

CURRENT LEGAL DEVELOPMENTS

The High Level Panel Report on Threats, Challenges and Change and the Future Role of the United Nations Security Council

KENNETH M. MANUSAMA*

Abstract

The UN High Level Panel Report, published in December, takes a comprehensive approach and is very frank in analysing the threats to international peace and security and their rootcauses. Its analysis and recommendations range from economic and social challenges to the use of force. This article discusses in particular the role and tasks that the High Level Panel envisages for the Security Council in light of the threats and challenges it identified. With the events of 11 September 2001 as the pivotal moment in history, the Panel nevertheless does not recommend or insist on fundamental changes of international legal paradigms, including in the (collective) use of force. The Panel's focus on reform of Security Council composition instead of the system that it operates neglects the problems with the latter and the impossibility of achieving the former.

Key words

High Level Panel; economic and social threats; Security Council; terrorism; collective security; weapons of mass destruction

I. INTRODUCTION

On 2 December 2004, the eagerly awaited Report of the High-level Panel on Threats, Challenges and Change was released.¹ Commissioned by the UN Secretary-General in September 2003, the Panel was mandated not only to outline the current challenges and threats to international peace and security, but also to indicate to what extent the current framework for collective security and the entire UN system will be capable of meeting those challenges and removing those threats to the international community. The Report, entitled *A More Secure World: Our Shared Responsibility*, is remarkably frank in its approach. The Report highlights all the causes and consequences of the threats and challenges to international peace and security as well as the failures of the international community and international institutions to respond effectively, and does so without trying to be diplomatic or to conceal the

* Adjunct lecturer in International Law at the Center for Global Affairs, New York University.

1. *A More Secure World: Our Shared Responsibility – Report of the High-level Panel on Threats, Challenges and Change*, UN Doc. A/59/565 (2004) (hereinafter Report).

identity of those responsible. More importantly, the analysis on the causes of the ills of the world provided by the Panel is comprehensive, integrated and methodical. For all the progress it makes with respect to earlier reports, declarations and goals,² however, the Panel is hindered by its own acknowledgement of reality and by the tenaciousness of the issues. As the Report outlines, defines and analyses all the possible threats and challenges to the world, the lack of imagination in many of the proposals for legal, political and institutional change exposes the real issues that stand in the way of genuine progress and genuine international peace and security, namely the lack of political will and global consensus.

The Report's shortcomings are most apparent in the proposals of the Panel regarding the Security Council, and the question when and how armed force should be used by the international community. Moreover, the Report envisages a central role for the Security Council in a significant number of its proposals and recommendations, as the primary co-ordinating and coercing organ of the international community. This article outlines and comments briefly on the major findings of the Panel relating to the threats and challenges to the international community and the role of the Security Council.

2. PREMISES AND BENCHMARKS FOR A REALISTIC SYSTEM OF COLLECTIVE SECURITY

As stated, the Report currently under review is quite comprehensive in its approach. In Part One, it recalls the differences between the world of 1945 and that of 2005, as well as the evolution of international relations and the United Nations in the years between. The much heralded end of the Cold War is recalled and the short-lived optimism about the functioning of, inter alia, the Security Council following it. Straightforwardly, the Panel recalls that 'the United Nations had exchanged the shackles of the Cold War for the straitjacket of Member State complacency and great Power indifference'.³ It becomes clear from the Report that the terrorist attacks of 11 September 2001 are considered a pivotal point in the Panel's evaluation of the current state of world affairs. While, on the one hand, the international response to the attacks provided 'a glimpse of the potential for renewed collective security',⁴ the attacks also revealed that the international community 'failed to keep pace with changes in the nature of threats'.⁵ Thus, while it may be acknowledged that '9/11' constitutes a watershed moment in history in a number of ways, 9/11 nonetheless failed to bring agreement to long outstanding issues, such as the legal definition of terrorism, nuclear non-proliferation and Security Council reform. Instead, as the

2. See, e.g., *Agenda for Peace*, UN Doc. A/47/277-S/24111 (1992); *Supplement to an Agenda for Peace*, UN Doc. S/1995/1 (1995); *Agenda for Democratization – Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies*, UN Doc. A/51/761 (1996); *We the People: The Role of the United Nations in the 21st Century, Report of the Secretary-General* ('Millennium Report'), UN Doc. A/54/2000 (2000).

3. See Report, *supra* note 1, para. 13.

4. *Ibid.*, para. 14.

5. *Ibid.*, para. 16.

Report goes on to analyse, the events of 9/11 have inscribed only new items on the agenda of the international community.

Before outlining exactly what threats and challenges face us, the Report goes on to discuss briefly the nature of the threats.⁶ The elements comprising the nature of the threats and challenges seem obvious and have been acknowledged for quite some time. Yet, their restatement by this notable Panel and the comprehensiveness of that restatement in substance gives them added weight and authority. First, the notion that the existence of a threat anywhere has transboundary consequences is illustrated not only by the HIV/AIDS pandemic and SARS, but also by the economic consequences of the 9/11 terrorist attacks.⁷ Second, 'No State, no matter how powerful, can by its own efforts alone make itself invulnerable to today's threats.'⁸ No matter how uninspired it may sound, the repeated call for international co-operation, inter alia, through international law, should be heard and received as more urgent. Third, the elusive concept of sovereignty is considered instrumental through emphasis on the duties and responsibility of sovereign states towards their citizens and the world at large: 'The Charter of the United Nations seeks to protect all States, not because they are intrinsically good but because they are necessary to achieve the dignity, justice, worth and safety of their citizens.'⁹ The final preliminary step that is taken by the Panel is outlining 'the elements of a credible collective security system', i.e. effectiveness, efficiency and equity.¹⁰ These elements also seem obvious, cumbersome and widely known. However, their rendition serves more as an indictment of past state practice in the context of the collective security system. The Panel clearly reminds us that no collective security institution can act alone, but is dependent on co-operation with other entities, in particular states. 'Collective action often fails, sometimes dramatically so',¹¹ it notes, and cites in particular cases involving massive human rights abuses and even genocide. Effectiveness of any collective security system or institution depends on the comprehensive nature of the approach and the range of actors involved. In the Report, the Panel is direct in lamenting the lack of efficiency in collective security. It points to 'countless ill-coordinated and overlapping bilateral and United Nations programmes', inter-agency competition and a simple 'unwillingness to get serious about preventing deadly violence'. With respect to equity, the Panel does not pull any punches either, as it cites the once solitary example of international and institutional paralysis, Rwanda, which is, however, joined by the response to the situation in Darfur, Sudan:¹² '[W]e have been struck', the Panel exclaims, 'by the glacial speed at which our institutions have responded to massive human rights violations in Darfur, Sudan'.¹³ The conclusion

6. *Ibid.*, paras. 17–31.

7. *Ibid.*, paras. 17–23. The Panel notes that 9/11 increased the number of people living in poverty by ten million, and the total cost to the world economy probably exceeded \$80 billion. Moreover, the Report also mentions in the relevant paragraphs issues such as terrorism, poverty and environmental degradation.

8. *Ibid.*, para. 24.

9. *Ibid.*, para. 30.

10. *Ibid.*, paras. 31–43.

11. *Ibid.*, para. 35.

12. *Ibid.*, paras. 40–1.

13. *Ibid.*, para. 42.

of the Panel as to the elements of a viable collective security system reveals where the directness and frankness of the Report comes from, as it cynically states:

When the institutions of collective security respond in an ineffective and inequitable manner, they reveal a much deeper truth about which threats matter. Our institutions of collective security must not just assert that a threat to one is truly a threat to all, but perform accordingly.¹⁴

3. THREATS TO THE INTERNATIONAL COMMUNITY

‘What we seek to protect reflects what we value’, says the Report,¹⁵ and the protection of community values is, indeed, the core purpose of any system of collective security.¹⁶ Thus, depending on the developments in international relations, the purposes and goals of the system may shift. The threats and challenges outlined by the Panel need to reflect values that are widely accepted in order to become a matter with which the collective security system must be concerned. The threats and challenges put forward by the Panel in the context of a collective security system are a departure from the traditional view on collective security, as the Panel uses a decidedly broad definition of a threat to international security: ‘Any event or process that leads to large-scale death or lessening of life chances and undermines states as the basic unit of the international system is a threat to international security.’¹⁷

3.1. Economic and social threats to the international community

Accordingly, the Report first considers poverty, infectious disease and environmental degradation as threats to international security. The integrated discussion of these matters is in itself not revolutionary, but, again, the language with which the Panel scolds the international community for not adequately combating these threats is remarkable. In particular, the response to the HIV/AIDS pandemic is ‘shamefully ill-resourced’ and the fact that Africa ‘has borne the brunt of the HIV/AIDS pandemic raises the troubling question of whether the international response would have been so slow if the disease had reduced life expectancy by 30 years in non-African countries’.¹⁸

Moreover, the Panel considers that current global structures ‘are woefully inadequate for the challenges ahead’.¹⁹ At the same time, however, it does not propose radical new initiatives besides encouraging greater efforts in current initiatives and increases in resources and capacities.²⁰ With respect to the Security Council, the Panel urges it to host a second special session on HIV/AIDS ‘as a threat to international

14. Ibid., para. 43.

15. Ibid., para. 30.

16. See, e.g., D. Sarooshi, *The United Nations and the Development of Collective Security – The Delegation by the UN Security Council of its Chapter VII Powers* (1998), at 5; K. Herndl, ‘Reflections on the role, functions and procedures of the Security Council’, (1987) 6 *Recueil des Cours* 206, at 297; N. D. White and Ö. Ülgen, ‘The Security Council and the Decentralized Military Option: Constitutionality and Function’, (1997) 94 *NILR* 378, at 382.

17. See Report, *supra* note 1, at 25.

18. Ibid., para. 48.

19. Ibid., para. 56.

20. Ibid., paras. 59–73.

peace and security'.²¹ Referring to the Council's discussion of this health crisis in 2000,²² it appears to want to go further than Security Council members were willing to go at the time, because no threat to peace in the sense of Article 39 was found at that first meeting.²³ Nevertheless, there is indeed a trend in Security Council practice to consider economic and social threats a threat to international security, and as root causes to threats to peace.²⁴ Another noticeable feature is the explicit mention and endorsement of the Kyoto Protocol, as well as the problems associated with it, and the manner in which the Panel looks to the future. If viewed in the context of the applied definition of international security, the Panel's integrated approach to these threats is reminiscent of the concept of human security, which is now a mainstay in security thinking.²⁵

3.2. Inter-state and intra-state conflict, and conflict prevention

The second threat identified by the Report is more conventional and deals with conflicts between and within states. It warns that several inter-state conflicts remain unresolved and cites the uncontroversial ills of, inter alia, the Security Council in failing to effectively prevent or halt such conflicts. While the Council increased its activity and the range of situations in which it became involved, the Security Council failed to act effectively. The Panel uses the imposition, yet lack of enforcement, of (economic) sanctions for a variety of reasons to illustrate the point. In addition, the Report recounts issues of selectivity, i.e. inaction by the Council in the face of obvious and objective necessity, as well as the lack of effective enforcement of resolutions. In a separate section, the Report discusses the role of sanctions, albeit rather cursorily and without acknowledging the development and refinement of sanction regimes in the 1990s. The Panel recommends, inter alia, that the Security Council improve a number of existing mechanisms, such as the sanction committees.²⁶ On the other hand, however, the implementation of one Panel recommendation would give the Council a virtual judicial authority. 'Where sanctions involve lists of individuals or entities', the Panel notes, 'sanctions committees should establish procedures to review the cases of those claiming to have been incorrectly placed or retained on such lists'.²⁷ It seems to be a reference to issues encountered in the implementation of anti-terrorism resolutions that involved sanctions, in particular against the Al Qaeda network.²⁸

The conflict situations in the 1990s have been often characterized by their internal nature and gross human rights violations, and the Panel's separate treatment of them is justified. Moreover, it highlights once again in the relevant paragraphs the

21. *Ibid.*, para. 67.

22. UN Doc. S/PV.4087 (2000).

23. UN Doc. S/RES/1308 (2000).

24. See, e.g., P. Wallensteen and P. Johansson, 'Security Council Decisions in Perspective', in D. M. Malone (ed.), *The UN Security Council – From the Cold War to the 21st Century* (2004), at 28.

25. *Ibid.*, at 28.

26. See Report, *supra* note 1, paras. 180–1.

27. *Ibid.*, para. 182.

28. UN Doc. S/RES/1267 (1999).

failures to prevent or combat effectively ethnic cleansing and genocide.²⁹ Most of the recommendations rightfully try to target underlying causes, including the scarcity of natural resources such as water,³⁰ violations of minority rights, and the proliferation of small arms and light weapons.³¹ Moreover, the Panel takes advantage of all means at the disposal of the Security Council by even advocating that the Council avail itself of its authority to refer cases to the International Criminal Court,³² as provided by the Rome Statute of the Court.³³ On the other hand, the Panel appears not to envisage a role for the Security Council in preventive diplomacy and mediation, with the sole exception of preventive deployment of UN peace-keepers, and instead to rely on the Secretary-General and the Secretariat for such efforts,³⁴ as other reports have in the past.

3.3. Weapons of mass destruction and disarmament

An increased sense of urgency has been in place with respect to weapons of mass destruction (WMD), i.e. nuclear, radiological, chemical and biological weapons, since the terrorist attacks of 11 September 2001, as these events revealed the extent to which terrorists will go to further their aim. The Panel acknowledges the nexus between terrorism and WMD directly in a separate paragraph,³⁵ and the combination of terrorist intent and such weapons has put concerns about the non-proliferation of nuclear weapons centre stage. Moreover, international law and the Security Council are also put centre stage in order to make the current non-proliferation mechanisms more effective. The Report chronicles with statistics the effectiveness of the Non-Proliferation Treaty (NPT) and the International Atomic Energy Agency (IAEA). While the NPT and IAEA mechanisms have 'helped dramatically to slow the rate of proliferation',³⁶ they are now at risk because of lack of compliance, withdrawal from the NPT, 'a changing international security environment and the diffusion of technology'.³⁷ The Panel implicitly blames those states recognized under the NPT to have nuclear weapons by recommending that these states reaffirm their commitments under the NPT.³⁸

The recommendations of the Panel's attempt to ensure effective non-proliferation of nuclear weapons focus on existing obligations under NPT, enhancement of the IAEA role and mechanism, and a central co-ordinating as well as enforcement function for the Security Council. Nuclear weapon states, non-nuclear weapon states, as well as non-parties to the NPT are urged to (re)affirm commitment to the NPT and disarmament in general,³⁹ despite the acknowledgement of the right to

29. See Report, *supra* note 1, paras. 84–8.

30. For an enlightening and persuasive argument for greater protection of access and right to water, see, e.g., A. Hilderling, *International Law, Sustainable Development and Water Management* (2004).

31. See Report, *supra* note 1, paras. 91–7.

32. *Ibid.*, para. 90.

33. Rome Statute of the International Criminal Court, Art. 13(b).

34. See Report, *supra* note 1, paras. 101–3.

35. *Ibid.*, para. 146.

36. *Ibid.*, para. 110.

37. *Ibid.*, para. 111.

38. *Ibid.*, paras. 120–1.

39. *Ibid.*, paras. 120–1, 124.

use nuclear energy.⁴⁰ Moreover, it judges the IAEA inspection and verification rules to be inadequate, but nevertheless recommends that it take on additional tasks, i.e. 'to act as a guarantor for the supply of fissile material to civilian nuclear users'.⁴¹ The role given to the Security Council is extensive. First, the Panel considered it 'valuable if the Security Council explicitly pledged to take collective action in response to a nuclear attack or the threat of such attack on a non-nuclear-weapon State'.⁴² However, such a pledge would not constitute a subsequent obligation for the Council to act on it.⁴³ On the other hand, the inherent scale and effects of any nuclear attack should spur Security Council action, regardless of any prior pledge. Second, the Report envisages the Security Council as the ultimate organ of verification of state obligations under the IAEA rules and NPT. Again, the Panel urges the Council to act in cases of non-compliance with IAEA rules and standards.⁴⁴ Furthermore, while states have a right of withdrawal from the NPT, the Report recommends that the Security Council might mandate verification of such a withdrawal for its legality under the NPT, and ostensibly through coercive measures if necessary.⁴⁵

The Panel seeks to connect the existing and expanded mechanisms and standards with the efforts of the Security Council itself in arms control and disarmament, and thereby create a comprehensive and global verification and monitoring system. The Council has a clear role in disarmament and non-proliferation under Article 26 of the UN Charter. Its actual and clear, albeit rather unfortunate, involvement in disarmament was, of course, most visible in Iraq and Resolution 687 (1991).⁴⁶ Moreover, the Security Council declared in 1992 that the proliferation of all WMD constitutes a threat to international peace and security,⁴⁷ and reinforced the importance of the NPT in Resolution 984 (1995).⁴⁸ Even more recently, however, the Council greatly enhanced its own role in Resolution 1540 (2004),⁴⁹ which is an additional example of a resolution with legislative character, and which is arguably contrary to the nature and role of the Security Council.⁵⁰ Despite its general and legislative character, the resolution does not contradict the supremacy clause of Article 103 or override state obligations under the NPT. In paragraph 5, the Council states that 'none of the obligations set forth in this resolution shall be interpreted so as to conflict with or alter the rights and obligations of State Parties to the [treaties on WMD]'. Although the resolution does not in fact legislate, the Panel recognizes its

40. *Ibid.*, paras. 127–8.

41. *Ibid.*, paras. 129–30.

42. *Ibid.*, para. 122.

43. F. L. Kirgis, 'International Law and the Report of the High-Level U.N. Panel on Threats, Challenges and Change', *ASIL Insight*, December 2004, available at <http://www.asil.org>.

44. See Report, *supra* note 1, para. 129.

45. *Ibid.*, para. 134; Kirgis, *supra* note 43.

46. UN Doc. S/RES/687.

47. UN Doc. S/23500 (1992).

48. UN Doc. S/RES/984 (1995).

49. UN Doc. S/RES/1540 (2004).

50. Resolution 1540 (2004) is a 'legislative' resolution as in the case of Resolution 1373 (2001), which purport to impose general and binding obligations on states. See, e.g., P. Szasz, 'The Security Council starts legislating', (2002) 96 *AJIL* 901. For the argument that the Security Council is an executive organ and not authorized to enact resolutions of a legislative character, see, e.g., K. M. Manusama, *The Principle of Legality in the Law and Post-Cold War Practice of the United Nations Security Council* (forthcoming 2005).

importance and suggests that, on the basis of Resolution 1540 (2004), the Security Council offer ‘model legislation for security, tracking, criminalization and export controls, and by 2006 develop minimum standards for the United Nations Member State implementation.’⁵¹ Should the Council take up that challenge, it may be submitted that it would be legislating and, thus, acting outside the scope of its functions and powers. In a more practical and legal sense, the suggestion of the Panel that the Council establish a permanent liaison with the relevant organizations dealing with WMD illustrates the central role for the Security Council and the ambition of the Panel to outline a comprehensive framework for ensuring the non-proliferation of WMD. The Panel’s ambition is justified. Based on the experiences of the Security Council with respect to Iraq in which it was accompanied by the IAEA, and the record of compliance with the NPT, it may be stated that ‘the concept of WMD and ballistic missiles to carry them covers very different problems that require different solutions’.⁵² Thus an effective inspection regime must rely ‘also on a professional, intrusive, and rigorous mechanism’, and be accompanied by ‘ongoing and reliable monitoring’ as an ‘indispensable complementary tool’.⁵³ The bi-annual reporting by the IAEA and the OPCW suggested by the Panel may, therefore, be welcomed. In addition, the Panel’s endorsement of the initially controversial Proliferation Security Initiative (PSI) illustrates its commitment to encouraging state initiative and to elaborating the existing framework.⁵⁴ The PSI aims to ‘stop the flow of [WMD] at sea, in the air, or on land’,⁵⁵ by concluding agreements between states authorizing parties to the PSI to ‘stop, search, and if necessary, seize vessels and aircraft believed to be transporting [WMD]’.⁵⁶ While initially controversial, the PSI is consistent with reigning law of the sea and ‘involves nothing more than the consistent and rigorous application of existing rights under national and international law’, and can be supported by precedents with respect to other issues.⁵⁷

3.4. Terrorism

Whereas the Panel envisages a central role for the Security Council with respect to WMD, it sees a leading role for the Secretary-General in promoting a strategy against terrorism, probably because of the comprehensive nature of the strategy proposed. The Panel recognizes that also other factors than religious extremism and political discontent provide fertile soil for terrorism, such as poverty and foreign occupation. It is telling, and to be commended, that the Report first deals with the concerns expressed by many about the emerging and increasing tension between effective anti-terrorism measures, on the one hand, and civil liberties and human rights on the other.⁵⁸ In addition, it expressed the much-repeated truism that such a trend

51. See Report, *supra* note 1, para. 136.

52. P. Teixeira Da Silva, ‘Weapons of Mass Destruction: The Iraqi case’, in Malone, *supra* note 24, at 217.

53. *Ibid.*

54. See Report, *supra* note 1, para. 132.

55. See US State Department, at <http://www.state.gov/r/pa/ei/rls/24134.htm>.

56. See, e.g., M. Byers, ‘Policing the High Seas: The Proliferation Security Initiative’, (2004) 98 *AJIL* 526, at 528.

57. *Ibid.* Byers notes that the right to interdiction of vessels is recognized, *inter alia*, with respect to the slave trade and drug smugglers. *Ibid.*, at 534–6, 538–40.

58. See Report, *supra* note 1, paras. 147–8.

endangers those values that terrorists attack and anti-terrorism measures seek to protect.⁵⁹

The section on terrorism in the Report is focused on those issues that are directly related to terrorism and are most controversial.⁶⁰ First, it is somewhat surprising that the Panel endorsed the efforts of the Security Council in combating terrorism by, as the Report put it, ‘filling gaps in counter-terrorism strategy’, referring to the anti-terrorism treaties to date.⁶¹ Resolution 1373 (2001), indeed, imposed universal anti-terrorism obligations on states and can be dubbed a ‘legislative’ resolution.⁶² The measures imposed by the Council relate to the financing of terrorism, state involvement, national legislation to criminalize certain acts of terrorism and terrorists, and inter-state co-operation. While the Security Council has adopted such general and sweeping language before, it had never done so under Chapter VII, and thus in legally binding language.⁶³ Admittedly, however, Resolution 1373 does not seem to go beyond existing international instruments,⁶⁴ with the exception of paragraph 2(e) of the resolution, authorizing states to establish universal jurisdiction in their domestic law for most terrorist acts. Indeed, with the establishment of the Counter-terrorism Committee (CTC), the Security Council has become the international centre of gravity for combating terrorism.⁶⁵ Furthermore, the Panel seeks to enhance the role and the capacity of the CTC. More importantly, however, it suggests that the Security Council ‘should devise a schedule of predetermined sanctions for State non-compliance’.⁶⁶ It is unclear in what situations the Panel sees the Security Council using its coercive powers under Article 41, but some measure of proportionality should govern any enforcement measures.

The second issue that has persisted to hamper anti-terrorism efforts is the lack of agreement on the definition of terrorism, and which ‘undermines the normative and moral stance against terrorism’.⁶⁷ Again, the Panel is frank and seemingly on the mark in its analysis. It argues that the inclusion of a state’s use of armed force against civilians in a definition is a matter of contention, as is a purported right to resistance against foreign occupation. The Panel rightfully notes, however, that in the latter case, ‘there is nothing in the fact of occupation that justifies the targeting and killing of civilians’.⁶⁸ Moreover, it determines that a definition agreed upon by the General Assembly is a necessary prerequisite for any future effective anti-terrorism strategy. Although the Report stops just short of offering a definition itself, the elements it suggests are firmly based on international legal instruments, and attempt to address all concerns, and thus close all loopholes.⁶⁹ The Geneva Conventions and

59. *Ibid.*, para. 146.

60. See, e.g., E. C. Luck, ‘Tackling terrorism’, in Malone, *supra* note 24, at 85.

61. Report, *supra* note 1, para. 151.

62. See *supra* note 50.

63. See Szasz, *supra* note 50, at 902.

64. *Ibid.*, at 902–3.

65. E. Rosand, ‘Security Council Resolution 1373 (2001), the Counter-Terrorism Committee, and the Fight Against Terrorism’, (2003) 97 *AJIL* 333, at 333–4.

66. See Report, *supra* note 1, para. 156.

67. *Ibid.*, para. 159.

68. *Ibid.*, para. 160.

69. *Ibid.*, para. 164.

international criminal law are considered to cover all acts of terrorism in any armed conflict. The actual definition must also include the definitions of the 1999 Anti-Terrorism Convention and Security Council Resolution 1566 (2004). The inclusion of the former is to cover the financing of terrorism. As the Report does offer a 'description' of terrorism,⁷⁰ the question is how it compares to the definition of Security Council Resolution 1566 (2004)⁷¹ and the attempts to formulate a definition for a comprehensive anti-terrorism convention.⁷² A quick review of all these descriptions reveals that the Panel focuses on acts against or intentionally affecting individuals. It does not, as does the draft comprehensive convention, attempt to capture in one description terrorist acts against buildings, planes, and other objects, but rather refers to existing instruments with respect to such objects. Although the Security Council added that terrorist acts are not justifiable under any circumstance, the language of all three texts is often similar in a literal and figurative sense. The Panel only appears to have sought to limit the amount of language for states to argue about and close any loopholes by excluding terrorist acts in times of armed conflict, as these are covered by existing international instruments. In that sense, the Panel's recommendations are realistic and should be able to accelerate international efforts to conclude a comprehensive anti-terrorism treaty.

4. COLLECTIVE SECURITY AND THE USE OF FORCE

In light of the frankness and bluntness of the Panel in analysing the effectiveness and causes of ineffectiveness, the optimistic tone that it combines with such analysis in discerning new trends with respect to the Security Council and the collective use of force is also surprising. The Panel observes that 'the balance between unilateral use of force and collectively authorized force has shifted dramatically', in favour of the latter. Moreover, the Panel claims to see a 'recent expectation that the Security

70. The Report describes terrorism as 'any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act'.

71. Resolution 1566 (2004) describes terrorism as: 'criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature . . . ' UN Doc. S/RES/1566 (2004).

72. See, e.g., Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, UN Doc. A/58/37 (2003), Annex II, paras. 4–6: 'Any person commits an offence within the meaning of this Convention if that person, unlawfully and intentionally, causes:

- Death or serious bodily injury to any person; or
- Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure, facility or the environment; or
- Damage to property, places, facilities, or systems referred to in paragraph 1(b) of this Article, or likely to result in major economic loss,
- When the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act.'

Council should be the arbiter of the use of force',⁷³ and bases its contention on the dual foundation of the attempt by the US to seek authorization for the invasion of Iraq in 2003, and the refusal of the Security Council to grant such authorization. In doing so, the Panel clearly takes the side of those who see the events surrounding Iraq as a reaffirmation of 'not just the relevance but the centrality of the Charter of the United Nations', i.e. the system of collective security, and, one may say, contrary to developments in the law on self-defence, in particular with respect to terrorism, and its own urgings of Security Council reform.

4.1. Self-defence

The issue of self-defence did merit a separate section in the Report, but it is remarkably conservative and short. Although it contains a resounding endorsement of the right to anticipatory self-defence in international law, almost literally based on the Caroline-criteria,⁷⁴ the Panel does ask the pertinent question whether preventive self-defence must be allowed, as espoused by the US National Security Strategy of 2002,⁷⁵ a doctrine which sparked much legal debate.⁷⁶ It dismisses the notion relatively easily by correctly suggesting that in cases in which preventive military action may be justified, the Security Council is the appropriate organ to do so. The suggestion acknowledges that there is time, i.e. no immediate requirement of the use of force, to consider the evidence and round up international support, i.e. Security Council authorization to use force. On the other hand, the Panel leaves us in the dark as to whether it also acknowledges the reasons for promulgating the preventive self-defence doctrine and reconsidering the modern collective security system in the first place, namely the combination of terrorists and WMD. Whereas preventive self-defence seems a clear departure from existing international law,⁷⁷ the Report points out the equally valid claim that the legal recognition of a preventive right through a reinterpretation of Article 51 of the UN Charter on self-defence is simply too great a risk.⁷⁸

It is also notable that the Panel does not address in more detail the issue of a right to (preventive) self-defence against a state acquiescing in the presence of terrorists on its territory, in violation of Article 2(4) of the UN Charter, and states 'adopting' terrorist actions after the fact, making them attributable to the state under Article 11 of the 2001 ILC Draft Articles on State Responsibility.⁷⁹ The war in and against Afghanistan in 2001 was partly premised on the right to self-defence also against the ruling *de facto* government of Afghanistan, the Taliban, after 9/11.⁸⁰ For such a

73. See Report, *supra* note 1, para. 81.

74. *Ibid.*, para. 188.

75. 'The National Security Strategy of the United States of America', (2002) 41 *ILM* 1478.

76. For a defence of the policy, see, e.g., A. D. Sofaer, 'On the Necessity of Pre-emption', (2003) 14 *EJIL* 209. For a contrary view, see, e.g., T. Franck, 'What Happens Now? The United Nations After Iraq', (2003) 97 *AJIL* 607, at 619–20; R. N. Gardner, 'Neither Bush nor the "Jurisprudes"', (2003) 97 *AJIL* 585.

77. See, e.g., T. Franck, 'Preemption, Prevention and Anticipatory Self-defence: New Law Regarding the Recourse to Force?', (2004) 27 *Hastings Int'l & Comp. L. Rev.* 425.

78. See Report, *supra* note 1, at para. 191.

79. Draft Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc. A/CN.4/L.602/Rev.1 (2001).

80. See UN Doc. S/2001/947 (2001) (letter to the Security Council of the US, as required by Article 51, notifying the Council of its defensive actions).

basis to be valid, the events of 9/11 either had to be attributable to the Taliban as an armed attack under Article 51, or must be considered an armed attack considering the scale and effects and irrespective of the identity of the perpetrators, i.e. non-state entities. Previously, violation of Article 2(4) did not necessarily amount to an 'armed attack' in the sense of Article 51. Moreover, any legal and legitimate response to a non-armed violation of Article 2(4) did not include the unilateral use of force. The Panel is silent on the issue, but any upgrading of a violation of Article 2(4) to an armed attack under Article 51 presents perhaps a graver danger for international stability than the recognition of the right to preventive self-defence in the case of WMD and terrorists.

4.2. The system of collective security and criteria for the legitimate use of force

Another area which has been under longer and even deeper scrutiny than the preventive right to self-defence, is the system of collective security with the Security Council and its coercive powers as central elements. Yet the Panel does not seem to acknowledge that these powers have been broadly, though controversially, interpreted, or at least have undergone an evolution that accelerated in the 1990s, or fully to recognize the legal controversies and debates surrounding the use of authorizations. On the contrary, the Panel merely states that 'the language of Chapter VII is inherently broad enough, and has been broad enough' to deal with a variety of situations, including internal conflicts. This is a valid claim, but not to recognize the debates and difficulties surrounding such a determination ignores a wider legal debate about the Security Council powers that have been recognised as being limited.⁸¹ Moreover, the Panel's conclusion with respect to the Council's powers is equally blind to the problems of the current system in which the Security Council must act:

The Security Council is fully empowered under Chapter VII of the Charter of the United Nations to address the full range of security threats with which states are concerned. The task is not to find alternatives to the Security Council as a source of authority but to make the Council work better than it has.⁸²

As in earlier parts of the Report, the Panel does not seem to recognise the dangers for the legitimacy of the Security Council and international legal system posed by a Council creating generally binding international norms, i.e. international legislation, or at least the revolutionary character of such legislative resolutions. Moreover, although there should be no alternative source of authority for the use of force than the Security Council, the technique of authorizing UN member states to use force in the absence of any independent UN capacity to do so presents challenges to the authority of the Security Council.

The authorization technique, as it has become known, has arisen out of the reluctance of states to conclude agreements under Article 43 of the UN Charter

81. See, e.g., E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004).

82. See Report, *supra* note 1, para. 198.

with the UN and place military forces at the permanent disposal of the Security Council; no UN army exists. However, as the need arose in both Korea in 1950 and in the Iraq–Kuwait crisis of 1990/91, the Council resorted to authorizing states to use force, instead of using force itself. Moreover, as Franck observes, to date the Security Council has not ordered states to use force, but only authorized it.⁸³ The legal basis for authorization can be clearly found in Article 42 of the UN Charter.⁸⁴ Not only does an analysis of Chapter VII support the argument, but also the principle of effectiveness⁸⁵ and logic would dictate as much.⁸⁶ As a practical and legal means of resorting to force for the protection or enforcement of the values and interests of the international community, the authorization technique has been used extensively and for a variety of purposes. Moreover, the authorization technique is used in the context of peace-keeping and more ‘traditional’ uses of force.⁸⁷ The use of this alternative model in practice has raised a number of questions that centre on the specific role of the Security Council when force is actually used pursuant to an authorization. As the Council does not itself use force, the question becomes to what extent it can command and control such forceful operations, and to what extent it can be held accountable for all that happens when force is used.⁸⁸ More importantly, to what extent does the Security Council have the political and legal authority to declare the mandate of the authorization fulfilled, and thus to end the military operation? In a more fundamental and political way, the authorization technique dilutes the central role in the collective security system that was reserved for the Security Council. It has become dependent on ‘coalitions of the able and willing’ to carry out its wishes and thereby reverses the political process of determining whether it is necessary to ultimately use force. Not the Council, but able and willing states, i.e. the United States and its allies, play an equal or even greater role in determining the necessity or desirability of forceful intervention, within and without the Security Council. Ideally, the legitimate and legal use of force on behalf of the Security Council through an authorization is based on an explicit authorization, with limited aims, under actual UN control, and is terminated when the recourse to force has fulfilled its goals.⁸⁹ In a system that is too decentralized, the Security Council obviously stands in danger of losing its role as director and arbiter of any legitimate use of force. The Panel thus proceeds from the status quo and existing interpretations of the collective security system when outlining in which instances force could or should be legitimate. It recognizes and endorses, above all,

83. T. Franck, *Recourse to Force – State Action Against Threats and Armed Attacks* (2002), 27.

84. See, e.g., *ibid.*, at 26; de Wet, *supra* note 81, at 260–5.

85. See, e.g., D. Sarooshi, *The United Nations and the Development of Collective Security – The Delegation by the UN Security Council of its Chapter VII Powers* (1998), 148, and the sources cited therein.

86. Gill argues, '[s]ince the Security Council has the authority to decide to employ military enforcement measures under Article 42 there is no reason why it should not be able to authorize or recommend such operations under the same provision'. T. Gill, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter', (1995) 26 *NYIL* 33, at 58.

87. See, e.g., N. Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by "Coalitions of the Able and Willing"', (2000) 11 *EJIL* 541. This is also recognized by the Report, paras. 212–13.

88. F. Berman, 'The Authorization Model: Resolution 678 and its Effects', in Malone, *supra* note 24, at 155–61.

89. See, e.g., J. Lobel, M. Ratner, 'Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-fires and the Iraqi Inspection Regime', (1999) 93 *AJIL* 124; White and Ülgen, *supra* note 16, at 378.

the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.⁹⁰

This norm has been adopted from the independent and authoritative report 'The Responsibility to Protect',⁹¹ and is indeed an emerging norm, though it may prove to be a problematic one in practice from an enforcement standpoint. In contrast to that report, the Panel does not propose a unilateral right to humanitarian intervention under strict circumstances. Nevertheless, it tries to be realistic in proposing criteria for determining the legitimacy of the collective use of force, as it recognizes that the guidelines it proposes 'will not produce agreed conclusions with push-button predictability'.⁹² Five criteria are proposed – seriousness of the threat, proper purpose, last resort, proportional means, balance of consequences – all of which the Security Council and General Assembly should adopt in declaratory resolutions.⁹³ They can all be easily agreed upon, though the last one could be viewed with suspicion. If a potential adversary can postpone collective military action and entrench its own position, or ensure that any successful outcome of a prospective collective action would come at a high price, then the balancing of consequences by the Security Council can fall in its favour. More explicit attention should perhaps be paid to the purposes for which force should be used. The Panel only identifies genocide and other large-scale killing, but what about WMD, for instance?⁹⁴

5. CONCLUSION

As has now been frequently stated, the Report attempts to make genuine progress by taking bold positions and taking sides in some legal and political controversies. It is blunt and frank in stating the problems plaguing the international community and the United Nations, as well as the underlying political, social and economic causes. However, the Panel, to its credit, moves beyond that stage and argues persuasively that all these causes and problems are interlinked and must be considered subject to the system of collective security. The interdependence of problems and their causes, married to a genuinely integrated approach, should now become the premise on which a comprehensive collective security system is built. The Secretary-General has endorsed the High Level Panel's Report in his own latest report.⁹⁵ While recommendations such as integration and co-ordination might not be shocking, there is a reason for their presence in every report on the state of the world. The

90. See Report, *supra* note 1, para. 203.

91. *The Responsibility to Protect – Report of the International Commission on Intervention and State Sovereignty* (2001).

92. See Report, *supra* note 1, para. 206.

93. *Ibid.*, paras. 207–8.

94. See, e.g., I. Daalder, 'The Use of Force in a Changing World – US and European Perspectives', (2003) 16 *LJIL* 171, at 179. Daalder also suggests for consideration the protection of 'global public good', and 'less malignant acts or even inadvertent threats', such as 'large-scale epidemiological outbreaks or environmental disasters'.

95. In 'Larger Freedom: Towards Development, Security and Human Rights for All' Report of the Secretary-General, UN Doc. A/59/2005 (2005).

High Level Panel Report envisages leading roles for both the Secretary-General and the Security Council in co-ordinating, monitoring and standard-setting. Particularly the Security Council must be given new tasks and must take the lead in formulating guidelines for its own actions as well as for states. Nevertheless, the realism that is apparent from the Panel's analysis of international relations is also clearly present in its concrete recommendations for reform. There is no need, according to the Panel, for new paradigms or reformulation of existing international law. Instead, it hopes that existing arrangements are used to their fullest extent, or extended enough to close the loopholes, such as in the case of WMD, the IAEA and the NPT, as a revamping of the Council's role in disarmament. On the other hand, the Panel does not dare tinker with the existing legal system of collective security around the Security Council, including the legal norms upon which it is founded.⁹⁶ While amendment of the Charter is frequently mentioned in the context of reform of the Council in terms of its composition, it is not often mentioned with respect to the collective security system of Chapter VII. In the few cases in which it is discussed, amendment is summarily dismissed in much the same fashion as is amendment of the composition of the Security Council, due to the required consent of the veto-carrying permanent members of the Council.⁹⁷ Nevertheless, this option should be more explored for its feasibility and acceptability among those permanent members, if it meant that these privileged states would retain their veto-power. In any case, the existing collective security system has been de facto replaced by an unwritten, uncertain and therefore arbitrary system of subjective determinations on the necessity of the collective use of force. While the system itself has proven to work to a certain degree, its codification would provide much-needed certainty and predictability with respect to the reaction of the international community to transgression of international standards.

It is questionable if reform of the composition and voting rights of the Security Council, or reform of the collective security system, alone will contribute enough to increase the effectiveness of the Council and its deterrent power. Besides those two areas of possible improvement, a third alternative may be offered. The expectation or desire that the Security Council become an all-encompassing international organ, charged with standard-setting, monitoring and verification, as well as enforcement, could very well prove to be unattainable. Instead of an evolutionary track, perhaps devolution or a lowering of expectations might increase the effectiveness and thereby the legitimacy of the Council.⁹⁸ A greater use of regional organizations, for instance, not only to enforce Security Council demands if necessary by force, but also by aiding the Council in determining whether it should act in their part of the world, could lower those expectations and spur regional organizations into taking greater responsibility. No amendment of the Charter, including the composition of the Security Council would then be needed. Admittedly, this would involve giving up the central role of global decision-making in matters of international peace and

96. See, e.g., Daalder, *supra* note 94, at 180 (advocating a genuine reappraisal of the norms on the use of force, instead of re-interpreting them over and over).

97. See, e.g., E. Suy, 'Is the United Nations Security Council Still Relevant? And Was it Ever?', (2004) 12 *Tul. J. Int'l & Comp. L.* 7, at 24–5.

98. See, e.g., *ibid.*

security, and the ambition to create global consensus on what constitutes a threat to peace and security. On the other hand, it could be argued that such a consensus already exists to a great extent in the form of the substantive norms of the UN Charter, human rights law, international humanitarian law, and even international criminal law.⁹⁹ Furthermore, the efforts to increase the capacity of, for instance, the African Union to make its own regional system more effective already points towards greater reliance on such regional organizations in the future.

99. See, e.g., UN Doc. S/RES/1593 (2005) (referral of the crimes committed in Darfur, Sudan, by the Security Council).