

# PRE-EMPTIVE ACTION

No. 36, AIV/No. 15, CAVV, July 2004

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- Annexe IIa** Members of the Committee on Pre-Emptive Action
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- Annexe III** List of abbreviations

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- Annexe IV** US National Security Strategy, September 2002
- Annexe V** European Security Strategy, December 2003
- Annexe VI** Dutch government position on the US National Security Strategy, 15 November 2002, Parliamentary Papers 28 600 V, no. 12

## Foreword

On 30 June 2003, the government asked the Advisory Council on International Affairs (AIV) and the Advisory Committee on Issues of Public International Law (CAVV) to produce an advisory report on the permissibility under international law and the political and military desirability of or need for 'pre-emptive action'. The government also asked for advice on possible criteria for pre-emptive action.

The questions specifically asked by the government were as follows:

- 1 What, in the opinion of the AIV/CAVV, does the term 'pre-emptive action' mean?
- 2 Can the AIV/CAVV describe the conditions and circumstances that could make pre-emptive action (as defined in their answer to the first question) either desirable or necessary in political or military terms, or permissible under international law? Should a threat be required to meet certain conditions - and, if so, which conditions (i.e. in terms of its nature, extent, imminence and verifiability)? And what is the relevance of the principle of proportionality in this connection?
- 3 What sort of parameters or criteria should be developed to prevent pre-emptive action that is either undesirable from a political or military viewpoint or contrary to international public law, or to restrict such action?

Although pre-emptive action has been a topic of debate for some time now, it has featured particularly prominently on the international agenda following the Bush administration's publication of the US National Security Strategy in September 2002. Although the prohibition on the use of force and the exceptions to this rule in the UN Charter are firmly anchored in international law, the potential threats facing states today and in the future are no longer the same as those they faced in 1945. Not only other states, but also non-state actors such as criminal organisations and terrorist groups are capable of posing serious threats to state security. In combination with ongoing advances in information technology, as well as the continued proliferation of weapons of mass destruction and their means of delivery, this is leading to larger scale and less predictable threats to national security. These 'new threats' are testing the limits of the prohibition on the use of force and the exceptions to this prohibition, as laid down in international law. Does the current system of collective security offer sufficient means of protecting national security against both current and future threats? How can the system be improved and strengthened? To what extent, and in what way, may a state disregard the system of collective security and use force to 'defend' itself against these 'new threats' before it has actually been attacked?

The first chapter of this report answers the government's first question: 'What, in the opinion of the AIV/CAVV, does the term 'pre-emptive action' mean?' The AIV/CAVV defines the terms 'pre-emptive action' and 'anticipatory self-defence' and, unlike the government's letter, distinguishes them from the concept of 'preventive action'. This chapter also discusses the 'new threats' and the US National Security Strategy, which have given pre-emptive and preventive action new relevance.

Chapter II answers part of the government's second question, which regards the permissibility under international law of pre-emptive and preventive action (as defined in Chapter I). It also examines the prohibition on the use of force under international law, and the exceptions to it.

The final chapter brings together the 'new threats' outlined in Chapter I and the international legal framework set out in Chapter II. It also discusses the other part of the second question, about the political or military desirability of or need for 'pre-emptive action', as well as the final question, about safeguards or criteria for preventing pre-emptive action that is either undesirable from a political or military viewpoint or contrary to international law, or for restricting such action. The focus is on the questions of how the current system of collective security can be strengthened to deal with threats better and whether a state could conceivably act outside this system.

To prepare this report, a joint committee was formed under the chairmanship of Professor K.C. Wellens (CAVV), with first Professor K. Koch (AIV) and subsequently Professor C. Flinterman (AIV) acting as the vice-chairs. The rest of this committee was made up of the following members of the CAVV and the AIV: A. Bos (CAVV), Dr P.P. Everts (AIV), Professor F.J.M. Feldbrugge (AIV), Lt. Gen. G.J. Folmer (retd., AIV), Professor B. de Gaay Fortman (AIV), Professor M.T. Kamminga (CAVV), Dr E.P.J. Myjer (CAVV), Professor P.A. Nollkaemper (CAVV), Professor N.J. Schrijver (CAVV and AIV), Professor A.H.A. Soons (CAVV) and E.P. Wellenstein (AIV). The following civil servants acted as contacts: W. Bargerbos (Ministry of Defence), H.P.P.M. Horbach (Ministry of Foreign Affairs) and Professor J.G. Lammers (Ministry of Foreign Affairs). The secretaries were W. van Reenen on behalf of the CAVV and initially P.J. Genee and subsequently S.M.H. Nouwen on behalf of the AIV. Additional assistance was provided by two trainees, T.J.P. Juhász and D.A. de Jong.

The report was approved by the AIV on 9 July 2004, and by the CAVV on 29 June 2004.

# I Pre-emptive and preventive action and 'new threats'

*This chapter starts by answering the first question in the government's letter: 'What, in the opinion of the AIV/CAVV, does the term 'pre-emptive action' mean?' It goes on to distinguish between pre-emptive action and anticipatory self-defence on the one hand and preventive action on the other (section I.1). It then discusses the 'new threats' that could prompt preventive action (section I.2). The final topic of discussion is the US National Security Strategy, which has brought the issue into the spotlight (section I.3).*

## I.1 The term 'pre-emptive action'

The letter from the government asking the AIV to produce an advisory report refers to 'pre-emptive action'. The terminology used in this connection is confusing and not always consistent. Other terms regularly used in addition to 'pre-emptive action' are 'anticipatory military action', 'anticipatory self-defence' and 'preventive action'. Because of the need to examine the permissibility of such action under international law (Chapter II), however, it is important not to regard these terms as synonyms. For this reason, and contrary to the implication of the government's letter, the AIV/CAVV has decided to distinguish between pre-emptive and anticipatory action on the one hand and preventive action on the other. In the AIV/CAVV's opinion, **pre-emptive action** is military action taken against an imminent attack. The same applies to **anticipatory self-defence**. For that reason, the terms 'pre-emptive action' and 'anticipatory self-defence' are used as synonyms in this report. In the case of **preventive action**, however, the threat is more remote. Action is taken at an earlier stage than in the case of pre-emptive action so as to ensure that the threat in question does not evolve into an imminent attack. Moreover, the term 'preventive action' also frequently relates to a much wider range of measures (including non-military measures) that can be used to thwart an attack. This report distinguishes between pre-emptive and preventive action. It is important to note in this connection that the US National Security Strategy - the main reason for the heightened interest in this issue - only uses the word 'pre-emptive' and does not refer to 'preventive action'. This is because one of the key aspects of the Strategy is the assumption that the 'new threats' make it necessary to redefine 'imminent threat', which is a key term in distinguishing between pre-emptive and preventive action. The implication is that pre-emptive action could increasingly take the form of preventive action.

## I.2 'New threats'

In various recent reports, the AIV has analysed the changes affecting the security situation in the 1990s.<sup>1</sup> The Dutch government agrees with most of its conclusions.<sup>2</sup>

1 See, for example, AIV report no. 10 (1999): 'Developments in the international security situation in the 1990s: from unsafe security to insecure safety', which has lost none of its relevance.

2 The 2000 Defence White Paper was largely in agreement with the security analysis presented in report no. 10; in 2003, the letter on defence policy presented at the annual opening of parliament stated that the same conclusions were 'still broadly relevant'. At the same time, certain events have occurred during the period since 1999, particularly in relation to international terrorism, that have heightened the urgency of the problems.

While the collapse of the Berlin Wall has not led to the formation of a clear, new and stable global geopolitical system, there is now greater clarity about the nature of what are generally referred to as 'new threats' to international peace and security. The main such threats are international terrorism and the continued proliferation of weapons of mass destruction and their means of delivery, combined with the possible use of (and, conversely, dependence on) information technology. These threats are emerging in a world that is characterised by a large number of intractable and frequently internationalised interstate conflicts, a greater role for violent non-state groups and an increase in cross-border crime.<sup>3</sup>

The main features of the 'new threats' are the nature of the actors involved (generally non-state actors), the potential or actual role played by weapons of mass destruction, and the fact that such weapons can be developed in secret, thus making them difficult to trace. Although a threat consists of a combination of capability and intention, capabilities are becoming easier to conceal, while intentions, crucial as they are in making an accurate assessment of a threat, are much more difficult to gauge and can also change at the drop of a hat.

Advances in information technology also affect the degree of protection afforded by geographical distance: hostilities initially restricted to a small area can evolve into conflicts with international or regional ramifications, that can ultimately affect both the economic interests and the physical security of other states all over the world. Ostensibly remote problems - such as that of failing states<sup>4</sup> - can have a direct impact on the security of the Netherlands and all of Europe, one of the main reasons for this being that it is easier for criminal and terrorist networks to go about their business undisturbed if they are operating in the vacuum created by such states. As a result, the distinction between domestic and foreign security has become less relevant to national security policy. Active involvement in developments in countries far from Europe may therefore also be desirable for reasons of domestic security, apart from humanitarian and human-rights reasons. The attacks that took place in Washington and New York on 11 September 2001 provided a dramatic illustration of the emergence of international non-state terrorist actors and the threat posed by them, even from a great distance. These attacks also showed just how blurred the dividing line between national and international terrorism is becoming: international terrorist groups use national 'cells' that strike in their 'home countries'. It is also an asymmetrical contest. This is not simply a question of the nature and quantity of the available arsenals; while it is vital for the defenders to ensure that terrorists are never successful, all the attackers need is the occasional success.

'New threats' can present themselves in a variety of ways. Every day, small-scale terrorist attacks are mounted all over the world whose perpetrators, victims and effects are basically local. Nonetheless, certain attacks attract publicity and have a global impact due to their nature and/or scale. In certain cases, the problem is a state that harbours terrorists and other groups, giving them a base where they can train and from which they can operate. Sometimes, this is with the explicit consent and support of the state in question; on other occasions, the state has so little effective authority that it is unable to prevent the terrorist

3 AIV report no. 10 (1999), 'Developments in the international security situation in the 1990s: from unsafe security to insecure safety.'

4 See the joint report recently published by the AIV and the CAVV, no. 35 (2004), *Falende staten, een wereldwijde verantwoordelijkheid* ('Failing states: a global responsibility').

groups in question from doing as they like. In other cases, the threat is in the shape of a state that possesses, or is capable of gaining access to, nuclear, biological or chemical weapons, or else has the expertise and the raw materials that are required to make such weapons. In the appropriate circumstances, such states can constitute an imminent threat.

This analysis of the changes in the security situation is broadly shared across the Western world. At a collective level, this is reflected by the revised doctrines adopted by organisations such as NATO, the EU and the OSCE. NATO adjusted its strategy in 1999, giving a more prominent place to 'new threats'.<sup>5</sup> The OSCE also recently published a new security strategy, which attaches a high priority to combating 'new threats', particularly terrorism, which it describes as 'one of the most important causes of instability in the current security environment'. Terrorism 'will remain a key challenge to peace and stability and to State power, particularly through its ability to use asymmetric methods to bypass traditional security and defence systems'.<sup>6</sup> The EU's recently adopted Security Strategy states that '[l]arge-scale aggression against any Member State is now improbable. Instead, Europe faces new threats which are more diverse, less visible and less predictable'.<sup>7</sup> The EU identifies the 'new threats' as terrorism, the proliferation of weapons of mass destruction and failing states in combination with organised crime.

It is not clear, however, just how new the 'new threats' are. Despite the welter of recent incidents, it is important to remember that there is nothing new about terrorism, nor about the large number of casualties regularly incurred as a result of terrorist attacks. Even prior to the 1990s, there were large-scale terrorist attacks, such as those in Munich in 1972, Beirut in 1983 and Lockerbie in 1988.<sup>8</sup> Even the terrorist attacks in New York (2001) and Madrid (2004) may be regarded as a form of international terrorism that had been in existence for some time already. What is novel about the current threats is the way in which they combine and compound a number of past threats, such as terrorism, the proliferation of weapons of mass destruction, the internationalisation of terrorist groups and the rise of non-state criminal organisations. At the same time, as traditional targets (such as airliners and embassies) have become better protected, so terrorists have shifted their attention towards places such as stations and markets, which attract large numbers of people but are more difficult to protect. The most urgent threat at present is not so much the possibility that terrorists might use weapons of mass destruction as it is the clear (albeit often invisible) proliferation of terrorist groups and attacks (including suicide bombings) throughout the world. In other words, although this may not be a new threat, it is a growing threat. What is also new is the relative intangibility of certain organisations. Whereas many terrorist attacks in the past were committed in connection with and in direct proximity to certain domestic or regional conflicts (hence the term 'bilateral

5 The Alliance's Strategic Concept, Approved by the Heads of State and Government attending the meeting of the North Atlantic Council in Washington D.C. on 23 and 24 April 1999.

6 OSCE, Eleventh Meeting of the Ministerial Council, Maastricht, 1 and 2 December 2003, para. 10.

7 'A Secure Europe in a Better World', European Security Strategy, Brussels, 12 December 2003, p. 3.

8 There are other examples, too. In 1985, 329 passengers and crew died when a bomb went off in an Air India airliner flying over the Atlantic Ocean. In 1989, 171 people were killed as a result of an explosion in an aircraft owned by the French airline UTA, as it was flying over Niger. A Colombian aircraft was blown up in the same year, killing 107 people.

terrorism'), today's attacks are designed to further a more abstract goal: attacking the 'Western world' as such, either directly or indirectly (hence the term 'global terrorism').

Although there is now worldwide acceptance of the existence of 'new threats', consensus has yet to be achieved about their significance and about whether the 'hard threats', i.e. the proliferation of weapons of mass destruction, international criminal networks and international terrorism, should or should not feature prominently on the international security agenda. Even more remote is the prospect of agreement ever being reached on the means of dealing with these threats. While most non-Western countries recognise the existence of these threats, they accord greater urgency to 'soft threats', i.e. famine, poverty, epidemics ('diseases of mass destruction'), civil war and ethnic and religious conflicts. This is not to deny, of course, that such soft threats can easily act as a breeding ground for 'hard threats'.

In this connection, UN Secretary-General Kofi Annan has called for agreement to be reached on a common security agenda. The implication is that it is not simply the North that is affected by certain threats, such as terrorism and weapons of mass destruction, while other threats, such as poverty, famine and disease, are only relevant to the South. Failure to address one type of threat seriously may undermine attempts to combat the other type of threat.

Realising that the sense of threat in the West may prompt unilateral action and hence undermine the UN Security Council's monopoly on the use of force, Secretary-General Annan has set himself the task of producing an analysis of the new situation that all the UN member states will be able to support.<sup>9</sup> He has asked a group of eminent persons to take on this task.<sup>10</sup> In response to both the hard and the soft new threats, the UN Security Council has extended and adjusted its repertoire of responses in recent years. The Security Council has not only expanded the range of available sanctions, but has also placed a broader interpretation on the key phrase for the imposition of coercive measures under Chapter VII, i.e. the existence of a 'threat to international peace and security' (Article 39).<sup>11</sup> In a sense, the Security Council has also started to act more preventively, given that it is tending to focus increasingly on developing crises, i.e. situations in which, while there is no acute military threat, the terms of Article 39 may nonetheless apply.<sup>12</sup> The root causes of conflicts have also been classified as threats to international peace

9 Annan: 'The past year has shaken the foundation of collective security and undermined confidence in the possibility of collective responses to our common problems and challenges. It has also brought to the fore deep divergences of opinion on the range and nature of the challenges we face, and are likely to face in the future.' See press release SG/A/857 of 4 November 2003.

10 High Level Panel on Threats, Challenges and Change. For information on the Panel's composition and brief, see UN press release SG/A.857, [www.un.org/News/Press/docs/2003/sga857.doc.htm](http://www.un.org/News/Press/docs/2003/sga857.doc.htm).

11 This new approach to 'soft threats' started with the Presidential Statement issued on 31 January 1992 (S/23500): '[T]he absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.'

12 Resolutions 841 (1993) and 1529 (2004) on Haiti are examples of this.



and security<sup>13</sup> Apart from seeking to intervene in specific conflicts, the Security Council has also begun to address more general issues such as terrorism, human rights violations and the proliferation of weapons of mass destruction.<sup>14</sup>

### **I.3 The US National Security Strategy** <sup>15</sup>

The US National Security Strategy, as presented by the Bush administration in September 2002, made the issue of pre-emptive and preventive military action a leading international issue. Preventive action became topical following the attack on Iraq carried out by the United States, the UK and Australia in March 2003, given the desire of the US administration in particular to view the campaign in the context of this doctrine. At the same time, the letters by which the three countries notified the Security Council of the attack on Iraq cited Iraq's continuous violation of Security Council resolutions as the main reason for launching the attack. Only the United States added that the action was needed *'to defend the United States and the international community from the threat posed by Iraq and to restore international peace and security.'*<sup>16</sup>

The US National Security Strategy should be placed in proper perspective. First of all, it is a political document about a new national security strategy adopted by a permanent member of the Security Council and goes a long way beyond merely defining the concept of pre-emptive or preventive military action. Secondly, the document does not define pre-emptive or preventive military action in detail, but simply keeps all the options open, without imposing any limits on them. Thirdly, the idea of pre-emptive or preventive military action in the 'new' US security doctrine is not entirely a new one in US politics.<sup>17</sup> Finally,

13 See Resolution 733 (1992), for example, which refers to the steadily deteriorating situation in Somalia, the large number of casualties and the massive material damage caused by the conflict in the country as a potential threat to international peace and security. See also Resolution 688 (1991), in which the effects of large refugee flows out of Iraq to and across international borders are regarded as posing a threat to international peace and security. In Resolution 1264 (1999), the worsening humanitarian situation in East Timor, combined with refugee flows and human-rights violations, is also classified as a threat to peace and security. Disregarding the situation in specific countries, the Security Council stated in Resolution 1308 (2000) that HIV/AIDS 'may pose a risk to stability and security'. Similarly, the Security Council stated in Resolution 1314 (2000) with regard to children in armed conflicts that 'the deliberate targeting of civilian populations or other protected persons, including children, and the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law, including that relating to children, in situations of armed conflict, may constitute a threat to international peace and security.'

14 See K. Wellens, 'The UN Security Council and the new threats to the peace: back to the future', *Journal of Conflict and Security Law*, 2003, Vol. 8, No. 1, pp. 15-70.

15 See the addendum to this report.

16 See S/2003/350, S/2003/351 and S/2003/352 (italicised by the authors).

17 See Chapter 2 for practical examples.

apart from the US, countries such as Australia<sup>18</sup> explicitly endorsed the right of states to take 'pre-emptive' (which should be taken to mean 'both pre-emptive and preventive') action.

Under the US security doctrine, the US may be both compelled to respond, and justified in responding, unilaterally, i.e. without the authorisation of the Security Council, with military force to potential future threats emanating from two categories of actor.<sup>19</sup> The first category is made up of terrorists,<sup>20</sup> terrorist organisations and states that render aid to terrorists,<sup>21</sup> for example by sheltering them. The second category consists of the 'rogue states'<sup>22</sup> identified by the US, mainly because such states may possess weapons of mass destruction that they might be capable of supplying to terrorists.<sup>23</sup>

One key aspect of the United States' new security doctrine is not so much the novelty of the perceived threat (for example, in the form of weapons of mass destruction) as the argument that tools that in the old days would have been regarded as constituting an adequate response to such a threat are no longer effective. The US takes the view that the security doctrine of nuclear deterrence used during the Cold War is no longer reliable;

18 See Robert Hill, the Australian Minister of Defence, 'The UN Charter is outdated', *International Herald Tribune*, 2 December 2002: 'The international community should review the limits of self-defence and the right of national governments to take pre-emptive action. Long-established principles of international law need to be reinterpreted in an age of over-the-horizon weaponry, computer network attack and asymmetric threats, when warning times are reduced virtually to zero and enemies can strike almost anywhere.'

19 The National Security Strategy does, however, warn that states should not use pre-emptive action as a pretext for aggression.

20 'We will disrupt and destroy terrorist organizations by: (...) defending the United States, the American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our borders. While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting pre-emptively against such terrorists, to prevent them from doing harm against our people and our country (...).' National Security Strategy, p. 6.

21 'We make no distinction between terrorists and those who knowingly harbour or provide aid to them.' National Security Strategy, p. 5.

22 The US National Security Strategy 2002, pp. 13-14, defines rogue states as 'states which:

- brutalise their own people and squander their national resources for the personal gain of the rulers;
- display no regard for international law, threaten their neighbors, and callously violate international treaties to which they are party;
- are determined to acquire weapons of mass destruction, along with other advanced military technology, to be used as threats or offensively to achieve the aggressive designs of their regimes;
- sponsor terrorism around the globe; and
- reject basic human values and hate the United States and everything for which it stands.'

23 The AIV/CAVV report on failing states deals with a broader category than rogue states, namely, states of concern. It defines 'rogue states' as states whose rulers deliberately pursue a policy of violating the rights not only of their own people, but also of other states and their subjects. Other states of concern are those known as 'criminal' or 'predatory' states, i.e. states in which public institutions are used by a small ruling elite for the purpose of self-enrichment at the expense of the general population.

deterrence does not work in relation to actors such as rogue states and non-state actors such as Al Qaida. Such states and actors are often described as irrational and hence not open to deterrence, not even by the US's huge nuclear arsenal. For this reason, the US has added a new element to the generally accepted definition of deterrence.<sup>24</sup> The core of this new thinking is that, while certain elements of the strategy of deterrence are still regarded as being both relevant and effective in relation to existing nuclear powers, they are not consistently effective in relation to 'new actors'. This is the reason for the heightened interest in active counterproliferation. Moreover, there is also the extremely important additional option of actually taking military action before a threat has materialised.

With regard to preventive action in general, the US National Security Strategy states that 'as a matter of common sense and self-defence, America will act against such emerging threats *before they are fully formed*'<sup>25</sup> and that the United States 'must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction' (p. 14).<sup>26</sup> The Security Strategy also clearly states that the United States 'will not use force in all cases to pre-empt emerging threats, nor should nations use pre-emption as a pretext for aggression' (p. 15).

The Security Strategy invokes international law in support of this position. As the US sees it, '[f]or centuries, international law recognised that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack' (p. 15). The Security Strategy goes on to suggest that the concepts of 'imminent danger of attack' and 'imminent threat' should be adapted to 'the capabilities and objectives of today's adversaries'.<sup>27</sup>

With the exception of the above considerations, the US Security Strategy does not discuss the international legal aspects of state conduct. These will be examined in the following chapter.

24 This point is described in more detail in the AIV's report no. 28, *An analysis of the US missile defence plans: pros and cons of striving for invulnerability*. The AIV makes clear in this report that, while deterrence in general should also be regarded as being effective in relation to a high-risk country, the situation could be different in an extreme emergency, when the country in question no longer has anything to lose. See also the US Secretary of State, Colin L. Powell, 83 *Foreign Affairs* No. 1, January/February 2004, 22-34, 24: 'As to pre-emption's scope, it applies only to the undeterrable threats that come from non-state actors such as terrorist groups. It was never meant to displace deterrence, only to supplement it.'

25 Covering letter from President Bush, 17 September 2002 (italicised by the authors).

26 Italicised by the authors.

27 The text continues: 'Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction - weapons that can be easily concealed, delivered covertly, and used without warning. The targets of these attacks are our military forces and our civilian population, in direct violation of one of the principal norms of the law of warfare...' (National Security Strategy, p. 15).

## **II The permissibility of pre-emptive and preventive military action under international law**

*This chapter responds to the request for the AIV/CAVV to describe the conditions and circumstances that could make pre-emptive action permissible under international law. The chapter starts by explaining the rules of international law on the use of force and the right of self-defence (sections I and II), and discusses the conditions that may apply to pre-emptive military action, the Caroline criteria. Finally, the permissibility of pre-emptive and preventive military action as envisaged by the US National Security Strategy will be considered from the prospective of international law (section III).*

### **II.1 International law on the use of force**

The primary sources of international law are treaties including the UN Charter, customary law and the basic principles of law. States are bound by these rules. Article 103 of the UN Charter states that the Charter will prevail in the event of a conflict between the obligations of the members under the Charter and their obligations under any other international agreement. The Charter is not merely the constitution of the United Nations and hence the basis of the system of collective security, but is also the source of a number of fundamental standards and principles. Of particular relevance to the issue under discussion here are the obligation to settle disputes by peaceful means (Article 2, paragraph 3) and the obligation for states to refrain from the threat or use of force against the territorial integrity or political independence of any state (Article 2, paragraph 4), a provision that is complementary to the former obligation.

#### *II.1.1 The basic rule: prohibition on the use of force*

Since the foundation of the United Nations, Article 2, paragraph 4 of the Charter has formed the basic norm on the use of force. The article reads as follows: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'. This makes clear not merely that states are forbidden from using force in their international relations, but also that states are forbidden from threatening others with the use of force. The International Court of Justice (in the *Nicaragua* case) appeared to agree with the International Law Commission about this issue, citing its opinion that the prohibition on the use of force laid down in Article 2, paragraph 4 of the Charter is part of *jus cogens*, i.e. peremptory norms of international law that may not be altered by contracting parties.<sup>28</sup> This means that the only exceptions to this prohibition are those explicitly recognised by international law.

#### *II.1.2 The exceptions*

The use of military force is lawful only if it falls under one of the two following exceptions to the rule prohibition on the use of force:

28 International Court of Justice, Case concerning Military and Paramilitary Activities in and against Nicaragua, ICJ Rep. (1986), para. 190.

**(a) The use of force by or on behalf of the Security Council**

If it is assumed that disputes are settled by peaceful means, the threat or use of military force is a last resort. Article 24, paragraph 1 of the UN Charter confers primary responsibility on the Security Council in the collective security system. It is empowered to take decisions on the use of force. If the Security Council concludes that the prevailing situation falls under the description in Article 39 of the UN Charter, constituting a threat to the peace, a breach of the peace or an act of aggression, it is empowered by Chapter VII of the Charter to take coercive action.

Article 39 of the Charter reads: 'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.' Article 41 authorises the Council to take peaceful measures, while Article 42 also empowers it to use force. For example, under Article 42, the Security Council is entitled to decide to 'take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security'.

This exception to the prohibition on the use of force is a pillar of the collective security system. It is important to note that it stems from a collective decision. In a situation in which the Security Council fails to act and it is not possible to invoke the right of either individual or collective self-defence (see below), neither the UN Charter nor customary law allows states, either individually or as members of a regional organisation, unilaterally to use force against a threat to international peace and security. The system of collective security described in the UN Charter is in itself sufficiently flexible to take account of new, genuine security requirements (and changing standards, including changing views on the relationship between sovereign rights and the responsibilities of the community of states). In this sense, the UN Charter is a proven framework for dealing with threats to peace and security. What may be a problem in this system, however, is that the mechanism of the Security Council may prove too slow or otherwise ineffective, when it comes either to taking decisions or to putting them into effect. The UN Secretary-General has emphasised the need for the Security Council 'to face its responsibilities',<sup>29</sup> since the credibility of the Security Council depends on its willingness to take credible action, including effective coercive measures, in response to threats to peace and security.

As mentioned in Chapter I, the Security Council has for some time now placed a broad interpretation on the phrase 'threats to peace and security'. Apart from being concerned with specific conflicts, the Security Council has also started taking a more general interest in issues such as human rights violations, terrorism and the proliferation of weapons of mass destruction.<sup>30</sup> For example, it has described the proliferation of weapons of mass destruction as a potential threat to peace and security.<sup>31</sup> If certain countries, as North

29 UN Press Release SG/SM/7136 (September 1999).

30 See Chapter III.

31 See Res. 1540 of 28 April 2004, e.g. p. 1: 'Affirming that the proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security'; and p. 4: 'Affirming its resolve to take appropriate and effective action 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'.

Korea and Iran have done, contravene the Treaty on the Non-Proliferation of Nuclear Weapons as well as agreements concluded with the International Atomic Energy Agency (IAEA), they lay themselves open to the sanctions provided for in the Treaty and those agreements. Unfortunately, none of these instruments has established a mechanism for taking effective coercive action. If all other channels have been exhausted, it is up to the Security Council to take a decision on such action, on the basis either of the procedure envisaged by the treaty in question (cf. Article XII of the Chemical Weapons Convention; the IAEA regime also includes a reporting procedure or, as the case may be, a reporting requirement) or of a Security Council resolution. Incidentally, the mere fact that a country decides to withdraw from a treaty cannot in itself be regarded as a form of proliferation. Other evidence is required in order to substantiate such a claim.

**(b) *Individual or collective self-defence***

The only other exception to the rule prohibition on the use of force as set out in Article 2, paragraph 4 is the right of states to defend themselves until the Security Council has taken the necessary steps to maintain international peace and security (under Article 51 of the Charter). Article 51 of the Charter reads: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.'

Article 51 makes it clear that a state's right of self-defence is a temporary right that it enjoys until the Security Council has taken the necessary steps to maintain international peace and security. Although the assumption is that the Security Council will take action to countervail the breach of law occasioned by an armed attack, the urgency of an armed attack entitles the state under assault to do everything in its power to defend itself (including the use of force either on its own or in conjunction with other states) until the Security Council has taken the necessary steps referred to above. The state that was attacked is obliged to report to the Security Council in order to explain its decision to resort to force.

The collective nature of the UN security system should act as a guide to the interpretation of any of the articles in Chapter VII of the Charter. It is for this reason that the Security Council, and not individual members, is responsible for assessing the adequacy of the measures taken. In other words, members are not at liberty to decide for themselves whether the Security Council has taken effective action. Nor is the right of self-defence revived if a member takes the view that the action taken by the Security Council has not been effective. By taking 'such action as it deems necessary', the Security Council suspends a member's right to exercise its right of self-defence until such time as the Council itself decides to revive this right. During the first Gulf War, therefore, the Security Council had to include in resolution 678 a provision explicitly stating that Kuwait and the coalition acting against Iraq would in future again be entitled to exercise their rights of both individual and collective self-defence if, in the Security Council's view, the sanctions had not had their intended effect.

All sorts of different views have been expressed over the years about the exception to the prohibition on the use of force laid down in Article 51. Two terms need to be clarified in

order to ensure that Article 51 is correctly interpreted and enforced: 'inherent' and 'armed attack'.

## **II.2 A closer look at the right of self-defence**

### *II.2.1 What does 'inherent' mean?*

Article 51 states that the prohibition on the use of force does not impair a member's inherent right of self-defence if an armed attack occurs. The International Court of Justice examined this right more closely in the *Nicaragua* case. After pointing out that '[...] in the language of Article 51 of the Charter, the inherent right (or 'droit naturel') which any state possesses in the event of an armed attack, covers both collective and individual self-defence'<sup>32</sup> the Court concluded: 'Thus, the Charter itself testifies to the existence of the right of collective self-defence in customary international law.'<sup>33</sup>

The Court also made clear in the same case that the term 'inherent' cannot refer, for example, to a wider right of self-defence, for instance against lesser forms of force than an armed attack:

...In the view of the Court, under international law in force today - whether international law or that of the United Nations system - States do not have a right of 'collective' armed response to acts which do not constitute an 'armed attack'.<sup>34</sup>

### *II.2.2. Armed attack*

If a state is to be justified in invoking its right of self-defence, it must be the victim of an armed attack. The term 'armed attack' does not refer exclusively to an attack by the armed forces of one state against another state. The terrorist attacks of 11 September 2001 were a 'situation equivalent to an armed attack' against which the victim was entitled to defend itself. This was recognised by the Security Council in Resolution 1368, and provided the legal basis for legitimising the invasion of Afghanistan, since Afghanistan's government was knowingly sheltering terrorists who planned and executed the attack.

The term 'armed attack' also encompasses an indirect attack in which a state does not make direct use of military force, but instead uses non-state actors (such as rebel forces) to exercise military force against another state. In the opinion of the AIV/CAVV, a state is also entitled to invoke its right of self-defence when taking military action **against** a state that harbours individuals guilty of serious terrorist offences. The crucial question here is whether the latter state has complied with its obligation under international law to take the necessary action to prevent terrorists from operating in or from its territory.

The final question is whether the *threat* of an armed attack is sufficient to justify self-defence. The term 'armed attack' is generally interpreted as referring exclusively to an attack that has actually been mounted. It is clear from an analysis of the normal meaning of the terms used in Article 51 that an 'armed attack' is not the same as 'a threat of an armed attack'. Even taking account of the context of Article 51, it is clear that the article is concerned with an actual rather than with an imminent attack. This is because, even

32 International Court of Justice (see footnote 28), para. 193.

33 *ibid.*

34 International Court of Justice (see footnote 28), para. 211.

though the rule to which the right of self-defence forms an exception (i.e. Article 2, paragraph 4 of the Charter) does distinguish between a threat to use force and the actual use of force, Article 51 refers only to an actual armed attack and does not contain any references to an imminent attack.

It is important to bear in mind that a threat to use force in contravention of Article 2, paragraph 4 of the Charter does constitute a threat to peace and security and hence falls under the collective security system laid down in Articles 39 ff. of the Charter.

### *II.2.3 Anticipatory self-defence / pre-emptive military action*

In order to ascertain whether it might not be possible to place a broader interpretation on the term 'armed attack', i.e. so that it includes the threat of such an attack, we need to examine the arguments that could potentially be used in favour of such an interpretation. This is the reason for examining the concept of 'anticipatory self-defence' in this context.

Anticipatory self-defence is a concept in international law the meaning of which corresponds with the definition of 'pre-emptive military action' used in this report. In order to decide whether the exercise of anticipatory self-defence is compatible with international law as it currently stands, we need first to examine the '*Caroline* doctrine'<sup>35</sup> before analysing state practice during the period since 1945, and finally to see what happens when the *Caroline* doctrine is combined with state practice.

#### **(a) The *Caroline* doctrine**

The *Caroline* doctrine assumes that a state is entitled to act in anticipatory self-defence if there is a 'a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation'. In other words, the sudden threat posed by a given situation must be so great as to leave no time to try any means other than military action in self-defence, taking account of the principle of proportionality, i.e. there must be 'nothing unreasonable or excessive' about the action. The immediacy of the threat is central to this doctrine. The threat must be not simply immediate and grave, but also likely to materialise, partly because of the way in which the state in question has behaved in the past.

The *Caroline* criteria were part of international customary law before the UN Charter was adopted. The question is whether these rules have continued to hold since the Charter was drawn up or whether customary law has changed in this respect. In order to answer this question, we first need to look at state practice during the period since 1945.

35 The following incident occurred in 1837. The schooner *Caroline* was bringing reinforcements from the United States to insurgents rebelling against the British authorities in Canada. The *Caroline* was sailing under the US flag. In response, a British armed force entered US territory, captured the *Caroline* and destroyed the ship, killing two US crew members in the process. The British authorities claimed that the British forces had acted in self-defence. Writing in reply to this claim, the American foreign minister, Daniel Webster, said that the British needed to demonstrate that 'the necessity of self-defence [was] instant, overwhelming, leaving no choice of means, and no moment for deliberation....[and that the British force], even supposing the necessity of the moment authorised them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.'



**(b) State practice since 1945: examples of actual and potential use of pre-emptive and preventive military action**

It has occasionally been argued in the past, in either considering or adopting certain policies, that preventive or pre-emptive military action can be both necessary and lawful. Although in most cases the international community has rejected the use of pre-emptive or preventive military action, it has not always been explicitly condemned.

The following examples may serve to illustrate the situation:<sup>36</sup>

- *1967: Six Day War between Israel and Egypt.* Israel invoked the right of anticipatory self-defence against an imminent attack. An attempt by the Soviet Union to brand the Israeli attack illegal did not receive sufficient support either in the Security Council or in the General Assembly.
- *1981: Osiraq.* The Israeli prime minister, Menachem Begin, saw Iraq's construction of a nuclear reactor as the first step on a road that might lead Iraq to possession of nuclear weapons and hence as a threat to Israel's continued existence. Intelligence sources spotted a window for preventive action in June 1981, before most of the highly enriched uranium arrived from France and the reactor became active. The Israelis attacked on 7 June 1981, provoking fierce expressions of disapproval from the international community. The Security Council condemned the attack as a clear violation of the Charter. It was not until much later, when UNSCOM was performing its inspections, that Israel's assessment of Iraq's intentions proved to be correct.<sup>37</sup>
- *1991-1998: Aftermath of the Gulf War and Desert Fox.* Following the 1991 Gulf War and as an extension of the response to the Iraqi invasion of Kuwait, a number of attacks were launched against Iraq's arsenal of weapons. The assessment in 1991 was that Iraq was two or three years away from producing a nuclear weapon. A series of crises surrounding Iraq's lack of cooperation with UNSCOM in the 1990s led to renewed attacks by the US and the UK in 1998, with the aim of 'degrading Iraq's WMD capabilities'. Interestingly, the US and the UK claimed that no separate Security Council resolution was required for these operations as they were already mandated by previous resolutions obliging Iraq to cooperate with UNSCOM. Other Security Council members, on the other hand, disputed the US and UK's interpretation of the resolution.
- *1998: Sudan.* On 20 August 1998, 13 days after the attacks on the US embassies in Nairobi and Dar es Salaam, the US launched a cruise missile attack against the Al Shifa pharmaceutical plant in Khartoum. This was part of a wider anti-terrorism campaign targeting Osama Bin Laden (and also involving cruise missile attacks on a Bin Laden camp in Afghanistan). The US justified the operation by invoking the right of self-defence enshrined in Article 51 of the UN Charter. Some observers regarded the operation as a reprisal for previous attacks, while others were prepared to see it as a form of preventive action, but were critical because the US had not been able to prove

36 These examples are based in part on Robert S. Litwak, 'The new calculus of pre-emption', *Survival*, vol. 44, no. 4, winter 2002-2003.

37 The Israelis regard the attack on Osiraq as an operation that is part of an existing war situation (Y. Dinstein, *War, Aggression and Self-defence* (2001), p. 45). This view is controversial, however, because of the large time span involved and the irregularity of the hostilities, which occurred in 1948, 1967, 1981 (Osiraq) and 1991. For this reason, it is unclear whether this particular operation may be regarded as an example of pre-emptive military action.

beyond doubt that Al Shifa was indeed producing VX nerve gas (although it was subsequently confirmed at the trial of the suspects in New York in 2001 that Al-Qaida was indeed producing chemical weapons in Khartoum).

State practice is not merely a matter of how states behave, though. It is also a matter of the things they do not do. It is often hard to know, however, when a state decides not to take action, whether this is for legal or other reasons. The following may serve as examples:<sup>38</sup>

- *1960: China's nuclear programme.* In the early 1960s, the Kennedy administration investigated the option of a preventive attack against the fledgling Chinese nuclear capability, which it regarded as a serious threat to US security. It was thought that China was likely to be capable of testing a nuclear weapon in around 1963-65. China was considered to be much more dangerous, more unpredictable and more irresponsible than the Soviet Union. Subsequent assessments concluded that China was unlikely to become aggressive, however, and that the Chinese capability would not affect the global strategic balance. A preventive attack was never launched.
- *1993-1994: North Korea.* The Clinton administration considered mounting preventive attacks against North Korea's nuclear facilities, but decided against it because of what it saw as the excessive risk of a war on the Korean peninsula. In 1994, an agreement was signed with a group of countries, under which North Korea pledged to freeze its activities in Yongbyon in exchange for a light water reactor. Following North Korea's violation of the agreement, the situation has once again become critical (2004) and a new round of negotiations with the US, China, South Korea, the Russian Federation and Japan has started.

**(c) Conclusions in relation to state practice**

The examples given in subsection (b) do not permit any clear conclusion to be drawn about the existence of international customary law on pre-emptive action, let alone on preventive action. What they do show, however, is that, to date, the international community has generally not wished to accept a broad interpretation of the right of self-defence laid down in Article 51. This is despite the fact that a number of the operations described (e.g. the Gulf War and the attack on Sudan) were conducted in response to earlier attacks, which would have lent greater credence to a claim that they were intended to dispel an imminent threat. An element of pre-emption is always inherent to the right of self-defence, in so far as the use of force in the exercise of this right is intended not merely to avert the attack that caused the state in question to invoke its right of self-defence in the first place, but also to prevent any further attacks.

In only one case has the Security Council refrained from condemning an attack that aimed to thwart the threat of an imminent attack, i.e. military pre-emptive action, and this was in relation to the Six Day War between Israel and Egypt. Genuine preventive military action either failed to materialise (as in the case of China and North Korea) or was the butt of international condemnation (Osiraq).

**(d) The making of the Charter and its impact on the Caroline criteria**

States' aim in 1945 was to restrict the freedom to make unilateral decisions on the use of military force based on the *Caroline* criteria (which are subjective in nature) to a case

<sup>38</sup> See Litwak (footnote 35).

defined as objectively as possible, i.e. an 'armed attack'. The Charter does not empower any state to take military action, except in exercising its right of self-defence in response to an armed attack.<sup>39</sup> If a state is the object of lesser force than the level required for an armed attack, the only course of action available is to take non-violent countermeasures,<sup>40</sup> or else to ask the Security Council for explicit permission for the use of force.

Views tend to conflict, both in the literature and, to a certain extent, between states, as to whether the customary-law criteria for justifying anticipatory self-defence, namely the existence of an instant, overwhelming threat that leaves no choice of means and no moment for deliberation (i.e. the *Caroline* criteria), have remained valid during the period since 1945.

The AIV/CAVV wishes to point out that subsequent state practice - as outlined in subsection (b) - is limited and unclear, even if account is taken of practical situations in which anticipatory self-defence has been used in response to lesser force than that required for an armed attack.<sup>41</sup> This makes it difficult to reach firm conclusions on the basis of state practice regarding the question of whether the *Caroline* criteria still hold good in the current international legal framework.<sup>42</sup>

39 For the parallels between the former customary law predating the Charter and the Charter itself, see the case law of the International Court of Justice, particularly in the *Nicaragua* and *Oil Platforms* cases: 'As regards the suggestion that the areas covered by the two sources of law are identical, the Court observes that the United Nations Charter ... by no means covers the whole area of the regulation of the use of force in international relations. On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the "inherent right" ... of individual or collective self-defence, which "nothing in the present Charter shall impair" and which applies in the event of armed attack. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover the Charter, having itself recognised the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law' (International Court of Justice, *supra* footnote 28, para. 176).

'The Court is therefore satisfied that its jurisdiction under article XXI, paragraph 2 of the 1955 Treaty to decide any question of interpretation or application of (*inter alia*) Article XX, paragraph 1(d) of that Treaty, extends, where appropriate, to the determination of whether action alleged to be justified under that paragraph was or was not an unlawful use of force, by reference to international law applicable to this question, that is to say, the provisions of the Charter of the United Nations and customary international law' (International Court of Justice, Case concerning Oil Platforms, ICJ Rep. (2003), para. 42).

40 *Articles on state responsibility*, article 50, 1, (a); General Assembly resolution (res. 56/83, Annex).

41 Examples are violations of airspace, territory and territorial waters, and the provision of small-scale material support for rebel movements. See T.D. Gill, 'The Forcible Protection, Affirmation and Exercise of Rights by States under Contemporary International Law' (*Netherlands Yearbook of International Law*, vol. XXIII, 1992, pp. 105 ff., at p. 111).

42 It should be stressed that decisions not to take action are also part of state practice.

The AIV/CAVV nonetheless believes that the *Caroline* criteria are a valuable tool for determining when Article 51 may be invoked to deal with new threats (such as terrorism, either on its own or in combination with the proliferation of weapons of mass destruction) that cannot be countered by any other means. In the case of an instant, overwhelming threat that leaves no choice of means and no moment for deliberation, force could be used as a means of anticipatory self-defence, subject to the principle of proportionality and provided that the *Caroline* criteria are strictly applied.

### **II.3 The US National Security Strategy and international law**

As we have already mentioned, the US National Security Strategy calls for preventive and pre-emptive action - where necessary - against terrorists, states that harbour terrorists and states that possess weapons of mass destruction and are regarded as a threat to 'the United States and its allies and friends'.<sup>43</sup> Although the Strategy uses such phrases as 'pre-emptive actions', 'to act pre-emptively', 'pre-emptive options' and 'anticipatory action', it is reasonable to conclude that the aim is not simply to neutralise imminent threats, but also to prevent emerging threats from materialising, i.e. to take preventive action.

The US National Security Strategy calls for the use of military force in some cases, which means that the lawfulness of such force needs to be determined by assessing whether the prevailing circumstances meet the criteria for the exceptions to the prohibition on the use of force. The Strategy does not appear to envisage the development of an approach by the UN Security Council, although it does not express an *a priori* preference for unilateral action either. For this reason, the Strategy could only be justified on the grounds of the second exception to the prohibition on the use of force, i.e. self-defence. The text of the Strategy contains no criteria whatsoever that might be used as a means of restricting the pre-emptive action or anticipatory self-defence described in it, apart from a statement to the effect that such categories may not be used as a pretext for aggression.<sup>44</sup>

For this reason, the AIV/CAVV concludes that the US National Security Strategy, in so far as it goes beyond the *Caroline* criteria, is not consistent with international law.

The AIV/CAVV wishes to stress that the new threats described in this report are developing in unpredictable ways and may manifest themselves in a manner that is inconsistent with the clarity inherent in the phrase 'instant, overwhelming threat'. Not only are the relative invisibility, speed and scale of the attacks an adversary could potentially mount unlike the circumstances of the *Caroline* incident in the 19th century, any attack could have a far more profound impact. Such developments could cause a further shift in views on the legal permissibility of preventive military action in certain situations.

The US National Security Strategy also appears to be inconsistent with the principle that the Security Council is the sole body that is entitled to determine the existence of any threat to international peace and security under Article 39 of the UN Charter and, accordingly, that it is the Security Council which is obliged to take the necessary action.

<sup>43</sup> See p. 14, *inter alia*.

<sup>44</sup> See p. 15.

### **III Political framework and developments**

*Chapter I outlined the ‘new threats’ and Chapter II examined the current state of international law. The two threads are brought together in this chapter, which seeks to answer part of the second question in the government’s letter, about the conditions and circumstances that could make pre-emptive and (as defined in this report) preventive action either desirable or necessary in political or military terms, as well as the third question, which relates to parameters and criteria. As we concluded in the previous chapter, international law as it currently stands does not allow preventive military action to be taken without a mandate from the Security Council. This is the principle that the Netherlands should observe in discharging its constitutional task of upholding the international legal order (section III.1). Precisely because the guiding principle is the collective security system in combination with Security Council’s primary responsibility for approving the use of force, the UN system needs to be strengthened in such a way as to discourage countries from resorting to force without UN backing (section III.2). Force should be used only as a last resort and the main aim should be to use other forms of ‘preventive’ action rather than force (section III.3). In addition, instruments designed specifically to deal with the ‘new threats’ should be strengthened (section III.4). Only if the Security Council, for political reasons other than those relating to the maintenance of peace and security, takes no action in a situation in which it might reasonably have been expected to act are there grounds for considering the possibility of action not authorised by the Security Council, although only within strict parameters (section III.5).*

#### **III.1 Maintaining and strengthening the international legal order**

Article 90 of the Dutch Constitution reads: ‘The government shall promote the development of the international legal order.’ This constitutional task is intended to guide the government’s foreign policy. The collective security system as set out in the UN Charter is one of the pillars of the current international legal order. If a state feels threatened, it may feel confined by the restrictions placed on the use of force. At the same time, undermining the collective security system by permitting the unilateral use of force could lead to even more threats. This is because, first of all, the use of force outside the collective security system could have an adverse effect on international cooperation in the next stage, i.e. peacebuilding. In the eyes of a large part of the international community, the difficulties currently encountered in building a new Iraq have been caused partly by the lack of legitimacy of the war that preceded the reconstruction process. Second, even if a short-term threat is defused by a successful war, a failure to ‘win the peace’ in the long term will create a breeding ground for unforeseeable future threats. It is important to remember that, once one country decides unilaterally to interpret the right of self-defence more broadly, any other country can do the same thing. Taking preventive military action without a Security Council mandate could thus undermine the entire collective security system in the long term, without providing better, alternative safeguards for international peace and security.

It should also be noted that strengthening other pillars of the international legal order, such as human rights and social and economic development, will help to maintain and promote peace and security, and hence aid in the battle against the ‘new threats’ (see section III.3).

### **III.2 Strengthening the collective security system**

The 'new threats' are putting the system of collective security enshrined in the UN Charter to the test. The question is: does the system afford sufficient protection against such threats? UN Secretary-General Kofi Annan has also acknowledged the existence of this challenge and has stressed the role played by the Security Council as 'the sole source of legitimacy on the use of force'. He is concerned about the precedent that may be set by states taking unilateral action against 'new threats'. At the same time, he concedes that more is needed than simply a denunciation of unilateralism: the UN needs to act in such a way that the sense of threat that induces certain states to take unilateral action is dispelled by effective and collective UN action.<sup>45</sup>

Although the Charter is sufficiently flexible to take account of new and genuine security requirements, the organisation and its bodies need to be able to make rapid and effective use of the options provided for in the Charter. It is not so much the principles and rules laid down in the Charter that need strengthening as the bodies that are charged with overseeing their application and enforcement, which act as the organisation's executive bodies. It is consistently - and indeed correctly - argued that whether the UN is able to accomplish its mission depends on its members, and on the permanent members of the Security Council in particular.

#### **(a) The Security Council (SC)**

The Charter empowers the Security Council to take preventive action. Such action is definitely permissible under Chapter VI, and also under Chapter VII, in which the Council is made responsible not simply for restoring international peace and security, but also for maintaining it. In recent years, the Council has taken the opportunity to place a dynamic interpretation on its duties and powers. The Council has itself already stressed the importance of preventive action and has classified 'new threats' such as terrorism and weapons of mass destruction as threats to peace and security.<sup>46</sup>

Some states regard this as insufficient, however. They have no confidence that the UN is either willing or able to take effective action. In most cases, a disagreement between a state that feels threatened and the Security Council will not be about the presence or otherwise of a threat. In most cases, the situation already features on the Council's agenda and has already been classified as a threat. In the exceptional case that the Security Council fails to put a given situation on its agenda even though one of the states involved feels that it should do so, it is up to the Secretary-General to take action. The Secretary-General should then make use of the power vested in him by Article 99 of the Charter to bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security. Both the resources and, in particular, the staffing available to the Secretary-General for this purpose should be strengthened. An early warning unit at the Secretariat (see section III.3) should be given the job of analysing

45 Address given by the Secretary-General to the General Assembly, 23 September 2003.

46 See, *inter alia*, S/Res/1366 (2001) on the prevention of armed conflict, the first operative clause of which reads: 'Expresses its determination to pursue the objective of prevention of armed conflict as an integral part of its primary responsibility for the maintenance of international peace and security'.

developing threats for the Secretary-General at an early stage.<sup>47</sup>

The recurring issue, however, is whether the Council should act, and if so, how. If a particular issue has been placed on the Security Council's agenda and the Council decides that it constitutes either a threat to or a breach of the peace, the Council may take coercive action. In the past, the Council has not only authorised the use of force, but has also imposed sanctions, established tribunals, set up monitoring mechanisms, dispatched inspection teams and formulated rules. The fact that the Council has made such wide-ranging use of its powers and authority in the past is of great importance. The Council is also capable of devising useful instruments with which to counter the 'new threats'.

Precisely because the system offers sufficient options, it is all the more important that full use is made of them and that the expectations raised by the new instruments are not dashed. This depends mainly on the attitudes of the 15 members of the Security Council. After all, the Council's strength depends ultimately on its members. Every member of the Security Council should be fully aware of its responsibility, most notably the permanent members with their veto rights. States that seek to circumvent sanction regimes adopted by the Council or obstruct Council decisions by using their right of veto for protecting what are clearly domestic political interests undermine the collective system. Moreover, it is essential for the credibility of the Security Council, and hence also for the fulfilment of its primary responsibility, that it should not simply adopt resolutions, but also act if they are violated. If it does not, UN resolutions will become devalued and states will act on their own initiative to force others to comply with UN resolutions, in the interests of both national and international security.

As the recent war in Iraq has made clear, reliable intelligence is absolutely vital in order to determine whether action is needed and, above all, what type of action is needed. The Security Council does not have a permanent intelligence service of its own, and is compelled to rely on intelligence gathered by member states, particularly the members of the Security Council. This means that intelligence is subject to selection and presentation by individual countries, including the country that perceived the threat in the first place.

In the case of Iraq, the UN did have access to a neutral, non-country-specific inspection body, UNMOVIC (the United Nations Monitoring, Verification and Inspection Unit). Nonetheless, a number of states attached greater value to information passed on either by their own or by other national intelligence services. In retrospect, it is clear that the information garnered by the UNMOVIC was more accurate than the interpretation placed by the US and the UK on the information supplied by their own intelligence services.

Even so, the AIV/CAVV has severe doubts about the proposal to equip the Security Council with a permanent body that is capable of collecting intelligence, i.e. its own, separate intelligence service. A proposal of this nature would encounter a great deal of opposition and form a source of friction. A better solution in the event of a serious threat to peace and security would be to form an ad hoc inspection team with a clearly defined mandate, acting on the authority of the Security Council. Consisting of independent experts (i.e. not tied to national governments), the team would be responsible for analysing the information collected and advising the Security Council accordingly. It would also be logical to

47 Compare the proposal by the International Commission on Intervention and State Sovereignty (ICISS report), *The Responsibility to Protect*, Ottawa, 2001, para. 3.16, for creating a unit along these lines for the Secretary-General in order to strengthen his early-warning capability.

make use of organisations such as the International Atomic Energy Agency (IAEA), the Organisation for the Prohibition of Chemical Weapons (OPCW) and, hopefully, the future Comprehensive Nuclear Test-Ban Treaty Organisation for this purpose. Although the Security Council would be responsible for exercising political judgment, the inspection team's independence would lend authority to its opinion. Member states would then be obliged to respect the Council's assessment of the facts of the situation and defer to it if necessary. If they had access to information at variance with the information given to the Council, they would be obliged to share it with the Council. Once the team published clear evidence of a genuine threat to peace, it would be a clear sign of the need for effective action by the Security Council.

Another area in which the Security Council can be strengthened is in relation to the availability of troops. The Council's authority is undermined if it wishes to dispatch a military force to a certain area, but is unable to raise the force in question (see Article 43 of the Charter). This problem has existed for some time, however, and is not likely to be resolved in the near future. Regional organisations can provide crucial assistance by making rapid-response forces available for operations mandated by the Security Council. It is worth pointing out that this problem is particularly acute in relation to peacekeeping missions and is less relevant in those cases in which a state or a coalition of states merely requires the authorisation of the Security Council in order to use force itself.

**(b) The General Assembly (GA)**

Although the Security Council bears primary responsibility for maintaining and restoring peace and security, the UN General Assembly can play a supporting role, as described in the 'Uniting for Peace' resolution passed by the UN in 1950,<sup>48</sup> and as recognised by the International Court of Justice in the *Certain Expenses* case.<sup>49</sup> The resolution states that, if the Security Council fails to discharge its primary responsibility for the maintenance of international peace and security, the General Assembly should immediately debate the issue with the aim of recommending collective measures including, if necessary, the use of force. In the *Certain Expenses* case, the Court of Justice interpreted the term 'action' as used in Article 11, paragraph 2 (stating that the General Assembly must refer to the Security Council any question on which action is necessary) as meaning 'coercive action'. For this reason, the UNEF peacekeeping force dispatched by the General Assembly to the border region between Israel and Egypt was not covered by the article, which meant that there was no need for the General Assembly to have referred the issue to the Security Council.

The Security Council could also decide to exercise its authority in certain circumstances, when an issue is under threat of veto, to use a procedural resolution - which states are not entitled to veto - to submit the issue to a special session of the General Assembly convened under Article 20 of the Charter. The General Assembly could also make more use of its authority to convene a special session under Article 20 of the Charter, in those cases in which a simple majority of members agrees on certain issues.

Although very little practical use has been made of these rights to date, the AIV/CAVV nonetheless believes they are worth mentioning for the sake of completeness.

48 Yearbook of the United Nations, 1950, pp. 193-195.

49 ICJ Reports 1962, p. 151.



### III.3 General 'preventive measures'

Because the use of force is a last resort in the system of collective security, other, non-military preventive measures need to be initiated and supported before force is used. Often, preventive measures achieve their results indirectly and their impact is not immediately visible. This holds true in the struggle against the 'new threats'. Nevertheless, if improvements are made, for example in early-warning systems, poverty alleviation, and promotion of good governance and human rights, this should help to make the breeding ground for 'new threats' less fertile, certainly in the long term.

One of the conditions for effective action is greater insight into the nature and scale of the 'new threats' and the degree of risk they pose. Although this is an area in which a great deal of progress has already been made, the early-warning capability both of the Netherlands and of regional and global organisations needs to be strengthened.<sup>50</sup> Initiatives taken to this end by the UN Secretary-General deserve both moral and financial support.<sup>51</sup> The Security Council could make more frequent use of fact-finding missions. It could set up a permanent team to this end, but could also decide to form teams on an ad hoc basis. Although many relevant initiatives have been taken in recent years, there is still room for improvement. Not only has large-scale violence broken out without warning, but, where warnings have been given (as has frequently been the case), action has not been taken.

The EU also recognises the importance of conflict prevention, as is demonstrated by its recently published security strategy, entitled *A Secure Europe in a Better World*. This document rightly claims that the form of conflict prevention needed for Europe requires a broad-based approach to security issues. First of all, European security requires threats to be averted at an early stage. For this reason, Europe needs to expand its 'line of defence' beyond the continent itself. Action must be taken before a crisis actually occurs in order to prevent it from occurring. Second, there is a need to strengthen the international community, *in part* by helping non-European countries to promote good governance. To this end, it is also important to improve cooperation between the EU and other international organisations, such as the UN and the WTO. For the Netherlands, the EU is one of the prime channels for helping to prevent conflicts.

It is difficult to make a clear distinction between 'hard' and 'soft' threats. These threats are tightly interwoven, and Dutch policy must reflect that fact.<sup>52</sup> Good governance needs to be promoted, poverty alleviated and human rights protected not simply for development-cooperation reasons, but also as a tool for securing peace and security. Poor

50 See, *inter alia*, the report *Early Warning and Conflict Management: Joint Evaluation of Emergency Assistance to Rwanda*, March 1996. See also the comments made on this issue in AIV report no. 6, *Humanitarian aid: redefining the limits*, November 1998, p. 33 ff.

51 For example, the recent proposal for the appointment of a Special Advisor on the Prevention of Genocide, who is supposed to report to the Security Council, the General Assembly and the Commission on Human Rights via the Secretary-General.

52 See the reports previously published by the AIV on these subjects: *Humanitarian intervention* (no. 13), April 2000, *Africa's struggle: security, stability and development* (no. 17), January 2001, *Pro-poor growth in the Netherlands bilateral partner countries in sub-Saharan Africa: an analysis of poverty reduction strategies* (no. 29), January 2003, *A human rights based approach to development cooperation* (no. 30), April 2003.

governance, poverty and human rights violations are potential threats to international peace and security. The problem is even more acute in combination with state failure, a phenomenon that has formed the focus of growing international concern in recent times. As the main breeding grounds for chaos, failing states have a regional impact, are associated with cross-border ethnic and religious conflicts, and are hotbeds of terrorism and unregulated arms trading. State failure hence requires an international approach. The government has asked the AIV/CAVV to prepare a separate report on this subject, which was recently published.<sup>53</sup> We will not be discussing this point in any more detail here, apart from pointing out that the AIV/CAVV stresses in the report on failing states, as in the present report, that the Security Council is responsible for dealing with threats to international peace and security. Addressing the major risks inherent in failing states, in good time and with an integrated set of tools, is a key component of the preventive policy advocated in the present report.

The United Nations is the global framework for dispelling both 'soft' and 'hard' threats. The AIV/CAVV fully endorses the proposals that have been made for revitalising the General Assembly.<sup>54</sup> If the General Assembly is to play a more important role, its agenda will have to more closely reflect the situation on the ground all over the world and the culture of speech-making will have to change into one of genuine debate. Moreover, the Netherlands must continue to support efforts to strengthen UN programmes, funds and specialist agencies, so as to raise their effectiveness in promoting development and fighting disease, famine, poverty and the effects of natural disasters. The reforms announced by Secretary-General Kofi Annan for improving cooperation between the programmes and funds, both in the field and at the UN's head office, deserve to be supported.

All these measures will help to tackle the breeding grounds for 'new threats'. Specific measures are required, however, in order to combat the 'new threats' themselves.

#### **III.4 Specific measures to combat 'new threats'**

There is both scope and a need for closer international cooperation in relation to both weapons of mass destruction and terrorism. To begin with, states must make more commitments. Forming international law by concluding treaties is the best way of achieving this aim. In certain exceptional circumstances, however (see points a and b of subsection 3.3), the Security Council has itself taken on a legislative role through its resolutions. The Council needs to proceed with caution, however, given the unclear constitutional basis on which it is acting: the Charter not only does not give the Security Council any explicit legislative authority, but also does not establish the necessary checks and balances. If, however, there is a specific threat to peace and security, and certain rules are regarded as being an effective means of countering this threat, legislative action may be one of the courses of action open to the Security Council. One advantage is that the Security Council is able relatively quickly to take decisions that are immediately enforceable and to impose obligations on member states.

<sup>53</sup> AIV report no. 35, *Failing states: a global responsibility*, May 2004.

<sup>54</sup> See *inter alia* A/RES/58/126, A/RES/58/248, A/RES/58/269, A/57/836 (letter of 9 June 2003 from the Permanent Representative of the Netherlands to the United Nations to the President of the General Assembly ('Greentree Report')).

In many cases, however, it is not so much a question of making new arrangements as of enforcing and monitoring the enforcement of existing arrangements. A combination of (soft) diplomacy and the (hard) threat of sanctions has recently proved effective in certain cases (with regard to Libya and possibly Iran). Such a tactic may also be counterproductive, however, by making a country even more intent on acquiring nuclear weapons in order to ward off sanctions (as in the case of North Korea).

The states that need to be targeted are not only those who have already accepted the obligations imposed by international treaties, but also those who have not yet signed such treaties. States that claim they need to take preventive military action in order to deal with the 'new threats' facing them should at least first be required to become parties to existing international treaties and organisations that have been set up for the purpose of countering such threats. Regional organisations can also use their influence, for example to persuade states that want to join them to sign up to existing treaties or organisations.

Measures to counter 'new threats' need to be designed with the specific nature of the threat in mind. This is why a clear distinction needs to be made between terrorist threats and those relating to weapons of mass destruction. Most terrorist attacks are perpetrated by non-state actors, some of whom are inspired by political and/or religious motives, while others are criminal organisations. This makes it much more difficult to devise an effective set of instruments to counter such threats.

Perhaps the greatest 'new threat' is that inherent to a situation in which terrorist threats are combined with the proliferation of weapons of mass destruction.

**(a) Weapons of mass destruction**

The current non-proliferation regime is inadequate, especially in respect of monitoring and enforcement. The current regimes for preventing the proliferation and use of weapons of mass destruction need to be strengthened and supplemented.

The rapid entry into force of the Comprehensive Nuclear Test-Ban Treaty - even though it is still a controversial issue, particularly in the US - and its widespread ratification would be a crucial step forward in this respect, as would be agreement as soon as possible on the draft protocol to the Biological Weapons Convention, so as to allow a monitoring mechanism to be put in place as quickly as possible. In addition, the IAEA's Additional Protocol should be made compulsory for all states that are members of the IAEA. Under this protocol, inspectors are entitled not only to inspect all sites declared by members, but also to investigate whether the members have declared everything they should declare.

The AIV/CAVV supports the proposal made by Dr Mohamed ElBaradei, the Director General of the IAEA, for making a sharper distinction between civil technology and technology that can result in the production of nuclear weapons.<sup>55</sup>

The AIV/CAVV also welcomes the resolution recently passed by the Security Council (Res. 1540, 2004), one of the aims of which is to prevent non-state actors from making, developing, possessing, transporting or using nuclear, chemical or biological weapons. The resolution, which was adopted under Chapter VII of the Charter, obliges member states to

<sup>55</sup> *The Economist*, 16 October 2003.

create or strengthen legislation to this effect. The resolution can be used to tighten regimes for regulating the export and transport of such weapons all over the world. The resolution provides a legal basis for the Proliferation Security Initiative (PSI) and expands the scope for coercive action.<sup>56</sup> The AIV/CAVV recommends continuing with the PSI, despite the adoption of resolution 1540, because the PSI is more fleshed out and also organises meetings, including interdiction exercises for member countries.

All arms control treaties provide for the possibility of withdrawing from them. It is the prerogative of the Security Council to take action against states that seek to destabilise arms control regimes; this is borne out by the obligation imposed on states to notify the Security Council of their withdrawal from the Non-Proliferation Treaty and the Biological Weapons Convention. There has recently been talk of a Security Council resolution, under Chapter VII of the Charter, that would, *a priori* and automatically, classify any future decision taken by a state to withdraw from the Non-Proliferation Treaty as a threat to international peace and security. It is not clear, however, whether such a resolution would have any added value. It is not likely that such a resolution would require the Security Council to take specific actions if a state withdrew from the treaty. Instead, the Council would still need to decide how to respond, as it does now, so that nothing fundamental would change. Moreover, the resolution would not have any effect on states that had never signed up to the treaties.

Although the arms control treaties are inadequate as a regime, they still provide a valuable basis, despite the fact that certain improvements should still be made and they should still be ratified by a wider range of countries. If the international non-proliferation regime is to survive, the nuclear weapon states that have signed up to the Non-Proliferation Treaty will have to be constantly reminded of their obligation under the treaty to undertake nuclear disarmament. In order to achieve this end, they must be prepared not to pursue the further modernisation and expansion of their existing weapons systems.

56 The Proliferation Security Initiative (PSI) was founded in Cracow, Poland, on 31 May 2003 in the wake of a US initiative. It is a joint initiative of 14 states (known as the core group) and is supported by a further 60 states. A state is entitled to join the core group if it is capable of making an effective contribution to its activities and if it meets a set of basic requirements (including having an effective government apparatus). The PSI is an instrument rather than an organisation. Its aim is to intercept weapons of mass destruction transported overland, by sea or by air. The members of the core group coordinate joint operations to this end. An example of a successful operation was the seizure of the North Korean freighter *Be Gaehung* in the Taiwanese port of Kaohsiung on 8 August 2003. The ship proved to be carrying a large volume of chemicals.

Cooperation between the members of the initiative is based on what are known as 'interdiction principles' formulated by the core group.

It is not the express aim of the PSI to replace other non-proliferation mechanisms; rather, its aim is to reinforce and supplement them. The PSI is consistent with, and forms a more fleshed-out version of, the Presidential Statement made by the Security Council in January 1992, which states that the proliferation of weapons of mass destruction is a threat to international peace and security and stresses the need for action by UN members to prevent proliferation. It is also consistent with statements issued by the G8 and the EU (e.g. *Basic Principles for an EU Strategy against Proliferation of weapons of Mass Destruction*) calling for coherent and coordinated actions in this field.

**(b) Terrorism**

The same principle applies to terrorism as also applies to weapons of mass destruction: it is important to focus not just on rules (whether old or new), but also on compliance with them.

Until recently, international anti-terrorism law consisted of a fragmentary regime of 12 treaties intended to counter specific forms or aspects of terrorism.<sup>57</sup> Attempts to negotiate a comprehensive anti-terrorism treaty have been fruitless to date. Since the attacks of 11 September 2001, terrorism has once again featured prominently on the UN agenda, in both multilateral treaty negotiations and the Security Council.

Plans for a comprehensive anti-terrorism treaty have recently been rekindled, however. The greatest obstacle is still disagreement about the scope of such a treaty: should it cover attacks perpetrated by 'freedom fighters' with 'political' aims, for example? It is also unclear whether a new, comprehensive anti-terrorism treaty should replace the 12 specific treaties currently in existence supplement them.

For a long time, the Dutch government has been opposed to a comprehensive treaty, mainly because it could undermine the existing treaties and provide states with a pretext for not signing up to them. The government accepts, however, that the proposal has gained so much international support that it now makes sense to join the negotiations so as to have a say in the contents of the treaty. Although the AIV/CAVV supports this change of policy, it believes that the efforts to create a comprehensive treaty along the above lines should not result in states no longer ratifying the existing, specific anti-terrorist treaties, nor in a failure to strengthen the mechanisms for monitoring the enforcement of existing treaties. The existing treaties already provide for effective concrete measures.

The need for joint action has been recognised not only through international treaties and regimes. The Security Council has also recognised the urgent need for legislation on its part, as is demonstrated by Resolution 1267, targeting the Taliban and Al-Qaida, which was adopted before the attacks of 11 September 2001. In Resolution 1373, the Council for the first time defined terrorism in general, rather than terrorism directed at a particular state or region, as a threat to international peace and security. This resolution stated that, in accordance with Chapter VII of the Charter, measures imposed under the International Convention for the Suppression of the Financing of Terrorism were to be binding on all

<sup>57</sup> Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 14 September 1963), Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970), Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal, 23 September 1971), Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973), International Convention against the Taking of Hostages (New York, 17 December 1979), Convention on the Physical Protection of Nuclear Material (New York/Vienna, 3 March 1980), 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 (Montreal, 24 February 1988), Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, 10 March 1988), Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (Rome, 10 March 1988), Convention on the Marking of Plastic Explosives for the Purpose of Detection (Montreal, 1 March 1991), International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997), International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999).

member states. The resolution obliges states, inter alia, to prevent and stop the funding of terrorism and the provision of support to terrorists. A Counter Terrorism Committee has been formed to monitor compliance by states with the terms of the resolution. It is important for the Committee to be able both to provide states with technical assistance in complying with the resolution and to monitor the enforcement of the resolution. The recent creation of a secretariat for the Committee and the appointment of an Executive Director are steps in the right direction, i.e. tighter supervision. Particularly in view of the many countries that cannot comply with the reporting requirements due to technical problems, the provision of bilateral support in this area could be adopted as a part of Dutch foreign policy. The Netherlands could not only assist in improving the quality of reporting, but could also provide technical assistance with the implementation of the resolution. Apart from promoting international peace and security, this would also help the countries concerned to build up their government apparatus and judicial systems. In the light of its extensive network of connections with developing countries, the EU is also in a good position to help develop policy along these lines.

The AIV/CAVV is in favour of the Netherlands adopting an active stance in the relevant fora (including the Council of Europe). More specifically, the AIV/CAVV urges the government to undertake a further study to see whether there is any overlap between the counterterrorism plans drawn up by the UN and the Council of Europe, whether they interfere with each other, and how the system can be improved.

Not only states but also individuals can, and sometimes must, be held responsible for violations of obligations under international law. The Dutch government should continue to seek to gain universal acceptance for the Statute of the International Criminal Court. The AIV/CAVV recommends investigating whether there would be sufficient support, in connection with the first review of the Statute, for bringing certain aspects of terrorism under the jurisdiction of the International Criminal Court.<sup>58</sup>

Improving international cooperation between police forces and judicial authorities is of vital importance, even in relation to domestic criminal investigations and prosecutions. One of the steps we recommend taking in this respect is the conclusion of extradition treaties with a wider range of countries, although this should not detract from defendants' rights to a fair trial.

Regional organisations have a crucial role to play in improving cooperation and promoting the mutual recognition of measures under the law of criminal procedure. The development of a European arrest warrant is just one example of an EU anti-terrorist measure. While the recent appointment of an EU Counter-Terrorism Coordinator is an encouraging sign, what ultimately matters is the degree of effective cooperation between member states. The level of mutual confidence needs to be raised to so as to encourage information to be exchanged and discussed both more efficiently and at an earlier stage.

58 Resolution E, adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, recommends that a future Review Conference should consider formulating an acceptable definition of terrorism and including it among the crimes that are within the Court's jurisdiction.

### **III.5 When the Security Council fails to act, though it might reasonably have been expected to do so**

Alongside the issue of the permissibility of preventive action under international law, the government's letter requesting the AIV to produce a report also raises the matter of the conditions or circumstances in which such action would be either desirable or necessary from a political or military viewpoint. The point is, after all, whether the international community is capable of responding, within the existing international legal framework, to the 'new threats' effectively enough to discourage any state or states from taking preventive action. The Security Council has both the authority and the duty to respond to such threats both effectively and in good time. Various suggestions are made in the previous section for raising the Security Council's effectiveness in this respect. The more effective it is, the greater the chance of either avoiding or limiting the scope of any conflict between international law and the perceived political or military need for action, and hence preventing unilateral action.

But this type of process takes both time and a great deal of political will. Well equipped though the apparatus of the United Nations may be, the decision-making process in the Security Council can nevertheless be held up or frustrated either for intrinsic reasons or for reasons that are not even necessarily connected with the problem in hand. Determined as one may be to avoid such a situation at all costs, in the world as it is one cannot close one's eyes to the possibility.

At the same time, the AIV/CAVV does not believe there is any point, before such a situation arises a situation, in designing a set of criteria for an emergency of this type that would make military action permissible or even desirable, as the government's letter proposes. The 'new threats' cannot be classified as a more or less one-dimensional problem, unlike the situations that call for humanitarian intervention (i.e. massive violations of fundamental human rights for which the only solution would appear to be the use of force and about which there is widespread consensus). Instead, the 'new threats' and their breeding grounds can take on all sorts of conceivable forms (and perhaps even forms that cannot yet be conceived) that do not lend themselves to prior definition and for which there are no ready-made solutions. Any attempt to do so would lead either to extreme detail or to excessive vagueness. In both cases, there is a great risk of giving an unintended impression of legitimating such military action in advance.

It is worth pointing out in this context that it is scarcely possible to legitimate such action in advance. After all, legitimacy requires not only action in accordance with predefined principles and decision-making based on agreed procedures, but also widespread international support for the outcome. Whether such support is forthcoming can generally only be ascertained after the fact.

In the event of an emergency as described above, the only way of ruling out any form of arbitrariness is by insisting on the broadest possible consensus, for example the largest possible majority in the Security Council - at the very least a formal majority - disregarding the permanent members' right of veto. Even a large majority in the General Assembly would, if the need arose, increase the political acceptability of action not authorised by the Security Council. The priority is still, however, to use all the means offered by the Charter to prevent this type of emergency.

## IV Summary and conclusions

1. The debate that prompted the government to ask the AIV to produce a report was triggered by the publication of the US National Security Strategy in 2002. This report does not attempt to provide an exhaustive commentary on the Strategy. Rather, it only examines those aspects that are relevant to the questions put by the government. It should be pointed out, by the way, that the Strategy is not a legal document, but a political paper of a topical nature that does not offer strict guidelines for every conceivable scenario. The way the Strategy is used will gradually evolve in the light of new developments. These developments include the international political debate to which the present report is intended to contribute. Makers of security policy inevitably run up against the conflict between 'regulation' and 'security'. States have an obligation to safeguard the security of their citizens. It goes without saying that the means they use to achieve this end should be effective. At the same time, however, such means should be consistent with the law. Both these aspects are of vital importance in the light of the 'new threats' to international peace and security. While states need to have access to effective means of protecting themselves, they also need an effective legal order that is capable, generally speaking, of constraining the action taken by states. The authors have sought to take account of this dichotomy in compiling this report.
2. The report begins by analysing the terms 'preventive' and 'pre-emptive' military action. We then go on to outline the nature of the new threats and the US security doctrine, which is based on the concept of military action. The doctrine does not distinguish between pre-emptive and preventive action. We subsequently seek to assess whether such action is permissible under international law in that it satisfies the criteria for exceptions to the prohibition on the use of force set out in Article 2, paragraph 4, of the UN Charter. Those exceptions are the use of force by or on behalf of the Security Council and the right of self-defence.

As far as the right of self-defence is concerned, we first examine Article 51 of the UN Charter, which grants states the right of self-defence in the event of an armed attack. We then consider whether 'anticipatory self-defence' or pre-emptive military action can be justified by placing a broader interpretation on the concept of an 'armed attack'. We do this by examining such action in the light of the *Caroline* criteria (i.e. an instant, overwhelming threat, leaving no choice of means and no moment for deliberation) and by examining state practice since 1945. We conclude that state practice is limited and unclear, as a result of which it is difficult to draw firm conclusions as to whether the *Caroline* criteria still apply under current international law.

We nonetheless believe that the *Caroline* criteria are a useful tool for determining when Article 51 may be invoked in response to 'new threats' that cannot be countered in any other way (i.e. terrorism either on its own or in combination with the proliferation of weapons of mass destruction). In the event of an instant, overwhelming threat that leaves no choice of means and no moment for deliberation, the use of force could be acceptable as a means of anticipatory self-defence, provided that the criteria are strictly applied and that the principle of proportionality is observed.

3. We conclude, however, that the US National Security Strategy is intended not only to prevent imminent threats (i.e. to pave the way for pre-emptive action), but also to prevent emerging threats from materialising (i.e. preventive action). We also conclude that



the Strategy calls for the use of military force in such cases, and does not appear to envisage the development of any policy by the UN Security Council. This means that the US National Security Strategy can be justified only on the grounds of the second exception to the prohibition on the use of force, i.e. self-defence. As the US document does not contain any criteria that might be used to restrict the type of military action described in it, apart from the proviso that such action may not be used as a pretext for aggression, we conclude that the US National Security Strategy, in so far as it goes beyond the *Caroline* criteria, is not consistent with international law. The US National Security Strategy also appears to be inconsistent with the principle that the only body entitled to determine the existence of a threat to international peace and security under Article 39 of the Charter is the Security Council and that, accordingly, it is the Security Council which is obliged to take the necessary action.

4. After analysing the permissibility of preventive military action under international law, we then go on to examine the international political context of the campaign against new threats (and developments within this context). In our view, the fact that international law as it currently stands does not permit preventive military action without a mandate from the Security Council should form a guiding principle for the Dutch government in its efforts to accomplish its constitutional mission of promoting the development of the international rule of law (under Article 90 of the Dutch Constitution).

In this section, we make a number of suggestions for strengthening the system of collective security, the primary objective of which is to make the Security Council more effective. In addition, we point out the scope provided by the Charter for making greater use of the UN General Assembly, although we readily admit that little actual use has been made of this scope to date.

Apart from strengthening the system of collective security, we believe that other, non-military preventive measures, such as improvements in early-warning systems, poverty reduction and the promotion of good governance and human rights, can help to counter the new threats. We have also made proposals for strengthening international instruments intended specifically for countering the new threats, although we stress the need to make a clear distinction between the issues of weapons of mass destruction and terrorism.

Finally, we also examined the political or military desirability of or need for preventive military action in a situation in which the Security Council fails to act even though it might reasonably have been expected to do so, and decision-making in the Council is either delayed or undermined for political reasons.

We do not feel that it would be desirable - in anticipation of a possible situation in which the Security Council fails to act - to devise a set of criteria for an emergency of this type that would make military action either acceptable or even desirable. In the event of an emergency of this nature, the only way of safeguarding against arbitrariness is by insisting on the broadest possible consensus, for example the largest possible majority in the Security Council - at the very least a formal majority - disregarding the permanent members' right of veto. Even a large majority in the General Assembly could, if the need arose, increase the political acceptability of action not authorised by the Security Council. The priority is still, however, to use all the means offered by the Charter to prevent this type of emergency.

## **Annexes**

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Chairman of the Advisory Committee on Issues of  
Public International Law

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30 June 2003

Dear Professor Wellens and Mr Korthals Altes,

In its letter to the House of Representatives of 15 November 2002 (28600 V, no. 12), the government set out its position on the new American security strategy. The letter also discusses the concept of pre-emptive action which is a prominent feature of that strategy. During the debate on the Ministry of Foreign Affairs' budget on 4 December 2002, in answer to a question from Mr Van Aartsen, I promised the House of Representatives to prepare a follow-up memorandum on the subject of 'pre-emption'.

In that light, I believe it would be desirable to receive advice on a number of points. Since the subject covers both political issues and issues of public international law, it makes sense to address the question both to the Advisory Council on International Affairs (AIV) and the Advisory Committee on Issues of Public International Law (CAVV). The Minister of Defence and I would like to have your views on the following.

The aforementioned letter outlining the government's position on the new National Security Strategy of the United States is enclosed. Chapter 3 of the American strategy paper deals with new threats and pre-emptive action. Since 11 September 2001 in particular, but before that date also, the American administration has insisted on its right to 'act pre-emptively' under certain circumstances against terrorists and 'rogue states' that have attempted, or are attempting, to acquire weapons of mass destruction. In its 1999 security strategy, the previous American administration already considered proportional, pre-emptive action against an 'imminent threat' to be justified in the case of a significant threat to national security. In the light of new threats said not to be 'detractable', the current security strategy puts greater emphasis on that option. The US approach continues to seek the support of the international community, but, if necessary, the United States will exercise its right to self-defence and, in last resort, take unilateral pre-emptive action against terrorists and 'rogue states'. To justify its position, the administration underscores the fact that, under recognised international law, 'nations need not suffer an attack before they can lawfully take action to defend themselves against forces that represent an imminent danger of attack.'

The government's opinion of the American security strategy is that the debate over the concept of 'immediate threat' must focus squarely on the central issue of what political and legal conditions any military response must satisfy. It is important to have a more detailed definition

of the reasons for such action and a better explanation of proportionality and the grounds for justification. Measures to ensure that the concept is not misused are also necessary.

When discussing 'pre-emptive action', the issues of non-proliferation and the extent to which existing instruments are sufficient are important. The new American security analysis sees non-proliferation and pre-emptive action as closely related. The AIV's advisory reports *Developments in the international security situation in the 1990s: from unsafe security to insecure safety* of September 1999 and *An Analysis of the US Missile Defence Plans: pros and cons of striving for invulnerability* of August 2002 have already dealt with the dangers of proliferation of weapons of mass destruction. The norms set out in arms control and disarmament treaties are extremely important but they can never eliminate proliferation completely. What is needed for disarmament is not so much new initiatives but an answer to the questions of how to enforce compliance to prevent the treaties from being eroded and how to deal with violators. In general, there must be more consideration of the 'harder' aspects of non-proliferation policy.

The government would ask the AIV/CAVV for an advisory report on the following.

1. How do the AIV/CAVV understand the concept 'pre-emptive action'?
2. Could the AIV/CAVV indicate what conditions and circumstances can make pre-emptive action (within the meaning of the answer to question 1) politically/militarily desirable or necessary and/or acceptable under international law? Should criteria be established - and if so, which ones - in respect of the concept of threat (type, scope, immediacy, verifiability) and, in this connection, what is the relevance of the concept of proportionality?
3. What guarantees must be in place or what review framework created to prevent or limit politically/militarily undesirable pre-emptive action, or pre-emptive action which contravenes public international law?

Yours sincerely,

Jaap de Hoop Scheffer  
Minister of Foreign Affairs

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**List of abbreviations**

<b>AIV</b>	Advisory Council on International Affairs
<b>CAVV</b>	Advisory Committee on Issues of Public International Law
<b>EU</b>	European Union
<b>IAEA</b>	International Atomic Energy Agency
<b>ICISS</b>	International Commission on Intervention and State Sovereignty
<b>ICJ</b>	International Court of Justice
<b>NATO</b>	North Atlantic Treaty Organisation
<b>OPCW</b>	Organisation for the Prohibition of Chemical Weapons
<b>OSCE</b>	Organisation for Security and Cooperation in Europe
<b>PSI</b>	Proliferation Security Initiative
<b>SG</b>	Secretary-General
<b>UN</b>	United Nations
<b>UNSCOM</b>	United Nations Special Commission
<b>UK</b>	United Kingdom
<b>UN</b>	United Nations
<b>US</b>	United States of America
<b>WMD</b>	Weapons of Mass Destruction
<b>WTO</b>	World Trade Organisation



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