War, Security, and Humanitarian Intervention in the United Nations Reform Agenda

Francesca Musiani

Abstract

Current and recent events are exposing open ends in the body of international law concerned with the use of force – as well as the deficiencies of the United Nations Security Council to respond to “new” security threats or effectively counter unilateralism.

This paper analyses the extent to which the recent proposals for United Nations reform have satisfactorily addressed the three following areas: the use of force in self-defence; the role of the Security Council in the collective security system; and finally, the newly developed concept of a “responsibility to protect” as the foundation of humanitarian intervention. Are changes in the legal framework regulating the use of force needed, and acknowledged in the UN reform agenda? Or are the existing provisions of the Charter sufficient to address the full range of threats to international peace and security?

The attempt to answer these questions will include an analysis of current and recent State practices, relevant international instruments, and proposals made in the context of UN reform before and during 2005 World Summit.

The military actions undertaken by Russia and Georgia in the disputed border regions of Ossetia and Abkhazia in August 2008 constitute the most recent, eloquent example of the dilemmas and open ends included in the body of international law covering the issues of war, collective security and intervention – the use of force in international relations. They also bring to the spotlight, more vividly than ever, the deficiencies and inabilities of the United Nations Security Council to live up to its mandate, i.e. “to maintain [...] international peace and security” in accordance with the principles and purposes that led sixty years ago to the establishment of the United Nations, so that generations to come could be spared the “scourge of war” (UN Charter Art. 39 and Preamble).

The situation in Georgia should not, however, overshadow the rest of recent history and the many warnings it has provided in the same respects. In fact, the fracture of early 2003 between the permanent members of the Security Council concerning the opportunity of an armed intervention against Iraq had already underlined dramatically – even more given its well-known consequences – the long-term deficiencies of the security system created in 1945 and no longer up to pace with the changed balances in international relations (Slaughter 2005).[1] The evidence of this led then Secretary-General Kofi Annan, in September of the same year, to proclaim in front of the 58th General Assembly (GA) the compelling necessity of a reform of the United Nations, to involve both the structure of the organization (one of the primary objectives being a revision of the composition of the Security Council) and rules of conduct of member states and the organization itself. Such an approach would have enabled the system to respond adequately and promptly to “new” threats to security – international terrorism, nuclear weapons proliferation, the chronic poverty of some areas of the world that favours the spreading of terrorist activities and organized...
crime – and, last but not least, would have more effectively fought the evident drift towards unilateralism.

To these aims, the SG selected in November 2003 a High Level Panel on Threats, Challenges and Change, with the mandate to delve into the most problematic aspects of current international relations and formulate recommendations for the reform of the UN system, to be discussed by member states at the World Summit scheduled for 2005. The High Level Panel report, meaningfully entitled *A More Secure World: Our Shared Responsibility*, appeared in 2004; taking it as a starting point for his reflections, Mr. Annan produced in 2005 his personal contribution to the identification of reform lines within the UN, in a report entitled *In Larger Freedom*. On these foundations opened the World Summit in September 2005, whose conclusions are expressed in GA Resolution 60/1, also called World Summit Outcome Document (WSOD).

Of primary interest to this paper are the paragraphs of these documents related to collective security and the principle of prohibition of the use of force, on which the UN was originally built and constitutes for the majority of states – despite repeated violations – the cornerstone of international relations in the post-World War II era. Unfortunately, the WSOD has been far less successful in this regard than public opinion expected and previous objectives stated; in particular, some interesting yet controversial proposals coming from both the Panel’s and the SG’s reports, drawing directly from current events, actions and positions, have been completely disregarded. The part of the WSOD concerning collective security and peace seems to focus on quite traditional positions, recalling word-to-word the aims of the UN as originally stated in the Preamble and Article 1 of the Charter and reaffirming the current system’s suitability to face its challenges; in short, what lacks is precisely the urgent, collective and firm response to those challenges that was the aim of the 60th Anniversary Summit.

In the area of collective security and peace, as mentioned, the WSOD does not acknowledge the need for modifications to the procedures and rules of conduct as they were originated in the Charter and subsequently reaffirmed by GA resolutions. Member states reaffirm the interdependence between development, human rights and international peace and security; their commitment to multilateralism and to the exclusive authority of the SC in the adoption of coercive measures to maintain and re-establish peace and security – all this with the conviction that “the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security” (WSOD par. 79).

The remainder of this paper will address the extent to which this is true, with particular attention to the areas of self-defence, SC intervention, and humanitarian intervention, analyzing current and recent state practice, relevant international instruments, and proposals made in the context on UN reform before the Summit outcome.

**The Use of Force in Self-Defence**

The notion of lawful self-defence included in Article 51 of the Charter is the only legal instrument available to states in order to justify use of force on their part. Thus, states have often tried to manipulate its meaning by ascribing to it measures that were clearly not an answer to an armed attack (such as raids in territories of unconsenting third states to save nationals, or attack alleged terrorist camps or armed groups headquarters). Article 51 has often been cited in alleged response to still-potential threats, as in the 1981 Israeli attack against a nuclear plant on Iraqi territory. These allegations have never found support in the SC and the preventive attack by Israel was unanimously condemned by the Council, including the US, as a flagrant violation of the Charter and of international norms of conduct (SC Resolution 487, 19 June 1981).

A more consistent dilemma regarding the interpretation of Article 51 is the possibility of resorting to self-defence to repel an imminent attack (e.g. by repelling the enemy before the crossing of an international border, or destroying a launch base before missiles are launched against a state). This is to be considered different than the previous Israeli example and even from the “Bush Doctrine” of pre-emptive self-defence (Langille 2003); the key is to distinguish an imminent attack from a possible/hypothetical one. This interpretation of Article 51 and the underlying norm of customary international law (CIL) is traditionally
sustained by Israel and Anglo-Saxon countries and scholars, drawing from the Caroline case (Harris 1998, 894-895). On this point, the 2004 High Level Panel report contains a precise position, awarding the right to engage in military action as self-defence to the state, within the proportionality and necessity requirements, when the state is confronted by an imminent threat (par. 188). To avoid any confusion with the so-called Bush Doctrine, explicitly rejected by the Report (parr. 189-190), the document further states that for the action to be legitimate, it is necessary for the threat to be actually imminent and not merely likely (an example of the latter would be a State developing a nuclear arsenal with possible hostile intent). In the latter hypothesis (an anticipatory rather than a pre-emptive self-defence), the state that deems it necessary to use force should ask for a SC authorization (parr. 190-191).

Despite affirming the lack of necessity to re-write or radically reinterpret Article 51, the Panel reaches conclusions that are not in continuity with most SC practice and part of the ICJ’s jurisprudence (e.g., in the Advisory Opinion on the Threat or Use of Nuclear Weapons; ICJ Reports 1996, 226). In a recent decision (Democratic Republic of Congo v. Uganda), the ICJ has also clarified a controversial point: the fact that a state can claim self-defence exclusively in response to an armed attack made by another state, or clearly referable to a state (ICJ 2005, par. 144).

The SG report, in turn, comes to the conclusion that Article 51, as formulated in the Charter, is fully appropriate in cases of armed response to imminent threats; the use of force as pre-emptive defence against “external or internal” threats to international peace and security is to be considered, on the other hand, as the SC’s exclusive competence (Annan 2005, parr. 122-124). “Pre-emptive” self-defence is thus subordinated to an express authorization of the SC, as the interpreter and “voice” of the international community’s collective security needs (id., parr. 125-126). To make the actions of the SC transparent and accountable (thereby “reassuring” states in light of the recent controversy of the body’s inaction in the Iraq case) the two documents suggest five criteria to be fulfilled before use of force is authorized: the gravity of the threat for state security; the proportionality between means and aim; the exclusive aim to neutralize the threat; the absence of peaceful alternatives; a comparative evaluation of the consequences in light of the initiative’s likely success and the risk of producing no major damage than the one caused by inaction (Panel 2004, par. 208). These criteria – aimed, on one hand, at the widest possible support to the SC decision, and on the other, at minimizing the risk of unilateral intervention – should have been precisely stated in SC and GA resolutions (id., par. 208); the SG moves in the same direction, attributing the duty to outline the conditions for authorization exclusively to the SC, in the framework of a broader resolution on the use of force (Annan 2005, par. 126).

Without over-emphasizing the proposed solutions – which are not sufficient to change the Charter provisions nor to formally bind the SC to a precise interpretation – it is to be underlined that they constitute an attempt to refer a controversial aspect of current state practice to the existing rule of law, without compromising balances between the UN and its member states in the use of force framework.

In the WSOD, no trace is to be found of the related considerations developed in previous Reform documents, it is, rather, a simple and vague re-affirmation of a commitment to multilateralism and to the main responsibility of the SC in deciding on coercive measures, and a reiteration of the multilateral system’s self-sufficiency in face of new threats (WSOD 2005, par. 79). In the absence of a specific position on the interpretation of Article 51 as outlined in the previous two documents, the resolution seems to affirm, at least, the lack of *opinio juris* on the legitimacy of pre-emptive self-defence (as defined in the previous documents).

**The Role of the Security Council in the Collective Security System**

The only authorization of the use of force by the SC included in the Charter is in favour of regional organizations and agreements, for the development of coercive actions included in their Statutes (UN Charter, Art. 53). SC practice, instead, has seen the authorization to use armed force (awarded to member states, individually or within regional member states, and even to *ad hoc* coalitions) for peace-enforcement,
peace-keeping and peace-building operations. In this sector, the international community has recently witnessed a significant capacity of autonomous intervention by regional organizations, established in specific provisions of the respective Statutes and supported by organizational agreement between member states. According to the powers endowed to the organization by its statute, these can be operations conducted with the consent of the state subject to intervention (Charter, Art. 52), or actual coercive operations implying SC authorization (id., Art. 53).

According to the Charter's original design, regional organizations should request SC authorization for those operations that require use of force in a coercive way; thus, traditional peace-keeping initiatives (as in consensual, impartial and not requiring use of force) should fall under the self-determination of the regional organization. In practice, however, the border line between peace-keeping and peace-enforcement is not clearly traceable (in particular as regards the level of armed force used); missions often change in the operational phase, to acknowledge current events and developments – as the UN mission in Somalia showed. Recent events underline how the UN is often, in fact, running after interventions initiated by regional organizations, especially those endowed with a normative framework and permanent or semi-permanent operational resources that allow quick decisions and equally rapid action (e.g. ECOWAS, whose actions in Sierra Leone and Liberia were formally supported by the SC at a later stage only, with an “ex post” authorization and operational collaboration).

In an attempt to refer the different interventions for peace to a comprehensive framework, the High Level Panel recommended that all the regional operations of peace-keeping (including the ones implying use of force), be authorized by the SC with a proper mandate (Panel 2004, parr. 212-213). The WSOD, on the other hand, generally emphasizes the meaningful contribution given by regional organizations to the cause of international peace and security, and supports the development of appropriate military capacity by such organizations, suitable for a quick response, while encouraging the establishment of agreements between the UN and regional bodies for a permanent coordination in the sector, including such contingents in the stand-by arrangements system (WSOD 2005, parr. 92-93 and 170). The document seems to reflect the de facto relationship that recently developed between the UN and regional bodies: one of complementarity, in which the UN holds a coordination role, rather than imposing a subordination on regional organs at outlined in Chapter VIII of the Charter.

In the WSOD, the GA does not acknowledge, at least explicitly, the indications of the Panel regarding the SC’s commitment to the support of regional operations (Panel 2004, par. 86), nor does it incorporate the SG’s recommendation for the creation of an integrated resources system to be employed in joint UN-regional organ(s) operations (Annan 2005, par. 112). Rather, it solicits, in much more general terms, a reinforcement of the cooperation and consultation mechanisms between the UN and the concerned regional and sub-regional mechanisms, and encourages formal cooperation agreements between secretariats. Particular attention is given to the strategic and financial strengthening of the intervention capacity of the African Union in order to improve the stability and security of the continent, in accordance with a recommendation by the Panel (par. 272). Inversely, the Panel’s proposals for the development of effective mechanisms for quick deployment of peace-keeping forces, and on the identification of criteria and resources to jointly finance and train these forces, are not considered. Similarly, the proposal to strengthen, with proper SC authorization, the capacity of peace-keeping missions to face every varying circumstance with an equally varying amount of force (Panel 2004, parr. 212-219), is neglected.

It is also worth noting that the objective of creating a multi-task, institutional body to support the phase of post-conflict reconstruction is indicated in both reports as one of the main priorities within the UN Reform. The Peace-building Commission, established in 2005 and created in 2006, is called upon to act “institutionally” in those contexts where the UN has already acted in the past, with mixed outcomes – Kosovo, East Timor, Sierra Leone – and incorporating, under a Security Council mandate, different kinds of contributions and competences made available by states and international organizations.

**Humanitarian Intervention: A Responsibility to Protect?**
Fostered by a relevant, albeit limited, state practice, and by a widespread scholarly debate, the question of humanitarian intervention through the use of force is currently in the spotlight. Is it legitimate for states, regional organizations or ad hoc coalitions to use force as a response to humanitarian emergencies, in situations where local authorities are unable or unwilling to act?

This has been the subject of an extensive debate in recent times,[6] and has been NATO’s “legal” justification for the Kosovo intervention in 1999, as is widely known (Legault 2006). However, even before that, there had been military interventions unauthorized by the SC for allegedly similar purposes, such as the Provide Comfort operation in Iraq for the creation, in the northern part of the country, of a humanitarian corridor for Kurds.[7] Moreover, throughout the Nineties, many of the interventions conducted under a Chapter VII mandate, or a specific SC authorization, have dealt with situations of grave humanitarian emergency: Somalia, Rwanda, former Yugoslavia, etc. This has been recently acknowledged normatively, in the Constitutive Act of the African Union – which, beyond the traditional right to territorial sovereignty, outlines the AU’s right to intervene coercively in the territory of a Member state in case of grave events such as a genocide, war crimes, or crimes against humanity (Art. 4h).

Considering the high level of uncertainty that characterizes the normative framework related to the use of force and humanitarian intervention – and, on the other hand, the present need of clarity on the subject – it would have been appropriate for the UN Reform documents to delve as much as possible into the conditions, if any, that might legitimate the use of force for humanitarian purpose, or at least make it more compatible with the prohibition of unilateral resort to force. Such an examination and eventual recommendations appear even more appropriate in light of the possibility of future developments of “hard” international law instruments on the subject.

The WSOD fails to achieve this important objective, despite the High Level Panel making explicit reference to it as an issue worth of special attention. In the Panel’s report, the legitimacy of such interventions is discussed within the section dedicated to collective security and use of force. In this section, the circumstances in which the effective safeguard of collective security might yield to the use of armed force are identified as: ongoing or immediate armed attack; threat imposed by a state to other(s) outside of its own borders; and, interestingly, the “internal” threat aimed at the population of a state, faced with genocide, ethnic cleansing or large-scale human rights violation (Panel 2004, parr. 199-201). The Panel faces the question of whether a right or maybe even a duty exists for states to intervene in such cases, and its response is that ever since the adoption of the 1951 Convention qualifying genocide as an international crime for which there is a commitment by states to ensure adequate prevention and repression, a CIL norm has gradually formed that deals with the common, collective responsibility of states to protect civil populations in circumstances where local governmental authorities are unable or unwilling to do so – a responsibility that may include, as a last resort, the use of force (id., par. 200).

In situations such as Somalia, Bosnia and Herzegovina, Rwanda, or recently Darfur, the principle of non-intervention should yield, in the Panel’s vision, to an external action inspired by the responsibility to protect involving not only the population of the specific state, but the whole international community (id., par. 201). The exercise of the collective responsibility to protect, the Panel underlines, must fit within the collective security framework disciplined by the SC, that will need to examine, prior to its authorization to use force, the extent to which a threat to international peace and security exists (UN Charter, Art. 39), which is “not especially difficult when breaches of international law are involved” (Panel 2004, par. 202).

Despite the fact that the consequences of the “emerging norm of a collective international responsibility to protect” (Panel 2004, par. 203) are in fact referred to in the provisions and procedures of the Charter, in particular Chapter VII, this is not just a mere reproduction of the founding document. Chapter VII enters into play in the Panel’s considerations only to allow the SC, within the actual terms of the Charter, to undertake legitimately the exercise of such responsibility to protect, “in pursuit of the emerging norm” (Panel 2004, par. 202).
In other terms, as it clearly emerges from the relevant paragraphs of the report, the Panel’s argument is that the duty to protect civilian populations in case of unable or unwilling government is applicable to states as the result of an emerging CIL norm, independent from the United Nations Charter. What is necessary is to verify if such responsibility – pertaining to every state, but to be exercised collectively – can be carried out within the existing multilateral cooperation framework. The Panel answers this question affirmatively, concluding that the language of Chapter VII is so broad that situations of emergency not explicitly included in the Charter can still fall under the umbrella of the Article 39 requirements for collective action. This does not prevent the Panel from outlining five “legitimacy conditions” the SC should take into account before awarding authorization. Such pre-determined (and as such, relatively objective) parameters are meant not only to increase the transparency and accountability of the SC (countering the “democracy deficit” label it often faces), but, first and foremost – and despite their evaluation on a case-by-case basis remaining at least partially subjective – they mean to avoid leaving to the exclusive discretion of the body what is in fact the accomplishment or exercise of a collective responsibility referable to an emerging CIL norm (Panel 2004, parr. 204-209).

The WSOD document underplays this perspective completely, both in content and in terminology, by reproducing only what is formally contained in the Charter. First, a significant change of perspective with respect to the previous documents is to be found in the treatment of the “responsibility to protect” concept, that is located in the section dedicated to human rights (IV), and not in the peace and collective security section (III). Second, while citing the concept as developed by the Panel, the WSOD refers to its other, and way more traditional, consequences. The responsibility to protect, in all its facets including prevention, belongs to the “individual” state; the international community should, “as appropriate”, encourage and help the state to carry this individual responsibility, using all peaceful means in conformity with Chapters VI and VIII of the Charter, and support the establishment by the UN of a mechanism of monitoring and early warning (WSOD 2005, par. 138). States declare themselves available (but not committed) to develop an eventual collective action through the SC on a case-by-case basis, cooperating with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities’ protection a failure (id., par. 139). States also “intend to commit”, to helping other states build internal protection capacities – always “as necessary and appropriate” – and underline the necessity for the GA to continue considering the responsibility to protect concept “bearing in mind the principles of the Charter and international law” (id., par. 139).

Beyond this brief reference to international law, the significance of which is not entirely clear, the resolution does not bear any trace of the “emerging norm” to which the possible use of force in situations of humanitarian emergencies is linked in the Panel’s and the SG’s reports. The WSOD also does not contain any reference to the suggestions made in previous documents, to take into account the developments of international law in the sector of the use of force, and their repercussions on the international community. Despite past examples of UN resolutions that become more inconsistent as they become longer, one needs to note with disappointment the banality of the response given by the gathering of all the governments of the planet, after years of reflections and analyses at the highest levels, to a question that has not only been passionately debated by international law scholars, but is constantly put in the spotlight by current events. The silence of the WSOD on other aspects of contemporary use of force, such as so-called pre-emptive self-defence, might be read in a positive light as the expression of the will of states not to endorse in any way the current “centrifugal” tendencies of some states with respect to Article 2(4). However, the same cannot be said for a hypothesis that is linked to the recognition of core values of the international community – values that have been acknowledged by international law only after the adoption of the UN Charter. The silence, or at best opaque response, of the Summit is highly problematic, when one thinks of the humanitarian catastrophes that have taken place in recent years with the indifference of the international community, as well as, the unilateral interventions with supposedly humanitarian aims that states have developed, or plan to do so, outside the multilateral system.
Conclusions

The analysis of the High Level Panel and Secretary-General’s reports, compared to the overall low profile of the World Summit Outcome Document and its fundamental lack of answers in a field of crucial importance in international relations as the use of force, lead to some conclusive considerations.

Firstly, the WSOD embodies a worrying lack of ideas and capacity to adopt a general perspective able to include the complex problems of security that the world is currently facing, interlinked with economy and human rights.

Secondly, the document quite clearly outlines the absence of an international capacity to gather consensus around a plan that, not penalizing national interests, is nonetheless able to integrate them in a more balanced and stable system of relationships between states. In the absence of this capacity, it becomes more likely that the notion of world leadership keeps on being considered as the capacity to impose, in the short-term, solutions inspired to national interest, while neglecting the possible consequences at a broader level. This is a notion that has prevailed in some recent and controversial cases, with well-known consequences.

The United Nations was born with the aim of building the normative and institutional architecture of a new, comprehensive system of international relations – encompassing economy, politics, law – aimed at ensuring that long-term balance of interests and forces that would ultimately avoid a new planetary conflict. Many consider this original plan to be, at least partially, a failure. However, this is probably due, in turn, to the failure to properly implement what is contained in the formal provisions of the UN Charter in the field of collective security (Arts. 43-50), and what this implies for economic and social cooperation.

At the same time, after sixty years the original design has been deemed, rightly or wrongly, “sufficient to address the full range of threats to international peace and security” (WSOD 2005, par. 79). While reading the WSOD, the question that arises does not only concern the will of states to be a part of the multilateral system, recently declared even by the most convinced promoters of unilateralism,[8] but rather the capacity of governments worldwide to set up appropriate shared strategies – shared in their foundations, objectives and resources – to face the challenges of the new millennium. If this capacity lacks, unilateral action may constitute the only way to achieve results -- as partial, incomplete and superficial as they may be – to the detriment of a more serious search for solutions to the complex challenges of today’s world.

Bibliography


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Webography

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Footnotes

[1] The first relevant example is likely the military intervention of 1999 in Serbia and Montenegro, also conducted outside the multilateral cooperation mechanism.

[2] In turn, many regional organizations and agreements (e.g. the African Union) include a number of conflict resolution possibilities that range from precautionary diplomacy to coercive interventions.


First outlined by the International Commission on Intervention and State Sovereignty (ICISS) in the 2001 report “The Responsibility to Protect”, the concept (often shortened to R2P) states that if a particular state is unwilling or unable to carry out its responsibility to prevent abuses such as genocide, massive killings and other massive human rights violations, that responsibility must be transferred to the international community, that will attempt to solve the issue via peaceful means and as a last resort, through the use of military force. This principle, called by many of its supporters a doctrine in its own right, is fostered a number of factors and dynamics such as globalization and the increased interconnectedness of States, the recognition of human rights, the augmentation of intra-state conflicts and the shift of focus from state sovereignty to state responsibility vis-à-vis its citizens. See International Commission on Intervention and State Sovereignty (ICISS) (2001), *The Responsibility to Protect*.


About the Author

Francesca Musiani has recently become a PhD candidate in Socio-Economics of Innovation at the Centre de Sociologie de l’Innovation of the Ecole des Mines in Paris, France. She holds two Master’s degrees, in International Law and the Settlement of Disputes from the UN University for Peace, Costa Rica and in Organizational Communication from the University of Padova, Italy. Her research interests include internet governance, multi-stakeholder decision-making processes, ICTs for development, new rights in the digital era, and the effectiveness and efficiency of international organizations.