Preemptive Strikes: A New Security Policy Reality

Karl-Heinz Kamp

Until a few years ago, terms such as “preemptive strike,” “preemptive military force,” and “anticipatory self-defense” were only common within experts’ circles. The topic did not receive international attention until the American President’s speech to West Point Military Academy cadets in June 2002. There George W. Bush – approximately nine months after the catastrophe of September 11 2001 and nine months before the American attack on Iraq – claimed the right of the United States to use armed forces before an attack on its own territory occurred. A few months later the option of preemptive defense was laid down in the new US National Security Strategy (NSS). Critics saw therein a breach of the prohibition on wars of aggression set down in international law, while its proponents referred to the changed threat situation, which makes a new understanding of defense necessary.

In Europe this fundamental debate on security policy was largely ignored. Only a few international law experts and individual politicians took notice of the explosiveness of the question. One reason for this has been, amongst other things, that the general discussion about preemption ignited by the American President coincided with the specific case of Iraq. In that sense, transatlantic dispute over Iraq precluded a sober discussion on the future interpretation of “defense.” Neither European policymakers nor the public will be able to avoid this complex question, however, because the consequences transcend a purely American dimension.

What rationale is behind the claim for preemptive strikes? Why does this also have meaning for NATO? Which legal questions are inherent therein, and how must the problem be dealt with politically?

The Logic of Preemptive Military Force

The major reason for American support for preemptive strikes is acknowledgement of a fundamentally changed threat situation, particularly after the crucial date of September 11 2001. This not only concerns the sheer existence of nuclear, biological or chemical weapons – they do not represent a truly new factor in today’s threat analysis. What is decisive, however, is the combination of three different threat elements: the spread of weapons of mass destruction; the availability of means of delivery (rockets and cruise missiles); and weapon-technology progress in range and accuracy. Thus more and more states and non-governmental organizations are in the position of being able to project destructive power over long distances. Geographic distance is becoming less of a factor in threat analysis. Parallel to this development, defenders against such attacks have less and less time to react. The traditional NATO principle of waiting for proof of an opponent’s intention to attack (for example, the marching of the Warsaw Pact’s troops) before activating military defense was valid during the Cold War, but it is becoming increasingly questionable. Under today’s circumstances, proof of an opponent’s intention to attack might be the detonation of a chemical weapon in a major city. Considering the potential number of casualties, waiting for such a case would be unjustifiable. Instead, in extreme cases it must be possible to fight such threats before they become acute.

Currently, however, the distinction between “preemptive” and “preventive” strikes is made in American usage – a difference that is more than a linguistic subtlety. One speaks of a preemptive strike when an attack is made on an enemy whose attack is imminent. A preventive strike, however, means that the attack is made solely on the assumption that offensive military action by the enemy will soon occur. While preemption used as defense in circumstances of an immediate danger can be quite legitimate, a preventive war that uses
military means to assert a country’s own interests is normally difficult to justify. In practice, however, the suitability of this distinction is limited. On the one hand these definitions are disputed: in fact some European international law scholars use these definitions to mean exactly the opposite. On the other hand concrete dangers and scenarios, which, in any case, are to a certain degree open to interpretation, could only rarely be assigned to one of the two categories. While the state that uses military force will always present its actions as preemptive, the critics will always blame the action as preventive or simply as aggressive.

The Relevance for Europe

Regardless of terminology, the question of when and under which circumstances armed force may be used can no longer be ignored. The conclusion that in extreme situations of danger preemptive military strikes can also be necessary is no longer drawn only by Washington. Even countries that had earlier been skeptical of preemption considerations consider this option necessary. Even France – a long-time vehement critic of “preemptive strikes” – has claimed the right to preemptive deployment of its military in its new Programmation Militaire. Russia reserves the right to preemption – just like Australia. Even in Japan, where military restraint is anchored in the Constitution, preemptive strikes are meanwhile being discussed at the government level.

Not only have individual governments taken up the question of preemption, but alliances and organizations have as well. At its last summit in Prague in November 2002, NATO adopted a new military concept to fight terrorism (MC 472) in which, at least implicitly, preemption is discussed, although for the most part the media did not notice this. Although the terms “preemption” and “anticipatory self-defense” are not explicitly mentioned, from the entire wording of the document, however, it is clear that NATO does not fundamentally rule out preemptive strikes against terrorist threats. In addition, the European Union discussed the preemption question in the framework of its new security strategy, which was agreed in December 2003.

Thus the idea of preemptive military action is no longer, as conventional wisdom would have it, an overreaction of a single American President to the disaster of September 11 2001. Instead, the need to redefine the understanding of defense in the light of new threats is being met with more and more international resonance.

The Question of International Law

Regardless of widespread willingness to consider preemption, the question of the legitimacy of preemptive defense under international law remains. Strictly interpreted, the Charter of the United Nations forbids military interventions and grants the highest priority to national sovereignty. The use of force is only legitimate for the purpose of self-defense or as mandated by the UN Security Council. Such strict interpretation, however, has been steadily weakened in recent years. The catchword “rogue states,” which has been used for the last few years, already breaks with the primacy of national sovereignty, since it implies that by ignoring fundamental values a country can lose its rights as a state. Furthermore, NATO’s humanitarian intervention in Kosovo contradicted the classic interpretation of the Charter. In light of the UN Security Council’s inability to agree on military action, the Alliance gave priority to fighting the obvious human rights’ violations in the Balkans over the prohibition of the use of force and went to war without a UN Security Council mandate. In contrast to the words of the UN Charter, NATO placed higher value on the protection of human rights than a state’s protection from external intervention.

Here lies the key to the progression of international law. Instead of calling for formal rules, the future must be more about interpretation and judgment. For each concrete situation, the fundamental values that underpin international law need to be weighed against each other.
From this perspective, it is not only problems such as the danger of weapons of mass destruction or humanitarian requirements that would justify preemptive military intervention. It would also be conceivable, in extreme cases, to intervene to protect natural resources necessary for life (examples might include a vital threat from ecologically irresponsible barrage projects or dramatically unsafe nuclear power stations near an international border).

Almost inevitably, a break from a formal interpretation of international law to a discretionary and deliberative mechanism creates legal uncertainty. The decision to deploy troops must therefore be bound to certain concrete requirements and criteria, such as the imminency of danger, the plausibility of the threat, and the proportionality of the means.

None of these criteria is precisely measurable or legally enforceable, nor is the list of conditions complete. Political debate must occur within individual countries as well as in the United Nations in order to achieve as broad a consensus as possible as to how these threats can be adequately addressed in the coming years in light of the changed security situation. Nevertheless, such a consensus will never be able to prevent completely the misuse of military force. The danger that threats will be intentionally exaggerated in order to justify using military force against another state or a non-state actor cannot be ruled out. This problem, however, will not be solved by a rigid interpretation of the UN Charter. There are enough examples in the last few decades in which states have attempted to justify military force by using questionable principles of legitimacy.

The Political Decision for a Preemptive Military Strike

Besides the legal judgment of a preemptive military strike, the problem of the political/practical decision still remains. Under what conditions can the political decision for the use of preemptive strikes be taken, and how can such decisions be carried through? When is a threat pressing enough to justify a preemptive strike, and on which source of information will the decision be taken?

A preemptive action does not only have to entail overthrowing a government; the spectrum of possible options is in fact substantially broader. Non-military as well as “semi-military” actions are just as conceivable against governments and non-governmental actors. These can take place on the states’ soil, or, for instance, in international waters. They can include interrupting information streams, capturing ships, intercepting aircraft, comprehensive blockading, or acts of sabotage. They can be accomplished by regular armed forces, by special forces, or by secret services. The targets of preemptive action can be production or storage facilities for weapons of mass destruction, command centers for terrorist organizations, or state structures. Each of these options has different levels of acceptability and feasibility. Destruction of a terrorist training camp is more likely to meet with public approval, on both national and international levels, than the overthrow of a government.

All of these actions have in common that they can only be justified in cases where the threat is exceedingly urgent and immediate. The question of urgency, however, leads to a serious dilemma when considering weapons of mass destruction. If one decides as late as possible for a military strike, in order to demonstrate that the threat was obviously and without a doubt imminent, then the success of the action is potentially small. The attacker has by then most likely fully developed his weapons’ arsenal and has protected it by dispersal or by deployment in hardened underground facilities. In extreme cases, fighting the threat can almost be impossible by the time that the seriousness of the situation is recognized. If instead a threat is dealt with as promptly as possible, then the chances of lasting success are probably better. Alas, it will then be clearly far more difficult to demonstrate urgency plausibly and receive public support in such a situation.
With regard to this dilemma, it seems difficult to find a mutually acceptable definition of urgency. In the 1970s there was already a debate in the United States over “just” and “unjust” wars and whether an “imminent attack” was the necessary legal standard for military action or if a “sufficient threat” might be more appropriate. Even if such a limitation must remain vague, certain criteria can nevertheless be defined:

- The opponent’s intention to inflict harm must be evident (for example, the head of state or the head of a terrorist group declaring such intent).
- Preparations and relevant measures to realize this intention must be recognizable (offensive dislocation of troops or launch preparations for missiles). Technological developments play a large role here. If the range capacity of rockets increases and allows for ever-shorter reaction time on the part of the potential victim, the threshold by which preparation for attack can be tolerated is thereby reduced.
- It must be obvious that non-action dramatically increases the risk or makes later reaction almost impossible. An example of this was Israel’s bombing of an Iraqi nuclear reactor in 1981. Israel asserted that the reactor would be used to make material for Iraq’s nuclear weapons’ program. June 1981 was specified as the time for the attack, because it was to be loaded with nuclear fuel the following month, and bombing a reactor filled with radioactive material would hardly have been possible.

With each of these criteria, the question arises of whence came the information on which the danger was evaluated. As a rule the information is provided by intelligence services. To achieve an appropriate picture of the situation, not only must the available threat potential (weapons, military forces) be correctly portrayed, but the intentions and “strategic culture” of the opponent must be adequately rendered as well: Is there a real intention to attack? Could weapons of mass destruction be given to a third party, such as terrorist groups? How will the opponent react to a preemptive strike? At the same time, policymaking can be confronted as much with the problem of an overload of information as a lack of reliable data. Immediately before the attacks of September 11 2001, American intelligence services suffered a flood of individual indications of a terrorist threat in which the decisive clues were sunk. The opposite is the case for such isolated countries as North Korea; here the problem is one of spotty intelligence, which greatly increases the difficulty for political decisions. In both cases the challenge lies in selecting and interpreting the available information, remembering that a degree of uncertainty in the findings is inevitable.

How difficult such a demand is in practice was shown in the latest Iraq crisis. Although the United States possesses the most advanced information capacities, and although Iraq was, from an intelligence service perspective, an easy intelligence target because of international inspections over the years, to date no definitive picture of Iraqi weapons of mass destruction capabilities has been drawn.

A Necessary Debate

Extreme situations may require a preventive deployment of military force. This must then be bound to concrete conditions. None of the mentioned criteria, however, can be defined without doubt or legally enforced. Moreover, this list of legal and political prerequisites for preemptive strikes is not complete. A debate must take place within individual countries and also in the United Nations in order to achieve the widest possible consensus over how to take on future security challenges. Public discussion is particularly necessary to prevent the abuse of preemptive military strikes. Even if criteria are specified for preemptive military deployment, judgment on the legal standard and commensurability of such an action will always be subject to interpretation in practice. Thus misuse of force cannot be excluded in principle. But when political decisionmakers (at least in democratic countries) have to justify their actions to a critical and informed public and have to accept the consequences of bad decisions, this would certainly create a hurdle to the carefree use of military might. If the
public declines to engage in such a debate, then it surrenders a substantial instrument of control against its government.

Karl-Heinz Kamp is the Security Policy Coordinator of the Konrad-Adenauer-Foundation in Berlin.