International Conference

The United Nations and the New Threats: Rethinking Security

Aspen Institute Italia

Istituto Affari Internazionali

Istituto Italiano per l'Africa e l'Oriente

UNICRI
United Nations Interregional Crime and Justice Research Institute

UNITED NATIONS FOUNDATION

With the support of

Ministero degli Affari Esteri

COMPAGNIA di San Paolo

G|M|F The German Marshall Fund of the United States
STRENGTHENING TRANSATLANTIC COOPERATION

Rome, 27-29 May 2004

THE UNITED NATIONS AND THE NEW THREATS:
RETHINKING SECURITY

Aspen Institute Italia
Istituto affari internazionali (IAI)
Istituto italiano per l'Africa e l'Oriente
United Nations Interregional Crime and Justice Research Institute (UNICRI)
United Nations Foundation
Roma, 27-29/V/2004

a. Agenda
b. List of participants
1. "Preemption and international security"/ Abraham D. Sofaer (4 p.)
2. "Preemptive attack: old constraints, new challenges"/ Ivo Daalder (4 p.)
3. "A duty to prevent"/ Anne-Marie Slaughter, Lee Feinstein (6 p.)
4. "Legitimacy, Legality and the use of force"/ Alain Pellet (4 p.)
5. "Legitimacy and the use of force"/ Michael J. Glennon (5 p.)
6. "Juridical institutions and security"/ Natalino Ronzitti (4 p.)
7. "Juridical institutions and security"/ Brigitte Stern (6 p.)
8. "Collective security and humanitarian intervention"/ Adekeye Adebajo (4 p.)
9. "Collective security and humanitarian intervention"/ Thomas G. Weiss 4 p.)
10. "Collective response to crisis situations: the EU, NATO, and UN, and more effective intervention"/ Marta Dassù and Roberto Menotti (9 p.)
11. "Collective response to crisis: strenghthening UN peace operations capacity"/ Susan Rice (7 p.)
12. "Post-conflict reconstruction"/ Mohammed Ayoob (5 p.)
13. "Institutionalizing accountability: a policy paper on the role of the United Nations in improving the design, implementation and coordination of post-conflict justice policies"/ M. Cherif Bassiouni (6 p.)

International Conference

The United Nations and the New Threats: Rethinking Security

Aspen Institute Italia

Istituto Affari Internazionali

Istituto Italiano per l'Africa e l'Oriente

UNICRI
United Nations Interregional Crime and Justice Research Institute

UNITED NATIONS FOUNDATION

With the support of

Ministero degli Affari Esteri

COMPAGNIA di San Paolo

G|M|F The German Marshall Fund of the United States
STRENGTHENING TRANSATLANTIC COOPERATION

Rome, 27-29 May 2004
Istituto Italiano per l'Africa e l'Oriente (IsIAO)
Via Ulisse Aldrovandi, 16A

AGENDA

Thursday, May 27

8:00 pm *Welcome Dinner*

Friday, May 28

Co-chair of the Conference:

- Giuliano Amato, Member of the Italian Senate; Former Italian Prime Minister, Rome
- Amre Moussa, Member of the UN Secretary-General's High-Level Panel on Threats, Challenges, and Change; Secretary General, League of Arab States, Cairo

9:00 am Welcome address by organizing Institutes

Key-note speech by the Secretary General of the Italian Ministry of Foreign Affairs: Umberto Vattani

9:30 am **Session I - Challenges to Security and Uses of Force:**
What do states and publics around the Mediterranean perceive as likely to be the principal risks to their peace and security in coming years? To what extent do they see the threat or use of force as part of the tool-kit to control or suppress these dangers-- and to what extent are such uses of force seen as themselves part of the threat?

Chair: Giuliano Amato, Member of the Italian Senate; Former Italian Prime Minister, Rome
Speaker: Amre Moussa, Member of the UN Secretary-General's High-Level Panel on Threats, Challenges, and Change; Secretary General, League of Arab States, Cairo
Respondent: Roberto Aliboni, Vice-President, Istituto Affari Internazionali, Rome

11:45 am *Coffee Break*

12:00 am **Session II - Pre-emption of Threats to Security**:
What is the capacity of states and international institutions to take pre-emptive action to safeguard against emerging threats? Do current concerns about perils arising from terrorist attacks, nuclear or other WMD proliferation, or terrorist/WMD linkages, reflect a qualitatively different threat environment that renders obsolete the 1945 constraints on states' resort to military force except in self-defense?

Chair: Michael Glennon, Professor of International Law, The Fletcher School of Law and Diplomacy, Tufts University, Medford (MA)
Speaker: Ana Palacio, Former Spanish Minister of Foreign Affairs and Member of the National Parliament, Madrid
Respondents: Yasar Qatarneh, Director, Regional Conflict Prevention Center, Jordan Institute of Diplomacy, Amman
Emma Bonino, Member of the European Parliament, Brussels and "No Peace Without Justice"

2:00 pm Buffet-Lunch

3:00 pm **Session III - Legitimacy, Law, and the Use of Force**:
Under what conditions is the use of force across borders "legitimate," and how much do policymakers care about perceived legitimacy? To what degree do collective security arrangements confer authoritative legitimacy or legality on use of armed force, whether to deal with perceived threats or to afford protection to endangered populations? What is the appropriate flexibility for war powers authority that should rest in the hands of national authorities, in regional organizations, and in the U.N.?

Chair: Stephen Stedman, Research Director, Member of the High-Level Panel on Threats, Challenges and Change, United Nations, New York
Speaker: Alain Pellet, Professor, University of Paris X-Nanterre; Member and Former Chairman, UN International Law Commission
Respondent: Michael Glennon, Professor of International Law, The Fletcher School of Law and Diplomacy, Tufts University, Medford (MA)

4:45 pm *Coffee-Break*

5:00 pm **Session IV - The Instruments of Justice and Political Realities:**
What is the current effectiveness of institutions of justice in dealing with security issues? What are the implications for 21st century security of the growing roles of the International Court of Justice, the new International Criminal Court and related tribunals, creeping "universal jurisdiction" of national courts, and other national and international judicial processes? To what extent may these institutions' application of law constrain the sovereign political decision-making of states, of regional organizations like NATO, and of the Security Council itself in the arena of peace and security?

Chair: Amre Moussa, Member of the UN Secretary-General's High-Level Panel on Threats, Challenges, and Change; Secretary General, League of Arab States, Cairo
Speaker: Nabil Elaraby, Judge, International Court of Justice, The Hague
Respondent: Natalino Ronzitti, Professor of International Law, LUISS University; Scientific Advisor, Istituto Affari Internazionali, Rome

7:00 pm *Adjournment*

8:30 pm *Dinner at the Restaurant "La Vigna dei Cardinali"*
Piazzale di Ponte Milvio, 34
Tel. 06 3333500 - 495

Saturday, May 29

9:00 am **Session V - Capacities for Collective Intervention:**

What are the weaknesses in current international capabilities--U.N., regional, and national--for deploying military units in crisis situations to prevent or contain conflicts? How reliable is NATO as an instrument for either "robust" or pacific peace operations in and outside of its region, and under whose authority may NATO-led forces deploy? How may the concerns and contributions of other states in the region best be incorporated into reliable machinery for collective action? What capabilities may the League of Arab States and its individual members bring to the maintenance of peace and reduction of threats in the region?

Chair: Jeffrey Laurenti, Senior Advisor, United Nations Foundation, New York
Speaker: Stefano Silvestri, President, Istituto Affari Internazionali, Rome
Respondent: Mohammed Kadry Said, Al-Ahram Center for Political and Strategic Studies, Al-Ahram Foundation, Cairo

11:00 am *Coffee-Break*

11:30 am **Session VI - Implications for Change:**

How might Chapters VI and VII of the U.N. Charter be "merged" to develop innovative ways of protecting security? Do recent trends toward Security Council mandates under Chapter VII requiring member states to adopt specified national legislation hold promise of strengthening peace and security? What changes may be needed in the institutional relationships between regional organizations and the United Nations, and among the organs of the United Nations system itself? Do the very rules governing use of force require formal revision?

Chair: Marta Dassù, Director General of International Programs, Aspen Institute Italia; Editor of *Aspenia* Journal, Rome
Speaker: Jeffrey Laurenti, Senior Advisor, United Nations Foundation, New York
Respondent: Shibley Telhami, Sadat Chair for Peace and Development, The Department of Government & Politics, University of Maryland

1:30 pm *End of the Conference*

Buffet-lunch

(6)

International Conference

The United Nations and the New Threats: Rethinking Security

Istituto Italiano per l'Africa e l'Oriente(IsIAO)
Via Ulisse Aldrovandi, 16A

Rome, 27-29 May 2004

LIST OF PARTICIPANTS

Tahar Absi	Professor, Faculty of Social and Human Sciences, Department of Psychology and Educational Sciences, University of Algiers
Aldo Ajello	EU Special Representative for the African Great Lakes Region, Council of the European Union, Brussels
Roberto Aliboni	Vice-President, Istituto Affari Internazionali (IAI), Rome
Giuliano Amato	Member of the Italian Senate; Former Italian Prime Minister, Rome
Fouad Ammor	Scientific Committee Member, Groupement d'Etudes et de Recherches sur la Méditerranée (GERM) ; Chief Editor of GERM-Maroc yearbook, Rabat
Maria Elena Andreotti	Officer-in-Charge, United Nations Interregional Crime and Justice Research Institute (UNICRI), Turin
Shlomo Avineri	Department of Political Science and Institute for European Studies, The Hebrew University of Jerusalem
Dipankar Banerjee	Member of the Resource Group to the United Nations High-Level Panel on Threats, Challenges, and Change; Director of the Institute of Peace and Conflict Studies, New Delhi
Claudio Bisogniero	Plenipotentiary Minister, Deputy Director, General Division for Multilateral Political Affairs and Human Rights, Italian Ministry of Foreign Affairs, Rome
Loretta Bondì	Member of the Resource Group to the High-Level Panel on Threats, Challenges, and Change; Director, Center for Transatlantic Relations program on Cooperative Security –The Paul H. Nitze School of Advanced International Studies/SAIS, The Johns Hopkins University, Washington DC
Emma Bonino	Member of the European Parliament, Brussels and "No Peace Without Justice"
Flavio Brugnoli	Coordinator of Grantmaking Activities, Compagnia di San Paolo, Turin
Vincenzo Camporini	President, Center for High Defence Studies (CASD), Rome
Francesco Cappè	Associate Expert in Charge of the Coordination of the Terrorism Prevention Unit, United Nations Interregional Crime and Justice Research Institute (UNICRI), Turin
Tullia Carettoni	Honorary President, Istituto Italiano per l'Africa e l'Oriente (ISIAO), Rome
Burcu Cevik	Advisor to the Permanent Mission of Turkey to the Office of the United Nations, Vienna
Giuseppe Cucchi	Director, Strategic Scenarios Watch-Nomisma, Bologna
Marta Dassù	Director General of International Programs, Aspen Institute Italia; Editor of *Aspenia* Journal, Rome

Aghil M. El-Barbar	Coordinator of Libyan Accademy in Italy, Rome
Ahmed el-Gehani	Head, Department of Criminal Law, Faculty of Law, University of Bengasi
Abdel Raouf el-Reedy	Chairman, Egyptian Council for Foreign Affairs, Cairo
Nabil Elaraby	Judge, International Court of Justice, The Hague
Giancarlo Gargaruti	Director General, Istituto Italiano per l'Africa e l'Oriente (ISIAO), Rome
Michael J. Glennon	Professor of International Law, The Fletcher School of Law and Diplomacy, Tufts University, Medford (MA)
Gherardo Gnoli	President, Istituto Italiano per l'Africa e l'Oriente (ISIAO), Rome
Smail Hamdani	President, Algerian Association of International Relations (AARI), Algiers
David Hannay	Member of the UN Secretary-General's High-Level Panel on Threats, Challenges, and Change; Former British Ambassador to the European Union and the United Nations
Tamer R. Iskandar	Judge, Ministry of Justice, Cairo
Carlo Jean	President, Society for Nuclear Equipments' Management (SOGIN), Rome
Mohamed Kadry Said	Head of Military Studies Unit, Al-Ahram Center for Political and Strategic Studies, Al-Ahram Foundation, Cairo
Azzouz Kerdoun	Director, Research Unit on Africa-Arab World (URAMA), University of Constantine
Jeffrey Laurenti	Senior Advisor, United Nations Foundation, New York
Sergio Marelli	President, Italian NGO Association, Rome
Andrea Meloni	Plenipotentiary Minister, Head of Policy Planning Unit, Secretariat General, Italian Ministry of Foreign Affairs, Rome
Roberto Menotti	Research-Fellow, International Programs, Aspen Institute Italia
Ghassan Moukheiber	Member of the Lebanese Parliament and President of the Association for the Defense of Rights and Liberties (ADDL), Beirut
Amre Moussa	Member of the UN Secretary-General's High-Level Panel on Threats, Challenges, and Change; Secretary General, League of Arab States, Cairo
Martin Ortega	Research-Fellow, European Union Institute for Security Studies (EU-ISS), Paris
Ana Palacio	Former Spanish Minister of Foreign Affairs and Member of the National Parliament, Madrid
Anand Panyarachun	Chairman of the UN Secretary-General's High-Level Panel on Threats, Challenges, and Change; Chairman, Council of Trustees, Thailand Development Research Institute, Bangkok
Alain Pellet	Professor, University of Paris X-Nanterre; Member and Former Chairman, UN International Law Commission
Silvia Poggioli	Senior European Correspondent, National Public Radio, Rome
Ra'Ed QaQish	Member of the Jordanian Parliament, Amman
Yasar Qatarneh	Director, Regional Conflict Prevention Center, Jordan Institute of Diplomacy (JID), Amman
Luigi Ramponi	President, Defence Committee, Chamber of Deputies, Rome
Natalino Ronzitti	Professor of International Law, LUISS University and Scientific Advisor, Istituto Affari Internazionali (IAI), Rome
Gianluigi Rossi	Vice-President, Istituto Italiano per l'Africa e l'Oriente (ISIAO), Rome
Alexander Schmid	Senior Crime Prevention and Criminal Justice Officer, Terrorism Prevention Branch, Division for Treaty Affairs, United Nations Office on Drugs and Crime (UNODC), Vienna

Mustapha Sehimi	Director of Studies, Center for Strategic Studies; Professor of Law, University of Rabat
Giuseppe Severini	Legal Counsellor, Italian Ministry of Defence, Rome
Stefano Silvestri	President, Istituto Affari Internazionali (IAI), Rome
Stephen Stedman	Research Director of the UN Secretary-General's High-Level Panel on Threats, Challenges, and Change, New York
Shibley Telhami	Sadat Chair for Peace and Development, Department of Government & Politics, University of Maryland
Umberto Vattani	Ambassador, Secretary General, Italian Ministry of Foreign Affairs, Rome
Marvin G. Weinbaum	Scholar-in-Residence, The Middle East Institute and Professor Emeritus, University of Illinois

Observers

Fathi Abu Abed	Press Office, Mission of the League of Arab States, Rome
Riccardo Alcaro	Research-Fellow, Istituto Affari Internazionali (IAI), Rome
Mohamad Ali Mohamad	Head, Mission of the League of Arab States, Rome
Giuseppe Battaglia	Junior Research-Fellow, Aspen Institute Italia, Rome
Alessandro Busacca	Plenipotentiary Minister, Head Office, General Division for Multilateral Political Affairs and Human Rights, Italian Ministry of Foreign Affairs, Rome
Gian Paolo Calchi Novati	Member of the Scientific Committee, Istituto Italiano per l'Africa e l'Oriente (ISIAO), Rome
Fabio Chinda	First Secretary, Embassy of Thailand, Rome
Michele Comelli	Research-Fellow, Istituto Affari Internazionali (IAI), Rome
Maritza Cricorian	Secretary of the Istituto Affari Internazionali (IAI), Rome
Jean-Pierre Darnis	Research-Fellow, Istituto Affari Internazionali (IAI), Rome
Giovanni Gasparini	Research-Fellow, Istituto Affari Internazionali (IAI), Rome
Stefano Jedrkiewicz	Plenipotentiary Minister, Director General's Office, General Division for Middle Eastern and Mediterranean Countries, Italian Ministry of Foreign Affairs, Rome
Pio Mastrobuoni	Member of the Board, Istituto Italiano per l'Africa e l'Oriente (ISIAO), Rome
Raffaello Matarazzo	Research-Fellow, Istituto Affari Internazionali (IAI), Rome
Franco Mazzei	Member of the Scientific Committee, Istituto Italiano per l'Africa e l'Oriente (ISIAO), Rome
Giuseppe Orofino	Member of the Italian Prime Minister's Office, Rome
Rocco Palma	Researcher in International Law, High University Institute for Interdisciplinary Studies (ISUFI), University of Lecce
Kundalee Prachimdhit	Minister, Embassy of Thailand, Rome
Vara-Poj Snidvongs	Ambassador of Thailand, Rome
Gabriele Tonne	Assistant Editor of *The International Spectator* Journal, Istituto Affari Internazionali (IAI), Rome
Giorgio Torchia	Press Office, Istituto Italiano per l'Africa e l'Oriente (ISIAO), Rome
Vichai Varasirikul	Minister Counsellor, Embassy of Thailand, Rome
Shantu Watt	Member of the United Nations Women's Guild, Vienna International Centre
Flavia Zanon	Research-Fellow, Istituto Affari Internazionali (IAI), Rome

Rapporteur

Minh-Thu D. Pham	United Nations Foundation, New York

PREEMPTION AND INTERNATIONAL SECURITY

ABRAHAM D. SOFAER

A crisis exists in the architecture of international security. Secretary General Kofi Anan has appointed this Panel of eminent persons to consider the relevant issues, warning that "it is not enough to denounce unilateralism, unless we face up squarely to the concerns that make some states feel uniquely vulnerable, since it is those concerns that drive them to take unilateral action. We must show that those concerns can, and will, be addressed effectively through collective action."

Among the problems the Panel must consider is the potential use of preemptive military force. Conventional legal analysis leaves little room for the use of force in the territory of foreign states without explicit Security Council approval. International law has been widely construed to permit a State to resort to force only in self-defense in response to an attack on its territory. Preemptive force is restricted to those situations in which such an attack is imminent, and the defending State has no alternative action. These rules, however, are neither reasonable nor respected. The need to defend against the current threats facing States have led them to assert a broader view, including a right to prevent the extraordinary damage that can be inflicted if serious threats are allowed to mature without action.

In considering the issue of preemptive military force – and the issue of force in general – the Panel should identify the current, formidable challenges to international peace and security: failed and irresponsible states; ideologically based fanatical terror; massive violations of human rights; enhanced danger from crime in a technologically advanced, globalized world; and enhanced vulnerability, especially in target-rich States, constrained by their commitment to fundamental liberties. Defensive action – however inventive and coordinated – cannot always provide an adequate level of security. Where massive human and economic consequences are at stake, States will inevitably consider and occasionally resort to the use of force to prevent attacks.

The Security Council, unfortunately, has failed to authorize the use of force in many situations that posed grave dangers for international peace and security. Until 1991, this was because of the Cold War, which restricted UN activities largely to peacekeeping. The collapse of the Soviet Union created new opportunities for the Council to use its powers to enhance international security, which it did with unprecedented consensus in repulsing Iraq's invasion of Kuwait. Thereafter, however, the Council (among other disappointments): failed to remove Saddam Hussein from power or to stop him from murdering many Iraqi citizens; expanded and then abandoned the nation-building effort in Somalia; delayed and inadequately implemented its humanitarian intervention in Bosnia; unconscionably failed to prevent the genocide in Rwanda; failed to approve the

intervention in Kosovo to prevent the murder and displacement of Muslims; and withheld decisive military assistance in several internal crises in Africa and elsewhere until after great human and economic damage had occurred. These failures, along with the Council's refusal to support military action to enforce its many resolutions condemning Saddam Hussein, have undermined any expectation that the Council can provide a reliable and capable, if not exclusive, forum for reducing international threats.

Any effective program to deal with the danger of preemptive force depends, therefore, on enhancing the power and willingness of the Security Council to reduce the dangers that underlie the need to use force preemptively or in response to attacks. This objective can be advanced through a three-part agenda that: (1) expands the Council's capacity to authorize the use of force; (2) establishes principled but realistic standards for the propriety of using force with or without the Council's approval; and (3) leads the Council to use its role as the proper forum for debating the use of force to provide considered evaluations of every use of force and some accountability for its consequences.

1. *Capacity*

International leaders and studies have repeatedly concluded that the Security Council must have a military force at its disposal to respond to humanitarian and strategic emergencies, and to deal with grave threats to peace. Many of the Council's failures to act, and its delays in acting, result not from any disagreement among its Members on the need or propriety of acting, but on the difficulty of fashioning and financing responses on an ad hoc basis. The Panel must remind the Council of Article 43 of the Charter, which anticipated that the Permanent Members would fashion agreements through a Military Committee pursuant to which the Council would be able to call upon cooperating States to provide the military capacity it requires to implement agreed decisions. Efforts to negotiate the basis for such agreements failed, but largely due to Cold War considerations that no longer should preclude consent. Many potential problems remain, but could be avoided, resulting in a plan with several advantages:

- The force would, as contemplated by the Charter, be called up and used only with Security Council approval;
- Each cooperating State would be required to approve sending its forces to implement Council decisions, or to cooperate in other ways;
- The lessons of Bosnia should be incorporated into the design of such a force, to ensure robust rules of engagement and ample command flexibility;
- Agreements would assure immunity and freedom of movement for all forces;
- The Military Committee contemplated in Article 43 could be fashioned to include as full members, entitled to participate in planning and executing military operations, several States that are not Permanent Members of the Security Council but are prepared to support its military operations on a substantial and continuing basis.

II. *Standards*

The Panel should urge the Council to articulate standards to guide both its own approval of military force, as well as the exercise of force by individual or groups of States. With regard to its own actions, the Council has begun this process through its action reversing Iraq's aggression in Iraq, and in resolutions establishing standards to which States must adhere with regard to terrorism. The Council should also signal a new seriousness with regard to attempts by irresponsible States to acquire weapons of mass destruction. Where States Parties to non-proliferation and other WMD-related treaties are found by the Council to be in violation of their obligations, or where States with records of improper conduct are bent on expanding their capacity to harm others, the Council must show greater resolve to curb such conduct. Finally, the Council must make clear that it will not tolerate massive violations of human rights such as occurred in Rwanda and Kosovo. A firm resolve to deal with these and possibly other categories of cases, backed by an Article 43 capacity, will deter wrongdoing and thereby lessen the need for force, as well as provide a higher degree of assurance of an effective Security Council response to States likely to be most seriously affected.

For many years, the UN has actively pursued an ambitious program to establish and expand state responsibilities and human rights. But it has failed to develop the means for implementing these principles, even where they have become universally accepted. It is time for the Council to make clear its intention to enforce the most basic and essential of those responsibilities and rights.

With regard to military actions that lack Council approval, the Panel should affirm the clear Charter principle recognizing the "inherent" right of self-defense. The Council cannot be expected to act in all situations that pose threats to international peace. States must be regarded as free to act to defend their nationals, and in egregious cases to protect humanity from universally recognized offenses. The Panel should affirm this principle, making clear that the Council cannot safely be regarded as the sole source of legitimacy with regard to the use of military force.

At the same time, the Panel should insist that States that resort to force also must be bound by standards. The problem here is the lack of workable standards that are accepted by the international community. It would be futile for the Panel to call on the Council and other international legal bodies to modify use-of-force principles generally asserted as valid by international lawyers. The Panel should, however, urge the Council to adopt as a guideline for its own consideration of military actions, including preemptive acts, an analytic framework that reflects the considerations that the Council itself and all national leaders acting in good faith resort to in weighing the necessity and reasonability of a resort to force. Those considerations include at least the following: the danger posed by the State or group that is regarded as a threat to the State or regional body contemplating action; the likelihood that the danger will be realized, even if an attack is not imminent; the availability of options other than force to reduce or eliminate the threat; and the support a military action derives from Charter principles, including Security Council findings relevant to the issues even if they do not explicitly authorize resort to force. The

effect of this set of standards would be to adopt de facto an approach to the use of force that is both more searching and honest than the rigid categories of current use-of-force analysis. The international community cannot expect to develop a workable system for dealing with threats to international security based on rules that condemn uses of force widely regarded as both morally and strategically necessary.

III. *Process & Accountability*

One of the inherent weaknesses in the current Charter system is its lack of procedures and sanctions designed to increase adherence to international standards of conduct. While the Panel should accept the reality of the use of force by States or groups of States without Council approval, it should also urge the Council to establish procedures and mechanisms of accountability that are informal but effective. Every use of force, by any State or group of States, should be reported to the Council and examined by the Council or a committee to evaluate its necessity and reasonableness under the standards established for this purpose. States should be expected to provide explanations and evidence to support their actions. A report should be prepared for Council consideration, and the Council should take such action on the report, as it deems proper.

Regardless of the outcome of the Council's consideration of military actions, the Council should establish a mechanism that is non-judicial in nature but based on principles of fairness and justice under international law to recommend to States engaged in military operations restrictions on their actions to minimize damage and suffering, and the payment of compensation to non-combatants for physical and economic injury. This function, which could be performed under the supervision of the Military Committee, could become an effective measure for shifting the cost of improper or erroneous military judgments to responsible States. While the body issuing such judgments would have no power itself to enforce them, its conclusions and the response of the States involved could be taken into account by the Council in exercising its own powers. States will inevitably tend to exaggerate the dangers they face, either deliberately or in good faith. Given the severe consequences of military measures, it seems just and potentially useful for the Council to establish regular mechanisms for holding States to account, and for at least encouraging them through moral pressure if not formal resolution to pay for the damage they cause.

The need for a more effective Security Council role is at the heart of any effective plan to deal with the potential use of preemptive force, or of actions based on prior attacks. The Council must accept the special threats that exist today to international peace and security based on terrorism, failures of state responsibility, and massive violations of human rights. It must fashion responses aimed at assuming responsibility for curbing those threats to the extent possible. That can only be achieved if the capacity of the Council to deal with such threats is increased, if the Council establishes standards for its actions, and if it accepts the legitimacy of actions by individual States that meet the standards of necessity and reason, and that are screened through a meaningful process of evaluation and accountability.

(2)

PREEMPTIVE ATTACK — OLD CONSTRAINTS, NEW CHALLENGES

IVO DAALDER

We live a world in which terrorists and tyrants may join forces to develop and use technologies of mass destruction to inflict grievous harm against the United States and its friends, allies and interests anywhere around the globe with not even a moment's notice. How should we respond to this new threat? In its *National Security Strategy* released September 2002, the Bush administration answered this question by promulgating a radically new doctrine of military preemption. "If the United States could have preempted 9/11, we would have, no question," Vice President Dick Cheney told the annual convention of the Veterans of Foreign Wars in Nashville in August 2002. "Should we be able to prevent another, much more devastating attack, we will, no question. This nation will not live at the mercy of terrorists or terror regimes."

Given the havoc a terrorist attack using nuclear or other weapons of mass destruction would surely inflict, preempting such an attack is unquestionably desirable. And the United States, like many other countries, has always left open the possibility of using military force preemptively. It is, as Secretary of State Colin Powell has frequently stated, long been a very useful tool to have in America's foreign policy toolbag. But the Bush administration has gone further by turning a useful tool of last rest into a guiding doctrine of American foreign policy. It is therefore incumbent on the administration to spell out in some detail when preemptive military action is justified and, especially, who is justified in taking such action. This it has not done. As a result, the promulgation of the new doctrine leaves unaddressed profound questions of policy that its advocates have so far ignored.

I. *The Administration's Case for Preemption*

The *National Security Strategy* puts the case for preemption thus: "Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first." This case rests on three propositions.

- First, with the diffusion of advanced technologies, tyrants are acquiring weapons of mass destruction at a perilously rapid rate and, with their help, so will terrorist groups like Al Qaeda. Traditional preventive measures — like diplomacy, multilateral nonproliferation treaties and export controls — may delay but cannot prevent the spread of these weapons into unsavory hands.

- Second, tyrants and especially terrorists view mass destruction technologies as weapons of choice rather than as weapons of last resort. They are much more risk-

prone than our cold war adversaries, and much less likely to care about the consequences of their actions for the lives of those who support or live among them.

- Third, the old, reactive strategies of containment and deterrence are therefore less likely to succeed. And since the risks and consequences of deterrence failing are great, the alternative of preemption is, for all the dangers of such a strategy entails, to be much preferred.

The legal justification for this doctrine resides in the concept of anticipatory self-defense — that is, the notion, long recognized in international law, that states can take defensive action even before an attack has occurred if the threat is truly imminent (traditionally when an opposing force mobilizes in anticipation of an attack). The classic example is Israel's preemptive attack that started the 1967 war, which came in response to the imminent invasion of Israel by its Arab neighbors. What makes the current situation different from previous instances is the need, as the Bush administration sees it, to "adapt the concept of imminent threat to the capabilities and objectives of today's adversaries" — *i.e.*, terrorists and tyrants armed with mass destruction weapons. Since it cannot be known when a state or terrorist organization that possesses weapons of mass destruction will use them and since weapons like these can be delivered without much if any warning, the administration argues that rogue states pose an "imminent threat" when they seek to acquire technologies necessary to build these weapons, and especially nuclear weapons. Accordingly, preemption is justified not just to prevent the use of weapons of mass destruction but also their acquisition.

II. *The Case Against Preemption*

The promulgation of this new doctrine has been met with concern at home and especially abroad — and not without reason. The doctrine suffers from considerable conceptual confusion, most importantly by conflating the notion of prevention with that of preemption. *Preventive* war refers to a premeditated attack of one state against another, which is not provoked by any aggressive action of the state being attacked against the state initiating the conflict. In contrast, a *preemptive* attack is launched only after the state being attacked has either initiated or has given a clear indication that it will initiate an attack. A war against Iraq that is justified by the belief that Baghdad will soon acquire nuclear weapons which it then may use to threaten the interests of others would be a preventive war; an attack against an Al Qaeda cell believed to be plotting a terrorist strike would be a preemptive strike. While the latter can readily be justified on the basis of self-defense, preventive war, especially if launched by a single state on its own accord, cannot. In years past, every president who confronted the question of launching a war to prevent an adversary from acquiring nuclear weapons — whether against the Soviet Union in the late 1940s, against Cuba in 1962, or against China in 1964 —decided against it. In 2003, George W. Bush chose differently, on the basis of evidence that was far flimsier than in these earlier cases.

The doctrine of preemption is also strategically imprudent. If taken seriously by others, it will exacerbate the security dilemma among hostile states, by raising the incentive of all states to initiate military action before others do. The result is to undermine whatever

stability might exist in a military standoff. Take the very real case of India and Pakistan, both nuclear powers with long-standing territorial and other grievances. Suppose tensions rise, as they did again two summers ago, when a million Indian and Pakistani troops massed on the border. Islamabad, fearing that Delhi might try to preempt its quite vulnerable nuclear strike capability, will have a powerful incentive to go first. India, knowing this to be the case, will have an equally powerful incentive to get its weapons off before Pakistan does. Given this dynamic, the use of force in tense situations like these will increasingly be viewed as a first resort, thus undermining whatever moderating influence diplomatic intervention might otherwise have had.

The case of India and Pakistan points to another grave danger of publicly promulgating a doctrine of preemption, which is that other states will invariably embrace arguments in its favor as a cover for settling their own national security scores — as Russia has already done with respect to Georgia. As Henry Kissinger has argued, "It cannot be either in the American national interest or the world's interest to develop principles that grant every nation an unfettered right of preemption against its own definition of threats to its security." The Bush administration recognizes this problem, and warns other countries not to "use preemption as a pretext for aggression." But that is easier said than done. The administration, while arrogating to itself the right to use force whenever and wherever it believes the preemption of potential future threats warrants it, has made no effort to define the line separating justifiable preemption from unlawful aggression. And that may well be the gravest flaw of the new doctrine. For by presuming that the concept of self-defense now includes preemption (as broadly defined), the administration has erased any viable distinction between the offensive and defensive purposes of military action. Yet, the legitimacy of using force depends crucially on a clear and agreed understanding of precisely this distinction.

Whatever the merits and demerits of a preemption doctrine, there are practical problems with relying on such a policy for dealing with the current threat in all but the most extreme situations. One is the difficulty determining the timing of any preemptive strike, especially if the goal is to preempt the acquisition of mass destruction weapons. Is construction of a nuclear plant sufficient reason (as Israel believed to be the case in 1981 when it attacked the Osirak reactor) or should one wait till fissile material production is actually underway? And what about chemical and biological weapons facilities? Are pharmaceutical or fertilizer factories game (as the U.S. believed when it struck a Sudanese facility in 1998)? If so, how can one distinguish between those that produce legitimate products and those that do not — and what of dual-use facilities?

III. *Preemption and Legitimacy*

Preemption sounds better in theory than it is likely to be in practice. There is no doubt that the United States must maintain the capacity to engage in the preemptive use of force. There may well be circumstances in the future in which doing so is both justified and strategically sound. But maintaining the option to preempt is one thing, codifying it as presidential doctrine is quite another. Interestingly enough, many in the Bush administration seem to have come to the same realization. At least when it comes to

dealing with rogue states, preemption seems to have lost its luster. With respect to Iraq, the administration abandoned much of its preemption rhetoric and based the case for using force on the need for Iraq to comply with its disarmament obligations. In the case of North Korea and Iran, the two other members of President Bush's "axis of evil," the administration has embraced diplomacy and dismissed any talk of military action — preemptive or otherwise.

Yet, for all its flaws as a doctrine, there is no doubt that the need for the preemptive use of force has increased in recent years. Just consider, the last three wars America has fought have all been triggered by internal developments within countries: In Kosovo, it was the violation of human rights; in Afghanistan, it was the harboring of a terrorist organization; and in Iraq, it was the development of weapons of mass destruction. Yet, the international norms and rules that govern decisions on the use of force are based on regulating the external behavior among states, not the internal behavior within them. Article 51 enshrines the right of collective and individual self-defense, while other uses of force to deal with threats to and breeches of international peace and security stress inter-state nature of conflict.

The challenge for the international community — and for the United States as one of its leading members — will be to forge a new consensus on the use of force that deals with threats and challenges stemming from the internal behavior of states. How, in such instances, can the use of force be legitimized? Relying solely on the UN Security Council for approval is quite unsatisfactory — as the different cases of Kosovo and Iraq have underscored. Dick Cheney surely isn't the only one to wonder why international legitimacy for using force requires the assent of such disparate countries as China, Russia, Britain, and France. At the same time, a unilateral decision to launch a war against another country, even if in the name of enforcing the will of the international community, is equally unsatisfactory as Iraq showed.

A different basis of legitimacy — one that is neither unilateral nor necessarily UN-based — will have to be developed. Finding this new basis will take intensive effort and discussion, first with our allies in Europe and elsewhere and ultimately with major nations across the globe.
Such an international discussion must be started with great urgency. The High Level Panel convened by Kofi Annan is one place to start finding answers to such important questions as:

- What circumstances justify the preemptive use of force?
- Who must be involved in determining the existence of such circumstances?
- Who should decide that the use of force in these instances are justified?
- Who must participate in its implementation?

An international dialogue aimed at finding appropriate answers underscores that the question of preemption is not one of now or never, but more of when, how, and by whom.

(3)

A DUTY TO PREVENT[1]

ANNE-MARIE SLAUGHTER
LEE FEINSTEIN

Under what conditions of is the use of force "legitimate"? This is a question that has had many answers through the centuries. Force was once legitimate when used in a just cause according to Catholic doctrine, when used to expand an empire, or when used to unite a nation. The drama of the 20th century, from an international legal point of view, is the effort for the first time actually to outlaw the use of force except when used in self-defense, and to transfer the legitimate use of force to a multilateral institution. That is the signal legal achievement of the UN Charter, the structure created by the combination of Article 2(4), Article 51, and Chapter VII.

Today these rules need to be rewritten, or at least amended. The Charter rules were written for the last war – for a classic inter-state conflict waged by standing armies of identifiable soldiers. As horrific as the invasion of Poland or the attack on Pearl Harbor was, the world had time to respond before irrevocable damage was done, and time, indeed, to anticipate and forestall the attack by collective action. The most dangerous security threat facing nations in the 21st century is a possible terrorist attack using a nuclear or biological weapon capable of killing hundreds of thousands or indeed millions of people at a stroke.

Neither deterrence nor defense offer adequate protection against this possibility. We must instead be able to identify the would-be attackers and stop them before they can strike. President Bush has proclaimed a doctrine of unilateral preemption, whereby individual nations that perceive themselves to be at risk can strike first. Secretary General Kofi Annan has rejected unilateral preemption, but has nevertheless recognized the gravity and unprecedented nature of the threat and called upon the Security Council to consider "early authorization of coercive measures." Such authorization will require a revision or at least a reinterpretation of what constitutes a "threat to the peace" under Article 39. It will also require a new consensus on when and how the Security Council should respond.

For many years, a small but determined group of regimes has pursued the nuclear option and other weapons of mass destruction in spite of the international rules barring WMD proliferation and, to a certain extent, without breaking them. Some of these nations cooperate with one another, for example, trading one state's comparative advantage in missile technology for another's in uranium enrichment. Their cooperation, dangerous in and of itself, creates incentives for others to develop a nuclear capacity in response. These regimes can also provide a ready source of weapons and technology to individuals and terrorist organizations that are actively seeking to acquire and use WMD. The threat is gravest when the state pursuing weapons of mass destruction is a closed society headed

[1] This article is adapted from a longer version by the same title published in *Foreign Affairs*, Jan./Feb. 2004.

by a ruler or rulers who menace their own citizens as they much as they do their neighbors and potential adversaries.

I. *New Guiding Principle: A Duty to Prevent*

In the area of humanitarian protection, the International Commission on Intervention and State Sovereignty, co-chaired by Gareth Evans and Mohammed Sahnoun, proposed a new "guiding principle" to govern the international community's response to large-scale humanitarian crises – massive violations of human rights, genocide, even famine or the human costs of anarchy. That principle was "the responsibility to protect." As articulated by the Commission, UN member states have a responsibility to protect the lives, liberty, and basic human rights of their citizens. If they fail or are unable to carry out this responsibility, the international community has a responsibility to step in.

We propose a similar guiding principle to govern responses to a new generation of threats to global security. The international community, acting through the United Nations, should adopt a collective duty to prevent nations run by rulers without internal checks on their power from acquiring or using weapons of mass destruction. In cases where such regimes have already acquired weapons of mass destruction, the first responsibility is to halt these programs and to prevent the regimes from transferring WMD capabilities or actual weapons. The duty to prevent would also apply where a state sponsor of terror is pursuing weapons of mass destruction.

Under the Charter, the Security Council may take action when it determines the existence of a threat to international peace and security. Nothing now prevents the Security Council from identifying the possession or effort to acquire weapons of mass destruction by a government with no internal checks on its power as a threat to the peace, and taking measures accordingly. But articulating and acknowledging a specific duty to prevent such governments from acquiring weapons of mass destruction will shift the burden of proof from suspicious nations to suspected nations and create the presumption of a need for early and, therefore, more effective action.

Why the emphasis on the absence of internal checks on a government's power? We are not simply trying to distinguish between "good" governments and "bad" governments, much less between democracies and non-democracies. It is not that governments that do have internal checks on their behavior always obey international law. They have the same obligations to abide by international agreements restricting the development and use of weapons of mass destruction as anyone else, and their compliance must be monitored. However, in an open society their behavior is open to scrutiny, criticism, and countermeasures by opponents, both domestic and foreign and the existing set of nonproliferation agreements can either circumscribe their behavior or, if political circumstances change dramatically, as they did, say, in South Africa in 1989 and Argentina and Brazil in the 1990s, they can provide a path for states to give up their nuclear ambitions or in the case of Pretoria, even their weapons.

In a closed society with no opposition, however, the international community may only discover a danger when it is too late. In such cases, the standard diplomatic tools are simply not up to the job. We argue that the greatest potential danger to the international community is posed by rulers whose power over their own people and territory is absolute – such that no matter how brutal, aggressive, or irrational they become, no force within their own society has the capacity to stop them. Moreover, they have typically reached such a position by destroying internal opposition and terrifying, brainwashing, and isolating their populations. Indeed, one of the ways that they subdue domestic opposition is to "close" their societies, controlling as many inflows of information as possible. Such leaders may seek simply to consolidate their power and be left alone. But if they choose to menace other countries or to support terrorist groups, it is far more difficult to find out what they are doing and to take effective measures to stop them.

II. *Caveats and Qualifications*

The recognition of a collective duty to prevent as outlined above would be a bold and strong step toward updating the Charter regime governing the use of force to face a new generation of threats. As a guiding principle, however, the duty to prevent would operate *together with* the existing non-proliferation regime. It would have to be carefully applied on a case by case basis. And perhaps most importantly, it must be applied through a process of collective deliberation, preferably through the UN Security Council.

A. *The Duty to Prevent Would Supplement the Existing Non-Proliferation Regime*

The nuclear nonproliferation treaty, the cornerstone of international efforts to prevent the spread of weapons of mass destruction, has been effective at stanching nuclear proliferation in the overwhelming majority of cases. It has also provided a pathway for states seeking to terminate their nuclear programs. Post-Apartheid South Africa's decision to end its nuclear program in 1989 and join the NPT, the first case of a nation with nuclear weapons on its soil voluntarily giving them up, is the leading example.

But the NPT did not prevent a small group of determined states, including Iraq, North Korea, and Iran from traveling down the nuclear path. Indeed, each of these nations, operating in some cases within the legal limits of the treaty, managed to develop advanced nuclear programs or, in the case of North Korea, the material for actual nuclear weapons.

How did this happen? The problem is that in the interests of fairness and due process, the agreement does not make it possible to meaningfully distinguish between nations that are members of the treaty in good standing and nations with clear nuclear designs. Only when clear evidence of a breach emerges can members take action against a member state -- at which point the options have narrowed and it is too late.. The duty to prevent would thus apply to cases where the underlying set of agreements restricting WMD programs -- the Nuclear Nonproliferation Treaty, the Biological Weapons Convention, and the Chemical Weapons Protection -- has not prevented a regime without internal checks from pursuing dangerous weapons, or when such a state withdraws from its obligations or

cheats on them, or when a gap in existing rules needs to be filled to prevent such a regime or leader from acquiring WMD or the means to deliver them.

B. *Application of the Duty to Prevent Would Be Tailored to Individual Cases*

Just as the responsibility to protect cannot practically apply to all regimes that abuse their citizens' human rights, the duty to prevent cannot apply to all closed societies with WMD programs. To be practical the duty has to be limited and applied when it can produce beneficial results. It will obviously be easier for the international community to take preventive measures regarding the acquisition or deployment of nuclear or biological weapons in a relatively small country rather than a major regional or global power. Absolute consistency of application is desirable, but the best cannot be the enemy of the good. At the same time, however, the emphasis on prevention means that the international community must act early in order to be effective and develop a menu of potential measures aimed at a particular government or governments, particularly measures that can be taken well short of any use of force.

C. *The Duty to Prevent Should be Exercised by a Global or Regional Organization*

The most contentious issue raised by a duty to prevent is who decides when and how to use force. No one nation can or should shoulder the obligation to prevent a repressive regime from acquiring WMD capabilities alone. Alternatively, a power as potentially far-reaching as a duty to prevent should not be vested in one nation alone.

The Security Council is still the preferred destination when collective action is necessary. The legitimacy and weight of preventive measures endorsed by the UN will make it easier to carry them out and make them more likely to be effective. It will also make it much harder for the targeted government to play politics as usual. When the international community is divided, nations pursuing weapons of mass destruction exploit the fissure, and states pursuing the nuclear option buy time to advance their WMD programs. The Security Council itself should consider the consequences when it fails to confront the tough issues, leaving it to individual nations to take matters into their own hands, and further eroding the stature and credibility of the United Nations.

Given the prospect of Security Council paralysis, however, other alternatives must be considered. The next stop should be the regional organization that is most likely to be affected by the emerging threat. Failing consensus there, the next best option would be another regional organization, such as NATO, that may have less direct connection to the targeted state but that has a broad enough membership to permit serious deliberation over the exercise of a collective duty. Only after these options are tried in good faith and exhausted should unilateral action or coalitions of the willing be considered.

If force is needed certain "precautionary principles" apply. All non-military measures to achieve the same ends must be tried, unless they can be reasonably said to be futile. The scale, duration, and intensity of force used must be the minimum necessary to achieve the objective; further, the objective itself must be reasonably attainable when measured against the likelihood of making matters worse. Finally, any use of force should be governed by rules of engagement that reflect the fundamental principles of the law of war: proportionality, necessity, and discrimination between combatants and civilians.

III. *Would It Work?*

Would recognition of a collective duty to prevent actually work to reduce the combined threat of terrorism and weapons of mass destruction? Or, as many skeptics are likely to suggest, would it be one more paper promise more likely to paralyze the Security Council than energize it? The best answer is to canvass some concrete examples.

Consider, how the recognition of a duty to prevent could have changed the debate over Iraq. Under existing law, the Bush administration could only make the case for intervention by relying on the present existence of WMD in violation of Security Council resolutions. Even in a case where Saddam Hussein's Iraq was subject to special Security Council restrictions in light of its past nuclear program and use of chemical weapons, the

United States could not make the obvious point regarding Saddam's potential threat, given his absolute power, his past behavior, and his expressed intentions. Yet if the international community had not treated his regime as a special case over the past ten years, that is, had it pursued the policies advocated by Russia and France during the 1990s, the world would have likely faced a nuclear Iraq in 2003, as it nearly did in 1991 at the time of the first Gulf War.

On the other hand, suppose that in March 2003 the U.S. and the UK had accepted a proposal by France, Germany and Russia to blanket Iraq with inspectors as an alternative to the use of force. Presumably those inspectors would have found what U.S. forces now seem to be finding – a capacity and intention to build weapons of mass destruction, but no existing stocks. Would the appropriate response then have been to send the inspectors home and leave Hussein's regime intact? The better answer would have been to recognize the combined threat of the nature of Hussein's regime and his determination to acquire and use WMD from the beginning. The Security Council could have sought his indictment and prosecution for crimes against humanity back in the 1980s, at the same time as we were blanketing the country with inspectors. The duty to prevent would thus focus attention on specific states as subjects of special concern.

And in the wake of the invasion of Iraq, consider the progress made on uncovering and dismantling nuclear programs in both Iran and Libya. In both cases determined action to *prevent*, rather to remove, has yielded results. Iran is a particularly important example, as it reflects a collective effort by the United Nations through the mechanisms of the NPT, but backed up by a new resolution to see the process through. Both cases have also revealed that the pathways of proliferation lead through many nations, both developed and developing, all of which must be both engaged in and possibly subject to the duty to prevent.

In sum, the security threats facing individual nations and the world at large in an era of both terrorism and the proliferation of weapons of mass destruction, particularly nuclear and biological weapons, require a proactive rather than reactive set of responses. The risk of letting a nation get all the way down the road to the actual creation of such a weapon in a political system that blocks information to the outside world and cannot restrain a leader's decision either to use it or to sell it to other nations or terrorist groups is too great. The international community, acting through the United Nations, must recognize a collective duty to prevent such an eventuality by acting as early and as expeditiously as possible.

LEGITIMACY, LEGALITY AND THE USE OF FORCE

ALAIN PELLET

I. *What is the problem?*

"Legitimacy" is not a common word in the language of law. However, it is not without relation to legality. The relationship is both ways:

- law being a result of a "successful political process" that defines how policy goals are converted into binding standards, rules of law will only (or, at least, more easily) appear and be seen as lawful when they are legitimate;
- reciprocally, legality is part of the legitimization process in that, in the usual circumstances, behaviors in conformity with legal rules are seen as legitimate while those illegal will appear as being illegitimate; unless the law is widely seen as manifestly unjust, the fact of a behavior's legality almost certainly guarantees its acceptance as legitimate.

This applies to the use of force in international relations as well. There is but little doubt that an armed action in conformity with either an authorization or a measure taken by the Security Council under Article 42 of the Charter or within the framework of Article 51 will be seen as legitimate, while an armed attack falling outside these two hypothesis will qualify, by nature, as both an illegal and illegitimate aggression. This probably explains why the United States has, even reluctantly, sought the Security Council's blessing before attacking Iraq in March 2003. Similarly, the high degree of probability that the Security Council would not have authorized the contemplated uses of force by the U.S. in this case, or by NATO in Kosovo, explains why, eventually, a vote in this organ was not requested: the rejection of a resolution authorizing the use of force would have made its illegality too apparent and, by way of consequence, would have jeopardized its legitimacy (that is its acceptability by public opinions) even more. By contrast, S.C. Resolution 1368 (2001) has certainly enhanced the legitimacy of the U.S. response in Afghanistan to the "horrifying terrorist attacks" of September 11, by making indisputable that the situation was one of self-defense.

But this is not the end of the question. Legitimacy through the rule of law might be jeopardized if the legitimacy of the legal process itself is put into question. In the present situation, this is the case for two main reasons (corresponding to the only two cases when the use of military force is lawful in the current state of international law):

- the voting rules applicable within the Security Council are seen as unfair since they give a handful of permanent Members a veto power, which, rightly or not, is seen as unfair by a great majority of States and public opinions all over the world – which weakens the moral authority of the decisions of this organ, including those authorizing the use of force; and
- the conditions for the use of the "inherent right of individual or collective self-defense" under Article 51 of the Charter are uncertain and open to questions, Resolution 3314 (XXIX) of the General Assembly (1974) defining aggression being both debatable and optional for the Security Council.

On the other hand, the legal conditions for the lawfulness of the use of force are seen in some limited but highly influential circles – mostly the Bush Administration and the US conservatives

– as abusively (and therefore illegitimately) restrictive mainly because they do not offer a proper legal framework for the defense and reinforcement of the State's interests and do not authorize (the United) States to use force in assuring their (its) national security interest. The U.S. and some others are therefore induced to define unilaterally both their own legitimate interests (quite usually presented under a veneer of "values") and the means by which they are most properly safeguarded -- at the expense not only of the UN collective security system and commonly accepted international law, but also of legitimacy as perceived by the rest of the World.

II. *What can be done?*

It stems from the above that the on-going established process for legitimization of the use of military force through the United Nations is under strong criticism from various circles and different parts of the World. In the current political climate it would seem unrealistic and hopeless to just defend the system as it stands – although from the present writer's point of view, it is highly defensible. On the other hand, it seems rather futile and useless to suggest changes in the law written into the Charter, which would clearly be unacceptable for either, or both, of the two opposed "camps" – if only because any change which calls for a revision of the Charter implies a vote and ratification by a two-thirds majority "of the Members of the United Nations, including all the permanent members of the Security Council" (Articles 108 and 109).

At the "normative" level, two directions could be explored, relating respectively to each of the two conditions for the lawfulness of the use of force under positive international law. *First*, something could probably be done with respect to Article 2, paragraph 4, of the Charter combined with Chapter VII. *Second*, the conditions of use of the inherent right of individual or collective self defense could be more clearly defined.

It is commonplace to recall that Article 2, paragraph 4, is not satisfactorily drafted, and the "codification" by Resolution 2625 (XXV) (1970) of the principle it lays down only improves its understanding in a limited way and, in any case, does not seem to fit the current state of international relations. It would be advisable to adapt and clarify the scope of this principle in a formal and consensual Declaration on the Legitimate Use of Force in International Relations, the main aspects of which could be inserted in a newly drafted Article 2, paragraph 4. The main themes of such a Declaration could be summarized as follows:

- the use of force in international relations or its threat is forbidden under all circumstances except when the conditions set forth in the UN Charter are fulfilled (the current drafting?? of Article 2.4 does not say this straightforwardly);
- the prohibition of the use of force in international relations includes any acts of reprisals, military intervention, and the organization of or aid to civil wars in other states and any acts of terrorism (this is already included in Declaration 2625 (XXV), but could be made clearer and more categorical);
- whether lawful or unlawful, any use of force in international relations does not exempt the Parties, including military forces under UN command, from fully respecting the laws of war, including those pertaining to military occupation of a foreign territory (this is made necessary by the uncertainties in several on-going situations where the differentiation between *jus ad bello* and *jus in bellum* is not clearly perceived).

It cannot be seriously maintained that, leaving aside Article 107 – which has clearly become obsolete -, there is any other legal ground for the use of force in international relations than (i) self-defense (or, at least, reaction to another use of force) and (ii) measures taken by the Security Council pursuant to Article 42, and there is no need nor any realistic possibility to change this

state of the law: "legitimate self-defense" is and must remain the only exception to the prohibition of the use of force in international relations.[1] However, given the uncertainties in the present drafting of the relevant provisions of the Charter, there is room for varied interpretation. It is suggested in particular that:

- the French (and Spanish) text of Article 51 should be brought into line with the English text (*attaque armée* replacing *agression armée*) in order to avoid misunderstandings such as the ones which happened after September 11; more widely, the use of the word "aggression" (for which no generally accepted and "operational" definition has ever been found) should be deleted from Chapter VII of the Charter and replaced by the less sensitive expression "armed attack";
- it could be accepted that measures that do not amount to an armed attack but do involve a use of force justify a proportional use of force by the victim or victims (the question was left open by the International Court of Justice in *Nicaragua* (*ICJ Rep.* 1996, p. 110, para. 210) – more recently, the Court seems to have accepted the lawfulness of such a further step (see the Court's Judgment of 2003 in the *Oil Platforms* case), that this writer nevertheless hesitates to encourage.
- it should be understood that any preemptive use of force is subordinated to a decision by the Security Council, but Article 42 should be redrafted so that (or formally interpreted in such a way that) the current practice (debatable from a strictly legal point of view) of authorizing use of force by a State or a group of States be clearly lawful.

III. *What contributions can be made by collective security mechanisms such as the UN?*

Whatever the clarifications and cautious widening of the cases when the use of force is lawful, the main question remains: who may decide? The answer to be found in the Charter is unambiguous: failing an armed attack the decision power belongs to the Security Council alone (Article 39) and, this is also true in case of an armed attack since, pursuant to Article 51, the inherent right of self-defense ends when the Council "has taken the measures necessary to maintain international peace and security". There should be no question that a State, whichever it is, cannot be a judge in its own case (*nemo judex in re sua*); otherwise the very idea of a collective security would vanish. However, it must be recognized that in the present state of the law, the monopolistic situation of the Security Council might give rise to an incapacity to act, claims for efficiency substituting the law in the quest for legitimacy.

Leaving aside the numerous and unconvincing attempts to modify the composition or voting rules in the Security Council, three tracks probably deserve to be explored.

First, one could think of an "organized self-restraint" in the use of the veto. By this, I mean that the five permanent Members should agree that, when not directly concerned by a given threat to the peace, breach of the peace or armed attack, they would abstain to use their veto right. This should be done through a formal and duly publicized memorandum of understanding.

Second, the celebrated Resolution 377 (V), "Uniting for Peace", should be revived. In reality, it has never been repudiated and all categories of States have used it at a time or another, which confirms its legitimacy even if the debate on its legality is still open. But the "Dean Acheson Resolution" has fallen asleep since the end of the Cold War. It should be seen as a practical

[1] "Strikingly, in making its case for the Iraq war to international audiences, even the Bush administration tacitly accepted this framework, citing Security Council resolutions dating back a dozen years as legal justification for military action; only to domestic audiences did it offer a "preventive" rationale without reference to the Charter.

means to overcome the paralysis of the Security Council and a powerful tool for enhancing the legitimacy of the use of force in such a case: the General Assembly is seen by most States as more "democratic" than the Council (as debatable as the very idea of "international democracy" is) and the end of the confrontation between blocs should lessen the fears of "automatic majorities".

Third, but probably not least, an in-depth thought should be given to the possibility of using the regional arrangements provided for in Chapter VIII not only as a means to achieve pacific settlement of local disputes or to enforce measures decided by the Security Council, but also, "upstream", as forces of proposals and as an aid to decision-making by the Council. At a time when the legitimacy of both the Security Council and the United Nations as a whole is put into question, such a shift towards regional organizations (when they exist – but this could be an incentive to create new ones, in particular in Asia) could be a way to safeguard a sense of collective security in relation with the UN but within less discredited institutions. Moreover, those arrangements, being more proximate to the (potential) enemies, could be, at the same time, more efficient and more easily accepted than the UN seen as a remote "World Government".

In this respect, it could be contemplated to encourage (or direct?) those regional arrangements to act as "peace watchmen" and to bring to the attention of the Security Council the potential threats to the peace in the region. It should also be accepted that, in a case of unlawful use of force against one or several Member States of those regional organizations they could have a first word (subject to confirmation by the Security Council) in determining whether there is a case for the use of force in self-defense and propose specific measures to the Council; they could even provisionally enforce them until the Security Council has taken the necessary measures.

The proposals made above are intentionally limited to fields that are not yet totally explored or in the works (such as the reform of the composition of the Security Council). I am strongly in favor of revisiting some important proposals for the reform of the UN, which are far from having been completely implemented so far, such as the *Agenda for Peace* of former Secretary General Boutros-Ghali of 1992 and 1995 or the Brahimi Report of 2000; their implementation would improve the efficiency of the UN and enhance the legitimacy of its action. However, I am firmly convinced that the current crisis is much less the result of the weaknesses of the legal framework than of the lack of political will of the various actors – and I have less in mind that of the U.S. than that of its partners which do not, or dare not, use properly the irreplaceable tool of regulation of the use of force provided by the UN Charter.

(5)

LEGITIMACY AND THE USE OF FORCE

MICHAEL J. GLENNON[1]

This paper addresses, first, issues concerning legitimacy and use of force, and, second, issues concerning international legal rules governing the use of force.

I. *Legitimacy*

A. *Whose sense of legitimacy is politically relevant, and how does a standard of "legitimacy" differ in theory and impact from "legality"?*

"Legitimacy" is like "morality," "fairness," or "justice" in that the standard it supposes to exist is entirely subjective; there is no commonly agreed upon test of legitimacy, nor is there any way of agreeing upon a methodology that would lead to the establishment of such a test. "Legitimacy" is often used in the United Nations as synonymous with "lawful," but the two terms have an entirely different meaning. Law is far less subjective, and its meaning is far less dependent upon the personal, political, and philosophical predisposition of the interpreter. Law is intended to be objective and universal; its meaning is intended to be the same for all actors subject to it. That, indeed, is its greatest contribution to social organization. If all that is legitimate were necessarily lawful, law would be robbed of its essential characteristic of equality of application, and enforcement and compliance would become a function of personal and political preference. No training is required to pronounce a given action "legitimate." There is no body of learning, like law, that sets out a common understanding of what is legitimate. Anyone and everyone therefore can say without fear of contradiction what is legitimate and what is not. It is thus a serious mistake to equate law and legitimacy.

The difficulty arises when law and legitimacy repeatedly conflict—when the law prohibits something that is seen as legitimate or permits something that is seen as illegitimate. Subjective though it is, ideas about what is legitimate or illegitimate often are shared by various groups. Legitimacy in this sense subsumes elements of justice and morality but is enhanced by institutional endorsements (by, for example, NATO, the Security Council, the U.S. Congress, or even the Pope) that create a sense of consensus. Over time, a tension between law and legitimacy weakens the binding force of legal rules. As discussed below, this is precisely what has happened with respect to the Charter's rules governing use of force. In numerous instances culminating in Kosovo and Iraq, one or more states viewed those rules as essentially illegitimate. The result has been the collapse of the legal use-of-force regime.

B. *Under what conditions is the use of force "legitimate?"*

While there is no universally accepted answer to this question, regional notions of legitimacy have emerged. NATO's intervention in Kosovo, for example, was seen as

[1] Professor of International Law, the Fletcher School of Law & Diplomacy, Tufts University.

"legitimate" by the nineteen NATO member states—but not by Russia, China, India, or much of the East and South. As a general matter, the more endorsements of a given use of force by respected individuals and institutions (including the international legal system), the greater its legitimacy. But there are exceptions: Kosovo, of course, almost assuredly violated the Charter, yet its legitimacy was generally not doubted by populations of states in the West and North. History and cultural conditioning play a huge role in the shared judgment whether a given use of force is legitimate; states that historically have been victims of intervention by colonial or imperial powers are less inclined to view intervention as legitimate, even to stop serious human rights abuses.

Unfortunately, much the same indeterminacy that pervades issues of the legitimacy of use of force now also obtains with respect to questions of its legality. I have suggested that the use of force regime set out in the UN Charter has largely broken down, and that states nowadays judge the propriety of using force not by whether such use is lawful but by whether it is wise.[2] It is not now possible to state authoritatively what rules govern use of force by states. After Kosovo, Iraq, and over 200 additional instances in which force has been used in violation of the UN Charter, no consensus can any longer be said to exist within the international community as to when the use of force is either lawful or legitimate.

C. *To what degree do collective security arrangements confer authoritative legitimacy or legality?*

As indicated above, "authoritative" legitimacy and legality do not exist today with respect to use of force. Legalist institutions, rules, and regimes (such as NATO or the Security Council) can enhance the legitimacy of a given use of force, but there is no guarantee that such enhancement will prove authoritative. Approval of the Kosovo intervention by NATO had no effect on the lawfulness of that use of force under the (antiquated) rules of the UN Charter. Under those rules, such use was unlawful inasmuch as it was neither approved by the Security Council nor an exercise in self-defense under Article 51. But those rules no longer represent the consensus of the international community. There is no contemporary international consensus on when use of force by states is permissible. Increased reliance upon "legitimacy" in this context is at once a sign of the law's demise and also a mask that hides the momentousness of that tragedy.

D. *How does the international community reconcile international constraints on the legitimate use of force with the view that a state has sovereign authority to use force in assuring its own national security?*

Because there are no longer legal constraints imposed by international law on the use of force, it is not necessary to reconcile constraints with a putative exception to such constraints (*e.g.*, for humanitarian intervention or preemption). It makes no sense to parse the breadth of an exception to a prohibitory rule when the rule itself does not in fact exist.

---

[2] See LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO (2001); *Why the Security Council Failed*, FOREIGN AFFAIRS (May/June, 2003).

II. *Law*

The central problem is that rules governing the use of force by states have collapsed. The principal reason for that collapse is the absence of a consensus concerning when force ought appropriately. Contributing to the fractured consensus are power disparities among member states, which give rise to disparate incentives to commit to legalist constraints, and a free-rider phenomenon that limits the willingness of member states to contribute to a genuine collective security regime. An elaboration follows.

A. *Roots of the Problem*

1. *Absence of consensus*

The reason that the term "aggression" is used but not defined in the Rome Statute establishing the International Criminal Court is plain: notwithstanding numerous efforts over five decades by the international community to define the term, "aggression" remains a concept which has no settled definition. The extent of the divisions became evident with NATO's use of force against Yugoslavia in 1999. Russia and China were not the only states to take vigorous issue with the claim that NATO's action was permitted by international law. In April, 2000, 114 member states of the Non-Aligned Movement condemned humanitarian intervention. It has "no legal basis under the Charter," they said. This gulf between nations of the North and West, on the one hand, and those of the South and East on the other was reflected in states' reaction to Secretary-General Kofi Annan's September 20, 1999 address to the General Assembly, in which he spoke of the need to "forge unity behind the principle that massive and systematic violations of human rights—wherever they take place—should never be allowed to stand." This speech led to weeks of debate among UN members. Of the nations that spoke out in public, roughly a third appeared to favor humanitarian intervention under some circumstances. Another third opposed it across the boards, and the remaining third were equivocal or noncommittal.

The divisions did not end with Kosovo. Before its attack on Iraq, the United States claimed broad power to use preemptive force—a claim contested by many other states, including American allies. The attack on Iraq generated heated denunciations by many states. A recent poll by the German-Marshall Fund taken in six European states and the United States asked whether the use of force is appropriate to advance justice. In Europe, 48 percent said yes; in the United States, 84 percent said yes. The evidence is incontrovertible: on the most important of international values—when use of force is appropriate—the international community is fractured.

The consequence of this fracture is to undermine severely the effectiveness of legal regulation of the use of force. To function properly, law requires a consensus on basic values concerning the subject matter of the regulation. When that consensus evaporates,

working rules become paper rules. As British Foreign Secretary Jack Straw put it, "If you have a set of rules which conflict with reality, then reality normally wins." That, unfortunately, is what has happened to the use of force rules embodied in the Charter: the rules have fought a losing battle with geopolitical reality.

2. *Power disparities*

A legal system must also be grounded upon incentives that enhance the likelihood of compliance. A principal source of those incentives must be the underlying power structure. Yet a configuration of power has emerged in the international community since the end of the cold war—unipolarity—that provides a disincentive on the part of the hegemonic power to subject itself to legalist constraints governing use of force. Because the United States is often capable of getting what it wants *through* the use of force rather than through support of *restraints* on the use of force, the United States has little incentive to subject itself to such restraints; to do so would eliminate the advantage of hegemony. So long as huge disparities in power separate the United States from other states, this dynamic will likely prevail.

Moreover, the dynamic is not one-sided: second-tier power competitors, such as France, Russia, and China, have every incentive to try to re-establish a multi-polar system. In so doing such states have every incentive to use institutional tools at their command to advance their national interest and enhance their own power—as, for example, France and Germany have done recently in the EU. Hence the train wreck in the Security Council in 2002 when the veto threat was deployed to that end. Of course, such incentives are not determinative; many other factors bear upon states' decisions to adopt or reject given policies. But these incentives are powerful and, under current conditions, undermine the proper functioning of the legalist order governing use of force. The same incentives will inevitably limit the potential of any reform aimed at strengthening that order.

3. *The free-rider phenomenon*

The more a given state acts unilaterally to provide a public good, such as collective security, the less incentive is provided other states to do so. In practical terms, this means that the percentage of GDP spent by the United States and European states on defense is not likely to change; European states will not give up TGVs, early retirement systems, universal health care and the like to provide the expenditures needed to participate meaningfully in collective security. The upshot is that the United States will continue to be caught in a dilemma: remain locked into a situation in which it must act alone as world policeman, or see *no* nation (or nations, as envisioned by Article 43) do so. Either alternative bodes ill for the possibility of breathing life into Chapter VII.

B. *The Solution*

These conditions severely limit the potential of a legalist regime to regulate the use of force. Because these conditions were not created by the UN, the UN probably can do

little to alleviate them. Reform efforts must originate primarily with individual member states. Innovative reform efforts by the UN will likely be ineffective for the simple reason that such efforts do not and cannot address these three root causes, which lie beyond the UN's reach. Tinkering with the composition of the Security Council, for example, will have no effect on these underlying conditions—and may, indeed, exacerbate power disparities by engendering greater paralysis and thus encouraging the United States to bypass the Council with even greater frequency in contentious circumstances.

III. *The UN*

The best that the UN can therefore do is to help lay the groundwork for the creation by member states of conditions in which the use of force can realistically be regulated by law. The most important contribution that the UN can make would be to encourage member states to recognize the seriousness of the problem and to drop the pretense that use-of-force rules work as they should. They do not. In the meantime, the UN can continue to test the waters to see whether the international community is any closer to a consensus. The General Assembly is the perfect laboratory in which to do so, and a trial balloon of the sort floated by the Secretary General in his 1999 address is the perfect medium for doing so. If and when the results are more promising than they were in 1999, a conference might then be convened (perhaps a General Conference of the Members, as contemplated in Article 109) to consider possible amendments to the Charter. Given the deep-seatedness of the three conditions outlined above, however, it is unlikely that that can occur any time soon.

little to alleviate them. Reform efforts must originate primarily with individual member states. Innovative reform efforts by the UN will likely be ineffective for the simple reason that such efforts do not and cannot address these three root causes, which lie beyond the UN's reach. Tinkering with the composition of the Security Council, for example, will have no effect on these underlying conditions—and may, indeed, exacerbate power disparities by engendering greater paralysis and thus encouraging the United States to bypass the Council with even greater frequency in contentious circumstances.

III. *The UN*

The best that the UN can therefore do is to help lay the groundwork for the creation by member states of conditions in which the use of force can realistically be regulated by law. The most important contribution that the UN can make would be to encourage member states to recognize the seriousness of the problem and to drop the pretense that use-of-force rules work as they should. They do not. In the meantime, the UN can continue to test the waters to see whether the international community is any closer to a consensus. The General Assembly is the perfect laboratory in which to do so, and a trial balloon of the sort floated by the Secretary General in his 1999 address is the perfect medium for doing so. If and when the results are more promising than they were in 1999, a conference might then be convened (perhaps a General Conference of the Members, as contemplated in Article 109) to consider possible amendments to the Charter. Given the deep-seatedness of the three conditions outlined above, however, it is unlikely that that can occur any time soon.

JURIDICAL INSTITUTIONS AND SECURITY

NATALINO RONZITTI

The peaceful settlement of disputes is instrumental to the maintenance of international peace and security, as proven by the relation between Article 2(3) and Article 2(4) of the UN Charter. This relationship is not new since it was already deeply-rooted in the Covenant of the League of Nations and the 1928 Kellogg-Briand Pact. States may renounce going to war or resorting to other forceful measures to settle their disputes if they have recourse to effective mechanisms to resolve their disagreements.

However, peaceful settlement of disputes and maintenance of security, albeit interrelated, are two different matters. The UN Charter deals with dispute settlement in Chapter VI and with the maintenance of international peace and security in Chapter VII. The Security Council plays a role under both Chapters: it has a primary role in Chapter VII, whereas under Chapter VI it shares its competences with judicial institutions (such as the International Court of Justice, or ICJ) or other institutions which may be involved in dispute settlement. During the cold war and immediately after the decolonisation era, newly independent States and Eastern bloc governments viewed international jurisdiction with diffidence. Negotiation was deemed the most promising manner for settling controversies. Third-party settlement was viewed with suspicion, and arbitration or judicial settlement were generally not accepted.

This situation has now changed. The ICJ is no longer the only permanent judicial institution. The number of specialized judicial or quasi-judicial institutions has increased (e.g. the International Tribunal for the Law of the Sea; the Dispute Settlement Body within the World Trade Organization or WTO) and the proliferation of international tribunals (both at an international and at a regional level) is a well known feature of the present-day international community. States are willing to become party to treaties that establish the compulsory jurisdiction of the ICJ or other judicial bodies. International justice has become open to individuals: they can bring claims against a State under human rights treaties, especially at the regional level (i.e. European Court of Human Rights). The consequence of this proliferation of judicial institutions is that they may be of no utility. The classic example is the Geneva Court of Conciliation and Arbitration. It was established in 1992 under OSCE auspices (Stockholm Convention), but no case has ever been brought to its attention. The advisory competence of the ICJ or other courts should also be mentioned, even though the opinions delivered are not mandatory.

International criminal courts are a very recent phenomenon and the existing ones have very little in common with the criminal tribunals established at the end of World War II (Nuremberg and Tokyo Tribunals).

How do international tribunals and related institutions encroach upon security matters? Usually, international tribunals do not deal with security. As a rule, matters involving sovereignty, peace, and security were not deemed suitable for adjudication and are excluded from the competence of international tribunals. However, recent practice shows that this assumption is no longer justified. In effect, there is no legal obstacle to having this kind of dispute settled by an international court.

More often than in the past, States are willing to bring matters related to peace and security before international judicial bodies. The Corfu Channel case (ICJ, 1949) is no longer an isolated example. Apart from the *Nicaragua* case, where Nicaragua brought proceedings against the United States (ICJ, 1986), recent practice includes several cases. It is sufficient to recall the 10 *Cases concerning legality of Use of Force* related to the intervention by NATO against the Federal Republic of

Yugoslavia (still pending), the case concerning *Armed Activities on the Territory of the Congo* (still pending), the *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria* (ICJ, 2002) and the *Oil Platforms case* (Iran *v.* Usa, ICJ 2003). Even the advisory competence of the ICJ has been activated, in order to assess the legality of the threat or use of nuclear weapons (ICJ, 1996) and the routing of an Israeli barrier through the West Bank (2004). It is moreover debatable whether the ICJ has the power to review Security Council resolutions and nullify them if they are inconsistent with the Charter or peremptory international law.

The enforcement of international judgments dealing with security-related questions cannot be considered as a success story, as proven by the Hostage Case (ICJ, 1980) or by the Nicaragua Case (ICJ, 1986). Enforcing an international judgment against a recalcitrant State is an arduous task, especially when the loser is a permanent member of the Security Council. Non-compliance may open the way to self-help if the victor has military means to resort to it.

Individual complaints before human rights bodies may involve security related-issues. The most famous cases are those brought before the European Commission on Human Rights about French nuclear tests in the Pacific (1995) and before the European Court on Human Rights on the bombardment of the Belgrade Radio-TV station during the Kosovo air campaign by NATO (*Bankovic case*, 2001). In both instances, the application was held to be inadmissible.

International criminal tribunals, whether ad hoc or permanent, are a different matter. Punishing war crimes, crimes against humanity and genocide is a priority for justice and, according to some, for ensuring a lasting peace. It is a necessary ingredient of post-conflict peace building. Reconciliation, however, is also an important feature of that process, especially for countries that which have experimented bloody civil wars. The International Criminal Court lacks universality and the two ad hoc Tribunals face difficulties in having many of those responsible for international crimes captured and brought before them. Moreover, aggression, as a crime committed by individuals, has not yet been defined and consequently does not yet fall under the jurisdiction of the ICC.

What can be done to solve those contradictions and find a fitting role for judicial institutions? What can be expected of judicial institutions in the field of maintenance of peace and security? Are we invited to explore other imaginative solutions?

One point of departure is that the maintenance of international peace and security is a political responsibility that should be performed by political institutions and entities, i.e. States through diplomatic intercourse. Judicial or similar institutions can help, but the process should be kept under the primary responsibility of both political institutions and States.

What can judicial institutions do and what can they not do with respect to the maintenance of international peace and security? The following is a non exhaustive list, drawing on recent practice and doctrinal opinions.

I. *What judicial institutions can do*:

- Judicial or similar institutions are a kind of confidence-building measure, as far as the maintenance of international peace and security is concerned. They are well suited to settling disputes that do not involve security issues, for instance commercial matters, fisheries, validity and termination of international treaties, etc. Even border disputes can be submitted to arbitration. Submitting a dispute to a means of peaceful settlement prevents its continuation from creating a danger for international peace and may forestall unilateralism. In effect, unsettled disputes may well be the cause for violent conflict.

- Individual remedies before international courts in the field of human rights create a sense of justice, which contributes to upholding the rule of law and to prevent civil uprising.

- International criminal tribunals judge those responsible for atrocities and should ensure justice for victims (including compensation). At the same time, international criminal tribunals can be a powerful dissuasion to prevent atrocities being committed, provided that they are effective and universal, i.e. that all responsible persons are brought before criminal justice, none excluded.

II. *What judicial institutions cannot do*:

- Judicial institutions are not a suitable instrument for conflict prevention, when parties are not ready to settle their controversies by peaceful means; in this case, conflict prevention is a task for political institutions, which should pave the way to a peaceful settlement of disputes.

- Security is, as a rule, non-justiciable. Often rules on security are contained in instruments of soft law. Disarmament treaties are justiciable; however, their compliance is ensured by mechanisms different from third party settlement, such as verification and inspection.

- UN bodies or UN agencies have experimented with the mechanism of ICJ Advisory competence, which occurred with regard to the legality of the threat or use of nuclear weapons. The major nuclear weapons States asked the Court not to render any opinion, stating that Court should abstain for reasons of expediency. In effect, the Court delivered its opinion; however, its findings were a kind of *non liquet*.

- States usually exclude matters related to their security from the competence of international courts and tribunals. International jurisdiction is not mandatory and courts may judge only on the basis of the consent of both parties.

- In principle, the ICJ could be asked to review the legality of SC resolution; however, on this point, the practice is either quite scant or almost non-existent.

- An international court may be asked to order interim measures and stop a conflict; but, as the affair concerning NATO air campaign against the FRY shows (1999), international tribunals usually refrain from granting provisional measures. When they do, the effectiveness of measures granted is open to debate.

- Controversies related to security are political disputes and, as such, are widely assumed to be non-justiciable unlike legal disputes (although this opinion is open to question).

- One cannot ask judicial institutions to play a role that they do not have even within the internal order of States. Security, being an eminently political question, should be dealt with by political entities, be they States or international institutions. This is not to say that international courts and tribunals cannot play any role. They can complement the efforts of political bodies. This is true not only for the ICJ, but also for international criminal tribunals. In short, one has to point out the limits within which the judiciary can deal with security issues, especially within international society, which is governed by rules completely different from those that exist within internal legal orders. Even within States, the judiciary plays a limited role as to security questions; *a fortiori*, this should be true for

the international society, where the function of judicial institutions is completely different and where the notion of international criminal jurisdiction is very recent.

III. *What is an appropriate role for the United Nations?*

The suggestions that follow only concern the relationship between the Organization and judicial institutions with regard to security.

- States cannot be prevented from submitting controversies involving security matters to the ICJ, if they so wish. This should not impede or suspend the political action by UN organs, bearing in mind that jurisdiction is a cumbersome exercise;

- Since matters involving security might be brought both before the SC and the ICJ (or other international tribunal), a mechanism administering the "litispendence" should be found. The question cannot be solved by stating that each institution should do its own work. The possibility of a conflict of jurisdictions cannot be excluded (for instance, the ICJ may take a position different from that of the SC): an action involving the recourse to force could be excused by the SC but branded violation of international law by the ICJ.

- The role of the ICJ in relation to SC resolutions should be clarified. Is it desirable for the ICJ, to review the legality of SC resolutions in the same manner as administrative tribunals review the legality of the executive? Should this function be precluded to the ICJ?

- Imaginative solutions, as the one found for the Brcko arbitration (1998-1999), should be encouraged. Arbitration, if security questions are involved, should not be confined to establishing the violation of an international obligation, but should aim at finding a political settlement;

- International criminal justice is a recent feature of the international community. International criminal justice might be an ingredient of post conflict peace building, but should not impede reconciliation whenever necessary. The balance should be struck by a political body and not by a criminal court. International criminal justice should be universal; otherwise it risks being perceived as a kind of non-justice. If such goals cannot be reached, it would be better to entrust an ad hoc criminal tribunal with the task of punishing those responsible for heinous crimes. The creation of ad hoc tribunals, though not perfectly in keeping with the principle of non retroactivity, is a more flexible option since it allows to take into account the political circumstances and their competence could be limited.

JURIDICAL INSTITUTIONS AND SECURITY

BRIGITTE STERN

I. *The problem*

A. *In international criminal law*

In the last years, the fight against impunity of political actors has increased. International criminal courts have been created and more frequent recourse by national courts to the concept of universal jurisdiction has been witnessed.

The two ad hoc Tribunals, the ICTY and the ICTR, have a limited jurisdiction over the indicted crimes, *ratione temporis* and *ratione loci*. The International Criminal Court (ICC) has come into existence on, and has now since 1 July 2002, virtually, a general jurisdiction over all the indicted crimes (genocide, war crimes, crimes against humanity and aggression, as soon as this concept will be defined) committed after that date, whether committed in the territoriry or by a national of a Member State or of a non-Member State accepting for that purpose the ICC's jurisdiction. One of the problems that has to be dealt with is the relation between these criminal juridical institutions and the political institution of the Security Council, which is entrusted by the Charter with the task of maintaining international peace and security.

As far as the relations between the *International Criminal Court* and the Security Council are concerned, the relations might be even more difficult. The Statute of the ICC itself gives the SC some powers in the functioning of the Court. Here again the question of the relation between the ICC and the SC is raised.

In addition to this problem of the relation between the international judicial institutions and the political organ of the UN in charge of international security, another question should be dealt with : that is the question of the impact of the widening reach of these judicial institutions on the sovereign elaboration of national policies on security.

The SC can be an *accelerator* and extend the jurisdiction of the ICC to situations for which it would not be competent on the basis of the States consent, according to Article 13 of the Statute. It can also be a *brake* if it uses article 16. Another domain in which the SC and the ICC might be in conflict is *the definition of aggression.* It is well known that, according to Article 5, para. 2 of the Statute, « (t)he Court shall exercise jurisdiction over the crime of aggression once a provision is adopted ... defining the crime». A question is whether a qualification made by the Court could be in contradiction with one made by the SC ?

But the fight against impunity has also been launched in national courts relying on universal jurisdiction to prosecute the authors of certain internationally defined crimes,

by whomsoever, against whomsoever and wherever committed. Here a problem can appear in the relation between a national juridical power and a foreign political power, that should probably not be left to be determined by the power relations of States.

B. *In general international law*

It is clear that the ICJ is more and more used by the political organs (General Assembly mainly) to answer political questions, in an advisory opinion, but also by States which raise highly sensitive political issues. This was already the case with the advisory opinion on the *Legality of the use of nuclear weapons*, and is presently the case with the request for an advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. But States also tend to use the Court for political issues, like Nicaragua, which raised an issue concerning the use of force by the US in the *Nicaragua* case, or Libya, which contested a SC decision in the *Lockerbie* case, or Yugoslavia, which brought a case on the *Legality of use of force*, against the different States that participated in the NATO's bombings during the Kosovo crisis, or the DRC in the *Arrest Warrant* case.

Here again serious horizontal problems are raised by the possible contradictory positions adopted by the political and the judicial organ of the UN, on questions of international law related to the use of force, in other words on the concept of security itself. But there can also appear a vertical contradiction between the national judicial organs and the international judicial organ. Moreover, one should ask whether the definition of the legitimate and illegitimate use of force by a State – as has been done in the Nicaragua case and will be done in the NATO's bombings case by the ICJ – will have an influence on the way States have recourse to the use of force in international relations : what is raised here is the question of the interaction of the highest international judicial institution and the political sovereign power in each State.

II. *The way the problem has been or can be adressed and the role of UN*

A. *In international criminal law*

The two ad hoc Tribunals have both been created by a resolution of the SC. This has prompted a challenge to their legality. The main objection raised in the *Tadic* case before the ICTY was that the SC had not the power to take a measure like the creation of an international tribunal. The critics were even more drastic in the *Kanyabashi* case before the ICTR : the accused first contended that the SC could not create such a Tribunal as there was no threat to international peace and security when the Tribunal was created. In both cases, the Tribunals judging on their own jurisdiction did uphold it and confirm that they were legally created by the SC. It can be interesting to quote here a few extracts of the *Kanyabashi* decision, as they emphasize the tension between juridical and political organs. On the absence of a threat to international peace by a internal genocide, the ICTR declared : «Although bound by the provisions in Chapter VII of the UN Charter and in particular Article 39 of the Charter, the Security Council has a wide margin of discretion

in deciding when and where there exists a threat to international peace and security. By their very nature, however, such discretionary assessments are not justiciable since they involve the consideration of a number of social, political and circumstantial factors which cannot be weighed and balanced objectively by this Trial Chamber ». On the absence of a threat to international peace because the genocide has ceased when the Tribunal was created, the ICTR declared : « The Trial Chamber notes, in particular, that cessation of the atrocities of the conflict does not necessarily imply that international peace and security had been restored, because peace and security cannot be said to be re-established adequately without justice being done.

It is clear that in the context of the *ad hoc* Tribunals, the power of the SC has not been challenged on the merits, although procedurally the Tribunals considered themselves as capable of looking into the legality of their own creation.
The solution was a self-restraint by the Tribunals, which considered that the definition of the threat to peace should be given by the political organ. This problem concerning *ad hoc* Tribunals should not appear in the future, because the SC has now the possibility to defer cases to the ICC without needing to create new tribunals.

But a lesson should be kept in mind in any reflection on the relations between juridical organs and security, that is that peace and security cannot be established without justice being done.

The ICC raises problems of its own. The SC has already concretely played the role of a brake under article16, in accepting to adopt resolution 1422, in order to prevent the ICC from prosecuting members of PKO operations, in order to accomodate the US concern for the members of their armed forces that participate in UN PKO, whom they refuse to allow to be prosecuted by the ICC. This resolution was renewed for another year through Resolution 1487. Although I consider this as a very regrettable move, I do not see what could be proposed to avoid such a decision, voluntarily accepted – although under American pressure – by the States in the SC.

It is too early to know how the SC will use its power to submit a situation to the ICC, but it can be assumed that it will never do so with a situation implicating a permanent member. In order to ensure equality of States before justice, it could be suggested that there should be no veto power for the enactment of Article 16, which would need a revision of the ICC Statute and of the UN Charter. Although advisable, this suggestion is probably politically quite unrealistic.

As far as the possible divergent views of the SC and the ICC on aggression, and the role the UN could play to help solve the problem, a few remarks can be made.

It is well known that no definition of aggression was included in the Charter, in order not to restrict the political power of the SC when deciding to use Chapter VII. Since the adoption of the Charter, a definition has been adopted by the General Assembly, but of course is not binding on the SC. The question is how to address the definition of aggression for the purpose of the ICC.

Two solutions seem possible. A first solution would be to propose a kind of « *question préjudicielle* » that the Court should ask the SC before indicting someone for the crime of aggression. This solution of course would protect the political decision-making of States. It seems that a second solution would be to agree on a definition of aggression that could be independent of a political determination : this is the work of the Preparatory Commission entrusted with the task of preparing proposals for a provision on aggression. I think that the UN, for example through a resolution of the GA convening the Preparatory Commission, should insist on the necessity to give a legal definition that is precise enough that it can be used by the ICC independently of a political assessment, and to exclude any necessary recourse to the SC before the ICC can issue an indictment for aggression. Naturally, there will still remain the power of the SC to withdraw a case from the ICC, if it does not agree with a qualification of a situation as an aggression given by the Court. In other words, the relation is one of complementarity with a possible primacy of the political organ. Considering the present evolution of the international community, I do not see a better solution. Ideally, I think that preeminence should be given to the judicial organ, but to me it is unrealistic in a near future. The idea to give the ICC an independent power of qualification is I think as close to a good solution as can prevail in to-day's international world

And the more the international criminal system is independent from the political power, the bigger its authoritative decision will, in my view, influence the policies of sovereign powers. The fact that there exists an objective international judicial body, in front of which even Heads of State might be brought, irrespective of the political power of their State, is a strong incentive for them to abide by the standards of behaviour enshrined in the Charter and other international instruments so that they become considered as impossible to disregard. This might shape their decisions concerning the use of force (when a definition is agreed upon) or on the way this use of force is conducted (war crimes) or any policy towards such and such part of their civilian population (crimes against humanity, genocide). The potential Pinochets of the future might think it over twice before they act, now that there exist an ICC, where they can *personnally* be indicted.

B. *In general international law*

The ICJ has so far managed to deal with its possible conflicts with the SC, but this might not always be the case. In the *Lockerbie* case, the Court has stated that in principle it can rule on the international legality of a SC resolution, but it never came to the merits as the case was finally settled. A possible conflict between the analysis of the SC and the Court could appear with the judgment by the Court of the Israeli construction of the wall, but at this stage this is mere speculation.

We know that, due to the structure of international relations where States still dominate, the judgments of the ICJ cannot be enforced against a State's will, unless the SC would so decide, which it has never done. In other words, in case of divergence of opinion the political organ will « win ». Unfortunately, I have no magical solution to suggest for this problem.

I think however that a better « *grand public* » diffusion of the decisions and advisory opinions of the ICJ, which is dramatically absent from the major media, should be made, in order to balance the political power of the SC with the symbolic power of the highest juridical institution of the world. This could prove the occasion for a real campaign of promotion of the work of the ICJ, in the world's media.

A last problem to be addressed is the possible contradictory approaches of national courts and the ICJ, as has appeared after the ICJ decision in the *Arrest Warrant* case, on a question involving international criminal law, and we see here that the two problems that we had analyzed separately are here at a crossroad.

It is well known that the question of the immunities of heads of States and other high officials before national courts has undergone major evolutions.

For the immunities of *acting heads of State*, the prevailing international rule is still absolute immunity, even if some countries disregard it. Personally, I think that this solution should be welcomed and I do not subscribe to the step, called for by some NGOs, allowing prosecution of current heads of state before foreign national courts, as long as they can be now generally prosecuted before the ICC.

Today, the question is raised whether the acts for which *former heads of state* do not benefit from any immunity are not only personal acts functionally outside the exercise of official duties, but also crimes under international law, which, even if performed as part of the exercise of power, have to be considered as teleologically outside the functions of a head of state. The answer to this question was clearly affirmative in the decisions of the House of Lords in the *Pinochet* case, but is less clear after the judgment of the ICJ in the *Arrest Warrant* case.

In their decisions, the Law Lords adopted a historic ruling, and decided that Pinochet could not benefit from immunity.

A narrow textual reading was adopted by three Lord judges who considered that all acts committed as part of the official activities of the head of state were immune from prosecution in national courts. However, nine of the Lords could not accept that acts of torture could be qualified as official acts and considered that they must be disqualified *per se*.

It seemed that what emerged is that *'international crimes in the highest sense' cannot per se be considered as official acts*, just as commercial acts have been distinguished from sovereign acts according to their finality.

This progress of the fight against impunity seems to have been halted by the ICJ, stating what in its view is the international law on immunities of former officials in the *Arrest Warrant* case: "... after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State might

try a former Minister for Foreign affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity". Not a word on acts that cannot be considered ever as part of the functions of a head of state, as acts considered as crimes under international law.

Here, I would suggest that the UN launch the idea of an international Convention on heads of States immunities, in order to clarify the state of international law, hopefully along the *Pinochet* decisions line.

A last issue is raised concerning the impact on the sovereign powers themselves of a decision of the ICJ involving international security. As much as I think that the development of international criminal law and the effective prosecutions of the leaders that do not respect its basic norms can play a role of deterrent for future leaders – at least if their country accepts the jurisdiction of the ICC –I am – unfortunately – equally quite sceptical about the ability of a decision of the ICJ to influence really and deeply future State policies on security: the decision in the Nicaragua case has had no influence, I believe, on American policies concerning the use of force. I do not see that a different conclusion could be drawn from future decisions of the ICJ, for example in the cases arising from the former Yugoslavia, as far as their immediate impact will be. This does not mean that a decision on what is a legitimate or illegitimate use of force by the ICJ is irrelevant, but its impact is in the long-range : the Court's decisions can set precedents that slowly will shape the customary law that binds States.

Can something be done to cope with this depressing statement? It can be suggested that the SC takes more seriously the role entrusted upon it by article 94 of the Charter and systematically takes measures against a State which does not abide by a decision of the ICJ, in order to give effect to the judgment.

COLLECTIVE SECURITY AND HUMANITARIAN INTERVENTION

ADEKEYE ADEBAJO

The idea of "collective security" involves states in the international system coming together to act under an agreed set of norms, principles and rules, to defend an existing security order from a threat or attack. Its proponents argue that both large and small states are protected by a system of collective security in which all states band together to defend the constituted order from illegal threats. The League of Nations and the United Nations (UN) – created respectively after the First and Second World Wars - were the most prominent organizations dedicated to the principles of collective security.

Humanitarian interventions in the post-Cold War era have tended to be motivated by strategic interests, security concerns, and humanitarian considerations. Some actors like the United States, France, Nigeria and South Africa have been accused of pursuing hegemonic ambitions through military interventions. The leaders of several states like Liberia, Uganda, and Rwanda have been charged with using interventions to pursue their own parochial economic agendas. Even when strategic and economic motives are present, security concerns are often a major factor in spurring these interventions. Genuine fears of refugees, rebels, and arms crossing porous borders to destabilize neighboring states are very real in places like Kosovo, Sierra Leone, and the Democratic Republic of the Congo (DRC). Humanitarian considerations of saving lives and rescuing citizens (or ethnic kinsmen) in distress have also been a factor behind some of these interventions. Many interventions by regional states have to be understood in light of the instability that population flows pose to neighboring states, particularly in regions where long, porous borders have often facilitated the establishment of transborder Diasporas transferring arms or recruiting rebels. But it should also be noted that the idea of "humanitarian intervention" has historically been abused by several states that have used it to justify more parochial political and economic agendas.

After the end of the Cold War and the apparent triumph of liberal democracy, the issue of human rights and democratization became part of the humanitarian intervention debate. The UN Security Council also became more flexible in defining threats to international peace and security to include refugee flows, humanitarian disasters, and even human rights abuses in places like Liberia, Somalia, northern Iraq, and Yugoslavia. Eminent scholars like Francis Deng championed the idea of "sovereignty as responsibility" to justify humanitarian intervention by external actors, sanctioned by the UN, in cases in which governments failed in their duty to protect their citizens from human rights abuses. The once sacrosanct legal principle of the sovereignty of, and non-interference in, the domestic affairs of states has been weakened if not yet abandoned.

With the end of the Cold War and the spread of civil conflicts in places like Bosnia, Liberia, and Somalia, the link between autocratic misrule and conflicts started to be more explicitly made. Former UN Secretary-General, Boutros Boutros-Ghali, argued forcefully for humanitarian intervention and advocated the use of regional security arrangements to

lighten the UN's heavy peacekeeping burden. The current UN Secretary-General, Kofi Annan, has also been a vociferous proponent of humanitarian intervention. As Annan noted, "States are now widely understood to be instruments at the service of their peoples, and not vice-versa....Nothing in the UN charter precludes a recognition that there are rights beyond borders".[1] Annan's promotion of humanitarian intervention has met with strong opposition from many leaders, particularly in developing countries, who fear that such interventions can be used to threaten their own power.

Two post-colonial taboos have been broken in the post-Cold War era: the inviolability of colonially-inherited borders and the secession of a group from a state through armed struggle. The first principle was challenged during border clashes or military interventions, often involving irredentist claims, between Morocco and Algeria in the 1960s, between Somalia and Ethiopia in the 1970s, between Libya and Chad in the 1980s, and between Iraq and Kuwait in the 1990s. The second principle was successfully breached by the wars of secession in the Balkans in the 1990s and the creation of Eritrea from Ethiopia in 1993 following thirty years of war. Somaliland has also attempted to break away from the anarchic state of Somalia.

The end of the Cold War by the late 1980s and the increased cooperation of the five permanent members of the UN Security Council (the US, Russia, China, France and Britain) raised great expectations that the UN would finally be able to contribute decisively to ending civil wars. The UN has deployed peacekeepers and/or military observers at least 42 times since the end of the Cold War. But despite the expectation that, with a more united Security Council, the Blue Helmets would fill post-Cold War security vacuums, difficult missions in Bosnia, Somalia and Rwanda scarred the organization and made its most powerful members more selective in their intervention priorities. The UN Security Council has, for example, shown great reluctance to sanction interventions in Africa, turning down requests for missions to Burundi, Congo-Brazzaville and Liberia (in 1995).

The Security Council shamefully failed to act in the clear case of genocide against 800,000 people in Rwanda between April and June1994. Rwanda was the worst failure of the UN to protect civilians from state abuse since its creation. This mission was tragically tarred with the Somali brush of failure after 18 American soldiers were killed in October 1993. Rwanda had, from the start, a UN mission (UNAMIR) based largely on ill-equipped armies from developing countries which lacked strong political and financial backing from the powerful members of the Security Council. This weakness encouraged Rwanda's extremist factions to force the withdrawal of the UN by killing its peacekeepers. France, which had trained members of, and provided military support to, the genocidal regime, was considered a partisan and compromised humanitarian intervener in Rwanda in 1994.

In contrast to Rwanda, the international community has recently launched some successful humanitarian interventions. The North Atlantic Treaty Organization (NATO) intervened decisively in Bosnia, and more controversially in Kosovo (without a UN

[1] Kofi Annan, "Two Concepts of Sovereignty", *The Economist*, 18-24 September1999, p.49.

mandate) in 1995 and 1999 respectively. The UN mission in Sierra Leone (UNAMSIL), with strong British military support, eventually stopped the killings and mutilations of the Revolutionary United Front (RUF) rebel force. A French-led largely European force intervened in the northern Congolese city of Bunia for three months in June 2003 to restore order and to save lives; while a Nigerian-led force deployed in Liberia in August 2003 to end the carnage in Monrovia and to oversee a peace accord. This multinational force was placed under UN command in October 2003.

I. *Learning Lessons*

Five factors have most often contributed to successful UN interventions. First, the willingness of internal parties to disarm and accept electoral results; second, the development of an effective strategy to deal with potential "spoilers"; third, the absence of conflict-fuelling economic resources in war zones; fourth, the cooperation of regional players in peace processes; and finally, the cessation of military and financial support to local clients by external actors and their provision of financial and diplomatic support to peace processes. It is worth noting that the presence or absence of these factors does not automatically determine the outcome of UN interventions. Future UN interventions must, however, keep these factors in mind.

In concluding this contribution, I offer four policy recommendations for bolstering collective security and future humanitarian interventions by the UN.

- First, particularly since most of the conflicts in the post-Cold War era are located in Africa, there remains an urgent need for western donors to demonstrate a similar generosity and consistency to the continent as they have done in Bosnia, Kosovo, and East Timor.

- Second, there is a pressing need to establish a proper division of labor between the UN and Africa's fledgling security organizations which need to be greatly strengthened. The Security Council has not done much to strengthen the capacity of regional peacekeepers and to collaborate effectively with them in the field. The Brahimi report on reforming UN peacekeeping of August 2000 was curiously and disappointingly short of details on the subject of establishing an effective division of labor between the UN and regional organizations. The willingness of western peacekeepers, who have both the equipment and resources, to continue to contribute to UN missions in Africa remains important as demonstrated by the cases of Sierra Leone and the DRC.
- Third, the missions in Sierra Leone, Liberia and Congo could signify an innovative approach to UN interventions based on regional pillars supported by local "hegemons" like Nigeria and South Africa whose political dominance of such missions is diluted by multinational peacekeepers from outside their regions. By placing regional forces under the UN flag, the hope is that the peacekeepers will enjoy the legitimacy and impartiality that the UN's universal membership often provides, while some of the financial and logistical problems of regional peacekeepers can be alleviated through greater burden sharing.

- Finally, if collective security is to be strengthened and future humanitarian interventions are to succeed, there is a strong case to be made for developing strategies to deal with "spoilers" who are determined to see the UN fail and attempt to ensure its withdrawal by attacking its peacekeepers. The economic, political, and legal sanctions of the sort that were imposed on the RUF in Sierra Leone and UNITA in Angola would seem appropriate in such cases. The recent innovation of establishing UN panels to "name and shame" countries and leaders who are supporting rebels could also be a useful tool for the UN to achieve compliance with peace accords, as long as such reports are based on meticulous research and information. The economic and legal sanctions imposed on Angola's Jonas Savimbi and Liberia's Charles Taylor by the UN Security Council appear to have made a significant contribution to ending the wars in Angola, Liberia and Sierra Leone.

COLLECTIVE SECURITY AND HUMANITARIAN INTERVENTION

THOMAS G. WEISS

I. *What is the problem?*

There are three problems, and all are embedded in the title. First, in spite of euphoria at the Cold War's end, too many conscience-shocking acts have taken place, including genocide and massive human rights abuses, with too little accountability for war criminals and thugs. Cries of "never again" have been drowned out by shouts of "once again." At the same time, the codification of international human rights norms also has continued, and more recently views about humanitarian intervention have converged. Speeches by the Secretary-General in 1998-9 placed "two sovereignties" squarely on the international agenda. The Responsibility to Protect (R2P), the 2001 report by the International Commission on Intervention and State Sovereignty (ICISS), staked out the creative middle ground of "sovereignty as responsibility" pioneered by the Special Representative on Internally Displaced Persons. Despite some consensus and momentum, controversy persists; practice lags behind proselytism; and barbarism thrives.

Second, the current generation of international organization, based on the theory of "collective security," was supposed to but does not have more military enforcement teeth than its defunct predecessor, the League of Nations. The central operational shortcoming is the absence of an independent military capacity. The world organization remains hostage to the political will of states to provide military might to enforce its decisions, especially for human protection purposes.

U.S. military hegemony is a stark reality in the contemporary international system. "Primacy" fails to capture that Washington's military expenditures are more than the rest of the world combined. Assent, and usually participation, by the hyper-puissance is a necessity for major collective military responses. At the same time, the rhetoric and reality of the current administration after September 11th has undermined the emerging common ground for humanitarian intervention and, especially after Iraq, has made even former proponents uneasy. For the U.S., humanitarian intervention seems a distraction from the real business of the so-called war on terrorism. In addition, downsizing the armed forces over the last 15 years means insufficient equipment and manpower—in the U.S. and elsewhere—to meet the rising demands for humanitarian intervention or even peacekeeping, tasks that have not traditionally been the fast-track for talented military officers or attracted advanced military hardware.

Third, humanitarian interventions open the proverbial Pandora's Box of addressing a wide-range of goals. By their very nature humanitarian interventions re-configure the political landscape of war-torn societies, create new needs, and lead to "mission creep." The ICISS suggested that we ask more than whether to intervene, namely what could ensure human protection before crises erupt and after they have cooled? However inadequate, collective security is more likely to elicit reaction to clear provocation—

where borders are crossed—than proaction to questionable or poor governance—when belligerents inflict large-scale suffering within state boundaries. While the ICISS's continuum of responsibility is problematic for prevention, humanitarian intervention necessarily abuts reconstituting state order. Collective intervention for human protection must mesh better with reconstruction and development.

Mass starvation, rape, and suffering will reappear as global security threats, and humanitarian intervention will continue to smolder on the public policy agenda.

II. *What cannot and can be done about it?*

Three common thoughts about reform are bound to arise but are problematic in today's charged political environment. Altering the Security Council is an illusion: the P-5 will not give up their vetoes, and there is no gimmick to finesse the lack of consensus about other permanent seats. The political correctness of this topic in UN circles demonstrates the extent to which process takes priority over pragmatism. None of the proposals under consideration would actually make humanitarian intervention more likely—indeed, fewer decisions and less action would emanate from a "rump General Assembly," or an enlarged Security Council. There is no need for Charter reform to permit Chapter VII humanitarian intervention, which was suggested by the Commission on Global Governance and others, because the definition of "international peace and security" has effectively expanded to include humanitarian catastrophes. Finally, the notion of an independent rapid reaction force to halt major humanitarian catastrophes is economically, logistically, and politically infeasible.

Two concrete ideas come to mind as actionable. First, laments about inefficiency and overlap within the UN delivery system are commonplace, but eyes glaze over at the mention of "coordination" or "reform." Yet a radical consolidation of the UN's humanitarian machinery almost took place. It was in the penultimate draft of the 1997 reform until turf-consciousness surfaced, and shell games replaced meaningful centralization. Radical surgery should not be postponed any longer. Pulling together the UN's emergency menagerie (UNICEF, WFP, UNDP, and OCHA) under UNHCR's leadership is doable. Moreover, a career track for civilian humanitarians would be possible within a "World Humanitarian Action Organization."

Second, it is time to revive the notion of "white helmets" (retired military personnel with a self-protection capacity) to provide succor in truly dangerous wars. The inadequacy of "copyrighted" humanitarian principles (neutrality and impartiality) was palpable even prior to attacks in Baghdad of UN and of ICRC headquarters. Since 1992 over 200 UN civilian staff have been killed in 45 countries by while delivering food, medicine, and shelter and reconstructing war-torn countries. Another 270 staff (both civilian and military) have been held hostage in 27 countries, and 34 are still detained. The UN is obliged to be present in every emergency, but its personnel and procedures are ill-adapted to an increasing number of armed conflicts. If occupying forces or outside militaries do not provide relief and protection in such areas, then "civilian" personnel with military expertise must.

III. *What is an appropriate role for the UN and other international organizations?*

The UN plays three major roles for collective security and humanitarian intervention. The first is the authorization of outside military force to protect human life and rights. Because such coercion is a derogation from the central principle behind international society and the Charter's provisions for sovereign equality and non-intervention, ideally decisions should be made by the Security Council. It upholds the principles while allowing for a departure from them. However, the council is the first, not last, port of call. The Kosovo Commission's useful distinction between international "legitimacy" (or perhaps better, "justifiability") and "legality" suggests that authorizations from regional organizations will continue to be an essential alternative to unilateral (or by a small and unrepresentative coalition) decisions when the Security Council is unwilling or unable to act. The most practical measures to ensure effective collective military action involve sub-contracting to regional organizations.

The second UN role is normative development. It would be sensible to pursue the humanitarian equivalent of 1970 General Assembly resolution 2625. The "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States" helped recast sovereignty (particularly self-determination and de-colonization) "in accordance with the Charter of the United Nations." The codification of sovereignty as responsibility in the form of soft law, or emerging custom, would help advance the norm that halting egregious abuses of human life matters more than treating sovereignty as sacrosanct. Principles are diluted through inconsistency, and so a "Declaration on Responsible Sovereignty" might help reduce selectivity. The ICISS proposed two thresholds—large-scale loss of life and ethnic cleansing. This bar is too low for some member states and too high for others, which suggests the right height. The declaration would also refer to just war criteria or precautionary conditions (right intention, last resort, proportionality, and reasonable prospects) that apply to humanitarian intervention.

The third UN role is protection and relief; its comparative advantage is not coercion. The earlier emphasis on consolidation is one requirement, but another is better information. The intricate political, economic, and military forces that give "complex emergencies" their name operate at a subterranean level. There is urgent need to understand and maneuver amid local actors who are neither warlord devils nor service-providing angels—who fall into the ambiguous middle. Involving knowledgeable academics and pooling information on the ground and First Avenue would facilitate improved tactical and strategic judgments by UN officials.

Although theoretical "collective security" remains a pipe-dream, meaningful collective action for humanitarian intervention is not. Better working relations by the political and humanitarian sides of the UN with regional organizations is one aspect of an improved international humanitarian system; and more accountability by regional organizations is another. Training and equipment for many regional organizations (only NATO is well endowed) should also be part of any reform package.

IV. *What about language and context?*

The problems and conundrums of collective security and humanitarian intervention are not the entire story; the terms and timing for the panel also are relevant. Although the background for these papers refers extensively to the "international community," the panel should develop an allergy to this moniker. This convenient shorthand permits fuzzy thinking and avoiding specific responsibilities for success and failure. The usual legal definition is "member states," which is too narrow because inter-governmental and non-governmental organizations are critical actors in humanitarian interventions. Yet sweeping references to a vague group facilitates drafting but inhibits devising sharp recommendations to keep a particular actor's feet to the fire. It would be useful systematically to distinguish recommendations about the "two UN's"—the arena where states make decisions, and the people who work in headquarters and the field.

"Collective security" is a state-centric theory that posits an automatic international response by all UN members against a clearly identified aggressor state (unless it is a permanent member or an important ally). The theory has never worked in practice (Korea and the Gulf War are possible exceptions). Moreover, a serious question arises whether a concept that applies against an invading state can be adapted to places where individual human beings are threatened—especially by failed states or non-state actors. Human protection is distinct from state security.

"Humanitarian intervention" is in the terms of reference for this paper and has a long and honorable genealogy in ethical, legal, and political discourse and analysis. The ICISS suggested instead "military intervention for human protection purposes." The meaning of both is clear: the use of military coercion against the expressed wishes of political authorities to protect and sustain civilian populations. The proposed shift in language reflects some poor (humanitarian self-righteousness) as well as more logical (the need to debate honestly the justifications for using the "h" word) reasoning. The shift from the rights of outsiders to those of affected populations is appealing, and the responsibilities (if not obligations) of outsiders to protect them is persuasive.

Can anything be done about the announced timing of the panel's findings in September 2004? The eve of the U.S. presidential elections is an unwise moment to issue a report, which risks being behind or ahead of the curve in Washington.

COLLECTIVE RESPONSE TO CRISIS SITUATIONS:

THE EU, NATO, AND U.N., AND MORE EFFECTIVE INTERVENTION[1].

MARTA DASSÙ AND ROBERTO MENOTTI

I. *The legacy*

Proceeding in a top-down fashion, there are at least three problems, which have invariably emerged in concrete cases in recent years:

- The issue of principles and norms;
- The issue of decisionmaking, both upstream – the decision to intervene – and downstream – how to carry out and terminate the intervention once it is decided;
- The issue of available resources.

To a large extent, the three dimensions could be placed along a continuum, and indeed present important overlaps. The distinction is useful, however, because each dimension (or level) refers to a rather specific set of requirements: ethical and legal in the first case; political-diplomatic and functional in the second; operational and financial in the third case.

II. *Criteria for collective intervention*

The first dimension concerns the criteria which justify and call for collective intervention in a crisis situation.

A. *The problem*

Collective intervention has proven to be highly problematic because there has been a gradual change in the perception of what constitutes a threat to international peace and security, without a parallel arrangement – on this crucial point – among the relevant international actors. In other words, perceptions have been shifting almost everywhere, but often in different directions.

From the European point of view (as emerges from the EU Security Strategy approved in December 2003), a set of diverse challenges have been added to the more traditional "regional" conflicts:

- first, most of the post-Cold War conflicts have occurred within rather than between states, and are principally linked to state failure;
- second, humanitarian concerns have become part of international security policies;

[1] The authors are indebted to Filippo Andreatta, Vincenzo Camporini, and Carlo Jean, for suggestions and contributions.

- third, transnational challenges – terrorism, proliferation of WMD, organized crime - have become key threats.

The first two challenges can be seen as part of the post-'89 agenda, and are linked to the legacy of engagements in the Balkans, Asia (East Timor) and Africa. The third one is part of the so-called post-9/11 agenda pressed by the US administration (Afghanistan, Iraq). Although Europeans and Americans are divided on how to manage the post-9/11 agenda, both sides recognize that these new challenges justify collective interventions.

B. *The response*

The main implication for the UN is a widening gap between what is considered legitimate by at least some international actors, and what is legal according to standing international law. The growing divide between legitimacy and legality was especially clear in the case of the Kosovo intervention.

For the UN, closing the gap is of crucial importance – so as to avoid a growing marginalization in crisis management.

There are two potential solutions:

- continue to consider instances of controversial intervention as "breaches" (Iraq) or as "exceptions" (Kosovo) to international rules;
- define new criteria for intervention precisely in order to reduce the gap between legitimacy and legality – legitimizing them within certain legal boundaries.

Our thesis is that the best option is to define a set of criteria in order to adapt the duty/right to intervention in light of the new security challenges. Such a process would not necessarily imply a modification of the UN Charter, but its pragmatic reinterpretation along the following lines:

- The legitimate use of force even without explicit UNSC approval needs to be broadened to include: striking terrorist groups operating in the territory of a state whose government has not complied with the legal obligation to combat their activity; preventing the transfer of WMD to terrorist groups
- A right of "humanitarian intervention" permits military action by the UN or regional organizations to prevent genocide or similar massive human rights violations– accelerating a process already under way.

On this basis, a sequence of steps should also be envisaged in advance, leading to the possible use of force only once the previous steps (sanctions, enhanced inspections etc) have been exhausted: in essence, a form of tightly controlled escalation should be made explicit (linking, in a sense, Chapter VI and Chapter VII provisions).

This approach would satisfy certain key European interests: since it is hard to imagine a European-only crisis response mission without a UN mandate, setting agreed criteria for intervention would greatly facilitate the political task for EU decision-makers in favor of more robust engagement in international missions. In addition, formulating new criteria would help reduce divisions across the Atlantic on the collective use of force, based on a

more precise understanding of the right/duty of intervention comprising both its principles and limits.

The alternative – seeing controversial cases as exceptions – is not only rather ineffective but also damaging for the UN: a proliferation of exceptions will ultimately destroy the fabric of international legality.

III. *The UN and regional organizations: political mandate and operational control*

A second major obstacle to collective action is the decision making procedure prior to any form of direct intervention.

A. *The problem*

How are the form, specific goals, timing and duration of an intervention to be decided? How is the mission to be precisely defined (so as to allow adequate planning and command & control – including when possible a reliable exit strategy, on which more below)?

As experiences in the Balkans and in Afghanistan demonstrate, there is a consolidated, decade-old practice of NATO missions under UN mandate; however, these have been mostly stabilization missions, carried out after a conflict – or in any case after the early stage. The ensuing risk for the UN is to serve simply as a *post-facto* complement to crisis management, or a kind of fig leaf. We have thus observed on various occasions a (partial) "return to the UN" following a phase of marginalization.

A related aspect is how to organize the control and fine-tuning of the operation, as well as assess the mission's progress, once it starts. No amount of planning can ensure that adjustment will be unnecessary; thus, both operational control and political oversight remain just as essential after the mission's launch.

Obviously, interventions in crisis situations inevitably affect, one way or another, the post-crisis settlements on the ground. From a UN perspective, the question is thus how to combine the devolution of operational tasks in an intervention without losing the political control over crisis management. In particular, the "end state" needs to be clear to all parties involved as early as possible, since the desired point of arrival ought to determine the entire mission. An "exit strategy" is often a political necessity for the contributing governments, but in the larger scheme of things crisis response should be guided by a positive goal, not by the objective of terminating the intervention.

B. *The response*

There is now a vast consensus that the UN as such is not best suited to direct a military-civilian operation under harsh crisis conditions.

The oscillation between the advantages of institutions and the temptation to build ad hoc – thus extremely flexible – "coalitions of the willing" (and able) has been the hallmark of the 1990s.
In the abstract, there are only two options to more fully develop the UN's response capabilities:

- give practical application to the part of Chapter VII which has so far remained on paper only;
- develop the potential of Chapter VIII, i.e. the link between the UN and regional organizations.

We believe that the first option - including standing armies - is totally unrealistic. The only way to avoid UN's marginalization is to develop arrangements with regional organizations or multi-national efforts lead by a "framework" nation.
To overcome a purely ad hoc logic, it would be useful to develop reliable procedures, rules of behavior, and even best practices. The evolving relationship between the planned "rapid response" forces of NATO and the EU (the Nato Response Force and the EU Rapid Reaction Force, respectively) stands to demonstrate, in fact, how even very *convergent, complementary and partly overlapping* organizations (with a large majority of the same member states) have a hard time fully coordinating their doctrinal choices and resource allocation.

IV. *The resource conundrum*

The third general obstacle to effective rapid response has been the lack of adequate resources – human (both military and civilian), material, and financial.

A. *The problem*

Resources need to be sufficient both in quantity (beginning with manpower, transport and other logistics, etc.) and in quality (training and equipment – including interoperability – support in terms of intelligence, etc.). Recent crises have shown that the UN does not possess either the former or the latter type of capability, while the well-known concept of using a set of forces pre-assigned to the UN for crisis response continues to encounter major obstacles- mostly because potential contributors wish to maintain control over the operations and graduate their involvement.

B. *The response*

A major step would be a commitment by NATO and the EU to make available a pool of resources for crisis management under UN mandate, although under NATO or EU command. Such contingents would be pre-assigned, but they will never be standing forces. France and the UK – the two countries in the lead of the current EU defense plans – have already stated in principle their intention to assign part of the EU Rapid Reaction Force to UN missions. It has to be clear, however, that concrete decisions about committing soldiers to international missions will continue to be made on an "ad hoc" basis.

A de facto division of labour may already be emerging, if we look at recent missions (see Annex), in terms of the various phases of intervention, with a lead nation (the US), NATO, or the EU respectively, depending on the expected level of combat intensity. In fact, aspects of the evolving NATO-EU "strategic partnership" could be replicated in the UN context, along the lines of the arrangement whereby certain NATO assets are presumed to be accessible by the EU in case of need. This would be a political commitment, not a legally binding one; yet, its significance and potential for setting a virtuous precedent is evident.

In any event, the scheme of a UN mandate coupled with one of the two major regional organizations (or a lead nation) is a good combination, since it would theoretically ensure both the much desired UN legitimacy and centralized command and control over the operational process.

The option of pragmatic arrangements among "willing and able" participants has only been pursued when a framework or lead nation was available, and recognized as such. This path has been mostly chosen when tight national control over a mission was the overwhelming concern – more so than multilateral cohesion per se. However, the most effective solution is probably to have both an organization *and* a lead nation ready to act within a given institutional context. A standing organization facilitates the sharing of sensitive information, fosters standardized procedures, and potentially creates credible expectations among outside actors (thus enhancing the degree of influence on crisis situations). The lead nation ensures certain key assets that usually prove hard to provide in a strictly collective mode.

The tension between the two options would be reduced if the EU and NATO were to become more flexible in their respective internal workings (thanks to "constructive abstention" mechanisms).

In terms of "available resources", both NATO and the EU are already committed to develop more and better deployable forces for crisis management missions. Even when referring to different "hats" (NATO and the EU), it seems evident that the technical difficulty of developing the "right mix" of deployable forces can only be overcome through close NATO-EU cooperation.

There is not only a need for deployable forces- but rather a need for robust and sustainable deployable forces, capable of waging expeditionary warfare if called upon.
These and other (more political) considerations call for a continuous cooperation between the EU and NATO. On the other hand, Europe potentially has the credibility and the resources to deal with a large array of crises – in the Balkans and in Africa – also independently from NATO, that is the US. Complementarity among different organizations is often real, going beyond the rhetoric of "interlocking institutions". There was no interest by the US or NATO in pursuing an intervention in Congo, and it became rather natural for the EU to step in. Mature regional organizations have no penchant for "beauty contests" when international problems abound and resources are scarce.

Turning more specifically to the EU, the recently approved EU Security Strategy recalls that "In the last decade European forces have been deployed abroad to places as distant as Afghanistan, East Timor and the DRC [Congo]", declaring an increasingly global outlook implying global responsibilities.

A widely noted statement captures the ongoing shift in attitude: "We need to develop a strategic culture that fosters early, rapid, and when necessary, robust intervention". Despite the well known deficiencies of the EU in long distance and "robust" crisis management, credibility can be gradually built, depending in part on self-confidence. The "framework nation" scheme is proving to be a good practical solution in this context, though not a panacea.

Some of the political difficulties constraining ESDP would be ameliorated, for the EU, through the UN connection: in a sense, the political legitimacy that only the UN can provide may well be an operational precondition for the effectiveness of the EURRF in global engagements.

The EU, in fact, seems to be moving fast on the road to an explicit link to the UN in short-term military engagements in support of UN-mandated military-civilian operations, as evidenced by the joint declaration (of 24 September 2003) between the European Union and the United Nations on cooperation in crisis management. Only a more organic relationship with the evolving EU's security and defense dimension could in fact improve the UN ability to act effectively in certain crisis, particularly in Africa.

Summing up, from a UN perspective, NATO and the EU remain better suited than any other organizations in terms of resources and capabilities to provide at least some key "enablers" for effective and rapid deployments of military-civilian contingents in trouble spots – even at considerable distance from the US or Europe.

One of their advantages is the tested ability to act as catalyzers of contributions from non-member countries: in this capacity NATO and the EU can serve as the core of broad coalitions, with other partners joining in the collective effort and bringing precious resources to the table.

Outreach, partnership and training activities can also be of great importance to facilitate the creation of other regional organizations capable of undertaking similar tasks over time, along the efforts now being pursued by the EU with regard to African multinational peacekeeping forces.

V. *Conclusions: a Coordination Forum*

The legacy of the last two decades indicates that today the UN has to be seen as *one of* the organizations providing the framework for crisis response missions – but not the only one and not necessarily the one with most influence on the missions. It is very likely that

some crisis response operations will be pursued within the UN framework, but others will be pursued in loose coordination with it, and yet others even outside it.
The UN will be the institution of choice to the extent that it serves not just as the provider of legality and legitimacy, but also as the nexus where general rules evolve and practical measures are developed to enforce these very rules.

- The ongoing efforts by the EU to define criteria for collective (i.e. EU-led) response to crises, while reiterating the centrality of the UN and simultaneously cultivating a strong link to the US and other non-EU allies through NATO, is an encouraging step forward which could be expanded. In particular, a coordinated UN-EU-NATO approach could significantly increase the effectiveness of crisis response – at least in the medium term – by developing better instruments, a more precise set of criteria for action, and (upstream) an updated risk and threat assessment paradigm. To this end, a "Coordination Forum" should be established for regular meetings of the three organizations on crisis management: the meetings would take place at the technical level – Secretary Generals or their representatives The proposed Coordination Forum could develop procedures to ensure rapid and early action (preventive whenever possible); in turn, these require an early warning system and, even more importantly, a common assessment system to evaluate the threat and formulate an appropriate intervention plan (ideally aiming at an explicit end state) complete with graduated options leading, if necessary, to a controlled escalation.

- Such a "Coordination Forum" might also have the side effect of encouraging other countries to join their own forces – not only figuratively but practically – and create additional regional and multilateral channels for crisis management. A geographical specialization is a logical choice, both for political and operational reasons (witness the role of Australia in East Timor); however, given the current reality of crisis management capabilities that are highly concentrated in the NATO and EU countries, these two organizations could serve as the "core" for the gradual dissemination of expertise and best practices, particularly in Africa and the Middle East. Assisting the efforts of countries in each region is a needed contribution, but so is a readiness to augment local contingents by providing ad hoc support when needed.

- As recent experience shows, the motivations behind a recourse to NATO or the EU vary widely – from practical support requirements (e.g. Polish troops currently in Iraq) to largely political/symbolic reasons (e.g. the EU "banner" in Bunia), and from burden-sharing (e.g. the gradual takeover of NATO in Kabul) to a progressive shift in the capabilities of organizations and the nature of the mission (e.g. the NATO-EU transfer underway across former Yugoslavia). Thus, a likely model is one in which a commitment is made to develop packages of capabilities to act in a crisis response mode with the highest possible level of legitimacy – explicitly UN-mandated in an ideal situation. The specific format can be defined ad hoc, provided it satisfies certain political and functional requirements that are crucial to getting the necessary contributions while

preserving the centrality of the UN. Here is where the agreed criteria for international intervention come into play.

In conclusion, the UN need to engage in a continuing dialogue with both NATO and the EU, if only because both comprise countries that are likely to be essential to any sizable crisis response operation, whatever its "hatting". Therefore, the effectiveness of the international system as a whole largely depends on how the UN can "anchor" NATO, the EU, and other countries or regional organizations to an evolving but shared concept of intervention in crisis prevention and management. In a context of "multilayered multilateralism" (comprising the level of ad hoc coalitions or groupings, the level of regional organizations, the global level), the unique position of the UN will be safeguarded only by allowing and actually prodding other institutions to do what they do best.

ANNEX

Macedonia, Congo, Afghanistan: harbingers of the future(s)?

The great diversity among these three post-2001 missions – which immediately meets the eye – stand as a testimony to the wide spectrum of contingencies that a generic crisis response capability would need to anticipate.

Operation Concordia in the FYROM followed three successive NATO missions (August 2001-March 2003), which in turn were requested by the Macedonian government, backed by UNSC Resolution 1371, and charged with disarmament, international observers' protection and stabilization tasks. As the first-ever EU mission under the "Berlin plus" agreement with NATO, Concordia is a numerically limited deployment (less than 1,000 people), carried out in a region where the EU has an unmistakable political and strategic stake, in the wake of a limited (less than 4,000 troops) but successful NATO engagement. The background of Operation Concordia is clearly a UNSC Resolution (1371 of 2001) supporting the creation of a multinational security presence, and a specific request by the host government. In such a context of strong legitimacy, the role of NATO, as well as the insertion of monitors and observers in the country since early on, ensured a kind of "soft landing" for the EU. These relatively favorable conditions may also have eased the transition from an initial Force Headquarters based on a framework nation (with France serving in that capacity) to a truly multinational Force Headquarters (EUROFOR) in October 2003.

It is also important to note that the original FYROM deployment under UN mandate (the United Nations Preventive Deployment Force – UNPREDEP) was unique in one crucial respect: it was the first mission in the history of United Nations peacekeeping to have a preventive mandate.

Operation Artemis in the Democratic Republic of Congo was the first-ever EU-only military mission of crisis management (involving around 2,000 troops deployed), conducted in the African heartland and thus implying a significant logistical challenge. The mission was based on UNSC Resolution 1484 (of May 30, 2003), explicitly under Chapter VII, and aimed at improving the humanitarian conditions and overall stability in the city of Bunia, while a pre-existing UN deployment (MONUC) was being reinforced. The Resolution called specifically for "the swift deployment in Bunia of the Interim Emergency Multinational Force" – thus setting a clear framework of rapid and temporary response. Beside the availability of a framework nation (France, which contributed a large majority of the troops and assets), the Bunia deployment benefited from a sort of guaranteed exit strategy thanks to the planned insertion of a larger UN force – a great plus from the perspective of any contributing nation or organization such as the EU.
One of the facilitating factors for this particular mission was the pre-positioning of some French troops in the region, as well as the fact that the French government was already preparing a national operation when the EU Council officially seized the matter. Perhaps equally important, the EU as a whole has a legacy of close involvement (through development assistance and diplomatic activity, formalized with the designation of a special envoy) in the Great Lakes region – a level of priority confirmed by a specific mention in the EU Security Strategy, alongside three major global hot spots: Kashmir, the Korean Peninsula, and the Middle East . In any case, it seems clear that the mission enjoyed vast approval from the EU members, as 16 of them made contributions (some only in the form of equipment).

NATO's engagement in Afghanistan (ISAF 4) is what the Alliance itself describes as its first mission "beyond the Euro-Atlantic area" – rightly referring to a major breakthrough in the history and internal debates of NATO. The original ISAF mission was based on UNSC Resolution 1386 (of December 2001) designed to assist the Afghan Transitional Authority in maintaining security in and around Kabul; this mission did not involve NATO as such and was led by the UK. But NATO's role had begun as support for ISAF 3 (under joint German-Dutch command).
ISAF came at a delicate and dangerous time, in the wake of an essentially non-contested but strongly US-led and high-intensity military operation against the Taliban regime and the Al Qaeda network on the ground – Operation Enduring Freedom. Strong political support in Europe (and elsewhere) for the Afghanistan mission rested to a significant extent on the early psychological effect of September 11, 2001, and the unusually direct link between a single terrorist episode and a regime harboring a terrorist organization. In the wake of the Taliban's fall, the need for a stabilization force at least in the capital was widely felt to avoid anarchy and a resurgence of factional fighting. In fact, as the anti-Taliban campaign proved longer than hoped for, providing a modicum of stability for at least partial reconstruction efforts has become more, not less, crucial to the survival of the Karzai government.

Taken together, the cases just recalled confirm that in various formats the three organizations – NATO, EU, UN – are bound to closely cooperate on the ground at successive (but sometimes overlapping) stages of a crisis, thus accumulating a wealth of common experiences in different configurations.

COLLECTIVE RESPONSE TO CRISIS: STRENGTHENING UN PEACE OPERATIONS CAPACITY

SUSAN RICE

I. *The Problem*

Despite a decade of quiet but important efforts to improve the United Nations' capacity to mount and sustain effective peace operations, significant gaps remain[1]. The UN Secretariat is to be commended for commissioning the Brahimi Report in 2000 and making significant progress in implementing many of its recommendations. Though still slow to deploy, the UN has demonstrated increasing success at supporting implementation of negotiated peace agreements, e.g. Ethiopia-Eritrea, Mozambique, Cambodia, Namibia. Moreover, the UN Security Council (UNSC) has learned to cede responsibility for interventions that require substantial combat to "green-" (vice "blue"-) helmeted coalitions, as in the Balkans, East Timor, and the first Gulf War.

Yet, there remain notable, even dangerous, weaknesses in the UN's capacity to respond effectively to various contingencies. In particular, the UN continues to fall short in the realm of rapid response to crisis. The problem of rapid response is critical and has at least three key components:

- Early warning and preventive response to conflict (e.g. Cote D'Ivoire, Central African Republic).

- Rapid deployment of trained, equipped and capable forces, CIVPOL and civilians in response to swiftly unfolding crises (e.g. Rwanda, north eastern Congo, Liberia, Sierra Leone).

- Political will of UNSC and its key member states to respond effectively to certain types of crises and to finance necessary actions.

Strengthening the UN in these three respects is essential to enable the international community to deal consistently and effectively with those threats to international peace and security that emanate from internal and regional conflict, failed states and their attendant humanitarian consequences. While regional organizations, alliances, individual states and ad hoc coalitions do sometimes intervene, at least briefly, to try to mitigate crises and stabilize conflict zones (as the Australians did in East Timor, the British in Sierra Leone, and the French in Cote D'Ivoire and north eastern Congo), there is no

[1] Peace operations is defined here to include peacekeeping, peace enforcement and post-conflict peace-building efforts.

substitute over the long term for the UN. Ad hoc interventions are typically limited in scope and duration by the finite political will and resources of their leaders. Moreover, the exit strategies for such interventions are often a hand-off to the UN.

More problematic is the fact that there remain instances (as most recently in Liberia) in which no country is both willing and able to intervene in a timely and effective manner to save lives in immediate danger. In such cases, not only may thousands die needlessly, but the credibility, moral authority and efficacy of the UN and its leading member states are also compromised.

The stark reality is that, ten years after the Rwandan genocide, the international community is not appreciably better equipped to respond effectively to such a catastrophe. If a similar crisis were to occur suddenly and all the major powers again lacked the will to intervene rapidly, then no one would. The UN and regional organizations are still unable to mount effective crisis-driven peace and humanitarian operations in a relevant timeframe, i.e. within two to four weeks.

II. *Potential Elements of a Solution*

Most of the actions necessary to redress the shortcomings outlined above must come from UN member states. Rhetoric alone will not suffice. Leading nations, particularly the U.S. and the Europeans, must face the current gaps in the UN's ability to respond to conflict and humanitarian crises. They must also recognize the direct and indirect costs to the international community of continuing to avoid concerted and sustained steps to redress these failings. Achieving meaningful change will take time, and require both a substantial commitment of money and significant shifts in the behavior of member states, especially the U.S. Nevertheless, there are some steps that the UN Secretary General and Secretariat could lead in taking, with support from member states, that could make some difference.

A. *Early Warning and Preventive Action*

Despite recognition by Brahimi and others of the problem, the UN still lacks adequate capacity to predict or anticipate crises before they occur. The key problem is lack of quality intelligence – both open-source and classified.[2] There is no integrated capacity at UN HQ to gather, analyze and disseminate timely intelligence on developments that could threaten international or regional peace and security. In addition, except where it already has field missions, the UN has no mandate to gather and report intelligence on its own. UNDP, the World Bank and other UN agencies that have offices in most countries

[2] This problem has multiple elements. Member states, especially the Non-Aligned, have traditionally been fearful of empowering the UN to gather and utilize intelligence, concerned that it may "spy" on them and meddle in their internal affairs. Moreover, those member states with significant intelligence-gathering capacity are often reluctant to share it with the UN. They are concerned that doing so could compromise "sources and methods" or result in it falling into the hands of unfriendly states through their nationals who may have access to it at the Secretariat. Moreover, when such intelligence has been shared, as by the U.S. in the case of UNMOVIC, its quality has sometimes been questioned. This has further tainted perceptions in many quarters of the value of intelligence in the UN context.

do not have a culture of political reporting. Moreover, that information which can be derived through such channels may not be shared with the relevant individuals in the UN Secretariat, i.e. DPA and DPKO.[3]

The consequences of these failings are serious. The UN's ability to launch effective preventive diplomacy, when appropriate, or to spur others to do so, is limited. Too often, crises must erupt before the UN is enabled by its member states to respond. By this time, the human and financial costs have escalated as has the complexity of the crisis.

Rectifying the intelligence problem will require major changes in the attitudes of member states and new guidance from the UNSC to the UN Secretariat. Such changes, however desirable, can be hoped for but not reasonably expected in the near term.

Member states should:

- Support the establishment within UN HQ of an integrated "early warning" unit to gather, protect, analyze and disseminate information relevant to the prevention and resolution of conflict and other threats to international peace and security. The recipients of such intelligence would be limited to a small number of key individuals in UN HQ and current UNSC members.

- Regularly and more freely provide both classified and open-source intelligence to the UN early warning unit.

- Authorize and encourage staff of UN specialized and affiliated agencies (including UNDP, UNICEF, the World Bank, WHO, WFP) to report to their agencies and to UN HQ on political, economic, social and other issues that have implications for local, regional or international security. Such issues could include, inter alia: internal political developments, outbreaks of infectious disease, IDP flows, drought, international criminal activity, unusual military expenditures, terrorist fundraising or recruitment, disappearance or theft of sensitive or potentially dangerous materials.

Correspondingly, the UN SG should:

- Direct DPA and DPKO to enhance systematically their utilization of open-source intelligence, in particular by harnessing the massive quantity of information available on the internet.

- Expand utilization by UN HQ staff of local and international academics, activists and experts who can offer valuable, potentially predictive analysis.

B. *Rapid Deployment*

[3] One major exception is IRIN News, OCHA's outstanding and cost-effective mechanism for producing and disseminating news reports on a wide range of developments across Africa and Central Asia. However good, IRIN is but one source, and its utilization outside the humanitarian community may be spotty.

The UN still lacks the ability to deploy trained, equipped and effective peacekeepers, civilian staff, and civilian police (CIVPOL) quickly enough. In response to the Brahimi Report, the UN Secretariat adopted the goal of deploying a traditional peacekeeping mission within 30 days of passage of an authorizing resolution and a complex force within 90 days. These ambitious, but reasonable goals are still not often met. Deployment delays tend to erode the UN's credibility and authority with the parties to the conflict and risk the dimunition of the parties' will to adhere their ceasefire or peace agreements. Serious as such risks are, however, they relatively rarely result in the resumption of armed conflict. Still, the UN's ongoing efforts to improve its ability to meet the 30/90 day goals are critical and deserve the fullest support from member states, which thus far has been uneven.

Yet, even if the 30/90 day goals are consistently achieved, the UN would still not be able to respond quickly and effectively to another genocide or even to the kind of humanitarian crisis that unfolded in Monrovia, Liberia in the summer of 2003. To be effective in these situations, the UN must be able to deploy significant forces and civilian personnel within two weeks – or four weeks maximum.

Meeting this far more aggressive goal is not impossible but will require serious, sustained investments by both developed and developing countries. Specifically, many member states will have to grant their fullest political and practical support to make the UN's Stand-by Arrangements System (UNSAS) operative not just in theory but in practice, particularly its "Level Four" requirement for rapidly deployable troops, support capabilities and strategic lift.

Urgently, member states should:

- Establish numerous sub-regionally-based, rapidly deployable brigades with all necessary support elements (e.g. communications, HQ, engineering, medical and other units).[4] These brigades must be fully inter-operable, trained, well-equipped, have exercised together and be available on short notice for mission-ready assessments by UN personnel.

- Assist developing countries to constitute, train and equip sub-regional, brigades. Developing countries express the desire to create such brigades (e.g. the African Union), but often lack the resources and expertise to bring their ambitions to fruition. Developed countries, especially the U.S., NATO and the EU, could cooperate to help establish such brigades. One model would be for the US, NATO and EU each to partner with different sub-regional entities

[4] The African Union has agreed in principle to establish five such brigades, one for each sub-region. The South Asians recently deployed an integrated brigade for the first time in north eastern Congo to replace the French. The EU is considering such a capacity. The multinational European and Canadian Standing High Readiness Brigade (SHIRBRIG), while the best of its kind, lacks the requisite support components, cannot yet deploy within 2-4 weeks and has been committed only once, to UNMEE.

to fund common equipment and provide training, doctrine and regular exercises for such brigades and support elements.

- Designate mission-ready combat support units to augment developing country brigades that lack them. Critically important are stand-by contributions from capable countries of "fly-away" headquarters elements, medical, communications, engineering and other logistical support units.

- Maintain and provide to the UN up-to-date lists of names of experienced individuals who are willing and able to serve on short notice as leaders (civilian and military) and civilian staff of UN field missions.

- Establish well-trained, equipped, mission-ready, rapidly deployable CIVPOL units available on stand-by to the UN. Canada, EU members and Japan are particularly well-suited to fulfill this badly-needed function. These same countries should expedite plans to establish regional training facilities. CIVPOL training should be financed though the UN peacekeeping budget. Simultaneously, the UN should press ahead with efforts to establish an effective stand-by system for CIVPOL parallel to that which exists for military forces.

- Provide UN DPKO (through changes in ACABQ rules) with necessary authority to draw down up to $50 mill. from the Peacekeeping Reserve Fund to expedite the launch of new field missions.

C. *Political Will*

Creating an improved rapid response capacity is necessary but not sufficient to enable the UN to respond effectively to crises. UNSC members must also be willing to employ that capacity swiftly and to pay for it, even when the mission costly and risky. To date, the Security Council's record in this regard has been unsatisfactory. In those relatively rare instances, such as Kosovo, when there were member states prepared to act to avert a humanitarian crisis, the UNSC failed to authorize the mission. More frequently, the UNSC has been reluctant, slow and cheap in response to calls for UN peacekeeping operations, especially in Africa. The U.S., often at the behest of its Congress, is the biggest culprit in this regard, but by no means the only one. In DR Congo, Cote D'Ivoire, Central African Republic, Liberia and elsewhere, the U.S. sought to limit the size and scope of UN operations both to control costs and reduce mission complexity.

Careful scrutiny of proposed UN missions is both wise and the appropriate responsibility of the UNSC. However, the UN Secretariat has substantially improved its processes for scoping, planning and costing-out new missions. Rare now is the case when UN DPKO presents the Security Council with a mission plan of dubious viability.

Thus, member states should:

- Resolve customarily to vote in favor of well-conceived UN peace operations when circumstances require prompt action and there are capable forces willing to undertake the mission. UNSC permanent members should normally resist the temptation to delay, down-size or re-cast proposed peace operations. To facilitate adoption of this new approach, Washington should reconsider its method of financing UN peace operations.

- Pay in full and on-time their UN peacekeeping and regular budget assessments and all arrears without further delay.

The UN SG should:

- Continue to ensure quality planning for proposed missions and to contain costs.
- Include an evaluation of the costs (humanitarian, security, political and economic) of potential *inaction* by the UNSC in reports to the UNSC on prospective peace missions.
- Use the bully pulpit to press reluctant member states to action, including by chronicling their failures and "naming and shaming" them, as necessary.
- Utilize the UN's public information apparatus to focus media attention on crises or conflicts requiring urgent UNSC attention.

POST-CONFLICT RECONSTRUCTION

MOHAMMED AYOOB

This brief addresses the problem of post-conflict reconstruction posed in the form of three questions in the e-mail commissioning the brief for the High-Level Panel appointed by the UN Secretary General. The brief addresses each of the questions in turn and then summarizes my recommendations in a concluding section.

I. *How can collective security mechanisms address the challenge of creating capable states in post-conflict situations?*

The question seems to assume that before engaging in post-conflict reconstruction efforts, the UN's collective security mechanism already has been used to intervene in the particular conflict situation that now requires reconstruction. If this is not the case, as the two most recent cases of Kosovo and Iraq demonstrate, then we immediately run into severe problems of legitimacy and credibility of the UN system. This is why attempts to dump post-conflict situations requiring reconstruction in the lap of the UN following unilateral or multilateral interventions not sanctioned by the SC should be strongly resisted. The SC and the UN's collective security mechanism should not be allowed to become tools in the hands of intervening powers who have done so without UNSC authorization, as happened in Kosovo and in Iraq. Allowing such dumping detracts from the legitimacy and credibility of the UNSC, undermines the letter and spirit of the Charter, and gives the distinct impression that the UN is a mechanism to be used when needed by one or more great powers and ignored, and often derided, when it does not serve such powers' purposes. If the UN does not take a strong stand on this issue to demonstrate its autonomy from the major powers who also happen to be the major unauthorized interveners in conflict situations, it will be seen as partisan by indigenous protagonists and is likely to face the wrath of those who may be resisting such unauthorized interventions. This was the reason why Iraqi insurgents targeted the UN mission in Iraq with extremely tragic consequences for the UN staff in Baghdad.

In order to successfully perform the twin tasks of international intervention and post-conflict reconstruction, UN collective security mechanisms must be perceived as legitimate instruments wielded on behalf of the international community and not used to further the objectives of one or more powers. The UNSC must act with a great deal of caution on this issue also because the Council itself lacks unconditional legitimacy in the eyes of many people around the world. This is the case both because of the archaic formula under which it is constituted (with Europe over-represented and other regions under-represented in terms of permanent members) and because of the veto power vested in the permanent members. It must, therefore, guard jealously against giving skeptics and critics greater ammunition by falling in line with the wishes of great powers in post-conflict situations where the SC has not expressly sanctioned intervention.

This problem becomes especially acute when the collective security provisions of Chapter VII of the Charter are used to sanction or endorse operations ostensibly undertaken for humanitarian reasons. These operations are mounted not to repulse external aggression (as was the case in Korea or the Gulf War of 1991) but to intervene in the domestic affairs of states sometimes against the wishes of the legally constituted government of such states. Kosovo, although undertaken without UN sanction, is a good example but there have also been cases of intervention – the no fly zones in Iraq are another pertinent illustration – where UNSC resolutions have been construed to permit such intervention. Since humanitarian interventions contravene the generally accepted rule of non-interference in the domestic jurisdiction of states, and since this makes for an automatic bias against them among the large majority of states, the UNSC must be all the more vigilant to ensure that its motives and actions do not become suspect in the eyes of large numbers of the UN's members who do not have any direct say in the SC's decisions.

Moreover, and most importantly, using collective security mechanisms for post-conflict reconstruction is by itself a contradiction in terms. Collective security mechanisms operate under Chapter VII of the Charter, which was written for the specific purpose of repelling external aggression and tackling threats to international security. Using these provisions for reconstruction stretches the provisions of the Charter beyond acceptable limits. New instruments/institutions that are more broadly based and, therefore, have the confidence of the international community must be devised to address reconstruction tasks. In fact, as I have argued elsewhere (Global Governance, July-Sept 2001), I believe that there is a need for a new UN organ, separate from the SC, that must determine the necessity for humanitarian intervention in specific cases, sanction such interventions, and oversee them both during the period of conflict and during post-conflict reconstruction. Such an organ, call it the Humanitarian Council if you will, must not be subject to veto and must be far more representative of the international community than the currently constituted SC. This will provide much greater legitimacy to collective interventions undertaken on behalf of the society of states and is likely to generate the consensus required for international cooperation in post-conflict reconstruction of states that have been incapacitated by civil wars or other types of debilitating conflicts and crises.

In the interim, or if it is politically unfeasible to create an independent mechanism for humanitarian and reconstruction purposes, the UNSC must take three important steps to bolster its sagging legitimacy and correct the perception that it has become a handmaiden for the world's only superpower. First, care must be taken to prevent the charge of selectivity being ever again leveled against the SC in the context of humanitarian interventions. As it is, it will take the SC a couple of decades to undo the damage to its reputation for giving priority to cases like Haiti over the mass genocide in Rwanda. Second, the permanent members must voluntarily abjure the right to veto in cases of humanitarian crises. Third, SC members must insist that all its resolutions must be considered equally sacrosanct. Selectivity in the implementation of resolutions passed by the SC generates the widespread perception that some states can defy the wishes of the SC with impunity while others are held to account for minor infringements. Nowhere is

this discrepancy more evident than in the context of the Middle East and the differential treatment meted out to Israel and Iraq. The argument that resolutions against Iraq were passed under Chapter VII of the UN Charter and were, therefore, self-enforcing, while those condemning Israeli actions regarding Jewish settlements, the status of Jerusalem, and the treatment of occupied populations, were not are seen by many as mere sophistry. Everyone knows that the US will veto any Chapter VII resolution against Israel (it has done so innumerable times even when they are not moved under Chapter VII). This has created the distinct impression that some states are more equal than others when it comes to implementing the will of the international community as expressed through the UNSC. It is time that this impression is corrected by the SC standing up for the sanctity of all its resolutions and prescribing appropriate punishments against recalcitrant states irrespective of the latter's' links to major powers.

The success of the UN's efforts to provide credibility to its role in post-conflict reconstruction can be guaranteed only when it succeeds in evenhandedly dealing with conflict situations. It is instructive to note in this context that there is tremendous need for the UNSC to be directly involved in bringing to an end the Israeli occupation of Palestinian territories and subsequently aiding Palestine to reconstruct economically and politically. However, the SC has not mustered the courage to move on this issue decisively. All that the UN has done is to engage in window dressing in the form of the Quartet's roadmap which no one – least of all the Israeli government – takes seriously. This does not augur well for the UN's credibility in a significant part of the world.

II. *How do states assess the urgency of investment in stabilizing, economically and socially, a war-torn country within or outside their immediate region?*

States usually assess the urgency of such investment on the basis of two interrelated criteria: one, geographic propinquity and, two, flowing from that, the likelihood of major refugee influx across their borders if instability and insecurity continues in their neighborhood. Only global powers, or major powers with interests in a particular region for strategic, economic or other reasons, are likely to conclude that states far away from them geographically need urgent attention if they are war-torn or threatened with destabilization. In other words, the wider the network of interests that particular powers have, the greater will be their interest and involvement in stabilizing war-torn countries of strategic or economic importance to them.

But, there is another side to this coin as well. Powers with far flung interests and the capabilities to pursue them also may be prone to intervening in the affairs of states important to them in such a way that the target states are destabilized or potential conflicts within such states exacerbated. This was the common experience of many war-torn states during the Cold War era and there is no reason to believe that major powers will not act similarly again if it suits their purposes. Therefore, this is a double-edged sword. It poses an acute dilemma for the UN when it needs states to volunteer on an ad hoc basis to mobilize resources and deploy military and civilian personnel in particular cases of humanitarian intervention and/or post-conflict reconstruction. Interested states are likely to volunteer, or even be willing to be subcontracted certain expeditions, but the

very fact that they may have their particular interests at stake is likely to make their efforts appear suspect and has the potential to distort the objectives the UN may have in mind. This is all the more reason that the UN must create a permanent mechanism with a significant amount of automaticity built into it to react to humanitarian crises as well as to respond to the need for post-conflict reconstruction.

III. *What is needed to support a more operationally and legally coherent approach to countries emerging from conflict?*

What is needed above all is a credible mechanism that is depoliticized as far as possible. I know that all major decisions are "political" in nature. But, I also believe that members of the UN in general and the major powers in particular need to demonstrate the "political" will to keep decisions regarding humanitarian intervention and post-conflict reconstruction above (or beyond) the political fray. There must be a degree of automaticity built into the UN's responses to humanitarian crises and post-conflict reconstruction efforts and members must assume financial responsibilities for these efforts according to their capacity irrespective of the fact whether their national interests are involved or not in particular cases. It would be worthwhile to create a Department of Post-Conflict Reconstruction within the UN Secretariat with a clear mandate to lead international efforts and implement UN resolutions relating to particular cases without fear or favor. The Secretary-General's powers to oversee such reconstruction must be insulated from political interference by the major powers by mandating that he/she report both to the GA and the SC on matters of post-conflict reconstruction and be held accountable before both bodies. The GA's direct involvement is likely to counter-balance any bias that may creep in toward major power interests in decisions regarding post-conflict reconstruction.

IV. *To sum up:*

- As far as possible, the UN's collective security mechanism should not be placed at the disposal of non-authorized interveners for purposes of post-conflict reconstruction. This violates the letter and the spirit of the UN Charter and detracts from the credibility of UN operations and the legitimacy of the UN system.
- Ideally, the UN's collective security mechanism should not be used for humanitarian intervention and post-conflict reconstruction. A different set of mechanisms ought to be devised for these purposes that are more broadly based and not subject to veto power. Serious thought should be given to amending the Charter to set up a Humanitarian Council. A Department of Post-Conflict Reconstruction should be set up in the UN Secretariat. It should report, in the absence of the Humanitarian Council, through the Secretary General to both the SC and the GA.
- These mechanisms should be guaranteed adequate and regular financing based on proportionate contribution by members calculated on the basis of their GDP and financing capabilities. Adhocism should be abjured in favor of more permanent

mechanisms that kick in automatically once the need for action is discerned and proper authorization received.

- Finally, the process of decision making regarding humanitarian intervention and post-conflict reconstruction must be insulated from "national interest" concerns of the major powers as far as possible. The process should be transparent and accountability ensured either to the new Council set up for this purpose or simultaneously to the SC and the GA through the Secretary General.

INSTITUTIONALIZING ACCOUNTABILITY:

A POLICY PAPER ON THE ROLE OF THE UNITED NATIONS IN IMPROVING THE DESIGN, IMPLEMENTATION AND COORDINATION OF POST-CONFLICT JUSTICE POLICIES

M. CHERIF BASSIOUNI

I. *Introduction*

Post-conflict justice strategies are increasingly central to the work of the Security Council, the Secretariat, the General Assembly, and other United Nations bodies. A growing percentage of the United Nation's budget, resources, and personnel are directed towards post-conflict justice, including peacekeeping operations, the two ad-hoc tribunals, assistance for truth commissions and mixed tribunals, and a variety of justice-related missions in transitional societies around the world. The Security Council, in particular, finds itself called upon to devote valuable time and resources to a growing number of post-conflict justice interventions in different nations around the world.

Despite the expanding profile of post-conflict justice within the United Nations, there exist no guidelines for these practices and no coordinating administrative body to deal with these issues in a comprehensive and focused manner. Because of this, post-conflict missions and strategies are often inefficient, costly, inadequately planned, and unable to benefit from the lessons of previous experiences. This short document reviews the United Nations' growing engagement with post-conflict justice, with a special focus on the Security Council, and considers key problems associated with these practices. The document proposes a two-part policy response: 1) develop United Nations Post-Conflict Justice Guidelines and Principles; and 2) establish a United Nations Office of Post-Conflict Justice.

II. *The Expanding Role of Post-Conflict Justice within the United Nations*

The United Nations' commitment to post-conflict justice arises from the Charter's definition of its mission, "to take effective collective measures for the prevention and removal of threats to peace." Post-conflict justice is premised on the idea that facing past political violence through prosecutions, truth commissions, reparations, and other strategies is a necessary prerequisite for building a stable political order and preventing the recurrence of social instability and violence.

Over the last fifteen years, the United Nations has significantly increased its engagement with specific post-conflict justice interventions as seen in an array of actions by the Security Council:

- The formation of the 1992 Commission of Experts to Investigate War Crimes in the Former Yugoslavia;
- The creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR);

- Linking peace-keeping activities to issues of justice in Cambodia. East Timor and Sierra Leone; and,
- Limiting the ability of the International Criminal Court (ICC) to prosecute individuals for a renewable 12-month period.

These activities display both a growing acceptance of the central role of post-conflict justice in fulfilling the Security Council's responsibilities under Chapter VII, as well as a marked concern for the potential policy limitations of a firm commitment to accountability in the wake of severe political violence.

This situation raises two interrelated questions: How can the Security Council and the United Nations more generally improve the success and efficiency of post-conflict justice strategies? And, will a more coherent and focused commitment to post-conflict justice hinder the ability of the Security Council to operate in a rapid and flexible manner in dealing with pressing questions of global security?

III. *Security Council – Balancing Peace and Justice*

The Security Council currently faces two interrelated problems regarding post-conflict justice strategies: an unnecessary use of valuable time and resources; and, a tension between the value of consistent policies and the need for context-specific flexibility.

Unnecessary Use of Time and Resources – At present, many post-conflict justice programs are directly managed by the Security Council and require a significant amount of the body's time and resources, which contributes to inefficiency and high costs. For example, every major management issue regarding the ICTY and the ICTR must pass through the Security Council. This includes decisions regarding hiring judges and other key personnel, reviewing annual reports produced by the Presiding Judge, the Prosecutor, and the Registrar, and an array of specific requests concerning daily operations. It is estimated that managing the ICTY and the ICTR uses 18 days of the Security Council's time each year (as much as 8% of annual work days). As the need for additional tribunals and other post-conflict justice policies increases (potentially for Iraq, the Democratic Republic of Congo, Liberia, etc.), the demands on the Security Council may well expand to levels that will impair its ability to deal with other issues. For this reason, the United Nations needs to shift the supervision, monitoring, and management of post-conflict justice strategies away from the Security Council towards a more appropriate entity.

Concerns that a Commitment to Justice Limits Policy Options – The Security Council requires great flexibility in addressing armed conflicts and related threats to international security and is, therefore, legitimately concerned about guidelines, rules or precedents that may limit its capacity to act. This situation is sometimes described as presenting a tension between the demand for justice and the need for peace. This situation is evident when accountability is traded for the negotiated end of a conflict, as in cases where authoritarian leaders are offered protection from prosecution in return for relinquishing power. As the Security Council's engagement with post-conflict justice expands, there

exists a growing concern for the coherence and long-term success of its policies. It is now necessary to develop principles that will guide Security Council actions in order to maximize the prophylactic power of post-conflict justice in preventing the recurrence of political violence and acting as a local, regional, and global deterrent. Past experience reveals that taking a strong stance on justice issues encourages states to alter their behavior and positively affects the conditions for peace negotiations (so as not to grant legitimacy to the most extreme demands of repressive leaders). Nevertheless, these guidelines must be created with an understanding that each conflict is unique and requires adequate flexibility to empower negotiators to seek reasonable, fair, and equitable settlements.

IV. *Current Problems in the Structure, Implementation and Sustainability of United Nations' Strategies of Post-Conflict Justice*

The United Nations' current engagement with post-conflict justice is characterized by the lack of a central coordinating institution. Because of this, specific programs and strategies are often hindered by key problems in structure, implementation, and evaluation.

A. *Structure*

Currently, post-conflict justice strategies are managed by too many distinct and disconnected United Nations bodies that operate independently without central coordination or a master plan.

Multiplicity of Agencies without Central Coordination – Post-conflict justice strategies are managed by multiple United Nations bodies situated within the Secretariat, the General Assembly, and the Security Council. Under the direction of the Secretariat, there is the Office of Legal Affairs (OLA), the Department of Peacekeeping Operations (DPKO), and the Office on Drugs and Crime (ODC). Under the direction of the General Assembly, there is the Office of the High Commissioner for Human Rights (UNOHCR), and the various programmatic entities, particularly the United Nations Development Programme (UNDP), which designs and manages development projects, rule of law interventions and other assistance programs crucial to social reconstruction. Under the Security Council, there are the two ad-hoc tribunals, various Peacekeeping Operations and Missions, and the United Nations Compensation Commission. These distinct institutions should be brought together under the unified direction of a single coordinating United Nations body.

Lack of a Master Plan – In almost every case, the United Nations' engagement with post-conflict justice involves multi-lateral programs that lack the general coordination necessary for efficient, coherent, and comprehensive project implementation. This situation is evidenced, above all, by the lack of a unifying master plan. This problem is especially serious during the early stages of a post-conflict justice intervention, when careful planning could significantly improve the focus of a mission and radically improve the value and efficiency of its future implementation. Where no centralized master plan exists, actual processes of post-conflict justice are generally left to individual heads of

particular offices or their field representatives. For example, following the Rwandan genocide, the United Nations sent a mission to the country and suddenly found itself working alongside over 35 nations and countless NGOs and IGOs. In this context, it was unclear who was in charge and who had the authority to manage projects and direct programs and resources to those in need. To remedy this situation, it is necessary to establish a single coordinating body that can develop and implement a master plan.

B. *Implementation*

The implementation of United Nations strategies of post-conflict justice are plagued by inefficiency, excessive costs, and a failure to build domestic capacity.

Inefficiency – Where there is no central coordinating body, the implementation of post-conflict justice strategies is left to an array of different entities. This creates a situation that tends towards inefficiency. Often, donor nations are interested in funding particular projects that may not serve a nation's most pressing needs. In addition, funding is often directed to only one component of a larger project, such as building a hospital while providing no money for beds or medicine; or funding judicial training without investing in required judicial infrastructure, such as libraries, computers, or buildings. Where investments of financial and human resources are poorly coordinated, significant inefficiency often renders well-intentioned interventions useless. The only way to remedy this problem is through coordination by a single entity.

Cost – Post-conflict justice projects are often extremely costly. While some costs are unavoidable, many aspects of program expenses could be significantly reduced with improved planning, greater coordination, and a more unified vision of the interrelationship between distinct projects. In many cases, new post-conflict justice projects reinvent program components that have already been designed and implemented in other places. The United Nations has no system for analyzing post-conflict experiences in distinct contexts to guide future practice. This oversight produces and reproduces significant project inefficiency. In addition, high costs could be lowered by reducing reliance on expensive foreign staff and improving managerial efficiency. Often, long term costs are not considered during the planning stages, so that actual implementation costs far exceed early, and often vague, speculations. The ad-hoc tribunals are excellent examples of this problem, having cost over $1 billion to date with an estimated final cost in excess of $2 billion, all to process fewer than 150 cases.

Failure to Build Domestic Capacity – Where the United Nations is strongly committed to post-conflict justice issues, it often fails to link its projects with improvements in domestic capacity. For example, the ICTR was not designed to improve any aspect of the Rwandan judicial system, despite the fact that it will ultimately cost the international community in excess of $1 billion. The ICTR's staff, training and significant resources have not been designed to assist Rwandan society in developing human capacity or making other improvements to address that nation's pressing post-conflict justice needs. Because the court is located in Arusha, Tanzania, it will not even contribute to Rwanda's judicial infrastructure. Most United Nations post-conflict projects share this

fundamental problem. They tend to be staffed by foreign professionals and fail to integrate local training, infrastructural development or other mechanisms of domestic capacity building into their normal operations. This problem can best be addressed by integrating a commitment to building domestic capacity into unified guidelines.

C. *Sustainability*

Post-conflict justice has reached a critical stage of development where it is essential that those who are planning new interventions can learn from the experiences of previous projects. This is true for every component of post-conflict justice, from tribunals to truth commissions to systems of reparation. Creating efficient and successful policies requires a uniform mechanism of evaluation alongside systems of communication that allow practitioners and policy planners to learn from each other. Ultimately, the true measure of the success of post-conflict justice is the ability of specific strategies to profoundly impact a suffering society, whether by punishing perpetrators, assisting victims, reconstituting damaged state structures, or otherwise creating the foundation for democratic practice and lasting peace. This requires the coordination of different elements of the United Nations structure. For example, one of the key failures of the United Nations sponsored truth commission for El Salvador was that its investigative work was not backed up by significant political pressure. After the Commission released its report, which found key elements of the Salvadoran state directly responsible for gross violations of human rights, the government promptly passed a blanket amnesty that protected all perpetrators from prosecution and refused to implement any of the investigative body's valuable recommendations. Situations of this type are common and could be most appropriately addressed by a coordinated and comprehensive political commitment to post-conflict justice managed by a unified body that focuses solely on these issues.

V. *How Can the United Nations More Appropriately Respond to Post-Conflict Justice Issues?*

The United Nations has an important responsibility to support post-conflict justice and encourage the institutionalization of accountability. In order to best meet this challenge, the United Nations should openly engage the question of post-conflict justice in a coordinated, efficient, and creative manner involving two key reforms. First, the United Nations should establish Post-Conflict Justice Guidelines and Principles; and, second, it should establish an Office of Post-Conflict Justice to coordinate post-conflict justice strategies around the world.

Develop the United Nations Post-Conflict Justice Guidelines and Principles – In order to organize, coordinate, and manage its various post-conflict justice projects and to establish a clear sense of its mission as regards this issue, the United Nations should formulate a series of guidelines and defining principles regarding post-conflict justice. This process could be enabled by appointing a special rapporteur on post-conflict justice. The process could also be assisted by the creation a working group that would specialize in assessing the experiences of past United Nations projects, with the expert assistance of various

human rights professionals, NGOs, IGOs, and others

Establish the United Nations Office of Post-Conflict Justice – The United Nations should create an Office of Post-Conflict Justice (OPCJ) within the Secretariat that would coordinate and manage overall policy as well as distinct post-conflict justice projects. The OPCJ would be defined by the following characteristics:

- Operate pursuant to a Security Council mandate or through a mandate by the General Assembly.
- Specially funded from donor states, so its projects would have a steady stream of funding that could be effectively and efficiently coordinated.
- Utilize personnel and existing expertise from OLA, DPKO, and ODC and work closely with all other United Nations' entities, such as UNOHCR and UNDP. Increased coordinating function would improve project efficiency and significantly reduce costs.
- Create and maintain comparative research regarding post-conflict justice strategies around the world in a manner similar to proposed improvements in peacekeeping research made by the Panel of United Nations Peace Keeping Operations chaired by Lakhdar Brahimi.
- Focus all post-conflict justice interventions towards long-term sustainability and the establishment of domestic capacity.
- Link all post-conflict justice interventions to each other to create institutional memory that would enable the evaluation of successful and unsuccessful strategies.

International cooperation is a necessary prerequisite for ensuring the success of post-conflict justice in specific societies and forms part of a broad global commitment to truth-telling, combating impunity, acknowledging victims, and ensuring accountability in the wake of severe political violence. In moving towards the resolution of these issues, it is essential that the United Nations define its role regarding post-conflict justice in a clear, focused manner. Establishing Post-Conflict Justice Guidelines and Principles and creating an Office of Post-Conflict Justice will assist the Security Council and the United Nations in balancing the demands for justice and peace with a firm commitment to institutional accountability, democracy, and the protection of fundamental human rights.