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A New Grand Bargain for Peace:

Towards a Reformation

in International Security Law

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About the International Security Law Project

This pamphlet is the first in the Foreign Policy Centre's 'International Security Law' Project which will be built around seminars, lectures, publications, media contributions and larger conferences on the subject. The project has been set up in response to the growing gulf between US and European perceptions of international legal order and those of the 'non-West', especially in the Middle East, Asia and Africa. The project will take as one of its reference points for analysis (and critique) the report of the UN Secretary General's High Level Panel on Threats, Challenges and Changes released on December 2004. In particular, the project is premised on reinvigorating the role of the General Assembly and the UN itself in promoting and shaping a new international security order that can meet contemporary and projected threats.

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Executive Summary

Kofi Annan's reform path at the United Nations (UN) has opened up more credibly than ever before the possibility of reform of Security Council membership arrangements. There is, however, little recognition so far that proposed new 'standing members' of the UNSC, especially India, represent a belief system and a set of power relationships that may, and probably should, sweep away important deformities of the old order. The underlying credo of the old order may be the same – peace among nations – but there is rising intolerance among developing nations of the current system of 'indulgences' enjoyed by the P-5. There is a rising confidence among leaders in the developing world that a new international economic and social order, with a fundamentally more democratic and grass-roots nature, is taking shape.

On the economic front, this gulf between the developed world and the developing world, represented in part by the G-77, has been made plain in the G-77 rejection on 27 January 2005 of key aspects of the report of Annan's High Level Panel on the threats and challenges facing the UN system and its members: 'the report does not adequately address many issues of concern to the South'. This is our conclusion too.

It is plain therefore that if major powers of the 'North' proceed with UN reform primarily by reference to the Panel's report, as if all that need be done were to 'implement' the report, then a historic opportunity will have been passed by and a major series of common threats will not have been addressed.

The UN system does not just need reform. It is in need of a political reformation. The scope of the reformation needed and the paths it must take can only be understood with reference to the massive changes in power relationships in the world since the UN Charter was signed. But an additional reference point must be the moral and political impulses that led to or flowed from those power changes. An

adjustment to UNSC membership arrangements and creation of a new Peacebuilding Commission, along with the lesser recommendations of the Panel, do not address many of the threats and challenges enumerated by the panel itself. But more importantly, the changes recommended by the Panel do not remotely reflect the character and scale of the transformation of world order in recent decades, especially the last decade.

A 'root and branch' reformation of the UN will not be led from New York, or from the foreign ministries of the major powers. Through appointment of his High Level Panel on UN reform, Kofi Annan has delivered the opportunity, and indeed further exposed the need, but he cannot lead the reformation. Annan is no Martin Luther. He could not survive as Secretary-General if he were.

A new order for international security, based principally on reform of the Security Council, is not sufficient of itself in the absence of a comprehensive approach to other aspirations for reform among major actors and without addressing several areas of grave concern in international security order broadly defined. This paper argues that the growing support for reform of the Security Council provides a unique opportunity to address these other concerns. States can now work towards a new grand bargain that will begin to bridge the growing gulf between, on the one hand, US and European perceptions of the international legal and political order and, on the other, those of the 'non-West', especially in Asia, the Middle East and Africa. Only when these other concerns are addressed will reform of the Security Council be meaningful and durable.

These other concerns relate to the effects of a number of lawful or unregulated activities which for many states and people are so destructive or deleterious that they need to be addressed by new legal regimes. For these states and people, such concerns are felt to be as fundamental to conceptions of international order and global collective security as the Security Council itself is. These concerns go to the very heart of perceptions of security at one or more of three levels: collective security, state security or human security. Together they might be bracketed under the term 'common security'.

The discrete areas of international law that are affected by these fundamental concerns include:

- Sanctions and Trade Bans
- Humanitarian Law in Armed Conflict
- Military Interventions
- Foreign Military Bases
- Private (non-state) Actions in Armed Conflict
- Sovereignties, New and Old
- Biological Weapons
- Missile Proliferation
- Nuclear Weapons Proliferation and Control Regimes
- Weaponisation of Outer Space

While at first glance, there may appear to be few direct links between many of these subjects, all of them raise concerns that can no longer effectively be addressed only by relying on the normal processes of subject-specific international conferences or bodies set up specifically to negotiate arms control instruments. Indeed, some of the issues have so far fallen outside of reform efforts in international security law.

More specifically, many of the opportunities for potential reform of international security law in these individual areas will not be fulfilled within the existing frameworks for intergovernmental consideration of each one. There are a variety of reasons for this unique to each case, but there are also generic causes. One of the most overwhelming generic causes is the growing suspicion internationally that the USA, or indeed other P-5 members, will seek to entrench their supremacy or power positions at existing levels.

A generalised approach to reform of international security law is now needed. It is of some note that the 2003 Agenda of the International Law Commission includes an item on ‘Fragmentation of international law: difficulties arising from the diversification and expansion of international law’. This situation is clearly in evidence in the domain

of international security law. The proposed new approach to reform of international security law should include the following elements:

- States must now treat international security law as a unified corpus of policy and practice in need of comprehensive review
- The UN should convene a Special Session of the General Assembly on International Security Law (The planned discussions of only a few aspects of global collective security reform during the September 2005 summit of 'Millennium plus five' will not be adequate.)
- This UNGA Special Session should establish a standing UN Conference on International Security Law (UNCISL) with a potential life span of 5-10 years
- UNCISL should set up working groups that address clusters of linked issues now currently treated quite separately at the intergovernmental level (for example, clustering all issues of weapons of mass destruction now dealt with discretely as chemical weapons, biological weapons and nuclear, together with consideration of an international regime on missiles which is currently almost totally lacking).
- The International Law Commission (ILC) must take on a multi-year project of review of global collective security law. (The ILC has never addressed international security law, except for its foray – highly contested at the political level – into attempting to define 'aggression' more than twenty years ago.)
- States must work closely with mobilising NGOs, think tanks and leading scholars in a process of global and regional consultation similar to that seen in the cases of the land-mines ban or control of small arms and light weapons.

The general objective must be to seize the opportunity now presented by the prospect of Security Council reform to make a quantum advance in reducing the scope of war and war-like actions, an advance that may be as radical as the Kellogg-Briand Pact of 1928 which sought to outlaw aggressive war and as ambitious as the signing of the UN Charter in 1945. In particular, there must be:

- an outright prohibition on the use of generalised, non-targeted economic sanctions or trade bans
- a new mechanism of accountability to the UN General Assembly for civilian casualties in all wars or combat operations, either those authorised by the UNSC or those lawfully undertaken by states without specific authorisation of the UNSC
- a new commitment to work towards the complete prohibition of weapons of mass destruction
- a new relationship between UN membership and state sovereignty since sovereignty remains one of the main catalysts of war.

Current P-5 members may be surprised how well they could secure their own interests through a detailed and necessarily protracted set of negotiations in which they look to make trade-offs between their preferred responses on issues of concern to the non-aligned movement (such as the banning of comprehensive sanctions, elimination of nuclear weapons or security guarantees) and great power interests (such as an end to proliferation of all sorts of WMD, especially biological weapons, and the harbouring of terrorists).

In the next twelve months, states and all interested parties must avoid the easy option of pretending that a UN-convened panel could ever have reached consensus on all of the threats and the appropriate responses to them. The tough questions and the politically difficult answers regarding reform of the international security order probably lie elsewhere than in such a report, even though the Panel's report does provide a great launch pad for a 'reformation' in that order. There is a need for massive mobilisation of specialists, NGOs and like-mined states that emulates the Ottawa process that led eventually to the banning of land mines.

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Introduction

Unexpected opportunities for reducing threats to international security arose in the 1990s as a result of the end of the Cold War. The same period saw human security increasingly considered as a discrete and important element of the international security order.

Yet in important areas of international security law, the decade saw a degree of unwillingness or inability by leading powers to seize these new opportunities. It was as if the emerging power of China and India, the Taiwan Strait crisis of 1996, the India-Pakistan nuclear tests of 1998, the India-Pakistan Kargil crisis in 1999, the collapse and re-emergence of Russian power, the stalling of Japanese economic growth and the gradual emergence of the European Union had – in the wake of Cold War certainties – fundamentally unsettled the multilateral foundations of the international security order. The wars in the heart of Europe, in the former Yugoslavia between 1994 and 1999, and the strategic manoeuvres involved in those wars, and the two wars in Chechnia, shook even the foundations of Europe's security order.

Notwithstanding the success achieved in the last decade in some discrete areas of international security law, such as the land mines moratorium and subsequent international treaty enshrining it, negotiations in many important areas of international security law began to stall, while others were not even being addressed or reviewed. Despite the human propensity for seeking a villain, the fault for new delays or stalling in the majority of these areas cannot be laid at the feet of the US government alone. Nevertheless, given its status as the sole superpower, and its sometimes autonomous and selective role as the world's sheriff, it is perhaps inevitable that when the USA sneezes, the international legal – and political – order catches a collective cold.

By contrast to the 1990s, the world in January 2001 stood at a moment in history of unparalleled possibilities for reform of the global security order. The single superpower, the USA, had never

had such a window of opportunity to rethink and redefine its fundamental security structures. The USA also wielded the political, military, and economic wherewithal to work with other major powers to reshape the international security order. This opportunity was nevertheless rejected by the current Bush Administration, and abjectly squandered by it.

Until 2002, the USA and the UK, with the backing of many others in the UN, believed they were implementing international law in addressing widely held security concerns provoked by Iraq. Their view was that international law allowed economic sanctions, which it did. They also argued that international law allowed for sustained military attacks on Iraq in response to Iraq's persistent ignoring of certain UN Security Council resolutions. They took these actions, moreover, on the basis of the alleged authority of the Security Council. Many other political leaders and commentators around the world, especially in Arab countries, found serious fault with these views and the ensuing actions.

By late 2002, the sustained application of the UN-approved sanctions on Iraq, no matter how lawful, forced the USA and the UK into a blind alley. There was near universal criticism of the sanctions and the USA and UK were under intense pressure to lift the sanctions. But if they did so, they would have been seen to have allowed Iraq avoid its obligations. The only course open to them was therefore war. If a forced choice for war of this sort is the inevitable result of comprehensive economic sanctions, then such sanctions are not just a blunt instrument of policy, but a dangerous one.

The invasion of Iraq in 2003 by the USA, UK and their few allies in the venture provoked loud and often repeated condemnations from world leaders, including from other close allies of the USA, that the action violated international law. The issue was a very serious one. For some commentators, the US action was just another manifestation of a broad disregard for international law and previously negotiated treaties that had been shown by the USA since the first months of the current Bush Administration. Of particular concern had been the general US determination to exempt its armed forces from the jurisdiction of the International Criminal

Court and the subsequent detention by the US armed forces of 'enemy combatants' at the US military base at Guantanamo Bay in Cuba.

The focus of much of the commentary was outrage at the US actions, and some confidence that it was important to vent such outrage in order eventually to force or persuade the US to refrain from such actions, now or in the future.

There is, however, one important dimension of the US actions that has received far less attention. That is the possible need to review and update the applicable law in the area of international security across the board. The war against Iraq in 2003 may not have occurred if certain, seemingly discrete regimes of international law in areas like economic sanctions, foreign military bases, weapons inspection, and the status of prisoners captured during military actions, had been better able to address the security concerns of all parties. The applicable international law was either outdated, unclear or defective. The linkage between laws on one level with security concerns on other levels was visibly inadequate. On the basis of experience in Iraq, if such evidence were needed, one could easily conclude that comprehensive economic sanctions should probably be dropped altogether from the menu of possible responses. Then too, the idea of sustained military containment of an enemy over a ten year period, with the equivalent of one 500 pound bomb being dropped every day, is sufficiently dehumanising to warrant some serious reflection on the desirability of the current situation where 'permanent war' can be regarded as legal.

One lesson which might be drawn from the circumstances in which the USA and UK felt obliged to invade Iraq to extricate themselves from a blind alley where they had been led by bad or outdated law, is that the law needs to be changed to better deliver security outcomes. If the international legal regime for sanctions had been more effectively linked to broader security law, then the security outcomes sought by the UN in Iraq through the 1990s and by the US and UK after September 11 2001, might have been more readily achieved without recourse to invasion.

The UN Secretary-General, Kofi Annan, was addressing this link between individual legal regimes for certain discrete aspects of international security and the need for a new all-embracing approach by the UN, when he set up his High Level Panel on Threats, Challenges and Change looking at future challenges likely to face the UN. The issue of reform of the permanent membership of the UN Security Council, which had been on the table for over a decade, had become more topical. It was, after all, the rejection by two UNSC P-5 members of a US effort to secure approval for the allied invasion of Iraq that helped crystallise international opposition to the invasion on legal grounds.

But Annan's motivations in establishing the Panel, and the report of the Panel itself,[1] did not address as explicitly as they might have some of the essential historical and perceptual influences on the review process that had been launched. Rule one of effective reform of a security order is to address insecurities that shape that order. The report of the High Level Panel did not address as explicitly as it needed to the linkages between specific insecurities and the potential security order on offer.

This critique has been made explicitly by the G-77 countries (and China) in a declaration on 27 January 2005:

> We question the conceptual underpinnings of the Report which sees development in the context of addressing prevention of terrorism and organised crime. This rather narrow and restricted approach diminishes the importance of an issue which in itself represents one of the major challenges of our time and which requires analysis of the broader and systemic aspects of global economic relations. Furthermore, location of development issues within the confines of security threats and prevention strategies would lead to an undesirable alteration in the balance of responsibilities between the various organs of the system. ...
>
> the Panel Report states that existing global economic and social governance structures are woefully inadequate for the challenges

[1] United Nations, *A More Secure World: Our Shared Responsibility*, Report of the Secretary General's High Level Panel on Threats, Challenges and Change, New York, 2004, http://www.un.org/secureworld/report3.pdf.

> ahead. This is a powerful conclusion, but surprisingly, no serious recommendations were made to address the issue....
>
> The premise of the analysis of the link between security and development should not, in our view, be used as a basis to strengthen the role of the Security Council *vis-à-vis* the other Principal Organs of the UN....
>
> .... the Report does not adequately address many issues of concern to the South.[2]

There is an iron law of politics: if the power structures of any society do not adapt to reflect fundamental changes in the power relationships within it, then the power structures will weaken, fracture and then be swept away. There is a corollary law in the moral domain: if the power structures of any society lose or surrender political legitimacy, then new centres of moral authority will form and these new centres of legitimacy inevitably weaken the authority and power of the old. A third and related principle is that to function, any society needs a corpus of law that reflects a balance between the coercive power and the moral aspirations within it.

This paper shares the hope of Annan and the High Level Panel that its report should become one reference point for future innovation in international security law. But even he and the Panel members would recognise that they were unable for reasons of time, space (and even politics) to articulate some of the more serious threats to international order and the legal regime underpinning it. This fact alone means that the Panel's report is not sufficient by itself for an objective understanding of the threats and challenges facing the international security order.

The Panel's report does acknowledge the interconnectedness of all aspects of international security, including human security, and

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[2] Statement by Ambassador Stafford Neil, Permanent Representative of Jamaica to the United Nations and Chairman of the Group of 77, at the informal meeting of the plenary of the General Assembly to continue an exchange of views on the recommendations contained in the report of the High-Level Panel on Threats, Challenges And Change (New York, 27 January 2005), http://www.g77.org/Speeches/012705.htm.

outlines a rich and credible agenda for reform that needs to be pursued vigorously. Two important departure points for reform in this area are a revision of the membership of the Security Council and reinvigoration of the General Assembly. But the report did not pay enough attention to international security law and the process of law-making in international security. The report addressed the importance of norms but paid little attention to the interplay between existing, possibly outmoded norms and rules on certain issues of concern, and the likelihood that member states could unite behind a comprehensive agenda for change.

As useful and reformist as the Panel's report is, the claim of its chairman that the report 'puts forward a new vision of collective security, one that addresses all of the major threats to international peace and security felt around the world',[3] is patently unsustainable, as the issues raised in this paper demonstrate. The range of subjects covered by the report is not comprehensive. There is for example no mention of finding new ways of ensuring that economic sanctions do not have widespread deleterious effects on civil populations. Yet this was one of the issues most consistently raised throughout the 1990s.

There is also too little of the non-Western, especially the Islamic, world in the report. This may have resulted from the fact that some 75 per cent of the 40 regional consultations and workshops for the panel were held in the Americas and Europe.[4] And while there was a reasonable 'geographic spread' in the composition of the panel itself, with two of the sixteen panel members coming from predominantly Muslim countries, the Secretariat was dominated by Europeans and Americans.

The remainder of the paper touches briefly on a number of issues which in our opinion point to the need for a more fundamental recasting of international security law than the High Level Panel was

[3] Transmittal letter, 1 December 2004, A/59/565, 2 December 2004.
[4] Ten were held elsewhere (Delhi, Singapore, Kyoto, Cairo, Capetown, China with two non-sequential events and Addis Ababa with three sequential events). The meeting in Cairo addressed Mediterranean security. Otherwise, the panel met six times: three in the USA, two in Western Europe and once in Addis Ababa.

prepared to admit. The paper advocates a number of new approaches to these issues, but its overall argument is that there needs to be a fundamentally new approach both to international security realities and values and to the law that reflects those realities and values. The paper proceeds on the assumption that the opportunity for a 'reformation' within the UN and international security law is now here and the need is urgent. It can be done without significant change to the UN Charter, but not without several major changes in existing international law.

Reform of UN Security Council Membership and Procedures

The existing membership of the UN Security Council reflects the international order of 1945 and the outcome of World War II. It thus reflects a set of power relationships that has changed fundamentally in the ensuing sixty years. There is now once again a unified Germany. Japan again has large, technologically advanced armed forces. India, now independent, is a nuclear power with its own large armed forces. Russia is a much lesser power than the USSR in 1945, but China is a much more potent one than sixty years ago. Decolonisation in sub-Saharan Africa has produced new security challenges and new demands for a different international order. Significant slices of the population of the Muslim world, including in Indonesia and Pakistan, two of the most populous countries in the world, support armed revolt against the current character of the world order with a view to changing the place of religion in it. The European Union has 25 members, and alongside other powerful pan-European organisations (NATO, OSCE, Council of Europe), has transformed the security architecture of that continent and its adjoining regions.

Leading world powers – and indeed a significant number of less powerful states – are now calling for change, and have been doing so for over a decade. These calls should not go unheeded. Moreover, continued delay in adjusting to the changes of six decades in the world security order can only increase the threat to it.

The High Level Panel could not agree on a new approach to Security Council Reform. The General Assembly must decide.

Indeed, as the High Level Panel Report acknowledges,[5] the General Assembly is potentially capable of doing much more. What the Report does *not* discuss in any detail, however, is a possibly expanded role for the General Assembly in dealing with international security. Article 11 of the UN Charter provides that the UN General Assembly – which is after all the Organization's chief normative body – may consider, and make recommendations (though not decisions) on matters relating to the maintenance of international peace and security. However, under Article 12, it is constrained from making such recommendations (though not specifically from considering the matter) if the Security Council remains seized of the matter. The General Assembly even developed a procedure, called 'Uniting for Peace'[6], to deal specifically with a situation where the Security Council was unable or unwilling to deal with an important matter of international security[7]. Though the procedure has only been used ten times since it was instituted in 1950, and though a two-thirds majority of the Assembly is required to carry a vote on any recommendations, that is not to say that in the new international climate favouring reform of the UN, renovating, and perhaps even expanding 'Uniting for Peace' may not be feasible. At the very least, consideration of these issues could form part of the general debate of reform of the international security order in their own right.

In 2004, India declared its view of the imbalance of interests and power in the UN system. Foreign Minister Rao Inderjit Singh told a Ministerial meeting of the Non-Aligned Movement (NAM) that the Security Council was more regularly acting against the interests and positions of the majority of states.[8] He talked of the 'agenda of the few' being applied in disregard (or selective application) of the

[5] *A More Secure World*, paras 240–243.
[6] A/RES/377A (V) of 3 November 1950.
[7] It allowed the commitment of UN troops to the conflict on the Korean Peninsula.
[8] Excerpts from the Intervention by Minister of State for External Affairs, Rao Inderjit Singh, during the debate 'Challenges to Multilateralism in the 21st Century' at the 14th NAM Ministerial Meeting, Durban, 19 August 2004, http://meaindia.nic.in/speech/2004/08/19ss01.htm.

principles of international law. He said there had to be a re-balancing of decision-making power between the Security Council and the General Assembly through 'greater respect' for the views of the latter.

The Human Security Cluster

In spite of the explosion of interest in new approaches to human security in the past decade, beginning with the *Agenda for Peace* by former Secretary-General, Boutros Boutros Ghali, and subsequent development by scholars, NGOs and policy makers, there has been no correspondingly 'explosive' adjustment in important aspects of international security law. There have been some important innovations. The most important has been the establishment of international criminal courts of various types (the special tribunals for the former Yugoslavia, Rwanda, or Sierra Leone, and the International Criminal Court). Others have included the ban on land mines, the moves towards control of small arms and light weapons, and work on demobilisation and rehabilitation of child soldiers. Another important milestone is the 2004 Stockholm Declaration on the Prevention of Genocide and Ethnic Cleansing.

But what Mendes has described as the 'tragic flaw' in the UN Charter – the 'conflict between territorial integrity and individual integrity'[9] – remains to be addressed comprehensively in international security law. Mendes, writing in 1999, argued that the 'international community in the next Century will have to redesign its institutions, including the UN to incorporate new concepts such as human security which have the potential to resolve the tragic flaw'.

[9] Errol Mendes, 'Human Security, International Organizations and International Law: The Kosovo crisis exposes the "tragic flaw" in the U.N. Charter', 1999, http://www.cdp-hrc.uottawa.ca/publicat/bull38.html. Mendes notes the efforts by the Director-General of UNESCO and NGOs to 'formulate a companion to the 1948 Universal Declaration of Human Rights which would encompass the duties and responsibilities necessary for the implementation of human security'. See the 'Declaration of Human Duties and Responsibilities', http://www.cdp-hrc.uottawa.ca/publicat/valencia/valenc1.html.

As the Director General of UNESCO, Federico Mayor Zaragoza, argued in 1998:

> The right to life and the preservation of the genetic heritage, the right to development and personal and collective fulfilment, together with the right to live in a balanced ecological environment, are some of the basic principles that need to be recognized and guaranteed henceforth.[10]

The need for legal reform in this area of law has been demonstrated by the conflicts in and around Iraq in recent years. These wars – even though they may have involved the lawful use of force by states (UN-authorised use or other lawful uses of force) – have produced highly deleterious effects on civilian populations. There are two aspects to this: the application of wide ranging economic sanctions and the 'collateral damage' associated with direct military attacks.

It must be noted that calls for reform in this area have not been limited to NGOs or other activists outside the state system. Many states, including at least one prospective new 'standing member' of the UNSC (India), have made solemn appeals for changes in the law on these fronts.

The examples discussed briefly below provide considerable potential to act as the foundation for new efforts to codify the principles of 'human security' in international law in a comprehensive way.

Sanctions and Trade Bans

Since the end of the Cold War, there has been an increase in the imposition of trade and other sanctions and embargoes designed overtly to punish or isolate selected regimes. Experience, for example with Iraq, has shown that the indefinite application of such measures often leads to the measures being ignored or evaded by the target state, or that they can also ultimately cause more harm

[10] At the First Congress on Human Duties and Responsibilities in the Third Millennium, Valencia, 1998. See http://www.cdp-hrc.uottawa.ca/publicat/valencia/valenc1.html.

than good, particularly to the innocent population of the target country, while the regime itself suffers little.

Some work has been done on better targeted 'smart sanctions', and a manual has been developed for the Security Council, but overall the work has not yet been codified. The High Level Panel made recommendations for moving toward more effective sanctions but did not address in any significant way the loud complaints of the last decade about the types of sanctions imposed on Iraq which many states and many international observers believe should be outlawed.

For example, Richard Falk has argued that sanctions against Iraq, amounted to a serious violation of international humanitarian law which needed to be punished.[11] He said:

> Given our knowledge of the massive civilian suffering that has resulted from more than eight years of sanctions imposed on the people of Iraq, it becomes clear that their continuation amounts to a serious violation of international humanitarian law. And for those responsible for implementing such a policy there is the added element of criminal accountability for complicity in the commission of crimes against humanity.[12]

A 2002 report by the Global Policy Forum, an organisation which monitors policy making at the UN and lobbies on issues of international peace and justice, made the following findings on sanctions:

> World public opinion now recognizes comprehensive economic sanctions as a seriously flawed policy tool, a 'blunt instrument'

[11] Professor Richard Falk, 'Implementing Sanctions Against Iraq Involves the Commission of Crimes Against Humanity', Voices in the Wilderness; A Campaign to End the Economic Sanctions Against the People of Iraq, (Attachment II to VITW Response to 'OFAC'), http://www.rdrop.com/ users/vitwpdx/falkstatement.html.

[12] Falk goes on to say: 'civilian damage is only acceptable to the extent that it is collateral. This rule is incorporated into binding treaties in the form of the Hague Conventions of 1899 and 1907 on warfare and the Geneva Conventions of 1949 on humanitarian responsibilities. The sanctions policy against Iraq was a direct outgrowth and continuation of the Gulf War, and it has been implemented ever since 1990 in a manner that is mainly directed at the civilian population. It amounts to an indiscriminate weapon that is relied upon over and over again'.

> almost certain to do massive harm to innocent civilians. The Council itself no longer uses such sanctions, choosing to use exclusively targeted sanctions instead. But two Permanent Members have prevented the Council from reforming Iraq sanctions so as to meet the widely-agreed new standards.
>
> The Council's failure to lift the comprehensive economic sanctions is a breach of its humanitarian responsibilities and an abject failure to use the principles of proportionality. [13]

The Non-Aligned Movement has consistently opposed wide-ranging economic sanctions. India consistently opposed UN sanctions on Iraq. India's general position, that sanctions should only be 'targeted' sanctions, has been expressed as follows:

> Economic embargoes and trade sanctions have caused great hardships to third States and their people, especially the developing countries. ... [T]he Security Council has the responsibility to assess the possible effects of sanctions prior to their imposition. The Security Council should apply a clear and coherent methodology for the imposition, application and lifting of sanctions. Sanctions should be clearly defined, targeted, imposed for a specific time-frame, subject to periodic review and lifted as soon as the reason for the imposition has ceased to exist.[14]

There appears to be therefore an excellent opportunity presented by possible expansion of the UNSC to include India, to undertake a fundamental reform of UN sanctions law and practice. At the very least, consideration needs to be given to the development of rules governing the imposition and revocation of the sorts of long-term sanctions and embargoes of the sort mentioned above.

Humanitarian Law in Armed Conflict

The treatment of 'prisoners of war' and civilians in inter-state and intra-state conflict is dealt with extensively in the four Geneva 'Red

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[13] http://www.globalpolicy.org/security/sanction/iraq1/2002/paper.htm#8.

[14] Statement by Dr. M. Gandhi, Counsellor and Legal Adviser on agenda item 155: Report of the special committee on the Charter of the United Nations on the strengthening of the role of the organization, at Sixth Committee of the 58th session of the UNGA on October 9, 2003, http://secint04.un.org/india/ind812.pdf.

Cross' Conventions on humanitarian law in armed conflict and their two Additional Protocols. Despite their clear and widely respected provisions, however, the USA – which is Party to the Conventions – engaged in some legal fancy dancing when it devised the new category of 'enemy combatant' in order to evade the application of strict Convention protection to prisoners captured during the UN-mandated operation in Afghanistan. Although the International Committee of the Red Cross (ICRC) maintains that the meaning and efficacy of their Conventions remains unchanged, it has to be said that some doubt exists as to the exact scope of their application in the light of the new types of conflict currently afflicting the world, including in particular the so-called 'war on terror'.

Civilian casualties

The war against Iraq, and in the former Yugoslavia and Chechnia in the last decade provoked new levels of outrage at the lack of protection to civilians. The civilians killed or injured were seen as unavoidable 'collateral damage'. This term has been defined usefully in one source as follows: 'loss of life of, or injury to, civilians or other protected persons, and damage to or the destruction of the natural environment or objects that are not in themselves military objectives'.[15]

The issue of 'excessive' collateral damage, especially through the use of more modern weapons systems, has been put on the table consistently throughout the 1990s (wars in the former Yugoslavia, sanctions-enforcing attacks on Iraq, the two wars in Chechnia) and in the current decade (wars in Afghanistan and Iraq). The cases of Chechnia in 1999 and 2000 and the US-led invasion of Iraq in 2003 are discussed below to illustrate the level of 'collateral damage' in two operations widely regarded as 'lawful' by many states but in

[15] 'San Remo Manual on International Law Applicable to Armed Conflicts at Sea', Prepared by International Lawyers and Naval Experts, Convened by the International Institute of Humanitarian Law, Adopted in June 1994, 31-12-1995, *International Review of the Red Cross*, No 309, p.595-637, See http://www.icrc.org/web/eng/siteeng0.nsf/iwpList149/966627225C719EDCC1256B6600598E01.

which there was no mechanism for international oversight of the extent of 'collateral damage'.

In August 1999, Chechen guerillas mounted an attack in Dagestan, the adjacent republic. In subsequent months, unidentified assailants undertook a series of bombings of apartment buildings in Moscow and another Russian city (Volgodonsk). The Russian government wrongly attributed the attacks to Chechen guerrillas, and used the brutality of the attacks and the large death toll as justifications for breaking its peace agreement with Chechnia (after the 1994-1996 war) and reopening the war.

As the American Committee for Chechnia has noted, the Russian military 'offensive and subsequent occupation was brutal' even though the government claimed a limited objective of neutralising Basayev's force. The testimony of Grozny's residents and TV news footage provided graphic and incontrovertible evidence of the deliberate targeting of civilians and civilian sites, and the commission of war crimes on a massive and sustained scale. Whole apartment houses and even whole city blocks were flattened in several areas of the city as the result of bombardment by aircraft, missiles and artillery. According to the Ministry of Defence, Russian military losses were 4,750 killed and 13,040 wounded. Other sources estimate Russian losses to be more than twice the official figure.

According to US government estimates, some 80,000 Chechen civilians and resistance fighters have died since 1999, on top of the 100,000 killed in the first Chechen war. Estimates of the death toll by Russian and Chechen NGOs are much higher: around 250,000. The United Nations High Commissioner for Refugees (UNHCR) reports that approximately 350,000 Chechens have been displaced, with 150,000 in the neighbouring republic of Ingushetia, and another 30,000 in the rest of Russia. According to the American Committee for Chechnia, nearly half of the territory's pre-war population is now either dead or displaced. Russia continues to restrict access to Chechnia by most humanitarian relief organisations and journalists. Those who remain in Chechnia are often subject to atrocities, such as 'disappearances' and extra-judicial execution, not to mention rape

and robbery at the hands of the Russian forces. The US Helsinki Commission reported that Chechnia is the site of the 'most egregious violations of international humanitarian law anywhere in the OSCE region'. In September 2003, the US reported to the OSCE that the 'violation of human rights in Chechnia continues to be an issue of the gravest concern' for it.[16]

In the invasion of Iraq in 2003, the world was presented with two starkly contrasting positions with regard to civilian casualties. On the one hand there were vociferous and bitter protests against the high level of civilian casualties. For example, early in the war, Amnesty International (AI) called for an end to use of cluster bombs and what it said was unlawful targeting of civilians.[17] On the other hand, there was the US Government saying that civilian casualties were inevitable and did not need to be counted. To quote Secretary of State, Colin Powell on one occasion: 'We really don't know how many civilian deaths there have been, and we don't know how many of them can be attributed to coalition action').[18] This point can be added to statements by other US leaders, including General Tommy Franks about operations in Afghanistan ('we are not there to do bodycounts') and Brig. Gen. Mark Kimmitt (saying that U.S. forces do not have the capacity to track civilian casualties).[19]

Amnesty International was calling for the 'prompt and impartial investigations into civilian deaths, and the use of the International Humanitarian Fact-Finding Commission to investigate incidents'. According to one legal specialist, 'Obtaining better information about the rates and causes of civilian casualties can only enhance military commanders' ability to make sound judgments in the heat of combat

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[16] Testimony of Ambassador Steven Pifer, Deputy Assistant Secretary of State in the Bureau of European and Eurasian Affairs, Department of State, to the Commission on Security and Cooperation in Europe, 16 September 2003, available http://www.csce.gov/witness.cfm?briefing_id=266&testimony_id=414.

[17] Amnesty International, 'Civilians under Fire', 8 April 2003, http://www.globalpolicy.org/security/issues/iraq/attack/law/2003/0408cluster.htm.

[18] Interview by Sir David Frost of BBC, Secretary Colin L. Powell, Washington, DC, 12 April 2003, http://www.state.gov/secretary/former/powell/remarks/2003/19581.htm.

[19] Daniel Cooney and Omar Sinan, 'Iraq Morgue Records: More than 5,500 Killed', Associated Press, May 24, 2004. Available at: http://www.guardian.co.uk/worldlatest/story/0,1280,-4124482,00.html.

– and improve their ability to ensure that US forces really are doing all they can to protect civilians'.[20] While this observer acknowledged that 'it would be impossible to obtain a perfect accounting of civilian casualties, in part because the civilian status of many victims may be doubted', she observed that 'it doesn't make sense to respond to the proverbial fog of war by donning a blindfold'.

A number of studies have shown that while the full extent of the civilian casualties in a war may not be known, there are reasonable foundations for estimating and in some cases even counting the numbers of civilian deaths in particular attacks or operational areas. The much quoted study in the medical journal *Lancet*, a study notorious for its high estimate of civilian casualties, made the seemingly incontestable observation: 'We have shown that collection of public-health information is possible even during periods of extreme violence. Our results need further verification and should lead to changes to reduce non-combatant deaths from air strikes.'[21]

One response in the UK to the Lancet study in December 2004 saw 44 public figures call for a government inquiry into the number of civilian deaths in Iraq. Their letter said that without counting the dead and injured, no one can know whether Britain and its coalition partners are meeting their obligations under international humanitarian law. The UK government rejected the call for such an enquiry.

The loud outcry about civilian casualties in wars that may be lawful, including those authorised by the UN Security Council, demands the establishment of a new rule of international law requiring that any state undertaking war be obliged to monitor and report in a timely fashion the impacts of the war on civil populations, especially the number of deaths and the number of casualties. States should be required to make these reports to the Security Council, which would

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[20] Diane Orentlicher, Professor of International Law at American University, cited in Brad Knickerbocker**, '**Who counts the civilian casualties?', *The Christian Science Monitor*, 31 March 2004, http://www.csmonitor.com/2004/0331/p15s01-wogi.html.

[21] Les Roberts, Riyadh Lafta, Richard Garfield, Jamal Khudhairi, Gilbert Burnham, 'Mortality before and after the 2003 invasion of Iraq: cluster sample survey', *The Lancet*, 2004; 364: 1857–64 cited on http://www.wslfweb.org/iraq.htm#health.

publish them immediately to the public domain. Apart from the normative logic of this position, there is an operational or expedient logic to it as well. It is only when a state undertaking war knows the full scale of the civilian deaths and casualties of prior operations can it make the best decisions for subsequent prosecution of the war aims. This is especially important where winning the hearts and minds of the civil population in the state being attacked is essential to victory. Suggestions to the contrary – that a state's war aims may be derailed if the true scale of civilian deaths and casualties are known – has a degree of validity, but it is only one consideration. And it is probably outweighed by the other consideration.

Prisoners of war

The manner in which the US has, particularly since September 11 2001, pursued extra-judicial and extraterritorial detention of citizens of other countries outside its borders, and their 'rendition' to third countries which practice torture, is also a subject requiring close consideration in relation to potential changes to international law. While the ICRC is conducting its own study on the matter, it would be extremely useful to examine in a wider context whether the Geneva Conventions do in fact cover detainees labelled by the US as 'enemy combatants', or whether a further Protocol or other international instrument is required to guarantee such detainees a guaranteed minimum set of human rights. The decision of the recent House of Lords case on related questions is particularly relevant.[22]

The detention without trial after what many would see as war's end or the torture of captured combatants on the scale seen in the past four years by several members of the UN Security Council, is not a systemic problem on the same scale as establishing new rules for respecting human security. Nevertheless, it would seem odd that

[22] House of Lords Session 2004–05, Opinions of the Lords of Appeal for Judgment in the Cause *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) X (FC) and another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, [2004] UKHL 56 *on appeal from: [2002] EWCA Civ 1502,* 16 December 2004, http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/16_12_04_detainees.pdf. This is the report by the law lords regarding the four British detainees.

any major reform of international security order to be addressed in 2005 not look closely at possible changes to international law in this area.

The New Sovereignties Cluster

The Westphalian concept of state sovereignty, and the allied principle of non-interference in the internal affairs of sovereign states, remain central in international law, reflected in the UN Charter and strongly defended, particularly by states which have only recently attained sovereign status or which don't want their internal affairs too closely examined. The concept, however, is no longer monolithic or unassailable. The vast complex of international treaties over the past sixty years, and in particular multilateral human rights conventions, have cut considerable inroads into the notion of unfettered state sovereignty.

At the same time, there has been no effort to address the issue head on. What is the new political bargain that will allow states to make a decisive and measurable quantum leap in their collective approach to sovereignty? Is a quantum change in the legal expression of Westphalian sovereignty possible? Maybe not, but the question should be re-examined by states in the light of experience and new threats and challenges. In particular, the discussion needs to be more radical, not less, than that thrown up by discussion of humanitarian intervention.

On that point, it seems clear that for many, state sovereignty has for a long time included an important element of responsibility by a state for the protection and well-being of its people. This has been explicitly agreed in treaty form for the case of genocide in the Genocide Convention, in the various special tribunals for the former Yugoslavia, Rwanda and Sierra Leone, and in the 2004 Stockholm Declaration on the ethnic cleansing and genocide. All of these legal instruments provide a legal window for the involvement in the internal affairs of one state by others or by appropriate international organisations.

The 2001 Report of the International Commission on Intervention and State Sovereignty (ICISS)[23] took this one step further, and asserted that where a population is suffering serious harm as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to an international responsibility to protect.

These developments are closely allied to the notion advanced by the UN Secretary-General and others of the sovereignty of the individual, which in some circumstances may override, or heavily restrict, state sovereignty. But all of this remains highly controversial and unsettled. It is certainly time for the issues to be reconsidered in an organised way and, hopefully, for some firm conclusions to be drawn.

Even though the concept of self determination remains fungible in practice and highly dependent on power relationships, it is quite clear that a threat to peace arises where 'long standing' and 'established' claims for independence go unaddressed. The UN system must find a way of reducing the threat that is posed by failure of states to address such claims by peaceful means.[24]

One specific case needs special attention from the UN General Assembly: that of Taiwan. A sustained insistence on the part of the majority of states that China has sovereignty over Taiwan runs a high risk of a major war involving the USA and China, and possibly also Japan. *Prima facie*, rigid adherence by the UN to the notion of sovereignty in this case is a serious threat to peace. The question needs to be considered whether the UN can redefine sovereignty or UN membership in any way that might eliminate this threat and similar threats. The opposition of Turkey to the aspirations of Kurdish populations for independence might be similarly viewed as a threat to peace that might be ameliorated if the UN system could find a way of giving face to the self-determination claims without

[23] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, International Development Research Centre, Ottawa, 2001, http://www.iciss.ca/report-en.asp.

[24] This important point is not an original idea of the authors but was made in discussion by a participant during a two-day meeting in Ottawa in January 2005.

threatening the real interests that underpin the classic ideas of sovereignty.

Military Interventions

In a speech in Chicago in 1999, in the wake of the Kosovo intervention, British Prime Minister Tony Blair advocated reform of the international system and agreement on a number of criteria which would represent the threshold for intervention.[25] Blair noted that 'non-interference has long been considered an important principle of international order'. He said it was a principle 'we would not want to jettison too readily'. He said that 'One state should not feel it has the right to change the political system of another or foment subversion or seize pieces of territory to which it feels it should have some claim'. At the same time he called for the application of five criteria, which he said could never be absolute, for making such interventions:

- 'First, are we sure of our case? War is an imperfect instrument for righting humanitarian distress; but armed force is sometimes the only means of dealing with dictators.
- Second, have we exhausted all diplomatic options? We should always give peace every chance, as we have in the case of Kosovo.
- Third, on the basis of a practical assessment of the situation, are there military operations we can sensibly and prudently undertake?
- Fourth, are we prepared for the long term? In the past we talked too much of exit strategies. But having made a commitment we cannot simply walk away once the fight is over; better to stay with moderate numbers of troops than return for repeat performances with large numbers.
- And finally, do we have national interests involved? The mass expulsion of ethnic Albanians from Kosovo demanded the notice of the rest of the world. But it does make a

[25] Prime Minister's speech: 'Doctrine of the International community', at the Economic Club, Chicago, 24 April 1999, http://www.number-10.gov.uk/output/Page1297.asp.

> difference that this is taking place in such a combustible part of Europe.'

There is however an important qualification that Blair made in that famous Chicago speech, and that needs to be acted upon. He said that 'Any new rules ... will only work if we have reformed international institutions with which to apply them. ... we have to support the UN as its central pillar. But we need to find a new way to make the UN and its Security Council work'.

In December 2001, ICISS presented its report on so-called 'humanitarian intervention' – the existing and potential rules relating to military intervention in pursuit of a responsibility to protect large groups of people suffering major violations of human rights. However, the ICISS report has been greatly overshadowed by the 2001 terrorist attacks in the US, the ensuing 'war on terror', and the associated debate on pre-emptive and preventive strikes.

Although the High Level Panel Report blew some new life into aspects of the ICISS report, there remains a pressing need to carry forward the 'responsibility to protect' and other ICISS recommendations, and to develop appropriate international mechanisms and rules covering them. There is also a need to reach consensus on the circumstances in which other military interventions not falling strictly within the purview of 'humanitarian', and carried out by individual states or 'coalitions of the willing', may be justified.

The flip-side is arguably even more important. There may need to be some codification of a prohibition against military interventions where certain threshold criteria are not met. This may go part of the way to addressing concerns of the G-77, which were summed up by the Cuban representative to the UN in January 2005:

> a number of concepts and categories are used, which lack consensus among UN Member States, such as: the so-called 'human security', 'the responsibility to protect', the 'right to intervention', the 'pre-emptive attack'; while other controversial terms are used, such as, that of 'capable' or 'responsible' States, among others. When stating such categories as premises for the UN institutional reform and as referents of its actions, it seems to

> be making thereby a dangerous reinterpretation of the principles and purposes enshrined in the UN Charter, particularly the one related to all States' sovereign equality, the non-interference in States' domestic affairs, and the prohibition to resort to threat or the use of force against the territorial integrity or the political independence of any State. The Charter's Purposes and Principles shall be respected without restrictions or condition.[26]

If there is to be any advance on the principles espoused by Blair or ICISS, there needs to be anew grand bargain struck on the balance between sovereign rights and responsibilities of the P-5 or other powerful states and the rest of the world.

One area worthy of attention is the possibility of elaborating flip-side criteria to the ICISS criteria that might underpin provision of a Chapter VII security guarantee by the UN Security Council to weak states who will always feel vulnerable to direct attack across their borders. It is clear that the neuralgia of G-77 countries to the ICISS criteria will not be dissipated without a new bargain of some sort.

Foreign Military Bases

The continued insistence by the US that its military security and its national interests can only be guaranteed by the maintenance of overseas military bases, has some important and credible foundations. Nevertheless, experience of the past sixty years suggests that this policy is in itself one of the greatest sources of international insecurity, sometimes at the intra-state level and sometimes in terms of human security. Many states actively oppose foreign military bases and may like to see an international prohibition against them. For example, the draft 'African Non-Aggression and Common Defence Pact' says that 'the presence of foreign military bases on our continent may constitute a threat to peace and

[26] Speech by the Cuban representative to the informal meeting of the plenary of the General Assembly to continue an exchange of views on the recommendations contained in the report of the High-Level Panel on Threats, Challenges And Change (New York, 27 January 2005), http://www.un.int/cuba/Pages/requeijo59ps280105-ing.htm.

security'.[27] The presence of a US military base in Saudi Arabia after the first Gulf War in 1991 has been one of the main legitimators in the Arab world of the terrorist campaign led by Osama bin Laden. A recent White Paper by China on its defence policies viewed the standing presence of US military forces in the Western Pacific with concern because of what China sees as an aggravating influence on the prospects for military confrontation over Taiwan.

While examples such as these can be dismissed, in part for good reason, it is impossible to deny that there has been a long standing neuralgia among the Non-Aligned members of the UN to the permanent basing of military forces of major powers outside their immediate periphery, and that this remains their considered position. Major powers, particularly the US, should now consider whether there may be a net gain to their own long term security interests by moving toward a standing ban or some other global regulatory regime on the permanent stationing of military forces in foreign countries. Given the technological superiority of the US and its military pre-eminence in fields like long range cruise missiles, it certainly now has an unprecedented opportunity to contemplate and plan in detail warfare premised on stand-off capabilities and only temporary lodgement of troops – except where dictated by imminent military necessity.

It is not difficult to make a case that the US might have avoided the September 11 attacks if it had not been a close military ally of the Saudi government, a relationship dependent largely on three elements: perceived threats from Iran and Iraq, arms sales to Saudi Arabia, and the desire for a US military base on the Saudi peninsula. The US could have provided a security guarantee to Saudi Arabia without having an operational military base there. The presence of the base, which was used for air attacks on Iraq throughout the 1990s, allowed the USA the 'technical' possibility for the military strategy it pursued against Iraq in the 1990s, a strategy that

[27] African Union, Draft, The African Non-Aggression and Common Defence Pact, First Meeting of the African Ministers of Defence and Security on the Establishment of the African Defence and Security Policy, 20-21 January 2004, Addis Ababa, Ethiopia, MIN/Def.&Sec. 4(I).

ultimately proved unsustainable because it left only one option if Saddam did not submit, and that was invasion and occupation.

Private Actions in Armed Conflict

There has been a long-standing and widespread rejection of the use of mercenaries in armed conflict, France's Foreign Legion notwithstanding. This culminated in 1989 in the finalisation of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries – a convention which, however, has few Parties.[28] A linked issue has been the emergence in the past two decades of private security firms in effect offering guns for hire. One of the more successful companies is Sandline International, first hired to resolve the Bougainville crisis in Papua New Guinea, but expelled when its presence was discovered. Another firm, Executive Outcomes, was used successfully in Sierra Leone in 1996–97, but expelled as a result of international pressure, with the democratically elected government subsequently being overthrown. The President was restored in 1998, this time with the assistance of Sandline, but it too was then expelled, with an ensuing result in that country which the world is still grappling with.

A related issue is the international effort over many years to give the UN a standing force which it can deploy rapidly as the need arises,[29] along the lines of the European Rapid Reaction Force, which is close to implementation. At the same time, there are some[30] who argue that the UN does not really have the capacity or the character to fight wars, but can only undertake peacekeeping missions. Others are worried about giving the UN in effect its own standing army, answerable only to the UN and not home governments. But the fact remains that there have already been situations where the UN –

[28] The Treaty required only 22 ratifications to enter into force, but this only occurred in October 2001. It currently has only 26 States Party which have ratified it.
[29] Report of the Panel on United Nations Peace Operations, A/55/305 and S/2000/809, 21 August 2000 ('the Brahimi Report'), paras 86–91.
[30] *Ibid*, para 53. "The Panel recognizes that the United Nations does not wage war. Where enforcement action is required, it has consistently been entrusted to coalitions of willing States, with the authorization of the Security Council, acting under Chapter VII of the Charter."

because of the attitudes of its members – has been late in its military response to a situation needing action, or where sometimes, as in the tragic case of Rwanda, its response is vastly inadequate or totally absent.

A more radical suggestion is that the time may be approaching when the UN itself may have to consider employing a private firm or firms to supply it with this type of standing capacity. Needless to say, there would be considerable resistance to such a notion, particularly for the use of such troops in a situation where the Security Council will not authorise action, and regional organisations or states also refuse to intervene. It is, nevertheless, a notion which may warrant consideration in relation to specific conflicts, and the process suggested in this paper may provide just such an opportunity.

These three issues seem sufficiently important together to warrant a careful review of the attribution of nationality, the attribution of sovereign immunities and the attribution of state responsibility in times of war or war-like actions.

WMD Cluster

There is a strong case to be made for discussion of the future handling of all categories of WMD *and* missiles in one and the same forum. At the most basic level, the fact that missiles are a significant launch platform for all categories of weapons of mass destruction (chemical, biological and nuclear), as well as more conventional weapons, means that discussion of missiles in the context of any consideration of individual categories of WMD, is long overdue.

But there are several more compelling reasons. The first relates to current US national security strategy premised on the view that WMD represent a new generic threat that justifies new approaches to pre-emptive attacks. The second relates to the fact that there is an Advisory Opinion of the International Court of Justice (ICJ) on the table that expresses a view on the lawfulness of the use or threat of use of nuclear weapons that has fairly clear potential application to other WMD, especially biological. A third relates to the current

stalemate in negotiations on specific regimes to do with single classes of WMD, such as a protocol for biological weapons control and the future of the Nuclear Non-Proliferation Treaty.

On the first point, in September 2002, President George W. Bush announced a new 'National Security Strategy' of the USA that declared a new type of standing or continuing war: 'we will defend the peace by fighting terrorists and tyrants'. The US will now seek to use its 'position of unparalleled military strength … to create a balance of power that favors human freedom'.[31] After the US issued its new National Security Strategy in September 2002, it released a new 'National Strategy to Combat Weapons of Mass Destruction' in November 2002.[32] This document commits the USA to ending the threat posed by the 'world's most dangerous regimes' from the 'world's most dangerous weapons'. The document notes that 'some states …are seeking even greater capabilities [in WMD] as tools of coercion and intimidation'. After the invasion of Iraq, which was believed by the USA and UK to possess WMD but did not, the US continues to identify Iran and North Korea as such states.

On the second point, the ICJ produced in 1996, pursuant to a request from the UN General Assembly, an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, which concluded that the threat or use of nuclear weapons is generally illegal and that there is an obligation to conclude negotiations on complete nuclear disarmament. This was based mainly on the principles of humanitarian law prohibiting warfare conducted with weapons or methods which do not discriminate between military and civilian targets; which cause unnecessary suffering; are disproportionate to the act being responded to; violate the territory of neutral states; and last but not least, cause long-term and widespread damage to the environment.[33]

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[31] For text see http://www.whitehouse.gov/nsc/nss.html.
[32] http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf.
[33] The Court found: 'It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; ....However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the

As may have been expected in such a controversial case, just about every aspect of the Court's opinion was welcomed by some and heavily criticised by others. And it must be admitted that there are various elements of it which require further consideration and development. In particular, it would be particularly useful to elucidate on the Court's provision of a potential escape clause in "an extreme circumstance of self-defence, in which the very survival of a State would be at stake", particularly in the partial justification advanced by the US for the 'war on terror' and preemptive strikes which is based on self-defence. It would probably also be useful to consider further the status of tactical nuclear devices, particularly given growing concerns about their potential use by terrorists groups or even certain countries.

Another important aspect of the case was the minority opinion of ICJ President Bedjaoui that the ban on the threat or use of nuclear weapons had moved beyond that contained in the Nuclear Non-Proliferation Treaty (NPT). He felt that it was now an obligation of customary international law which applied to all states – in other words, including those few who have refused to accede to the NPT. Needless to say, it would be a major step forward in the nuclear disarmament debate if this notion were to be more widely and authoritatively affirmed.

Those states looking to genuine reform of international security order must address the issues of WMD disarmament. This view has been put many times by leading states such as India, but was well summed up by the Cuban representative to the UN in January 2005:

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threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake;' ... 'The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.' http://www.icj-cij.org/icjwww/icases/iunan/iunanframe.htm.

> The question of nuclear and other weapons of mass destruction are basically covered from the horizontal non-proliferation approach while wrongly putting the fundamental question of disarmament second. In this context we do not support the so-called Proliferation Security Initiative (PSI). In fact, the inclusion in the Report of such recommendation is very controversial as there is a clear lack of consensus in the international community regarding the PSI, for being such a non-transparent mechanism of selective composition, designed by some States acting on the fringes of the United Nations and the international treaties in this matter. In our opinion, the possibility of terrorist attacks with weapons of mass destruction cannot be eliminated by means of a selective approach, as the one that promotes the PSI, which is limited to struggle against horizontal proliferation and takes no notice of vertical proliferation and disarmament. [34]

Here may lie the seeds of grand bargain on other issues like the ICISS criteria and a host of sovereignty issues. In return for some security guarantees of some sort, and for addressing their key concerns on the superior military capabilities of P-5 states, the latter group may be able to secure what they want in terms of support for keeping WMD out of the hands of terrorists.

Nuclear Issues

For some good reasons outlined in various statements about the dangers of terrorists' acquisition of nuclear weapons, an early move to the abolition of these weapons, accompanied by stricter controls on related materials, is now a political necessity. There is now certainly a strategic opportunity. As a report by the Stimson Centre in 2001 noted:

> The United States stands at a moment in history of unparalleled possibilities. Without dismissing some very real security threats, never

[34] Speech by the Cuban representative to the informal meeting of the plenary of the General Assembly to continue an exchange of views on the recommendations contained in the report of the High-Level Panel on Threats, Challenges and Change (New York, 27 January 2005), http://www.un.int/cuba/Pages/requeijo59ps280105-ing.htm.

> has a nation had such a window of opportunity to rethink and redefine its fundamental security structures. The United States faces no global rival and wields the political, military, and economic wherewithal to reshape the role nuclear weapons play in a global security environment.[35]

Development of a Fissile Material Cut-off Treaty (FMCT) to stop the production of the material necessary for the making of nuclear weapons, is seen as a valuable step towards total nuclear disarmament. However, substantive negotiation of such a convention has been stymied in the Conference on Disarmament (CD) in Geneva for the past five years or more, with the CD becoming virtually moribund as a result.

Although the Nuclear Weapons States are likely to oppose any direct discussion of a timetable for comprehensive nuclear disarmament, they may be willing to at least consider what steps might be taken to re-start negotiation of an FMCT. Such talks might then provide a forum for encouraging NWS to avoid the development of new types of nuclear weapons or new technologies to extend the life of existing nuclear arsenals. An associated step could be to encourage wider adherence to the Comprehensive Nuclear Test Ban Treaty (CTBT), particularly by the United States and a small group of other states (India, Pakistan, North Korea, Iran, Israel).

Biological Weapons

Negotiation of a detailed Protocol to the Biological Weapons Convention (BWC) was broken off in mid-2001 when the United States withdrew from the drafting group. The US was concerned that the inspection regime would compromise the commercial integrity of peaceful pharmaceutical industries such as its own, while doing little to uncover hidden BW programs in other countries. At the same

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[35] *Beyond Deterrence: A Global Approach to Reducing Nuclear Dangers*, A Report on US Nuclear Weapons Policy by the New Nuclear Direction Dialogue, a project of the Henry L. Stimson Centre, Report no.38, July 2001, http://www.stimson.org/n2d2/pdf/bdreport.pdf.

time, they argued that it could undermine existing export control regimes, such as the Australia Group.[36]

Given that the great bulk of the international pharmaceutical industry is based in the US, UK and Western Europe, it will be essential to bring the industry on board if negotiations are to resume. Other major US concerns will also need to be addressed. In 1989 Australia organised international government-industry consultations which produced a breakthrough in the finalisation of the Chemical Weapons Convention. There is scope for a similar public/private partnership in the BW context.

The work of other groups would also need to be included. A 2003 Stimson Centre Report, for instance, argues for a 'compliance-through-science' approach to reducing the biological weapons threat. Urging that inspection techniques need to be further researched and tested, the report's authors agreed to draft trial monitoring plans for field tests at industry facilities to facilitate such activities.[37]

Missiles

A major lacuna in the international security order has for a long time been the almost total lack of any effective multilateral regime to regulate production, trade and use of missiles. The Missile Technology Control Regime (MTCR) has a limited membership and

[36] The Australia Group is made up of more than 30 countries which maintain national export controls on products which could be used in the production of chemical and biological weapons.

[37] The report's authors, a group of senior industry experts, argue that as the Bush administration proposals are currently structured, they could produce actions that are fragmented, weak, and contradictory to the desired goal of thwarting terrorists and governments in their attempts to acquire offensive biological weapons capabilities. The report's tougher approach features the establishment of universal minimum standards for biosafety, biosecurity, and oversight of genetically-modified research, underpinned by penalties for non-compliance. The industry experts identify specific models for international standards in each of these areas, and they support a phased approach to implementation. In addition, they describe how to fill gaps in the US biosecurity initiative. The industry experts were confident, as were their predecessors in the Stimson Center's previous report, *House of Cards*, that a technically sound multilateral monitoring protocol can be constructed.

is not based on any international treaty. Its 2002 International Code of Conduct Against Ballistic Missile Proliferation is not a binding instrument and moreover is not supported by some proliferator states. The only existing treaties dealing with missiles were bilateral (between the US and former USSR), and related only to specific categories of missiles held by each country.[38]

US efforts to develop a National Missile Defence system, and its related withdrawal from the bilateral Anti-Ballistic Missile Treaty it had signed with the former USSR, have added a degree of uncertainty to the international non-proliferation system. That system has been further undermined by the efforts of states such as North Korea to export missiles to countries of concern, and, it must be said, the efforts of a number of states to find ways of interdicting North Korean vessels on the high seas which are suspected of carrying the missiles.

Weaponisation of Outer Space

One subject long overdue for more detailed international consideration concerns the stationing of weapons platforms in outer space. As a recent Pugwash report noted, 'there is a near-term prospect of deploying weapons in space for the very first time. As part of its National Missile Defense (NMD) program, the US administration has stated its intent to launch a space-based interceptor test bed by 2008.' The report went on to say:

> With the UN Conference of Disarmament deadlocked on the issue of space weapons, the participants felt an urgency to approach this issue from many different angles and involving many different constituencies, including industry, NGOs, the scientific community, the military, the general public and governments.[39]

[38] For example, the 1987 Intermediate-range Nuclear Forces Agreement which eliminated all nuclear-armed ground-launched ballistic and cruise missiles with a range between 500 and 5,500 km.

[39] Robert Schingler, Will Marshall, George Whitesides and Bojan Pecnik, Pugwash Meeting no. 283, 'Pugwash Workshop on Preserving the Non-Weaponization of Space', Castellón de la Plana, Spain, 22-24 May 2003, Workshop Report, http://www.pugwash.org/reports/sc/may2003/space2003-report.htm.

While the UN has in the past devoted considerable effort to the peaceful uses of outer space, there has been virtually no substantive movement for close to a decade. Some countries retain an active interest (in particular the People's Republic of China, an emerging space power in its own right), and the subject can be expected to take on renewed life as projects to establish bases on the Moon and Mars emerge. China has in the past also insisted that its agreement to negotiate a Fissile Material Cut-off Treaty as a next step in the nuclear disarmament debate would be conditional on the CD also establishing a substantive agenda item on the demilitarisation of outer space. Wider consideration of this issue could thus be a means of helping enable movement on the central issue of nuclear disarmament (and potentially unlocking the work of the Conference on Disarmament).

Quantum Leap: Reformation in International Security Law

Growing support for reform of the Security Council, including that reflected in the report of the High Level Panel, provides a unique opportunity to address international security concerns already addressed in this paper. States can now work towards a new grand bargain that will begin to bridge the growing gulf between, on the one hand, US and European perceptions of the international legal and political order and, on the other, those of the 'non-West', especially in the Middle East, Asia and Africa. Indeed, it is strongly arguable that only when these other concerns are addressed will reform of the Security Council be meaningful and durable.

In this context, there are two approaches to international security reform which need to be pursued simultaneously: the discrete, single issue approach and an aggregated, comprehensive approach.

Few of these subjects have direct links with each other. While all of them are difficult, there are nonetheless degrees of difficulty and differing time frames in which forward movement might be achieved.

Some of the subjects, moreover, are already being considered in other contexts (e.g. the UN High Level Panel), and others might at some stage need to be taken to more formal drafting mechanisms such as the International Law Commission.

While there may be few direct links between many of these subjects, some of the concerns outlined in this paper can no longer effectively be addressed only by relying on the normal processes of subject-specific international conferences, such as the negotiation of a protocol to the Biological Weapons Convention. Nor can there be reliance on bodies, like the CD, set up specifically to negotiate arms control instruments. The CD has been virtually moribund now for well over five years through a combination of big power politics and outdated rules of procedure.

Many of the opportunities for potential reform of international security law in these individual areas will not be fulfilled within the existing frameworks for intergovernmental consideration of each one. There is a variety of reasons for this that are unique to each case, but there are also generic causes. One of the most overwhelming is the growing suspicion internationally that the USA, or indeed even other P-5 members, will seek to entrench their supremacy or power positions at existing levels or even seek to expand them.

A generalised approach to reform of international security law is now needed. It is of some note that the 2003 Agenda of the International Law Commission includes an item on ‘Fragmentation of international law: difficulties arising from the diversification and expansion of international law’. A key example of this process is international security law.

Recommendations

A new approach to reform of international security law would include the following elements:

- States must now treat international security law as a unified corpus of policy and practice in need of comprehensive review
- The UN should convene a Special Session of the General Assembly on International Security Law (The planned discussions of only a few aspects of global collective security reform during the September 2005 summit of 'Millennium plus five' will not be adequate.)
- This UNGA Special Session should establish a standing UN Conference on International Security Law (UNCISL) with a potential life span of 5–10 years
- UNCISL should set up working groups that address clusters of linked issues now currently treated quite separately at the intergovernmental level (for example, clustering all issues relating to weapons of mass destruction now dealt with individually as chemical weapons, biological weapons and nuclear weapons. A binding multilateral missiles regime should also be considered in the same context).
- The International Law Commission (ILC) must take on a multi-year project of review of global collective security law.[40] (The ILC has only addressed certain aspects of international security law, in its attempt – highly contested at the political level – to define 'aggression' which began more than fifty years ago, and its parallel, protracted and ultimately hollow work leading to the 1954 and 1996 Draft Codes of Offences against the Peace and Security of Mankind.)[41] This work will need to be supported by teams of

[40] Under the Statute of the International Law Commission, proposals for the progressive development of international law are not formally initiated by the Commission but are referred to it by the General Assembly (article 16) or by the Members of the United Nations and other authorized agencies (article 17). On the other hand, the Commission itself may select topics for codification, although it must give priority to requests of the General Assembly to deal with any question (article 18).

[41] The ILC 'decided not to prepare a conclusive definition of aggression but to continue considering the matter in the context of the Draft Code of Offences against the Peace and Security of Mankind'. See ILC Report, A/1858 (A/6/9), 1951, chp. III, paras.35-53. See also http://www.un.org/law/ilc/guide/7_5.htm. In the event, in 1974 there was a General Assembly Resolution (3314) to adopt a definition of aggression but it limited itself in Article 1 to define aggression as use of force 'inconsistent with the Charter' of the UN. This denied the remainder of the definitional work in the

political and security specialists identifying in depth the linkages between the currently discrete areas of international security law.
- States must convene international conferences of specialists and policy makers to promote and inform the inter-governmental review, both at the general level and at lower levels.
- States must work closely with NGOs, think-tanks and leading scholars in a process of global and regional consultation similar to that seen in the cases of the land-mines ban or control of small arms and light weapons.

The general purpose must be to take the opportunity now presented by the prospect of Security Council reform to make a quantum advance in reducing the scope of war and war-like actions of the sort represented by the Kellogg-Briand Pact of 1928 which outlawed aggressive war.

There are many specific outcomes that should be pursued in this process. Some that we have identified include:

- A ban on economic sanctions that are not specifically targeted at named persons, governments or other legal personalities. Wide-ranging economic sanctions and trade bans are not just inhuman and outmoded. They offend the laws of civilised humanity because of their effects on the more vulnerable groups of society, including notably children.
- A ban on 'permanent war' of the sort seen in the 1990s where the US and UK mounted repeated attacks on Iraq with little military or political utility. 'Permanent war' of this sort is equally an affront to humanity.

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resolution any real value. By the time the Draft Code of Offences Against the Peace and Security of Mankind was adopted by the ILC in 1996 it had already been overtaken in major respects by other conventions: the Genocide Convention of 1948; the Geneva Conventions of 1949 and their Additional Protocols of 1977; and the Torture Convention of 1984. Instead of simplifying international law, the draft Code only further complicated it, and it was ultimately overtaken by the adoption of the Rome Statute in 1998 and subsequent creation of the International Criminal Court.

- A ban on the permanent basing of military forces in another country in the absence of a direct and imminent threat of military attack.
- Study of the circumstances under which a Chapter VII security guarantee might be made by the UN Security Council to a state subjected to direct attack across its borders by another state.
- New legal regimes for the protection of civilians from 'collateral damage' in limited or undeclared wars.

In the next twelve months, states and all interested parties must avoid the easy option of pretending that a UN-convened panel could ever have reached consensus on all of the threats and the appropriate responses to them. The tough questions and the politically difficult answers regarding reform of the international security order probably lie elsewhere than in such a report, even though the Panel's report does provide a great launch pad for a 'reformation' in that order. There is a need for massive mobilisation of specialists, NGOs and like-mined states that emulates the Ottawa process that led eventually to the banning of land mines.

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