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"Peace and Law"

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In 1958 Grenville Clark and Louis Sohn published their famous '***World Peace through World Law***'. They proposed a drastic revision of the UN Charter giving the General Assembly some legislative power; establishing a world police force; making the Security Council more representative of the membership and transforming it into an Executive Council. They also provided for general and complete disarmament and judicial settlement of disputes.

In discussing the considerable practical hurdles to such a plan Mr. Clark took the optimistic view (in the 1960 edition) that the process of general and complete disarmament would be well on its way in 1975.

Sadly, in 1975 the world was far from general disarmament. At the peak of the Cold War there were between 50 and 60 thousand nuclear warheads and the world war far from UN reform.

Although I must conclude that the vision of Clark and Sohn was wildly optimistic, I find their view persuasive that in seeking world peace we might seek inspiration in how we have come to attain peace **in the domestic sphere of nations**: through legislatures, executive and judicial organs, the disarming of the individual citizens, etc.

We are evidently **very far from** such a system now. Although the number of **interstate wars** is reported to have gone down,

- the world's annual **military expenses** are currently at some 1.2 trillion dollars;
- millions of people **continue to suffer** the consequences of war, internal armed conflicts and political violence; and
- "something approaching **ColdWar** attitudes is re-emerging" according to an article by Henry Kissinger (International Herald Tribune 10 August 2007).

We understand that it will take a great deal before we get to drafting a world federal constitution and that we shall be moving very slowly to a better organized world. Yet, it is meaningful to **identify and try to build on elements** that help us move in this direction. We should note that the number of armed **interstate conflicts** has gone down and that the fear of a **showdown** between the two blocks that stood against each other has subsided after the end of the Cold War. Why is this?

Borders cause fewer conflicts than they used to – exception being made for borders drawn in colonial times. The overall geopolitical division of the world has moved toward greater stability.

Religion and ideology no longer remain likely to cause **armed** conflicts between states. The much talked about 'wars of civilizations' will not be shooting interstate wars – but could comprise acts of terrorism.

Some arms control and disarmament measures have reduced tension and the risk of conflicts, while admittedly arms races, for instance in space, has increased tensions.

The rapidly growing economic and environmental **interdependence** of states probably help develop pressures to maintain peace. The **European Union** is based on this belief.

Many factors, such as these are relevant for the world to develop into a peaceful society akin to advanced democratic states. However, **in this lecture I shall focus on the role of law**. My main tenet is that the huge body of bilateral, regional and multilateral **legal rules** that is resulting from the interdependence of states help to avoid conflicts.

Many of the rules are found in what essentially are **contracts** between two or more state parties **but many** are also found in **'law-making treaties'**. Basic rules governing state conduct have been laid down in the UN Charter, in nearly universal conventions regarding human rights, the law of the sea, outer space etc.

The tremendous growth of these legally binding rules must not, however, cloud the reality that the world community lacks **legislatures** similar to those existing in individual state communities. Most rules becoming binding on states today do so only as a result of the states expressing individual consent – not as a result of majority decisions in some global representative assembly.

One reason why **in individual democratic states**, we accept that majority-adopted rules that may not be welcome by all nevertheless become binding for all, is that the legislature is reasonably representative of the whole nation. Although we may have been against a particular rule adopted by a majority, we have had a chance to influence the composition of the legislature and we accept that majority rule may be needed to prevent inaction.

The UN Charter gives each member state one vote in the **General Assembly**. There is no way big countries like China, India, US or for that matter any other member would consent to be bound by rules adopted by a majority of the Assembly. It was not designed to be lawmaking. Indeed, even if the General Assembly were to become fairly representative of the world's peoples many would at the present stage of global relations not feel confident that the majority would act 'fairly' to them.

Unlike the General Assembly, the **Security Council** has been given authority to adopt decisions binding on all members– even regarding sanctions and the use of armed force. This requires a special majority that must comprise the five permanent members. While this authority applies to decisions rather than to lawmaking, in practice the Council seems ready to create world law – at least in some limited areas (UNSC Res. 1540) by requiring member states to introduce legislation of specific contents. This innovative use of its authority has not so far evoked objections by member states.

It is clear on the other hand that the composition of the Council is no longer seen as properly representing the world. The Security Council, like the General Assembly, has a **democratic deficit** that may undermine respect for the authority conferred on it.

The **conclusion** I draw from this discussion is that one condition for the world to move to a less difficult way (than individual state consent) to adopt law binding on all states is to establish bodies that better represent it. This will not happen tomorrow. It is some consolation that even as things stand today so many important rules have come about through the expressed individual consent of states.

We must admit, however, that the **exact contents** of some central rules are subject to different interpretations and to controversy that may be used by individual states to give them more **elbow room**. As I shall show, rules governing **the right of states to use armed force** belong to this category.

The currently relevant rules are found in the UN Charter.

The United Nations

The Charter of the United Nations adopted at the end of World War II marked a conceptual and organisational **leap forward** in the efforts to restrict the use of armed force and to advance the idea of 'collective security'.

Art. 2:4 of the Charter **prohibited the threat or use of force** against the territorial integrity and political independence of any state. This was not to be just a toothless rule admonishment. The Security Council was authorized to intervene – if need be with military force – to stop aggression or threats to or breaches of the peace and member states undertook in Art. 25 "to accept and carry out the decisions of the Council in accordance with …the Charter."

In practical terms, upholding the ban on the use of armed force was made dependent on the five victors in the Second World War: China, France, the Soviet Union, the UK and the US. These states were given permanent seats in the Council and the Charter prescribed that their consent would be needed for all decisions of substance. Decisions and action by the Council could thus be blocked by the veto of any one of the P5 and it was to be expected that the Council would be unable to agree on any action to be taken against the use of force exercised or threatened by anyone of these five states or their allies.

In a bi-polar world this meant that states could not look for intervention by the Council to protect them. As before, they had to protect themselves through individual or collective self-defence -- a right that was explicitly preserved in Article 51:

"*Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. …"*

On paper the reliance on the 'inherent' right of individual or collective self -defence looked like an exception, valid only until the Security Council could take action. However, the exception became the main rule: NATO and other alliances – not the UN – could provide shields of protection. During the cold war, the Charter was mostly inoperative against transgressions that occurred and that more directly engaged any one of the P 5.

Nevertheless, both during the Cold War period and subsequently, there have been many cases in which what appeared like *prima facie* violations of art. 2:4 met with Security Council reactions in which legal logic was tempered by pragmatism and by what seemed **equitable** in the particular circumstances. *Thomas M. Franck* devotes a meticulous study to a fairly large number of such cases *(Note:*'*Recourse to Force'(2002), pp.50 and 52 – 17).* The conclusion that emerges from his analysis is that the Security Council administration of art. 2:4 is one in which an **'international law of equity'** is allowed to prevail to blunt the categorical rules of a common (UN Charter) law:

"…while the UN system aims to substitute its collective security for traditional state reliance on unilateral force, it has had some success in adjusting to a harsher reality. In particular, it has acquiesced, sometimes actively, at other times passively, in the measured expansion of the ambit for discretionary state action and has done so without altogether abandoning the effort evident in Article 2(4) to contain unilateral recourse to force. It has sought balance, rather than either absolute prohibition of license."(Note: Op.cit.,p.171).

One need not agree with Thomas Franck's reading of every one of the cases analysed. In the main, however, his conclusion is convincing.

The Gulf War 1991

With the end of the Cold War and the end of the East-West ideological conflict, a fundamental practical premise for the Council's action changed to the better. **Unanimity** or at least consensus between the five permanent members of the Council was **no longer unlikely**. The early and most spectacular case occurred in 1990, when Iraq attacked and occupied the state of Kuwait.

President Bush the elder built an international coalition of states, including Arab states, and in 1991 the Security Council authorized military action to oust the Iraqi forces from Kuwait. The action could be legally justified on two grounds: as an act of collective self-defence by Kuwait and other states and as action authorised by the Security Council against an act of aggression.

The action caused **euphoria** in the UN and the world. It was felt that following the long paralysis during the Cold War, the security system and the Charter might now come to function as originally envisaged at San Francisco. President Bush the elder spoke about *"a new international order."*

Sceptics felt some doubts about the reliability of this order and, indeed, in the course of the 90s, there developed differences in the way various P5 members of the Security Council followed up sanctions and inspections in Iraq.

The bombings by NATO in **Kosovo in 1999** was another case in which serious disagreement between the permanent members of the Security Council resulted in failure to cement the common international order supposedly born in 1990.

The clash in the case of Kosovo between the need for Security Council authorisation for NATO bombings, on the one hand, and the widely felt need for armed action to prevent a state from massacring its own citizens gave impetus to a new reading of the UN Charter. The

view was taken that while the Charter protects states against attacks, the states have a **duty under the Charter to protect their own citizens** and if they fail in this duty the UN must enforce it – in the very last resort by the use of force. *(Note: See 'The Responsibility to Protect' report of the International Commission on Intervention and State Sovereignty, p.1; and Zacklin, R., 'Beyond Kosovo: The United Nations and Humanitarian Intervention' in Virginia Journal of International Law, vol. 41,number 4.)*

The doctrine has warm support in many quarters but it is far from clear that this support will invariably translate into action that may be costly both in lives and resources. The doctrine is meeting some resistance especially among developing countries as a possible new ground for intervention by strong industrial states.

The US 2002 doctrine on pre-emptive (preventive) armed action and the Iraq war of 2003

The rule requiring unanimity among the five great power members in the Security Council had a simple rationale. Such action could lead to direct conflict – in the worst case, armed conflict – between them. The red light that a **threat of a superpower veto** could flash against a possible SC resolution might be a procedural warning of blocking action on the ground.

During the Cold War the preparation of an action similar to that undertaken by NATO in Kosovo could have posed some risk of superpower confrontation. A reason why the action was undertaken was presumably that ignoring Security Council authorisation – including Russian assent – was deemed to carry little risk as by 1998 Russian military power had declined.

The US national security doctrine of 2002 ignoring UN Charter

After the terror attacks on the United States on 11 September 2001, there was a growing interest within the US administration in "regime change" in Iraq. The – erroneous – conviction also grew that Iraq retained weapons of mass destruction and was resuscitating a nuclear programme.

On 17 September 2002, a new *US National Security Strategy* gave support to and arguments for possible pre-emptive (preventive) actions against terrorist organizations and 'rogue states'. In an overview it declared that

> *"The U.S. national security strategy will be based on a distinctly American internationalism that reflects the union of our values and our national interests. The aim of this strategy is to help make the world not just safer but better…" (Sec. I)*

On the legality of pre-emptive (preventive) **strikes** *(Note: The Strategy rightly uses the term 'pre-emptive' for armed action against an imminent attack. However, it also seeks to fit under the same term action to avert a 'sufficient' threat, even when there is uncertainty as to time and place of an enemy's anticipated attack. Most writers would call such action against non-imminent threats 'preventive'. When in this lecture reference is made to the broader concept asserted in the strategy, the term pre-emptive (preventive) is used.)* the Strategy had the following to say:

> *"For centuries, **international law** recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of pre-emption on the existence of an imminent threat – most often a visible mobilisation of armies, navies, and air forces preparing to attack. "We must **adapt the concept of imminent threat** to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They rely on … the use of weapons of mass destruction – weapons that can be easily concealed, delivered covertly, and used without warning."*

The central message was that

> *"The United States has long maintained the option of **preventive actions** to counter a sufficient threat to our national security. The greater the threat, the greater the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, **even if uncertainty remains as to the time and place** of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively."*

The Strategy went on to explain that in order to support preemptive options, the U.S. will

> *"build better, more integrated intelligence capabilities to provide timely, accurate information on threats, wherever they may emerge…"*

It was thus realised that if 'counter attacks' were to be made before attacks had occurred there would be a crucial **need to justify them** by "accurate information on threats". It is somewhat ironic to read this line from September 2002, a period when the intelligence services and governments in the US and UK were remarkably negligent in critically examining the accuracy of evidence, preferring to read available information as supporting the pre-conceived notion of an acute threat requiring armed action.

Nevertheless, a **UK dossier** presented in the autumn of 2002 did not seek use of the evidence it presented to justify pre-emptive action but linked further actions to Iraq's response to the UN: The foreword stated that

> *" the [UN] inspectors must be allowed back in to do their job properly; and that if he [Saddam] refuses, or if he makes it impossible for them to do their job, as he has done in the past, the international community will have to act."*

As Iraq accepted UN and IAEA inspections in November 2002, this ground for action disappeared. Many hundreds of inspections were carried out, including dozens at sites suspected by intelligence agencies. No WMD were found but inspectors cast doubt upon some of the evidence advanced to prove the existence of WMD. Yet, on 19 March 2003, the invasion was launched. A **resolution** that might have implicitly authorized the action was **withdrawn** in the face of evident impossibility of passing. The majority of members in the Security Council – as in the General Assembly – wanted more inspections.

Justifications for the war

The **rhetoric** leading up to the armed intervention had been geared by the US and UK to **show Iraq as a threat** justifying armed action – either as self-defence or on the basis of an authorisation by the Security Council. At the political level, this line of reasoning was maintained after the invasion. For the US, the attack clearly fell within the category of pre-emptive (preventive) action that was described in the US 2002 doctrine.

Acceptance or rejection of the asserted right to unilateral pre-emptive (preventive) use of armed force in the case of Iraq is evidently **of relevance to the future standing of the UN prohibition** of the use of armed force. I shall discuss the question in a moment. At this point, I note, however, first that **internationally, arguments other than** an alleged right to unilateral pre-emptive (preventive) action were stressed as legal justification for the 2003 intervention in Iraq – notably alleged **prior authorisations** by the Security Council.

It is tempting to think that in the international sphere the US deliberately **avoided** resting its case on a right to **pre-emptive** (preventive) action, because asserting such a right for the United States and its allies would carry the implication that other states, too, could make use of it. Another reason might have been that the UK would not have been ready to assert it as a legal precept. I shall come back to that. *(Note: See below, p.)*

Legal justification advanced at the international level for the Iraq war

The *legal justification stressed at the international level* for using armed force against Iraq in 2003 without Security Council authorization– *was* that **Iraq had violated past Security Council resolutions.**

It would have been within the authority of the Council in March 2003 to determine that Iraq's conduct constituted a 'threat' to international peace and security and authorise armed action in a new resolution. However, the majority of the Council was not willing to do this.

The question facing the US, the UK and its allies was thus whether *individual members* of the Council could at any time take armed action against Iraq, claiming that they were **so authorised under earlier Security Council resolutions**. Indeed, could they so argue even when it was clear that a majority of the Council would not accept a new resolution and was opposed to armed action.

The US took this view already in November 2002 holding that SC Resolution 1441 that was then adopted was not really necessary to give individual members authority to take armed action. When faced with the impossibility of getting even an implied authorisation for armed action from the Security Council in March 2003, the UK publicly sided with the US albeit – as I shall show – with substantial internal reservations.

After the war, Dr. Condoleezza Rice, pointing to years' of SC resolutions, suggested that the states launching the war were *"upholding" the authority of the Council…*" The idea sounds somewhat puzzling: states that had refrained from submitting a vote to a resolution that they realised could not pass, would nevertheless have had the authority that they could not persuade the Council to give them.

Further, if the US and UK and other states in the "alliance of the willing" deemed that *they* were at liberty without new explicit authorisation by the Council to intervene by force to "uphold" the authority of the Council, presumably one would have to conclude that China, France and Russia and allies of these states could have taken action *they* deemed appropriate to uphold the same authority. *Pointing to the risk to the 'global order' that such reasoning would entail, the Report of the* ***Secretary-General's High-level Panel on Threats, Challenges and Change*** *(2004) states: '****allowing one so to act is to allow all****.'(P.63, para. 191).*

It is hard to avoid the conclusion that a decision by the Council authorizing the war was required and that no permission slips of unlimited duration had been handed to individual members of the Council in connection with resolutions from 1990, 1991 or even 2002. Nevertheless, this was the main legal line presented by US Secretary of State, Colin Powell and the UK *Attorney-General, Lord Goldsmith.* On 17 March 2003 the latter stated that

"the authority to use force against Iraq exists from the combined effect of resolutions 678, 687 and 1441. All of these resolutions were adopted under Chapter VII of the Charter which allows the use of force for the express purpose of restoring international peace and security."(Note: Written answer to a parliamentary question. Hansard, House of Lords 17 March 2003, Column WA3)

However, in an extensive written secret memorandum of 7 March to the British Prime Minister, Lord Goldsmith had examined what he termed the "key question", whether SC Resolution 1441 (2002) revived the authorisations to use force that had been granted by earlier SC resolutions, notably 678 (1990). He noted that the Law Officers had earlier advised that this could be possible though it would require the SC to decide on the matter (Para.9). He remained of the view that the "safest legal course would be to secure the adoption of further resolution to authorise the use of force" (Para. 27). Nevertheless, having heard the arguments of the US Administration, he accepted that

"a reasonable case can be made that resolution 1441 is capable in principle of reviving the authorization in 678 without a further resolution"(Para.29).

Lord Goldsmith's extreme discomfort at delivering this no doubt eagerly desired sentence is evident in the explanation given in the next paragraph that throws light on more cases than that hand:

"30. In reaching my conclusions, I have taken account of the fact that on a number of previous occasions, including in relation to Operation Desert Fox in December 1998 and Kosovo in 1999, UK forces have participated in military action on the basis of advice from my predecessors that the legality of the action under international law was no more than reasonably arguable. But a 'reasonable case' does not mean that if the matter ever came before a court I would be confident that the court would agree with this view…"

A right to pre-emptive (preventive) action

In the US **public debate**, the armed intervention in Iraq in 2003 was most commonly justified as a pre-emptive (preventive) action in line with the claim made for such a right in the US National Security Strategy of 2002.

In the 2004 American election campaign, both candidates took the view that the US must be able to take preemptive action in certain situations. However, a difference between them was that Senator Kerry said that such action would have to stand up to **a *'global test'*,** while President Bush ridiculed any idea of what he termed a 'permission slip' from anybody. In the current US Presidential race, **Senator Obama** has expressed a view that does not put him on collision course with the dominant interpretation of Article 51 of the UN Charter: He would

"not hesitate to use force, unilaterally if necessary, to protect the American people or our vital interests whenever we are attacked or imminently threatened" (Note: Foreign Affairs, July/Aug. 2007).

From an international perspective there is a need to examine whether the right of pre-emptive/preventive armed action – anticipatory self-defence – asserted in the US 2002 Strategy is compatible with the limited right of self-defense permitted under Art 51 of the UN Charter. The article stipulates that nothing in the Charter impairs

"the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations until the Security Council has taken measures necessary to maintain international peace and security…"

On the face of it the rule is simple and straightforward. When the attack occurs, you see it and you are fully entitled to act in self-defence. It was written with old-fashioned wars in mind. Thomas Franck offers critical comments on it. He writes:
"At San Francisco, …it is beyond dispute that the negotiators deliberately closed the door on any claim of 'anticipatory self-defence', a posture soon to become logically indefencible by the advent of a new age of nuclear warheads and long-range rocketry…" (Op cit., p 50).

The authors of the 2002 US Strategy studiously refrained from citing or even mentioning the UN Charter. However, they must have been of the view that the action they recommended was not compatible with existing law. They **submitted** that the concept of "imminent threat" needed to be adapted to fit a wider right to pre-emptive armed action than that which they believed existed. *(Note: supra, p. 10: "We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries").*

How much the concept of 'imminent threat' would need to be adapted to satisfy the needs seen by the authors of the 2002 US Strategy is not explained. President Bush is quoted as saying that when a threat is **'imminent', it is too late.** The 2002 US Strategy emphasises the gravity of 'emerging threats' rather than their imminence:

"The greater the threat, the greater is the risk of inaction – and the more compelling the case for anticipatory action to defend ourselves, ***even if uncertainty remains as to the time and place of the enemy's attack.*** *…"*

As discussed above, and shown by Thomas France, already during the Cold War, new types of conflicts in the shape of subversive actions and wars by proxy raised difficulties of interpretation of the UN Charter rules regarding the use of armed force and self-defence. The Security Council often was more pragmatic than legalistic in its view of the rule.

Nevertheless, this pragmatism and the new types of military threats that have emerged do not necessarily lead to a conclusion that Article 51 of the Charter has become obsolete and must now be revised or drastically reinterpreted, as would follow from the 2002 US strategy and as is argued by some scholars, especially in the US. *(Note: For references. see Weiner, op cit.,p.438).* Indeed, most governments and scholars oppose this line. *(Note: See Beckman, O., Armed Intervention, Lund 2005, p. 67; see also Brownlie's discussion in International Law and the Use of Force by States (London 1963).*

Interestingly, in his memorandum of 7 March 2003, the UK Attorney-General *(Note: p.)* recognised that "force may be used in self-defence if there is an actual or imminent threat of an armed attack" but he rejected such a right in other cases:

"… in my opinion there must be some degree of imminence. I am aware that the USA has been arguing for recognition of a broad doctrine of a right to use force to pre-empt danger in the future... this is not a doctrine which, in my opinion, exists or is recognised in international law."

The many authorities accepting a right to pre-emptive self-defence under Art 51 against an attack that is "imminent" mostly cite the 19th century *Caroline Case* which stated as a pre-condition for the exercise of the right that no other means than armed action would deflect the imminent attack and further required that the action in self-defence must be proportionate. *(Note: See Weiner, op cit.,p. 439)*

It is not difficult to imagine situations in which defence would appear reasonable against an armed attack that seems 'imminent' but has not yet 'occurred'. For instance, it would be reasonable to intercept a fleet of foreign bombers or naval vessels even before it enters national space toward which it is heading. But beyond this?

Defense against weapons of mass destruction in the hands of 'rogue states' and terrorists

The US 2002 doctrine does not actually discuss the question of **preemptive action** in the context in which it became famous during the **Cold War:** action between nuclear weapon states. Rather, it advocates that the rule on self-defence be 'adapted' to allow a wider freedom of armed action against **'rogue states' and 'terrorists'** than just when they pose an imminent threat.

To take a concrete and current example, it would be suggested that the right of self-defence under Art. 51 should be interpreted to allow states to launch attacks in 'anticipatory self-defense' on Iranian installations designed for the enrichment of uranium. The argument would be that there was an intention to develop nuclear weapons and to use them. In the case of Iraq, Dr. Condoleezza Rice made the famous statement that there is no need to wait for the 'smoking gun' to become a 'mushroom cloud', implying that the right of taking preemptive action in the case of a nuclear weapons programme arises long before a weapon is tested. She has alluded to a right of self-defence also in the case of Iran.

However, while the Security Council has declared the Iranian programme a 'threat to international peace and security', governments have generally not supported the view that any armed action could be taken – whether in anticipatory self-defence or on the basis of a Security Council authorisation.

No doubt there are many different reasons for this, chief among them perhaps the certainty of painful Iranian responses. Another reason may be that in the eyes of many countries, such action would lack legitimacy and might even appear to be a violation of the UN Charter, as they read it. Whatever they may think of an Iranian nuclear weapon, they may not wish to endorse an extensive right of anticipatory self-defence and may not even see the Iranian programme as an 'imminent threat'.

The UN Secretary-General's High-level Panel on Threats, Challenges and Change explicitly discussed the case of the acquisition, with allegedly hostile intent, of nuclear weapons-making capability. While the Panel considered that

"*a threatened State, according to long established international law can take military action as long as the threatened attack is* ***imminent*** *"*

It saw the acquisition of a nuclear weapons-making capability as an non-imminent threat and rejected any right to anticipatory – preventive – self-defence. There would be time to submit the matter to the Security Council, which could authorise suitable action including in the last resort, military action. Even in the case that the Council remained unwilling or unable to remove the alleged threat, the Panel rejected unilateral armed action, stating:

"... in a world full of perceived potential threats, ***risk to the global order… is simply too great*** *for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted.* ***Allowing one to act so is to allow all."***
"We do not favour the rewriting or reinterpretation of Article 51."
(Note: Op cit., p. 63, para. 191 and 192).

In his report '*In Larger Freedom'*, UN Secretary-General Kofi Annan concurred with the advice of the Panel. Thus, while in his view Article 51 fully covers the right for states to use armed force in self-defence against imminent threats, for responses to non-imminent threats he points to the power of the Security Council.

(Note: See UN Doc A/59/2005 of 21 March 2005, Sec. E.)

Problems and Prospects

While a number of writers in the US have supported the extensive right to self-defence claimed in the US 2002 doctrine, most writers, whether in the US or elsewhere, do not.

One American writer argues that there is less reason today than during the Cold War to seek to try to extend the right to take armed action without Security Council authorisation. He notes that in the case of the threats that seem to have prompted the new doctrine – the threats from 'rogue states' and terrorists – the interests of the permanent members of the Security Council are more converging than competing. Action based on authorisation by the Security Council, he says, "carries with it greater legitimacy, greater prospect for success, and less danger of destabilising error or abuse" than action based on doctrines that expand the right of states to use force unilaterally." *(Note: Weiner, op. cit.,p. 416).*

It is possible that over time reactions in the Security Council and General Assembly may come to lend authority to some – equitable – reading of Article 51 and deny legitimacy to and raise the costs of other readings. Until this happens, the landscape of legal controversy remains and cases may arise again in which some members may claim that the armed action they have taken is in self-defence allowed under Article 51 of the Charter, while others denounce it as illegal.

Let me note, finally that there is something paradoxical about the criticism of the Security Council as failing in its function when not authorising the use of armed force against Iraq in 2003 or when failing later to adopt biting sanctions against Iran. Since the end of the Cold War, the Council has not been dysfunctional and automatically prevented from action by the threat or use of vetoes. Large numbers of peace-keeping operations have been started and not so few decisions are taken by consensus in the Council.

In my view, the lack of support in the Council for a resolution that would have implied an authorisation of the 2003 Iraq war prevented placing a UN stamp of approval of a war that most governments thought should not have been launched.

The current US administration has shown impatience with this and other cases of reluctance among members of the Security Council to authorise some harsh actions. Perhaps this reaction is a result of the US having become the lone superpower and feeling entitled to support in its efforts to act as a sheriff in an unruly world and free to shoot without strict legal restraints. However, the sheriff is not omnipotent and has not been appointed by the community. For success and for legitimacy his actions depend upon the support of that community.

It is striking that the strongest efforts to loosen the legal restraints to use armed force unilaterally are linked to threats perceived in the acquisition or development of modern **weapons of mass destruction**, notably nuclear weapons or the capability to produce them. With rapid and widespread development of technical capability, more and more states – and perhaps non-state actors – will be able to join the now technically advanced states in producing and handling such weapons.

The response to this slowly growing risk of proliferation is not likely to lie in efforts to expand a right to unilateral armed action to enforce non-proliferation. It is more likely to lie in garnering the **cooperation of all** in **efforts of disarmament**: to free the whole world from weapons of mass destruction and the means of delivering them. Such efforts must be combined with work to further develop the United Nations, including reforms to make the Security Council more representative and, thereby, give it greater authority and legitimacy.