

COLLECTIVE SECURITY REVISITED IN LIGHT OF THE FLURRY OVER UN REFORM : AN INTERNATIONAL LAW PERSPECTIVE

PAR

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INTRODUCTION

This contribution on certain legal issues relating to collective security arising in part from the debate over UN reform is but a prolongation of the discussions I held over the years with Victor-Yves, my esteemed colleague, "*mais néanmoins ami!*", as we academics are fond of saying, as we sat together on interminable undergraduate oral exams on international organisation and cooperation. Our friendship over the years is in part due to a shared birthplace – Egypt – but I have also very much appreciated the numerous ways in which he has demonstrated that friendship. I gained insight from his immeasurable expertise on the League of Nations, UN, OSCE, ILO and other institutions, occasionally daunted by his scepticism of the role played by international law within such highly politicised institutions, but also happy to confirm the complementary nature of our approaches which I hope to demonstrate in what follows.

"The United Nations is a bus without a driver", Victor-Yves is fond of pointing out to his rapt audiences – a very apt observation. One can indeed rightly enquire of the UN (just to mix metaphors): "Is there a pilot on this plane?". Yet I also want to show that although the bus has often skidded on ice or even been on the verge of a precipice, it has laboriously continued its own route despite a

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multiplicity of "back-seat" drivers all pointing in different directions.

The United Nations is once again under scrutiny. The debates surrounding the recent process of reform of the United Nations have tended to project the image of an outdated and static institution incapable of adapting to its rapidly changing environment. But this is of course not the first time that its demise has been predicted. To place these debates in perspective, one should be reminded that the history of the UN has been one of constant crisis ever since 1946 when a New York Times headline had proclaimed: "Is UNO going to break on the rocks of Iran?", with reference to one of the first items on the agenda of the Security Council. Historians of the Organisation – and prominent amongst them is Victor-Yves Ghebali – will recollect the first peacekeeping crisis arising from the Congo operation which led to the alleged plot causing the death of Dag Hammarskjöld in 1961, to the Soviet Union's proposal for a Troika which would have signalled the end of a functioning Secretariat, and to the feared walkout of the USSR and its allies in 1964 in retaliation over the United States brandishment of the threat of article 19 as a sanction for the Soviet arrears in its financial contributions which brought to a halt an entire session of the General Assembly. Then followed the crisis of multilateralism in the 1980s with such milestones as the United States' withdrawal or threatened withdrawal from certain of the specialized agencies, and its refusal in turn to pay its UN dues; the displacement of the General Assembly's 1988 session to Geneva following on the United States' refusal to grant a visa to Yasser Arafat; and after the end of the cold war, the smear campaign against the United Nations, brought on by the onslaught on the UN by the Bush administration and its UN representative John Bolton, and the resort to unbridled unilateralism when the United States and United Kingdom invaded and occupied Iraq without UN Security Council authorisation. But the doomsday prophets who heralded at each step the end of the United Nations discounted the remarkable resilience of the Organisation and its constituent instrument.

Amendment is of course the normal way to update an international agreement. However, while formal reform proposals have been tabled at every stage of the UN's momentous history, there have so far been only three amendments to the Charter since 1945,

due to the difficulty of obtaining the unanimity of the permanent members of the Security Council as required by Articles 108-9: these have therefore been mere numerical ones entailing enlargement of the Security Council and of ECOSOC. Yet never has there been so much flurry and debate around the need for some formal reform of the system as in these past few years.

Despite the absence of formal amendments, however, the Organisation has undergone over the years radical changes going well beyond the original intentions of those who framed its constitution. The UN of today is radically different from that of 1945. From a legal perspective, this evolution, in response to the changing needs of the international system, has taken place through a variety of mechanisms.

First, there has been a broad teleological and dynamic interpretation of the UN's flexible Charter mechanisms, in particular thanks to a series of Advisory Opinions of the International Court of Justice, on the basis of the implied powers doctrine and in light of its purposes and principles. Judge Azevedo had put the matter most forcefully in 1950:

".... [T]he interpretation of the San Francisco instruments will always have to represent a teleological character if they are to meet the requirements of world peace, co-operation between men, individual freedom and social progress. The Charter is a means and not an end. To comply with its aims one must seek the method of interpretation most likely to serve the natural evolution of the needs of mankind...even if the terms remain unchanged..."

And Judge Alvarez had added: "it is necessary when interpreting... the Charter... to look ahead". (2) In this way, the UN's goals set out in the Charter – day-to-day peace maintenance and longer-term creation of the conditions for peace – have over the years shifted in priority, while the principal organs of the UN have expanded their powers and competences.

Second, the UN has since 1948 invented new machinery for the attainment of these goals, in particular through the establishment of a variety of subsidiary organs which can be said to be subsidiary only in name – UNHCR, UNCTAD, UNEP, Peacekeeping forces, OHCHR, the ICTY and ICTR, to name a few. Thus the two latest institutional creations, namely the Peacebuilding Commission and

(2) (*Second Admissions case*, ICJ Reports 1950, pp. 23 and 18, respectively.

the Human Rights Council, were brought into being not through Charter amendment but through Charter provisions which enable the General Assembly and Security Council to create the subsidiary organs deemed necessary for the performance of their functions. Indeed, the Peacebuilding Commission is innovatory insofar as it is a joint subsidiary organ of both these principal organs.

Third, politically driven or instigated *manœuvres* have become institutionalized, sometimes even escaping, if not working against, their original authors: one has only to think of the Uniting for Peace resolution which has become an undisputed part of the UN procedural machinery. (3)

Current reform proposals are eclectic, embedded as they are in a number of documents: the 2000 Millennium Development Goals (MDGs) – which range from halving extreme poverty, halting the spread of HIV/AIDS and providing universal primary education, to achieving global partnerships for development, all by the target date of 2015; the 2004 reform proposals put forward by the Secretary-General's High Level Panel on *Threats, Challenges and Change, A More Secure World, Our Shared Responsibility*; the Secretary General's own report *In Larger Freedom*; as well as the World Summit Outcome document of September 2005. There are also currently on the table diverse proposals for reform of the Security Council, as well as reports on administrative and financial reform.

But these reform proposals are coherent insofar as they may be considered, in the words of Kofi Anan, to be based on the fact that the UN was founded on three legs – development, collective security and human rights to which he has added a fourth leg, necessary for these three – that of management reform.

I propose to centre on a re-interpretation of the main purpose of the UN, *i.e.* the maintenance of international peace and security, as laid down in the first part of Article 1(1) of the Charter, in light of reform proposals and the evolution of the collective security system through the recent practice of the Security Council.

(3) See the latest confirmation of this mechanism by the International Court of Justice in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of July 9, 2004, ICJ Reports 2004.

I. – EVOLUTION OF THE COLLECTIVE SECURITY SYSTEM AND CONCOMITANT PROBLEMS

The Charter's collective security system is embedded in Article 1(1) which lays down as one of the purposes of the UN the taking of "effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace", while Chapter VII provides the means for carrying this out. This system has evolved quite markedly since the '90s in response to fundamental changes within the international system and to reform proposals, raising diverse problems in so doing.

A. – *The Recent Practice of the Security Council*

Under the umbrella of Chapter VII, the Security Council has certainly taken some innovative paths in its practice, surely never dreamed of by those who framed the Charter at San Francisco which have raised the question of the limits to its competence and of its accountability.

The Council has qualified the acts of states and non-state entities as illegal and invalid and called for collective non-recognition; it has imposed arms embargos and economic, financial and diplomatic measures. It has authorised resort to all-out military force – to remove Iraq from Kuwait – or for limited purposes: to enforce economic sanctions at sea, to protect UN so-called safe areas, to facilitate the delivery of humanitarian aid or to reinstate democratically elected regimes. It has created peacekeeping operations with complex mandates, including the international administration of territories. It has imposed wide-ranging reparations on Iraq amounting so far to over \$21.4 billion dollars and sweeping disarmament measures, drawn up and enforced peace treaties, ordered states to extradite nationals (the case of *Lockerbie*), established international criminal tribunals for the prosecution of individuals (the ICTY and ICTR on Yugoslavia and Rwanda, respectively), and adopted "legislative" resolutions, imposing on States the obligation to take penal measures against individuals committing (undefined) acts of international terrorism or obligations relating, *inter alia*, to weapons of mass destruction.

Since its first application of sanctions under Article 41 against Southern Rhodesia beginning in 1966, and subsequently a limited arms embargo against South Africa in 1980, the Security Council has, since 1990, imposed 16 sanctions regimes, not including the most recent measures relating to Syria, Lebanon, Iran and North Korea; these regimes have spanned four continents, targeting states, non-state entities and individuals, and have been aimed at enforcing an increasingly diverse range of stated purposes. Such non-military sanctions, as well as Council authorisations to resort to military force in a number of cases, have raised diverse problems.

*B. – Problems arising from the imposition
of non-military sanctions*

1. Humanitarian issues raised by comprehensive measures

Of the post-1990 measures, only three – those relating to Iraq, Haiti and Yugoslavia – can be considered to have been quasi-comprehensive, covering the whole gamut of economic, financial, diplomatic and other measures. These far-reaching sanctions have raised grave humanitarian issues with considerable repercussions. They have led to disillusionment with comprehensive measures and a turn to other solutions.

Comprehensive sanctions are difficult to end once set in place, since a targeted entity is hostage to the subjective assessment of a single veto-wielding member as to whether the attainment of the objectives of sanctions have been reached, particularly when these objectives have not been clearly defined in the sanctions resolutions. Moreover, in the case of Iraq, the goal-posts were moved, as on to the initial objectives defined in SC Resolution 660 (1990) of unconditional withdrawal of Iraqi forces from Kuwait were grafted a second set of objectives requiring Iraq to comply with all resolutions of the Council, in particular SC Resolution 687 (1991) with its disarmament requirements. This resulted in subjecting Iraq to sanctions for over a decade. Yet the inclusion of time-limits in sanctions resolutions has been far too controversial although this has been done in one or two recent cases.

The humanitarian and other exceptions which are included in sanctions resolutions (in particular foodstuffs “in humanitarian circumstances” and medical supplies) have not been easy to interpret

and such interpretation has been open to unilateral and often unsubstantiated blockages by member States on the alleged grounds of their “dual-use”. The ludicrous situations this could lead to was illustrated by the notorious blockage of 1 mn. Pencils for Iraqi school-children on account of their purported dual use; it will be noted that the Iraq sanctions did not include educational materials among the important exceptions to sanctions, thus penalising an entire generation of school children for the 12 years or more during which sanctions lasted. The “oil-for-food” programme designed to redress the humanitarian impact of comprehensive sanctions led ironically to a major scandal within the UN, although one of the worst effects of this programme was not so much the derisory sums that were raked off by UN officials in charge, but the “appalling disrepair”, in the words of the Secretary General, of Iraq’s infrastructure, due in part to “holds” on contract applications imposed by certain permanent members in the sanctions committee on Iraq.

*2. Issues of effectiveness arising from sanctions taken in response
to wars fought over natural resources*

A range of sanctions measures have been imposed on the African continent in response to internal military conflicts and general collapse of internal order and state authority, but also to economic wars fought for acquisition of natural resources. The shift from ideological warfare during the cold war era to wars in which one of the, if not the, main objective has been the control of natural resources, as in Sierra Leone, Angola and the Democratic Republic of the Congo, has underlined the ineffectiveness of traditional measures of diplomacy and peace accords, for these particular types of wars are self-perpetuating and self-financing conflicts. They have also been highly problematic in terms of monitoring and control. To embargo crucial commodities such as “conflict diamonds”, including the imposition of certification schemes, such as the Kimberley diamond process, has meant seeking control of the activities not only of non-state actors but also of private and business interests. The “naming” and “shaming” of States and businesses for their alleged role in the violation of sanctions has also met with criticism. There has been therefore a call for the development of “norms governing the management of natural resources for countries emerging from or at

risk of conflict". (4) This category of sanctions raises questions of monitoring, control and the need for other operational methods which are beyond the scope of this contribution.

3. Issues of legitimacy and due process arising from action against terrorism

The Security Council has also adopted resolutions on terrorism, initially aimed at alleged State-sponsored terrorism – the cases of Sudan, Libya and Afghanistan – then targeted against non-state entities – the Taliban, Usama bin Laden and associates of Al-Qaida. Its most recent action, however, has been directed at individual perpetrators in general. It has in addition been concerned with the proliferation of weapons of mass destruction by non-State actors and has called on States to take measures to prevent this, as well as with the potential development of nuclear weapons by States – hence the crises looming over Iran and North Korea. But it is particularly in relation to measures such as the freezing of funds and other financial measures to combat individual acts of terrorism, that it has raised vital issues of legitimacy, in particular questions of individual due process. Resolution 1373 is a departure from traditional sanctions resolutions. It imposes on Member States open-ended obligations with no temporal limitation, criminalizes certain individual conduct without defining it (the later resolution 1456 does go further in that respect), while imposing on States the obligation to adopt implementing domestic legislation. The target is general and impersonal and leaves a wide margin of appreciation to implementing authorities in individual States.

C. – Problems arising from the Delegation or "Contracting-out" of the Use of Military Force

In the absence of the military forces that were meant to be placed at the disposal of the Security Council under Article 43, the Security Council has resorted in its practice to privatisation or "contracting out" of military force by delegating its powers under Chapter VII by means of resolutions which authorise particular States, groups of States or regional organisations to "take all nec-

(4) Report of the High Level Panel on Threats, Challenges and Change, *A More Secure World, Our Shared Responsibility*, UN Document 1/59/656, para. 92.

essary means" to restore international peace and security, a euphemism for military force.

There was at the start considerable controversy over such authorisations and their ambiguous legal basis, in the absence of an express provision in the Charter, but this has become a standard practice by the Security Council. The insertion of unilateral action within Chapter VII should mean that the action authorised must nevertheless be conducted within the overall objective of "restoration of international peace and security"; and that it is up to the Security Council to determine when international peace and security has been threatened or when such a situation has ceased to exist; moreover it means that the Council continues to bear major responsibility for it, although that does not exclude an eventual form of joint accountability.

In practice, however, while no longer contesting the competence of the Council to adopt such resolutions, States have nevertheless contested particular resolutions, on the basis that they imply a wide margin of discretion on the part of those called on to implement them, and that they provide "a blank cheque" to the States concerned. The limited forms of accountability introduced into the resolutions have proved inadequate and the Security Council has in a number of cases lost control over the military action underway, particularly in situations where forces fly their own flags and ensure their own command; nor have Member States taken their reporting obligations seriously. Moreover, this delegation of the Council's powers has tended to blur the collective nature and objectives of the military operations with the unilateral conduct of the operation and the particular interests which are promoted by the states concerned.

The various problems raised by enforcement measures are being or should be addressed through the prism of a new reading of the Charter goals relating to collective measures.

II. – A NEW READING OF ARTICLE 1(1) OF THE UN CHARTER

The changes in the international system and the consequent UN reform proposals necessitate a re-reading of the Charter goal of col-

lective security; this entails a serious re-evaluation of coercive measures (5).

A. – *The Changing Functions of the Security Council
in the International Legal System*

From a systemic perspective, the Security Council may now be said to exercise certain functions of law enforcement and even to purport to act as a world “legislature” far from the kinds of functions it was originally intended to exercise.

The first purpose of the UN as stated in the first part of Article I(1) of the Charter – the maintenance of international peace and security through resort to “effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace” – must now be read in the light of certain core interests and values of the international community as a whole which have come to be considered component parts of the security fabric.

Although the mechanisms instituted under Chapter VII of the United Nations Charter were clearly intended to grant extensive, discretionary powers to an elitist, political organ whose primary responsibility is the maintenance of a political conception of international ordering, the Council has come to play an important law enforcement function, for its decisions though *politically* motivated have had far-reaching *legal* consequences which affect the rights of States and individuals. (6)

In its practice, the Security Council, beginning with the first sanctions experiment in the case of Southern Rhodesia, has determined under Chapter VII that conduct in violation of such norms – serious breaches of the prohibition to use force, genocide and other gross violations of human rights, including self-determination, and grave breaches of humanitarian law, including those encompassed within a State’s own borders – constitute threats to international peace and security, leading to enforcement action under

(5) See generally, LACHS M., “Article 1, paragraphe 1”, mis à jour et augmenté pour la 3^{ème} édition par Vera GOWLLAND-DEBBAS, in: COT J.-P. et PELLET A., *La Charte des Nations Unies. Commentaire article par article*, Economica, 3^{ème} éd., 2005, pp. 327-336.

(6) See GOWLLAND-DEBBAS V., “The Functions of the United Nations Security Council in the International Legal System”, in: BYERS M. (ed.), *The Role of Law in International Politics*, Oxford University Press, Oxford, 2000, pp. 305-341.

Chapter VII. The notion of threat to the peace has thus been redefined going beyond classic cases of aggression by one State against another.

Globalization with its concomitant threats has also led the UN Security Council to become more active in lawmaking. It now regularly addresses injunctions to all sorts of entities using the language of international law. The creeping extension of the powers of the Security Council in non-traditional fields in recent years has thus raised the specter of a supra-national legislative body enacting general open-ended regulations binding on all States; this form of “global legislating”, a legislative competence distinct from its enforcement powers on the basis of which it adopts temporary binding decisions in respect of specific crises under Chapter VII, began with SCR 1373 (2001) in the face of the global threat of terrorism. The legislative nature of resolution 1373 is evident from the fact that States are called on to implement provisions similar to those found in conventional instruments, such as the International Convention for the Suppression of the Financing of Terrorism. Similarly, in SCR 1540 (2004) the Security Council addresses the challenge of the proliferation of weapons of mass destruction by their acquisition by non-state actors, although the existing conventions – the Chemical Weapons Convention, Nuclear Non-Proliferation Treaty and the Biological Weapons Convention – do not deal with such an issue. The resolution imposes a series of permanent obligations on all States to guard against the proliferation of WMDs in regard to non-state actors, but it also imposes a general duty of non-proliferation in paragraph 3 which requires States to adopt national legislation, including domestic control measures such as effective border controls and law-enforcement procedures. The Council’s resolution thus has acted as a substitute for the many years required to negotiate a new multilateral treaty. These resolutions, including others such as those on children in armed conflict, impose obligations in apparent disregard of the consensual nature of treaty obligations.

But the cumulative actions of the Security Council under Chapter VII have also contributed to the progressive development of certain areas of international law, for example, international criminal law and humanitarian law through the case-law of the two international tribunals. Yet the Council’s resolutions cannot – by

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analogy with General Assembly resolutions – be said to reflect either *opinio juris* or the generality of the requisite State practice.

In light of these changing functions of the Security Council, reform of its composition, voting and working methods has become imperative, although there are divergent proposals currently on the table in relation to the expansion of the permanent members, curtailment of veto rights and transparency and accountability of working methods, among others, which presage serious obstacles to such reform.

B. – *The Introduction of the Concept of Human Security Alongside State Security*

The move from a State-oriented to a more individually-oriented international legal system has meant that the term security referred to in Article 1(1) can no longer be confined to the security of States, but must ultimately be destined to the protection of individuals. The various reports and declarations on UN reform are replete with references to “human security” alongside state security, even though the former is not an entirely novel concept, nor has it yet been defined. However it has underlined the need to re-read collective security in a novel way.

1. *Protection of populations*

The concept of human security has been reflected in the use of Chapter VII measures for the protection of populations as opposed simply to the protection of States, emphasizing individual rights and human dignity. This has been a notable development, leading to the formulation of a “responsibility to protect” populations from genocide or other massive violations of human rights. The Security Council has also responded to mass exodus or refugee flows by linking these to its determination of a threat to international peace and security in particular situations, either reacting to imminent movements of populations or addressing their root causes: one need only think of Iraq (in the case of the Kurds), Haiti, and Kosovo. The Council has given a central place to the solution of the problem of refugees and internally displaced persons in the peace settlements it has helped to conclude and to enforce – one need only think of the

Dayton agreements which contain a separate annex on refugees and displaced persons.

2. *The limits of “effective” collective measures*

This re-orientation of the notion of security to include human security has also meant that collective security measures can no longer aim to be simply “effective” in the words of Article 1(1).

Enthusiasm for comprehensive sanctions so manifest at the turn of the 90’s decade – and even earlier in respect of apartheid in Southern Africa – has evidently waned, in particular due to the Iraq experience as their serious long-term detrimental effects on populations, including women, children and future generations, and on infrastructures, have gradually become apparent. It is now increasingly unlikely that the United Nations will resort in the future to such global trade sanctions. Here the effectiveness of sanctions has in fact worked against their legitimacy, for the more water-tight the blockade, the worse their negative long-term effects on the country concerned.

The problems raised by comprehensive sanctions have triggered proposals for a re-orientation of sanctions away from comprehensive and towards so-called “smart sanctions” or targeted sanctions: targeted against individuals, such as government leaders, elites and other specifically designated entities responsible for the policies condemned; targeted against particular commodities or services, involving in particular restrictions on financial and banking operations (asset freezes, blocking of financial transactions or financial services) and travel and aviation bans, including visas, or directed against specific commodities, such as arms or diamonds. Three Government initiatives contributed to developing this concept: the Bonn-Berlin, Interlaken and Stockholm processes. (7)

While acknowledging that sanctions remain an important tool for maintaining international peace and security without recourse to the use of force, the 2005 Summit Outcome document has also

(7) See “Targeted Financial Sanctions – A Manual for Design and Implementation: Contributions from the Interlaken Process”, at <http://www.smartsanctions.ch>; “Design and Implementation of Arms Embargoes and Travel and Aviation Related Sanctions: Results of the ‘Bonn-Berlin Process’” (at: <http://www.bicc.de/events/unsanc/2000/booklet.php>); and “Making Targeted Sanctions Effective: Guidelines for the Implementation of UN Policy Options” (at: <http://www.smartsanctions.se/>).

underscored the resolve "to ensure that sanctions are carefully targeted in support of clear objectives" and that they are "implemented in ways that balance effectiveness to achieve the desired results against the possible adverse consequences, including socio-economic and humanitarian consequences, for populations and third States." Moreover, "(s)anctions should be implemented and monitored effectively with clear benchmarks and should be periodically reviewed, as appropriate, and remain for as limited a period as necessary to achieve the objectives of the sanctions and should be terminated once their objectives have been achieved." Finally, the Security Council is called upon to "improve its monitoring of the implementation and effects of sanctions, to ensure that sanctions are implemented in an accountable manner, to review regularly the results of such monitoring and to develop a mechanism to address special economic problems..." (8)

C. – *The Linkage between International Peace and Security and Justice*

The shift to an individually-oriented international law has also led to a linkage between international peace and security and justice. These two concepts can no longer be separated as they once were in the original Charter reading of Article 1(1) which links justice only to peaceful settlement of disputes and not to collective measures. (9) The Appeals Chamber of the Yugoslavia Tribunal, in the *Tadic Case*, upheld the view that the legality of its creation rested on Article 41 of the UN Charter its establishment thus constituting one measure the Security Council could itself impose under Chapter VII (as opposed to those measures it may call on member States to carry out). Justice was in this sense perceived as one of the means of contributing to the restoration and maintenance of peace in the former Yugoslavia.

There is also a notable convergence of the objectives and functions of the International Criminal Court and the Security Council. The ICC, as stated in the preamble to the Rome Statute, is to exer-

cise jurisdiction "over the most serious crimes of concern to the international community as a whole", those that threaten "the peace, security and well-being of the world", i.e. genocide, crimes against humanity, war crimes and, eventually, aggression (Article 5(1)); these crimes are the ones most likely to be viewed by the Council as constituting threats to international peace and security. Moreover, the Rome Statute has enlisted the mechanisms of Chapter VII, for the Council has been given the power under the Statute to refer situations to the ICC, as well as to defer its exercise of jurisdiction, in addition to a potential role in the determination of the crime of aggression; this power is to be exercised within the framework of Chapter VII of the Charter.

The move towards international criminal responsibility of individuals certainly serves to undermine the fiction of the black box – the monolithic State that is responsible for all acts committed within its territory – by providing a more acceptable alternative to that of holding entire populations accountable for the acts of their leaders.

At the same time, it raises some important issues under international law. One such issue is the relationship between peace and justice. This relationship can take the form of peace collaborating with justice – this is the case for example when the Security Council cooperates with the Court by referring situations to it, as it has recently done in the case of Darfur through the adoption of Security Council Resolution 1593 (2005). There is here a role for justice within peace; this means at the same time that justice is only viewed as instrumental for peace.

But this relationship can also be seen as one of peace vs. justice, when the two are in opposition or conflict. I refer here to the notorious Resolution 1422 (2002) requesting the ICC not to proceed, for a period – renewable – of 12 months, with investigations or prosecutions of officials participating in UN peacekeeping missions from States not parties to the Statute who may have committed crimes on the territory of a State party. This resolution would have called into question the principle of equality of individuals before the law – a fundamental principle of criminal justice – by serving to shield certain individuals from the administration of justice. Resolution 1422 was one of several moves taken by the United States to thwart the International Criminal Court which it refused to join.

(8) World Summit Outcome, A/RES/60/1, 24 October 2005, para. 106-108.

(9) An amendment by Egypt at the San Francisco conference which would have linked the two concepts in Article 1(1) was defeated on the grounds, *inter alia*, that this would have undermined the effectiveness of the Security Council when dealing with threats to the peace (see discussion in *UNCIO*, vol. VI, pp. 46-57).

Fortunately, in June 2004, after weeks of intense debate held against the background of the tortures in Abu Ghraib, the United States government withdrew its request for renewal of the Security Council resolution.

A second issue is the relationship between law and politics, or that between judicial and political organs, as viewed from a systemic perspective. Problems arise when the political organ acts in a quasi-judicial capacity, affecting the decision-making in the judicial forum. This has taken place not only in the context of the relationship between the ICC and the Security Council, but also in that of the relationship between the Security Council on the one hand and the International Court of Justice and ICTY on the other in the *Lockerbie* and *Tadic* cases, respectively. (10)

It is therefore evident that this linkage between international peace and security and justice must be tempered to ensure safeguards, in accordance with general principles of criminal law, particularly in view of the far-reaching effects of the Council's recent actions which encroach on the rights of States as well as of individuals.

D. – *The Need for Safeguards against Erosion of the "Collective" Nature of Coercive Military Measures*

The intention of Article 1(1) of the Charter and of Chapter VII was the centralisation of military force in the hands of a collective body; such centralisation of the use of force has usually been considered to be one of the hallmarks of an advanced legal system.

This has been a concomitant to the gradual process of outlawry of the unilateral use of force in international relations from the League to Article 2(4) of the Charter, with the exception of the use of force in individual and collective self-defence, as well as the conditioning of unilateral countermeasures short of military force.

(10) For a general discussion of these relationships see: GOWLLAND-DEBBAS V., "The Relationship between Political and Judicial Organs of International Organisations: The Role of the Security Council in the New International Criminal Court", in: BOISSON DE CHAZOURNES L., ROMANO C. and MACKENZIE R. (eds.), *International Organisations and International Dispute Settlement: Trends and Prospects*, Transnational Publishers, 2002, pp. 195-218; GOWLLAND-DEBBAS V., "The Relationship between the International Court of Justice and the Security Council in the Light of the *Lockerbie* Case", *American Journal of International Law*, vol. 88, 1994, pp. 643-677.

Today, however, two sets of claims are being made in respect of resort to unilateral military action. The first claims as its purpose the enforcement of *collective* decisions for the maintenance of international peace and security, the purported justification of which is based on the inadequacy or paralysis of centralised mechanisms, *i.e.* claiming to act unilaterally in the promotion of international community interests; the second would widen the scope of self-defence as laid down in Article 51 of the UN Charter and in customary international law, particularly in the framework of the so-called "war on terror" to include self-defence against non-state actors and preventive self-defence against perceived security threats.

1. *Implied or continuing authorisations*

The question has arisen as to whether a member State or group of States wishing to act unilaterally can do so in the absence of an express authorisation of the Security Council. A draft resolution tabled by Spain, the United Kingdom and the United States on 24 February 2003 had sought to secure such an authorisation to use military force against Iraq, but had been subsequently withdrawn because of the inability to obtain the 9 requisite votes in the Council. Consequently, the invasion and occupation of Iraq had been taken without a Council authorisation.

The US and UK had argued before the Security Council that the war had been conducted "with international (UN) authority", on the basis of an implied or continuing authorisation which could be unilaterally deduced from the cumulative effects of two Security Council resolutions – SCR 678 (1990) and SCR 687 (1991) – as somehow revived by Resolution 1441 (2002) which referred to a material breach by Iraq and to the serious consequences which could follow. (11) This was not the first time that the United States and the United Kingdom had claimed an implied authorisation from the Security Council for the ostensible purpose of enforcing Security Council decisions. The examples include the coalition intervention in Northern Iraq, on the basis of the combined SC Resolutions 688 (1991) and 678, and Operation Desert Fox in

(11) See, *inter alia*, letter dated 20 March 2003 from the Permanent Representative of the United States to the United Nations, John Negroponte, addressed to the President of the Security Council and legal opinion from Lord Goldsmith, the UK Attorney General, addressed to the Prime Minister on 17 March 2003.

December 1998. Another example is the military operation by NATO against the Federal Republic of Yugoslavia in 1999, although other justifications, such as the doctrine of humanitarian intervention, were put forward. (12)

It has also been argued before the Security Council that a *posteriori* legitimisation of unilateral action by means of a Security Council resolution serves to remove any taint of illegality even in the absence of prior authorisation. Again, examples include Security Council resolutions following the military bombardments by NATO, as well as those following on the Iraqi invasion and occupation (SC Resolutions 1472, 1483, 1500 and 1511 (2003)).

However, the view that SCR 1441 did not automatically set a process in motion is supported not only by many member States, including these permanent members, France, China and Russia, but also by the express statements made by the United States and United Kingdom representatives themselves during the debate in the Security Council following the adoption of Resolution 1441 that this resolution did not contain a "hidden trigger" for unilateral recourse to force. This interpretation has also been supported by a majority of legal commentators (13).

Moreover, while none of the resolutions adopted after the war in Iraq was launched clearly condemns the occupation, they do not legitimise it either. This is clear from the Security Council debates on Iraq in the immediate aftermath of hostilities. An overwhelming majority of speakers emphasized that the war, carried out without Council authorisation, was a violation of international law and the United Nations Charter and thus did not meet the criteria of international legitimacy. But even those countries opposing the military operation considered that the humanitarian situation of the civilian population and the need to end the foreign occupation made it imperative for the international community to participate in the reconstruction of the country and in the establishment of a viable and representative government, hence the reason put forward for

(12) For an elaboration of these arguments, see GOWLLAND-DEBBAS V., "The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance", *EJIL*, vol. 11, n° 2, 2000, pp. 361-383.

(13) See numerous letters and protests from such well-known legal scholars as Georges Abi-Saab, Gaetano Arangio-Ruiz, Yadh Ben Achour, Paolo Benvenuti, Ian Brownlie, Christine Chinkin, Luigi Condorelli, James Crawford, Pierre-Marie Dupuy, Richard Falk, Thomas Franck, Vaughan Lowe, Jean Salmon, Philippe Sands, Eric Suy ... the list can be extended.

United Nations involvement in Iraq in the aftermath of the war (14).

It is clear from the above that resort to unilateral action in the absence of express Council authorisation has been viewed as an act of usurpation of Council powers and a resort to force which is prohibited under international law.

2. Claims based on a broad re-interpretation of Article 51 of the Charter

The claim to resort to unilateral use of force has also recently been made in the context of the "war on terror" on the basis of a broad reading of Article 51 of the Charter. Security Council Resolutions 1368 (2001) and 1373 (2001) on the prevention and suppression of terrorist acts refer ambiguously in their preambles to the inherent right of individual or collective self-defence in accordance with the Charter. This has been interpreted by countries such as the United States (in Afghanistan regarding the military operation that was launched on October 7, 2001) and Israel (in the construction of a wall in the Occupied Palestinian Territory), as meaning that Article 51 can no longer be read narrowly as justifying self-defence against an armed attack by States, but must take into account also armed attacks by non-State actors; alternatively, a right to take military action against States which merely harbour terrorists, and on a preventive basis, even in the absence of their direct implication in the terrorist acts, can be justified.

However, the International Court of Justice in its Advisory Opinion on the construction of a wall in the Occupied Palestinian Territory in reply to Israel's argumentation, has affirmed once again that Article 51 must continue to be restrictively read, *i.e.* that this provision authorises a response only to an (actual) armed attack by a State. (15) It also reiterated this strict reading of Article 51 in the 2005 *Congo v. Uganda* case, rejecting Uganda's plea of self-defence and stating that "Article 51 of the Charter... does not allow the use of force by a State to protect perceived security interests beyond these parameters. Other means are available to a concerned State,

(14) See S/PV 4726, 26 March 2003.

(15) See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of July 9, 2004, para. 141-142 (available on the website of the ICJ at: <http://www.icj-cij.org>).

including, in particular, recourse to the Security Council", a clear rejection of the doctrine of preventive self-defence. (16)

At any rate, no Security Council resolution on terrorism provides anything like an unequivocal authorisation to use military force against terrorist acts. The action of United Nations organs in the general fight against terrorism has been situated in the framework of international criminal responsibility, requiring effective inter-state and inter-organisational cooperation across borders to bring to justice the perpetrators of such acts. The UN has consistently insisted, moreover, that measures adopted by States comply with international law, including human rights and the stringent requirements of international and domestic criminal procedures.

It is clear from the three major documents concerning reform proposals that such claims to a broad interpretation of Article 51 is unacceptable. The High Level Panel Report considers that "Article 51 needs neither extension nor restriction of its long-understood scope", although it concedes that it covers imminent threats (17) (that however is still controversial among international lawyers). It also addresses claims to preventive action by stating (para. 191):

"In a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all."

3. *The need to limit the Security Council's contracting-out of the use of force*

The reform documents also emphasise the importance of collective measures in carrying out a collective international responsibility to protect and stress their commitment to promoting and strengthening the multilateral process. The World Summit Outcome Resolution reaffirms (para. 79): "... the authority of the Security Council to mandate coercive action to maintain and restore international peace and security". Furthermore, the Security Council in exercising its collective international responsibility to protect, is to

(16) ICJ, *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgement of 19 December 2005, para. 146-148 (available on the website of the ICJ at: <http://www.icj-cij.org>).

(17) High Level Panel Report, p. 4, para. 188.

resort to military force only in the last resort and under certain conditions. Thus the High Level Panel Report states:

"207. In considering whether to authorize or endorse the use of military force, the Security Council should always address – whatever other considerations it may take into account – at least the following five basic criteria of legitimacy:

- (a) Seriousness of threat. Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify prima facie the use of military force? In the case of internal threats, does it involve genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended?
- (b) Proper purpose. Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved?
- (c) Last resort. Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed?
- (d) Proportional means. Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?
- (e) Balance of consequences. Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?"

It also recommends that these guidelines be embodied in declaratory resolutions of the Security Council and General Assembly.

In conclusion, it appears all the more imperative today to emphasize the importance of retaining centralized collective measures as foreseen in Article 1(1), for institutional and collective protection of the values and interests of the international community should be the only logical response to the violation of such values and interests.

E. – *The Emergence of the Concept of the Rule of Law in International Relations*

The reference to International Law which was originally linked in Article 1(1) of the Charter to peaceful settlement of disputes, must now be read also as referring to collective enforcement measures.

The operation of the rule of law both at the national and international levels as a framework for advancing human security has been underlined in all the recent reform proposals. The Summit Outcome document has reaffirmed this commitment "to an international order based on the rule of law." (18)

(18) Para. 134(a).

While the meaning of the term "rule of law" in the international context has yet to be determined, there are certain characteristics of the principle of the rule of law on which there can be little disagreement.

1. *The law must conform to certain standards of justice, including that of due process and predictability.*

Sanctions have highlighted certain contradictions in the current international system. They continue to be considered necessary instruments for the achievement of certain important priorities of the international community, including the protection of human rights. At the same time, their effective implementation has served to erode fundamental principles safeguarding individual rights. In particular, it is evident that the general "war on terrorism" has placed tremendous pressures on the UN Charter regime of international protection of the individual.

Resolution 1373 (2001) on the prevention and suppression of the financing of terrorist acts which has been central to States' counter-terrorism legislation is particularly problematic in terms of due process rights for the individual. Such individually targeted financial or travel sanctions are indeed not to be seen as mere administrative procedures, for they function in effect as penalties. Yet at the same time, the procedure for drawing up lists of targeted individuals particularly by the Sanctions Committee established for the implementation of Resolution 1267, and its lack of transparency raises serious doubts over the safeguard and protection of individual rights in sanctions implementation, such as the right to a fair and public hearing for those who are listed.

Thus the High-Level Panel Report states in paragraph 152:

"The way entities or individuals are added to the terrorist list maintained by the Council and the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions."

Remedies for the individual from potential abuses in implementation of such decisions appear to be slim. There is little possibility for a person who has been listed to effectively demonstrate his or her own innocence and the delisting processes are not judicial but diplomatic and hence discretionary.

Article 103 of the Charter, which provides that in the event of a clash between the obligations of Member States under the Charter and their obligations under any other international agreement, the former prevails, has been interpreted by national and regional courts as overriding the provisions of human rights treaties, other than those strictly of *jus cogens* or peremptory character. (19) In my view, however, unless there is a manifest intent on the part of the Security Council to derogate from such treaties, its resolutions must continue to be interpreted in the light of such treaties, particularly since the Council is limited under Article 24 (1) by the Purposes and Principles of the UN Charter, the human rights provisions of which have been given effect by these treaties. The Security Council is itself aware of these limitations. In Resolution 1456 (2003) it calls on States to ensure that their counter terrorism measures comply with all their international law obligations, "in particular international human rights, refugee and humanitarian law" (para. 6).

The General Assembly in its September 2005 World Summit Outcome document reiterated the obligation of all States to ensure that they comply with such obligations under international law, including human rights law, in all the measures taken to combat terrorism; furthermore it called on the Security Council "to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and removing them, as well as for granting humanitarian exceptions." (20) This reform of the listing process is on-going, although it offers unsatisfactory diplomatic rather than judicial remedies. (21)

2. *There can be no power without accountability*

The accountability of international organisations as a means of checking the increase in their powers and mandates in recent years has become a central problem of international law. The assumption

(19) See European Court of First Instance, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, Case T 306/01; *Yassin Abdullah Kadi v. Council and Commission*, Case T 315/01, 21 September 2005; UK Court of Appeal, *Hilal Abdul-Razzaq Ali Al-Jedda vs. The Secretary of State for Defence*, Appeal no. 2005/2251.

(20) Para. 85 and 109, respectively.

(21) See the diplomatic efforts undertaken by Switzerland and Germany and *Strengthening Targeted Sanctions through Fair and Clear Procedures*, White Paper prepared by the Watson Institute Targeted Sanctions Project, Brown University, 30 March 2006.

of quasi-legislative powers by the Security Council has raised increasing concern over its legitimacy. The reform proposals, including the World Summit Outcome have called on the Security Council to enhance not only its effectiveness but also its accountability and transparency.

The problem is how to insist on limitations on the powers of international institutions without at the same time opening the door to unilateral determinations by States based on parochial interests and the hi-jacking of collective measures, which of course would constitute a set-back to the evolution of these organisations. That there are legal limits to the Council's powers no-one contests; these may be found in the Charter and in general international law. But another question altogether is that of a third party review of the legality of its resolutions. While the International Court of Justice has no powers of judicial review over the resolutions of the United Nations, it has examined these on occasion if this was a necessary part of the case or question put before it, but it has not yet challenged a resolution of the Security Council.

3. *The rules should be applied on a basis of equality to all the legal subjects*

As the High Level Panel Report points out: (22) "a collective security system must be effective, efficient and equitable" (emphasis added). It continues: "The credibility of any system of collective security also depends on how well it promotes security for all its members, without regard to the nature of would be beneficiaries, their location, resources or relationship to great Powers." (23) This is the basis of course of the pure theory of collective security – all for one and one for all, regardless of who is the victim and who the aggressor. But double standards in the treatment of like situations have been inbuilt into the system and are in the nature of the Council's discretionary action in responding to threats to the peace – one has only to point to the Council's treatment of the Occupied Palestinian Territory in contrast to its responses to other similar cases of illegal occupation.

(22) Para. 31.

(23) *Ibid.*, para. 40.

The panel reports focus on a so-called "responsibility to protect", emphasizing the collective nature of this responsibility. The World Summit document proclaims:

"The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter of the United Nations, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity." (24)

However, the Israeli bombardments of Lebanon, or the dramatically deteriorating situation in Darfur, while the international community has remained at best on the sidelines, have revealed the problems with the doctrine of the responsibility to protect. How should this duty on the part of the international community be reconciled with the discretionary competence of the Security Council under Chapter VII to prefer inaction to action in particular cases? The Secretary-General's *mea culpa* in the cases of Rwanda and Srebrenica had underlined that the international community as a whole had to accept its share of responsibility for failing to take action to prevent the tragic course of events. Surely the "responsibility to protect" if it is to go beyond a mere pious buzz word must mean that the Security Council has an obligation, and not mere discretion, to take action in such circumstances; and that inaction must entail the concurrent responsibility of the Security Council and the States which compose it, in particular its permanent members?

III. – CONCLUDING REMARKS

There has been no formal amendment of the Council's functions or of the collective security system under Chapter VII, yet as has been seen, this has not stopped their evolution and transformation in the light of the changing international context. There has also

(24) Para. 139.

been a serious re-evaluation of the sanctions mechanisms: the questioning of the effectiveness and consequences of broad, indiscriminate sanctions whose human cost is clearly disproportional to the objectives of the sanctions, did lead to a focus on targeted or "smart" sanctions, and some reflection is now taking place on how to address the human rights problems engendered by those same targeted sanctions. While such cosmetic changes of sanctions measures has taken place more as a result of auto-regulation and auto-critique, the Council could not ignore the pressures exerted on it from the outside. There is also the realization that an increasing perception of the illegitimacy of sanctions could seriously erode their effective implementation.

There is of course an undoubted and urgent need to review United Nations mechanisms for coercive measures – to set limits on the collective action which can be adopted within the Security Council so that states do not escape constraints on unilateral action by hiding behind the corporate veil, to provide for some form of accountability and to ensure a more equitable representation within that body. There is also a need to have a fresh look at the veto power. The High Level Panel Report suggests that the Permanent members limit their use of the veto to "matters where vital interests are genuinely at stake" (25), but there have also been proposals to limit the use of the veto in cases of genocide and serious human rights violations. It is also interesting to note that the General Assembly has itself questioned, with reference to the self-determination of the Palestinian people, the validity of a veto thwarting the exercise of a *jus cogens* norm.

It is also important that the General Assembly reassert its residual role in the field of international peace and security. In the light of current discussions on United Nations reform and of the Security Council's assumption of vast and quasi-legislative powers while under the preponderant influence of a single superpower, this bolstering of the role of the most representative of the UN political organs – the General Assembly – is of major significance. Indeed, the Secretary-General's High Level Panel Report recommended that Member States "renew efforts to enable the General Assembly to perform its function as the main deliberative organ of the United

Nations", highlighting its legitimacy as a universal body which provides a unique forum within which global consensus must be sought on contemporary challenges facing the international community, including broader, more effective collective security. (26) The 2005 World Summit declaration, while reaffirming the Security Council's primary responsibility in the maintenance of international peace and security, also noted the role of the General Assembly in this field. (27)

The International Court of Justice has, in addition, set the seal on the Uniting for Peace resolution, thus putting an end once and for all to old controversies, and in so doing upholding the General Assembly's role in the field of maintenance of international peace and security. Far from upsetting the Charter's delicate balance between the General Assembly and the Security Council, the ICJ Opinion has served to right it, for the Security Council, by widening the notion of threat to the peace and its linkages, has considerably encroached on fields which lie either expressly or by implication, within the exclusive competence of the General Assembly: decolonisation, human rights, including self-determination, humanitarian law, international criminal law, etc. The ICJ has stressed that not only does the Assembly's competence extend to matters of peace and security, but that it has the unique vantage-point of being able to address such matters also from a broader humanitarian, social and economic perspective. (28)

Protection and enforcement of community values and interests should be sought by seeking to address these problems, rather than by resort to unchecked unilateral action exercised outside the United Nations. The Organisation remains, despite all its weaknesses and the criticisms which can be directed to it, the only existing forum that can accommodate and protect the diversity of cultures and claims – this is an important asset in the current climate.

But a debate must also take place on the very role of coercion in international law and of whether the increasing and diversified use of sanctions as a means of ensuring compliance within a complex and globalised environment is necessarily the best response to perceived threats. This means reflecting on the place of sanctions in

(25) Para. 256.

(26) Section XIII, para. 240, 242.

(27) Para. 80.

(28) *Wall case*, Advisory Opinion, *op. cit.*, para. 27.

the UN system, and on the balance to be struck between the different priorities of the UN Charter – day to day peace maintenance or *ad hoc* responses to crises on the one hand, and the longer term creation of a veritable “culture of peace” (29).

(29) See A/RES/53/243, Declaration and Programme of Action on a Culture of Peace.