C. (2004), pp. 172-175.
- 205 Dinstein, Y. (2001), pp. 194-203 and 213-221. As regards the action against Libya in 1986, Dinstein, Y. (2001), p. 201, notes with approval that: "In substance, these were acts of defensive armed reprisals".
- 206 Gray, C. (2004), pp. 163-164; Cassese, A. (2001), pp. 306-307 regards the instances of US action as an abuse of self-defence, since these actions had "strong punitive connotations and also pursued a primarily deterrent purpose". Similarly, as regards the US action against Iraq in 1993, Randelshofer, A. (2002), p. 794.
- 207 Franck, T. M. (2002), pp. 64-68 and 96.

- 208 Letter of 7 October 2001 from the American Representative to the Security Council, UN Doc. S/2001/946.
- 209 Letter of 7 October 2001 from the British Representative to the Security Council, UN Doc. S/2001/947.
- 210 Bowett, D. W. (1958), pp. 188-189; Franck, T. M. (2002), p. 97. For a sceptical view, see Brownlie, I. (1963), p. 274.
- 211 As a matter of fact, in the *Caroline Case* the necessity of anticipatory self-defence was based on previous attacks as evidence of an imminent threat of further attacks (see above Section 1.1), but the Caroline precedent has been recognised as justifying also purely anticipatory self-defence, even in the absence of previous attacks.
- 212 French version: “où un Membre [...] est l’objet d’une agression armée”; Spanish version: “in caso de ataque armado”.
- 213 Bowett, D. W. (1958), pp. 187-189; Goodrich, Leland M., Edvard Hambro and Anne Patricia Simons (1969) *Charter of The United Nations* (New York: Columbia University Press), p. 301; Shaw, M. N. (2003), pp. 1025-1026; Greenwood, C. (2002), p. 312; Franck, T. M. (2002), p. 50; O’Connell, M. E. (2002), p. 8. For further references, see Cassese, A. (2001), p. 308 with footnote 18 (p. 448).
- 214 UNCIO Documents, Vol. 6, p. 459.
- 215 Bowett, D. W. (1958), p. 187-89; cf. also Shaw, M. N. (2003), p. 1026.
- 216 Cf. e.g. Brownlie, I. (1963), pp. 272-275; Gray, C. (2004), p. 98; Randalshofer, A. (2002), pp. 790 et seq. For further references, see Cassese (2001), p. 308 with footnote 20. Dinstein, while rejecting anticipatory self-defence as incompatible with Article 51 (p. 166), includes under Article 51 instances where a state “has committed itself to an armed attack in an ostensibly irrevocable way”, labelling this “interceptive self-defence”, cf. Dinstein, Y. (2001), pp. 169-173. It is doubtful whether this concept is much different from that of anticipatory self-defence, cf. Cassese, A. (2001), p. 309; Greenwood, C. (2003), pp. 14-15.
- 217 Bowett, D. W. (1958), p. 184, however, finds no explanation why the committee preparing the provision on self-defence ultimately inserted the additional clause “if an armed attack occurs”, and thus considers it “curious”.
- 218 Cf. Franck, T. M. (2002), p. 50, referring to statements by US delegates during delegation meetings in May 1945, shows that the initiative to restrict the right of self-defence to cases where “an armed attack occurs” was led by the US Delegation in San Francisco with the deliberate purpose of ruling out a right of anticipatory self-defence. On this basis, Franck concludes that: “it is beyond dispute that the negotiators deliberately closed the door on any claim of “anticipatory self-defence”, a posture soon to become logically indefensible...”. See also Dinstein, Y. (2001), p. 166.
- 219 Bowett, D. W. (1958), pp. 191-192; cf. also Franck, T. M. (2002), pp. 50 and 98; Higgins, Rosalyn (1995) *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press), p. 242, arguing that the inclusion of imminent threats of attack is “the only realistic interpretation of the contemporary right of self-defence”.

- 220 United Nations, High-level Panel on Threats, Challenges and Change (2004) *A more secure world: Our shared responsibility* (New York: United Nations), para. 188.
- 221 United Nations (2005) *In larger freedom: towards development, security and human rights for all. Report of the Secretary-General, A/59/2005*, 21 March, para. 124.
- 222 Cassese, A. (2001), pp. 309-310.
- 223 Shaw, M. N. (2003), pp. 1029-1030; Gray, C. (2004), pp. 130-133.
- 224 Greenwood, C. (2003), pp. 13-14; Franck, T. M. (2002), p. 102.
- 225 See the statement by Israel's Foreign Minister in the Security Council on 6 June 1967, S/PV.1348, p. 15.
- 226 See the statement by Israel's Foreign Minister in the Security Council on 6 June 1967, S/PV.1348, pp. 14-19.
- 227 Security Council Resolution 233 (1967); Security Council Resolution 234 (1967); Security Council Res 236 (1967).
- 228 On the Six Day War see Franck, T. M. (2002), pp. 101-105; Gray, C. (2004), pp. 130-131, Dinstein, Y. (2001), p. 173.
- 229 According to Cassese, A. (2001), p. 309, the motivation for non-condemnation was, presumably, chiefly political.
- 230 See Gray, C. (2004), pp. 97 and 131.
- 231 Security Council Resolution 487 (1981).
- 232 Cassese, A. (2001), pp. 309-310; Gray, C. (2004), pp. 130-133; Shaw, M. N. (2003), pp. 1025-1030; Franck, T. M. (2002), pp. 97-108.
- 233 ICJ Reports (1986), Merits, para. 194.
- 234 Cf. Franck, T. M. (2002), p. 107; Cassese, A. (2001), pp. 310-311, finds that: "In the case of anticipatory self-defence, it is more judicious to consider such action as legally prohibited, while admittedly knowing that there may be cases where breaches of the prohibition may be justified on moral and political grounds and community will eventually condone them or mete out lenient condemnation".
- 235 United Nations, High-level Panel on Threats, Challenges and Change (2004), paras. 188-190. See also Greenwood, C. (2003), pp. 15-16; Bothe, Michael (2003) "Terrorism and the Legality of Pre-emptive Force", *European Journal of International Law*, 2003, Vol. 14, No. 2, Section 3.
- 236 Greenwood, C. (2003), p. 16, however, seems to indicate that this might suffice to warrant anticipatory self-defence, requiring as a minimum "evidence not only of the possession of weapons but also of an intention to use them".
- 237 International Military Tribunal (Nuremberg) Judgment of 1 October 1946, p. 205.
- 238 Brownlie, I. (2003), p. 702; Franck, T. M. (2002), p. 98; Gray (2004), pp. 171 and 175-79; Dinstein, Y. (2001), pp. 165-169; Greenwood, C. (2003), p. 15; O'Connell, M. E. (2002), p. 5.

- 239 See Franck, T. M. (2002), pp. 99-101; Gray, C. (2004), p. 131.
- 240 See the statement by Israel's representative at the Security Council meeting 12 June 1981, S/PV.2280, p. 11.
- 241 Security Council Resolution 487 (1981).
- 242 Cf. Cassese, A. (2001), p. 309 with reference. See also Gray, C. (2004), p. 133; Franck, T. M. (2002), pp. 105-107.
- 243 Prior to the war, the US had referred to both self-defence and Security Council resolutions as a legal basis, cf. Gray, C. (2004), pp. 181-184. Formally, however, the US letter to the Security Council of 20 March 2003, UN Doc. S/2003/351, while referring also to military actions as "necessary steps to defend the United States and the international community from the threat posed by Iraq", mainly justified military action by reference to the authority of the Security Council.
- 244 The White House (2002a) *The National Security Strategy of the United States of America*, September 2002.
- 245 The White House (2002a) pp. 13-15 (Section 5 entitled: "Prevent Our Enemies from Threatening Us, Our Allies And Our Friends with Weapons of Mass Destruction").
- 246 The White House (2002a), pp. 15-16 (Section 5 entitled: "Prevent Our Enemies from Threatening Us, Our Allies And Our Friends with Weapons of Mass Destruction").
- 247 Cf. Freedman, Lawrence (2003) "Prevention, Not Preemption", *The Washington Quarterly*, Vol. 26, No. 2 (Spring), p. 106.
- 248 The White House (2002a), pp. 13-15.
- 249 Brownlie, I. (2003), p. 702; Farer, T. J. (2002) "Beyond the Charter Frame: Unilateralism or Condominium?" *American Journal of International Law*, Vol. 96 (2002), pp. 359-364; Gray, C. (2004), pp. 171 and 179; Bothe, M. (2003), Section 3; Greenwood, C. (2003), p. 15.
- 250 United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 188, cf. paras. 189-190.
- 251 Gray, C. (2004), pp. 175-79 and 194.
- 252 See e.g. the statements by Minister of Defence, Robert Hill, in a memorial oration on 28 November 2002 at the University of Adelaide, pp. 6-8.
- 253 Cf. the statement by the Secretary of State for Foreign and Commonwealth Affairs in response to the second report of the Foreign Affairs Committee, Session 2002-2003, Cm 5793, p. 8 (cited from Gray, C. (2004), p. 179): "There is already scope under international law to take into account all the circumstances, including the likelihood, nature and seriousness of any attack, in determining whether any threat is imminent (...)".
- 254 See e.g. Russia's letter to the Security Council on 11 September 2002, S/2002/1012.
- 255 Under current international law, a state victim of a purely preventive attack is therefore entitled to respond by force in the exercise of its right of self-defence under Article 51.

- 256 See further Chapter 1 above.
- 257 DUPI (1999) *Humanitarian Intervention: Legal and Political Aspects* (Copenhagen: Danish Institute for International Studies), pp. 57-61.
- 258 The principle of non-intervention in the internal affairs of a state, “matters which are essentially within the domestic jurisdiction of any state”, cf. Article 2(7) UN Charter, does not limit the competence of the Security Council to take enforcement action under Chapter VII, cf. expressly Article 2(7) i.f.
- 259 Kelsen, Hans (1951) *The Law of the United Nations*, 2nd impr. (London: Stevens & Son), p. 727; Sarooshi, Danesh (1999) *The United Nations and the Development of Collective Security* (Oxford: Oxford University Press), p. 106. Kelsen, H. (1951), pp. 728-729, footnote 7, refers to proposals made at Dumbarton Oaks to limit the freedom of the Security Council by setting up criteria for automatic action, supplemented by discretionary action in other fields. In the end, however, none of these proposals were adopted.
- 260 The General Assembly may, however, ask the Court for an advisory opinion on the legality of Security Council action, cf. Article 96(1) UN Charter, or the Court may be called upon to rule on this issue in the context of an ordinary case between states. See further DUPI (1999), pp. 72-73.
- 261 As regards military threats, there is thus no need of a dynamic interpretation of Article 39, such as has been the case with regard to internal conflicts and humanitarian crises within a state, cf. DUPI (1999), pp. 62-68.
- 262 Kelsen, H. (1951), pp. 732-737.
- 263 Kelsen, H. (1951), pp. 19 and 731.
- 264 See further DUPI (1999), p. 62.
- 265 Kelsen (1951), p. 731: “The Security Council may very well decide that a situation which has not the character of a conflict between two states is a threat to international peace and take enforcement action against a state or a group of people involved in this situation, though the state is not in conflict with another state and the group has not the character of a state”. See also Kelsen (1951), p. 19.
- 266 See also Goodrich, Leland M., Edvard Hambro and Anne Patricia Simons (1969) *Charter of the United Nations* (New York: Columbia University Press), pp. 295-296 referring to early debates over the distinction.
- 267 Sarooshi, D. (1999), p. 106
- 268 The Security Council has only twice authorised the use of force against external threats: against North Korea in 1950 (Security Council Resolutions 82 and 83) and Iraq in 1990 (Security Council Resolution 678). In these cases an armed attack had already occurred, and the Security Council therefore referred to a “breach of the peace”.
- 269 Cf. United Nations, High-level Panel on Threats, Challenges and Change (2004) *A more secure world: Our shared responsibility* (New York: United Nations), paras. 183 and 193-94; United Nations (2005) *In larger freedom: towards development, security and human rights for all. Report of the Secretary-General, A/59/2005*, 21 March, para. 125.

- 270 United Nations (2005), para. 23.
- 271 Cf. also General Assembly Resolution 2625 (1970) and 3314 (1974) mentioned earlier in Chapter 3.
- 272 The International Convention for the Suppression of the Financing of Terrorism (1999) in Article 2(1), *litra b*) defines terrorism as an “act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or abstain from doing any act”. The Security Council in Resolution 1566 (2004), para. 3, refers to “criminal acts, including against civilians, committed with the intent to cause death or serious bodily harm, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or to abstain from doing any act”; The United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 164, defines terrorism as “any action...that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organisation to do or to abstain from doing any act”. United Nations (2005), para. 91, adopts this definition.
- 273 In the United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 163, it is recommended that the General Assembly should rapidly complete negotiations on a comprehensive convention on terrorism. United Nations (2005), para. 84, adopts this recommendation.
- 274 Cf. United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 159.
- 275 The United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 150, urges states who have not yet done so to adhere to all twelve conventions and protocols. Cf. also Security Council Resolution 1377 (2001).
- 276 See e.g. General Assembly Resolution 49/60 Declaration on Measures to Eliminate International Terrorism (1994). Security Council measures on counter-terrorism will be referred to in Section 3.2 below.
- 277 Cf. among others Security Council Resolutions 1526, 1530, 1535 and 1566 (2004).
- 278 The USA responded to the attacks by the use of force, cf. Chapter 3.
- 279 The USA and its allies responded by force, initiating *Operation Enduring Freedom* on 7 October 2001. See Chapter 3.
- 280 ICJ Reports (1986), *Military and Paramilitary Activities In and Against Nicaragua*, p. 14 et seq, para. 269.
- 281 The predecessor of these two conventions was the *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare* (1925), signed at Geneva on 17 June 1925.

- 282 Annex to General Assembly Resolution 2826 (XXVI) (1971). Open for signature on 10 April 1972.
- 283 Appendix I to General Assembly 47th session, suppl. 27 = A/47/27, adopted and open for signature on 13 January 1993.
- 284 Cf. also the Security Council in Security Council Resolution 687 (1991).
- 285 Biological Weapons Convention 1972, Article XIII; Chemical Weapons Convention 1993, Article XVI.
- 286 The Non-Proliferation Treaty was supplemented in 1996 by the *Comprehensive Nuclear Test Ban Treaty*. Furthermore, numerous regional treaties have been adopted in order to limit 1) the acquisition, manufacturing and possession of nuclear weapons; 2) the deployment of nuclear weapons and 3) the testing of nuclear weapons, see further ICJ Reports (1996), *The Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion*, para. 58.
- 287 Annex to General Assembly Resolution 2373 (XXII) (1968). Open for signature 1 July 1968.
- 288 ICJ Reports (1996), paras. 98-103.
- 289 ICJ Reports (1996), para. 98.
- 290 Cf. Security Council Resolution 984 (1995) urging states to implement Nuclear Non-Proliferation Treaty, Article VI. See also United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 120.
- 291 General Assembly Resolution 1653 (XVI) (1961), and repeatedly confirmed since then, concerning the illegality under international law of the use of nuclear weapons; however, numerous states, including nuclear-weapon states, have not supported this view, cf. ICJ, ICJ Reports (1996), para. 68.
- 292 ICJ Reports (1996), paras. 62-63 and 73. The Court held that although the Nuclear Non-Proliferation Treaty and other treaties on nuclear weapons “point to an increasing concern in the international community with these weapons (and) could be seen as foreshadowing a future general prohibition of the use of such weapons...they do not constitute such a prohibition by themselves”. However, a tiny majority of the Court (7-7 with the President’s casting vote) found that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the rules and principles of humanitarian law. However, in view of the current state of international law, and of the facts at its disposal, the Court could not conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme situation of self-defence, in which the very survival of a state is at stake, paras. 95-97.
- 293 NPT (1968), Article X.
- 294 Cf. the Security Council in Security Council Resolution 984 (1995). See also United Nations, High-level Panel on Threats, Challenges and Change (2004), paras. 124 and 134, recommending that states not party to Nuclear Non-Proliferation Treaty should commit to non-proliferation and disarmament; and that withdrawal from the Nuclear Non-Proliferation Treaty should prompt immediate verification of compliance with Nuclear Non-Proliferation Treaty obligations, if necessary mandated by the Security Council.

- 295 Cf. Security Council Resolutions 660, 661 and 678 (1990), the latter authorising the use of force under Chapter VII.
- 296 Iraq had used chemical weapons during its 1980-88 war with Iran and had also during the 1980s used chemical weapons within Iraq to quell the Kurdish insurgency, killing some 100,000 Kurds altogether.
- 297 United Nations, High-level Panel on Threats, Challenges and Change (2004), paras. 184 and 204-205.
- 298 United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 206.
- 299 ICISS (2001) *The Responsibility to Protect. Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Center), p. 32; United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 207. Whereas The ICISS deals only with criteria of humanitarian intervention, the criteria defined by the High-level Panel in *A More secure world* applies to all kinds of threats to international peace and security, external as well as internal, and the five criteria proposed are identical to those defined by the ICISS (the latter also defines a crucial sixth criterion: *right authority*, which, however, is not relevant in the present context of Security Council action, but see Chapter 5).
- 300 United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 207.
- 301 United Nations, High-level Panel on Threats, Challenges and Change (2004), paras. 208-209.
- 302 United Nations (2005), para. 126. Such a resolution would entail a political commitment made by Council members in the name of the Council, but, by definition, would not be legally binding on the Council, which is only bound to act in accordance with the purposes and principles of the UN Charter (Article 24(2)).
- 303 United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 207. Cf. also DUPI, pp. 106-107; ICISS (2001), pp. 32-34.
- 304 United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 190.
- 305 ICISS (2001), p. 32.
- 306 United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 206.
- 307 United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 194.
- 308 Cf. United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 190.
- 309 Cf. United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 190.
- 310 See also United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 194.
- 311 Cf. the International Court of Justice, ICJ Reports (1949) *Corfu Channel*

- Case, p. 35; DUPI (1999) *Humanitarian Intervention: Legal and Political Aspects* (Copenhagen: Danish Institute of International Affairs), pp. 80-84.
- 312 Crawford, James (2002) *The International Law Commission's Articles on State Responsibility*, (Cambridge: Cambridge University Press), p. 160. See also the International Court of Justice in the case concerning the ICJ Reports (1997) *Gabčíkovo-Nagymaros Project*, para. 51, where the Court also held that the defence of necessity is available only "on an exceptional basis". The International Law Commission Special Rapporteur on state responsibility, James Crawford, has characterised necessity as standing "at the outer edge of the tolerance of international law for otherwise wrongful acts", and there was, accordingly, in the International Law Commission a clear consensus to provide the "narrowest possible definition of necessity", Cf. Report of the International Law Commission on the Work of its 51st Session (1999), A/54/10, paras. 378 and 388 respectively. Thus, the defense of necessity is "subject to strict limitations to safeguard against possible abuse", cf. Crawford, J. (2002), p. 178.
- 313 Cf. ICJ Reports (1997), para. 51.
- 314 Crawford, J. (2002), p. 183.
- 315 Crawford, J. (2002), pp. 183-184.
- 316 The International Law Commission Special Rapporteur, James Crawford, and apparently the International Law Commission itself, takes the position that necessity can never be invoked to justify the use of force, the legality of which is regulated by the primary norms of international law, cf. Crawford (2002), pp. 185-186; Report of the International Commission on the work of its 51st Session (1999), paras. 375, 384 and 389. See also DUPI (1999), p. 86; Rytter, Jens Elo (2001) "Humanitarian Intervention without the Security Council: From San Francisco to Kosovo - and Beyond", *New Journal of International Law*, Vol. 70, pp. 133-136. For a different view, Spiermann, Ole (2002) "Humanitarian Intervention as a Necessity and the Threat or Use of Jus Cogens", *New Journal of International Law*, Vol. 71, pp. 523-543.
- 317 See also United Nations, High-level Panel on Threats, Challenges and Change (2004), 2004, para. 191.
- 318 The "Bush doctrine" apparently warns other nations not to take advantage of the US doctrine: "The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression", The White House (2002a) *The National Security Strategy of the United States of America*, September 2002, p. 15.
- 319 See also United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 191.
- 320 The White House (2002a), p. 15: "But deterrence based only upon the threat of retaliation is less likely to work against leaders of rogue states more willing to take risks, gambling with the lives of their people, and the wealth of their nations Traditional concepts of deterrence will not work against a terrorist enemy whose avowed tactics are wanton destruction and the targeting of innocents; whose so-called soldiers seek martyrdom in death and whose most potent protection is statelessness".

- 321 See also United Nations, High-level Panel on Threats, Challenges and Change (2004), para. 189.
- 322 The White House (2002a), p. 15: “Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today’s threats, and the magnitude of potential harm that could be caused by our adversaries’ choice of weapons, do not permit that option.... Rogue states and terrorists do not seek to attack us using conventional means. Instead, they rely on terror and, potentially, the use of weapons of mass destruction – weapons that can be easily concealed, delivered covertly, and used without warning. ... The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively”.
- 323 See Chapter 4, Section 5.
- 324 It should be stressed that the inclusion of the latter three criteria (the Security Council is blocked; preferably an alternative forum of legitimacy; preferably multilateral action) anticipates the discussion in Section 4 below of the legal-political strategy to be pursued with respect to the unauthorised use of preventive force. The relevance of these three criteria presuppose that no claim of a “general right” of unilateral preventive action (expanding the right self-defence) is asserted.
- 325 See DUPI (1999), pp. 106-111; ICISS (2001) *The Responsibility to Protect. Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Center), pp. 32-38.
- 326 ICISS (2001), p. 32.
- 327 ICISS (2001), p. 55.
- 328 ICISS (2001), p. 36; DUPI (1999), pp. 110-111.
- 329 ICISS (2001), p. 55.
- 330 Cf. in the same direction ICISS (2001), p. 55.
- 331 DUPI (1999), p. 108.
- 332 ICISS (2001), p. 50, requires that a formal request for authorisation must have been brought before the Council prior to undertaking unauthorised humanitarian intervention.
- 333 The General Assembly may adopt such a declaration under Articles 10-11 of the Charter or under the 1950 *Uniting for Peace* Resolution. A minimum majority of two-thirds of the UN members present is required, cf. Article 18.
- 334 ICISS (2001) (on humanitarian intervention), p. 48: “It is evident that, even in the absence of Security Council endorsement and with the General Assembly’s power only recommendatory, an intervention which took place with the backing of a two thirds vote in the General Assembly would clearly have a powerful moral and political support”. Also p. 53: “Although the General Assembly lacks the power to direct that action be taken, a decision

by the General Assembly in favour of action, if supported by an overwhelming majority of states, would provide a high degree of legitimacy for an intervention which subsequently took place, and encourage the Security Council to rethink its position”.

335 ICISS (2001), pp. 48 and 54.

336 ICISS (2001), pp. 53-54.

337 ICISS (2001), pp. 54-55.

338 DUPI (1999), pp. 108-109; ICISS (2001), p. 36.

339 DUPI (1999), p. 108; ICISS (2001), p. 55.

340 See further DUPI (1999), pp. 111-120.

341 Cf. ICISS (2001), p. 49: “there is no better or more appropriate body than the Security Council to deal with military intervention issues for humanitarian purposes. It is the Security Council which should be making the hard decisions in the hard cases about overriding state sovereignty.... That was the overwhelming consensus we found in all our consultations around the world”. There is thus no widespread international support for a legal right of unauthorised humanitarian intervention, cf. DUPI (1999), pp. 118-120; ICISS (2001), p. 54.

342 Cf. High-level Panel (2004), para. 191-192: “in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all. We do not favour the rewriting or reinterpretation of Article 51”.

343 Cf. as regards the 2002 *National Security Strategy of the United States*; Gray, C. (2004) *International Law and the Use of Force*, 2nd ed. (Oxford: Oxford University Press), pp. 175-179 and 194 (the UK government prefers a flexible concept of anticipatory self-defence/imminent threat).

344 As was shown in Chapter 3, Section 5.4 state practice contains but a few instances of military force, which might arguably be labelled preventive action, none of which, however, set a clear precedent for preventive action as a legal right of self-defence or even as an acceptable or justifiable resort to force.

345 See also Chapter 4, Section 5.4 on legal-political considerations concerning purely preventive self-defence.

346 In the same vein, the International Court of Justice in the *Corfu Channel Case*, ICJ Reports (1949), firmly rejected the UK invocation of a right of forcible intervention in the Corfu Strait to secure evidence for a claim of damages after two British ships had been sunk by Albanian mines in the Corfu Channel (p. 35): “The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses, and such as cannot, whatever be the present defect in international organisation, find a place in international law”.

- 347 As stated by Franck, Thomas M. (2002) *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge: Cambridge University Press), p. 98: “a general relaxation of Article 51’s prohibitions on unilateral war-making to permit unilateral recourse to force whenever a State feels potentially threatened could lead to another *reductio ad absurdum*. The law cannot have intended to leave every state free to resort to military force whenever it perceived itself grievously endangered by actions of another, for that would negate any role for law”.
- 348 United Nations, High-level Panel on Threats, Challenges and Change (2004), paras. 191-192.
- 349 Cf. on the the concept of extenuating circumstances DUPI (1999), p. 25; Franck, T. M. (2002), pp. 174-191 (notably pp. 179 and 183-185). In the *Corfu Channel Case*, although it declared that the United Kingdom had violated international law when, following an incident where two British vessels were hit by mines in the Albanian Corfu Channel, the British Navy had intervened in Albanian waters to sweep the mines, the International Court of Justice recognised that “the Albanian Government’s complete failure to carry out its duties after the explosion and the dilatory nature of its diplomatic notes are extenuating circumstances for the action of the United Kingdom Government”. On this basis the Court concluded that the declaration of a violation of the law was “in itself appropriate satisfaction” and refrained from awarding compensation to Albania, ICJ Reports 1949, p. 35.
- 350 For this process, see Knudsen, Tonny B. (2005) *Humanitarian Intervention and International Society: Contemporary Manifestations of an Explosive Doctrine* (London: Routledge).
- 351 This apt description has been taken from Knudsen, T. B. (2005).
- 352 Betts, Richard K. (2003b) “Suicide from Fear of Death?” *Foreign Affairs*, Vol. 83, No. 1 (January/February), p. 35.
- 353 Macfarlane, S. Neil, Carolin J. Thielking and Thomas G. Weiss (2004) “The Responsibility to Protect: is anyone interested in humanitarian intervention?”, *Third World Quarterly*, Vol. 25, No. 5, pp. 977-992; Roth, Kenneth (2004) “The War in Iraq: Justified as Humanitarian Intervention?”, *Kroc Institute Occasional Paper*, No. 25 (Notre Dame, IN: The Joan B. Kroc Institute for International Peace Studies, University of Notre Dame).

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