



DIIS · DANISH INSTITUTE FOR INTERNATIONAL STUDIES

NEW THREATS AND THE USE OF FORCE

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).