



DIIS · DANISH INSTITUTE FOR INTERNATIONAL STUDIES

# NEW THREATS AND THE USE OF FORCE

# 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.<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> 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*).<sup>6</sup>

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.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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-

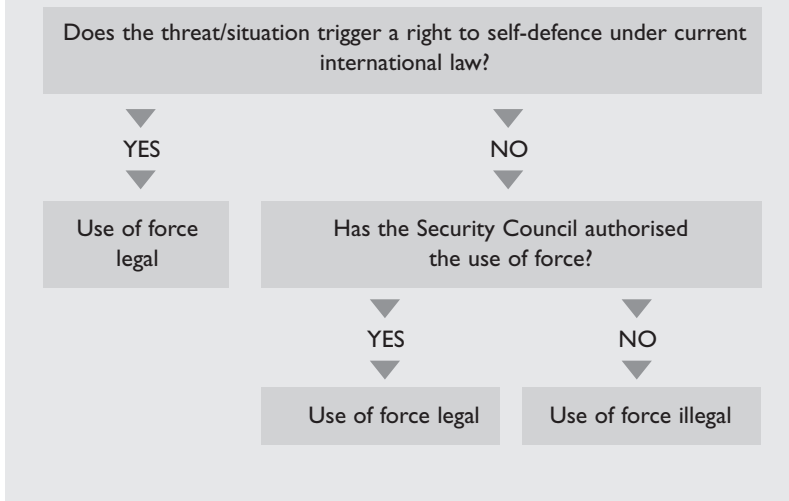
sequences that its critics fear. If, on the other hand, it is reserved for exceptional circumstances, it may have a positive effect on international peace and security.

#### 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.<sup>13</sup> 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 effective

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.<sup>14</sup>

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:<sup>15</sup>

*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.