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PRIME MINISTER

Peter Hill

well done.

SS. 173.

Rules on the Use of Force: The Rights and Responsibilities of States

1. The nature of the new threats we face – WMD proliferation, international terrorism, catastrophic state failure, particularly when combined – and the need for a better international understanding of how we address them, are the biggest challenge for our foreign policy. You set out on 5 March the terms of the debate the international community needs to have. Your speech provides a good platform to take this further.
2. The key issue is to develop a broader international consensus both on the nature of the threats and how to address them, including through military action. Without such a broad agreement there will always be controversy over preventive or pre-emptive action, and any attempts to assert new guidelines for action, or in the longer term to develop international law.
3. I enclose a recent paper by our Directorate of Strategy and Innovation which tries to introduce clarity into what can be a confused debate. The paper identifies three broad sets of circumstance in which we might want to consider the use of force: self-defence, humanitarian intervention,

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and threats to international peace and security. It argues that it is in the third area that we now need to concentrate international reflection.

4. **Self-defence:** the interpretations and misinterpretations of the 2002 US National Security Strategy, followed by Iraq, have led some to identify "pre-emptive" self-defence as the central issue; and to see the spectre of an unrestrained US taking unilateral military action against regimes it does not like, unheeding of allies. I think this is both to misunderstand the US approach and to mistake the real issue. We took action against Iraq not primarily for reasons of immediate self-defence, but because Iraq represented a threat to international peace and security due to its repeated failure to implement UNSCRs.

5. That is not so say that the inherent right of individual or collective self-defence is straightforward. The nature of the threat from international terrorists, and rogue states armed with WMD; the changed nature of deterrence; and the reliance on intelligence information make the use of force in response to imminent attack more complicated and potentially controversial than in the days when armies massed on borders. But the UN Security Council resolutions passed in the wake of 11 September, and the widespread international support for our action in Afghanistan, show that the international community has recognised that the conditions under which self-defence operates have changed; that the 9/11 attacks represented an armed attack in the terms of the UN Charter; and that those harbouring international terrorists may be legitimate targets under article 51 of the Charter if they fail to take action against them to avert further terrorist attacks. The nature of the threat posed by terrorism and WMD is now clearly a consideration in assessing the imminence of an attack giving rise to the right of self-defence.

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6. **Humanitarian intervention:** here the debate has moved in recent years. The legal basis we relied upon during Kosovo – that military action on the grounds of overwhelming humanitarian necessity but without a UNSCR was lawful – remains controversial. The criteria for humanitarian intervention we tabled in the Security Council in 2001 did not gain widespread support. But there is a growing pattern of UN Security Council willingness to authorise intervention which represents progress on the agenda you set out in your Chicago speech. There is now greater international acceptance that humanitarian intervention is a legitimate subject for debate and action.

7. This builds on a pattern of UN Security Council willingness to authorise intervention on humanitarian grounds where the "magnitude of the humanitarian crisis ...constitutes a threat to international peace and security" including in Somalia (1992), Haiti (1994), Rwanda (1994) and Eastern Zaire (1996). More recently the UNSC has authorised intervention in Haiti on grounds that include humanitarian considerations. The issue facing the Security Council is therefore not whether it can authorise intervention on humanitarian grounds but whether, in individual circumstances, it will do so. We need to keep this debate moving forward. A stronger right to intervene on humanitarian grounds is a good thing in itself. It also underlines your argument that notions of sovereignty and intervention cannot be fixed in stone.

8. **Threats to international peace and security:** this is an area where practice has evolved since 1945, but where I see a real need to move the agenda forward, because it is the emerging threats to collective security, through WMD proliferation, catastrophic state failure and in many cases

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international terrorism, that the international community needs to understand and tackle better. It is also the area in which the possibility of pre-emptive or preventive action (if endorsed by the Security Council) is written into the UN Charter in Chapter VII. As you have said, the key to long term progress must be to build a better international understanding of the challenges and threats we face. This needs to be done both through debate and case-by-case, as the occasion arises. Building that understanding among Western countries will be difficult enough, particularly on the role of force. That is why Solana's new security strategy represents such an important step forward. Doing so with the rest of the world, where perceptions of the nature of the threats differ significantly and where Western motives are suspect, will be harder still.

9. For both tactical and strategic reasons we must address and be seen to address a wide range of threats. Tactical because we will not get support, even tacit, for our concerns about WMD and terrorism unless we also address the wider security concerns of the majority of the world; and because the US will be more willing to address that broader agenda if it believes the international community is moving on its concerns. Strategic because the wider agenda of issues like poverty, HIV/Aids, climate change and state failure really do affect our security; and because WMD proliferation and international terrorism impact on developing countries at least as greatly as on us. More Africans than Americans were killed by the Tanzanian and Kenyan Embassy bombs. More Iraqi civilians than US soldiers are killed every day by terrorism. And we need to raise awareness that a WMD attack on the United States would have major economic impacts, including probably knocking out any hope of attaining the Millenium Development Goals. This is the approach David Hannay agrees that Annan's Panel should be taking.

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10. As you say, all this is about constructing a consensus. The way in to discussing these difficult issues is through the language of rights and responsibilities, in particular the responsibilities of states to behave in certain ways towards their own people; and to fulfil their obligations to others in the international community. And while the primary responsibility rests with states themselves, the international community has a responsibility to prevent massive abuses of humanitarian law and to ensure states fulfil their obligations, whether in relation to WMD or the fight against terrorism.

11. A year on from the start of military conflict in Iraq, now is the right time to move this agenda forward domestically and internationally on the basis of your speech. The issues are sensitive and difficult. We need now to work up a coherent strategy for building the new consensus you have outlined. We need to work through the UN, in particular with Annan, David Hannay and the Panel; through the EU, building on Solana's strategy paper; through the G8, using our Presidency in 2005 to follow up Annan's Panel report; and with the US. We will also consider whether and when EU or UN Council discussions of these issues could help move the agenda forward. We also need to make use of domestic opportunities. We will need to handle the presentation to ensure our ideas are recognised as attempts to construct a new consensus, not portrayed as an endorsement of a policy of regime change.

12. We should not expect overnight conversions. But we can continue to push the debate in the direction it is already heading. I am also working with officials to put flesh on these ideas and intend to develop this thinking further in a speech soon.

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13. I am copying this minute to David Blunkett, Geoff Hoon, Hilary Benn, Peter Goldsmith, Sir Nigel Sheinwald, Sir Emyr Jones Parry (New York), John Grant (UKREP Brussels), Sir David Manning (Washington), Sir Peter Ricketts (UKDEL NATO), Sir John Holmes (Paris) and Sir Peter Torry (Berlin).

*Jonathan Sinclair*

PP (JACK STRAW)

(Agreed by the Foreign Secretary  
and signed in his absence by the  
Private Secretary)

Foreign and Commonwealth Office  
16 March 2004

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## INTERVENTION AND THE USE OF FORCE

### Summary

1. The political and legal arguments over Iraq have focused interest again on the grounds for military intervention. Some argue it has highlighted the need for new rules governing the use of force, even a new doctrine of intervention.
2. This paper looks at the threat environment and the main political and legal issues we face when considering the threat or use of force. It identifies three broad circumstances in which we might wish to intervene militarily: for humanitarian reasons, for self-defence (article 51 of the UN Charter), and to address threats to international peace and security (articles 1 and 39). It suggests that our long-term aim could be to reach political agreement among the key players to rules of the road for military intervention in the last of these three categories. These could be thought of as a "responsibility to prevent". In the short-term we aim should to put in place the groundwork to underpin political support for future interventions.
3. Tackling these issues head-on will be counter-productive. But the Foreign Secretary could use a programme of speeches, starting on 12 February, to set out the issues and foster the debate.

### What do we mean by intervention?

4. Intervention is not a term of art. And it means different things to different people. In its loosest sense, it can cover almost any situation where one state gets involved in the affairs of another. This includes all sorts of international engagement, from military action to many of the activities associated with longer-term conflict prevention. The pooling of sovereignty within the EU and its interaction with its immediate neighbours extends the concept further still.
5. This paper focuses on a particular and narrow form of intervention at the hard end of the spectrum – intervention involving the threat or use of force without the consent of the government concerned. This typically involves measures to coerce another state to change its behaviour; to tackle threats in another state which that state is unable or unwilling to tackle; or to assume a degree of control over another state to prevent eg a humanitarian disaster in the event of state collapse or internal conflict.

### The political context for the use of force

6. The main hard threats to our security are international terrorism and the proliferation of WMD. These threats are more dispersed and dynamic than the threat of conventional attack was during the Cold War; and they present different challenges:-



- The level of damage caused by a terrorist attack, particularly one involving WMD, is potentially catastrophic.
  - It is difficult to persuade a state to give up WMD once it has them and almost impossible to persuade non-state actors to do so.
  - Deterrence is no longer as effective as it was. Non-state actors are hard to deter, particularly in an era of suicide bombing. Often the main threats emerge from within weak and failing states, which cannot deal effectively with the threats within their borders.
7. This puts a higher premium on early action. Depending on the circumstances, this could involve anticipatory intervention (to tackle an imminent threat), pre-emptive intervention (to prevent the emergence of an imminent threat) or preventive action (to tackle the conditions which can lead to the emergence of an imminent threat). Preventive action normally involves the use of a range of longer-term diplomatic, economic and developmental tools rather than the use of force. These terms represent points on a spectrum rather than distinct categories.
8. But dealing with threats before they become imminent, particular if force is considered, is problematic. Identifying such threats often involves heavy reliance on intelligence and expert analysis. This can make it harder to get public and international support for early action than to tackle the same threat once it has become clearly visible. All this raises difficult questions of legality and legitimacy.

### Legality

9. Non-intervention in the internal affairs of others is a principle of international law. This is the corollary of a state system based on sovereign and equal state actors and a key element of the UN Charter<sup>1</sup>.
10. Article 2(4) of the UN Charter rules out "the threat or use of force against the territorial integrity or political independence of any state". The lawful use of force is limited in the Charter to:-
- The inherent right of individual or collective self-defence (article 51). This includes anticipatory - ie when an armed attack has not taken place but is imminent - but not pre-emptive self-defence.<sup>2</sup>

<sup>1</sup> Article 2(7) - "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state..."

<sup>2</sup> This dates back to *The Caroline* (1837), when the British captured and destroyed a US steamboat which was supporting rebels in Canada. US Secretary of State Daniel Webster argued it was necessary to show "a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment of deliberation".



- Action authorised by the Security Council to maintain or restore international peace and security (see Articles 39 and 42).

The Security Council has considerable discretion in deciding how to apply these rules. There have been numerous instances of military intervention over the past decade, most of which have been clearly authorised by the Security Council. These include Bosnia, Somalia, Rwanda, Sierra Leone and East Timor. In other cases the legal basis has been contested or authorisation not explicit. A (simplistic) summary of these is set out at Annex A.

11. There are two situations not explicitly referred to in the UN Charter where the use of force is sometimes claimed to be legal:
  - i) In the UK view there is a strictly limited right to use force without Security Council authorisation to avert an immediate and overwhelming humanitarian catastrophe. We relied on this controversial basis for the use of force in relation to the safe havens in northern Iraq and the no-fly zones, and NATO action in Kosovo.
  - ii) To protect one's citizens and their property overseas. This is sometimes seen as a form of self-defence and was claimed by the US in Cambodia, Iran and Grenada.

12. Putting to one side intervention to protect one's own citizens, **there are three sets of circumstances in which we might wish to consider the threat or use of force: for humanitarian reasons, in self-defence (article 51), and to address threats to international peace and security (articles 1 and 39).** In recent years there have been two proactive initiatives to develop international law in these areas.

#### Humanitarian intervention

13. During the Kosovo crisis, the UK and others argued that military intervention on the grounds of pressing humanitarian need without a UN Security Council resolution was legal ie not just an emerging international norm. This and the use of force over the northern no-fly zone in Iraq provides some basis for arguing that a limited right to use force to avert an immediate humanitarian catastrophe forms part of customary international law.
14. The UK has also sought to flesh out principles to guide the Security Council in considering humanitarian intervention, including those set out in the Prime Minister's speech to the Economic Club of Chicago. The most comprehensive version was tabled in the Security Council in May 2001 and announced to Parliament (see Annex B).
15. More recently, the Canadian sponsored International Commission on Intervention and State Sovereignty (ICISS) produced its own study. This sought to redefine a general right of humanitarian intervention as a responsibility to protect. This attaches primarily to governments in

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relation to their own citizens but it can impose a duty (and right) to intervene elsewhere in certain circumstances. It can also impose a duty to rebuild following intervention.

16. These approaches are intended to guide the Security Council in deciding when to authorise military action. They do not provide criteria for intervention without a UN mandate, except implicitly if the Security Council fails to meet its responsibilities. Nor do they find widespread support. Intervention on humanitarian grounds does not appeal to the US and a number of key international players, including Russia, China and India are extremely cautious.

#### Pre-emption and self-defence

17. The US set out its views on pre-emption in its National Security Strategy 2002<sup>3</sup>. This sought to push back the parameters of self-defence by adapting the concept of an "imminent" threat. The idea was not new but received renewed impetus after the events of September 11. This was the first time it was officially endorsed by the US.
18. The US approach has been widely criticised, including by Kofi Annan. Some are concerned that it gives the US carte blanche to intervene whenever it wants. They see Iraq as the first application of the doctrine, even though it was never put forward as the legal justification. They are concerned it will be used to justify US action elsewhere eg against Iran or Syria. The perceived intelligence failure in Iraq has probably diminished the willingness of the international community to accept pre-emptive military action without UN authorisation.
19. More generally it is questionable whether a doctrine of pre-emption is the best way to deal with the issues raised by the new threat environment. Whilst the current rules may throw up some hard cases in future, pushing back the parameters of self-defence could be used as a pretext by others (eg Russia, China, India) for intervention in all sorts of unwelcome situations.
20. It is also the case that the Security Council has since 9/11 passed resolutions recognising that those terrorist attacks were armed attacks giving rise to the right to act in self-defence. And the nature of the modern threat posed by terrorism and weapons of mass destruction are now clearly considerations in deciding whether an imminent attack gives rise to the right to self defence.

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<sup>3</sup> "For 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. Legal scholars and international jurists often conditioned the legitimacy of pre-emption on the existence of an imminent threat – most often a visible mobilisation of armies, navies and airforces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries". US National Security Strategy 2002

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Threats to international peace and security (article 39): a "responsibility to prevent"?

21. The US approach to new threats has provoked wider debate on the circumstances in which military action is necessary. The European Security Strategy recognises the need to act early and the importance of preventive action, but does not go as far as accepting the need for pre-emptive intervention<sup>4</sup>.
22. US thinking on pre-emption blurs the distinction between threats to international and threats to national security. There is no right to take pre-emptive action in relation to self-defence. But the reference to "threats" in articles 1 and 39 of the UN Charter shows that the system of collective security created by the Charter was intended to include the possibility of pre-emptive action. It may therefore be around the conditions for pre-emptive action in this area, rather than self-defence or humanitarian intervention that there is the greatest scope for further reflection.

### **Legitimacy**

23. Many of the problems we have faced when intervening are caused by the lack of legitimacy, rather than legal concerns. Legitimacy depends on whether what is done is perceived as necessary and proportionate; has the widespread support of the international community, particularly of the Western democracies and other major international players; and whether it is successful. Many of these factors will depend on the political circumstances at the time.
24. In most situations, legitimacy is expressed through legality. A Chapter VII UN Security Council resolution authorising the use of force delivers both legality and legitimacy. But legality and legitimacy are not always identical. During the Iraq crisis, arguably the main debate centred on the legitimacy of military action rather than the strict legal basis. Conversely, NATO's intervention in Kosovo was widely accepted as legitimate, despite weaknesses in the legal position.
25. International law has proved sufficiently flexible to enable a wide range of interventions over the last 10 years. Attempts to get international acceptance of the doctrine of humanitarian intervention demonstrate how difficult it is to change the legal rules for the use of force. Arguably, the UK is not best placed to push such a process forward.

<sup>4</sup> "...Our traditional concept of self-defence – up to and including the Cold War – was based on the threat of invasion. With the new threats, the first line of defence will often be abroad. The new threats are dynamic. The risks of proliferation grow over time; left alone, terrorist networks will become ever more dangerous. State failure and organised crime spread if they are neglected – as we have seen in West Africa. This implies that we should be ready to act before a crisis occurs. Conflict prevention and threat prevention cannot start too early" – European Security Strategy 2003

## Conclusions

26. The main conclusions from this analysis are as follows:-

- There are good reasons for supporting the principle that intervention using force should remain exceptional and difficult.
- International law does not give unambiguous authority for the use of force in every situation in which we or others may wish to intervene in future. But changing the legal rules for the use of force is immensely difficult. Changes to the interpretation of these rules have been achieved largely via practice. This will continue to be the case.
- Rather than seeking to achieve radical and - in the case of a universal doctrine of pre-emption - probably unwise rewrites of international law, we should focus on building political support for future interventions. Our long-term aim could be to reach political agreement among the key players to rules of the road for the use of force in response to threats to international peace and security. But we should resist equating such threats with those giving direct rise to the right to exercise self-defence. This means focussing our thinking on articles 1 and 39, rather than 51 of the UN Charter.
- We could frame this in terms of the "responsibility to prevent". This could cover the prevention of the emergence of threats to international peace and security, in particular international terrorism and WMD proliferation. But it could also cover broader issues such as catastrophic state failure. This might reduce the perception that we are pursuing a narrowly Western (or UK/US) agenda and improve the chances of getting support from those who are more concerned with other threats such as HIV/AIDS, poverty.
- The experience over humanitarian intervention, where our ideas for guidelines received little international support, underlines the sensitivity of these issues. A head-on approach is likely to be counter-productive. Our aim in the short-term should be to put in place the groundwork to underpin the legitimacy of future interventions.
- To do so, we should:-
  - i. Develop a shared understanding between the key players of the threats we face and the appropriate policy responses. This process is partially underway with the European Security Strategy. We should look to develop fleshed out rules of the road for military intervention eg within the P5, G8 and NATO. And we should press Solana and Cooper to make the ESS operational across all areas of EU policy.

- ii. Build up a body of non-binding statements based on this shared understanding. This could include a Declaration at the next G8 summit, a NATO/Russia statement from Istanbul, other summit communiqués etc;
- iii. Foster international reflection on the responsibility to prevent. This will need to be handled carefully, but could include supporting meetings of international experts in order to build a consensus on the broad parameters of a responsibility to prevent.
- iv. Work with Lord Hannay to encourage Annan's High Level Panel to address the issues. This offers scope for progress if we keep the panel focussed on the new agenda.
- v. Encourage regional organisations to develop norms for intervention, including military, within their respective regions.
- vi. Pursue specific related initiatives such as building consent for interdiction operations (which in the long term could include developing the Law of the Sea); raising the profile and membership of the PSI, including possibly getting the UN to endorse it.

ANNEX A

**Interventions carried out during since the end of the Cold War  
without explicit UN authorisation**

Liberia (1990): ECOWAS peacekeeping force intervened without UN authorisation, but the UN did provide retroactive authority (permitted under Chapter VIII). It could also be argued that the intervention had the consent of the local government. But the regime had collapsed and lacked both domestic and international legitimacy.

Northern Iraq (1991): UNSCR 688 condemned Iraqi repression of the civilian population in the north, demanded that Iraq end it and insisted on immediate access for humanitarian organisations. It also appealed to all member states "to contribute to these humanitarian relief efforts". This was used to justify the creation of safe havens and no fly zones.

Kosovo (1999): NATO took action against Milosevic without seeking a UN resolution, since it was clear that Russia would veto. The action was justified on the basis of humanitarian intervention and a UN mandate obtained for a stabilisation operation afterwards.

Afghanistan (2001): UN resolutions and statements after September 11 implicitly recognised that self-defence: (1) covered attacks by non-state actors; (2) allowed attacks on terrorist bases in countries which are unwilling or unable to deal with them; and (3) allowed an attack on the government of the country itself if it failed to prevent or punish terrorist attacks from its territory. These provided the basis for military action against Afghanistan on the ground of self-defence.

Iraq (2003): Military action was justified on the basis of enduring Security Council authorisation from the first Gulf War and revived by UNSCR 1441.

## ANNEX B

**UK Proposed Guidelines for Humanitarian Intervention**

1. The Security Council should authorise action to halt or avert massive violations of humanitarian law and crimes against humanity that threaten international peace and security.
2. In response to potential humanitarian crises, the Security Council should consider the full range of tools at its disposal and seek to act while prevention is still feasible.
3. In response to humanitarian crises, force may be used:-
  - in the face of an overwhelming and immediate humanitarian catastrophe;
  - when a government has demonstrated its unwillingness or inability to avert the humanitarian catastrophe or is actively promoting it;
  - when all non-violent methods have been exhausted;
  - when the scale of (potential) human suffering justifies the risks and dangers of military action;
  - if there is a clear objective or set of objectives, designed to avert or end the humanitarian catastrophe, and the military means are available to ensure a high probability of success;
  - if there is clear evidence that military action would be welcomed by the people at risk; and
  - if the consequences for human suffering of non-action would be worse than those of intervention.
4. The use of force in such circumstances should be:-
  - collective;
  - limited in scope and objective to actions necessary and proportionate to achieving the humanitarian purpose; and
  - consistent with international humanitarian law.