



DIIS · DANISH INSTITUTE FOR INTERNATIONAL STUDIES

NEW THREATS AND THE USE OF FORCE

Chapter 5

Preventive Use of Force not authorised by the Security Council

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

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

I. The absence of a legal basis

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

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

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

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

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

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

1.3. Preventive action as a legal necessity?

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

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

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

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

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

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

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

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

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

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

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

2. Illegal but legitimate?

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

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

2.1. The dangers of unauthorised preventive military action

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

The subjectivity of identifying potential threats

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

The relative necessity of preventive action

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

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

The vagueness of conditions makes the absence of procedural safeguards critical

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

The risk of wrong assessment or intelligence

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

The prerogative of strong states

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

The real risk involved in demolishing the international legal order

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

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

2.2. The possible justifiability of unauthorised preventive military action

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

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

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

Some threats may not be eliminated by non-military means

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

Some threats may not be deterred by the threat of retaliation

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

Necessity to act because to wait would be too risky

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

Enforcement of international law

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

2.3. Preliminary assessment

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

3. Criteria of possible legitimacy in exceptional cases

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

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

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

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

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

3.1. The five general criteria of legitimacy

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

1) *Serious threat*

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

2) *Proper purpose*

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

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

3) *Last resort*

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

4) *Proportional means*

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

5) *Balance of consequences*

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

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

3.2. The Security Council is blocked

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

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

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

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

3.3. Preferable use of an alternative forum of legitimacy

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

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

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

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

3.4. Preferable use of multilateral action

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

4. Choice of legal-political strategy

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

4.1. Four conceivable strategies

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

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

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

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

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

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

4.2. Assessing the feasibility and consequences of the four strategies

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

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

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

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

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

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

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

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

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

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

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

4.3. Recommendation

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

5. Conclusion

No legal basis

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

Illegal but legitimate/justifiable?

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

Criteria of possible legitimacy

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

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

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

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

The choice of legal-political strategy

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

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

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