

**OLD QUESTIONS AND NEW CHALLENGES
FOR THE U.N. SECURITY SYSTEM:
THE ROLE OF THE SECURITY COUNCIL IN THE LIGHT OF THE CHARTER'S REFORM**

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I. INTRODUCTION

This report is the outcome of a workshop on “Old Questions and New Challenges for the U.N. Security System: The Role of the Security Council in the Light of the Charter’s Reform,” held on October 1, 2005 in Geneva with the financial support of the Directorate of International Law/Swiss Federal Department of Foreign Affairs.

The workshop dealt with some of the most important legal questions that have arisen in the recent practice of the Security Council and have been explored in the reports prepared by the High-Level Panel¹ and the United Nations Secretary-General² as well in the resolution adopted by the United Nations General Assembly at the recent World Summit³ and in other U. N. documents.

The report is composed of the five papers presented and discussed at the workshop and the conclusions prepared by the chairman of the workshop.

II. ARE THERE LIMITS TO THE POWERS OF THE SECURITY COUNCIL?

As a result of the prolific action taken by the Security Council in the area of peace and security since the end of the Cold War, questions have been raised as to whether there are legal limits to the power of the Council. If there are legal limits to the powers of the Council, what are those limits and are they subject to judicial determination? These questions have been raised in a number of different contexts, including the imposition of sanctions, the use of force, and the administration of territory by the U.N. Some have questioned whether the imposition of comprehensive sanctions by the U.N. violates principles of human rights and humanitarian law.⁴ Others have argued that the procedure by which targeted sanctions are imposed on individuals deprive individuals of due process rights. Questions have also been asked as to whether the Security Council is able to release states from their obligations under the law of belligerent occupation. In addition, the ability of the Security Council to act as a global legislator has been questioned.⁵

¹ U.N. High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565 (2004) [hereinafter High-Level Panel].

² U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, U.N. Doc. A/59/2005 (2005).

³ G.A. Res. 60/1, *2005 World Summit Outcome* (2005).

⁴ Mary Ellen O'Connell, *Debating the Law of Sanctions*, 13 EUR. J. INT'L. L. 63 (2002); Matthew Craven, *Humanitarianism and the Quest for Smarter Sanctions*, 13 EUR. J. INT'L. L. 43 (2002); W. Michael Reisman & Douglas L. Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes*, 9 EUR. J. INT'L. L. 86 (1998).

⁵ See the discussion by Tsagourias in Chapter VI below.

Questions regarding the powers of the Security Council were raised before the International Court of Justice (ICJ) in two cases in the 1990s.⁶ These cases have formed the focus of intense debate among scholars.⁷ This debate has often been placed in the context of ensuring the legitimacy of the Council's actions and the promotion of the accountability of the Council. In this regard, various other methods by which these aims can be achieved have been noted. For example, it has been argued that the Council may be subject to political control by the General Assembly through the exercise of the latter body's budgetary powers.⁸ Again, it has been suggested that the possibility of non-compliance with Council decisions by member states is another way in which the Council may be kept in check.⁹ Others point to the checks which may exist within the Council itself.¹⁰ These checks include the veto possessed by each permanent member of the Council as well as the collective veto which non-permanent members

⁶ See Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.; Libya v. U.K.), Provisional Measures, 1992 I.C.J. 3, at 114 [hereinafter *Lockerbie Case*]; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), Second Request for Provisional Measures, 1993 I.C.J. 325 [hereinafter *Bosnia Genocide Convention Case*].

⁷ See, e.g., MOHAMMED BEDJAOU, THE NEW WORLD ORDER AND THE SECURITY COUNCIL—TESTING THE LEGALITY OF ITS ACTS (1994); ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL (2004); Dapo Akande, *The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?*, 46 INT'L. & COMP. L. Q. 309 (1997); José E. Alvarez, *Judging the Security Council*, 90 AM. J. INT'L. L. 1 (1996); Ian Brownlie, *The Decisions of Political Organs of the United Nations and the Rule of Law*, in ESSAYS IN HONOUR OF WANG TIEYA 91 (1994); Thomas M. Franck, *The Powers of Appreciation: Who is the Ultimate Guardian of UN Legality*, 86 AM. J. INT'L. L. 519 (1992); Terry D. Gill, *Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter*, 26 NETH. Y.B. INT'L. L. 33 (1995); Vera Gowlland-Debbas, *The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, 88 AM. J. INT'L. L. 643 (1994); R. St. J. MacDonald, *Changing Relations between the International Court of Justice and the Security Council of the United Nations*, 31 CAN. Y.B. INT'L. L. 3 (1993); Peter Malanczuk, *The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?* 10 EUR. J. INT'L. L. 517 (1999); Ken Roberts, *A Second-Guessing the Security Council: The International Court of Justice and its Powers of Judicial Review*, 7 PACE INT'L. L. REV. 281 (1995); Malcom Shaw, *The Security Council and the International Court of Justice: Judicial Drift and Judicial Function*, in THE INTERNATIONAL COURT OF JUSTICE—ITS FUTURE ROLE AFTER FIFTY YEARS 219 (A. Sam Muller, David Raic & Johanna M. Thurànszky eds., 1997); Krysztof Skubiszewski, *The International Court of Justice and the Security Council*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 606 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996); W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L. L. 83 (1993); Geoffrey R. Watson, *Constitutionalism, Judicial Review and the World Court*, 34 HARV. INT'L. L. J. 1 (1993).

⁸ Alvarez, *supra* note 7, at 10.

⁹ *Id.*, at 12–13.

¹⁰ Reisman, *supra* note 7, at 83–86, 96; Roberts, *supra* note 7, at 318–19.

(or a part of that group) possess. It will, of course, be remembered that it was the threat or exercise of the veto power by permanent members that prevented the Council from taking effective action (except in limited cases like the Rhodesia incident)¹¹ during the Cold War.

Despite the absence of unambiguous pointers in the U.N. Charter and its negotiating history,¹² I have argued elsewhere that there are substantive limits to the powers of the Security Council discernible from the U.N. Charter.¹³ These limits are discernible from the purposes and principles of the U.N. which the Security Council is obliged to act in accordance with under Article 24(1) of the Charter. In particular, I argued that the Security Council is bound by general international law,¹⁴ human rights obligations,¹⁵ and peremptory norms of international law.¹⁶ The existence of these and similar limitations on the powers of the Council has been recognized both by those who favor judicial review and those who do not.¹⁷ Once these legal limits to Council action are acknowledged, it becomes difficult, from a formal point of view, to see how there can be opposition to judicial review by the ICJ.

¹¹ See VERA GOWLLAND-DEBBAS, COLLECTIVE RESPONSES TO ILLEGAL ACTS IN INTERNATIONAL LAW: UNITED NATIONS ACTIONS IN THE QUESTION OF SOUTHERN RHODESIA (1990).

¹² For an examination of the Charter provisions and its *travaux préparatoires* on the question of limits of Council power and possible judicial control, see Roberts, *supra* note 7, at 286–93 (coming to the conclusion that these sources do not resolve the issue conclusively but they certainly do not favor a power judicial review even rejecting it as an institutionalized procedure); Watson, *supra* note 7, at 4–15 (summarizing that the text and negotiating history of the relevant U.N. instruments do not rule out all forms of judicial review). See also the dissenting opinion of Judge Weeramantry in the Lockerbie Case, Provisional Measures, *supra* note 6; dissenting opinion of President Schwebel in the Lockerbie Case, Preliminary Objections (27 Feb. 1998) (concluding from the *travaux préparatoires* and text of the Charter lead that the Court was not and was not meant to be invested with a power of judicial review of the legality or effects of decisions of the Security Council).

¹³ See Akande, *supra* note 7.

¹⁴ By Art. 1(1) of the Charter, one of the purposes of the U.N. is that the adjustment or settlement of international disputes or situations which might lead to a breach of the peace is achieved in conformity with the principles of justice and international law. For a development of the argument, see *id.* at 317–21.

¹⁵ *Id.*, at 323–25.

¹⁶ *Id.*, at 322–23.

¹⁷ See Gill, *supra* note 7; Alvarez, *supra* note 7, at 17 (“The Council cannot impose an absolute embargo denying a targeted population access to medicine or food, in violation of peremptory norms of the laws of war and /or human rights, and . . . its actions must generally be proportionate to the aims sought. [T]he Council must respect some essential core of sovereignty so that targeted states are not deprived of their right to statehood, including the right to self-preservation and to manage and govern their territory”); Judith G. Gardam, *Legal Restraints on Security Council Military Enforcement Action*, 17 MICH. J. INT’L. L. 285 (1996) (contending that the Security Council is bound by the *jus in bello* and *jus ad bellum* when it resorts to military force); Reisman & Stevick, *supra* note 4 (contending that sanctions imposed by the Council must comply with principles of proportionality and necessity and there must be periodic review of their effects).

The limits of the Council are derived from the Charter and are principles of international law. No question of international law is *prima facie* excluded from the purview of the International Court of Justice. Thus, if in a contentious case¹⁸ the ICJ is asked by one party to apply a Security Council resolution and the other party takes the position that the Council decision is unlawful, the ICJ is bound to decide the issue of legality. This power to review the legality of Council decisions arises from the following propositions: the limits of the Council's power are derived from the Charter; Charter rules are higher norms than Council decisions; and where the International Court is asked to choose between a Council decision and a Charter norm, it must apply the higher Charter norm.¹⁹

Having identified *substantive* limits of the power of the Council, a further issue that arises is whether there are limits to the *procedure* that may be utilized by the Council in reaching its decisions. This issue is particularly important because one of the major complaints against Council action today is the lack of transparency and the secrecy entailed in the current decision-making procedures of the Council. It has been pointed out by close observers that decisions of the Council are now made in "consultations" of Council members which take place outside the Council chamber and without records being kept.²⁰ Thus, issues may arise as to whether the Council has acted illegally by not giving sufficient opportunity to the State or an individual affected by sanctions to present a case, i.e., whether there has been procedural unfairness. This argument was raised by South Africa in the advisory opinion on *Namibia* but was not considered

¹⁸ Most authors admit that questions of judicial review may legitimately arise in advisory proceedings if it is the wish of the Council. I would go further to argue that judicial review may occur in advisory proceedings even if it is not expressly requested in the Council's question. This is what happened in *Certain Expenses of the United Nations* (Article 17, Paragraph 2, of the Charter), Advisory Opinion, 1962 I.C.J. 151 (July 20); *Legal Consequences for States of the Continued Presence of South Africa on Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 2, 16 (1971) [hereinafter *Namibia Opinion*]. Furthermore it is possible and permissible that the General Assembly request an opinion on the legality of the acts of the Council. This follows from the fact that the Assembly can request an opinion on any legal question [U.N. Charter art 96, para. 1] and from the fact that it is within the Assembly's functions to consider how the Council is exercising its powers [U.N. Charter art. 15, para. 1 of the Charter provides that the Assembly shall receive and consider reports from the Council].

¹⁹ This argument is fuller developed in Akande, *supra* note 7, at 325–33.

²⁰ Anthony Aust, *The Procedure and Practice of the Security Council Today*, in *DEVELOPMENT OF THE ROLE OF THE SECURITY COUNCIL—COLLOQUE 365* (R.J. Dupuy ed., 1993).

in any detail by the International Court.²¹ Alternatively, it may be argued that the Council has not taken sufficient steps to ascertain the facts or has based its decision on incorrect facts.

A closely related issue to that of procedural limits to the powers of the Council is that of whether it may be argued that the decision taken by the Council, though within its substantive limits (and thus theoretically within the powers of the Council), is in the circumstances directed towards an ulterior purpose (i.e., that there has been an abuse of power).²² This is a contention that was advanced by Libya in the *Lockerbie* case. At least one writer has noted that the concept of abuse of rights as a general principle of international law might impose constraints on Council decision making.²³

One question that may be asked with regard to these procedural limits is what their sources are. These limits may be derivable either from the Charter or from general principles of administrative law. In relation to the latter, very interesting questions arise as to the extent to which international law is able to borrow from domestic public law. There have been examinations of the ways in which international law uses private law analogies²⁴ but no real analysis of whether public law analogies are permissible or helpful in international law. The answers to these questions may rest ultimately on the question of whether international law includes a concept of the rule of law so that it is to be presumed that powers delegated to the Security Council by the international community are to be used for lawful purposes.

²¹ See *Namibia Opinion*, *supra* note 18, at 16. Art. 32 of the Charter provides that “[a]ny Member of the United Nations which is not a member of the Security Council or any state which is not a Member of the United Nations, if it is a party to a dispute under consideration by the Security Council, shall be invited to participate, without vote, in the discussion relating to the dispute.” It is true that in *Namibia Opinion*, the Court distinguished “a dispute” before the Council from “a situation” before the Council. It may be argued that Chapter VII matters relate to the latter and are therefore outside the scope of Art. 32. It may also be argued that the Council may not have the time to engage in this quasi-judicial function of listening to arguments. However, it ought to be noted that in many cases, Council actions are not taken urgently and there is time for giving rights of audience of affected States.

²² See Judge Morelli, in *Namibia Opinion*, 1971 I.C.J. at 223, (including an example of “an act of the Organisation can be regarded as invalid, and hence an absolute nullity”, “a resolution vitiated by a manifest *excès de pouvoir* (such as, in particular, a resolution the subject of which had nothing to do with the purposes of the Organization)”). Presumably, such an invalid act would include an act which, though valid if taken to achieve the purposes of the Organization, is shown not to have been taken for those purposes. It is however apparent this requires proof of motive—a very difficult thing to prove, especially in the light of the secrecy of Council decision making pointed out earlier. *Id.*

²³ Vera Gowlland-Debbas, *Security Council Enforcement Action and Issues of State Responsibility*, 43 INT’L. & COMP. L. Q. 55 (1994).

²⁴ See HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES IN INTERNATIONAL LAW pages??(1927).

As with the substantive limits identified above, if these procedural limits on the decision-making powers of the Council can be shown to exist, there is no rule which excludes the Court from being able to point out that the Council has transgressed those limits.

Most of the previous work in this area only address the possibility of review by the International Court. They do not seek to examine the extent to which other judicial bodies may seek to question Security Council decisions. The International Criminal Tribunals for the Former Yugoslavia and for Rwanda have already had occasion to inquire into the legality of Security Council actions.²⁵ It cannot be assumed that this issue will not arise before other international tribunals. For example, it is possible that certain determinations made by the Security Council, in connection with Iraq's liability for damage occasioned by its invasion of Kuwait, may be challenged before the United Nations Compensation Commission set up to examine the claims arising out of those events.²⁶ The extent to which these other international tribunals will be able to inquire into the legality of Security Council decisions will clearly depend on how these tribunals are set up and what their general competence is. However, the argument could be made that insofar as this question is not specifically excluded from the competence of the tribunal, it ought to apply higher Charter norms when they clash with Security Council resolutions.

The issue of national or regional court review of Security Council decisions is also likely to be important in the future. This latter possibility is raised by the fact that decisions of the Security Council imposing trade sanctions on States are ultimately applied by national bodies. In recent times, there have been a number of cases where the European Court of Justice (ECJ)²⁷ has been faced with the applicability of Security Council sanctions regimes and has reviewed, albeit

²⁵ In the *Duško Tadic* case, 35 I.L.M. 32 (1996), the Trial Chamber of the Yugoslavia Tribunal denied that it had the competence to inquire whether the Council had the power to set up the tribunal. However, the Appeals Chamber held that it did have the competence to pronounce on the question. The decision of the Appeals Chamber was followed by the Rwanda Tribunal in *Prosecutor v. Kanyabashi*, in 92 AM. J. INT'L. L. 66 (1998).

²⁶ For an overview of the Commission, set up by Resolution 687 (1991) of the Council, see THE UNITED NATIONS COMPENSATION COMMISSION (Lillich ed., 1995); John R. Crook, *The United Nations Compensation Commission - a New Structure to Enforce State Responsibility*, 87 AM. J. INT'L. L. 144 (1993); David J. Bederman, *The United Nations Compensation Commission and the Tradition of International Claims Settlement*, 27 N.Y.U. J. INT'L. L. & POL. 1 (1994). For some decisions of the Commission, see the entire volume 109 of the International Law Reports.

²⁷ Although the ECJ is a tribunal set up by treaty for member states of the European Communities, for the purposes of this issue, the ECJ will be considered as a national tribunal because in this context, it is considering and applying norms generated by the Council at a national level or lower. In its activities, in this regard, it is almost acting in substitution for national courts.

indirectly, the decisions of the Security Council.²⁸ In two cases, the ECJ held that, having regard to the aim of the sanctions, which was to bring an end to a state of war in the former Yugoslavia involving massive violations of human rights and international humanitarian law, the particular regulations at issue did not violate the applicants' fundamental rights.²⁹ In *Kadi v. Council of the European Union*, the Court of First Instance of the European Communities (EC) held explicitly, in a case involving sanctions against an alleged member of al-Qaeda, that it was "empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible." This issue of the compatibility of sanction regimes with human rights is one that may well arise again in the EC or elsewhere.

Similarly, in 2006, a UK court *R (Al Jeddah) v. Secretary of State for Defence* was asked by a British national who had been detained in Iraq by British forces to rule that his detention, although within the powers conferred by the Security Council on the multinational force in Iraq, was unlawful as it was contrary to his rights under the European Convention on Human Rights. The Court denied the relief sought, but only after examining whether the claimant did have the rights he alleged and after examining whether the Security Council resolution would prevail over the rights provided for in the ECHR.³⁰

These national and regional cases are still relevant to our inquiry as to how far the international system is developing means of asserting legal controls on Council decisions for a number of reasons. First of all, it is often the case that the test being applied in these cases for reviewing Council decisions is international law as the court is being asked to strike down the Council decision (or the domestic implementing legislation) on the ground that it is contrary to

²⁸ See *Bosphorus Hava Yollari Turizm Ve Ticaret AS v. Minister for Transport, Energy and Communications, Ireland and another* (Case C-84/95), 3 COMMON MKT. L. REV. 257 (1996); *R v. H.M. Treasury and Bank of England ex parte Centro-Com Srl* (Case C-124/95), 1 COMMON MKT. L. REV. 555 (1997); *Ebony Maritime SA and another v. Prefetto della Provincia di Brindisi and others* (Case C-177/95), 2 COMMON MKT. L. REV. 24 (1997); *Kadi v. Council of the European Union*, Case T-315/01 (2005).

²⁹ *Bosphorus Hava*, *supra* note 28; *Ebony Maritime*, *supra* note 28.

³⁰ EWCA Civ 327 [2006]. It is also to be noted that a Canadian court was asked to determine the legality of the U.N. authorization to use force in the 1991 Gulf War. See Yves Bouthillier & Michel Morin, *Réflexions sur la validité des opérations entreprises contre l'Iraq en regard de la Charte des Nations Unies et du droit canadien*, 29 CAN. Y.B. INT'L L. 142 (1991). The case was filed by the authors of the article. Attempts by the present writer to find out the results of the case have so far proved unsuccessful.

international law.³¹ Secondly, even where domestic law alone is invoked, that domestic law may have the same content as international law. This is particularly true in the case of human rights norms. A ruling that a Council decision violates (or is consistent) with domestic human rights standards is likely to be the same even if international standards had been applied.

The possibility of domestic courts exercising this sort of review of Council decisions is perhaps one argument in favor of permitting (either through judicial development, or acknowledgment, of the power or by express Charter amendment) judicial review by the ICJ. It is probably an agreeable proposition that review of Council decisions, if it were to exist, would more appropriately be done at the international level than at the national levels. A situation where differing national courts gave their own conclusions on the legality of Council action and thus prevented their governments from responding to those Council decisions will unravel the whole premise of binding action on which the Charter system of peace and security is based. However, since many national courts do possess the power to examine the compatibility of implementing legislation with higher norms, one finds it difficult to see how they can be dissuaded from doing so where they are specifically asked to do so in relation to Council action. Moreover, it is unlikely that domestic courts will give up a power of review they possess if it is not to be replaced by anything. The situation might become similar to that which occurred in the EC in relation to the testing of the legality of EC legislation by human rights standards. Until the ECJ developed the doctrine that fundamental rights were part of EC law, the German Constitutional Court stringently held onto the position that EC law was subject to fundamental rights provided for in the German Constitution. It might be possible to pry this power of review from national courts if they can be assured that an effective system or possibility of review exists at the international level.

Whether or not one comes to the conclusion that, in formal terms, certain judicial bodies have the competence to review the decisions of the Security Council, one still has to address the question of whether judicial review of Security Council decisions is desirable and how far it would be workable. As has been noted above, the Council acts to maintain international peace and security and it would appear inappropriate to unduly fetter the carrying out of that body's

³¹ In the case referred to in the previous note, it was argued that the Canadian government, in committing troops to the Gulf War, pursuant to Council Resolution 678 (1990), had acted in violation of the National Defence Act. This violation of the Act was said to arise because the Act authorizes military action taken pursuant to the U.N. Charter and it was argued that Resolution 678 was contrary to the Charter.

important tasks. It is clearly important that the ability of the Council to respond *effectively* and *promptly* to threats to the peace is not prejudiced. In this context, it is useful to note that many national executives have very wide powers to act in the area of national security and domestic judiciaries are usually hesitant to interfere with the exercise of such powers. This is undoubtedly due to a belief that in the scheme of national distribution of powers, it is the executive that is best able to discharge the sensitive tasks involved in this field.

These concerns notwithstanding, it is possible to devise a scheme of review by the International Court which safeguards the efficiency of the Council. This can be done through a wise application of certain standards of review. First of all, the Court has already held that “when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires*.”³² This means that the burden is on the State relying on the invalidity of Council action to show that it is invalid. Until that is done, the decision continues to benefit from the presumption of validity and continues to be operational. Therefore, if the stage of the proceedings does not permit an assessment of the validity of the resolution, the Council’s powers are not threatened because the Court is bound to presume the validity of the resolution. This was the holding at the provisional measures stage of the *Lockerbie* case where the Court denied the possibility of obtaining provisional measures against the application of a resolution which appeared *prima facie* valid.³³ However, it might well be the case that the Court would have to develop a balancing approach where it weighs the potential damage if the resolution were applied against the potential damage if the resolution were not applied. In the case of a claim that a resolution might violate a *jus cogens* norm, such as the prohibition of genocide, the Court might be inclined to take a more stringent view even at the provisional measures stage.³⁴

³² See *Certain Expenses of the United Nations*, *supra* note 18, at 168.

³³ See *Lockerbie Case*, *supra* note 6, at 114.

³⁴ It should be pointed out that the Court did not do this in the *Bosnia Genocide Convention Case*, *supra* note 6, at 325. However, in that case, the Court held that the measures requested fell outside the scope of its provisional measures jurisdiction as it would not have required the respondent to take any action but was rather seeking a declaration of rights for the international community. In a case where the measures do fall within the Court’s jurisdiction to order provisional measures and where it is clear that without them horrible consequences would follow, the Court ought to be able to indicate those measures even if they require a suspension of the application of a Council resolution.

Another factor which ought to be pointed out is that there is unlikely to be a flood of judicial review cases. Political will is necessary for review through the advisory opinion mechanism, and in the case of contentious cases, there needs to be a jurisdictional link between a party dissatisfied with a particular Council decision and a party applying it. Furthermore, it ought to be pointed out that the grounds of review are not particularly extensive. Thus, taking all these factors into consideration, we are not going to see a flood of judicial review cases (which are generally successful).

Nevertheless, in shaping any mechanisms for judicial review of Council action, it ought to be borne in mind that when the Council is acting to maintain international peace and security, it is acting in an area where the Council has primary responsibility. That primary responsibility must remain with the Council³⁵ and not any other body as the task is essentially a political one albeit constrained by law. Following from this, there ought to be deference to the Council in relation to the decision regarding whether a particular event constitutes a threat to the peace, breach of the peace, or act of aggression.³⁶

While it is clear that the possibility of judicial review of the decisions of the Security Council introduces (or will introduce) significant changes in structure of governance in the U.N. and for international organizations generally, this is not in itself a reason for denying this competence. As a legal matter, once the existence of legal limits to Council decision making is accepted, the Court has the competence to determine those limits in so far as it is not specifically excluded from doing so. The end of the Cold War and the prospects for enhanced international cooperation through international organizations has brought about significant changes for the exercise of global governance through international organizations. However, we must begin to consider the next step relating to the constitutionalization of the international system.

III. ADDRESSING THE SCOURGE OF WAR: THE PROSPECTS FOR THE U.N. PEACEBUILDING COMMISSION

The preamble of the Charter of the United Nations begins, “we the peoples of the United Nations determined to save succeeding generations from the scourge of war.”³⁷ With these

³⁵ See *Lockerbie Case*, *supra* note 6, at 114 (dissenting opinion of President Schwebel).

³⁶ See Akande, *supra* note 7, at 336-41; Roberts, *supra* note 7, at 322.

³⁷ U.N. Charter preamble.

words, the United Nations affirms its commitment to work towards promoting international peace and security. Sixty years on, violent conflict continues to ravage member states and societies of the U.N. The post-conflict reconstruction (PCR) processes depends primarily on the commitment and efforts of the primary actors to a dispute. There is, however, a role for external actors such as civil society and inter-governmental organizations. The United Nations Peacebuilding Commission (PBC) was established in September 2005 with the express mission to assist countries in post-conflict transition to consolidate their peacebuilding processes.

The conflicts around the world have brought about the collapse of social and economic structures and generated political tension. Infrastructure has been damaged and education and health services have suffered, not to mention the environmental damage which has been caused by conflict situations. Development has also been severely retarded as a result of the carnage and destruction caused by conflict. In Africa, the effects of conflict in terms of refugee flows into neighboring countries, and emergence of internally displaced persons (IDPs) has demonstrated that no African country is an island unto itself. Refugee camps in the Mano River Union region of Guinea, Liberia and Sierra Leone have served as a source of instability for countries in the region. The camps in the Democratic Republic of the Congo (DRC), from the Rwandan conflict which took place over ten years ago, remain a source of concern for all the key actors involved in the Great Lakes region. Refugee flows into Chad as a result of the violent conflict in Darfur have created tension along the border. These situations illustrate the need for effective post-conflict reconstruction processes and the institutions to back them up.

By post-conflict reconstruction, we are referring to the medium to long-term process of rebuilding war-affected communities. This includes the process of rebuilding the political, security, social, and economic dimensions of a society emerging from a conflict. It also includes addressing the root causes of the conflict and promoting social and economic justice as well as putting in place political structures of governance and the rule of law which will consolidate peacebuilding, reconciliation and development. Grassroots populations in war-affected regions generally tend to be the worst affected by the scourge of violence. Women and children are often faced with tremendous social upheaval. Reconstruction therefore needs to proceed with the active participation of these sectors of society. An effective strategy for promoting PCR therefore has to take into account all of these elements. Such a strategy has to ensure that it

promotes measures, and proposes the establishment of institutions, that will strengthen and solidify peace in order to avoid a relapse into conflict.

The U.N. Charter makes provisions for the promotion of peace, notably Article 33, which states that “parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means.”³⁸ However, the U.N., for the sixty years of its existence, has had more failures than successes. It has not lived up to its ambitious mandate of maintaining international peace and security.

The first post–Cold War effort to reform the U.N., in order to effectively address the issue of building peace, was undertaken by the former U.N. Secretary-General Boutros Boutros-Ghali. In his landmark report, *An Agenda for Peace*, published in 1992, Boutros-Ghali set out an international strategy for conflict prevention, peacemaking, peacekeeping, and peacebuilding post-conflict reconstruction.³⁹ The post-conflict reconstruction has therefore been part of the lexicon of building war-affected communities for more than a decade. The end of the Cold War also increased the incidence of intrastate conflicts which complicated post-conflict reconstruction efforts. In Africa, major challenges were faced in rebuilding war-torn countries such as Somalia and Angola. The role of the U.N. in assisting to bring peace was prominent in the case of Mozambique. With the advent of the twenty-first century, Africa is still plagued by the persistence of post-conflict challenges. The United Nations has maintained an engagement with Africa and is implicated in post-conflict reconstruction efforts across the continent, including southern Sudan, Sierra Leone, Liberia, the Central African Republic (CAR) and Guinea-Bissau.

As the world continued to undergo geo-political change, the relevance of the U.N. to the transformed global context became an issue. Significant international political divisions were created as a result of the illegal 2003 U.S.-led invasion of Iraq. Launched without U.N. authorization, the Iraq invasion created deep structural fault lines within the Security Council which paralyzed the Council and threatened to tear it apart. Sensing a turning point in the relations within the U.N., the Secretary-General Kofi Annan read a speech to the General Assembly in which he noted that “the events of 2003 exposed deep divisions among members of

³⁸ U.N. Charter art. 33, para. 1.

³⁹ The Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*, U.N. Doc. S/24111, A/47/277 (June 17, 1992).

the U.N. on fundamental questions of policy and principle.” Annan further noted that “we have come to a fork in the road. This may be a moment no less decisive than 1945 itself, when the United Nations was founded.” To try and bring a semblance of order to the dis-united nations, Annan established a High-Level Panel on Threats, Challenges and Change on 3rd November 2003. The idea behind the creation of the High-Level Panel was to ensure that the U.N. remains capable of fulfilling its primary purpose as enshrined in Article 1 of its Charter which is “to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.”⁴⁰ Several member states of the U.N. viewed the U.S. invasion of Iraq, together with its so-called “coalition of the coerced,” as an “act of aggression” and a “breach of peace.” They maintained the belief that it was therefore in direct contravention to the Charter, purpose and principles of the U.N. If a member state could act in such a way, what did this mean in practice about the future relevancy of the U.N.? So Annan was justified in being concerned about the viability of the U.N. and its ability to uphold its stated principles and salvage the festering dis-unity among its nations.

At the end of 2004, the High-Level Panel submitted a report to the Secretary-General entitled “A More Secure World: Our Shared Responsibility.”⁴¹ The report focused on an assessment of present and future security threats so that collective strategies could be developed to address them. The High-Level Panel examined six key areas, including civil wars and large scale violence and genocide; interstate conflict threats and the use of force, socioeconomic issues, including poverty and HIV/AIDS; environmental degradation; weapons of mass destruction; terrorism; and transnational organized crime.

One of the recommendations that the High-Level Panel came up with was the creation of a Peacebuilding Commission, a Peacebuilding Support Office and a Peacebuilding Fund. The Panel felt that the current U.N. Peacebuilding efforts were not sufficiently coherent. There was therefore a clear and compelling need to pull together all the different parts of the United Nations that work on post-conflict reconstruction. The Panel report noted that “deploying peace enforcement and peacekeeping forces may be essential in terminating conflicts, but they are not sufficient for long-term recovery.” The report further argued that “serious attention is needed to

⁴⁰ U.N. Charter art. 1.

⁴¹ High-Level Panel, *supra* note 1.

focus on the longer-term process of peacebuilding in all its multiple dimensions.” The report also stated that it was vital to invest adequately in peacebuilding and development to ensure that a country does not relapse into conflict.⁴²

The Secretary-General took on board this recommendation and on March 21, 2005, he issued his report entitled: “In Larger Freedom: Towards Development, Security and Human Rights for All.”⁴³ In this report the Secretary-General recommended that the U.N. member states should agree to establish a Peacebuilding Commission (PBC) to fill the institutional gap that exists with regards to assisting countries recovering from war to make the transition from war to lasting peace. Annan noted that the U.N.’s record in implementing and monitoring peace agreements has been tainted by some devastating failures, for example in Angola in 1993, Rwanda in 1994, and challenges in Bosnia 1995 and East Timor in 1999. Approximately half of all countries that emerge from war lapse back into violence within five years. Therefore, an integral part of addressing the “scourge of war” has to be to establish an institutional framework to ensure that peace agreements are implemented and post-conflict peacebuilding is consolidated.

After the report of March 2005 was issued, debates about the creation and establishment of the U.N. Peacebuilding Commission increased. This culminated, in September 2005, with the U.N. World Summit and the fifty-ninth session of the General Assembly—at which the recommendations of the report were reviewed. The General Assembly adopted an Outcome Document⁴⁴ at the close of the meeting which the Secretary-General described as “a once-in-a-generation opportunity”⁴⁵ to forge a global consensus on development, security, human rights, and United Nations renewal. The Outcome Document, however, was a compromise between the competing interests of member states. It was a watered-down document which dodged key issues like nuclear disarmament and Security Council reform. Specifically, on U.N. Security Council reform, the meeting pledged to issue yet another report in December 2005.

The Outcome Document, in paragraph 97, “emphasiz[es] the need for a coordinated, coherent and integrated approach to post-conflict peacebuilding and reconciliation. With a view

⁴² For a discussion on the potential of countries relapsing into conflict, see Anthony W. Pereira, *The Neglected Tragedy: The Return to War in Angola, 1992-3*, 32 J. MOD. AFR. 1 (1994).

⁴³ U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, *supra* note 2.

⁴⁴ [G.A. Res. 60/1, *2005 World Summit Outcome* (2005)].*supra* note 3.

⁴⁵ Centre for Conflict Resolution - Cape Town, *A More Secure Continent: African Perspectives on the High-Level Panel Report* (2005).

to achieving sustainable peace and recognizing the need for a dedicated institutional mechanism to address the special need of countries emerging from conflict towards recovery,” the General Assembly decides “to establish a Peacebuilding Commission as an inter-governmental advisory body.”⁴⁶ The established Peacebuilding Commission backed by a Peace Support Office and “a multi-year standing Peacebuilding Fund” marks a new level of strategic commitment to enhance and sustain peace after conflict.⁴⁷

As noted earlier, the PBC will “bring together all relevant actors to advise on and propose integrated strategies for post-conflict Peacebuilding and recovery.”⁴⁸ The core work of the PBC will be its country specific activities. It will ensure that the international community supports national authorities, but the focus will have to be based on country-based realities. The PBC will be able to ensure that the national priorities are supported by the necessary mobilization of resources. Predictable and reliable funding will need to be identified for the short-term early recovery activities as well as financial investment for development over the medium- to longer-term period of recovery. The Peacebuilding Fund is meant to ensure the provision of these resources.

The PBC will also have a monitoring and review function. At regular intervals, the PBC will meet to review the progress towards medium-term recovery goals, particularly with regards to developing public institutions and laying the foundations for economic recovery. Its role will be to alert the international community if progress is not being made so as to avoid a relapse into violent conflict. In this way the PBC through effective post-conflict peacebuilding and reconstruction will also in effect have a preventive role in terms of preventing violence from recurring.⁴⁹ During the debates leading up to the creation of the PBC, various countries did not want to provide the Commission with a conflict prevention or preventive diplomacy role.⁵⁰ This role is currently the mandate of the U.N. Department for Political Affairs (DPA).

⁴⁶ [G.A. Res. 60/1, 2005 *World Summit Outcome* (2005).*supra* note 3, ¶ 97.

⁴⁷ [G.A. Res. 60/1, 2005 *World Summit Outcome* (2005).

⁴⁸ [G.A. Res. 60/1, 2005 *World Summit Outcome* (2005).

⁴⁹ Catherine Guicherd, *Picking up the Pieces: What to Expect from the Peacebuilding Commission*, in BRIEFING PAPERS, REPORT OF CONFERENCE ORGANIZED BY THE FRIEDRICH EBERT FOUNDATION (FES) IN COOPERATION WITH THE GERMAN FEDERAL MINISTRY OF ECONOMIC COOPERATION AND DEVELOPMENT (BMZ) 3 (Friedrich Ebert Stiftung, 2005).

⁵⁰ African Union, *The Common African Position on the Proposed Reform of the United Nations: The Ezulwini Consensus*, Seventh Extraordinary Session of the Executive Council, Doc. Ext/EC.CL/2 (VII) (2005).

More concretely, for a specific country, the PBC will have an Organisational Committee which will include representatives from: (a) the country under consideration; (b) countries in the region engaged in the post-conflict process, and other countries that are involved in relief efforts and/or political dialogue, as well as relevant regional and sub-regional organizations; (c) the major financial, troop and civilian police contributors involved in the recovery effort; (d) the senior United Nations representative in the field and other relevant United Nations representatives; and (e) such regional and international financial institutions as may be relevant.⁵¹

In order to support this work the Peacebuilding Commission is assisted by a Peacebuilding Support Office staffed by qualified experts in the field of peacebuilding. The Peacebuilding Support Office will prepare the substantive inputs for meetings of the Peacebuilding Commission through analysis and information gathering. The office will also contribute to the planning process for peacebuilding operations by working with the relevant lead departments in the U.N., international community, and civil society. The office will also conduct an analysis of best practices and develop policy guidance as appropriate.

The necessity to address global security challenges through global responses requires the recognition that African concerns are the world's concerns. The "responsibility to protect" needs to now become mainstreamed in international politics.⁵² However, military interventions should be consistent with the purpose and principles of the U.N. Charter and in particular they should comply with the provisions of Article 51 of the U.N. Charter which authorizes the use of force only in cases of legitimate self-defense. The U.N. is not capable of solving all the problems faced by Africa. It is therefore important to identify what the U.N. can realistically do for Africa. Challenges such as the humanitarian catastrophe in the Darfur region of the Sudan, has proved to be particularly resistant to U.N. action, due to the interests of powerful countries behind the scenes notably China's oil interests. The U.N. is nevertheless conducting post-conflict peace operations in Cote D'Ivoire, the Democratic Republic of the Congo, Burundi,

⁵¹ [G.A. Res. 60/1, 2005 World Summit Outcome (2005).supra note 3, ¶ 100.

⁵² International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, Ottawa: International Development Research Centre, (2001); F. Deng et al., *Sovereignty as Responsibility: Conflict Management in Africa*, Washington, D.C.: The Brookings Institution, 1996; and T. Weiss and D. Hubert, *The Responsibility to Protect: Research, Bibliography and Background*, Ottawa: International Development Research Centre, 2001.

Liberia, Ethiopia and Eritrea and Western Sahara. U.N. peacekeepers are due to leave Sierra Leone at the end of 2005. It also has a political office for Somalia. Historically, peace operations were also conducted in Mozambique, Angola, and Rwanda with mixed results. Local solutions to peacekeeping and peacebuilding are preferable because actors would have a better understanding of the region they are working in. In the absence of robust local peace operations there is still a need to strengthen the role of the U.N. in keeping Africa's peace and promoting economic development and democratic consolidation on the continent. The U.N. also has to play a role in consolidating post-conflict reconstruction through the effective monitoring and policing of the illicit trade of natural resources and small arms, as well as curtailing the activities of mercenaries in war-affected regions. It also has to continue to play an important role in assisting with refugees and internally displaced persons.

The PBC will have utility for a significant number of the countries around the world. The U.S. will be able to use it for rebuilding Iraq and Afghanistan, Europe can make use of it for rebuilding the still troubled Balkans, France can use it for its post-conflict interventions in Cote D'Ivoire and Haiti, Russia when it so chooses can use it for Chechnya, and so on. Africa has a major need for an effective PBC, so its relevance for Africa cannot be underestimated. As a region Africa has one of the highest number peacemaking and peacebuilding operations which have badly affected the lack of basic services such as health, housing and education. Post-conflict reconstruction requires the building of infrastructure which is vital for development. All of these issues will be assisted by the creation of a PBC that is operational and effective.

The Rwandan tragedy of 1994 indicated that Africa has to ultimately develop its own conflict management and peacekeeping capacity. Efforts to create an African Standby Force (ASF) with sub-regional brigades is a step in this direction.⁵³ In tandem, however, the international community needs to rethink its intervention and reconstruction strategies and train its civilian and military personnel to respond effectively to conflict and post-conflict situations. The Commission will seek to bring the same degree of focus and attention to ensuring a smooth transition from ceasefire to nation-building, reconciliation, justice and reconstruction.

There is strong case for African membership of the Peacebuilding Commission in particular South Africa, Nigeria, Senegal, Ghana, Kenya are Africa's leading troop contributors

⁵³ The Centre for Conflict Resolution, *The New Partnership for Africa's Security: The United Nations, Regional Organisations and Future Security Threats in Africa* (2004).

in ongoing peacekeeping operations. These countries have distinguished themselves in the field of post-conflict reconstruction and peacebuilding. Such countries can bring a substantial amount of institutional memory to a Peacebuilding Commission which should not try to reinvent the wheel as far as strategies for intervention go.

In terms of the staff complement within the Peacebuilding Commission and the Peacebuilding Support Office there should be a representation weighted towards individuals from countries affected by war. In particular, there needs to be a significant African representation because the Commission will play a vital role in promoting a more secure future for Africa.

The successful creation and operationalization of the PBC has significant implications for Africa. This is an unprecedented framework which if it succeeds in its objectives can reduce and ultimately stop the loss of human life due to the recurrence of conflict on the continent. The Peacebuilding Commission under its current form therefore has the potential to serve as a mechanism for consolidating post-conflict reconstruction in Africa. The continent is plagued with a number of post-conflict situations which urgently need to be addressed. If the PBC is politicized then the opportunity for it to function in the short- to medium-term will be severely hampered. If given the necessary backing a pragmatic PBC, that is appropriately funded, can go a long way “to improve our success rate in building peace in war-torn countries.”⁵⁴ The challenge as with all other institutional building will be to convert the rhetoric into reality.

IV. THE USE OF FORCE IN THE COMMON INTEREST OF THE UNITED NATIONS

The recent Iraqi crisis has once again confirmed that the Security Council needs the comprehensive reform called for by the General Assembly in the *Millennium Declaration*.⁵⁵ The role of the Security Council is indeed crucial for the maintenance of international peace and security in the 21st Century and the future of the United Nations. The debate over Security Council reform has focused on its enlargement and its powers and responsibilities in the fields of conflict mediation, peace-keeping, peace-building, and economic sanctions. Although all these questions are at once important and urgent, it is rather disappointing that the questions

⁵⁴ U.N. Secretary-General *Address to the World Summit*, Sep. 14, 2005.

⁵⁵ G.A. Res. 55/2, ¶ 30, U.N. Doc. A/RES/55/2 (Sept. 18, 2000).

concerning the use of force have been addressed in a rather summary way. The reports prepared by the U.N. High-level Panel and the U.N. Secretary-General make no exception.

This paper focuses on collective security law and discusses when force can be used in the “common interest” of the United Nations⁵⁶ to maintain and restore international peace and security. It preliminarily describes the evolution—or better, the involution—of the collective security system through the emergence of a rule allowing the use of force authorized by the Security Council. It then assesses the impact upon such a rule of the main recent military interventions and identifies the main questions that the organization and its members should address in the context of the reform of the Security Council and the whole organization. In this perspective, it is accepted without discussion that Article 51 of the U.N. Charter continues to adequately govern the use of force in self-defense and does not need to be reconsidered.⁵⁷

The collective security system originally envisaged in the U.N. Charter was essentially based upon three pillars: (a) the general prohibition on the use of force under Article 2 (4) of the Charter (which reflects customary international law); (b) the exception of individual and collective self-defense against armed attack or imminent—yet not merely potential—threats to armed attack (Article 51); and (c) the exclusive competence of the Security Council to take the military action necessary to maintain and restore international peace or, alternatively, to authorize regional organization to take military enforcement measures.

With a possible exception,⁵⁸ the collective security system has never quite worked as intended. Rather, after the end of the Cold War, member states hammered out something completely different. The Security Council, instead of directly taking the military action necessary to maintain and restore international peace, on several occasions authorized member states to resort to force. This practice was accepted by virtually all States and brought about an informal modification of the Charter.

The authorization is the result of a three-phase decision-making process composed of (a) the determination of the existence of an act of aggression, a breach of peace or a threat to

⁵⁶ U.N. Charter pmb1.

⁵⁷ This is the conclusion reached by the U.N. High-Level Panel, *supra* note 1, ¶¶ 188-192; by the U.N. Secretary-General, *supra* note 2, ¶¶ 122-124; and by the Workshop on Article 51 of the United Nations Charter in Light of Future Threats to International Peace and Security held in Geneva on March 2004.

⁵⁸ The coercive military operation carried out by the United Nations forces under the control of the Secretary-General in Somalia in 1993 is one exception.

international peace and security for the purpose of Article 39 of the Charter; (b) the definition of what needs to be done to tackle the crisis; and (c) the decision to allow armed force to be used.

Although the Security Council certainly remains a political body making political decisions, the authorization to use force produces a permissive effect: it makes lawful a conduct that otherwise would be contrary to the general prohibition to use or threaten to use force. This is another manifestation of the extensive normative powers member states have conferred upon the Security Council.⁵⁹ Following Security Council authorization, member states are merely allowed to use force but certainly not obliged to do so. At any rate, the authorization to use force should come when peaceful means have proved or are inadequate to tackle the crisis and must respect the principles of necessity and proportionality.

The authorization practice hardly has any resemblance to the collective security system envisaged in the Charter. The role of the Security Council is rather limited as is its control over the operations. It is indeed for the States themselves to decide whether, when, and how to use military force. Nonetheless, it may be argued that the three pillars upon which the collective security system is built have been maintained, although the third one has significantly been weakened. At least there is a collective control on the initial decision to resort to force.⁶⁰ Writing in 1967, Jennings observed that “[t]he problem is not one of drafting legal precepts controlling the use of force but one of devising international institutions through which the use of force in international relationships can be legally ordered and controlled on an international instead of a sovereignty basis.”⁶¹

Five major problems may be identified with regard to the authorization practice. The two most immediate problems concern the Security Council composition and voting procedure. As to the composition, there is no need to insist on the fact that the organ is hardly representative of

⁵⁹ According to Hans Kelsen, the Security Council “may create new law for the concrete case.” HANS KELSEN, *THE LAW OF THE UNITED NATIONS* 295 (1951). This view has also been recently endorsed, if not paraphrased, in the Joint Declaration of Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley. *Lockerbie Case, supra* note 6, at 3, 24–25, 114, 136–37.

⁶⁰ As admitted by the Secretary-General, the authorization practice provides the Organization with an enforcement capability it would not otherwise have, but also implies the risk that “the States concerned may claim international legitimacy and approval for forceful actions that were not in fact envisaged by the Security Council when it gave its authorization to them.” The Secretary-General, *Report of the Secretary-General on the Work of the Organization*, ¶ 80, delivered to the Security Council and the General Assembly, U.N. Doc. S/1995/1, A/50/60 (Jan. 25, 1995).

⁶¹ ROBERT Y. JENNINGS, *General Course on Principles of International Law*, in *COLLECTED WRITINGS OF SIR ROBERT JENNINGS* 1, 249 (1998).

the whole international community and its decisions are not necessarily an expression of the common interest of the United Nations. Mention should be made in this respect to the Kosovo crisis. During the intervention, the majority of the Security Council (12 to 3) voted against the draft resolution calling for the cessation of the operations. In contrast, the majority within the General Assembly was clearly oriented in the opposite position. The problem of representation is therefore real and urgent. Its solution, however, depends on the existence of an extremely broad consensus that seems rather remote at the moment.

Moving to the voting procedure, the so-called veto power is often indicated as the main cause of the ill-functioning of the collective security system. This conclusion is debatable. It is certainly true that any permanent member can block the Security Council and there is an evident risk of abuse. Incidentally, it must be noted that the veto power was clearly not an issue in the recent Iraqi crisis as the majority of the Security Council was against the war (as was the majority of the General Assembly). Nonetheless, the veto power must not be demonized because it may be an effective guarantee that the Security Council takes action in line with the common interest of the United Nations.⁶² In a crisis like Kosovo, a Security Council minority of one or more permanent members could prevent the Security Council from making a decision which is not supported by the majority of the organization. At any rate, the veto power—however unpopular—will remain a prominent feature of the United Nations for many years, as the permanent members will not likely renounce it.

The remaining three problems seem to be even more crucial in the context of Security Council reform. The third problem is the lack of control over the Security Council action leading to the authorization to use force. The U.N. High-level Panel has proposed to apply the following criteria to the Security Council decision-making process leading to the authorization to use force: (a) seriousness of the threat requiring the use of force; (b) proper purpose of the military action; (c) military action as a measure of last resort; (d) proportional means of military action; and (e) balance of consequences from a costs-benefits perspective. The panel has invited the Security Council and the General Assembly to adopt a resolution in this regard. The criteria seem firmly established in the Security Council practice and to a large extent inspired by common sense.

⁶² See W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 95 (1993).

The crux of the matter is another issue. It is undisputed that the Security Council powers are to be exercised within certain limits. This implies that these limits can be breached. Is there any remedy against Security Council violations of these limits? This consideration is extremely important if we consider that the Security Council can make lawful the use of force against a given State. Whether the International Court of Justice may exercise judicial review over Security Council acts still remains a rather controversial issue. What is clear, however, is that the United Nations system is currently deprived of adequate checks and balances and this is certainly a question that needs to be addressed when dealing with the comprehensive reform of the Security Council.

The fourth problem is the lack of effective control by the Security Council over the authorized use of force, especially when permanent members are involved. A permanent member can indeed prevent the Security Council from modifying or terminating the authorization (so-called reverse veto). As a result, no mechanism is available to verify throughout the operations that the action is pursued in the common interest of the United Nations.

The problem may be solved by allowing the General Assembly, the Security Council members, or a number of States not represented in the latter organ to request during the operations a new Security Council resolution confirming the authorization to use force. Only if the intervention is still supported by the required qualified majority within the Security Council—not necessarily the same original majority—the continuation of military operations would be lawful. The decision would be exposed to the veto power. Again, this may be unpopular, but nonetheless might amount to a guarantee that force is still in the common interest.⁶³

The fifth problem is probably the most serious. On a number of occasions, States have used armed force without Security Council authorization.⁶⁴ The recent crises in Kosovo (1999) and Iraq (2003) are egregious examples. In both cases, there was a unanimous agreement on the existence of a threat to peace and on the need, respectively, to put an end to the humanitarian crisis and to obtain Iraqi compliance with U.N. disarmament obligations. In both cases,

⁶³ Alternatively, the new Security Council resolution confirming the authorization to use force could be adopted with a less grave majority than Article 27(3) of the U.N. Charter in order to reduce the risk of a veto. This would require a formal amendment of the Charter, a possibility that seems rather remote.

⁶⁴ See TARCISIO GAZZINI, *THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW* ch. 3 (2005).

however, there was strong disagreement on how to tackle the crisis and more precisely on the necessity of a military intervention. Hence, the three-step decision-making process was incomplete and force was used without a Security Council authorization.⁶⁵

Individually taken, these interventions are deviations from the norm allowing the use of non-defensive force only when authorized by the Security Council and therefore unlawful under current international law. The impact of these deviations—globally taken—on the collective security system, however, is to be carefully assessed, bearing in mind that, as any other rule of international scope, the rules on the use of force are exposed to a continuous process of evolution due to the claims and counter-claims by States and International Organizations.

Many elements militate against the view that these interventions have led to the desuetude of the relevant rules on the use of force and made the Security Council a matter of political convenience rather than a political requirement. In the first place, only a limited number of States—although certainly important—have resorted to force without Security Council authorization. Even among these States, only the United States and to a lesser extent the United Kingdom openly claimed the right to unilateral use of non-defensive force. Significantly, the claim was poorly articulated and generally accompanied by other legal justifications for the military interventions. Additionally, some of the States supporting the recent interventions declared that they did not intend to establish a precedent departing from existing law, or invoked—however unconvincingly—previous Security Council resolutions. Most importantly, the overwhelming majority of the international community—representing all geo-political groups—expressed its clear opposition to the use of non-defensive force without a Security Council authorization.

It is therefore safe to conclude that the claim has failed to muster the critical mass necessary to change existing law. Nonetheless, it remains that the authority of the Security Council has been openly challenged and seriously undermined by the recent negative military interventions in Kosovo and Iraq. It is important to understand what is at stake. The third pillar of the United Nations referred to above is shaking. If it is further eroded to the point of allowing States to use force regardless of collective endorsement of the Organization—expressed through the Security Council authorization—the whole collective security system will collapse. As rightly pointed out by both the U.N. High-level Panel and the U.N. Secretary-General, “[t]he task

⁶⁵ This article does not discuss whether the intervention could have been justified on humanitarian grounds.

is not to find alternatives to the Security Council as a source of authority but to make it work better....”⁶⁶

The basic idea underpinning the Charter is that force can be used only in the common interest. Without prejudice to the right to use force in self-defense, member states have definitively renounced to use force and conferred upon the Security Council extensive powers to be exercised on the basis of a collective decision.⁶⁷ This was clearly the position of the United States’ representatives at the San Francisco Conference in stating the objective of Chapter VII was “to concentrate authority in one body and give that body the power and the means to assert its authority”.⁶⁸

The recent crisis in Iraq has demonstrated that the emergence of new threats to international peace and security have made the argument even more compelling than before to submit non-defensive use of force to a collective control. Yet, the decision to intervene unilaterally was based on a misrepresentation of both the facts and the law. On the one hand, the Security Council was not effectively dealing with the crisis, but also, with the benefit of hindsight, correctly assessing the threat posed by the Iraqi military program. On the other hand, the intervention was neither authorized by the Security Council nor permitted as an exercise of the right of individual or collective self-defense; rather, it was utterly against the Charter which allows the use of non-defensive force only in the common interest of the United Nations and on the basis of a collective decision.

In this respect, it is reassuring that the General Assembly had recently declared:

⁶⁶ High-Level Panel, *supra* note 1, ¶ 198; U.N. Secretary-General, *supra* note 2, ¶ 126. There is no room for ambiguity. Paragraph 190 of the High-Level Panel report is rather unfortunate in stating that

if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment—and to visit again the military option.

High-Level Panel, *supra* note 1, ¶ 190.

⁶⁷ At the San Francisco conference it had been stressed that “[t]he use of force is left possible only in the common interest. As long as we have an Organization, the Organization only is competent to see the common interest and to use force in supporting it.” *Report of Committee I to Commission I*, Doc. 994, Jun. 13, 1945, UNCIO, vol. 6, 446, at 451.

⁶⁸ *Report to the United States President on the Results of the San Francisco Conference*, June 26, 1945, Dept. of State Pub. No. 2349, at 100.

We reaffirm that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security. We stress the importance of acting in accordance with the purposes and principles of the Charter.⁶⁹

V. THE LEGISLATIVE ROLE OF THE SECURITY COUNCIL

The Security Council has in recent years adopted a number of legislative resolutions. The most (in)famous is Security Council Resolution 1371 (2001), which prescribes a number of measures that aim to prevent and suppress the financing of terrorist acts and also criminalize certain activities relating to terrorism. The obligations imposed on states by the aforementioned resolution either go beyond the conventional obligations that certain states have already accepted or introduce new obligations. Security Council Resolution 1540 (2004) provides another example of a resolution with legislative effects because it imposes on states certain obligations in relation to the non-proliferation of WMDs that exceed their conventional obligations.

Whereas the above two resolutions are treated in legal literature as the prototype legislative acts,⁷⁰ one may trace legislative provisions in a number of other resolutions as well. For example, Security Council Resolution 1483 (2003) mandates states to grant immunity against all liability to the export of Iraqi oil, with the exception of liability for environmental damage as well as the Security Council resolutions that established the Yugoslav and Rwanda tribunals.⁷¹ Security Council Resolution 687 (1991) legislated on the boundaries between Iraq and Kuwait.

The aforementioned resolutions, but also the Security Council's legislative practice, have raised a number of questions about their legality and legitimacy.⁷² More specifically, there are

⁶⁹ G.A. Res. 60/1, *2005 World Summit Outcome* (2005), *supra* note 3, ¶ 79.

⁷⁰ See, e.g., Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901 (2002); Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT'L L. 193 (2005).

⁷¹ S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993); S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994).

⁷² For example, the Permanent Representative of India stated that "India is concerned at the increasing tendency of the Security Council in recent years to assume legislative and treaty-making powers on behalf of the international

questions as to whether the Security Council's practice is consonant with the U.N. Charter, which is the constitutive treaty, and, secondly, to what extent such practice responds to societal needs and expectations.

Before we discuss the first issue, it is important to consider the meaning of legislation.⁷³ Legislation is a norm-creating act which is general and binding. It follows that one of the main characteristics of legislation is its unilateral character in the sense that its creation and binding force is independent of the consent of those to whom it applies. In addition, legislation is general in the sense that it contains general rules and applies to general and indeterminate categories of addressees. Within the context of the Security Council, resolutions are promulgated by the Security Council acting as a unitary organ; they are binding on all member states;⁷⁴ and to the extent that they contain rules of general application they satisfy the above criteria and thus constitute legislative acts. That said, the Security Council's legislative power is circumscribed. It can only legislate in relation to matters pertaining to international peace and security⁷⁵ because these matters are within its competence. Secondly, the Security Council cannot impose obligations on individuals; it can only impose obligation on states. While it does not have competence over individuals, it can impose obligations on individuals indirectly via their own state. Furthermore, it is the states that should implement the obligations deriving from Security Council legislation. The Security Council can only adopt framework legislation that binds states as to the desired result but leaves the choice of means at the discretion of each state. This is a very important stipulation that derives from the division of competences between the Security Council and member states⁷⁶ and the principle of jurisdictional autonomy of member-states.⁷⁷ In the same vein, the powers of the Security Council do not encroach on those of the General

community, binding on all States, a function not envisaged in the Charter of the United Nations." Security Council, *Letter dated 27 April 2004 from the Permanent Representative of India to the United Nations addressed to the President of the Security Council*, ¶ 5, U.N. Doc. S/2004/329 (Apr. 28, 2004).

⁷³ The terms "legislation," "legislative resolution," and "legislative act" are used here interchangeably.

⁷⁴ U.N. Charter art. 25.

⁷⁵ U.N. Charter art. 24, para. 1.

⁷⁶ Joe Verhoeven, *Les activités normatives et quasi normatives*, in *A HANDBOOK ON INTERNATIONAL ORGANIZATIONS* 413, 414–15 (R.-J. Dupuy ed., 2d ed. 1998).

⁷⁷ U.N. Charter art. 2, para. 7.

Assembly since the latter can only mobilize legislative activity⁷⁸ but cannot adopt binding resolutions, a power conferred only upon the Security Council.

The question remains as to whether the Security Council has such power according to its constitutive document, which is the U.N. Charter.

In order to answer this question we need to examine the competence of the Security Council under the U.N. Charter and in particular under Chapter VII. A key provision is Article 39 according to which the Security Council determines whether there exists a threat to the peace, a breach of the peace, or an act of aggression and makes recommendations or decisions regarding appropriate action to maintain or restore international peace and security. It is maintained that the action envisaged in Chapter VII is of an executive nature in the sense that the Security Council can only take concrete measures to address concrete crises. Thus, legislation which is by its nature general does not fall within the mandate of Article 39.

However, this opinion is erroneous. The Security Council's competence under Article 39 is not only to restore but also to maintain peace and security. Whereas a breach of the peace or an act of aggression refers to a concrete situation which demands concrete action, this does not mean that the Security Council cannot adopt, prior to or after an event, general measures if it determines that they will contribute to restoring or maintaining the peace. For example, sanctions or embargoes adopted after peace has been breached or after peace has been restored have general applicability and their aim is to maintain peace in the future. The same consideration applies with regard to terrorism. Terrorism may give rise to concrete events that demand concrete action but it may also refer to activities, behaviors, or situations that demand preventive or suppressive action. It is thus noted that the competence of the Security Council in maintaining the peace may indeed give rise to general and concerted actions that go beyond particular events and address the whole situation. This is combined with the Security Council's competence in relation to threats to the peace. When there is a threat to the peace, the Security Council can adopt measures to suppress, contain, or neutralize the threat, but because the threat may not be something tangible and concrete, these measures can be general in nature. In sum, the powers of the Security Council under Article 39 are not only individualized and reactive, but also general and constructive.

⁷⁸ U.N. Charter art. 13, para. 1.

Whereas Article 39 provides a sound basis for legislative acts, it also says that the envisaged “measures” should be in accordance with Article 41 and 42. One may then question whether legislative acts are “measures,” and also whether they fall under Article 41 or 42. With regard to the first issue, the use of the word “measure” in Article 39 is generic and refers to any measure the Security Council may decide to take under this article. As we said above, the Security Council can take concrete action when it thinks that only such action can address the situation or take general measures when it thinks that they are adequate to address the situation and attain peace and security. In other words, legislative acts are included in the word “measure.” With regard to the second issue—whether legislative measures fall within Article 41 or 42—they do not fall within Article 42 because they are not military measures.⁷⁹ Article 41, on the other hand, does not contain any restriction as to what measures the Security Council can adopt. It mentions a number of measures, but this is indicative and not exhaustive as the Yugoslav Tribunal said in the *Tadic* case.⁸⁰ Therefore, legislative measures can be placed within this article.

Be that as it may, what we need to discuss at this juncture is the legitimacy of the Security Council’s legislative powers. Legitimacy means the degree of acceptance that the exercise of such powers by the Security Council enjoys and consequently the acceptance of the outcome. In this regard, we need to consider two issues that represent constant tenets in legislative action; one is the issue of representativeness, while the other is the issue of checks and balances.

The Security Council is not a representative institution. Its membership and decision-making process is controlled by the permanent members. Thus one complaint is that the Security Council—and consequently its decisions—lack legitimacy. In response to such criticism and mindful of its weak legitimacy, the Security Council introduced a more open and participatory process during the adoption of legislative resolutions by inviting other states or interested parties to participate in the deliberations. This is a positive step because it enhances the transparency and the level of scrutiny exercised on the proposed legislation. It is our view that this needs to be

⁷⁹ Certain Expenses, *supra* note 18, at 164–65, 177; THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 734–59 (, (BRUNO SIMMA ED. 2002).

⁸⁰ Prosecutor v. Dusko Tadić a/k/a “Dule”, Case No. IT-94-1-AR72, Decision on the Defence Motion of Interlocutory Appeal on Jurisdiction ¶ 35 (Oct. 2, 1995) (“It is evident that the measures set out in Article 41 are merely illustrative examples which obviously do not exclude other measures.”).

institutionalized instead of being used on an *ad hoc* basis. Moreover, the expansion of the Security Council's membership currently under discussion needs to reflect the political, social, and economic diversity of the international society. In our opinion, the current proposals are not entirely satisfactory. It is submitted that wider membership and representative membership combined with open and participatory legislative process will definitely enhance the legitimacy of Security Council resolutions and secure their acceptance by international actors.⁸¹ For this to happen, there must be more clarity in the categorization of Security Council resolutions and also with regard to the phrasing of legislative provisions. To this we should add that if the process is open and participatory then the adoption of legislative resolutions should follow different voting procedures probably not involving the right of veto.

The second issue is that of checks and balances on the Security Council's powers. In constitutionally organized systems, judicial review is a scrutinizing mechanism. The current international legal system does not allow for proper judicial review because there is no legislation as such at the international level but only law-creating acts based on state consent. The ICJ has also refrained from reviewing Security Council resolutions in a number of cases not so much due to lack of willingness, but more due to the inhospitable international system.⁸² However, Security Council legislation denotes a radical transformation of the international law production process with the introduction of true legislation. In such a system, judicial review is an appropriate method to check the legality of such acts but this requires a stable body of principles and rules against which Security Council legislation can be reviewed and a revision of the *locus standi* criteria.⁸³

As a conclusion we can say that Security Council legislation will centralize the law-production process and contribute to the uniformity and universality of international rules. Because it represents an important step in the constitutionalization of the international system and will radically change its content and structure, it should entail other changes in terms of membership, processes, or checks in order to be successful and legitimate. With these caveats in mind, we conclude by saying that it is a welcome development.

⁸¹ Nikolaos Tsagourias, *The Shifting Laws on the Use of Force and the Trivialization of the UN Collective Security System*, 34 NETH. Y.B. INT'L L. 55, 80–85 (2003).

⁸² *Namibia Opinion*, *supra* note 6, at 45; *Lockerbie Case*, *supra* note 6, at 15, 127.

⁸³ Sep. Op. Lauterpacht in *Bosnia Genocide Convention Case*, *supra* note 6, 324, at ¶¶ 101–03.

VI. THE SECURITY COUNCIL'S ADMINISTRATION OF TERRITORIES BETWEEN PEACE-ENFORCEMENT AND STATE-BUILDING

By “administration” of territories by the Security Council we may indicate the Chapter VII authorization and mandate for the exercise of extensive governmental powers, both of a legislative and executive nature, to a U.N. civilian administration, often headed by a Special Representative appointed by the Secretary-General. This form of post-conflict intervention, albeit not unprecedented, has acquired particular importance in the last ten years, after having taken place in Bosnia and Herzegovina (1995), Kosovo (1999) and East Timor (1999).⁸⁴ By authorizing this type of mission, the Council discharges its function of maintenance and restoration of international peace and security. In the transitional period following an armed conflict, it provides the legal and political instruments for the direct construction or reconstruction of an institutional framework and of sound standards of governance. The phenomenon is often portrayed as U.N.-driven process of state- or nation-building.

While in Kosovo and East Timor, the United Nations Mission in Kosovo (UNMIK) and the United Nations Territorial Administration for East Timor (UNTAET), respectively, have initially exercised exclusive governmental authority over those territories, they have also gradually transferred powers to the local authorities. In the case of East Timor, with the access to statehood and independence on 20 May 2002, UNTAET was first replaced by the United Nations Mission of Support in East Timor (UNMISSET) and, later, by the United Nations Office in Timor-Leste. The U.N. Office in Timore-Leste currently exercises decreasing governmental powers in conjunction with the Timorese government within a number of areas, including police-training, the organization of ministries, the organization and management of the judicial system, and the management of financial and other vital services such as water and health care.⁸⁵ In the case of Bosnia and Herzegovina (BiH), the parallel management of the federal constitutional structure by both the Bosnian authorities and the Office of the High Representative (OHR) was

⁸⁴ Cf. S.C. Res. 1031, U.N. Doc. S/RES/1031 (Dec. 15, 1995); S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999); S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999).

⁸⁵ See S.C. Res. 1410, U.N. Doc. S/RES/1410 (May 17, 2002) (setting out the role of the United Nations Mission of Support in East Timor and how it interacts with East Timorese authorities); S.C. Res. 1599, U.N. Doc. S/RES/1599 (Apr. 28, 2005) (explaining the reduced power of the United Nations Office in Timore-Leste).

already envisaged in the Dayton Peace Accords and Security Council Resolution 1031.⁸⁶ That was the result of a situation where institutions that were providing governance were already in place, although the governance was provided along ethnic lines. The solution was identified in transforming the institutions into inclusive ones which were committed to the unity of the state of BiH. The process was somehow inverted as compared to East Timor and Kosovo, in the sense that the High Representative, rather than gradually transferring its powers to the local authorities, soon received support from the Security Council for more intrusive and extensive powers of civil administration, which represented the model for the subsequent missions in Kosovo and East Timor.⁸⁷

The other fundamental characteristic of these missions is that they are accompanied by the robust employment of a peace-enforcement military presence. Such military presence is authorised by the Security Council under Chapter VII; in the cases of BiH (IFOR/SFOR) and Kosovo (KFOR) it has been composed of a multinational force under unified NATO command, whereas in the case of East Timor it has been a U.N. contingent, initially under Australian command (UNTAET/UNTISET), which took over in 1999 the job of the INTERFET multinational force.⁸⁸ More recently, the military mission in BiH has shifted operational command from NATO to the EU (EUFOR).⁸⁹ All these missions have been given a very extensive and detailed mandate aiming at the maintenance of peace and security and at supporting the U.N. civil administration in its task of state-building. The broad mandate conferred by the Security Council and by the underlying deployment agreements has been used in a number of activities: apart from the more typical tasks of monitoring the withdrawal and disarmament of fighting factions or armies, they have also included the provision of security at elections, supporting the return of refugees and displaced persons to their homes, the hunting

⁸⁶ General Framework Agreement for Peace in Bosnia and Herzegovina, Annexes 4 and 10, Dec. 14, 1995, 35 I.L.M. 75 (1996) [hereinafter Dayton Agreement].

⁸⁷ Summary of Conclusions, Bonn Peace Implementation Conference, Dec. 10, 1997, Art. XI(2) in: Office of the High Representative, Bosnia and Herzegovina, Essential Texts (2000, 3d ed.), 199. See also S.C. Res. 1174, U.N. Doc. S/RES/1174 (June 15, 1998).

⁸⁸ S.C. Res. 1244, Annex 2, ¶ 10, U.N. Doc. S/RES/1244 (June 10, 1999); Military Technical Agreement Between the International Security Force (KFOR) and the Federal Republic of Yugoslavia, June 9, 1999, 38 I.L.M. 1217 (1999); S.C. Res. 1272, ¶ 9, U.N. Doc. S/RES/1272 (Oct. 25, 1999); S.C. Res. 1264, U.N. Doc. S/RES/1264 (Sept. 15, 1999).

⁸⁹ S.C. Res. 1575, U.N. Doc. S/RES/1575 (Nov. 22, 2004).

down of war crimes suspects, the protection of religious sites, and the support and training of newly formed national armies.

In the present section of the report, we wish to address some of the most contentious legal and policy issues, which are at the heart of the nature and purpose of the Security Council's administration of territories. A frank evaluation of these issues is particularly important in a phase of debate over U.N. and Security Council reform. There are indeed some lessons to be learned from the current models of territorial administration, which may in the future enhance the legitimacy and effectiveness of these ambitious projects, as well as the accountability of the actors involved. Apart from all of the political, administrative, and operational challenges that U.N. territorial administrations have to face in their daily work and which have been thoroughly addressed in the Brahimi Report and in the High Level Panel report, it is possible to identify three fundamental questions that should be addressed and thought through in any further steps of U.N. reform.

Firstly, similar to any enforcement action undertaken by the Security Council under Chapter VII, the question of accountability towards the Council and control by the Council over member states and regional organisations involved in both the civil and military part of the U.N. administration should be raised. We submit that while the cases of BiH and East Timor represent sound models where the Council has exercised regular reviews of the situation on the ground, both in terms of peace-enforcement and in terms of state-building, the case of Kosovo indicates a lack of political control by the Council that shows some reluctance to mingle with the difficult situation of that province. A clear indicator of such reluctance is the open-ended mandate given to UNMIK and open-ended endorsement given to KFOR in Security Council Resolution 1244. Paragraph 19 of 1244 “[d]ecides that the international civil and security presences are established for an initial period of 12 months, to continue thereafter unless the Security Council decides otherwise” (emphasis added).⁹⁰ As of today, 1244 remains the only resolution concerning Kosovo adopted by the Council. If we consider the same period of time, the Council has adopted 11 resolutions concerning Bosnia (all of them under Chapter VII) and 14 resolutions concerning East Timor (most of them under Chapter VII). We do not suggest that the adoption of resolutions is by itself an uncontroversial sign of the proper exercise of the Council's primary responsibility in the field of international peace and security. However,

⁹⁰ See S.C. Res. 1244, ¶ 19, U.N. Doc. S/RES/1244 (June 10, 1999).

certainly in the cases of BiH and East Timor, it represents evidence that the Council has been constantly reviewing the situation on the ground and its policy vis-à-vis those troubled countries. The problem with the open-ended mandate nature of 1244 is that even if the Council wanted to change its policy concerning the province or direct the action of UNMIK and KFOR, the veto of one of the five permanent Security Council members (hereinafter P-5) could prevent it from doing so. The lack of a renewal of the mandate caused no extra pressure in that emergency situation which would push the Council to find a consensus quickly.⁹¹ At any rate, we could not find any evidence that the Council ever tried to table a resolution concerning Kosovo after 1999: the open-ended mandate can eventually become a recipe for immobilism.

The problem is highlighted by the history of the Kosovo crisis, where the Council failed to take up its responsibility for the maintenance of peace and security in that region at the peak of the crisis and, eventually, it had to “accept” the results and effects of NATO’s military action. The deployment of KFOR was one of its results and one should characterize relevant parts of 1244 as an endorsement of the deployment of KFOR, rather than an authorization. With regard to the relation between the Council and regional organisations, the High Level Panel report seems to pave the way for such an “endorsement” model, “recognizing that in some urgent situations the authorization may be sought after such operations have commenced.”⁹² It is arguable that such delegation of powers and authority to regional organisations and member states is risky in the long run, because it undermines the international legitimacy of the Council as the organ embodying U.N. authority and legality. It is even more risky when the Council fails to regain control over the post-conflict phase. The models of East Timor and BiH, where the mandate is given for a definite period of time and is subject to renewal, should be preferred to the Kosovo model and adopted for future projects of territorial administration and peace-enforcement.

⁹¹ On the other hand, in a Kosovo-like scenario, the risk that a P-5 Member could make its consent to the renewal of the mandate conditional upon the Council approving a resolution unrelated to the operational and policy needs of the mission on the ground is minor. That danger was shown in conjunction with the renewals of SFOR mandate in 2002 and 2003, where the United States made it abundantly clear that it would not vote a renewal of the mandate unless its military personnel based in States party to the ICC Statute were given full immunity from the jurisdiction of the ICC. See S.C. Res. 1422, U.N. Doc. S/RES/1244 (July 12, 2002); S.C. Res. 1487, U.N. Doc. S/RES/1244 (June 12, 2003).

⁹² High-Level Panel, *supra* note 1, ¶ 272(a).

The second interesting and controversial aspect to explore is the dualistic nature of these powers, already highlighted in the literature.⁹³ On the one hand, the U.N. civil administration is in all respects an international actor, whose legal authority is based on an international act; on the other hand, it acts as a national legislative and executive authority, issuing legislation and decisions with direct effect and applicability. As far as the international dimension is concerned, the source of legal authority is fundamental. In the cases of Kosovo and East Timor, such source is both an agreement with the local authorities or host state and a Chapter VII resolution. With regard to BiH, the picture is blurred. Whereas both Security Council Resolution 1031 and Annex 10 of the Dayton Agreements provide for the designation of a High Representative, the OHR was initially entrusted with the tasks of monitoring the implementation of the peace settlement and coordinating the civilian authorities in the institutional reconstruction of the country.⁹⁴

It was only in 1997 that the High Representative requested a broader and more incisive mandate, in the face of stiff opposition by all Parties to the proper and smooth implementation of the civilian aspects of the peace agreement. The response came from the Steering Board of the Peace Implementation Council (PIC) that in December 1997, in its Bonn Conference concluding document, welcomed “the High Representative’s intention to use final authority in theatre regarding interpretation of the Agreement on the Civilian Implementation of the Peace Settlement in order to facilitate resolution of difficulties by making binding decisions”, including interim measures to take effect until the national institutions adopt a measure consistent with the Peace Agreement and actions against public officials.⁹⁵ The so-called “Bonn powers” were eventually put into practice with the adoption of over six hundred legislative measures, ranging from the establishment of custom services to the enacting of the telecommunications law; they have also resulted in the dismissal of a number of public officials, including democratically elected politicians.

Despite the important provision of Annex 10 that designates the High Representative as the “final authority in theatre” regarding the interpretation of the agreement (Art. V), there are a number of clear question marks around the legal source of these legislative and executive

⁹³ E.g., Carsten Stahn, *The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis*, 5 MAX PLANCK Y.B. U.N. L. 105, 145 (2001).

⁹⁴ Dayton Agreements, *supra* note 86, Annex 10, art. II(1).

⁹⁵ *supra* note 87.

powers. Is the legal source of authority for the Bonn powers the decision of the Steering Board of the PIC, or the interpretative power of the High Representative? If the former, as it appears from the preamble of all binding measures adopted by the OHR, where does the PIC, an *ad hoc* inter-governmental body, derive its legal authority from? If the latter, is the High Representative amending Annex 10, rather than interpreting it? To find a straight answer to these questions is not an easy task. A conferral of legal authority may be construed in Security Council Resolution 1174 adopted on 15 June 1998 where the Council, acting under Chapter VII, “reaffirm[ed] that the High Representative . . . in [the] case of dispute [sic] may . . . make binding decisions as he judges necessary on issues as elaborated by the Peace Implementation Council in Bonn on 9 and 10 December 1997.”⁹⁶ Still, once more, the Council appears to endorse, rather than provide, a mandate. Furthermore, the OHR has hardly ever mentioned Security Council Resolution 1174 as one of the legal sources of its legally binding powers; it normally refers to the PIC Bonn document and to Art. V of Annex 10. There is a clear case to be made that the conferral of such broad legislative and executive powers should be clearly set out and authorised in a Chapter VII resolution and that such resolution should be referred to in the decisions of the U.N. civil administration, such as in the cases of Kosovo and East Timor. The experience of BiH shows a lack of clarity and transparency in the way the U.N. civil administration construes its legal authority.

As far as the internal dimension of the U.N. authority is concerned, there should be the acknowledgment by international actors that the U.N. may act as transitional civilian government for a long period of time and its decisions should to some extent be subject to powers of legal review by either domestic or international bodies, in order to make them more accountable vis-à-vis the local populations and representative institutions.⁹⁷ The case of BiH shows that domestic courts have indeed timidly started taking up that task when solicited to do so by individual applications. Both the BiH Human Rights Chamber and the BiH Constitutional Court have

⁹⁶ S.C. Res. 1174, ¶ 4, U.N. Doc. S/RES/1174 (June 15, 1998).

⁹⁷ Another controversial issue of accountability that cannot be explored due to length constraints is that concerning the applicable law. For interesting discussions on this matter, see, e.g., SIMON CHESTERMAN, *YOU, THE PEOPLE: THE UNITED NATIONS, TERRITORIAL ADMINISTRATION, AND STATE-BUILDING* (2004); ROBERT KOLB, GABRIELE PORRETTO, & SYLVAIN VITÉ, *L’APPLICATION DU DROIT INTERNATIONAL HUMANITAIRE ET DES DROITS DE L’HOMME AUX ORGANISATIONS INTERNATIONALES: FORCES DES PAIX ET ADMINISTRATIONS CIVILES TRANSITOIRES* (2005); Steven R. Ratner, *Foreign Occupation and International Territorial Administration: The Challenges of Convergence*, 16 AM. J. INT’L L. 695 (2005).

considered the legislative decisions of the High Representative as part of the domestic law of BiH, hence subject to judicial review. In a 2000 case concerning the OHR law on border services, the Constitutional Court stated the following:

[T]he High Representative—whose powers under Annex 10 to the General Framework Agreement, the relevant resolutions of the Security Council and the Bonn Declaration as well as his exercise of those powers are not subject to review by the Constitutional Court—intervened in the legal order of Bosnia and Herzegovina substituting himself for the national authorities. In this respect, he therefore acted as an authority of Bosnia and Herzegovina and the law which he enacted is in the nature of a national law and must be regarded as a law of Bosnia and Herzegovina.⁹⁸

While the Constitutional Court has carried out such review in a number of cases, it has never found a OHR enacted provision or legislation to be in violation of the BiH Constitution.⁹⁹ The Human Rights Chamber has also been willing to review legislation enacted by the OHR, in particular when looking at the implementation of that legislation by local authorities.¹⁰⁰ In the *Miholic* case, it has found OHR enacted amendments to be in violation of human rights and ordered a remedy.¹⁰¹ On the other hand, whereas both the Constitutional Court and Human Rights Chamber have reviewed the content of OHR legislation, they have not examined whether there was enough justification for enacting legislation, instead of leaving the performance of this task to the democratically elected domestic institutions.

By contrast, the Human Rights Chamber and the Constitutional Court have consistently refused to review non-legislative measures, such as those concerning the dismissal of public officials by the OHR. These decisions arguably present the most human rights sensitive cases, in

⁹⁸ Constitutional Court of BiH, U/9/00, Decision of Nov. 3, 2000, ¶ 5, *available at* http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=22419.

⁹⁹ *E.g.*, Constitutional Court of BiH, U/25/00, Decision of Mar. 23, 2001; Constitutional Court of BiH, U/42/03, Decision of Dec. 17, 2004; Constitutional Court of BiH, U/24/03, Decision of Sep. 22, 2004, *available at* <http://www.ccbh.ba/eng/odluke/>.

¹⁰⁰ *E.g.*, BiH Human Chamber, Case No. CH/02/12470, Nedjeliko Obradovic against Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina (decision on admissibility and merits of Oct. 10, 2003), *available at* <http://www.hrc.ba/database/searchForm.asp>.

¹⁰¹ BiH Human Rights Chamber, Case Nos. CH/97/60, CH/98/276, CH/98/287, CH/98/362 and CH/99/1766, Andrija Miholic and Others against Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina (decision on admissibility and merits of Nov. 9, 2001) [hereinafter *Miholic Case*], *available at* <http://www.hrc.ba/database/searchForm.asp>.

particular when the dismissed officials are democratically elected politicians which are removed from office, with no possibility of appeal, because of “anti-Dayton speech”, i.e. statements which are perceived as threatening the implementation of the peace agreements. In such cases, the OHR has been considered as acting within powers which do not have the nature of state legislation, nor could they constitutionally be exercised by the state of BiH; thus the Constitutional Court and the Chamber found that they lacked jurisdiction *ratione personae*.¹⁰² While the distinction *ratione personae* made by the Chamber was the most direct solution for the sake of deciding on the issue of jurisdiction, a more linear and sound approach may require a distinction *ratione materiae* that will lead to the same end-result. Whereas a legislative act pertains to typical acts issued by state organs in their institutional activities and should be subject to judicial review because of their nature, an order of dismissal pertains to the typical emergency powers conferred to the international authority and because of its nature should be beyond the reach of local institutions. Such approach and distinction is already implicit in the *Miholic* decision.¹⁰³

Finally, any domestic judicial review should be complementary, not exclusive of international review. It remains to be seen whether the European Court of Human Rights will undertake the task to examine dismissal decisions by the High Representative, which often present the danger of infringing rights guaranteed under the European Convention on Human Rights. A temporary solution suggested by the Venice Commission of the Council of Europe is the setting up of an independent panel of international experts that would have to give its consent to the dismissal of individuals and elaborate some clear criteria on which to decide those dismissals.¹⁰⁴ The setting up of advisory panels is even more urgent for the actions of UNMIK and KFOR in Kosovo, where the European Convention does not directly apply and where local courts have been more deferential, as compared to domestic courts in BiH, to the international

¹⁰² BiH Human Rights Chamber, Case No. CH/98/1266, Dragan Cavic against Bosnia and Herzegovina (decision on admissibility of Dec. 18, 1998), ¶¶ 18-19, available at <http://www.hrc.ba/database/searchForm.asp>.

¹⁰³ *Miholic Case*, *supra* note 101, ¶ 132.

¹⁰⁴ See European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of High Representative*, Mar. 11-12, 2005, ¶ 98, [http://www.venice.coe.int/docs/2005/CDL-AD\(2005\)020-e.asp](http://www.venice.coe.int/docs/2005/CDL-AD(2005)020-e.asp).

authorities.¹⁰⁵ Undoubtedly, such measures should be taken in the context of a gradual phasing out of the adoption of interim and security measures and of increasing empowerment of domestic institutions. U.N. administrations and the Security Council should never lose sight of the transitional nature of these projects.

The third question remains to be addressed, i.e., the “borders” of the Security Council’s territorial competence: may the Council permanently change the final political status of a territory? May and should the Council go as far as disposing of territory and formally “creating” a state?

The question has practical relevance in the context of the decision on Kosovo’s final status. As things stand on the basis of Resolution 1244, the decision should result from an agreement between Belgrade and Pristina, which is approved by the U.N.¹⁰⁶ Although that is the objective of the final status negotiations initiated in October 2005, there is no indication that such an agreement may come in the near future: Pristina clearly aims at complete independence, an end-result that, at this stage, is unacceptable to Belgrade, which aims at a status of substantial autonomy for the province. UNMIK head Soren Jessen-Petersen and the Special Envoy Maarti Atishaari have made clear that any agreement should not in any way impair the territorial integrity of the province.¹⁰⁷

In the case of impasse may the Council take action and “impose” a permanent status on Kosovo? Matheson has argued that “the Security Council would be justified in directing a permanent change in some aspect of the status, boundaries, political structure, or legal system of territory within a state, if the Council should determine that doing so is necessary to restore and maintain international peace and security.”¹⁰⁸ One may agree in principle with Matheson’s observation and apply it in practice to the case of Kosovo, if the decision was to grant the province a permanent status of substantial autonomy within Serbia, with very limited central powers, such as border controls, coordination of foreign and defense policies, and policing; or in

¹⁰⁵ See European Commission for Democracy through Law (Venice Commission), *Opinion n. 280/2004 on Human Rights in Kosovo: Possible Establishment of Human Rights Mechanism*, ¶¶ 115-133, available at [http://www.venice.coe.int/docs/2004/CDL-AD\(2004\)033-e.asp](http://www.venice.coe.int/docs/2004/CDL-AD(2004)033-e.asp).

¹⁰⁶ See UNMIK Legal Advisor Alexander Borg-Oliver statement of May 25, 2001, Doc. UNMIK/FR/0040/01; UNMIK-FRY Common Document, Nov. 14, 2001, <http://www.bnldg.de/~wplarre/back011114.htm>.

¹⁰⁷ See Declaration of the SRSG, Mr Soren-Jessen Peters, in U.N. Doc. S/PV.5130, 5.; and Declaration by Mr Maarti Athisaari, Press Conference of Nov. 23, 2005, available at <http://www.unmikonline.org>.

¹⁰⁸ Michael J. Matheson, *United Nations Governance of Post-Conflict Societies*, 95 AM. J. INT’L L. 76, 85 (2001).

case it led to a permanent “internationalization” of the province (possibly following the model of Danzig after World War I), with a view to a speedy integration in the European Union. These measures could be considered as proportionate measures aimed at permanently solving the inter-ethnic conflict, if taken after the achievement of a situation where human rights, and in particular the rights of minorities, are guaranteed. However, one can hardly see how the granting of independence by the Security Council could be considered as necessary and proportionate to the maintenance of international peace and security. On the contrary, a policy of that kind may spark new tensions and secessionist claims in neighboring countries such as BiH. It would be also in conflict with Resolution 1639, adopted on 21 November 2005 (at the tenth anniversary of the conclusion of the Dayton Agreements), where the Council has reaffirmed “its commitment to the political settlement of conflicts in the Former Yugoslavia, preserving the political independence and territorial integrity of all States there, within their internationally recognized borders.”¹⁰⁹

To sum up, the Security Council should stop short of formally and substantially “creating” a new state by disposing territory of a U.N. member state. That would be unprecedented, legally very controversial and politically risky. On the other hand, the Security Council should not disengage from an ongoing project of territorial administration when facing the most delicate choices. In the case of Kosovo, an agreed solution between Belgrade and Pristina remains the best case-scenario; should that not happen, the Security Council should step in decisively and decide for the best status of the province that will guarantee peace and security in the region in the longer term. Little supports the argument that full sovereignty and independence of the province would serve the purpose of long-term stability in the region.

VII. CONCLUSION

Numerous questions have been raised, and avenues of answers prospected, in the extraordinarily open and rich discussion of this day. All the variegated aspects of this discussion cannot here be melded into a single streamlined conclusion. Instead, I would like to focus on aspects of the reform of the U.N. The attempt shall be to see more clearly not only what is desirable and possible, but also what is undesirable and inconsequent. Crises and discussions on

¹⁰⁹ S.C. Res. 1639 (2005), preamble.

reform, ever present in international life, sharpen the views for what should be achieved and are thus useful. They also tend to eclipse the view for the framework into which a reform must necessarily be embedded if international relations are not to be completely upset. The tendency here is to expect too much and then to be disappointed. This line of events can be traced back to the times of the League of Nations.

What can be the reform of the U.N.? Is reform of the U.N. necessary? To the first question, many answers are given. To the second, few would challenge that reform is necessary or at least useful. It shall not be denied that reform on minor points, where experience has shown inconsistencies, may be welcome. For example, why not increase transparency, e.g., for the decisions of the Security Council, where in the past too much was discussed or decided behind the scenes? Why not establish an organ for peace consolidation as a consequence of the fact that such activities have taken a paramount role in the life of the U.N.? Why not establish a new Council for Human Rights in order to—apparently at least—overcome the shortcomings and political lack of credibility of the Human Rights Commission? On this last point, one could ask some hard questions. Was the old Commission not simply the expression of the action of the member states? As long as a human rights body remains filled with representatives of States, how could it work dramatically differently than the old Commission? How could it avoid “politicizing” the questions put to it? It could work otherwise only if it was filled with independent experts. But this is not the direction of the reform. An organ where the States are represented, is desired, not simply an expert organ with no political responsibilities. Political work has to be done by the States if it is to enjoy some political weight. One cannot put aside the States. But then, why complain about the political nature of the Commission or the Council? Can they be anything but political? The reform may, therefore, be useful but it has to be put in a proper perspective and not exaggerated.

The more important question is to ask oneself what the U.N. is and what is demanded of it. Does one ask the U.N. to be what it cannot be? Is the whole question of reform not too often too much predicated upon the notion that the U.N. should be as effective as a national executive? That if it is not such, it is necessarily ill adapted and must be reformed? The process of taking precise account of the failures and inadequacies of the U.N. in the context of its own structure, mission, possibilities, and asking for amelioration on that basis, seems to be colored by a comparison with the public administration of some properly organized State. However, the U.N.

is not a super-State. It has no sovereignty. At its basis, it is a debating club for common actions to the extent the member states desire such actions. Therefore, it cannot be like a State. It cannot have the same “efficacy” as may have the executive of this or that State.

Thus, to put it bluntly, the U.N. is not profoundly reformable; nor would such a reform be at all useful. The U.N., in fact, performs exactly the tasks for which it was created. Measured by that yardstick, it performed them fairly well. It does as well or badly as it is endowed with effective means to work by its member states. However, never was the Charter a limit put upon a will to act when there was agreement among the member states, or even just a large majority of them. The peacekeeping operations are an example in point. If some of these missions failed, it was not due to an insufficiency of the U.N. itself. It was due to pusillanimity and procrastination by the member states; to absence of clear mandates given to the U.N.; to absence of funding; etc. These are mainly responsibilities of the member states, not of the Organization.

It can be said, roughly speaking, that there is a general rule of adequacy of the international organs to what the member states wish. The international organs are almost always as effective as intended. Between the organization and its members there is some mirror. Thus, the bottom of the problem lies almost always with the member states, who detain the real power. The point is that the governments happen to hide behind the purposive “inadequacy” of the international organs to mask their own inconsistencies, lack of will or even bad will, thus shifting ostentatiously the responsibility of failure to others than themselves. Winston Churchill very correctly said of the League of Nations: “It was not the failure of the League of Nations, it was the failure of the nations of the League.” The point is precisely that we do not want the organizations to be more effective as they are! This reality tends always to be forgotten. If one really wanted a profound reform for significantly increased efficacy of the U.N., the only way to achieve it is crystal clear. The U.N. should be endowed with supranational powers of decision, the member states yielding their sovereignty. There is no guarantee that the U.N. would perform well (as national governments neither) in such a setting, and it would in any case take time to live up to such new challenges. However, it would have the power to decide and to realize its action through its own executive. It would then be accountable for its successes and failures alike. However, this—and rightly so—nobody wishes. We do not want a world State. Thus, it is shortsighted to criticize the U.N. for something which nobody wishes them to be: fully effective, as a world government. The relative lack of efficacy flowing from the lack of sovereign power,

in other words, is part of the structure and the mission of the U.N.; the U.N. cannot be criticized for respecting it. If you have no sovereign power, you cannot do more than what you are allowed and asked to do by the sovereigns.

The question of efficacy thus shifts essentially from the organization to the sovereign States. Hence, if the "U.N." is not "effective" or not sufficiently perceived as being such, the members should reform their own policy. However, in this area, nobody wishes to go far. Nobody, apparently, wishes a loss of sovereign independence, a tying of one's hands for the future. This is true in 2006 more than ever. The Western States, under whose guide the U.N. was established, and on the concurrence of which it is eminently backed (since these States are a significant part of the great powers of the day), show less inclination than ever towards strengthening the U.N. On the contrary, we are in the high tide of anti-multilateralism; we are amidst apparent halcyon days of unilateralism.

We assumed up to this moment that the concept of "efficacy" has some clear meaning. However, it does not. What is efficacy? Is it efficacy as that of the executive of a State, or of a well-organized State executive, say Switzerland? Is it efficacy of a body possessing no executive power? This point has been addressed above. Then, is it efficacious only to act, but not to abstain from acting? There seems today a quite common way of thinking accorded to "inaction"; that it is necessarily an expression of lack of capacity, of lack of will, of inefficacy. That may be true in some instances. The experience of the League of Nations is there to show it. However, that view does not necessarily hold true. The decision not to authorize action by force in Iraq in 2003 was not the sign of any weakness, but the sign of a precise political and legal analysis according to which the results of armed intervention would be worse than those of non-intervention, at least at the time of decision. This is a political judgment which, by the way, proved to be wise and sound.

Similarly, it is always thought, namely in the West, that the veto in the Security Council corresponds to a "blocking" of this organ. It is true that a blocking by one single State may occur, especially if the recourse to the veto is systematic. This was the case of the practice of the USSR in the fifties (which can be explained by the simple fact that the USSR was in an extreme minority position in the U.N.). However, what is called a "veto" is very often not. Not every negative vote in the Council by one of the five permanent members is a veto. If there is no requisite majority for the decision, the decision fails on this ground; there is no place for any

veto. The veto exists only if the proposed decision obtains the requisite majority of nine votes, and then is defeated precisely because of a negative vote by one of the five permanent members. It is spurious and dishonest to say that the action in Iraq in 2003 could not pass because of an anticipated French veto. In fact, only four States were ready to vote in favor of the proposal of the US and its allies. Four is not nine. Where is the problem of efficacy here? There is no collective organ whatsoever where somebody will be authorized to do something which is not desired by the majority. If one wants to have more “efficacy” here, that can only mean the following: “I want to be able to act even if the majority disagrees, and eventually also if anybody else disagrees.” This is unilateralism, not efficacy.

Moreover, consider that one of the great powers uses in effect is the veto. It is interesting to note that the term “the Council is blocked”—implying that the Council is unjustifiably blocked—is used only when the veto comes from some hostile power. It is then claimed that the Council is blocked because Russia or China used their veto power. However, when the West, and especially the US, use the veto power (e.g., to cover Israel), nobody here speaks of a “blocked” or “ineffective” Council. The charge of “blocking” the Council, of rendering it “ineffective,” is thus profoundly political. The Council is “blocked” when the others do not want my action; but the Council is obviously not “blocked” when I do not want the action of the others. This *géometrie variable* deserves some reflection. The net result is simply that the Charter grants a veto power to the big five and allows them to use it. One can discuss if it should be abolished or limited. But the attitude which consists in adoring your own veto and hating that of the others – and linking this surreptitiously to questions of efficacy – is one whose honesty is not recommendable. One sees, here too, that the question of “efficacy” is very contextual and all but neat.

Should the veto be abolished or limited? Let us just consider a recent Swiss proposal, which sounds very sympathetic. This proposal consists in discounting the veto in all cases where genocidal acts, crimes against humanity, or grave and massive violations of human rights are at stake. This proposal is an outflow of many previous works, such as that of the Commission on the “Responsibility to Protect” established after the events in Kosovo (1999) following a wish which had been expressed by the Secretary-General of the U.N. Now, that proposal certainly looks good. The problem with it is that it tends to make believe—this being certainly also part of its aim—that action not only should, but will, be taken in such circumstances in the future to stop

the “massacres.” The great obstacle is envisioned in the veto of the permanent members. It should thus fall in the name of humanity, as the Berlin Wall fell. However, the obstacle for such action is hardly the veto. Today, there are many countries where genocidal acts or crimes against humanity (or human rights) are perpetrated. In many of these countries the great powers have no specific involvement. They would not veto specific action. If such action is not taken, it is out of indifference, out of the impossibility to act everywhere, out of lack of resources. Abolishing the veto will not change the fact that on all these spots no action will be taken in the future, exactly as no action was taken in the past. Moreover, enforcement action against a great power will remain impossible, with or without the veto. Assume the veto is abolished for such questions. Could measures then be taken, say against Russia for Chechnya, or against the US for Guantanamo and other camps? Certainly not. No more than what is done now (diplomatic action of different type) would be done in future.

May I add that a way to avoid the veto already exists in the law of the United Nations without any reform. If there was firm political will, one could have recourse to the Resolution “Uniting for Peace” (377[V], 1950) of the General Assembly of the U.N. It allows the General Assembly, under certain liberal conditions, to take the place of the Security Council if the latter is “blocked” by a veto in order to recommend (not to decide upon) the measures to be taken, these measures including the use of force. Why do the interventionist Western States not think of that resolution, which was a creation of their own? Certainly, the Western world has lost the majority in the Assembly. Moreover, these States do not wish to submit their action to the Assembly. This would imply some subordination to the Assembly, a duty to give account of the action undertaken, a danger to have the authorization retracted because of some dissatisfaction of the Assembly. However, what would be more “democratic” than to ask the rank and file of the Assembly if they wished an action or not? Finally, may it be recalled that the precise definition of genocide, crimes against humanity and, even more so, of grave violations of human rights is extremely open-ended and would finish as a political play-tool in the hands of the members of the Security Council.

In sum, the danger of the Swiss reform is that it tends to make believe that the problem for action in this area is the “veto” (which it is not really), and that removing it will open up an era of much more effective action. If that is believed, the disillusion will be strong. Hence, the population who will have believed in such measures to increase the “effectiveness” of the U.N.

will be frustrated and think that, at the end of the day, it is really impossible to do anything useful in that mammoth organization called the U.N. From there, cynicism and further disinterest in the U.N. follows. The people have the impression of having been *dupés* once more. And they will swear to themselves not to be taken as a fool any more. This example was given not to reject bluntly a proposal such as the Swiss one, but to show once more how problematic perceptions of “efficacy” may be in this area.

It seems to me that the most urgent problems of the day are twofold. They are not essentially centered upon a reform of the U.N., even if this reform deserves some attention.

First, one has to revitalize an essential role played by the U.N. and which nobody else can claim to perform. The U.N. must come back to be the conscience of the international community. It has to give voice again to the views and wishes of the majority, which is the basis for political action in every community. It has to crystallize the common values, to sustain common actions, to say how it sees the application of the principles shaped in concrete cases. In one word, the U.N. must again become the “oracle of the international community”: the place where values are expressed and action envisaged. This role is essentially one which the General Assembly must perform. It is the only organ of general competence composed of the entire membership of the U.N. However, the Assembly has been excessively marginalized in the last 15 years. The U.N. is first of all a place for common debate and prospecting avenues of action. The Assembly must again take up this essential role of the U.N. and live up to its exigencies. It should also speak out when the values of the community, its law, or its visions, have been violated.

Second, and most importantly, we are witnessing a return to the ideology of unilateralism, to the flight from international institutions, to unreserved skepticism about common (i.e. multilateral) international action. Unilateral action, action by ad hoc coalitions, is gaining ground. The complicated and non-spectacular avenues of multilateralism are repudiated, if not ridiculed. Impatience is felt everywhere; neat and quick results are to be obtained for urgent problems. Multilateralism, with all its burdens and half-hearted results, seems a stumbling block on this road. Worse still: the unilateral use of force is again considered as a (inescapable) means of solving disputes, of obtaining quick political results. The system of collective security, which never worked really satisfactorily, but to which no satisfactory alternative exists, is despised, sometimes ridiculed – but Winston Churchill once said: “What is

the only ridiculous thing about collective security? That we do not have it!”¹¹⁰ An essential progress of the twentieth century (the rule on the non-use of force by States) is thus largely jettisoned. And as usual, the return to a non-coordinated use of force tends to usher in an increase of force effectively used, in a sequence of wars, and in re-armament. There are here some, albeit limited, analogies to the time of the League of Nations after 1935. At that time, the abandonment of the collective system brought back individual alliances, re-armament, and finally war. All that may seem worthwhile to some self-appointed realists, who never believed in collective action: neither at the time of the League, where they managed to kill it, nor in the times of the U.N.

The net result of this practice is a poisoning of international relations. The price for it is international regression and the creation of an atmosphere of great mistrust, upon which nothing stable can, for the time being, be erected. As Serge Sur puts it: “Mais les réponses que suscitent ces défis [d’après le 11 septembre 2001] renvoient quant à elles au passé – retour du primat de la sécurité, monopole des Etats dans la réplique, érosion des institutions internationales, climat de méfiance et de doute qui se substitue à la confiance qui avait été laborieusement développée au cours des décennies précédentes par le multilatéralisme, la maîtrise des armements, spécialement de destruction massive, logique des coalitions, de recours incontrôlé à la force armée qui remplace l’effort séculaire de limitation de l’emploi de la force . . . , distanciation entre l’Europe et les Etats-Unis. N’est-ce pas alors le XIXème siècle qui revient en force?”¹¹¹

For years to come, everything will become more difficult to be realized at the international plane, since mistrust has greatly increased. One can think at this juncture of the talks on armaments reduction or non-proliferation. Mistrust is an antidote to effective international action. Those who attempted to strike out unilaterally in the hope to get more effective results are, first, confronted with a series of unexpected setbacks on the spot. Second, they have also put a seed into international relations, which for years will inhibit further effective action.¹¹² This is particularly disquieting in an international environment of ever-growing interdependence and of problems of unprecedented magnitude and gravity to be tackled.

¹¹⁰ WINSTON S. CHURCHILL, *ARMS AND THE COVENANT*, 450 (1938)

¹¹¹ SERGE SUR, *RELATIONS INTERNATIONALES VII-VIII* (4th ed. 2006).

¹¹² As. Bourquin said very aptly, “Il faut une atmosphère de clame et de sécurité pour que les peuples s’adonnent à une œuvre de civilisation et de progrès. L’inquiétude les en détourne. Elle durcit leurs méfiances et creuse les

The next years will consequently be marked by a most regrettable split between the problems to be tackled at the international level and the modesty of possibilities to reach concrete results. This is an ever-existing drama of international society. Those with which the power lies can do no effective action on their own (the States), and there where effective action could be taken lies no power (the international community). But the opening up of that gap may reach unprecedented and most disturbing depths in these next years, so replete with urgent international agendas.

There, in patiently reconstructing multilateralism and in rebuilding some form of international confidence, lays the most urgent task of the moment. This task is not to be performed simply through a reform of the U.N. It must be tackled at its root, in the internal societies where for years now a narrow-minded “sovereignism” is progressing, where “clashes of civilizations” are promoted, where impatient unilateralism has gained intellectual ground. If humanity, the peoples and the States, in which it is organized, are unable to learn, they will be bound to feel on their skin the results of such a policy of disunion. It will not be the first time in history. But it may well be the most problematic occurrence, in view of the stage of urgency of common action reached in the world of today.

fossés qui les séparent. Elle les oblige à se contracter, à se replier sur elles-mêmes, à mobiliser leurs ressources en vue de l'épreuve qui les menace.” MAURICE BOURQUIN, *VERS UNE NOUVELLE SOCIÉTÉ DES NATIONS* 82 (1945).