Hersch Lauterpacht Memorial Lectures
Held at the Lauterpacht Centre for International Law, University of Cambridge, 7th – 9th November 2006

THE UN SECURITY COUNCIL AND INTERNATIONAL LAW

by

Sir Michael Wood, KCMG*

THIRD LECTURE:
The Security Council and the Use of Force

(as delivered on 9th November 2006)

---

1. In this third lecture, I consider the contribution of the Security Council to the development of international law. Once again, I shall have to be selective. Indeed, this evening I shall limit myself to one area only: the use of force, that is the *jus ad bellum,* including the use of force in the fight against terrorism. At the end I shall say a word about Security Council reform.

2. It is, however, worth recalling that the Security Council, including its subsidiary organs such as the *ad hoc* International Criminal Tribunals, has made significant contributions to international law in many fields, including statehood: recognition and non-recognition; the law of treaties; State responsibility; international criminal law; international humanitarian law; international human rights law; and the international administration of territory. Many of these topics were covered by Rosalyn Higgins in her ground-breaking book, published in 1963, on *The Development of International Law*

---

* *Senior Fellow of the Lauterpacht Centre for International Law, University of Cambridge, and a member of 20 Essex Street Chambers; formerly Legal Adviser, Foreign and Commonwealth Office. The views expressed are personal and cannot be attributed to any government or institution with which I have been affiliated. An expanded version of these lectures will be published in due course by* ***Cambridge University Press*** *as a book within the Hersch Lauterpacht Memorial Lectures series: see http://www.cambridge.org/law. In the meantime, any suggestions on the views provisionally expressed herein would be welcome: mwood@20essexst.com.*

through the Political Organs of the United Nations. The preface records that the subject-matter was originally recommended to her by Sir Eli Lauterpacht.

3. The development of international law by and within the Security Council refers to at least four distinct processes. *First*, the Council may itself lay down the law, in a manner of speaking. It does so in part through its so-called legislative and quasi-judicial functions, which I referred to in the first lecture.

4. *Second*, the Security Council through it actions may interpret and develop (in some cases perhaps even modify) the Charter, for example as to the meaning of "concurring votes of the permanent members" in Article 27, or "breach of the peace" in Article 39. It has done so through various interpretative techniques, including what one observer has described as breaking down the barriers among articles and even (with peace-keeping) between Chapters. In short, as that author put it rather graphically, the members of the Council "did not succumb to a paralytic textualism".[1]

5. *Third*, the Security Council itself, through its action (less likely through inaction), may stimulate developments in general international law. "Responsibility to protect" is an example. Another is resolution 794 (1992) on Somalia, in which the Council stated that those committing violations of international humanitarian law in the internal conflict would be held "individually responsible for them". This was cited by the Yugoslav Tribunal in support of the proposition that international law recognized that war crimes may be committed in civil wars.

6. *Fourth*, the Security Council, and States within the Council (whether Council members or not), may develop the law through practice. The Council is a forum in which States continually have to take positions, individually or collectively, on questions of relevance to international law. But caution is required. In her book, Rosalyn Higgins includes some important caveats, which others sometimes overlook. In particular, she points out that "the fact that voting patterns to some extent conform to

[1] S Ratner, "The Security Council and International Law", in: D Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century* (2004), 596-7.

political pressures rather than to legal beliefs must be recognized." That is putting it quite gently.

I. THE STATE OF INTERNATIONAL LAW ON THE USE OF FORCE

7. I shall begin with a few words on the general state of the law on the use of force. As throughout these lectures, I try to confine myself to law, and not enter into a discussion about more nebulous matters such as "legitimacy" or "propriety", still less notions derived from international relations theory – or medieval theology. I need not, in this audience, consider whether the rules of international law on the use of force are dead; or whether there is some fundamental gulf between Americans and Europeans on the law in this area. The answer to both these questions is "No".

8. But the fact that such questions are asked reflects growing concern about the many serious breaches of the *jus ad bellum* that we have seen both during and after the Cold War. It also reflects growing concern at failures to respond adequately to modern security threats (such as terrorism and weapons of mass destruction) and humanitarian catastrophes (such as Rwanda and Darfur). It has led some to push the boundaries of the law, with notions such as implied or retrospective authorization by the Security Council and the preventive use of force. In part this reflects frustration with existing rules and the Charter framework for collective security, the Security Council at its heart. Such frustration in turn is often based on a lack of understanding. A better grasp of existing rules, and the potential of the Security Council, could help avoid unilateralism, and a descent into a world where the rules of international law on the use of force are indeed widely seen as obsolete.

9. The recourse to armed force by the United Kingdom over the last few years illustrates a number of key issues. Kosovo raised a major issue of principle. Is there is a right of humanitarian intervention? (Or, as the British Government put it more narrowly, an exceptional right to use force to avert an overwhelming humanitarian catastrophe?) The intervention in Afghanistan in 2001 also raised an important issue, the right of self-defence against imminent attacks by non-State actors. Iraq in 2003, on the other hand, while politically and indeed among lawyers the most controversial, in

fact (and despite what some suggest) properly understood raised no great issue of principle. The legality of the use of force in March 2003 turned solely on whether or not it had been authorized by the Council. No one disputes that the Council can authorize the use of force. The question was simply whether it had done so. That turned on the interpretation of a series of Security Council resolutions

10. It is sometimes asked whether the existing rules of international law on the use of force (*jus ad bellum*) are adequate to meet current threats, especially from terrorist groups and weapons of mass destruction. Senior figures from time to time suggest they are not. The General Assembly of the United Nations, meeting at the level of Heads of State and Government, answered this question in the 2005 World Summit Outcome Document. The Heads of State and Government reaffirmed –

> "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."

11. In this, they were following similar statements by the United Nations Secretary-General in his report *In Larger Freedom* and the High-level Panel in its report *A More Secure World*. Of course, in a sense they didn't have much choice. It is unrealistic to think of amending the relevant provisions of the Charter. But they were fully justified in what they said. Properly interpreted and applied, the rules on the use of force in the Charter and in customary international law are flexible enough to meet the new challenges, given the political will. And they are better than some proposals for new rules that would excessively relax existing constraints and increase the risk of international anarchy.

12. Lawyers need to ensure that the rules on the use of force, and the potential of the Council, are properly understood. This is no easy task when there remain important differences concerning the existing rules. Such differences are evident from the General Assembly debate on the Secretary-General's report *In Larger Freedom* in April 2005,

the International Court's recent pronouncements in the *Wall* and *Democratic Republic of the Congo v Uganda* cases, and much of the writing in the field.

13. Whatever one may think of particular uses of force, or of recent policy documents or statements, States generally remain alert to the importance of upholding the rules of international law on the use of force. And there remains a broad consensus among States, on both sides of the Atlantic, and elsewhere, on what the rules are (except as regards the right of anticipatory self-defence). The basic rules have not, in fact, changed greatly since Professor Waldock delivered his lectures at The Hague in 1951.

14. My overall conclusion is that the contemporary rules of international law on the use of force, and in particular those on self-defence and Security Council authorization, properly understood, are adequate to address current threats. Efforts radically to change these rules are neither desirable, nor likely to succeed. Whatever else may have changed on 11 September 2001, international law did not.

II. THE RULES ON THE USE OF FORCE

15. I shall first set out briefly the rules of international law on the use of force (*jus ad bellum*), as I believe them to be. They are relatively easy to state. Their application to particular situations is another matter.

16. The rules are to be found in the Charter of the United Nations and customary international law. The Charter contains, among the Principles of the United Nations, a general prohibition of the threat or use of force (Article 2, paragraph 4). The Charter refers to two not unrelated circumstances in which the prohibition does not apply. *First*, forcible measures taken or authorized by the Security Council, acting under Chapter VII of the Charter. *Second*, the use of force in self-defence, recognized by Article 51 of the Charter (which includes the rescue of nationals abroad where the territorial State is unable or unwilling to take the necessary action). A possible, but controversial, third justification, not mentioned in the Charter and presumably to be found in customary international law, is the exceptional right (akin to necessity in domestic law) to use force to avert an overwhelming humanitarian catastrophe. The use of force in

retaliation (as punishment, revenge or reprisals) is not legal, and such terms are best avoided, even in political rhetoric.

17. It is not helpful when some commentators seek to merge the exceptions. Thus, one author refers to Article 51½, and appears to suggest that self-defence "authorized" by the Security Council is wider than Article 51 self-defence. Likewise, advancing the Charter's Purposes, or taking account of Security Council resolutions which do not themselves authorize the use of force, cannot be a basis for a unilateral right of pre-emption. To suggest that the Security Council "can and has implicitly recognized the propriety of using force", quite apart from being a highly subjective conclusion, has no support in practice. Some have suggested this was the case over Kosovo, because the Council failed to adopt a Russian draft resolution condemning the NATO action as unlawful. In the lead-up to the Iraq conflict in 2003, and after, there was much confusion, on the part of commentators (not on the part of States), between various possible bases for the use of force.

III. THE COUNCIL AND THE RULES ON THE USE OF FORCE

18. Before turning to the Council's contribution to the law and practice on the use of force, there is one methodological point to be made. It is essentially the point made by Rosalyn Higgins when she said that "the fact that voting patterns to some extent conform to political pressures rather than to legal beliefs must be recognized." The same is true of what the Council and States say and do, and perhaps especially what they do not say and do not do. It may sometimes even be questionable whether a positive decision of the Council, for example, to condemn some action, really means that the action is unlawful. All the circumstances need to be taken in to consideration. And the fact that the Council does not condemn a use of force cannot normally be taken as evidence that the Council, or States, consider it lawful. Yet this is how Professor Franck seems to read the Council in his Lauterpacht lectures on *Recourse to Force*. As a consequence, so it seems to me, he reaches overly generous conclusions about the permissible use of force.

(A) The prohibition of the use of force

19. Article 2, paragraph 4, of the Charter provides that –

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

It has been argued that this is not a general prohibition on the use of force, but is limited by the words "against the territorial integrity and political independence of any state". That argument has not been accepted by the Council. It is clear from the negotiating history that these words were inserted to strengthen the Principle, not to create a loophole. It is interesting to note that in the 2005 World Summit Outcome Document, the Heads of State and Government did not include these words when, paraphrasing Article 2, paragraph 4, they reiterated "the obligation of all Member States to refrain in their international relations from the threat or use of force in any manner inconsistent with the Charter."

(B) The use of force by or authorized by the Council

20. By way of a preliminary point, I should make clear that I am here only referring to the use of force by or authorized by the Council. Notwithstanding the Uniting for Peace resolution, the General Assembly does not have the power to authorize a use of force that would otherwise be contrary to international law.

21. It was sometimes argued that, in the absence of the arrangements laid down in Articles 43 to 47 of the Charter, the Council was not empowered to take measures involving the use of armed force under Article 42. That argument was based largely on a reading of the *travaux préparatoires* of the Charter and never had much merit. Article 42 itself makes no such linkage. As the International Court held as long ago as 1962 in the *Expenses* case, "it cannot be said that the Charter has left the Security Council impotent in the face of an emergency situation when agreements under Article 43 have

not been concluded." The established practice of the Council on the matter is conclusive.

22. The Council has authorized States and international organizations to use of force on many occasions. Such authorizations have become so much a part of the international landscape that we forget how relatively recent they are, and how hesitant the Council was in the early days, indeed until the end of the Cold War. Since then, the Council has authorized the use of force by coalitions led by the United States (Iraq in 1990/1, Somalia, and Haiti); by France (Operation Turquoise in Rwanda); by Italy (Operation Alba in Albania); by Australia (East Timor). It authorized the first-ever use of force by NATO (Bosnia in the mid-1990s).

23. I referred in the second lecture to the Council's readiness to find threats to the peace in situations of civil war or internal conflict. In 1995 in its *Tadić* judgment, the Appeals Chamber of the Yugoslav Tribunal noted that "the practice of the Security Council is rich with cases of civil war or internal strife which it classified as a 'threat to the peace' and dealt with under Chapter VII." This is a very important element in the practice of the Council, but it has been well documented elsewhere, and I shall not repeat that here.

24. Perhaps the principal legal significance of the 2005 World Summit's passage on "responsibility to protect" is that the Heads of State and Government clearly acknowledged the Security Council's right to act under Chapter VII should national authorities be manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing or crimes against humanity. There was here no reference to a need to find some international element, to find some "anomalous fiction."

25. I would also note that the Security Council has by now an extensive practice of determining that acts of terrorism are threats to international peace and security, justifying action under Chapter VII of the Charter. Its action in this field has thus far been confined to the adoption of measures not involving the use of force. But there is no reason why, in appropriate circumstances, the Council should not authorize the use of force to avert terrorist threats. This could be done both in circumstances where the

victim State may exercise the right of self-defence, and where such right is not available because the terrorist threat, though real, cannot be said to be imminent.

26. Sometimes there are references to "implied" or "implicit" Council authorizations to use force. These are misleading. Either the use of force has been authorized or it has not, and that is a matter of interpretation of the resolution or resolutions in question. So-called implied or implicit authorizations are not a separate category or mode of authorization by the Council for the use force.

27. It is occasionally suggested that the Security Council, by assisting to bring a conflict to an end, or by assisting at the post-conflict stage, has retrospectively endorsed the original use of force as lawful. Thus, it was argued that by adopting, on 10 June 1999, resolution 1244 (1999), following the Kosovo conflict, the Council somehow accepted the lawfulness of the NATO intervention. There was no basis for this in the terms of the resolution, or in the Council discussions. Similarly, following the military action in Iraq in 2003 there was concern that the Council's cooperation with the occupying Powers might be interpreted as endorsing the original intervention. Such concerns were without foundation. It should be clear that the Council cannot be taken to have implicitly rendered lawful *ex post facto* a use of force merely because it assists with the follow-up. Any other view would make it much harder to secure the assistance of the Council when it is needed.

28. Possible *ex post facto* Council authorization of the use of force has arisen in particular in connection with regional organizations. The starting point is that States acting collectively within a regional, sub-regional or other organization have no greater right to use force than they have as individual States. It was not, for example, claimed that NATO, when it intervened over Kosovo in 1999, had any right to use force over and above that of its Member States.

29. This basic legal position is reflected in Article 53 of the Charter of the United Nations, which provides that the Council may utilize regional organizations for enforcement action under its authority, but which goes on to provide that –

> "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council."

There have been a few cases where a regional or sub-regional organization has taken enforcement action without the prior authorization of the Council, and it has been argued (as was done by the United States in the 1962 Cuban missile crisis) that authorization after the event would be sufficient, and even cases where the Council has subsequently indicated its support. This practice has led some to suggest that is sufficient, to comply with Article 53 of the Charter, if the Council's authorization for enforcement action by a regional organization is sought and received after the event. Thus the Secretary-General's High-level Panel, after correctly stating that "[a]uthorization from the Security Council should in all cases be sought", goes to recognize "that in some urgent cases that authorization may be sought after such operations have commenced." This thought was not picked up by the Secretary-General in his report *In Larger Freedom* or in the 2005 Summit Outcome Document.

30. The notion of *ex post facto* authorization poses risks for the collective security system. If adopted as a regular feature, it could have the effect of effectively releasing States acting collectively within a regional organization from the central requirement of the Charter, to refrain from the use of force except in self-defence or with the authorization of the Security Council. It is difficult to see how it would work in practice, or indeed how it could provide a satisfactory basis for States wanting to take action. Can the lawfulness of a use of force really depend upon what happens subsequently? To act in the expectation that the Council will subsequently authorize the action pre-empts the Council, taking it for granted as it were - or suggests that those acting do not really mind whether their actions are eventually seen as lawful or not.

31. It is difficult to square the concept of *ex post facto* authorization with the text of the Charter. Presumably it is accepted that the Council has discretion whether to authorize, or not to authorize, the intervention. But in that case it cannot be said that the action is lawful before the authorization has been given. And what applies to one regional or sub-regional organization presumably applies all of them. Moreover, it is difficult to see why the same should not then apply to *ad hoc* groups of States ("coalitions of the

willing"), or to individual States. This seems to be the thesis put forward by Professor Franck in his F A Mann lecture on 6 November 2006. I do not find it attractive.

(C) Self-defence

32. Article 51 of the Charter provides that "[n]othing 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 …." The article recognizes the right of self-defence under general international law. At the same time, the right to self-defence is now embedded in the collective security system established by the Charter. Article 51 itself contains three relevant provisions.

33. *First*, the right of self-defence applies only "until the Security Council has taken measures necessary to maintain international peace and security." Under the Charter, self-defence is a residual, unilateral right that is needed only to the extent that the Council has not taken the measures necessary to prevent or reverse an armed attack.

34. It has occasionally been suggested that once the Security Council has taken any measures, sanctions for example, the right to take measures in self-defence ceases. Acceptance of such an argument would be a serious impediment to the adoption of non-forcible measures. It overlooks the fact that Article 51 speaks of "measures necessary to maintain international peace and security", not just any measures. The Council itself has sometimes made this clear in its resolutions; though this is not legally essential, it may sometimes be a useful clarification.

35. *Second*, Members of the United Nations are required to report immediately to the Security Council on measures taken by them in exercise of the right of self-defence. This usually takes the form of a letter to the Council President setting out, briefly, the circumstances giving rise to the right of self-defence and the fact that action in self-defence is being undertaken. Such a letter should be sent promptly, at the time of the commencement of the action concerned. The International Court of Justice attaches evidential importance to whether a State has, or has not, informed the Council that it is acting in self-defence. It does not seem to be the practice to send follow-up letters

keeping the Council informed about the specific measures being taken, though the terms and purpose of Article 51 (presumably to ensure that the Council is informed so that it can perform its functions and, perhaps, exercise some degree of oversight) might suggest that this should be done.

36. *Third*, Article 51 provides that measures taken in exercise of the right of self-defence "shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." This emphasizes the priority of measures taken by the Council.

37. At this point, I should say a word about expressions such as the "war on terrorism", "war on terror" or "global war on terror". They are generally used in a non-legal sense. Politicians use the rhetoric of war in all kinds of contexts, far removed from armed conflict. When asked in Parliament in November 2001 whether the use of the term "war against terrorism" meant that the United Kingdom was legally at war, a Government Minister responded that –

> "The term "the war against terrorism" has been used to describe the whole campaign against terrorism, including military, political, financial, legislative and law-enforcement measures."

38. The United States has, recently, gone on record in somewhat similar terms. In a speech at the London School of Economics on 31 October 2006, the State Department Legal Adviser, John B Bellinger III, explained that -

> "[w]e do not believe we are in a legal state of war with every terrorist everywhere in the world. Rather, the United States uses the term "global war on terrorism" to mean that all countries must strongly oppose, and must fight against, terrorism in all its forms, everywhere around the globe."

39. I now turn to the scope of the right of self-defence to see what the practice of the Council tells us about three main questions: is there a right of anticipatory self defence; does the right of self-defence apply in response to attacks by non-State actors, in

particular, terrorist groups; and, if so, how does the requirement of imminence apply in this context?[2]

40. Whether Article 51 of the Charter recognizes a right of anticipatory self-defence remains controversial, among writers as among States. During the Cold War, the Soviet Union and its allies took the position that self-defence was only available if an armed attack had actually been launched. The United States, the United Kingdom and other western countries, following the *Caroline* approach, took the position that self-defence was permitted in the face of an imminent attack.

41. The end of the Cold War, and the new threats, have not yet led to general agreement among States on this question. In some respects, new differences may be seen to have arisen (not least, as a result of references to preventive action in the US *National Security Strategy* of 2002). Yet I think, generally speaking, States are now closer in their views of the law than during the Cold War or indeed before 9/11. But while they often seem to agree on the legality of specific actions, the reaction of many States to the categorical affirmation of a right of anticipatory self-defence in the High-level Panel's report and in Secretary-General's report *In Larger Freedom* shows the difficulties with abstract debate, as opposed to a case-by-case approach.

42. The next question is whether the right of self-defence is available in response to attacks by non-State actors, such as terrorist groups. Immediately after 9/11, on 12 September 2001 to be precise, the Council adopted resolution 1368 (2001), in which it recognized "the inherent right of individual and collective self-defence in accordance with the Charter". Just over two weeks later it adopted resolution 1373 (2001) reaffirming "the inherent right of individual and collective self-defence as recognized by the Charter of the United Nations". While some commentators have tried to argue the contrary, it is difficult to read this language, in context, as doing other than recognizing the right of self-defence in response to attacks by non-State actors. In any event, State practice, including the practice of the Security Council, the North Atlantic

[2] For a recent attempt to answer these and other questions, see E Wilmshurst (ed.), "The Chatham House Principles of International Law on the Use of Force in Self-Defence", 55 *ICLQ* 963 (2006)

Treaty Organization, the Organization of American States, and other States such as Australia, strongly supports such a right, And this notwithstanding the Court's curious pronouncement in the *Wall* opinion. (The Court itself seems to have avoided the issue in *Democratic Republic of the Congo v Uganda.*)

43. Perhaps the most difficult issue is to understand what constitutes an imminent attack in the context of terrorism. There would seem to be broad agreement, among States and writers, that, to quote the Attorney General in the House of Lords in April 2004:

> "The concept of what constitutes an "imminent" armed attack will develop to meet new circumstances and new threats .... It must be right that States are able to act in self-defence in circumstances where there is evidence of further imminent attacks by terrorist groups, even if there is no specific evidence of where such an attack will take place or of the precise nature of the attack."

It seems doubtful whether it would be useful to try to adopt more specific tests for imminence, as opposed to assessing practice on a case-by-case basis. It is important in this connection to have in mind the general principle of good faith.

(D) Humanitarian intervention: "responsibility to protect"

44. The practice of the Security Council has had considerable influence on the development of the notion of "responsibility to protect." The current debate took off with the NATO action over Kosovo in 1999, but the Council itself had become involved in situations where humanitarian concerns were central long before that. The Council's early actions over Southern Rhodesia and South Africa were to some degree manifestations of concern for human rights abuses. In many cases, the Council demanded that the parties to conflicts comply with humanitarian law. In other contexts, too, the Council called for full respect for humanitarian law. (Sometimes it really meant international human rights law, but because of sensitivities the Council tended to avoid that term.) The Council established the two *ad hoc* International Criminal Tribunals, for the former Yugoslavia and for Rwanda, it helped to set up the Special Court for Sierra Leone, and it referred the situation in Darfur to the International Criminal Court.

45. The British Government has been a leading proponent of the exceptional right of States to use force to avert an overwhelming humanitarian catastrophe. This is not, it should be noted, expressed as a broad right of humanitarian intervention, and may be viewed as somewhat similar to an exceptional defence or justification of necessity such as is found in some domestic legal systems. The United Kingdom relied on this legal basis to justify the safe havens in Northern Iraq in 1991, and the Northern and Southern no-fly zones; then again, on a much larger scale, to justify the Kosovo intervention. The United States, on the other hand, appears not to have asserted any such right, justifying its actions to protect the Kurds in the North and the Shia in the South, and the intervention over Kosovo, if at all, on other grounds. Other States, too, have been reluctant to accept such a right.

46. A former State Department Acting and Deputy Legal Adviser has explained this American position in the following terms: "the assertion by states or regional organizations of a *legal right* to carry out such "benign" uses of force on their own authority could create precedents for future interventions by others that might be destabilizing and dangerous. This has been one of the main reasons why the United States has never asserted the doctrine." Matheson goes on to point out that "[i]n any event, there is a much stronger legal and political basis for forcible humanitarian intervention under the authorization of the Security Council under Chapter VII or VIII."[3] It is, in fact, along these lines that the United Kingdom and others have been working since shortly after Kosovo.

47. Following the Kosovo conflict, the United Kingdom sought to promote criteria for the circumstances in which the Security Council should be ready to authorize the use of force in the face of an overwhelming humanitarian crisis. This was an attempt to develop the underlying policy for Council action, not to develop the law as such. The British initiative did not lead to immediate results. As I have already suggested, the law and practice often develop best case-by-case, not through abstract debate. Few States

[3] M Matheson, *Council Unbound: The Growth of UN Decision Making in Conflict and Post-conflict Issues after the Cold War* (2006)

wish to commit themselves, especially in the Security Council, to abstract propositions on matters such as the use of force.

48. Various other initiatives followed, stimulated by concern at the unilateralism inherent in the Kosovo campaign: the Dutch and Danish Foreign Ministries produced interesting studies; and the Canadian Government set up the International Commission on Intervention and State Sovereignty, which produced another interesting report. So the Secretary-General's High-level Panel had plenty to go on. The Panel endorsed "the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military action as a last resort, in the event of genocide and other large-scale killings, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent." The Panel went on to propose that the Council adopt guidelines (as the British Government had already suggested, without success) as to when it should act, expressly to ensure the legitimacy of its actions, not their legality. The Secretary-General's report was in similar terms.

49. The General Assembly was not prepared to go so far. In paragraphs 138 and 139 of the Summit Outcome Document, the Heads of State and Government noted that "[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity". They went on to say that "[t]he international community, through the United Nations" also has the responsibility to use appropriate peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations. The key sentence then follows:

> "In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity."

50. This sentence merits careful study, as much for what it does not say as for what is included. The first question is whether, by using the word "responsibility", the Assembly was asserting that either "each individual State" or "the international community, through the United Nations" has an obligation under international law to protect populations from genocide, war crimes, ethnic cleansing or crimes against humanity. Clearly individual States have positive obligations under human rights law that would be encompassed in the concept of "responsibility to protect". But it does not follow that "responsibility to protect" amounts to a new international legal obligation. So to claim might even impede genuine acceptance of the principle at a political level. States (particularly those that would bear the burden of action) may be reluctant to agree to any legal obligation to act to achieve objectives that could require huge resources and where success may be uncertain.

51. As a political commitment, the passage on "responsibility to protect" in the Summit Outcome Document is potentially very significant, and shows how far States have come, though it is cautiously drafted. The Heads of State and Government said that they were "prepared to take collective action". This action is to be taken "through the Security Council" and "in accordance with the Charter." Such action will be taken "on a case-by-case basis." So whether action would be taken, and if so what, is up to the members of the Council. In terms, the commitment applies only in cases of protection against "genocide, war crimes, ethnic cleansing and crimes against humanity", but that does not preclude Council action in the event of grave violations not falling within these four categories, especially if they are comparable.

52. What is important, legally as well as politically, is that the 2005 World Summit Outcome Document confirms that enforcement action to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity is within the remit of the Security Council. And the Assembly, that is to say, the membership of the United Nations as a whole, has clearly said that it expects the Council to take such action in appropriate cases

IV. REFORM OF THE SECURITY COUNCIL

53. In his 2005 report, *In Larger Freedom,* the Secretary-General of the United Nations said that "[t]he task is not to find alternatives to the Security Council as a source of authority but to make it work better." So far I have not referred to reform (or enlargement) of the Council. It is important, I believe, not to exaggerate the importance of enlargement. In a speech in October 2006, the British Ambassador to the United Nations said that

> "[t]he United Kingdom is committed to further reform of the Security Council and - equally importantly – its working methods. We have long supported expansion of the Security Council to include permanent membership for India, Brazil, Japan, Germany and from Africa. … a way forward on this has not yet been found. This should not, however, prevent us from reforming the Security Council's working methods, where there is a strong case for greater openness and transparency."

54. A good case can doubtless be made for some modest enlargement, though the chances of agreement seem rather remote. But it is not the case that without enlargement the Council risks being sidelined. Nor should we suppose that enlargement will silence those whose see it in their interest to "demonize" the Council. Enlargement would undoubtedly make the Council more unwieldy. The experience of enlargement of the European Union from 15 to 25 shows how the character of discussions changes when numbers get that high. We should not lose sight of the *raison d'être* of the Council: "to ensure prompt and effective action by the United Nations" for the maintenance of international peace and security.

55. The veto is unpopular. But it was the price for getting the United States and the Soviet Union into the Organization in the first place. There would have been no United Nations without the veto. Suggestions for formally restricting its use are hardly realistic. The Canadian-sponsored International Commission on Intervention and State Sovereignty suggested that the permanent members should not use the veto "in matters where their vital state interests are not involved, to obstruct the passage of resolutions authorizing military intervention for human protection purposes for which there is

otherwise majority support." But who is to say if a State's "vital interests" – a curious echo of the past - are at stake? The High-level Panel, for its part, similarly suggested that the permanent members should only use the veto on "matters where their vital interests are genuinely at stake" and should not use it "in cases of genocide and large-scale human rights abuses." In fact, the chances of agreement formally to restrict the use of the veto are minimal. And if there were agreement, it could even prove counter-productive in the long-term.

56. Reform of the working methods of the Council is a continuous process. No doubt the United Kingdom Representative was right to suggest that more can done. It should, however, be acknowledged that a great deal has already been done. Reform of the working methods and documentation of the Council has been underway for over fifteen years. It has led to considerable, if sometimes unacknowledged, improvements in terms of transparency and genuine participation in the work of the Council by the United Nations membership at large. In addition, we have recently seen the establishment, jointly by the General Assembly and the Security Council, of the Peace-building Commission. While it is still too early to assess its impact, this important new body should help to bring together the activities of the many institutions working on peace-building in particular situations around the world, and foster a more cooperative spirit between Assembly and Council.

V. CONCLUSION

57. If continuing pressure for unilateral action is to be resisted, the world needs a Council that is capable of acting promptly and effectively and that is seen so to act whenever necessary. In this context "legitimacy" is important. As is often said, legitimacy and effectiveness do not pull in opposite directions. In the long term (and the long-term view is important), a Council that is not perceived to be legitimate will not be effective.

58. What should be the contribution of lawyers (whether in New York or elsewhere) to the future of the Security Council? *First*, I suggest, they can ensure that the legal framework within which the Council acts is better understood. *Second*, they should

seek to ensure that the applicable law develops in a healthy direction, and in particular that good precedents are set and bad ones avoided. Lawyers can sometimes contribute a longer-term view than others. And *third*, they should do their best to ensure that when the Council acts, it does so with as much clarity as the political circumstances allow; that its resolutions are properly drafted; and that their meaning and effect is well understood and transparent.

59. It is interesting to ask what Hersch Lauterpacht would have made of today's Security Council. He would surely have been alarmed at any suggestion that it is somehow "unbound by law". He would have been among those who strongly urge that the Council have regard to individual rights. The idealist in him would have welcomed much of what the Council does, for humanitarian purposes and against impunity, in particular. Yet he would not have demanded too much of the Council. Above all, he would surely have approved the Security Council's central role as an instrument for multilateralism in what is once again, as it was during so much of his lifetime, a dangerous and unstable world.

Sir Michael Wood, KCMG
9th November 2006