

BETWEEN INCAPACITY AND INDISPENSABILITY: THE UNITED NATIONS AND INTERNATIONAL ORDER

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SUMMARY: I. Introduction. II. The concept of the charter: order vs. law. III. The U.N. in 21st Century conflicts. IV. U.N. Reform: towards an institutional “Responsibility to Protect”? V. Conclusion. VI. Sources.

I. INTRODUCTION

In the UN Millennium Declaration,¹ the assembled Heads of State and Government reaffirmed their “faith in the Organization and its Charter as indispensable foundations of a more peaceful, prosperous and just world”.

They were “determined to establish a just and lasting peace all over the world in accordance with the purposes and principles of the Charter”.

Regarding international law, the global leaders resolved “To strengthen respect for the rule of law in international as in national affairs” and “To make the United Nations more effective in maintaining peace and security”.

Only seven years later, these high hopes for a new international order have faded. Shunned by the only superpower for not backing the use of force against an Iraq allegedly in possession

¹ A/Res/55/2.

of weapons of mass destruction and harboring terrorists, the UN appeared powerless. In the words of Richard Perle, at the time Chairman of the Pentagon's Defense Policy Board Advisory Committee "as we sift the debris of the war to liberate Iraq, it will be important to preserve, the better to understand, the intellectual wreckage of the liberal conceit of safety through international law administered by international institutions".²

Before, in his speech to the General Assembly in September 2002, President George W. Bush had challenged the UN to either support the United States in its policy against Saddam Hussein, or risk irrelevance: "All the world now faces a test, and the United Nations a difficult and defining moment. Are Security Council resolutions to be honored and enforced, or cast aside without consequence? Will the United Nations serve the purpose of its founding, or will it be irrelevant?".³

In other words: not only Saddam Hussein was tested, but also the UN. Oddly enough, Bush did not consider independent decision-making in the common interest to be a signal of the UN's vitality, but offered accession to US demands as the only conclusive test of "relevance".⁴ Of course, the UN entered Iraq without the blessing of the Security Council, but with the help of a "coalition of the willing", and appeared to score an early victory.

Five years later, the invasion has led to a situation of civil war, with no end in sight. The quasi-hegemonic order designed by Bush jr. seems as incapable to fulfill the security promise as the Charter system of collective security. It is an open question whether a UN legitimization of the US attack would have changed the picture in any relevant way. Nevertheless, the US, and UK, attempts to receive UN support testifies to the "relevance" they

² Richard Perle, "United They Fall", *The Spectator*, March 22, 2003, at 22.

³ Address by Mr. George W. Bush, President of the United States of America, GAOR, 2nd. plen. mtg., 12 September 2002, UN Doc. A/57/PV.2 (2002), p. 6 at 8.

⁴ *Cfr.* also Michael. J. Glennon, "Why the Security Council Failed", *Foreign Affairs*, vol. 82, num. 3, 2003, p. 16.

ascribed to the legitimizing role of the UN.⁵ On the other hand, the later UN involvement at the stage of the occupation itself points in the opposite direction; the UN, while failing to endorse the Iraq war as such, was nevertheless targeted by Iraqi insurgents.⁶

To talk about another example of massive violation of human rights, not even the crimes against humanity, if not genocide, committed in the Darfur region of Sudan, have brought about the collective “humanitarian intervention”⁷ called for not only by the

⁵ For an in-depth account, see Andreas L. Paulus, “The War Against Iraq and the Future of International Law: Hegemony or Pluralism?”, *Michigan Journal of International Law*, vol. 25, num. 3, 2004, 691-734; James Rubin, “Stumbling into War”, *Foreign Affairs*, September-October, 2003, at 46-57, with further references. For the official justification of the resort to war, see Letter Dated 20 March 2003 from the Permanent Representative of the United States of America to the President of the Security Council, UN Doc. S/2003/351 (2003); see also William H. Taft IV and Todd F. Buchwald, “Preemption, Iraq, and International Law”, *American Journal of International Law*, num. 97, 2003, p. 557.

⁶ For the SC resolutions on the occupation of Iraq and its transition to democracy, see, *inter alia*, Res. 1483 (May 22, 2003) and 1511 (October 16, 2003), the latter also deploring the loss of lives by the destruction of the UN headquarters through a terrorist attack on 19 August 2003.

⁷ From the enormously rich literature, see, e.g., Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned*, 2000; Antonio Cassese, “A Follow-UP: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*”, *European Journal of International Law*, vol. 10, num. 4, 1999, pp. 791-799; Antonio Cassese, “Ex iniuria is oritur: are we moving towards international legitimation of forcible humanitarian countermeasures in the world community?”, *European Journal of International Law*, vol. 10, num. 1, 1999, p. 23; Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, New York, Oxford, 2003; Thomas Franck, *Recourse to Force: State Action Against Threats and Armed Attack*, Cambridge, Cambridge University Press, 2004, at 131-91; Richard B. Lillich, *Humanitarian Intervention and the United Nations*, Washington, D. C., The Procedural Aspects of International Law Institute, 1973; J. L. Holzgrefe and Robert O. Keohane (eds), *Humanitarian Intervention. Ethical, Legal and Political Dilemmas*, Cambridge, Cambridge University Press, 2003; Georg Nolte, “Kosovo und Konstitutionalisierung: zur humanitären Intervention der NATO-Staaten”, *ZaöRV*, num 54, 1994, at 946-948; Bruno Simma, “NATO, the

historic origins of a Charter drafted in the wake of the slaughter of the European Jews,⁸ but also by the much trumpeted “responsibility to protect” announced at the 60th. UN anniversary summit of the Heads of State and Government.⁹ Although the Security Council has now established a peace force for the conflict,¹⁰ it is still incapable of sending troops without the consent of the Sudanese government, which bears heavy responsibility for the mass killings in the first place, and is playing a “cats and mouse” game with the UN and the AU.¹¹

UN, and the Use of Force: Legal Aspects”, *European Journal of International Law*, num. 10, 1999, at 5-6. In the Kosovo debate, most States have rejected a right of humanitarian intervention (Cassese and Nolte, *ibid.*); but see Belgium’s pleadings before the ICJ, *Me. Ergec (Belgium), Legality of Use of Force (FRY v. Belgium)*, Uncorrected Verbatim Record, ICJ Doc. CR 99/15, May 10, 1999, IIa, available at <http://www.icj-cij.org>.

⁸ The Preamble of the Charter already makes the connection between saving humankind “from the scourge of war” (first para.) and the protection of human rights (second para.), see, e.g., Wolfrum, in: Simma (ed.) *Charter of the UN*, Preamble, MN 4, 5. One of the first Security Council proceedings regarded an intervention in the Franco régime in Spain, see Report of the Sub-Committee on the Spanish Question, UN Doc. S/75 (May 31, 1946), pp. 11-12, paras. 18-22, 27, 28 (no case of Article 39) and the Polish reservation thereto, *ibid.*, pp. 16-17; T. Stein, in: Simma (ed.), *Charter of the UN*, Art. 36 MN 7. The contemporary sanctions régime has its origins in the intervention in racist Rhodesia, see Vera Gowlland-Debbas, *Collective Response to Illegal Acts in International Law: United Nation Action in the Question of Southern Rhodesia*, 1990, pp. 423-486.

⁹ World Summit Outcome, GA Res. 60/1, 24 October 2005, UN Doc. A/RES/60/1, para. 139. See Sofaer, *International Security and the Use of Force*, in: *Progress in International Law and Institutions*, 2008, p. 543 and ss.

¹⁰ See SC res. 1706 (2006) of 31 August 2006.

¹¹ See Report of the international commission of Inquiry on Darfur to the Secretary-General, UN Doc. S/2005/60, 1 February 2005, Annex, p. 3 *et passim*. According to the Prosecutor of the International Criminal Court, at the time of writing in February 2007, indictments are imminent, see Fourth Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the UN Security Council Pursuant to UNSCR 1593 (2005), 14 December 2006, p. 2, available at www.icc-cpi.int/otp/otp_events.html (visited 12 February 2007).

What, then, is the United Nations still for? What if Richard Perle was wrong about the Iraq war, but right on target regarding the potential of the United Nations to police the world? In this article, I will look at the original idea behind the Charter system of collective security and compare it to the role of the UN in the early days of the 21st. century, a century that is marred by the uneasy relationship of the inter-State system as built after World War II with an emerging, “neo-medieval”¹² world of non-State actors, from the economic forces of globalization to the neo-Islamist enemies of modernity, and with the neo-hegemonial aspirations of the only superpower claiming superior values and special rights for itself.

And yet, the skeptics of the UN’s capacity to contribute to world peace and justice must also consider the alternatives. While it remains almost impossible to bridge the gap between the need for a strong global institution to maintain and build international peace and security, on the one hand, and the universality required for a world body, on the other hand, this tension is inherent in the concept of a world organization for peace and security—at least as long as that world organization is not meant to become a world State. The UN must square the circle of being both effective in securing human and group rights while being respectful of the sovereignty the UN Charter secures for its States members. In most cases, it cannot order and enforce, in the true sense of the term, but needs to balance and to persuade. As Immanuel Kant long ago demonstrated,¹³ a true world State would both be

¹² See, e. g., Jörg Friedrichs, “The Meaning of New Medievalism”, *European Journal of International Law*, 7, 2001, with further references; for the term see already Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 2nd. ed., 1995, at pp. 245-47, 254-66.

¹³ Immanuel Kant, “Zum ewigen Freiden: Ein philosophischer Entwurf”, in *Werke in sechs Bänden 194-251*, Wilhelm Weischedel ed., 1983, at 208-213. Immanuel Kant, “Die Metaphysik der Sitten”, in *Werke in sechs Bänden* 309-634, Wilhelm Weischedel, 1978, par. 61, pp. 474-75. Even Realists support the idea of a world State, only to deplore its absence, see Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, 5th. ed., 1972, p. 493:

dangerous to freedom and suffer from lack of effectiveness (and efficiency). As long as we have different levels of governance, however, efficiency and effectiveness will invariably suffer.

In this article, I will also look at the proposals for UN reform and ask whether they even remotely achieve the goal of bringing the UN Charter into the new age. I will conclude by arguing, that, for all its shortcomings, the UN remains as indispensable for the taming and channeling of global conflicts as it is likely to continue to be impotent to “solve” them alone in the post-September-11 world.

II. THE CONCEPT OF THE CHARTER: ORDER VS. LAW

Contrary to Richard Perle’s claim, the Charter was not designed to implement international law. To the contrary, the founders of the Charter were wary of the failures of the League to maintain peace and security based on the mere application of existing law without regard to the underlying power relationships.¹⁴ On the one hand, the Charter is based on idealistic premises, as the Preamble suggests: “We, the peoples of United Nations, Determined to save succeeding generations from the scourge of war, ... and... to establish conditions under which justice and respect for the

“[I]n no period of modern history was civilization more in need of permanent peace, and, hence, of a world state, ... in no period of modern history were the moral, social, and political conditions of the world less favorable for the establishment of a world state”.

¹⁴ For a seminal debate on the role of law in the inter-war years, see Hersch Lauterpacht, *The Function of Law in the International Community*, 1933, at 85-135, 420-438 on the one hand (arguing that law needs to be regarded as complete to strive to reach peace); similarly Hudson, *Progress in International Organization: A Constitutionalist Reading*, in: *Progress in International Law and Institutions* pp. 63-71; against them Edward Hallet Carr, *The Twenty Years’ Crisis 1919-1939: An Introduction to Study of International Relations*, 2nd. ed., 1946, at 170-201; on this debate see Martti Koskenniemi, *The Gentle Civilizer of Nations: the Rise and Fall of International Law, 1870-1960*, 2002, pp. 361369.

obligations arising from treaties and other sources of international law can be maintained...".¹⁵

But note that it is justice that comes before existing law, and it is the aim of the organization "to establish conditions" conducive to the respect for law, not simply to apply and implement the law as it is. The same ambiguity is to be found in the purposes of the organization as contained in Article 1. The maintenance of international peace and security comes before the respect for existing law, and the peaceful settlement of disputes is to conform to the "principles of justice and international law," and does not simply consist in the application of pre-determined rules. Thus, even the most idealistic and aspirational parts of the Charter recognize the role of "peaceful change"¹⁶ rather than blind obedience to international law.

A more "realist" reading of the Charter is based on the special role given to the victors of World War II who hold veto power on the Security Council. The sovereign equality of States¹⁷ gives way to the prevalence of the great powers (especially those with nuclear weapons) to react to threats to international peace and security, breaches of the peace and aggression.¹⁸ While the exact relationship between binding decisions of the Security Council under Chapter VII of the Charter and the observance of international law remains vague,¹⁹ it is commonplace that the Council is not bound by international law in place when deciding on measures "to maintain or restore international peace and security." However, the Council must act "in accordance with the Purposes

¹⁵ Preamble to the Charter of the United Nations, 1946-47 U.N.Y.B. 831.

¹⁶ On the term and its meaning see J. Delbrück, "Peaceful Change", in: *Rüdiger Wolfrum*, 2nd. ed., United Nation: Law, Politics and Practice, 1995, at p. 970, par. 102 num. 13 (compromise character of the respective Article 14 UNC); O. Kimminich, M. Zöckler, in Simma (ed.), *Charter of the UN* (2d ed., 2002), Art. 14 MN 7.

¹⁷ UN Charter, Article 2 para. 1.

¹⁸ UN Charter, Article 39, 27.

¹⁹ See J. Frowein/N. Krisch, in Simma (ed.), *Charter of the UN*, Introduction to Chapter VII, para. 25-31, with further references.

and Principles of the United Nations”,²⁰ which are themselves sufficiently broad to leave the Council a large margin of appreciation. Even those who, as the present author does,²¹ maintain that the Council’s discretion is not unlimited, have difficulty to point to *ultra vires* acts by the Council unequivocally overstepping its competences.²²

The most important Charter mechanism for the maintenance of peace and security is the relationship between collective security administered by the Security Council in Chapters VI and VII of the Charter, on the one hand, and the unilateral right of individual and collective self-defense as contained in Article 51, on the other. States thus maintain the “inherent right” (English text) or “droit naturel” (French text) to individual or collective self-defense, *e.g.* alone and with the help of others, if and to the extent that the Security Council, albeit informed of the action, does not take the required measures to repel an “armed attack”. Note the extremely limited nature of this right to self-defense: It is only available “if an armed attack occurs”²³ and it ceases

²⁰ UN Charter, Article 24.

²¹ On *jus cogens* and the Charter see Frowein/Krisch (note 19), para. 29; Andreas L. Paulus, “Jus Cogens in a Time of Hegemony and Fragmentation”, *Nordic Journal of International Law*, num. 74, 2005, at 317-19, with further references. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, 8 April 1993, Provisional Measures, Sep. Op. Lauterpacht, *I.C.J. Reports 1993*, p. 440, para. 100.

²² However, the present author would also limit the competence of the Council to legislate beyond specific instances of threats to international peace and security; see Andreas Zimmerman and Björn Elberling, “Grezen der Legislativbefugnisse des Sicherheitsrats”, *Vereinte Nationen*, num. 52, 2004, 71, (same), but see Stefan Talmon, “The Security Council as World Legislature”, *American Journal of International Law*, num. 99, 2005, pp. 175-193 (arguing that those limitations do not derive from Article 39 UNC).

²³ See A. Randelzhofer, in: Simma (ed.), Charter of the UN, Article 51 para. 16-36, with further references. But see the endorsement of the right to self-defense by Israel against the kidnapping of two of its soldiers and killing of 8, albeit combined with the more or less regular firing of Katyusha rockets into Northern Lebanon, by both the G8 leaders, *e.g.*, the heads of State and government of the 7 industrialized nations and Russia, G8 statement at their summit in

when the Security Council itself “has taken measures necessary to maintain international peace and security”.²⁴ By giving the five permanent members individually the right to veto any resolution against their interests, however, and by leaving the judgment as to self-defense to individual States, the Charter does not amount to a complete collectivization of security.²⁵

Thus, the Charter model was not based on “international law administered by international institutions,” as Richard Perle suggests, but it was conceived as a system of “collective security” to embody the policing of the international community by the “five policemen” of the permanent members of the Security Council.²⁶

III. THE U.N. IN 21ST CENTURY CONFLICTS

The United Nations has rarely lived up to the task of guaranteeing collective security. Whereas the Charter contemplated the establishment of UN forces by special agreements with member States,²⁷ their absence transforms a system of collective security to one of the collective legitimation of the individual use of force. In the cold war, the antagonism of the Eastern and Western blocs prevented the Charter system from functioning, with the

St. Petersburg, July 16, 2006, available at www.lloyds.com/dj/DowJonesArticle.aspx?id=184866# (visited July 19, 2006), as well as, implicitly, by Security Council Res. 1701 (August 11, 2006), para. 1 (by only calling for the end of offensive operations by Israel).

²⁴ See Sofaer, *supra* note 9, and Foley, Reforming the Security Council to Achieve Collective Security, in: Progress in International Law and Institutions, 2008, p. 573 and ss.

²⁵ Note Hudson’s skepticism towards the right to self-defense, Hudson, Progress..., *op. cit.*, note 14, at 97, calling the permissive interpretation of the Pact of Paris “a weasel interpretation”. But see Sofaer, *International Security...*, *op. cit.*, note 9.

²⁶ See Karl Doehring, in: 1 Wolfrum (ed.), United Nations, at 110-115.

²⁷ UN Charter, Article 43. See also Abraham Sofaer’s proposal to invigorate this provision, *International Security...*, *op. cit.*, note 9.

sole —and problematic— exception of the Korea war when the Soviet Union pursued a boycott policy of an “empty chair”.²⁸ Instead, the UN developed “peace-keeping” by “blue helmets”,²⁹ who were acting not to *enforce* peace but to *keep* peace with the consent of the parties to a conflict. In spite of their military weakness, the blue helmets could point to some measure of success, for example in Cyprus, but also to failures, as in Lebanon.³⁰

1. *After the Cold War: From Collective Security to Genocide Nightmares*

Only after the end of the cold war could the UN hope for a new era of superpower consensus on the Council. Indeed, when Saddam Hussein invaded and annexed Kuwait, the promise appeared to live up to reality. The Security Council passed resolution after resolution not only condemning the Iraqi action,³¹ but implementing sanctions against Iraq under Article 41,³² and authorizing the use of “all necessary means,” including the use of military force, to liberate Kuwait.³³ Finally, the Council determined the conditions for an end to hostility and a cease fire.³⁴

²⁸ On the effects of the policy of an “empty chair”, see Bothe, in Simma (ed.), *Charter of the UN, Peace-keeping*, MN, 3; on the status of the Unified Command in Korea, see Paulus, *ibid.*, Article 29 MN 54; for a comprehensive treatment see Rosalyn Higgins, *United Nations Peacekeeping 1946-1967. Documents and Commentary*, 1969, vol. 2, p. 153-312; on the “empty chair” and its implications *idem.*, pp. 173-75, with further references.

²⁹ On Peace-keeping generally, see Bothe, *Peace-keeping*, in Simma (ed.), *Charter of the UN*, vol. 1, pp. 648-700, with a comprehensive bibliography; for the early practice see *ibidem*.

³⁰ See Michael Bothe, “Peace-keeping”, in: *The Charter of the UN – A Commentary*, MN 24 (Cyprus), 28 (Lebanon). For the future of UNIFIL in Lebanon see SC res. 1701 (2006) of 11 August 2006 and accompanying texts.

³¹ See SC res. 660, August 2, 1990, para. 1.

³² SC res. 661, August 6, 1990; 665, August 25, 1990; 670, September 25, 1990.

³³ Res. 678 (1990), November 29, 1990.

³⁴ SC res. 686, March 2, 1991; 687, April 3, 1991.

However, a closer look shows how far already the liberation of Kuwait in 1990 strayed away from the “Charter model,” laying the groundwork for later calamities. The US-led coalition claimed that it acted in collective self-defense of Kuwait with the authorization of the Council, under Article 51, rather than engaging in collective action under UN authority.³⁵ In spite of the wording of the cease-fire resolution 687 (1991), which implied the existence of a conflict between Iraq and the UN and not only the coalition,³⁶ the US, the UK, and initially also France claimed to retain the right to, if necessary unilaterally, enforce the terms of the cease-fire, culminating in the establishment of “no-fly zones” and the raid on Baghdad of December 1998.³⁷ The profound irony of this situation was only revealed well after the US war against Iraq in 2003: Apparently, Saddam hoped to deter the US and its allies by pretending to possess Weapons of Mass Destruction, but the US used allegations that he possessed such weaponry as justification for intervention.³⁸

It is not the place here to review the application of Chapter VII since the end of the first Iraq war until the turn of the century.³⁹ The post cold war conflicts do not follow the Charter model in a literal way. Inter-State wars, the scourge of the early 20th. cen-

³⁵ See J. A. Frowein/N. Krisch, Art. 42MN 22, on the one hand (arguing that the resolution fell under Article 42); Yoram Dinstein, *War, Aggression and Self-Defense*, 5th ed. 2005, pp. 272-275, on the other, with further references. The most fitting description, however, regards it as falling under a combination of the two, see, e.g., Oscar Schachter, “United Nations Law in the Gulf Conflict”, *American Journal of International Law*, num. 85, 1991, 452, at 457-463.

³⁶ See res. 687 (1991), April 3, 1991, para. 34.

³⁷ For the frustration of international lawyers in view of the silence of the international community on this and similar attacks, see Luigi Condorelli, “A propos de l’attaque américaine contre l’Irak du 26 juin 1993: Lettre d’un professeur désespéré aux lecteurs du JEDP”, *European Journal of International Law*, num. 5, 1994, pp. 134-144; but see W. Michael Reisman, “The Raid on Baghdad: Some Reflections on its Lawfulness and Implications”, *European Journal of International Law*, 5, 1994, at 120-133.

³⁸ See Paulus, *War Against Iraq*, pp. 701-706, with further references.

³⁹ See, e.g., J.A. Frowein/N. Krisch, Article 42 MN 8-9.

tury, are on the wane, and when they occur, international intervention remains precarious—from the Iraq/Iran war to the Eritrea/Ethiopia conflict. The “new” conflicts mostly have an inter-State component, but result from more complicated interactions between States and non-State actors. While a traditional reading of international law may tend to regard the relationship between State sovereignty and international order as a zero sum game—less sovereignty would lead to more international authority and *vice versa*—, the “new” system demonstrated how international order depends on the functioning of sovereign States. Enabling States to be sovereign on their territory—and to accept democratic accountability towards its citizens and the world at large— becomes a new challenge at least equal to the need of taming sovereignty by a minimum of world order rules. In the absence of global military or police forces, the UN needs to rely on States. In this alternative—Thomas Franck speaks of a “franchise system”—⁴⁰ the UN uses its unrivaled international legitimacy to authorize States to do its job. The problem with this system, however, consists in the mostly self-interested nature of third States offering support. The outcome thus is often not collective security for all, but for the happy few able to enlist the global media or powerful allies.

2. *The UN and the Maintenance of Peace after September 11, 2001*

After this system had worked more badly than not in the 1990s, came the terrorist attacks of September 11, 2001, the true turning point of the new century. Gone is the enthusiasm for a “new world order” of the elder President George H. W. Bush in the wake of the liberation of Kuwait.⁴¹ His son, at first, appeared

⁴⁰ Thomas Franck, “The United Nations as Guarantor of International Peace and Security: Past, Present, Future”, in *The United Nations at Age Fifty: A Legal Perspective* 25-38, Christian Tomouschat, 1995, at 31.

⁴¹ “Statements of September 11”, 1990, in *2 Public Papers of the Presidents of the United States: George Bush 1219*, 1990; Statements of January 29, 1991

to rely on the international solidarity after the worst terrorist attack in US history, only to shun international institutions later on. President George W. Bush did not ask for a Security Council resolution explicitly authorizing the use of force against Al-Qaeda and its Taliban protectors in Afghanistan, but was happy with an implicit endorsement of the right to self-defense against non-State actors of uncertain legal status.⁴² The UN was welcomed, however, when it came to rebuilding Afghanistan after the successful US-led uprooting of the Taliban regime. The Anti-Terrorism strategy⁴³ also included rendering SC measures binding on States, in spite of the dubious legality of law-making by the Council.⁴⁴ Nevertheless, the example shows that the UN was able to act against the use of force by non-State actors, re-interpreting Article 51 in a way that allowed for unilateral self-defense not only against a terrorist group, but also its protector State.⁴⁵

When the United States attacked Saddam Hussein's Iraq, another attack took place on the constitutional front of the UN Charter, so to speak. The claim for a unilateral right to "pre-emptive" self-defense against individual groups or States suspected of pos-

& Statements of April 13, 1991; in 1 *Public Papers of the Presidents of the United States: George Bush* 79, 366, 1991; Address Before a Joint Session of the Congress on the Cessation of the Persian Gulf Conflict (March 3, 1991), 27 *Weekly Compilation of Presidential Documents* 259 (January-March 1991). For early skepticism in this regard see George Abi-Saab, "A 'New World Order?' Some Preliminary Reflections", 7 *Hague Year Book of International Law*, 87, 1994.

⁴² SC res. 1368 and 1373 (2001), Preamble.

⁴³ See also the recent Comprehensive Strategy against Terrorism, A/Res/60/43, A/Res/60/288, A/60/519, A/60/825.

⁴⁴ See *supra* note 22; Oellers-Frahm, *The Evolving Role of Treaties in International Law*, in: *Progress in International Law and Institutions*, 2008, p. 173 and ss.; Walter, *Progress in International Organization: A Constitutionalist Reading*, in: *Progress in International Law and Institutions*, 2008, p. 133 and ss.

⁴⁵ But see the (overly narrow) interpretation of the SC resolutions by the ICJ in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 Jul. 2004, 43 *International Legal Materials*, 2004, 1009, para. 139.

sessing WMD in the US National Security Strategies of 2002⁴⁶ and 2006⁴⁷ is putting the Charter system of collective security in doubt. The Charter is premised on the assumption that self-defense would only be available in the face of Security Council inaction, and only to repel an existing armed attack.⁴⁸ Although the latter term may include the anticipatory use of force when an armed attack is imminent and no peaceful alternative exists—the so-called *Caroline* principle—⁴⁹ the right to self-defense is limited to instances of a “clear and present danger,” and does not extend to long term threats. For these, the Charter provides for collective security mechanisms. The Security Council is authorized to react to mere “threats of the peace”⁵⁰ when direct aggression is not imminent or even likely, whereas Article 51 demands an actual “armed attack” for unilateral military action by States.⁵¹

The effect of the failures of the UN, from Somalia until Iraq, has been a reluctance to deploy military force in the midst of an ongoing armed struggle. For example, such resolve seems to be

⁴⁶ The National Security Strategy of the United States of America (Sept. 2002), available at www.whitehouse.gov/nsc/nss.pdf (visited Feb. 12, 2007).

⁴⁷ *Ibidem*, March 2006.

⁴⁸ UN Charter, Article 51. See, e.g., Albrecht Randelzhofer, in Simma ed., Charter of the UN, Article 51 MN 3 *et passim*.

⁴⁹ Letter from Daniel Webster to Lord Ashburton, Aug. 6, 1842, 2 *Digest of International Law* 412 (John Bassett Moore ed. 1906); see also Robert Y. Jennings, “The *Caroline* and *McLeod* Cases”, *American Journal of International Law*, 32, Leod Cases, 1938, 82, The Nuremberg judgment regarded the *Caroline* Case as the ultimate limit of the anticipatory use of self-defense, see “International Military Tribunal (Nuremberg), Judgment”, October 1, 1946, *American Journal of International Law*, 41 (1947) 172, at 205; Foley, *supra* note 24; Valek, Legality versus Legitimacy and the Use of force, in: Progress in International Law and Institutions, 2008, pp. 617 and ss.; Davis, “The Phantom of the Neo-Global Era: International Law and the Implications of Non-State Terrorism on the Nexus of Self-Defense and the Use of Force”, in: *Progress in International Law and Institutions*, 2008, pp. 635 and ss.

⁵⁰ UN Charter, Article 39.

⁵¹ See, e.g., Randelzhofer, in Simma ed., Charter of the UN, Article 51 MN 16-36 with ample references.

missing in the case of the alleged genocide⁵² and civil war in Darfur (Sudan) among some members of the Security Council. The UN appears only successful to keep the peace in those regions in Southern Sudan⁵³ in which a political compromise is already in place.⁵⁴ Again, a deployment without the consent of the parties, or at least the territorial State that is itself party to the conflict, would require resources and a political will absent at the UN and its member States. Whether the *status-of-forces agreement* between the United Nations/African Union and the Government of Sudan will improve the situation, remains doubtful, at best.⁵⁵

⁵² In 2005, the UN Commission of Inquiry established by SC res. 1564 (September 18, 2004) was unable to conclude that genocide had occurred and left this determination to a future court or tribunal. In any case, it regarded the attacks against the civilian population as crimes against humanity and war crimes, see Report of the International Commission of Inquiry on Darfur, Jan. 25, 2005, available at www.un.org/News/dh/sudan/com_inq_darfur.pdf (visited Sept. 13, 2006), at pp. 124 and ss. Whether the present situation in Darfur amounts to genocide or “only” to crimes against humanity at a massive scale is hotly debated, although the humanitarian imperative in both cases appears more or less identical. The Commission correctly stated that, depending on the circumstances, these crimes could be of no lesser gravity than genocide, *ibid.*, para. 522, p. 132. However, only in case of genocide, the Genocide Convention contains, in its Article I, an unambiguous obligation of third States to prevent it from being committed – an obligation States seem disinclined to be seen violating. Again, however, crimes against humanity and war crimes also carry the obligation to extradite or punish.

⁵³ See Reports of the Secretary-General S/2008/98 (14 February 2008), S/2008/196 (25 March 2008), in which he denotes, that the situation in Southern Darfur remained relatively stable compared to other regions.

⁵⁴ See SC res. 1547 (June 11, 2004), SC res. 1627 (September 23m 2005) establishing the UN(A)MIS mission in Southern Sudan.

⁵⁵ Pursuant to the UN Secretary-General, the signing of this agreement on 9 February 2008 represents “an important milestone” in the deployment of UNAMID in Darfur and constitutes a significant step forward in ensuring that UNAMID has the ability to effectively discharge its mandate under clear terms and provisions (S/2008/196, 25 March 2008). The Agreement provides the legal framework within which UNAMID will operate. It covers the activities of the military, police and civilian personnel of UNAMID. The SOFA also deals with UNAMID funds, property, communications facilities, as well as the freedom of movement

After September 11, 2001, the UN continues to prove useful for the legitimation of the use of force when necessary, but has failed to show that it can, by itself, fulfill the task given to it by its framers: “to save succeeding generations from the scourge of war”.⁵⁶ But it is not enough to criticize the UN for its slowness, its reliance (and dependence) on non-democratic States and human rights violators or its mismanagement. The challenge consists in devising alternative institutional settings in which the organization can fulfill its tasks in spite of its institutional shortcomings. In addition, the organization must learn to deal not only with inter-State conflicts, but increasingly with conflicts between States and non-State actors such as terrorist groups, and even among non-State actors, as in Darfur.⁵⁷ In the latter case, Security Council action cannot rest on consent as easily as in inter-State conflict, however.

If one expects “collective security” in the full sense of the term, one will be disappointed by this UN record. But to downgrade the United Nations to a mere talking shop underestimates its indispensable function in peace-making and in legitimizing the use of force in a world where the unilateral use of force is increasingly doomed to failure —not only the one by the U.S. in Iraq. In addition, if one made the counter-attempt to analyze the successes and failures of unilateralism, one cannot but conclude that multilateralism has the better chance of success, at least in the long run.⁵⁸

of UNAMID personnel, their safety and security, privileges and immunities, entry into, and exit from Sudan.

⁵⁶ UN Charter, Preamble, para. 1.

⁵⁷ For a beginning, see the recently adopted Global Counter-Terrorism Strategy, A/RES/60/288, Annex (September 8, 2006). Still missing, however, is a comprehensive definition of terrorism.

⁵⁸ The examples of unilateral failures abound, from the Soviet invasions of Afghanistan to Iraq’s aggressions against Iran and Kuwait and to the US adventures from Vietnam to Iraq II, in particular if compared to the more successful operations in Korea and the former Yugoslavia, where the US was backed by international institutions, if, at times, not by the UN. Sofaer’s list of unilateral

IV. UN REFORM: TOWARDS AN INSTITUTIONAL “RESPONSIBILITY TO PROTECT”?

Two years after the summit of the Heads of State and Government that started the implementation phase of the most recent round of UN reforms, the most ambitious plans have yet to materialize—from the reform of the composition of the Council to the effective implementation of the “Responsibility to Protect” populations from crimes against humanity and genocide. And yet, after the first disappointment at the feeble outcome document of the anniversary summit of Heads of State and Government—⁵⁹ a more ambitious draft had been thwarted not the least by a US bid to re-negotiate the document at a very late stage⁶⁰—the glass appears half-full rather than half-empty—.⁶¹ After all, in spite of a less-than-hospitable international climate, the Peace Building Commission⁶² and the Human Rights Council⁶³ have been established and the Responsibility to Protect has been recognized in

success forgets, for instance, Gorbachev’s willingness to co-operate instead of resisting the end of the cold war; and his mentioning of Nicaragua as a success of US intervention seems to contradict the fact that it was peaceful accommodation rather than the Contra war which brought peace. It is ironic that, at the time of writing, the Sandinista leader of the time, Daniel Ortega, has been re-elected president of Nicaragua; See also Sofaer, *supra* note 9.

⁵⁹ World Summit Outcome, GA Res. 60/1, 24 October 2005, UN Doc. A/RES/60/1. On the disappointing aspects, see Christian Tomuschat, *Einführung, Friedenswarte*, 80, 2005.

⁶⁰ For the draft before the arrival of US Ambassador John Bolton, see Revised draft outcome document of the high-level plenary meeting of the GA of September 2005 submitted by the President of the GA, July 22, 2005, Doc. A/59/HLPM/CRP.1/Rev.1 (2005).

⁶¹ This was also the initial assessment by Kofi Annan, see *idem.*, *A Glass At Least Half Full*, *Wall Street Journal*, September 19, 2005, p. A 16.

⁶² SC res. 1645 (December 20, 2005); GA res. 60/180 (December 30, 2005). On the Peace-building Commission, see. Detlev Wolter and Jörn Müller, *The United Nations at Sixty: Getting Serious with Conflict Prevention?*, FW 80, 2005, p. 333.

⁶³ See GA Res. 60/251, April 3, 2006.

principle.⁶⁴ Both the administrative reforms of the General Assembly and the Security Council reforms are lagging behind, however. Ultimately, the true test of the reform lies in its eventual contribution to a more swift and effective reaction to threats to international peace and security.

With regard to UN action under Chapter VII, the necessary reforms would concentrate on enhancing the readiness of UN member States to provide troops and on allowing for the rapid, effective, and efficient reaction to new threats, both to inter-State peace and to the massive violation of human rights. Large-scale violation of human rights is often the harbinger for new conflicts, and the earlier the reaction, the better the chances of success. But at the same time, the Security Council must see to it that the legitimacy of the Council is preserved and enhanced. If perceived as a superpower club with limited accountability, the legitimacy of the Council will wane and this would profoundly affect the prospects of effective implementation. When UN operations become suicide missions, the readiness of States to contribute troops will further decrease. Thus, the decision-making procedures of the Council must become more transparent. In addition, the Council must not only act, but also justify its actions to the General Assembly, the member States, and the public at-large. The following remarks are limited to the “responsibility to protect” and Security Council reform because they are the core of the structural reform as well as the key advance in material international law involved in UN reform.

1. *Responsibility to Protect*

The so-called “humanitarian intervention” is one of the most common phrases bandied about in the debate on UN reform.⁶⁵ However, no agreement seems to exist as to who exactly is to

⁶⁴ See *infra*, note 70 and accompanying text.

⁶⁵ For the debate in the framework of UN reform, see *infra*, note 69; for humanitarian intervention generally, see *supra*, note 7, and *infra*, note 68.

intervene and under which circumstances. Indeed, according to the Charter, intervention in domestic affairs is prohibited, both in inter-State relations—as a consequence of the sovereign equality of the State parties—⁶⁶ as well as between the UN and its member States,⁶⁷ except for the Security Council acting under Chapter VII of the Charter.

The meaning of “intervention” depends, however, on the extent of the freedom of action of States under international law. In other words, the enforcement of justified legal claims does not constitute intervention. As to the means, in any event, Article 2 (4) of the Charter prohibits the use of force between States. Only the Security Council, when acting under Chapter VII of the Charter, may intervene by force into the domestic realm of States.

It was never to be expected that the debate on whether international law permits—or should permit—intervention for truly humanitarian reasons, that is, for the sake not only of individual or collective self-defense of States, but also for the most basic rights of survival of individual human beings,⁶⁸ would be solved

⁶⁶ Article 2, para. 1, of the UN Charter, see B. Fassbender, in: Simma ed., *Charter of the UN*, Art. 2 (1) para. 54.

⁶⁷ Article 2, para. 7, of the UN Charter, see G. Nolte, *ibidem.*, Article 2 (7) para. 7.

⁶⁸ For arguments in favor of humanitarian interventions by individual States for the protection of human rights, see Claus Kreß, “Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung” in *Gewaltakte Privater*, 1995; Fernando R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2d. ed., 1997. For the conclusion that only a “thin red line” separates unilateral humanitarian interventions from international legality see Bruno Simma, “NATO, the UN, and the Use of Force: Legal Aspects”, *European Journal of International Law*, num. 10, 1999, issue 1, p. 22; opposed Brad Roth, “Bending the law, breaking it, or developing it? The United States and the humanitarian use of force in the post-Cold War Era”, in Michael Byers and Georg Nolte (eds.), *United States Hegemony and the Foundations of International Law*, 2003, pp. 232-263; Marcelo G. Kohen, “The use of force by the United States after the end of the Cold War, and its impact on international law”, in Michael Byers and Georg Nolte (eds.), *United States Hegemony and the Foundations of International Law*, 2003, pp. 197-231. On the general literature of humanitarian intervention, see *supra*, note 7.

within the debate on UN reform. However, what the reform set out to achieve was to provide criteria for collective intervention in reaction to gross violations of the most basic human rights or to the mass commission of war crimes, crimes against humanity, and genocide.⁶⁹

The 2005 Outcome Document can be regarded as a limited success in this direction. It emphasizes both the responsibilities of each individual State, as well as the subsidiary obligation of the international community. The summit pointed out that “[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity”.⁷⁰

However, States are extremely reluctant to unconditionally bind themselves to act in a concrete manner. Nevertheless, the “international community” seems now to accept an obligation to collectively act to counter mass violence, including measures involving the use of force against the will of the State concerned. Though codifying the responsibility to protect, the summit declaration includes important caveats. In particular, the text limits the responsibility to cases of war crimes, ethnic cleansing, crimes against humanity and genocide —thus excluding the defense of democracy. It is the Security Council— eventually with the support of regional organizations which is called to act, and not individual states, in each specific case and only after the territorial state was “manifestly” unable to do so. Thus, the text avoids giving a blank check to States for unilateral interventions. The responsibility to protect thus attempts to bind the Security Council to take concrete action and to assuage concerns that, in case of in-

⁶⁹ See, in particular, The International Commission on Intervention on State Sovereignty, which had “invented” the concept in its report on The Responsibility to Protect (2001), and the Report of the High-level Panel on Threats, Challenges and Change, A more secure world: our shared responsibility, UN Doc. A/59/565 (Dec. 2, 2004), paras. 29, 199-203.

⁷⁰ World Summit Outcome, GA Res. 60/1, UN Doc. A/RES/60/1, Oct. 24, 2005, para. 138. *Ibidem*, para. 139. The numbers in brackets are ours.

action, gross violations of human rights can go on unhindered.⁷¹ It also meets concerns of individual action by being directed towards the Security Council, not individual States. Thus, the responsibility to protect does not authorize unilateral “humanitarian interventions”.⁷²

Again, however, the main problem lies in the implementation of these principles. In the Council, as the crisis regarding Burma at this very moment demonstrates, China and Russia are inclined to block any measure when internal action of States are concerned. When, however, the Security Council has the will to act, it still needs the support by States to carry out its mandate. A “humanitarian intervention” involving the use of force, cannot be contemplated in the absence of a fighting force. As the Sudan example shows, even when the UN is ready to act decisively, it does at least need the acquiescence of the local government. An all-out war of the UN against Sudan would make things worse not the least for the suffering population of Darfur.⁷³ As it turns out, the recognition of a “responsibility to protect” is the easiest part. The actual prevention of further genocides is something much more complex.

2. Security Council Expansion between Effectiveness and Representation

In many quarters, UN reform and the enlargement of Security Council membership are regarded as two sides of the same coin.

⁷¹ See, e. g., Sofaer, *supra* note 9.

⁷² On “humanitarian intervention” see SC res. 1701 (2006) of 11 August 2006 and *supra* notes 7 and 66 and accompanying text.

⁷³ See for the latest incidences: Report of the Secretary-General on the deployment of the African Union-United Nations Hybrid Operation in Darfur (S/2008/196 and S/2008/98), in which the Secretary-General denounces that the security situation in Darfur deteriorated dramatically in some areas during the month of February 2008; latest attacks on 8 February on civilians in the Western Darfur towns of Abu Suruj, Sirba and Seleia, caused an estimated 200 casualties and have led over 10,000 civilians to flee their homes and seek refuge across the border in Chad.

Many States perceive the current composition as a relic of the World War coalition. If the composition of the Council better reflected the international community, the argument goes, its decisions would enjoy greater legitimacy and the record for compliance would increase.⁷⁴ In the same vein, the Outcome Document of the World Summit 2005 marking the 60th anniversary of the United Nations endorsed a Council reform “in order to make it more broadly representative, efficient and transparent and thus to further enhance its effectiveness and the legitimacy and implementation of its decisions”.⁷⁵

Indeed, many important States and regions are not represented by a permanent member, whereas Western Europe, in spite of its dwindling share of the world population and economy, holds two permanent seats. An increase of non-permanent seats—as performed in the 1960s—⁷⁶ cannot make up for the underrepresentation of the developing States, because they do not have a single permanent member with veto power in their ranks (there is only a “collective veto” of 7 of the 10 non-permanent seats together or any 7 members of the Council voting against or abstaining). Thus, Great Britain or France can veto a resolution, India or Brazil—or any other Latin American or African State—cannot. In addition, one may question whether Britain or France, with far less than 100 million inhabitants, should have veto power, while Brazil or India (more than one billion) do not, or why Britain or France, paying about 6% each of the regular budget, should have a veto, Japan and Germany, contributing 19.5% and 8.67%,

⁷⁴ See, e. g., Report of the High-level Panel on Threats, Challenges and Change, A more secure world: our shared responsibility, UN Doc. A/59/565, 2 Dec. 2004, paras. 248-50; In larger freedom: towards development, security and human rights for all, Report of the Secretary-General, UN Doc. A/59/2005 (Mar. 21, 2005), paras. 168-70.

⁷⁵ World Summit Outcome, GA Res. 60/1, 24 October 2005, UN Doc. A/RES/60/1, para. 153.

⁷⁶ GA Res. 1991 (XVII) (UN Doc. A/6019); Simma/Brunner/Kaul, in: Simma (ed.), Charter of the UN, Article 27 MN 9.

respectively,⁷⁷ do not. While there are answers to the question—Britain and France do not only possess nuclear weapons, but are also members of the Nuclear Non-Proliferation Treaty, and enjoy a large following among their former colonies—it is difficult to imagine that, if the Charter were drafted today, Britain and France would become permanent members, while India or Japan would remain on the outside.⁷⁸

Three main proposals are currently under consideration.⁷⁹ The proposal of the former “Group of Four” (Brazil, Germany, India, and Japan)⁸⁰ would add 6 new permanent members, however without the right to veto, and 4 addition non-permanent seats. Obviously, the problem with this proposal is at least twofold: (1) it would further enlarge the Security Council and hamper its effectiveness; and (2) the identification of the new members is dif-

⁷⁷ Scale of assessments for 2005, see Status of contributions as at 30 September 2005, UN Doc. ST/ADM/SER.B/666 (November 10, 2005), Annex II. The exact numbers are 6,127 % (Great Britain), 6,03 % (France), 19,468 % (Japan), 8,662 % (Germany).

⁷⁸ But see Georg Nolte, *Zu Wachstum und Krisen des Völkerrechts in sechzig Jahren Vereinte Nationen, Vereinte Nationen*, 53, 2005, at 192 (the present P5 still the “world-wide most influential powers”, our transl.); Georg Nolte, “The International Legal System: Is Its Nature Changing?”, *Austrian Review of International and European Law*, 8, 2003, 81, at 89 (current composition is “compromise between the possibility of efficient decision-making and co-determination.”).

⁷⁹ The latest version of the G-4 proposal—without Japan—is contained in Brazil, Germany and India: draft resolution, Security Council reform, UN Doc. A/60/L.46 (Jan. 9, 2006). For the AU proposal, see Ghana, Nigeria, Senegal and South Africa: draft resolution, Reform of the Security Council, UN Doc. A/60/L.41 (December 14, 2005). For the Uniting for Consensus (or “Coffee Club”) proposal, see Argentina, Canada, Colombia, Costa Rica, Italy, Malta, Mexico, Pakistan, Republic of Korea, San Marino, Spain and Turkey: draft resolution, Reform of the Security Council, UN Doc. A/59/L.68 (Jul. 21, 2005). The reports by the High-level Panel and the Secretary-General had contained also two proposals, one similar to the G-4, the other to the Coffee Club ideas, see High-level Panel, *supra* note 75, paras. 252-53; In larger freedom, *supra* note 72, para. 170.

⁸⁰ In the meantime, Japan has left the group and pursues consultations of its own.

ficult, in particular in Africa and Latin America. Each of the four countries has regional foes and competitors that would have great difficulty accepting a permanent seat for one of these countries. The proposal would also further deepen a sort of U.N. “class system”. The “*Ezulwini Consensus*” of African Union members would add eleven seats to the Council and give veto power to the six new permanent members and thus render the Council almost unworkable. The counter-proposal of the 12 country group “Uniting for Consensus”, most of its supporters being among the regional competitors of the G-4, would add 10 new non-permanent seats, and provide for re-election into a seat (“semi-permanent” seats). This proposal would however endanger the stability of the Council by introducing a permanent jockeying for positions.

Nevertheless, contrary to the reform proposals, the main problem of the United Nations is probably not the composition of the Council or even its legitimacy, but its effectiveness. If anything, the legitimacy of the Council has been strengthened since the 1990s as the only body with the capacity to legalize the use of force except in self-defense. If, however, effectiveness is the problem, an expansion of the Council hardly is the solution, in particular if the new permanent members received the right to veto. New permanent members without a veto would further exacerbate the tension between the different “classes” of membership.

For deepening the legitimacy of the Council, the adoption of the proposals of the so-called “Small Five” (S-5)⁸¹ which seeks, *inter alia*, to induce the Council to consult more intensely with the General Assembly and the UN membership at large, to establish “lessons learned” groups for the implementation of SC resolutions, and to broaden the participation in sanctions committees to non-Council members, appears more to the point. As to the use of the veto, the S-5 suggested requiring an explanation

⁸¹ S-5 (Costa Rica, Jordan, Liechtenstein, Singapore, Switzerland), Draft resolution: Improving the working methods of the Security Council, UN Doc. A/60/L.49 (Mar. 17, 2006).

of any exercise of the veto power⁸² and excluding the use of the veto in cases of genocide, crimes against humanity, and serious violations of international humanitarian law altogether.

As to be expected, the response by the Council was disappointing, promising more consultation and information, but no more influence for non-members, let alone a modification of the right to veto or its exercise in practice.⁸³ It is indicative of the real situation when the Council needs to reaffirm that non-permanent members should be involved in the drafting of resolutions and presidential statements.⁸⁴ Thus, the veto will remain at the discretion of the permanent members, and they apparently do not feel bound by any specific duty of self-restraint or of any restriction of selfishness in its exercise.⁸⁵

After the summit, the window of opportunity for Council reform regarding membership seems to have closed.⁸⁶ If anything,

⁸² *Cfr.* Bardo Fassbender, *UN Security Council Reform and the Right of Veto. A Constitutional Perspective*, 1998, pp. 326 and ss.

⁸³ Note by the President of the Security Council, 19 July 2006, UN Doc. S/2006/507 (2006). See already the 2005 World Summit Outcome, GA Res. 60/1, 24 October 2005, UN Doc. A/RES/60/1, para. 154, calling for an increase of the involvement of States not members of the Council and increased accountability and transparency of its work.

⁸⁴ *Ibidem*, para. 41. On the “real” decisionmaking, see, e.g., Anthony Aust, “The Procedure and Practice of the Security Council”, in *The Development of the Role of the Security Council*. Workshop, The Hague, 21-23 July 1992, pp. 365-374 (René-Jean Dupuy (ed.), 1993). See also (in German) Hans-Peter Kaul, “Arbeitsweise und informelle Verfahren des Sicherheitsrats”, *Vereinte Nationen*, 46, 1998, p. 6. There is no indication that this practice has considerably changed since.

⁸⁵ But see Fassbender, *supra* note 83.

⁸⁶ See also the rather superficial Report of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council, General Assembly, Official Records, Sixtieth Session, Supplement num. 47, UN Doc. A/60/47, 2006. However, the President of the General Assembly recently named five diplomats another round of Security Council reform talks, see Assembly president names five diplomats to lead Security Council reform talks, UN News report, Feb. 8, 2007, available at www.un.org/ga/61/news/news.asp?NewsID=21506&Cr=general&Cr1=assembly (visited Feb. 13, 2007).

the debate will have produced some improvements regarding the transparency of the Council's work.

3. *The Future of UN Reform*

The UN reform may thus have fared much better than many observers expected after the disappointing Outcome Document. The establishment of the Peacebuilding Commission is a further contribution to improving the record of UN interventions.⁸⁷ But Security Council reform cannot substitute for the willingness of member States to provide the UN with the required means to exercise protection. The key consists in making States and their representatives—whether superpower or “failed State”—understand that paralyzing and scapegoating the UN will ultimately hurt everybody he strong States, because they cannot do everything alone, and the weak States, because an incapacitated UN may well mean unilateral intervention, and therefore less involvement of smaller powers in actual decision-aking.

V. CONCLUSION

Some claim that the regulation of the use of force by the Charter has failed.⁸⁸ But they do not provide any alternative mechanism to legally circumscribe the use of force. A legal order worthy of that name cannot, however, leave the use of armed force unregulated or unlimited. The post-war situation in Iraq strengthens the insight of the drafters of the Charter that the use of force seldom solves problems, but rather, constitutes the problem itself. The test of relevance has turned against the challenger. When this is progress, it is the one step forward after two steps back.

⁸⁷ The Peacebuilding Commission, UN GA Res. 180 (2005), Doc. A/RES/60/180, December 20, 2005. For an early assessment, see Wolter and Müller, *Getting Serious with Conflict Prevention?*, at 345-46. Its first meetings (on Rwanda and Sierra Leone) were held in July 2006.

⁸⁸ See Glennon, *supra* note 4; Perle, *supra* note 2; Sofaer, *supra* note 9.

The Iraq conflict was a momentous event, but it is not the first instance in which the biggest world power has allegedly disregarded the international rules on the use of force. International law could never be enforced on the territory of a superpower against its will. On the contrary, the effective implementation of international law largely depends on the support of superpowers, in particular the United States. But the project of an international rule of law has lost, in the Iraq war, nothing of its usefulness, even for a power with a global reach that cannot, in spite of all imperialist temptations, manage the world alone. In the words of Michael Walzer: "The US administration will learn sooner or later that hegemony, unlike empire, rests on consent".⁸⁹

The use of force without the clear and unequivocal support of international law and institutions is costly in terms of so-called "political capital", e.g. the costs of maintaining fragile "coalitions of the willing",⁹⁰ which can only be maintained as long as the common will persists. In other words, a permanent institution can withstand conflicts of interests of its members far better than a loose coalition held together by mere expediency.

Thus, the legitimacy bestowed on military action by international institutions is everything but negligible. For example, a Security Council resolution would have allowed not only for a larger anti-Saddam Hussein coalition including, among others, France, Turkey, and NATO as such, but also for a more inclusive and more acceptable post-war regulation. Fighting terror, in particular, requires broad international cooperation. A United States abandoning multilateralism had a much harder time in winning support for the implementation of anti-terrorism measures. As the post-war phase in Iraq has shown, if violence should eventually abate, any use of force has to give way to non-violent means of conflict-resolution, based on a minimum set of common val-

⁸⁹ Michael Walzer, *Is There an American Empire?*, Dissent, 2003, at 29.

⁹⁰ On "coalitions of the willing" see the contributions to Christian Calliess, Peter-Tobias Stoll and Georg Nolte (eds.), *Avantgarde or Threat?*, forthcoming, 2007.

ues and institutions —the very values and institutions international law has helped to develop. Under these circumstances, the UN can, as representative of the international community, provide the legitimacy that eludes the US as former occupying power—. ⁹¹

On the other hand, the UN cannot serve as a world State. It does not possess its own forces. It depends entirely on the support of its membership. The very fact that the UN may play a decisive role in the legitimation of the use of force does not mean that it can guarantee the preservation of peace. Sudan is a warning example that intervention by force can seldom solve problems and is not always available, not in spite, but because of consideration for the civilian population.

The tragedies of Iraq and Sudan attest that neither big power leadership nor UN involvement can guarantee peace or prevent mass murder or genocide. The UN can help the parties and the international community to find a common basis for a solution, and to channel the requisite means for this task. But it cannot step in where willingness for compromise and for providing the requisite means of implementation is missing in the first place. In other words, “safety through international law administered by international institutions” may indeed constitute an illusion, as Richard Perle submits. But, at the same time, safety by super-power fiat does not fare any better.

In a 21st. century in which States appear unable to monopolize the use of force in the same way as in the past, the concept of collective security cannot remain unchanged. But the need for collective action has never been as strong as in the globalized world of today, which faces mass criminality against civilians, and terror, not to mention global inequality, famine, environmental degradation, and religious hatred. The economic realm also needs a

⁹¹ Even Robert Kagan, who had formerly defended US might by pointing out the reliance of the rest of the world on its leadership now emphasizes the need for legitimation, see Robert Kagan, “America’s Crisis of Legitimacy”, *Foreign Affairs*, 83, 2004.

minimum of regulation to thrive. Maintaining and strengthening the universal international organization is cumbersome, but constitutes, ultimately, the only conceivable avenue for building and implementing shared responses to these challenges. Most of these problems will not be solved by military force. But when its use appears necessary, the unilateral defense of universal values against or without the legitimacy provided by the UN will further diminish the prospects of success.

There is little doubt that the UN system of collective security is in crisis. In fact, it always was. Absent of a world State, regulating the use of force places international law always, as Sir Hersch Lauterpacht famously remarked, “at the vanishing point of law”.⁹² But it is the only system we have. Does anyone believe anything resembling the Charter limitations on the use of force would be the outcome of a new San Francisco conference? While international organization is not the solution to all of the world’s problems, a solution of these problems, in particular those involving matters of war and peace, can be found only within the framework of the UN.

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