

**The Expanding Powers of the UN
Security Council and the Rule of Law
in International Relations**

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“I see the most serious fault of our past policy formulation to lie in something that I might call the legalistic-moralistic approach to international problems...It has in it something of the old emphasis on arbitration treaties... and schemes for universal disarmament, something of the more ambitious American concepts of the role of international law, something of the League of Nations and the United Nations,...something of the idea of a universal “Article 51” pact, something of the belief in World Law and World Government. But it is none of this entirely...It is the belief that it should be possible to suppress the chaotic and dangerous aspirations of governments in the international field by the acceptance of some system of legal rules and restraints”

*George F. Kennan*¹

“Our postwar institutions were built for an international world, but we now live in a global world. Responding effectively to this shift is the core institutional challenge.

*Kofi Annan*²

¹ *American Diplomacy, University of Chicago Press, Chicago, 1951, pgs 82,83*

² *The Role of the United Nations in the 21st century, Millennium Summit Report 2000, New York, pg11*

1. Introduction

1.1 A Brief Overview

The Security Council is the organ of the United Nations with the power to determine, in accordance with Article 39 of the Charter, the existence of any threat to the peace, breach of the peace, or act of aggression and to make recommendations, or decide what measures shall be taken to maintain or restore international peace and security.

In discharging such a paramount responsibility the Security Council has expanded its powers and prerogatives. This process has been generally accepted as it concerns the first main purpose of the United Nations, according to Article 1 (1) of its Charter: “to maintain international peace and security”.

However, as the Security Council expands its competence through practice, cases of abuses of powers raise concern about the deficit of legitimacy and representation in that principal organ of the United Nations and affect the rule of law in international relations.

The thesis addresses the essential question of how to strengthen the rule of law within a horizontal and fragmented structure of international relations with a view to making it in tune with the political evolution of nation-states towards a more democratic representation of States in a globalized and interconnected world.

1.2 The Structure of the thesis

The objective of this thesis is to examine the legitimacy of the expanding powers of the Security Council as an international legislator, adjudicator and enforcer. It will also aim at discussing whether such hypertrophy serves the purpose of strengthening the rule of law endeavoured in the United Nations Millennium Declaration.

Due to its focus on Chapter Seven of the UN Charter, the paper will address the widening notion of what may constitute a threat to international peace and security in the absence of a legal definition of this important concept, which leaves an extremely wide discretion to the Security Council.

The paper raises the question of whether there is a line to be drawn between those Security Council decisions which it is proper for it to take as part of its activity directed to the immediate restoration of peace and those that go beyond that function by making legal determinations that are of a legislative or judicial nature.

The thesis deals with a matter of principle related to the legitimacy of the functioning of the main political body of the United Nations, and the legality of the decisions taken, when it acts as a Court of Law, determining what conduct is lawful, if legal prescriptions are null, what behaviour to be criminalized and what specific laws to be enacted.

As the Council acts as a legislature then the question of the representation within that organ becomes more pertinent and the notion of legitimate powers and consent, of democracy and checks and balances to ensure transparency, accountability and prevent abuses of power.

In fact, the Security Council is supreme in the hierarchy of international organisations. No other institution can overrule its determinations and there is no judicial review for the mandatory decisions it takes under Chapter Seven.

The relevance and opportunity of this thesis are enhanced by the dimension of the changes and challenges humankind has been facing since the end of the Cold War and the degree of uncertainty about the shape of democracy, political representation and the rule of law in national and in international affairs.

As the scope of “security” reflects a growing linkage between peace, security and development, ideals of justice, ethics and morals have started to take front seat in international society against a background of a decade of failed unilateralism, political arrogance and a threat to civil liberties on the part of major powers.

1.3. Sources and Methodology

This thesis will use legal, factual as well as political science and political philosophy sources.

The legal sources are mainly the “The United Nations Charter”, as well as charters, resolutions, customs, declarations of the United Nations and other international bodies and organizations. Other sources are legal literature by distinguished scholars, of which many have worked to advance the role of law in international relations and to promote improvement in the machinery of international justice. Information has also been collected from the web sites of the United Nations and the International Court of Justice.

One of the main doctrinary sources used is Norberto Bobbio, philosopher of law and political sciences, also considered a historian of political thought. In an *Age of Rights* how relevant should international law be to the conduct of international relations and foreign policy, as states review their global interests and security paradigm in the 21st century? The thesis finds also inspiration in classical texts of political philosophy such as Immanuel Kant’s 1795 treatise *Perpetual Peace*, according to which peace can only be achieved and secured by increasing the importance of the rule of law in

relations between states and its focus on the role of citizenship. Kant's emphasis on a federation of states able, in cooperation with individual states and their citizens, to take responsibility for preserving the law, would represent a crucial protection against despotism. In that same vein, Jurgen Habermas' 1992, *Between Facts and Norms*, adds to the philosophical debate involving law, politics and democracy. Its pertinence lies also in the fact that his discourse recasts the Kantian "cosmopolitan project" as a "constitutionalization of international law".

As for the methodology, the thesis is based both on comparative concepts pertaining to national and international legal orders as well as historical analysis of international relations and political science and political philosophy research material. The recourse to this multidisciplinary approach is necessary to assess the relationship between international public law and international politics and the extent to which a more legally grounded global community contributes to stability and legitimacy in international relations.

Chapter I

Strengthening the rule of law

During the four decades that followed the Second World War, nuclear deterrence may have prevented a global catastrophe, despite the peripheral conflicts, which challenged the ban on the use of force adopted by the United Nations. The Cold War was a reminder that relative peace on a global scale depended not on the rule of law but on the balance of power, not on the principle of universal respect for human rights and individual freedoms but rather on the notion that might would continue to make right.

That international structure could be considered successful as it avoided another major military conflict for almost half a century, a lengthy historic period when compared with the twenty years interval between the First and the Second World Wars. The failure of the international system conceived by the League of Nations has been attributed to a rigid institutional model created in the belief that a law-based international system could ensure peace and stability.

The system of collective security adopted by the United Nations Charter was founded on that same idea but with significant improvements. This time the establishment of norms of conduct was accompanied by institutional structures for peace enforcement and the peaceful settlement of international conflicts. The ideological dispute between the Superpowers would hamper the functioning of the system. With the collapse of the former Soviet Union, prospects emerged for a new international order founded on the rule of law and not on the fear of mutually assured destruction by military means.

After initially following the path of multilateralism and international cooperation in dealing with the invasion of Kuwait in 1991, the United States of America changed course and, inspired by its hegemonic position in the world, took the path of unilateralism, a tendency exacerbated after the September 11 attack and the President of the United States' declaration of "war on terrorism" ("Our grief has turned to anger, and anger to resolution. Whether we bring our enemies to justice, or bring

justice to our enemies, justice will be done”³). Once again the eclipse of international law’s relevance in dealing with world problems would reflect the dominance of the realist paradigm in international affairs enhanced this time by neo-conservatism belief that unilateralism would ensure quicker results.

No matter the circumstances and expectations after the Cold War, the revitalization of the collective security system established under the Charter did not happen. The efforts made by the international community to strengthen the United Nations and maintain international peace and security in face of the invasion of Kuwait have failed to inaugurate a new paradigm for the conduct of international relations. A decade afterwards, at the turn of a century in which the military expenditures had far outpaced the investments in peace, the UN Millennium Declaration showed how the international community perceived the global predicaments.

On 18 September 2000, at the United Nations, in New York, heads of State and Government of 181 countries signed the Millennium Declaration⁴, a document that represents a broad commitment to mobilize all countries to tackle the main challenges for humankind at the dawn of a new century.

The document considers certain fundamental values to be essential to international relations in the XXI century and acknowledges as the first among them “Freedom”, which is introduced together with the following explanation: *“Men and women have the right to live their lives and raise their children in dignity, free from hunger and from the fear of violence, oppression or injustice. Democratic and participatory governance based on the will of the people best assures these rights”*.⁵

³ U.S. President George W. Bush's address to a joint session of Congress and the nation on 20 September 2001, Washington DC.

⁴ The Declaration was adopted on 18 September 2000 by the General Assembly as Resolution 55/2 (UN – doc: A/RES/55/2), at the Fifty-fifth session, under Agenda item 60 (b).

⁵ *Ibid* paragraph 6.

Within the Millennium Declaration, the Heads of State and Government decided that the first step to promote freedom and other fundamental values was: “*To strengthen respect for the rule of law in international as in national affairs...*”.⁶

The rule of law constitutes a fundamental component of democratic society. It is generally defined as the principle according to which all members of society - both citizens and rulers - are bound by a set of clearly defined and universally accepted laws. In a democracy, it is widely recognized that the rule of law is manifested in an independent judiciary, a free press and a system of checks and balances on leaders through free elections and separation of powers among the branches of government. The legitimate powers of the government should derive from the consent of the governed.

Since Hammurabi’s Code of Laws, the Ten Commandments of the Hebrew, the Chinese, Hindu and Muslim Laws, the Roman Law and the Napoleonic Code up to what it is today the civil and the common law systems, the discipline and protection of the individuals within communities and societies have been a precondition of their survival as a civilization. As the old Latin aphorism says: “Ubi societas, ibi jus” (if there is a society, law will be there). Every community generates its own individual system of law, and only when such a system of law is in fact substantially just and effective is the community able to function.

The same would apply to international society in a shrinking world, in which individual nation-states are more and more interconnected and interdependent and the protection of human rights has become a universal moral and legal imperative. Interdependence means that nation-states are more affected by external circumstance and decisions. Trade, investments, finance and the environment are globally related and are becoming the subject of multilateral regulation, as it also happens with immigration and trans-boundary movement of people.

⁶ *Ibid paragraph 9*

Due to the world's demography and environment, its cultural diversities and current predicaments, as well as to a growing perception of a common fate for humankind, the strengthening of the rule of law in national as well as in international relations might give the measure of success or failure of a global civilization in the 21st century.

According to the Millennium Declaration: *Democratic and participatory governance best assures the right to live in dignity, free from hunger and from the fear of violence, oppression or injustice.*⁷ Political representation and participation are essential elements to guarantee that “the strengthening of the rule of law” serves the entire international community and enhances the legitimacy of international institutions.

Indeed, the principle of democracy is now universal and one of the greatest challenges for humankind in this new millennium will be the struggle to make the practice of democracy equally universal.

Exercised with extreme vigor during the present decade by major powers, the unilateralist trend may have eroded the rule of law and weakened international institutions. Unilateralism still threatens the consolidation of a multilateral system, which better translates the interests of the whole international community and reflects the consensus building efforts necessary to the formation of, and particularly respect for legal rules of universal application.

One of the most important transformations in international law through the twentieth century was the shift from predominantly bilateral treaty relations to multilateral institutional relations. This path should proceed and be enhanced, on a multilateral basis. In the Millennium Declaration, the Heads of State reaffirmed their faith in the Organization of the United Nations and its Charter as indispensable foundations of a more peaceful, prosperous and just world. They also reaffirmed their commitment to the purposes and principles of the Charter, “which have proved timeless and universal”.⁸

⁷ *Ibid* paragraph 6

⁸ *Ibid* paragraph 1

Negotiated by 51 member countries and adopted in 1945, the Charter of the United Nations is the foundation of a multilateral system which now encompasses 192 members, almost four times more than the original ones. In his address to the General Assembly in September 2003, United Nations Secretary-General Kofi Annan warned Member States that the organization had “*reached a fork in the road. It could rise to the challenge of meeting new threats or it could risk erosion in the face of mounting discord between States and unilateral action by them*”.⁹

Today multilateralism represents collective deliberation and reflects democratic values and principles, as it serves the international community, limiting special interests and focusing on common interests of a pluralistic society of nation states.

Democratisation of the international community should gradually reduce some fundamental differences between national and international legal orders. In the first, individuals are the main subjects of a broad and well-established system of domestic laws, while, in the second, States are the principal actors of an expanding but still embryonic system of international rules and institutions.

As States are sovereign, international jurisdiction depends on their consent as parties. Despite widening breaches of this general rule, there is no formal global authority or a centralized power system in the international community similar to the one, which prevails within nation-states.

However, in the most sensitive area of international concern, international peace and security, States have acquiesced in 1945 that some international organs assume an extraordinary degree of compulsory jurisdiction. This is the case of the United Nations Security Council, whose Permanent Members, against whom no action can be taken without their consent, were granted by the United Nations Charter the power to identify the existence of threats to the peace, breaches of the peace and acts of

⁹ *UN Secretary General Statements, The Secretary General Address to the General Assembly, New York, 23 September 2003*

aggression, as well as to determine what measures should be taken by States to restore international peace.

No organ within any domestic legal framework parallels this international instrument of collective peace keeping. No legislature and no judiciary perform such a task. The executive branch might have this dual function of identifying the breach of the law and reacting to it. However, such a reaction is not, or is not meant to be, predominantly influenced by political factors. Moreover, it is subject to judicial control, at least within democratic states.

On the international scene, a different situation exists. The Security Council is not subject to any judicial control that can be invoked at the instance of a party against which it directs its political reaction. In fact, under international law no institution has a formal power of judicial review over an action of the political organ of the United Nations, not even the International Court of Justice.

This situation becomes worrisome as the Council's powers grow exponentially through practice, without any change of the UN Charter. In fact, after the Cold War years, the Security Council's role has expanded indiscriminately in delimiting borders, establishing international criminal tribunals, governing territory, and passing laws of general application on terrorism and nuclear proliferation.¹⁰

Despite growing interdependence among States, the idea of global governance is still considered by most analysts as a utopia, even if defined as "a premature truth". Realistically, international community should remain largely horizontal, based on the principle of the sovereign equality of States, whose deep roots reach the 17th century with the Peace of Westphalia. Yet the legitimacy of the current international order based on the United Nations Charter will increasingly depend on its capacity to be more representative and more accountable for its decisions.

¹⁰ *Security Council Resolutions 773 (1992), 833 (1993), 955 (1994), 1272 (1999), 1373 (2001), 1540 (2004), inter alia.*

The structure of international community continues to be decentralized, in an incipient stage of evolution. Advancements in modern political and social thinking have gradually brought humankind to the *Age of Rights*, to use Bobbio's expression¹¹, but with still fragmented institutions to enforce them. The International Criminal Court is an example of this inexorable but partial expansion of the rule of law.

Indeed, the challenge to strengthen the rule of law as envisaged by the Millennium Declaration is how to improve this horizontal and fragmented structure of international relations to make it more in tune with the political evolution of nation-states towards a more democratic and participatory representation of their peoples taking into account their historic, cultural and religious differences.

It is widely accepted today that the recognition and protection of human rights are the foundation of modern democratic institutions. Human rights, democracy and peace represent the three essential components of the same historic movement. According to Bobbio: "if human rights are not recognized and protected, there is no democracy, and without democracy, the minimal conditions for a peaceful resolution of conflicts do not exist".¹² The Universal Declaration of Human Rights already stated that "...recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".¹³

So far, in international relations there is no system of legal rules to ensure the same degree of transparency in the decision making process, which exists within domestic jurisdiction, to prevent abuses and arbitrary acts by individual States or international organizations concerning peace and security. The administration of justice outside national jurisdiction is still precarious.

¹¹ Bobbio, Norberto, *The Age of Rights*, Polity Press, 1996, first published in Italy as *L'Età dei Diritti*, Giulio Einaudi, 1990.

¹² *Ibid*, vii, *Preface to the English Edition*.

¹³ *The Universal Declaration of Human Rights*, adopted by the General Assembly of the United Nations on 10 December 1948, Preamble, paragraph 1, United Nations documents.

Many argue that we are living in an era of historical transition – one of those periods of rapid change in society and in the institutions as well as in the process by which it is governed. It may seem still far too early to have a clear understanding of the main trends and directions of the changes that lie ahead. If the evolution of nation states is a parameter, the millennium may witness the fragmentation of international power and the emergence of those same rights and values of liberal democracy and representation on a universal scale.

Chapter II

Abuses of power in national and international jurisdictions: a paradox

In 1215, the King of England signed the Magna Carta¹⁴ inaugurating a constitutional tradition of recognition and representation of rights, which is in the origin of early parliamentary democracy. From the 17th to the 19th centuries, in England and in France, philosophers of the “Age of Reason” proclaimed the idea that governments should be created to serve the people and not vice-versa. In opposition to the “divine right of kings”, John Locke insisted on “an established, settled, known law” to which even kings are subject, “a known and indifferent judge” with “power to back and support the sentence when right” and a “supreme” legislative power elected by the people, but bound itself by standing laws and authorized judges.¹⁵ Together with Jean Jacques Rousseau’s “Social Contract” (1762), these ideas of “freedom” and “equality” under the law became basic tenets of democracy.¹⁶

In democratic societies, a regime of separation of powers (legislative, executive and judiciary) provides checks and balances among these different autonomous branches of the State. Both the wide political representation of the people and the system of division of competences within the national government seek to ensure individual rights against abuses of power and arbitrary excesses by the State. Within national systems, States enact constitutions or basic laws establishing the fundamental principles to regulate rights and obligations, which the State enforces inside its borders, where national jurisdiction is respected and internationally recognized.

¹⁴ *King John of England agreed, in 1215, to the demands of his barons through the Magna Carta, which grants "to all freemen of our kingdom" the rights and liberties the great charter described. It is one of the earliest expressions of the rule of law and influenced the development of the common law and constitutional documents.*

¹⁵ *Locke, John, Two Treatises of Government, ed. Thomas Hollis (London: A. Millar et al., 1764). Chapter: CHAP. IX. Of the Ends of Political Society and Government, paragraphs 124, 125 and 126.*

¹⁶ *Rousseau, Jean Jacques. The Social Contract or Principles of Political Right, 1762, Translated by G. D. H. Cole. In its chapter on the right of the strongest, he sustains that: "force does not create right, and that we are obliged to obey only legitimate powers". On the subsequent chapter on slavery, he proceeds by arguing that: "Since no man has a natural authority over his fellow, and force creates no right, we must conclude that conventions form the basis of all legitimate authority among men".*

In the world scene, international law has not yet evolved towards a similar system of wider political representation of States and judicial review of international decisions to safeguard States' rights against abuses and arbitrary excesses by other members of the community of nations. States remain the principal actors in the global arena and their agreement is necessary for subjecting them to international adjudication. Despite the advancements in the evolution of public international law in areas such as representation (concept of sovereign equality of States), peaceful settlement of disputes, prohibition of the threat or use of force and collective enforcement resulting from the adoption of the Charter of the United Nations, consent by the State, remains, in general, a condition for jurisdiction.

The International Court of Justice has no jurisdiction unless the parties have specifically agreed thereto either through a treaty or by accepting the Optional Clause in appropriate terms.¹⁷ Every other tribunal, whether specifically created or institutional, is likewise dependent upon the consent of the parties with a few exceptions such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). They are both ad hoc courts established, respectively, by the Security Council Resolutions 827 (93) and 955 (94) under Chapter VII. It was disputed then if the creation of a tribunal can be considered a *measure* to maintain or restore peace and security, as foreseen in the United Nations Charter, or if the Security Council had overstretched its powers. The question would be solved when, as a result of a process initiated by the UN General Assembly, the Rome Statute entered into force in July 2002. The International Criminal Court became the first permanent, treaty based, tribunal established to help

¹⁷ According to Article 36 of ICJ Statutes: "1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force. 2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation. 3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time. 4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court. 5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms. 6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

end impunity for perpetrators of the most serious crimes. As an independent international organization, not part of the United Nations, the ICC is the instrument for addressing responsibility for those crimes outside national jurisdiction.

Thus, as a general rule, the jurisdiction of international courts and the application of international treaties would require State's consent to acquiesce with the adjudication of the specific tribunal or the signature and ratification of a treaty. Otherwise, the State would not be bound by the rules of that treaty nor will it be subject to the jurisdiction of that court.

However, State compliance on decisions of the Security Council taken under Chapter Seven of the United Nations Charter is mandatory to all member states. If these Resolutions acquire a quasi-judicial or judicial character, if they are perceived as an instrument to enhance a deficit of representation in the decisions on the most serious matters, then the legitimacy and fundamental legal basis for such actions should be subject to further scrutiny.

One may argue that the consent given by signing the Charter is so distant from the occasion on which it becomes relevant that the very significance of consent could be at risk. In fact, when the Security Council decides to take actions with respect to threats to the peace, breaches of the peace and acts of aggression, that Resolution must be universally observed and enforced.

Composed of five Permanent Members (China, France, Russia, the United Kingdom and the United States) and ten non-permanent members, with a two-year mandate, the Security Council acts on behalf of the whole international community as the main political organ of the United Nations with the highest hierarchy within the organization.¹⁸

Once a decision is taken by the Security Council under Chapter Seven, it must be observed by all Member States¹⁹ and when necessary, enacted as law. This means that

¹⁸ Article 23 of the United Nations Charter.

¹⁹ According to Article 25 of the UN Charter, "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".

the Executive, the Parliament and the Judiciary of non-member States of the Security Council took no part in the discussion of said Resolution, which will become, nonetheless, in such States a source of legal obligations, as well as of political decisions on the matter.

Chapter Seven deals with “actions with respect to threats to the peace, breaches of the peace and acts of aggression” and Article 39 states that: “the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations or decide what measures shall be taken...to maintain or restore international peace and security”.

Decisions adopted by the Security Council are mandatory for all States, as established by Article 25. By signing and ratifying the Charter, UN Member States agree to accept and enforce them. That obligation is further stressed in Article 48: “ 1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine. 2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members”.

Besides representing the core of the most important organ of the United Nations, for its responsibility on maintaining international peace and security, the Council’s five permanent members can veto any decision of the Council. Such a right is not explicitly mentioned in the Charter, but it is a consequence of Article 27 (3): “Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members...”. Accordingly, any of the five Permanent Members can block decisions on substantive matters, that is to say, on all matters that are not of mere procedural nature.

On the one hand, because of that extraordinary degree of compulsory jurisdiction conferred to it by the Charter, Security Council’s decisions on threats to international peace are, as explained, universally bound. On the other hand, as a prerogative of the

veto power, the Five Permanent Members are the only States to have a license to escape compulsory jurisdiction by the possibility of choosing the cases they are willing to acquiesce and of rejecting those others they object being considered by the Council.

This situation represents in itself a departure from the principle of the sovereign equality of States and consecrates a system in which some states are, indeed, more sovereign than others. At that time, it could be argued that it was the price to be paid by the international community to those States, which played an important role in the outcome of the Second World War and in the multilateral system that emerged afterwards. However, from the perspective of the beginning of the 21st century, it is not at all certain that this perception should indefinitely endure in face of the same powerful principles and values which inspired the struggle against Nazism, Fascism and other totalitarian regimes.

Whenever the decisions of the Security Council on Chapter Seven, or the lack of decisions thereof, seem not to reflect the principles and the letter of the Charter but rather the selective political interests of its permanent members the deficit of representation in the main political organ of the United Nation and the lack of judicial review become a reason for legitimate concern. What are the consequences of the hypertrophy of the Council's power and does it contribute to strengthen the rule of law in international relations?

The Security Council accumulates the prerogative of defining and identifying the breach as well as of reacting against it on political ground. The Council already has an extraordinary power, as the organ responsible for international collective security, without any judicial control that can be invoked at the instance of a party against which it directs its political reaction, be it a State or an individual.

The Algerian War, Northern Ireland, Tibet, Vietnam and Chechnya are historically some of the international armed conflicts that do not figure in the record of Resolutions adopted by the Security Council under Chapter 7 of the Charter. Yet, they correspond to similar situations which have been, otherwise, considered by the Council as threats to peace and security.

During the Cold War, the veto has always loomed over the work of the UN Security Council. The United States and the Soviet Union often evoked their prerogative. Overall, the five permanent members cast 199 vetoes between 1946 and 1989, preventing the Council from taking action on many important cases.²⁰ After the Cold War, despite a reduction of the use of veto by the Permanent Members, the Council continued to avoid discussing crises that one of the Five Permanent Members considers to be within its own exclusive sphere of interest.²¹

The selective choice of situations and conflicts enhances the search for greater legitimacy in the decision making power of the Security Council. The record of the Security Council and the unilateral actions of some Permanent Members might be perceived as not in tune with the objective of transparency and accountability.

In a power fragmented shrinking world, international order has to be founded on common principles, values and legitimised by a wider political representation. This order cannot be based on military force alone, but on the capacity of inspiring collective action to pursue the objectives enshrined in the United Nations Charter, as well as in those prescribed by the Millennium Declaration to strengthen the rule of law and democracy in both national and international affairs.

To remain legitimate, international order in the 21st century must not only be accepted by major powers, but will have to be efficient in answering to important ethical and moral issues in the global agenda, such as the ones related to poverty, health and sustainable development, as well as other Millennium Development Goals, capable of inspiring, mobilising and uniting the whole international community. The same would apply to a higher sense of justice in the manner that international decisions are taken, moreover by the Security Council.

²⁰ *Monitoring Policy Making in the United Nations, Subjects of UN Security Council Vetoes, Global Policy Forum, New York, 2004, presents a table with all vetoes from 1945 to 2008, based on data from the United Nations (www.globalpolicy.org).*

²¹ *Bailey, Sydney and Daws, Sam, "The Procedure of the UN Security Council", 3rd Edition, Clarendon Press, Oxford, 1998.*

International politics should be increasingly based upon legal prescriptions, which establishes the limits, discipline and scope of political action. Addressing the dilemma between power and law in the end of the 20th century, Oscar Schachter, former legal advisor to the Secretary General of the United Nations and Professor of the University of Columbia in New York, argued that²² “since we cannot deny the crucial role of power in the relations of States, we should seek to understand the specific impact on the international legal system. Plainly, international law is not an ideal construct, created and given effect solely in terms of its internal logic. Nor can it be understood only as an instrument to serve human needs and aims (though it is that too). International law must also be seen as the product of historical experience in which power and the relation of forces are determinants. Those States with power (i.e., the ability to control the outcomes contested by others) will have a disproportionate and often decisive influence in determining the content of rules and their application in practice. Because this is the case, international law, in a broad sense, both reflects and sustains the existing political order and distributions of power”.

Professor Schachter follows on by asking: “Are powerful States therefore above the law? Does their power mean not only that they have a substantial influence on the formation of rules and obligations but that they also have sufficient ability to control the outcome contested by others as to enable them to violate the law when it is in their interest to do so?”

The former UN Legal Counsel tries to answer that critical dilemma by saying that this would be a misleading conclusion about the realities of law observance in international society.²³ But those questions remain valid and a reminder of the challenges facing the international community to strengthen the rule of law and the democratic principles, as envisaged in the Millennium Declaration.

²² Schachter, Oscar, *International Law in Theory and Practice*, Martinus Nijhoff Publishers, Dordrecht, Netherlands, 1991, pg 6.

²³ *Ibid* pg 7

Chapter III

International law in a more democratic world

In his classical book American Diplomacy, George Kennan, in the chapter dedicated to the war with Spain, explains the imperial phase in United States' history during the 19th century:

“The opponents of expansionism argued partly in legal terms, challenging the constitutionality of such arrangements. But their most powerful arguments were those which asked by what right we Americans, who had brought our country into existence on the thesis that governments derive their just powers from the consent of the governed, could assume the rights of empire over other peoples and accept them into our system, regardless of their own feelings, as subjects rather than as citizens”.

He proceeds by quoting the Senator Hoar of Massachusetts during the debate over the ratification of the Peace Treaty with Spain: “To annex foreign territory and govern it without the consent of its populations would be utterly contrary to the sacred principles of the Declaration of Independence and unconstitutional because it promoted no purpose of the Constitution. The Founding Fathers had never thought that their descendants would be beguiled from these sacred and awful verities that they might strut about in the cast off clothing of pinchbeck emperors and pewter kings; that their descendants would be excited by the smell of gun powder and the sound of guns of a single victory as a small boy by a firecracker on some Fourth of July morning”.²⁴

Nowadays, the principle of consent of the governed is widely recognized. It would be a paradox – and would deprive it of any consequence - if the principle would have no bearing in international relations in a world that becomes ever more interdependent and global.

²⁴ Kennan George F., *American Diplomacy 1900-1950*, University of Chicago Press, Chicago, 1951, pg19

The Declaration of Human Rights, adopted in 1948, states in its Article 21 that:

- “(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives;
- (2) Everyone has the right of equal access to public service in his country;
- (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”

In the last sixty years, the right of all people to take part in the government of their country through free and regular elections has become generally accepted and upheld. People of all cultures value their freedom of choice, and feel the need to have a say in decisions affecting their lives. Yet, the “world of democracies” is not a democratic world. Democratic principles are still to be applied and recognized within the international community.

After the collapse of the Soviet Union and the end of the Cold War, then Secretary General of the United Nations Kofi Annan declared that: “one of the greatest challenges of humankind in the new century will be the struggle to make the practice of democracy equally universal.”²⁵

Indeed, “in an era in which the fates of peoples are deeply intertwined, democracy has to be recast and strengthened, both *within* pre-established borders and *across* them”.²⁶

Under the conditions and circumstances prevailing in this first decade of the 21st century, broader participation and representation in world decision making has become a contingency of the changes in international politics with the emergence of a different scenario from the one which characterized the previous century.

In 2005, the Secretary General of the United Nations presented a five-year progress report on the implementation of the Millennium Declaration, which he called “In

²⁵ Kofi Annan's Closing Remarks to the Ministerial Warsaw, Poland, June 27, 2000.

²⁶ Held, David, *Democracy and the Global Order*, Polity Press, Cambridge, 1995, pg x.

Larger Freedom: Towards Development, Security And Human Rights For All”. In introducing the Report, he stressed that these three interconnected goals - development, security and human rights - “must be underpinned by the rule of law” and should go hand in hand.²⁷

According to the Report: “in a world of inter-connected threats and opportunities, it is in each country's self-interest that all of these challenges are addressed effectively. The cause of larger freedom can only be advanced if nations work together; and the United Nations can only help if it is remoulded as an effective instrument of their common purpose”.

The Report also recognizes that “there is a yearning in many quarters for a new consensus on which to base collective action.” It concludes by saying that “the protection and promotion of the universal values of the rule of law, human rights and democracy are ends in themselves. They are also essential for a world of justice, opportunity and stability. No security agenda and no drive for development will be successful unless they are based on the sure foundation of respect for human dignity”.²⁸

It might be perceived today as a paradox that democracy does not constitute a prerequisite for State membership in the United Nations not even a priority criterion. More and more in regional arrangements, such as in the Organisation of American States, a democratic clause is being introduced as a condition to accession.²⁹

In the United Nations, the Charter in its Article 4th affirms that the Organization is open to all peace loving states which accept the obligations in the Charter and that, according to the Organization, are apt and willing to fulfil these obligations. No state has ever declared to be bellicose although historically some waged wars allegedly declaring to be in pursuit of a lasting peace.

²⁷ UN, General Assembly, Doc. A/59/2005, 21st March 2005, paragraph 13

²⁸ UN, General Assembly, Doc. A/59/2005, 21st March 2005, paragraph 128

²⁹ The United Nations membership are dealt with in Articles 3 to 6 of the UN Charter.

While there is no one model of democracy suitable for all societies, resistance to the democratization process in some cases seems, according to the UN Secretary General, to cloak authoritarianism in claims of cultural difference.

Democracy is on the global agenda and regional particularities have to be taken into account when universal principles and norms are to be established. It is a grass-root process that can find inspiration but cannot be imposed from outside. Secular source of sovereignty and legitimacy, pluralistic multi-party political structures, independent judiciary, free market economies with adequate mechanisms to assure supervision and transparency represent the model of democracy widely accepted.

Kofi Annan's reflections on democracy followed a work by his predecessor Boutros Boutros-Gali, published in 1996 under the title "An Agenda for Democratization".³⁰ There he explains the evolution of the meaning of democracy in world affairs. Thus, in 1945, democracy was a clear concept as defined by the Allied nations in opposition to fascism. But with the onset of the cold war, democracy came to be propounded from two perspectives, East and West. As the third world took its place on the international stage, its members strove to find their own methods of government, appropriate to their needs, providing in the process alternative perspectives on democracy. According to Boutros-Gali, the rapidly changing global scene had set the age-old concept of democracy in a new light: "while differences in the economic, social, cultural and historical circumstances of the world's societies mean that differences will continue between democracy as viewed by one society and democracy as viewed by another, democracy is increasingly being recognized as a response to a wide range of human concerns and as essential to the protection of human rights".³¹

In the last decades, commitment to democracy is becoming a condition clause for participation in regional organizations. According to the Inter-American Democratic Charter: "The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it."³² By asserting this basic

³⁰ Boutros-Gali, Boutros, *An Agenda for Democratization*, New York, 1996

³¹ *Ibid* pg 6

³² *Inter-American Democratic Charter, adopted by the General Assembly of the Organization of American States at its special session held in Lima, Peru, on September 11, 2001.*

universal right, the document upholds the principle that an interruption of the democratic order, or an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state, constitutes an insurmountable obstacle to that government's participation in the inter-American system.³³

The Charter further states that in its Article 2: “The effective exercise of representative democracy is the basis for the rule of law and of the constitutional regimes of the member states of the Organization of American States. Representative democracy is strengthened and deepened by permanent, ethical, and responsible participation of the citizenry within a legal framework conforming to the respective constitutional order.”

According to the Inter-American Democracy Charter, “essential elements of representative democracy include, *inter alia*, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government.”³⁴

Within the African Union, the African Charter on Democracy, Elections and Governance (ACDEG) was adopted in Addis Ababa on January 30, 2007. The document must be ratified by 15 states before it actually enters into effect.

It was developed as part of the African Union’s stated emphasis on promoting democracy and good governance in member states. The ratification of the Charter and the outcome of the current crisis over Zimbabwe’s elections will test the *regional paradigm of democracy in Africa* as well and the role of the international community in supporting it.³⁵

³³ *Ibid* Article 19.

³⁴ *Ibid* Article 3

³⁵ *The African Charter on Democracy was adopted by the Eighth Ordinary Session of the African Union Assembly, in Addis Ababa, Ethiopia, on 30 January 2007, but has been ratified so far by a few countries.*

Democratic accountability requires more than an electoral mandate. For elections to be genuinely free, and for people to feel genuinely represented in government, much more is needed: institutional checks and balances, an independent judiciary, viable political parties, a free press and the freedom of each individual to express his or her ideas without fear of retribution.

One of the main challenges of this century will be to achieve not only national democratic governance worldwide but also to strengthen international relations with the values and principles of political representation and human rights. Those are the same values, principles and rights that once inspired Revolutions in Europe and in America, the struggle against colonialism in Latin America, Asia and Africa, as well as the emergence of national liberation movements and the action of organised civil societies to defend the rights of minorities, cultural identities and social objectives.

Behind the formation of the United States of America in the 18th and 19th centuries and of the European Union in the 20th and 21st centuries, some common principles and ideas as well as institutions could be identified. In both cases there was an urge for freedom and constitutional democracy, representation, participation and accountability. In both cases, there was a strong belief in the need of a system of checks and balances to prevent arbitrary behaviour and abuses of power. In both cases a commitment to uphold the rule of law prevailed together with the notion that no one should be above the law.

In the Millennium Declaration all nations reaffirmed their pledge to the rule of law as the all-important framework for advancing human security and prosperity.³⁶ The strengthening of constitutional democracy and the rule of law should take place primarily within nation-states but the principles and concepts of participation, representation and accountability involved should be more and more part of international relations and a global order.

³⁶ According to the Millennium Declaration, "Good governance comprises the rule of law, effective state institutions, transparency and accountability in the management of public affairs, respect for human rights, and the participation of all citizens in the decisions that affect their lives". *Op cit* pg 22

There should be no paradoxical attitudes in relation to individual States and the international community as a whole, those principles should apply to both in order to be more effective and inspire a better understanding of their value and purpose.

For Boutros-Gali, “democratization is the most reliable way to legitimize and improve national governance, it is also the most reliable way to legitimize and improve international organization, making it more open and responsive by increasing participation, more efficient by allowing for burden-sharing and more effective by allowing for comparative advantage and greater creativity. Moreover, just like democratization within States, democratization at the international level is based on and aims to promote the dignity and worth of the individual human being and the fundamental equality of all persons and of all peoples”.³⁷

He proceeds stating that: “The new world environment has strengthened this fundamental link between democratization nationally and internationally. Once, decision-making in global affairs could have only a limited effect on the internal affairs of States and the daily lives of their peoples. Today, decisions concerning global matters carry with them far reaching domestic consequences, blurring the lines between international and domestic policy. In this way, unrepresentative decisions on global issues can run counter to democratization within a State and undermine a people's commitment to it. Thus, democratization within States may fail to take root unless democratization extends to the international arena.”³⁸

³⁷ *Ibid* pgs 26 and 27 paragraph 66

³⁸ *Ibid* pg 27 paragraph 67

Chapter IV

The Use of Force

The settlement of disputes through the force of arms has been part of the history of humankind. The monopoly of coercion came as a result of the creation of modern states, when war was still considered a legitimate means to advance national interests. During the “Enlightenment”, in the 18th century,³⁹ limits to the traditional behaviour of settling differences by force were imposed. The question of the legality of war started then to be examined. Accountability to citizens for the use of military forces has become a central component of the struggle to establish democratic forms of government. In 1945, after the scourge of two major wars in the core of western civilization, that effort was reflected in the Charter of the United Nations, whose main purpose was to render the use of force between states unlawful.

The threat or use of force was first globally proscribed in Article 2.4 of the United Nations Charter. Under that provision, all Members of the Organization shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

Therefore the UN Charter prohibits armed force in international relations. Force may be used in self-defence if there is an actual or imminent threat of an armed attack. Yet, the use of force must be necessary, that is the only means of averting an attack; and the force used must be proportionate response. It is now widely accepted that an imminent armed attack would justify the use of force if the other conditions are met. The concept of what is imminent may depend on the circumstances.

³⁹ *The philosophical development of that period inspired moral, social, and political change. It promoted the concept of self-governance, natural rights, liberty from oppression, reason, individual rights, common sense, among others. These principles constituted a revolutionary departure from theocracy, oligarchy, aristocracy, and the divine right of kings which prevailed during the Middle Ages. The world evolved then from being teocentric into antropocentric. Religious authority, guild-based economic systems, and censorship of ideas were replaced by a rational discourse and personal judgment, republicanism, liberalism, scientific method and a sense of social responsibility and the rule of law. Such revolutionary changes had also a bearing on the resort to coercion.*

With the exception of the right of self-defense, decisions about the use of military force were to be made in the context of international institutions, as established by Article 39 of the Charter: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”.

For democratic countries which are not permanent members of the Security Council, those decisions would take place far from the representative structures that their governments have relied upon to provide accountability.

In fact, the deficit of representation and accountability within the system of international collective security seems to have been enhanced and become even more conspicuous as a consequence of two historic events at the onset of the 21st century: September 11 and the Invasion of Iraq. Because of these two events, the international agenda put forward in the Millennium Declaration and based on the strengthening of multilateralism was replaced by a different one whose success would allegedly depend on swift response by military means, even if unilaterally decided upon.

The September 11 terrorist attack against the United States in 2001 represented a challenge to the security paradigm both domestic and abroad. It contributed to further boost a tendency by Permanent Members of the Security Council in favour of broadening the concept of security in order to include non-military threats to states as well as non-military and military threats to groups and individuals.

In its turn, the US led invasion of Iraq in March 2003 raised grave questions concerning the legality of that military action, the paralysis of the Security Council, the need of checks and balances and review mechanisms on the decision making process to authorize the use of force and the lack of the necessary public scrutiny and transparency.

These issues were not new and have been debated for a long time. What might be different in this new millennium is the prevailing widespread urge on the part of the international community to promote the rule of law, to ensure accountability in

international relations without exclusion of the most serious cases involving matters under Chapter Seven of the UN Charter.

As the Security Council seeks to widen its responsibility by enlarging the concept of what constitutes a threat to or a breach of international peace and security, the answer to questions raised by the invasion of Iraq and enhanced by the present credibility crisis affecting national and international institutions in the core of the western system has become ever more demanding morally and politically.

On a highly controversial legal basis, the invasion may represent the "last straw" in decades of stretching the UN Charter to cover actions by the major powers in a manner not expressly contemplated in Chapter 7. Whether or not it was done under UN authority, that invasion demonstrates the need to strengthen the legal regime on the use of force and to make the UN Security Council more effective and its members more accountable in matters concerning alleged threats to peace and international security.

Despite the initial emphasis on a so-called "doctrine of pre-emptive self-defence"⁴⁰, the US Government has ended up justifying the legality of its action against Iraq not on that evolved "right" to strike, but rather on a twelve-year old Security Council Resolution 678 (91), which authorized in 1991 a coalition of states to repel Iraq from Kuwait and to restore peace and security in the area.

The US argued that Iraq violated its obligations under the UN-mandated cease-fire, which thus amounted to a "material breach" of the cease-fire conditions that had the effect of "reviving" the earlier authorization to use force. The same legal theory was asserted by other members of the U.S.-led coalition.

⁴⁰ *Nine months after September 11, 2001, in a speech at West Point, President George W Bush declared that the US could not always rely for its security on traditional strategies of deterrence and containment. Instead, he claimed that faced with the perils posed by terrorist networks and rogue states acquiring weapons of mass destruction, it might have to strike first before the danger had materialised. That justification for the use of force, and its profound implications for the UN Charter prescriptions, raised serious legal, moral and philosophical issues. It was not clear if the Bush Administration was seeking to create a new legal basis for the use of force that would be available to all states. Or whether it was trying to create an exception to the existing legal rules that would only apply only to the US.*

In a secret memo of 7 March 2003, the Attorney General of the United Kingdom, Peter Goldsmith, explained the possible legal basis for the use of force against Iraq.⁴¹

Although stating “the UK’s view that a violation of Iraq’s obligations under resolution 687, which is sufficiently serious to undermine the basis of the cease-fire, can revive the authorisation to use force in resolution 678”, he observes the UK and the UN Legal Counsel opinion that, as the cease-fire conditions were set by the Security Council in resolution 687, it was for the Council to assess whether any such breach of obligations have occurred.

However, according to the UK Attorney General, “the argument that resolution 1441 alone has revived the authorisation to use force in resolution 678 will only be sustainable if there are strong factual grounds for concluding that Iraq has failed to take the final opportunity. In other words, we would need to be able to demonstrate hard evidence of non-compliance and non-cooperation”

He finally stressed that: “the lawfulness of military action depends not only on the existence of a legal basis, but also on the question of proportionality. Any force used pursuant to the authorisation in resolution 678:

- must have as its objective the enforcement of the terms of the cease-fire contained in resolution 687 (1990) and subsequent relevant resolutions;
- be limited to what is necessary to achieve that objective; and
- must be a proportionate response to that objective, i.e. securing compliance with Iraq’s disarmament obligations”.

The legal theory deployed by the United States is not considered to be persuasive. The text of Resolution 678, and those resolutions that followed, along with the associated negotiating history and subsequent practice, individually and collectively demonstrate that the United States did not have Security Council authorization in March 2003 to invade Iraq. Moreover, regardless of whether one believes the U.S. legal theory as

⁴¹ *The memo entitled “Advice on the Legality of Military Action Against Iraq”, became public and was reproduced in the Articles in Public International Law of the University of Oslo, Faculty of Law, 2006, pgs 61 to 73.*

persuasive, the complexity of the theory (with its reliance on Security Council decisions taken years earlier to address different circumstances) and the clear resistance of a majority of Security Council members in March 2003 to the deployment of force against Iraq combined to strip the invasion of Iraq of the collective legitimacy.

Indeed, the invasion of Iraq raises serious questions about the international regime on the use of force and the role of the Security Council. If the United States proceeded without authority under international law, then what is the consequence for the rule of law and the institutions which represent it? If the United States advanced despite opposition within the UN Security Council, then what conclusions should be drawn in relation to the Security Council, to its jurisdiction under the Charter and, more broadly, to international law?

Before the war broke out, forty-three Australian experts in international law and human rights legislation, amongst them Sir Ronald Wilson, a former High Court judge and the President of the Human Rights Commission in Canberra, have issued a declaration that an invasion of Iraq would be an open breach of international law and a crime against humanity. The declaration was published by the *Sydney Morning Herald* on the 26th February 2003. Australia was a member of the “coalition of the willing” which under the US leadership invaded Iraq in March 2003.

The Australian legal experts rejected the justifications for war being made by the American, British and Australian governments as a violation of the UN Charter, under which there are only two grounds for the use of force in international conflicts. As they explained: “The first, enshrined in Article 51 of the United Nations Charter, allows force to be used in self-defence. The attack must be actual or imminent. The second basis is when the UN Security Council authorises the use of force as a collective response to the use or threat of force. However, the Security Council is bound by the terms of the UN Charter and can authorise the use of force only if there is evidence that there is an actual threat to the peace (in this case, by Iraq) and that this threat cannot be averted by any means short of force (such as negotiation and further weapons inspections).”

Having outlined the legal basis for war, the declaration concluded: “Members of the ‘coalition of the willing’... have not yet presented any persuasive arguments that an invasion of Iraq can be justified by international law.”

It further argues that “the weak and ambiguous evidence presented to the international community by the US Secretary of State Colin Powell to justify a pre-emptive strike underlines the danger of a doctrine of pre-emption. A principle of pre-emption would allow particular national agendas to completely destroy the system of collective security contained in Chapter 7 of the UN Charter and return us to the pre-1945 era, where might equalled right.”

The letter goes on by stating that there is another “legal dimension” which would form the basis for a war crimes indictment of those responsible for any invasion of Iraq—the likely extent of Iraqi civilian casualties: “Even if the use of force can be justified, international humanitarian law places significant limits on the means and methods of warfare”.

Recent State practice on enforcement of repression of terrorism, disarmament obligations and humanitarian intervention pose a serious challenge to the current legal regulation of the use of force. The concept of security has been further politicised.⁴²

Would it be possible that poor political decisions based on lack of scrutiny and intelligence are creating precedents that could eventually be used to impose a precarious and self-serving dynamics in international law?

Would it be fair to assume that the content of the rules governing the use of force in international law could evolve and be construed on the basis of flaws and fallacies

⁴² Fierke, K.M., *Critical Approaches to International Security*, Polity Press, Cambridge, UK, 2007, pg 1. According to Fierke, “in the decade before the end of the Cold War the concept of security was politicised. Its previous narrow definition, relating to the threat or use of force by states, gave way to a broadening of the term to cover new referent objects and threats”. He sustains that the politics of security went beyond its military dimension and that there is a “renewed conflation of security with the use of force”. He further identifies an “expansionist agenda”, which, with the end of the Cold War, sought to replace the emphasis on the state and the threat or use of force with a broader array of referent objects and sources of insecurity” (pg 2). But the most interesting part of its work may be when he raises the question of “what is security” and how it should be examined. He analyses the meaning and use of the concept of security and its relevance to empirical problems, “ranging from the end of the Cold War, NATO expansion, religious and ethnic conflict, migration, suffering in war, the construction of liberal democracy, the War on Terrorism and Hurricane Katrina”.

rather than on postulates grounded on sound judgement open to the scrutiny of the community of nations and reiterated in subsequent documents?

These are questions that still must be thoroughly examined as the prohibition of the use of force established in the United Nations Charter represents one of the most important changes in international public law after two successive world wars.

Despite the ban on the right of States to use military force unilaterally and the efforts to establish ways in which military force could be used for collective purposes under the auspices of international institutions, hundreds of conflicts have broken out since 1945. In cases, which involved unilateral use of force by Permanent Members of the Security Council, accountability was an issue.

The record of selectivity in choosing which cases Chapter Seven should be applied to as well as the prerogatives proper of the Five Permanent Member of the Security Council make even more relevant the question of how to ensure democratic accountability in the use of means of coercion.

In 1974, the UN General Assembly, in order to contribute to the strengthening of international peace and security, adopted, through Resolution 3314 (XXIX), the following definition of Aggression, considering it “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations...”. The Resolution also called the Security Council to take it into account as guidance in determining, in accordance with the Charter, the existence of an act of aggression.

The definition of aggression contemplates only States actors. Furthermore, there is no legal or other definition that describes the type of situation that is regarded as “a threat to the peace”. The UN Security Council decides, on a case-by-case basis, whether a situation threatens the peace.

The experience over 64 years has revealed a wide gap between what was intended by the drafters of Chapter 7 and the implementation of its prescriptions. As previously

indicated ⁴³, many acts of aggression and breaches of peace have occurred since 1945 without any recourse to the enforcement measures of Chapter 7.

In December 2004, the Secretary General of the United Nations, Kofi Annan, submitted to the General Assembly a Report “A More Secure World: Our shared responsibility” introducing the conclusions of the High Level Panel on Threats, Challenges and Change.⁴⁴

The Panel set out a broad framework for collective security and adopted a broad perspective on security. Annan “wholly endorsed its core arguments for a broader, more comprehensive concept of collective security”. In presenting it to the UN General Assembly, he singled out the Panel’s insistence that we must see the interconnectedness of contemporary threats to our security. In his view, we cannot treat issues such as terrorism or civil wars or extreme poverty in isolation: “the implications of this interconnectedness are profound. Our strategies must be comprehensive”.

The High Level Panel acknowledged that security threats might go far beyond States waging aggressive war. They could extend to poverty, infectious disease and environmental degradation; war and violence within States; the spread and possible use of nuclear, radiological, chemical and biological weapons; terrorism; and transnational organized crime. The threats could come from non-State actors as well as States, and to human security as well as State security.

The panel defended this expansionist concept of security. It argued that the preoccupation of the United Nations founders was with State security. So, when they spoke of creating a new system of collective security they meant it in the traditional military sense: a system in which States join together and pledge that aggression against one is aggression against all, and commit themselves in that event to react collectively. But they also understood well, according to the Panel, long before the idea of human security gained currency, the indivisibility of security, economic development and human freedom. Thus, in the opening words of the Charter, the

⁴³ *Vide pg 20, third paragraph.*

⁴⁴ *The Report of the Secretary-General was tabled as UN document A/59/565.*

United Nations was created “to reaffirm faith in fundamental human rights” and “to promote social progress and better standards of life in larger freedom”.⁴⁵

Indeed, according to the Secretary General, the central challenge for the twenty-first century is to foster a new and broader understanding, bringing together all these strands, of what collective security means — and of all the responsibilities, commitments, strategies and institutions that come with it if a collective security system is to be effective, efficient and equitable.

In its Report, the High Level Panel stressed that any strategy to combat the new international challenges must be respectful of the rule of law and the universal observance of human rights. It stated that the question on when and how force can be used to defend international peace and security has also deeply divided Member States. They had disagreed about whether States have the right to use military force pre-emptively, to defend themselves against imminent threats; whether they have the right to use it preventively to defend themselves against latent or non-imminent threats; and whether they have the right — or perhaps the obligation — to use it protectively to rescue the citizens of other States from genocide or comparable crimes.

According to the Panel, when considering whether to authorize or endorse the use of military force, the Council should come to a common view on how to weigh the seriousness of the threat; the proper purpose of the proposed military action; whether means short of the use of force might plausibly succeed in stopping the threat; whether the military option is proportional to the threat at hand; and whether there is a reasonable chance of success. By undertaking to make the case for military action in this way, the Council would add transparency to its deliberations and make its decisions more likely to be respected, by both Governments and world public opinion.

The Panel recommended the Security Council to adopt a resolution setting out these principles and expressing its intention to be guided by them when deciding whether to authorize or mandate the use of force.

⁴⁵ *United Nations Charter, Preamble, paragraph 2*

Both the record of the Council as well as of its permanent members under the protection of the veto are not encouraging. Either inaction by the Council or arbitrary and non transparent decisions by the major powers represent a threat to the authority of the collective security system, to the legitimacy of the composition of the Council and its voting procedure, and ultimately to its capacity to represent the international community.

No structural changes have been so far approved by the Security Council and no resolution on the use of force has yet been adopted as requested by the Secretary General.

The question remains as to how recent unilateral trends and ethnocentrism have influenced the role and function of the Council as well as the integrity of the Charter system. Do cases such as the armed conflict between Israeli military apparatus and Hamas fighters in the Gaza Strip in 2009 constitute an example of use of force in accordance with the current legal doctrine? Or should they deserve to be further scrutinized to verify whether they reflect prevailing moral values and pattern of veto cast within the Security Council?

Chapter V

The Expanding Powers of the Security Council

The Security Council has been expanding its powers by arrogating to itself in the discharge of its duties a legislative and a judicial competence. This expansion is being achieved through practice rather than reform. After the terrorist attacks against the United States of America on September 11, 2001 and the “war on terror”⁴⁶ declared by the US Administration, such an expansion of power became conspicuous and its consequences started to be felt by Nation States, as well as individuals worldwide.

On 12 September 2001 the Security Council adopted Resolution 1368, which in its preamble recognizes the right of individual and collective self-defence of the United States and other States willing to assist it. However, in operative paragraph 1 it considered the terrorist acts of September 11 as ‘a threat to the peace’ and not an ‘armed attack’ which would legitimise self-defence under Article 51. The same pattern was repeated in Resolution 1373 passed by the Council on September 28 and based upon Chapter Seven.

On that date, the North Atlantic Council took a decision based on Article 5 of NATO Statute, which established the right of collective self-defence in case of attack on one of the members of the Alliance. Its members chose therefore the solution based on Article 51 rather than the collective use of force under the authority of the Security Council.

Thus, in a matter of days, decisions were taken in a way to overcome opposition within the Security Council to the use of force. The question remains if there was then a clear scrutiny of who was responsible under international law for the perpetration of the attacks against the United States on September 11, 2001. The recourse to that combination of political and legal decisions from different international organizations

⁴⁶ *On September 20, 2001, addressing a joint session of congress, President George W. Bush launched what he called the war on terror: "Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated."*

was interpreted by analysts as “a considerable departure from the legal system on the use of force, to the effect of broadening the notion of self-defence”⁴⁷

On 7 October 2001, the United States, assisted by the United Kingdom, started military action against Afghanistan in order to eliminate the bases of terrorist organisations and promote the change of the Taliban regime believed to be associated with them. In a letter to the UN Security Council, the US government asserted its right to use force not only against Afghanistan but also against other organizations and countries involved in terrorism. It has been maintained that the position of the UN Security Council coupled with the substantial lack of contestation and indeed massive support by States of the US action, could be seen as amounting to “instant customary law and an authoritative re-interpretation of the Charter”. Cassese challenges the existence of “consistent practice and *opinion juris* required for customary change”, moreover in an issue of such overarching importance.⁴⁸

Among the questions raised in relation to the United States led military action against Afghanistan the following should be singled out: 1) lack of a Security Council resolution considering the attacks against the US an *armed aggression* as defined by Article 1 of Resolution 3314 (1974), “aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations”; 2) the absence of a legal recognition of State responsibility in relation to Afghan authorities, taking into account Art 9 of ILC Draft Articles on States Responsibility: “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority”⁴⁹ ; 3)

⁴⁷ Cassese, Antonio, *International Law*, Oxford University Press, second edition, pg 474).

⁴⁸ *Ibid*, pg 47

⁴⁹ On 21 January 2009, speaking at a Conference organized to commemorate in Oslo the 50 Anniversary of NUPI, Lakhdar Brahimi, former Special Representative of the UN Secretary General to Afghanistan regretted that members of the Taliban regime were not invited to the Bonn Conference in 2001 when in his view that regime still then could not be fully identified with Al Qaeda, an organization which has claimed responsibility for the September 11 terrorist attacks.

Security Council Resolutions 1368 (2001) and 1373 (2001), despite recognizing the right of self-defence, could not legitimise military action against Afghanistan, taking into account Article 51 of the UN Charter, which refers specifically to “armed attack” as a “condition sine qua non” for such a lawful reaction⁵⁰ ; 4) self-defence should observe certain conditions well established in international law, such as the temporary character of the resort to self-defence and the proportionality of the action in relation to the aggression. Regime change and prolonged occupation of a country could not be considered the legitimate objective of self-defence; 5) the military action against Afghanistan would represent, for some, a sort of armed retribution of a repressive character in violation of art 2 paragraph 4 and art 2, paragraphs 1 and 7 of the UN Charter; others, however, considered it a *justifiable* war.⁵¹

The legislative phase of the Security Council was significantly enhanced by the adoption of Resolution 1373 (2001), as it imposed a regime to fight terrorism, which transcends the September 11 attacks. The Resolution contains obligations to prevent the financing of terrorism, to freeze funds, to exchange information, to punish terrorists, and to establish effective border controls. Because of the scope of such broad obligations, it is considered a truly legislative resolution under Chapter 7 of the Charter, mandatory to all States, most of them did not participate in the discussion of the matter and will have to apply it as it were a Treaty.

In fact, the enforcement powers of the Security Council are replacing the conventional law making process on the international level. As a consequence of Resolution 1373 (2001) many obligations of the Convention for the Suppression of the Financing of Terrorism of 1999 became universal, although the Convention would only enter into force in March 2002.

⁵⁰ According to Article 51 of the UN Charter: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an **armed attack** occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security...”;

⁵¹ Falk, Richard, *Appraising the War against Afghanistan*, Princeton University, 2002. In early retrospect, he considers “possible to appraise recourse to (the Afghanistan) war by relying on a flexible interpretation of the just war doctrine combined with the rule of reason that takes account of the new context established by a defensive war raged against a global terrorist network of demonstrated will and capacity to inflict catastrophic harm on civilian society”. Yet, he stresses the “importance of identifying and adhering to limits is of great significance here”.

Resolutions 1422 (2002) and 1487 (2003) on the International Criminal Court (ICC) constitute other examples of legislative action taken by the Security Council. They enabled the Council to address a general request to the ICC to defer, for a twelve month period, investigation or prosecution of any case involving current or former official or personnel from a contributing state not a party to the Rome Statute of the ICC, over acts or omission relating to the United Nations –established or - authorized operation. The resolutions were criticized by member states for not specifying a threat to the peace as a precondition for Chapter 7 action. States also disagreed on whether Article 16 of the Rome Statute allowed for such a general request.⁵²

Adopted unanimously by the Security Council, Resolution 1540 (2004) would further confirm allegations of legislative activities as it, under Chapter 7, mandates all States to refrain from supporting by any means non-State actors that attempt to acquire, use or transfer nuclear, chemical or biological weapons and their delivery systems. All States must therefore establish domestic controls to prevent the proliferation of such weapons and means of delivery, in particular for terrorist purposes, including by establishing appropriate controls over related materials, and adopt legislative measures in that respect.

Also by that text, the Council decided to establish, for a period of no longer than two years, a committee comprising all Council members, which would report on the implementation of the present resolution. It called on States to present a first report to that committee, no later than six months from the adoption of the resolution, on steps they had taken or intended to take in its implementation.

By other terms of the text, the Council decided that none of the obligations set forth in the resolution would be interpreted so as to conflict with or alter the rights and obligations of State parties to the Nuclear Non-Proliferation Treaty, the Chemical Weapons Convention and the Biological and Toxin Weapons Convention or alter the responsibilities of the International Atomic Energy Agency (IAEA) or the Organization for the Prohibition of Chemical Weapons (OPCW).

⁵² *Stefan Talmon, Articles in Public International Law, UIO, 2006, pg 6.*

Further by the text, the Council called on all States to: promote the universal adoption, as well as full implementation and strengthening, of multilateral treaties aimed at preventing the proliferation of nuclear, biological or chemical weapons; adopt national rules and regulations to ensure compliance with their commitments under the key multilateral non-proliferation treaties; renew and fulfil their commitment to multilateral cooperation, particularly within the framework of the International Atomic Energy Agency, the Organization for the Prohibition of Chemical Weapons, and the Biological and Toxin Weapons Convention, as important means of achieving their common objectives in the area of non-proliferation and promoting international cooperation for peaceful purposes; and develop appropriate ways to work with industry and the public regarding their obligations under such laws.

No country would dispute the importance of the matter addressed by Resolution 1540 (2004), the question that remains concerns the legality of the Council, under present circumstances of representation and powers, to legislate for the world and replace treaty-making process. Over-simplifications and errors of judgement and analysis as well as intelligence flaws would have clearly recommended a more prudent and legitimate course of action. In domestic legal system this would correspond to a due process of law.

The question of the expansion of legislative powers by the Security Council tends to become ever more politically delicate due to the absence of transparency and accountability, of checks and balances, of a review mechanism and is aggravated by the lack of a reform to make the Council a more representative and democratic body.

In addition to that, as the concept of what constitutes a threat to peace and security has not been legally defined, the power of the Council to determine, on a case-by-case scenario, what is and what is not a threat or a breach could be eventually questioned depending on the merit of such decisions and on other attributes that would ensure and enhance their legitimacy.

As the concept of what constitutes a threat to international peace and security is broadening, transparency and accountability in the decision making process should become most probably a *condition sine qua non* to protect the interests of nation states which are not Permanent Members of the Security Council and do not enjoy the right of veto over the Council's decisions.

In the introduction of the 2004 Report of the High-level Panel on Threats, Challenges and Change⁵³, the Secretary General of the United Nations stressed the need to reach a new security consensus as the challenges in the 21st century, according to the Panel, "go far beyond States waging aggressive war"... "and extend to poverty, infectious disease and environmental degradation; war and violence within States; the spread and possible use of nuclear, radiological, chemical and biological weapons; terrorism; and transnational organized crime". It acknowledged also that these threats are from non-State actors as well as States, and to human security as well as State security.

Annan endorsed the core conclusion of the High Panel that: "the central challenge for the twenty-first century is to fashion a new and broader understanding, bringing together all these strands, of what collective security means - and of all the responsibilities, commitments, strategies and institutions that come with it if a collective security system is to be effective, efficient and equitable.

The Panel also stressed that if there is to be a new security consensus, it must start with the understanding that the front-line actors in dealing with all the threats we face, new and old, continue to be individual sovereign States, whose role and responsibilities, and right to be respected, are fully recognized in the Charter of the United Nations.

For the High Level Panel, more than ever before, no State can stand wholly alone in the twenty-first century. Collective strategies, collective institutions and a sense of collective responsibility are indispensable. The case for collective security would rest on three basic pillars. Today's threats recognize no national boundaries. They are connected, and must be addressed at the global and regional as well as national levels.

⁵³ *Annan, Kofi, A more secure world: Our shared responsibility* (UN doc: A/59/565), 200, pg 14

According to the Panel: “no State, no matter how powerful, can by its own efforts alone make itself invulnerable to today’s threats. And it cannot be assumed that every State will always be able, or willing, to meet its responsibility to protect its own peoples and not to harm its neighbours. We must not underestimate the difficulty of reaching a new consensus about the meaning and responsibilities of collective security”⁵⁴

The first years after the end of the cold war seemed to point towards a new role for the United Nations. In 1990, the Security Council authorized the use of force against Iraq to liberate Kuwait. The Security Council *broadened the interpretation of threats to international peace and security to authorize an intervention for humanitarian purposes in Somalia...*⁵⁵

The concept paper prepared by the United Kingdom for the Security Council open debate of 17 April 2007 is an example of initiatives on the part of some permanent members of the Council in relation to the expansion of its role. The paper deals with the relationship between energy, security and climate and the risks of international conflict. It addresses the impact on potential drivers of conflict (such as access to energy, water, food and other scarce resources, population movements and border disputes).⁵⁶

Taking into account the actions of the Security Council as well as this diplomatic process of reaching a consensus on a broadening notion of what constitutes a threat to international peace and security, the expansion of the Security Council powers through practice on decisions of legislative or judicial nature deserve closer analysis. It will become ever more important for the affected parties and the international community in general to make sure that those deliberations are within the competence

⁵⁴ *Ibid* pg 9

⁵⁵ *Ibid* pg13.

⁵⁶ The concept paper on “Energy, Security and Climate”, presented by the UK for the Security Council open debate on 17 April 2007 can be found at: http://unfccc.int/files/application/pdf/ukpaper_securitycouncil.pdf

of that body according to the Charter and that their rights are safeguarded against abuses of powers.

As there is no international review mechanism for the decisions taken by the Council under Chapter Seven, which are mandatory to all member states of the United Nations, a greater awareness should develop of the deficit of representation and legitimacy within the system of collective security.

In the context of the administration of international justice the question is whether and, if so, where and on what conditions, a line should be drawn between, on the one hand, decisions of the Security Council specifically and directly related to its task of maintaining and restoring international peace and security and, on the other, legal prescriptions that must be automatically enforced by the whole international community. Is it right that the Council acts as a court of law in the sense of determining what conduct is lawful or unlawful for the whole international community. Can the Security Council impose on States rules from treaties that they have not adhered to?

On the other hand, has a permanent member of the Security Council a license to act unilaterally and abuse its privileged powers so as to impose to the whole international community, independently of its will, the most serious consequences of that member's actions in matters related to waging war under the pretence of maintenance of international peace and security?

If we accept that the Security Council has these legislative and judicial powers what would be the implications for the exercise of consent in international law or is it covered by the acceptance of Article 24 of the Charter? How would one explain the importance of consent in international judicial proceedings and the need to identify in relation to the International Court of Justice in each case a specific act of consent for establishing jurisdiction? Is it not a contradiction that States appear willing to recognize the kind of summary and relatively unregulated activity of the Security Council while at the same time resisting the exercise by international tribunals of an orderly and reasoned jurisdiction in respect of disputes which not often rise to the same level of political importance?

This first decade of the new millennium has already given mankind the measure of the changes and challenges nation states, individuals and the world will experience in a much more interconnected, complex and fragmented international community where the strengthening of the rule of law has become as imperative as it was for nation states themselves.

If the Security Council, through its enforcement powers, is replacing convention law-making process in matters concerning maintenance of peace and security, are Resolutions 1373 (2001) and 1540 (2004) examples of this expanding jurisdiction of the Council? Has the Security Council entered a legislative phase and is enacting laws binding on all the Members of the United Nations, despite of their consent? Where will these self arrogated prerogatives lead with an unchecked progressive expansion of the notion of what constitutes a threat to peace and security, in particular to those countries which are not permanent members of the Security Council and are directly affected by the lack of representation and democratic deficit of that body? Are the normative powers of the Security Council, the interaction between the Charter and customary international law, and the processes of desuetude and informal modification of treaties being stretched to the limit of prudence and legitimacy? What constraints operate on the Council when it begins to assume legislative and judicial functions?

These questions must be more thoroughly examined than they have been so far taking into account the main principles of representation and democracy that constitutes an element of legitimacy in the exercise of power in international relations.

It is widely recognized that the Security Council has been expanding its powers for almost twenty years, taking on judicial functions and interceding in the jurisdiction of international courts. It has established international tribunals with criminal jurisdiction over individuals, created exceptions to the jurisdiction of the International Criminal Court, ruled on border disputes between Iraq and Kuwait, and applied sanctions to both states and individuals. When the Security Council performs its functions under Chapter Seven of the Charter and determines the existence of a threat to international peace and security, it enjoys a wide margin of discretion in choosing the appropriate

course of action. The latitude of such a prerogative and the evolving character of the concept of *threat to peace* on which the Security Council basis its actions would demand enhanced legitimacy and representation by the Council as well growing scrutiny by the international community as a whole.

These questions should be more openly addressed by the whole international community before the Security Council adopts a new paradigm of collective security.

Conclusion

During the Cold War, Great Powers' politics prevailed upon international law and affected the system of collective security established by the Charter of the United Nations. Post-1989 transformations represented an opportunity to make the Security Council work properly and enhance the rule of law. Yet the first eight years of the 21st century were a time of missed opportunities in a transition from a world of hegemonic power into an age of multipolarity. Instead of being strengthened, international law and the system of collective security have been weakened either by the misinterpretation of challenges, or the lack of transparency and accountability in the methods to investigate them, as well as the departure from old values, principles and rights that constitute the basis of the Security Council's legitimacy and moral authority.

Collective enforcement under the UN Charter has become relatively free from the constraints of the East-West rivalry. Yet, the Security Council in matters pertaining to the maintenance of peace and security has continued to act in a selective manner not always on the merit of the cases and on the impartial scrutiny of the alleged reasons but rather on the political interest of the Permanent Members of the Council. Decisions on serious matters affecting the whole of the international community have been taken unilaterally by those members or within that Council, not so rarely on a controversial legal basis. Abuses of power raise the issues of consent for the exercise of jurisdiction, deficit of legitimacy and democratic representation within the Security Council, as well as the need for checks and balances and review mechanisms.

Fairness and justice should prevail in order to ensure and enhance the credibility of the United Nations and its organ responsible for the maintenance of international peace and security. For sovereignty to continue losing its strength against the enforcement of mandatory resolutions of the Security Council, those decisions must be applied *erga omnes*, as it becomes harder for the international community to accept that a State or group of States should be above the law. A culture is emerging to reject impunity and to ensure that every State, no matter how powerful, should not be

exempted from public international scrutiny and accountability. The continuous abuses by Permanent Members of the Security Council of their prerogatives make it ever more difficult to morally justify the reasons for the maintenance of such privileges in the 21st century.

It is a major responsibility for the international community to promote and restore greater respect for the rule of law domestically and internationally, as recognized in the Millennium Declaration. It will become ever more difficult for citizens of large democracies to acknowledge and accept that some States remain sovereign while most others are subject without proper representation to a process of continuous weakening of their consent.

States must abide by the UN Charter, but this duty should not exclude criticism or condemnation whenever distortions threaten the legitimacy and the principles on which the United Nations are founded. It should neither prevent member states to pursue reforms that would enhance transparency and accountability and would ensure greater legitimacy in international decision making. The multilateral system will be weakened if the rights and responsibilities that emanate from a century old process of conquest and achievements of individual political freedoms are not properly recognized in the representation of nation states.

A genuine and effective international law system can emerge to regulate a society formed by sovereign States if the price of prevailing instability becomes too high for the majority of its members when domination exclusively by power and self-interest do not attain the common objectives and when the loss of sovereignty affects only the weaker States among the international community. The dangers of indiscriminate use of force and of a lawless world are so evident and challenging that international law must gradually emerge as a *sine qua non condition* for a sustainable international order. A common authoritative international legal system should be incrementally achieved as a means to avoid the prospect of an anarchical global society in which might makes right and significant part of the world population is deprived of proper representation in the decision making process that ultimately regulate their lives.

Under present circumstances of globalisation and interdependence, opportunities exist for establishing an international system which should be progressively based upon the principles of democracy and constitutionality. The rule of law is a necessary safeguard against arbitrary governance both in the local as well as in the global communities. Rights cannot be safeguarded on the former and be disregarded on the latter. The way to promote the rule of law in international relations is to reduce and eliminate what is left of its anarchical nature based on power and misrepresentation of justice and political rights.

Despite the circumstances of power which affect the respect for international law, growing compliance with their norms and principles is being observed and enforced in different fields, including human rights, trade and environment. Before the adoption of the UN Charter, States were authorised to resort to military means to enforce their rights. There was then no general ban on the use of force. No adjudicating organ endowed with general and compulsory jurisdiction has ever been created. However, on the basis of Chapter 7, Security Council resolutions are mandatory and enforceable.

Permanent Members of the Security Council have the faculty to escape compliance even with International Court of Justice's rulings. The relationship between the International Court of Justice and the Security Council well demonstrates the limitation for compliance by the Permanent Members. Given its primary function under the United Nations Charter for maintaining international peace and security, the Council prevails upon the Court.⁵⁷

Consequently, the Security Council can have control over the Court's ability to exercise its jurisdiction in cases being considered by the Council under its Chapter 7 prerogatives. Such a restriction may affect the independence of the Court. If the Court is subject to the control of the Security Council - and to its political decision-making

⁵⁷ According to Article 103 of the UN Charter, "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

process – it cannot function independently and therefore preserve its legitimacy, authority and credibility.

Article 94 of the UN Charter establishes that all members of the Organization must comply with decisions of the Court if they are parties and, therefore, recognize ICJ's jurisdiction. If the parties do not comply, the issue may be taken before the Security Council for enforcement action. Yet, if the judgment is against one of the permanent five members of the Security Council or its allies, any resolution on enforcement could be vetoed. The Nicaragua case⁵⁸ constitutes an example of how the Permanent Members escape non-compliance with the Court's decision. When the Security Council refuses to enforce a judgment against a state, there is no alternative means of forcing the state to comply.

The council's role in delimiting borders, establishing international criminal tribunals, governing territory, and passing laws of general application on terrorism and nuclear proliferation was not contemplated by the international community when the UN Charter was drafted and approved. This situation aggravates the problem of legitimacy in relation to the decisions of the Security Council under Chapter 7 and to the expansion of the notion of what constitutes a threat to international peace and security.

The fact that the Council has acted does not make its actions legitimate and will not always guarantee that its actions are lawful. The Council's actions must be founded in the Charter. It can, for example, impose the respect of a cease-fire or another existing line under Chapter 7, in response to a specific threat to peace and security, but cannot

⁵⁸ *The Nicaragua case was a legal dispute between Nicaragua and the US submitted to the International Court of Justice, which, in 1986, ruled against the US and awarded reparations to Nicaragua. According to ICJ's decision, the U.S. violated international law by supporting Contra guerrillas in their war against the Nicaraguan government and by mining Nicaragua's harbors. The court considered the US "in breach of its obligations under customary international law not to use force against another State", "not to intervene in its affairs", "not to violate its sovereignty", "not to interrupt peaceful maritime commerce", and "in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956." The Court ruled in Nicaragua's favor after the States lost the argument that the ICJ lacked jurisdiction to hear the case, and refused to participate. It later blocked enforcement.*

impose it as a legal boundary between two states where such a boundary is contested and had not been previously delimited.

The absence of formal review mechanisms constitutes a problem to establishing a proper check on the Council's expansive interpretation of its powers. Formally some limits do exist, but they are rarely resorted to. The Council's own voting rules are a check on the uninhibited exercise of those powers. The General Assembly can challenge the Council's actions through a censure, question them through a request for an advisory opinion of the International Court of Justice, or curtail them through its control of the United Nations budget. The issue may be raised in an international tribunal as an incidental question in a case before it. And finally, ultimate accountability lies in the respect accorded to the Council's decisions: if the Council's powers were stretched beyond credibility, States retain the faculty of ignoring the expression of those powers and refuse to comply. However, when it comes to mandatory decisions of the Security Council, the rule is to comply. Otherwise, the Organization would lose prestige and could become irrelevant.

In deciding whether there is a threat to international peace and security, the UN Security Council enjoys a wide margin of discretion in choosing the appropriate course of action. The need for a swift and effective response to a threat to international peace and security might require broad measures, without the safeguards which would apply to courts or to decisions taken by individual States.

The absence of a clear definition of threat to peace and security increases the discretion of the Security Council members when deciding on Chapter Seven issues. As there is no review of the decisions of the Security Council, how would such discretion be considered in case the Council transcends its powers and misjudges the existence of a threat to peace or a breach of peace, which are concepts not legally defined?

The concept of "security" has evolved significantly. From a narrow political and military context, it is being pressed to expand further to acquire new dimensions, which would correspond to new threats and challenges, be they "terrorism", the

proliferation of weapons of mass destruction, major human rights violations, organised crime, failing states or environmental deterioration.

It is important however that such an evolution be grounded not only on the respect for international law and the commitment to strengthen international cooperation under the multilateral system, but also on the perception of fairness, justice and morality, which would ultimately mean that the rules apply to all member states. The double standard will become hardly acceptable under the prevailing circumstances of this first decade of the 21st century.

The record of the Security Council in relation to the principle of legality might be considered to reduce the urgency of any judicial review by the ICJ or a political review by the General Assembly. Yet the terms of the charter increasingly fail to provide legal certainty as to the range of situations covered by the powers of the Security Council. As a matter of fact, legislative resolutions 1373 (2001) and 1540 (2004) threaten further to de-legitimise the Council as they contradict the basic premises of international law-making.

Within the realities of international relations, the Security Council should reclaim its status, as the representative of the international community in order to deal with the new threats, dangers and moral imperatives that have been identified since 1990. However, it is questionable whether the existing legal framework of the Charter, as interpreted through Security Council practice and debate, can meet those challenges in a legitimate and legal way.

If a hegemonic state distorts multilateralism and uses intergovernmental organizations to unilaterally pursue its interests through these mechanisms, it will impair their credibility, legitimacy, and functioning as global institutions. There is a growing unease about the extent to which the Security Council agenda is being dominated by the most powerful member states and translated into military action.

The launching of a UN authorized humanitarian intervention against the wishes of the legitimate governments of member States constitute grave precedents. International organizations may be viewed more as a threat to the security of many countries than

as a source of protection against major-power actions. The allegedly moral predicament of the “right to protect” is being jeopardised by ambiguity and selectivity as in 2009 international conflicts are being witnessed involving serious humanitarian crisis.

Since the Second World War, the legitimization of the use of force by multilateral institutions such as the United Nations and the North Atlantic Treaty Organization has been an important historic evolution. Multilateral forces seem to be moving from a traditional peace-keeping position into a peace-enforcement mode among the warring parties. However, the strengthening of the role of international institutions will largely depend on a coherent vision of justice, morality, legitimacy and consistency.

Despite the end of the Cold War, the continuous expansion of the North Atlantic Treaty Organization raises questions about the threats which would justify it. Is the enlargement process in itself a threat to disarmament and larger global cooperation? Does History justifies the concern of those who would still recognize in NATO a military alliance of former colonial owners responsible for artificially carving up Asia and Africa. Policies of divide, conquer and leave are still alive, if not in the memories of old people at least in the pages of History books. The consistence in the upholding of values and principles is important to ascertain these noble purposes and differentiate them from self-interest and expediency.

Since the establishment of the United Nations a new paradigm has been slowly emerging to become a strong and, possibly, a prevalent factor in international relations during the 21st century. Individual interests would cease to predominate and be subject to a broader international scrutiny coming from a more democratic global society formed by nation states and international organizations, both governmental and non-governmental. Respect for human rights, including the right to development, for a sustainable global environment, for transparency and democratic accountability and a broadened definition of the concept of security would ultimately prevail.

International control over the use of force must be exercised by the Security Council, an organ that suffers from a deficit of legitimacy. The Security Council authority, which is based on the consent of all member states of the United Nations, must be

fully restored and respected. Yet, a critical issue is whether the authority of the Council can be sustained indefinitely if the unrepresentative allocation of power to the present Permanent Members remains unchanged and prevents a more rule based international system.

The expanding powers of the Security Council can be either an enhancement or a challenge to the rule of law and legitimacy in international relations. It will all depend on the Council's capacity to adjust to the realities and expectations of the new millennium. With the spread and the strengthening of democracy, international community cannot evolve independently of a growing urge for fairness and representation in international decision making in matters as serious as a threat or a breach of peace and security and enforcement actions under Chapter Seven of the UN Charter.

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