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The United Nations: from the end of the Cold War to the Bush Doctrine

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Abstract

Con la fine della Guerra Fredda, l'ordine internazionale cambiò drammaticamente così come la sicurezza globale, oggigiorno sempre più caratterizzata da conflitti interni invece che interstatali. Questi conflitti hanno dato vita ad un dibattito sul piano internazionale per quanto riguarda una maggior adeguatezza ed efficienza delle risposte garantite dal sistema degli Stati. I tragici attentati terroristici dell'11 settembre 2001, in particolare, hanno dimostrato che la nuova sfida posta dal terrorismo internazionale deve essere affrontata a livello multilaterale, insieme a quella data dalla proliferazione delle armi di distruzione di massa e dai rischi causati da armi non convenzionali. Nell'ultimo ventennio è sorta la convinzione che il sistema delle relazioni internazionali iniziasse a mostrare segni di cedimento e che le Nazioni Unite si trovassero di fronte a una crisi sempre più profonda di legittimità e credibilità. I mezzi a disposizione dell'ONU dovevano, dunque, essere rimodellati sulla base di queste nuove esigenze e, in particolare, per quanto riguarda i conflitti civili, il Consiglio di Sicurezza emanò sempre più risoluzioni

in merito alle operazioni di pace. A partire dagli anni ’90, infatti, si andò affermando l’idea che l'ONU potesse riappropriarsi di quel ruolo centrale che aveva perso negli ultimi 40 anni a causa del bipolarismo della Guerra Fredda. I conflitti interni che hanno cominciato a ripetersi periodicamente dalla fine del millennio portarono l’ONU a concentrarsi in modo particolare sul consolidamento mantenimento della pace con misure il cui scopo era quello di ridurre il rischio di ulteriori conflitti futuri. Aspirando alla limitazione del ricorso unilaterale alla forza armata (art. 2, par. 4 Carta ONU), ad eccezione della legittima difesa (art. 51), l’ONU decise di affidare il potere del mantenimento della pace e della sicurezza internazionale al Consiglio di Sicurezza (art. 24), il quale riflette la situazione post Seconda Guerra Mondiale con gli Stati vincitori come 5 membri permanenti (Cina, Federazione Russa, Francia, Inghilterra, Stati Uniti) e 10 Stati eletti ogni due anni dall’Assemblea Generale. La pace e la sicurezza internazionale, assicurate dal divieto generale dell’uso e della minaccia alla forza sancito dall’art. 2, par. 4, sono il servizio minimo che l’organizzazione si è posta dalla sua istituzione, cercando di garantire una gestione efficace delle violazioni del diritto internazionale. I cambiamenti attuali riguardanti il divieto alla forza armata sono influenzati da una profonda trasformazione nella natura dello Stato e della comunità internazionale. A seguito degli eventi recenti, nello specifico se consideriamo la Seconda Guerra del Golfo del

2003, non si può più affermare, però, che l'uso della forza abbia smesso di giocare un ruolo decisivo nel contesto internazionale.

Dopo alcune fasi importanti nella regolamentazione del divieto all'uso della forza (Statuto della Società delle Nazioni, *Patto Briand-Kellogg*), fu solo con l'introduzione della Carta ONU nel 1945 che il divieto previsto nell'art. 2, par. 4 divenne fonte generale del diritto internazionale, appartenente allo *jus cogens*, contemplante un obbligo *erga omnes* e successivamente ribadito anche dalla Corte Internazionale di Giustizia nella sentenza sulle *Attività Militari e Paramilitari in Nicaragua* del 1986. La legittima difesa non venne inclusa nel divieto: rimase, infatti, l'unica eccezione permessa dal diritto internazionale ai sensi dell'art. 51, mentre il Consiglio di Sicurezza era l'unico organismo a cui venne concessa l'adozione di misure coercitive sia pacifiche, ai sensi dell'art. 41, sia militari, sancite nell'art. 42, in caso di minaccia alla pace, di violazione della pace o di aggressione (art. 39). Le potenze vincitrici della Seconda Guerra Mondiale decisero, in questo modo, il sistema di sicurezza collettivo regolato in virtù del cap. VII della Carta. La distinzione concettuale tra uso illecito e lecito della forza venne messa per iscritto: da quel momento l'uso lecito avrebbe avuto una natura esclusivamente punitiva. Tuttavia, la globalizzazione ha fatto sì che qualsiasi evento potesse essere considerato pericolo per la sicurezza internazionale: diventa, dunque, difficile decidere in maniera generica quali siano i

limiti della discrezionalità del Consiglio in merito alla valutazione della pratica dei suoi poteri coercitivi. Ai sensi dell'art. 39, il Consiglio, accertata una minaccia o violazione alla pace, può emanare raccomandazioni o decidere quali misure debbano essere adottate in conformità con gli artt. 41 (misure non comportanti l'uso della forza) e 42 (misure comportanti l'uso della forza) con lo scopo di facilitare una soluzione pacifica tra le parti. Fino all'invasione del Kuwait da parte dell'Iraq nel 1991, il Consiglio si rivelò restio nell'invocare il cap. VII della Carta come base per la sua autorità. Dallo scoppio della Prima Guerra del Golfo, la lunga serie di risoluzioni adottate dimostrarono chiaramente il cambio di atteggiamento nella politica dell'organismo nell'era post Guerra Fredda. Le risoluzioni prese in questo contesto divennero particolarmente importanti per l'evoluzione del diritto della Carta, come, per esempio, la celebre ris. 660 dell'agosto 1990 con cui il Consiglio accertò l'esistenza di una violazione della pace e della sicurezza internazionale e, agendo ai sensi degli artt. 39 e 40, condannò l'invasione dell'Iraq nel territorio del Kuwait, domandando un immediato ritiro delle truppe invasori. Per la prima volta le Nazioni Unite, dopo anni di paralisi dovuta alla Guerra Fredda, iniziarono a comportarsi come *peace-keeper* attraverso sanzioni, programmi di disarmo e controllo delle armi, assistenza umanitaria, ecc... Infatti, nessun'altra crisi nella storia dell'ONU ricevette tale attenzione in così poco tempo: dall'inizio dell'invasione

nell'agosto 1990 fino alla fine di novembre, il Consiglio emanò 12 risoluzioni ai sensi del cap. VII della Carta, in particolare riguardanti gli artt. 39, 40 e 41. In questo modo, l'invasione del Kuwait provocò una serie di eventi che trasformarono il ruolo dell'ONU in "poliziotto del mondo" e le differenti forme di operazioni di pace usate per quello specifico scopo. La progressiva escalation delle risoluzioni culminò con la ris. 678, il più importante testo elaborato dal Consiglio dopo la Guerra Fredda, la quale autorizzò l'intervento militare contro le truppe irachene dando origine all'Operazione *Desert Storm* da parte di una coalizione di Stati, capeggiati dagli Stati Uniti. Il conflitto Iraq-Kuwait fu il primo test reale per l'ONU a partire dagli anni '90: infatti, la guerra dimostrò che il sistema internazionale degli Stati Membri poteva decidere sulla giuridicità del diritto di legittima difesa e ritenere necessaria e proporzionale l'azione intrapresa, dimostrando così che il suddetto diritto poteva fornire la base legale per un'azione di sicurezza collettiva.

Gli attacchi dell'11 settembre 2001 perpetrati dall'organizzazione terroristica Al-Qaida a New York e Washington D.C. trasformò drasticamente il contesto della sicurezza internazionale che venne messo subito in discussione dall'amministrazione Bush. Si iniziò, infatti, a discutere in merito all'interpretazione dell'art. 51 e alla dottrina della legittima difesa preventiva, in particolare, con l'elaborazione della *National Security Strategy* formulata dal Presidente Bush

nel 2002. Con lo sviluppo del terrorismo internazionale su larga scala, i giuristi internazionali si divisero tra chi riteneva necessaria una sorte di prevenzione contro queste nuove sfide e chi invece continuava ad attenersi alla tradizionale interpretazione dell'art. 51, in quanto la dottrina della legittima difesa preventiva non era e non è tuttora supportata da nessuna base giuridica, né precedente, né successiva all'articolo della Carta. Attualmente, la maggioranza degli Stati ritiene che una concezione più ampia del diritto di legittima difesa, includendoci un'azione preventiva, potrebbe rivelarsi un pericolo per l'equilibrio internazionale. Infatti, se gli Stati dovessero confermare l'esistenza del diritto di legittima difesa preventiva, è chiaro che questo dovrà essere assolutamente seguito da una dettagliata regolamentazione dei limiti giuridici in modo che chiunque ne faccia uso possa essere in grado di farne una valutazione legale, invece che una semplice questione di giudizio soggettivo. A causa dello shock, gli Stati Uniti di Bush decisero di intraprendere una "Guerra al Terrore" con lo scopo di tutelare i propri interessi nazionali non solamente con misure unilaterali, bensì impegnandosi anche in azioni preventive nei confronti dei cosiddetti "Stati Canaglia" (Stati che sponsorizzano il terrorismo), cambiando così la concezione della prevenzione e sentendosi autorizzati nell'avviare azioni militari anche senza un'effettiva o imminente minaccia alla loro sicurezza. Convinti che l'Iraq intrattenesse rapporti con gli autori degli attentati e convinti

della presenza di armi di distruzioni di massa nel territorio, gli Stati Uniti cercarono delle giustificazioni per un possibile intervento armato contro l'Iraq nella precedente ris. 687/1991 e nella più recente ris. 1441/2002. L'occupazione militare anglo-americana in territorio iracheno intrapresa nel 2003 senza alcun diritto giuridico e priva di alcuna esplicita autorizzazione da parte dell'ONU violò, di conseguenza, l'integrità territoriale dell'Iraq. Con questo intervento, l'unilateralismo raggiunse il punto di massima espansione, ma anche il punto di maggior degenerazione. Ciò che ne seguì fu una sconfitta per gli Stati Uniti: infatti, la coalizione non ebbe le capacità e i mezzi necessari per imporre un'effettiva occupazione in grado di ristabilire le condizioni minime di legge per i civili. Le operazioni svolte senza la supervisione di un'autorità dell'ONU lasciarono il Paese con serie conseguenze giuridiche riguardanti le norme dell'occupazione di guerra. Uno dei problemi principali chiaramente rivelato dalla Seconda Guerra del Golfo è che il volere delle azioni politiche da parte dell'ONU è tuttora guidato prevalentemente dai programmi interni delle maggiori potenze, invece che dai problemi dell'intera comunità. Gli eventi recenti hanno, purtroppo, evidenziato la mancanza di un ordine internazionale giuridico funzionante: il sistema della sicurezza collettiva elaborato dalla Carta ONU continua a mostrare le sue vulnerabilità, non prevenendo il ricorso alla forza. Il contesto dell'ONU si rivela necessario ed essenziale per la sicurezza dell'equilibrio

mondiale, ma deve trovare le capacità di adattarsi ai cambiamenti internazionali per preservare un'affidabilità andata persa nell'ultimo ventennio. Un'appropriata riforma risulta essere necessaria per ridare all'ONU quel ruolo di garante che gli spetta e per ridefinire un nuovo sistema di sicurezza internazionale. Fino ad oggi, le varie proposte (ricordiamo la principale elaborata nell' *High-Level Panel on Threats, Challenges and Change* del 2004) si sono focalizzate sull'allargamento del Consiglio, prefissandosi di raccogliere i differenti punti di vista per realizzare una migliore integrazione della società globale. Ciò che viene richiesto è un maggior coinvolgimento nel processo decisionale di chi contribuisce al supporto finanziario, militare e diplomatico: non essendo i cinque membri permanenti più in grado di rappresentare al meglio le esigenze di un intero sistema di Stati, si propone di includere anche gli Stati di realtà emergenti (Brasile, India), tuttora lasciati in disparte, e Stati già affermati (Germania, Giappone). Certo è che, attualmente, gli Stati non possono sopravvivere senza un'autorità supervisionale esterna indispensabile per la convivenza collettiva: l'internazionalismo dell'ONU rappresenta, infatti, un porto sicuro e necessario per gli Stati più deboli, privati di un sistema di alleanze capace di proteggerli. Mentre la sfida strategica posta dalla proliferazione delle armi di distruzione di massa e dal terrorismo può essere combattuta e superata grazie ad un efficiente sistema giuridico di contro-

proliferazione, non c'è nessuna base giuridica che giustifichi l'uso della forza come mezzo strategico con lo scopo di migliorare una pace imperfetta. A partire dalla Seconda Guerra del Golfo, possiamo affermare che nessuna occupazione militare non desiderata può essere in grado coesistere con il processo di democratizzazione di uno Stato. La lezione principale che il sistema internazionale può trarre è che le soluzioni "veloci" non possono funzionare: le sanzioni economiche, la forza armata, gli interventi umanitari non saranno mai in grado di risolvere i problemi, nazionali e regionali, insiti in certe realtà del mondo fintantoché non venga presa *in primis* una chiara e specifica analisi delle conseguenze sul lungo termine. A seguito dell'occupazione americana conclusasi nel 2011, l'Iraq è diventato "un santuario dei terroristi", lasciato in uno stato precario di guerra civile in cui sono riemerse alcune tensioni interne che si pensava fossero scomparse con la fine della Guerra Fredda. La concreta prevenzione contro la proliferazione e il terrorismo richiede una regolamentazione e più nello specifico un'effettiva amministrazione e gestione. Bisogna anche considerare, tuttavia, che il futuro del diritto internazionale può essere compreso e previsto solamente se si tiene in considerazione il ruolo delle potenze dominanti, in particolare degli Stati Uniti, gli unici in grado di imporre un ordine mondiale secondo i propri progetti. Ciononostante, possiamo affermare che la guerra al terrorismo non può lasciare spazio ad un sistema

internazionale conformato sul modello interno statunitense: gli USA non possono continuare con il multilateralismo senza il supporto degli altri Stati e dell'opinione pubblica globale. Nello specifico, gli Stati non possono decidere unilateralmente e ancora meno regolarizzare le controversie con il ricorso alla forza armata: questa pratica mostra chiaramente che gli USA, consapevoli dei limiti dell'ONU, delle norme redatte nella Carta e dei suoi poteri di sanzione, hanno sempre cercato e continuano a cercare di aggirarle. Se è necessaria la sopravvivenza di un quadro giuridico internazionale, soprattutto con lo scopo di limitare e controllare le ambizioni individuali di ogni singolo Stato, il sistema non può rimanere uguale a quello attuale.

INTRODUCTION

The end of the Cold World and the consequent dissolution of the Communist block in 1991 dramatically altered the background of global security, which nowadays seems increasingly marked by internal conflicts rather than interstate ones. The surge of civil conflicts caused a major awareness of the issues regarding the pertinence and efficiency of the response provided by the international system of States. The tragic attacks of 09/11 meant the brand-new challenge of international terrorism had to be faced, together with the interrelated matter of the proliferation of WMDs and the perils caused by unconventional weapons. The variety of means that the United Nations has at its disposal was reshaped and improved simply in order to deal with these recent challenges and, concerning the civilian conflict in particular, the Security Council issued more and more complex and innovative resolutions regarding peace operations. These conflicts, which started to occur periodically from the early '90s, ensured that the UN mainly focused on the consolidation of peace through efforts whose aim was to reduce the risk of further conflict. In this way, the UN wanted to

increase countries' capacity to manage conflict and to lay the foundations for sustainable peace and good governance. Therefore, the UN Charter tried to make a great attempt to assign the respective tasks and powers to the General Assembly and the Security Council in a well-defined and homogeneous manner. As a matter of fact, one of the main purposes of the authors of the Charter was to avoid the overlapping of powers, which had been a preeminent feature of the Covenant of the League of Nations. As Ronzitti and Cassese argue, the existing system before the end of the Second World War was totally revolutionized by the UN Charter. In fact, the achievement of the prohibition of the threat and the use of force and its subsequent transformation into customary norm brought to the fulfillment of a difficult process that started at the beginning of the XX century and completely changed compared to traditional international law.(1)

In an age following two global conflicts, the main aspiration has been to restrict individual countries' right to decide to wage war: any unilateral recourse to armed force is considered illegal, with the exception of self-defense, which is the only recourse legally endorsed in the UN Charter.(2) The authors of the Charter drafted a set of procedures to avoid armed conflict at any costs or to interrupt it in the event of it having already been started. The Security Council's composition reflects the situation in the second postwar period with 15 members, 5 permanent States (China, the Russian Federation, France, the United Kingdom and the United States) and 10 States elected every two years by the General Assembly, in accordance with art. 24. It is the only institution able to maintain international peace. Although the Charter envisaged armed forces placed at the disposal of the Security

(1) N. RONZITTI, *Introduzione al Diritto Internazionale*, IV ed., Giappicchelli Editore, Torino, 2013, p. 413-414; A. CASSESE, *Diritto Internazionale*, a cura di P. GAETA, II ed., Il Mulino, Bologna, 2006, p. 151

(2) B. CONFORTI, "In tema di azioni del Consiglio di Sicurezza", in *Scritti di Diritto Internazionale*, vol. I, Editoriale Scientifica, Napoli, 2003, p. 261

Council and assisted by the Military Staff Committee, in accordance with articles 43 and 47, this project was never realized due to the Cold War.

The minimum service that the UN wants to guarantee is effective management of the exceptional breaking of international law, such as armed aggression and illicit bombing, as well as illegal administration in a UN sovereign Member State, in order to solve it and restore the *status quo*.

Increasingly nowadays, Western powers use humanitarian grounds to try to justify intervention in the affairs of other States. Those who propose a contemporary version of what was considered "imperialism" in the 19th century, today discuss the responsibility of protecting human rights in those States which are victims of dictatorial or repressive regimes. This intervention could be carried out either through a collective effort authorized by the UN or through a unilateral operation undertaken by an individual State, if it is believed necessary.

Therefore, the principal value of the international system is the protection of the security of each member and of the system as a whole, considering appropriate measures that go beyond mere defense both for individuals and the community. Collective security must be ensured both against illicit violations directed at individuals, and also against the threats that have the whole system as target. According to Conforti, the UN is the principle existing international organization. Such organizations, which aim to correct economic imbalances and social conflicts of international matter, try to work on the causes of the political conflicts and the recourse to force. In this way, these international organizations, in particular the UN, try to make the interests of wide human communities prevail on the particularism of each single State.(3) As Panebianco states, "for this reason, the UN

(3) B. CONFORTI, "Organizzazione delle Nazioni Unite (ONU)", in *Scritti di Diritto Internazionale*, vol. I, Editoriale Scientifica, Napoli, 2003, p. 164

presents itself as an organization at the top or the core of a global system characterized by a plurality of smaller international organizations and by a variety of States that constitute the primary political unit, which own a large part of their traditional powers."(4)

The several international organizations are connected together by the belief that the use of force must be discouraged throughout an action of international cooperation. If we focus on this principle, it is clear that the UN is at a position of supremacy compared to the others due to its universality and to its work of international cooperation.(5)

Over the centuries, the basic legal issue that has been repeatedly discussed is which possible ways of armed intervention should be permitted and which should be considered illegal by the international juridical system. From the introduction of the UN Charter as a source for international law, the individual States cannot resort to military force unilaterally, except when a justification provided by international law is demonstrated. "Contemporary changes in the prohibition of war are affected by deep transformations in the nature of State and the international community. A general process of restriction regarding State sovereignty is found both in *ius pacis* and in *ius belli*. So, the old notion of the power of war has been downgraded in its right and its content restricted: nowadays it is considered a faculty (*facultas bellandi)* and it is no longer considered *ius ad bellum*."(6) Indeed, the original project of the Charter was based on the exclusive ownership of the use of force by the Security Council, except for self-defense, and "it marked the beginning of a process aimed to decrease the relevance of the *ius belli* in doctrinal treatises."(7) Therefore, the authors of the

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(4) M. PANEBIANCO, voce *Nazioni Unite (ONU)*, in Enc. giur., vol. XXIII, Roma, 1990, p. 1
(5) B. CONFORTI, "Organizzazione delle Nazioni Unite (ONU)", in *Scritti di Diritto Internazionale*, vol. I, Editoriale Scientifica, Napoli, 2003, p. 165
(6) M. PANEBIANCO, *Diritto Internazionale Pubblico*, III ed., Editoriale Scientifica, Napoli, 2011, p. 339
(7) N. RONZITTI, *Diritto Internazionale dei Conflitti Armati*, IV edizione, Giappicchelli Editore, Torino, 2011, p. 28-34

Charter set the prohibition of the unilateral use of military force by the individual States,[8] centralizing the power in the Security Council (chap. VII) and allowing States to react in self-defense until intervention by the Council.[9] In this way, the lawful use of force was not only centralized, but also regulated according to a series of norms that the Council had to respect when it exercised its task of international "policing". The original system of collective security that involved the disposal of military contingents by the UN had never been able to work. Therefore, the practice evolved into peace-keeping operations and the issuing of authorizations by the Council, in particular starting from the end of the Cold War and the First Gulf War in 1991. In this way, the Council has no power of direct intervention, but it can authorize the individual States to act, making each action licit which would otherwise break international law.

The use of force in the First Gulf War in 1991 and the Second Gulf War in 2003 flies in the face of the fact that recourse to force is prohibited by international law and, therefore, that any form of armed self-help constitutes an illegal action: we can no longer affirm that the use of force has stopped playing a decisive role on an international level.
In an international system of States which have already been strengthened, like the current one, it is obvious that the "voids of power" cannot be tolerated if they can compromise the security of populations. Since the adoption of the UN Charter, the system of States has striven for the protection of all humankind, preventing a global imperial authority from doing so, owing to the fact that each potential transgressor succumbs to the jurisdiction of one or other State. When a State does not work, the others intervene with the duty of protection to the advantage of the entire system, at least in theory.

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(8) Art. 2, par. 4, UN Charter
(9) Art. 51, UN Charter

CHAPTER ONE

THE UN AND THE PROHIBITION OF THE USE OF FORCE IN THE CHARTER

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1.1. Foreword: The law of the use of force before the UN Charter

With the introduction of the UN Charter in 1945, intervention having recourse to armed force in the affairs of another State is strictly

forbidden by virtue of art. 2, par. 4. Indeed, the regulation of the use of force on an international level had its acme in the UN system. Here the authors outlined a system based on the precondition that no State would any longer have to have, or threaten to have, recourse to force. Moreover, the major global powers, which were reunited in the Security Council, would handle the integrity of international peace. "Whereas previously the distinction between lawful and unlawful use of force either could not be made or was blurred", the winning powers in the Second World War wanted to codify "whether a specific instance of use of force was lawful" with the purpose of solving "all disputes threatening peace and security by peaceful means [...] in conformity with the principle of justice and international law."(1)

The use of force is the monopoly of the Security Council, which is entitled to intervene in accordance with Chapter VII of the Charter, when a threat or a breach of peace or an act of aggression are verified.(2) In fact, the Security Council is not an organism entitled to react to international violations. Consequently, it is not a judicial institution that can verify that a violation is committed and that can establish the measures to adopt against the author of the breaking of the law. Instead, the Security Council owns the task of recommending or deciding which measures should be adopted when three particular situations occur: in the cases of threat to international peace, breach of international peace, and acts of aggression.(3) Consequently, "whereas previously the distinction between lawful and unlawful use of force either could not be made or was blurred, it had now become possible to say – at least in theory – whether a specific instance of use of force was

(1) A. CASSESE, *International Law*, II ed., Oxford University Press, Oxford, 2005, p. 281; B. BROMS, *The United Nations*, Suomalainen Tiedeakatemia, Helsinki, 1990, p. 50
(2) N. RONZITTI, *Introduzione al Diritto Internazionale*, IV ed., Giappicchelli Editore, Torino, 2013, p. 413
(3) A. CASSESE, *Diritto Internazionale*, a cura di P. GAETA, II ed., Il Mulino, Bologna, 2006, p. 380

lawful."[4] Moreover "whereas previously (until the League of Nations), force could be used without any previous assessment by a third party, now an international body, the Security Council, could decide to enforce peace after having determined the existence of a threat to the peace, a breach of the peace, or an act of aggression."[5] Thus, the Charter sets the goal of abolishing the right to go to war and, more generally, recourse to force as one of the features of State sovereignty.

Nevertheless, regardless of the law, international ethics tackles the moral and practical issues regarding armed intervention. Public opinion often wonders whether State's intervention is necessary enough to justify breaking the law. Ethics judges armed intervention illegal firstly when it is not undertaken for a just cause; secondly, when it is undertaken with means that involve disproportionate damage and, finally, when the achievement of a fair result is not expected. In the last few years, several attempts have been made to adapt the concept of the use of force to the justification of a just cause, especially regarding the concept of "war of national liberation" related to the practice of the right to self-defense. The issue that the principal juridical debates have focused on is whether a State should be allowed to actively intervene in a war being waged by another State with the aim of overturning the imposition of colonialism. The supposed authorization for the recourse to force by one State against another in a war for national liberation is not based on legal norms, but only on claims of justice. A State that approves such a cause believes it is authorized by international law to wage a war on the basis that a population fighting for its independence from foreign domination is allowed to consider itself a beneficiary of just cause. The problem is that the moral reasons that induce States to identify a war as "just" often coincide with the political and ideological beliefs of the State which is invoking just cause. Therefore, on behalf

(4) A. CASSESE, *International Law*, II ed., Oxford University Press, Oxford, 2005, p. 324
(5) v. *supra*

of justice, the existing legal prohibition of the use of interstate force is conditioned by political motives, which are not always the most charitable ones. The law of the use of force has dramatically changed over history and its juridical discipline goes back to ancient times. Before the entry into force of the Covenant of the League of Nations and the following UN Charter, States took advantage of the freedom of recourse to armed force: war was a means allowed by international law. The theory and the practice of the use of force during the 19th and 20th centuries referred to the *bellum justum*. The origins of the possible regulation of the recourse to force go back to the just war doctrines of the days of Roman law, found in the *jus fetiale*. In fact, Rome was the first "State" that established strict rules aiming to control the relations with third-parties. There was a set of regulations concerning war and peace with a religious connotation that was run by particular priests (the *fetiales*) who implemented a law half secular and half religious.(6) The doctrine of just war legitimated the recourse to violence in international law as a self-defense process only if certain criteria concerning the war authorities which allowed war, its purposes and its intentions were satisfied. War was considered "a just war" only when certain preconditions existed, such as punishment for a tort suffered, repelling an enemy invasion or the recovery of assets. In particular, the moral problem regarding Christian ideology was whether they should consider the Evangelical message or should obey their own sovereign who asked them to fight and kill during the war. Saint Thomas rephrased the just war doctrine according to classical notions and, "recalling Augustine's authority [...], he fixed the three conditions for the *bellum justum*: the *auctoritas principis*, by which war should be stated by the legal authority; the *iusta causa*, by which war should be moved by a just cause and the *recta intentio*, by which war should

(6) D. CARREAU, F. MARRELLA, *Droit International*, XI ed., Pedone, Parigi, 2012, p. 48

pursue good against evil."[7]

This doctrine was a cornerstone of the Medieval *jus in bello* doctrine (that is, the extended set of norms, both customary and pact ones, that enter into force among the warring States once war has started. *Jus in bello* consists of norms that tend to soften the brutalities of war among States, to protect civilians and States that are not involved in the conflict and to impose the punishments concerning war crimes.)[8], where an independent institution, namely the ecclesiastical authority in Rome, supervised war justice. After the Protestant Reformation had a disintegrating impact on the Church's unity and authority, the *bellum justum* doctrine lost its centrality and became subjective. With the erosion of papal and imperial power and the emergence of national modern States, identifying a warring State as "just" became particularly difficult, because everybody claimed just cause and a higher authority which was able to declare justness did not exist. There was a gradual acceptance of war as "just for both sides" (*bellum justum ex utraque parte*), legitimating the recourse to force by any State. Each warring State became its own personal judge regarding the *justum* aspect of its own war. Until war was legitimated by the *bellum justum* doctrine, international law dealt with self-defense as counter-war in response to an act of aggression. The situation changed when war was banned *in primis* in the Kellogg-Briand Pact[9] and later by the UN Charter: the notion of self-defense became an exception that restricted the use of force in a world united in the name of international peace and security.

If, over the 19th century, the recourse to war took inspiration from the "non-discrimination" conception, and was always considered legal, in the 20th century the recourse became increasingly more illegal with the

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(7) A. CALORE, *"Guerra giusta" tra presente e passato*, consulting at http://www.dirittoestoria.it/tradizione2/Calore-Guerra-giusta.htm#_ftn34, visited on 02/05/2016

(8) B. CONFORTI, *Diritto Internazionale*, X ed., Editoriale Scientifica, Napoli, 2014, p. 419

(9) *The Kellogg-Briand Pact*, Documents, consulting at http://avalon.law.yale.edu/subject_menus/kbmenu.asp, visited on 21/04/2016

return of the discriminatory conception based on the *bellum justum* doctrine, which rewarded the warring State "which had a «just cause» on its side."(10)

1.2. The Kellogg-Briand Pact: a first step towards the prohibition of the use of force

1928 can be regarded as the turning point in the history of use of interstate force's regulation: in fact, the *General Treaty for Renunciation of War as an Instrument of National Policy*, known also as *Kellogg-Briand Pact*, was signed. As Curti Gialdino affirms, "this treaty [...] announces the condemnation of the recourse to war as solution in international controversies by the contracting parties and, moreover, the abolition of the recourse to force as means of national politics in their mutual relations."(11) The Kellogg-Briand Pact, which entered into force on 25 July 1929 among 46 States and to which others adhere later, arose from the French system of postwar alliances, which was negotiated with the aim of maintaining peace in Europe. France saw its security and, implicitly the security of entire Europe, deeply threatened by its ex enemy, Germany. Consequently, it tried to gain the support from other powers if Germany had the chance to attack. After having established alliances with neighboring States, France, owing to its Minister of Foreign Affairs, Aristide Briand, proposed to the United States to join them in a treaty that ratified the prohibition of the use of force as instrument of national politics between the two powers on 6

(10) C. FOCARELLI, *Diritto Internazionale,* vol. I, II ed., CEDAM, Padova, 2012, p. 713
(11) A. CURTI GIALDINO, voce *Guerra (dir. intern.)*, in *Enc. dir.*, vol XIX, Milano, 1970, p. 862

April 1927. The proposal became official in June. The American response came in December, 1927, by the Secretary of State Frank B. Kellogg who suggested achieving the adhesion of all the major world powers in a declaration of war surrender as instrument of national policy.

Although the right of self-defense was not explicitly recognized in the Pact, however it was discussed during the previous negotiations. One of the terms imposed by France proclaimed that the surrender of use of force would not have deprived the signers of the right of self-defense. In the Kellogg's answer in June 1928, he declared that there was nothing that would restrict or modify the right of self-defense in any way. He went on saying:

> "[t]hat right is inherent in every sovereign State and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense. If it has a good case, the world will applaud and not condemn its action."(12)

The Pact was signed on 28 August 1928 by 15 States. The Pact consisted only of three articles, one of them of technical nature. In art. I, the contractors solemnly declared that:

> "[...] they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another."(13)

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(12) *The Kellogg-Briand Pact*, Documents, consulting at http://avalon.law.yale.edu/subject_menus/kbmenu.asp, visited on 21/04/2016
(13) Art. 1, *The Kellogg-Briand Pact*, consulting at http://avalon.law.yale.edu/20th_century/kbpact.asp, visited on 21/04/2016

Art. II concerned the regulation of controversies and it established that: "the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be",(14) which might have arisen among the contracting States, should be achieved only through peaceful means. Lastly, art. III concerned the procedure for other signers and the final ratification. The Pact did not deal with the *forcible measures short of war*, which remained legal, and self-defense.

Although war was generally banned by the Pact, it was legal in some circumstances:

- during the war for self-defense: no reservation was put in the text of the Pact and the parameters of natural law were not defined. "Concerning this issue, the annotation made by the American government on 23 June 1928 was particularly clear. Not only did it exclude the abolition of recourse to self-defense war, but also it underlines that the individual State is the only competent in deciding when the circumstances require such recourse."(15) Besides, no competent body able to determine whether a State was acting under the right of self-defense or breaking the Pact was created;
- during the war as instrument of international politics. Since art. I of the Pact prohibited war only as a means of national politics, it remained legal as instrument of international politics. The expression *"national politics"* gave life to subjective interpretations according to which other wars were allowed, too, not only in national terms, but also in pursuing religious or ideological purposes;
- during the war outside the range of mutual relations among the contractors: the abolition of use of force was circumscribed to relations among contracting States *inter se*.

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(14) v. *supra*
(15) A. CURTI GIALDINO, voce *Guerra (dir. intern.)*, in *Enc. dir.*, vol XIX, Milano, 1970, p. 864

In any case, the *jus ad bellum* outlined in the Kellogg-Briand Pact was subject of several debates because it lacked in four points:

- the issue of self-defense was not clearly specified in the text;
- an agreement regarding the limits of war legitimacy as instrument of international politics was not achieved;
- the prohibition of recourse to war did not concern the whole global community;
- *forcible measures short of war* were not taken into consideration.

The idea at the basis of the Pact was to overcome the simple procedural restrictions concerning war and it created, in this way, a general explicit prohibition against war. "So, the relevance of the Pact could be summarized as the definitive end of the *laissez-faire* doctrine, which had its apex in the early 19th century."(16)

1.3. Art. 2 and the prohibition of the use of force in the international system

With the institution of the League of Nations in 1919, the prohibition of the recourse to the use of force was definitively approved and in particular, the principle of respect and protection of territorial integrity and political independence of the Member States from any external aggression made by another member:

(16) S. NEFF, *War and the Law of Nations: A General History*, Cambridge University Press, Cambridge, 2005, p. 294

> "[t]he Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled."(17)

The most serious problem that had to be solved in the period of the League of Nations was the limitation of the right of self-defense and, at the same time, allowing States to preserve the most essential aspects of the existence in a society that lacked an appropriate system of political and community protection.(18) Therefore, "[...] one of the pillars of this community construction, which was composed of processes for the prevention of international conflicts, based itself on the assumption of some obligations concerning the non-resort to war (preamble), specified in the Covenant."(19)

According to the article, the Covenant did not forbid or restrict the recourse to reprisal, to intervention and to peaceful block.

One of the principal aims of the UN Charter was to fill the lacks of the Covenant of the League of Nations, lingering mostly on the prohibition of the use of force. Following the decision made in 1944 by China, the ex-Soviet Union, the United Kingdom and the United States, the delegates of 50 States took part in the Conference of the United Nations on the International Organization in San Francisco in 1945. The Charter of the United States was signed on 26 June 1945, and entered in force on 24 October 1945 with the ratification of China,

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(17) Art. 10, *Covenant of the League of Nations*, consulting at https://cil.nus.edu.sg/rp/il/pdf/1919%20Covenant%20of%20the%20League%20of%20Nations-pdf.pdf, visited on 21/04/2016

(18) I. BROWNLIE, *International Law and the Use of Force by States,* Oxford University Press, Oxford, 1963, p. 217-18

(19) A. CURTI GIALDINO, voce *Guerra (dir. intern.)*, in *Enc. dir.*, vol XIX, Milano, 1970, p. 860

France, Soviet Union, the United Kingdom and the United States. The Charter is the constitutive instrument of the organization, it sanctions the rights and duties of Member States and it designates the main institutions, while supervising its operation. The Charter is considered the codification of the fundamental principles concerning international relations since it currently binds 193 Member States. "The original system expected by the UN Charter in its chapter VII provides for a complete and systematic variety of measures aimed at the solution of armed conflicts among Member States by means of verification and execution of the right by the Security Council or group of States or individual States under the Council's control."(20)

Among the many aims pursued by the Charter, the prohibition of threat or use of unilateral armed force by Member States (art. 2, par.4) has particular relevance. Self-defense is not included in the prohibition (art. 51) and only the Security Council is allowed to adopt peaceful coercive measures (art. 41) and military ones (art. 42) in case of threat to international peace and security.

The cornerstone which the current *jus ad bellum* is based on (that is, the right of waging war)(21) is the art. 2, par. 4 of the Charter, which proclaims:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."(22)

Consequently, as fundamental principle of the organization and general principle of international law, the art. 2, par. 4 expressly demands that

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(20) M. PANEBIANCO, voce *Legittima Difesa II) DIR. INTERN.,* in *Enc. giur.,* vol. XXi, Roma, 1990, p. 1 ss.
(21) B. CONFORTI, *Diritto Internazionale*, X ed., Editoriale Scientifica, Napoli, 2014, p. 419
(22) Art. 2, par. 4, UN Charter

States shall abstain from the use of force as solution to international controversies. According to the current prevailing opinion among the majority of States, also confirmed by the International Court of Justice in the case *Military and Paramilitary Activities in and against Nicaragua* of 1986,[23] the prohibition to recourse to force "[...] is often qualified as a fundamental or essential principle of general international law. Moreover, it is specified as the most important example of norm of *jus cogens*. The *jus cogens* norms have higher rank than simple customary ones. The category of imperative norms emerged in a relatively recent period with the *Vienna Convention on the Law of Treaties* in 1969. According to the Convention, the *jus cogens* norms are those rules of general international law that are recognized and accepted as peremptory by the States.[24] The *Vienna Convention* established the concept of *jus cogens* in art. 53, stating that:

> "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[25]

"The Vienna Convention, open for signing on 23 May 1969, recognized and accepted such norms as legal rules that cannot be ignored through agreements among States by the international community in its whole."[26] The imperative norms are customary norms supported by an

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(23) ICJ, *Militarv and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), merits, *judgment*, 27 June 1986, I.C.J. Reports, 1986, par. 202
(24) N. RONZITTI, *Introduzione al Diritto Internazionale*, IV ed., Giappichelli Editore, Torino, 2013, p. 165
(25) Art. 53, *Vienna Convention on the Law of Treaties*, consulting at https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf, visited on 06/10/2016
(26) V. STARACE, voce *Uso della forza nell'ordinamento internazionale II)*, in Enc. giur., vol. XXXVII, Roma, 1994, p. 2

highly qualified *opinio juris*, that is, they are not subjected to variation by agreement.(27) Finally, the prohibition to recourse to force covers an *erga omnes* obligation. The International Court of Justice had the opportunity to point out the definition of *erga omnes* obligations in an *obiter dictum* concerning the judgment in the Barcelona Traction case (1970).(28) It clearly distinguished between norms that create a set of bilateral relationships and norms that originate *erga omnes* obligations. "A substantial distinction must be made especially between the obligations of States towards the international community as its whole and the obligations that arise towards another framework of diplomatic protection. Due to their characters, the first ones concern all States. Seen the importance of the rights at stake, all States can be considered owners of a juridical interest so that those rights are protected; the specified obligations are *erga omnes* obligations.(29) At present single States that act *uti universi* are generally recognized to act or react in order to protect *erga omnes* obligations, putting in place some "independent" judgment concerning both the subject of the obligations and the range and the procedures of the permitted reactions.(30)

According to the general opinion following two world wars, "the definition wants to deny the Hobbesian point of view that considered the international relations intrinsically competitive and led by war."(31) Therefore, "the conceptual distinction between illegal use and legal use of force was codified. From then on, the legal use of force should have a nature exclusively punitive."(32)

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(27) N. RONZITTI, *Introduzione al Diritto Internazionale*, IV ed., Giappichelli Editore, Torino, 2013, p. 165

(28) ICJ, *Barcelona Traction Light and Power Company, Limited* (Belgium vs. Spain), merits *judgment*, 5 February 1970, I.C.J. Reports, 1970, 3, par. 33

(29) N. RONZITTI, *Introduzione al Diritto Internazionale*, IV ed., Giappichelli Editore, Torino, 2013, p. 182

(30) P. PICONE, *Comunità Internazionale e Obblighi "erga omnes"*, Jovene Editore, Napoli, 2006, p. 522

(31) S. NEFF, *War and the Law of Nations: a General History*, Cambridge University Press, Cambridge, 2005, p. 317

(32) M. PANEBIANCO, *Diritto Internazionale Pubblico*, III ed., Editoriale Scientifica, Napoli, 2011,

The basic idea of the system of international collective security requested by the United Nations was to take away the recourse to unilateral force from the States and to centralize it under the Security Council, by the virtue of art. 24:

> "[...] its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."(33)

Unlike the Covenant of the League of Nations, "the stress was set not on the event of war itself – which is mentioned in the preamble – but on the word *force*. The creators of the organization wanted to avoid those ways out allowed in the Covenant and in the Kellogg-Briand Pact. This was made possible thanks to the recourse to collective actions that were not able to be technically defined as war."(34) In fact, the prohibition of using force also includes all those indirect measures such as the provisions of armament to an insurrectionary force in another State, the military training, intelligence operations, etc... However, provisions of financial assistance to an insurrectionary force are not included in the use of force. One of the most important elements that must be underlined when we talk about the prohibition of use of force is the widely diffused consensus according to which resorting to force and breaking the prohibition does not mean war, but it is considered an action of illegal aggression made in peacetime.

Art. 2, par. 4 purposely avoids the word "war": the use of force in international relations includes also the war in its whole. Not only does the prohibition go beyond the mere war, including also the *forcible*

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p. 336
(33) Art. 24, UN Charter
(34) N. RONZITTI, voce *Forza (uso della)*, in *Dig./pubbl.*, vol. VII, Torino, 1991, p. 3

measures short of war, but also it goes beyond the current recourse to force, forbidding simple threat of use of force, too. "In other circumstances when the Charter uses the word *force*, it is correlated to the explicit clarification of the armed force or, when the explication does not appear, the context clearly excludes that force could make reference to economic coercion (art. 44)."(35) We must notice that the use of threat of using force is forbidden only in "international relations" among Member States: consequently, the article does not involve interstate conflicts among its competences. States see internal conflicts as a problem concerning their internal nature, unless they compromise international peace and security, becoming a threat in accordance to chap. VII of the UN Charter.(36) Nevertheless, the prohibition of the use of interstate force is not limited only to UN Member States: in fact, art. 2(4) forbids the use of force against "every States", whether a UN member or not.
Art. 2(4) must be read closely together with paragraph 3, that states:

> "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."(37)

The right interpretation is that any use of interstate force by Member States is forbidden for any reason, unless the Charter explicitly allows it. In particular, the recourse to force by a non-Member State is explained in art. 2, par. 6:

> "[t]he Organization shall ensure that states which are not Members of the United Nations act in accordance with these

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(35) v. *supra*, p. 4
(36) C. GRAY, *International Law and the Use of Force,* 2nd edition, Oxford University Press, Oxford, 2004, p. 59
(37) Art. 2, par. 3, UN Charter

Principles so far as may be necessary for the maintenance of international peace and security."[38]

Therefore, the organization is obliged to take the necessary measures against non-Member States when they might undermine the international peace and security.

The rules of game drastically changed in the last 50 years: the freedom of waging a war and, more generally, of employing interstate force became obsolete. "In the contemporary era, from the League of Nations to the United Nations, the use of force has gradually weakened. It has been deprived of its essential features, both due to the obligations accepted by States and due to the power of collective security assumed by global and regional organizations. In such organizations, the war power is not recognized as a power itself and the use of force is allowed as *exceptional and temporary instrument*, as the first step of a multi-phase process of collective security. This multi-phase process should verify the illegal nature (aggression) or the legal one (reaction to the aggression), it should stop futher developments and sanction the consequences. Therefore, in contemporary international law, the norm that allows war is no longer general, but it is exceptional or special: in fact, it is an exception to a prohibition."[39] Nowadays, the prohibition of the use of force, as delineated in art. 2(4), has become an essential part of customary law, committing every States. "Such principle fits in the trend of juridical pacifism. It is confirmed by several constitutional dispositions of individual States (art. 11, Italian Constitution). So, it forms the new *lex generalis* of the *jus gentium*."[40] The current condition of customary international law was analyzed by the International Court of Justice in the case of *Nicaragua v. United States*,

(38) Art. 2, par. 6, UN Charter
(39) M. PANEBIANCO, voce *Guerra I) DIR. INTERN.,* in *Enc. Giur.,* vol. XVII, Roma, 1989, p. 1
(40) v. *supra*, p. 2

otherwise called *Military and Paramilitary Activities in and against Nicaragua* of 1986.[41] In 1986 the International Court of Justice judged the art. 2(4) as "principle of prohibition of the use of force" in international relations. In that particular situation, the United States helped the insurgents, the so-called "contras", with massive financial provisions, with supplies of weapons on large scale, as well as with intelligence information. Furthermore, they provided military training to the insurgents in the headquarters set in the nearby areas, like Honduras, where the contras would have attacked Nicaragua. In front of the International Court, Nicaragua asserted that the American aids to contras armed forces were so significant to change the conflict from a simple civil war into international conflict. According to Nicaragua, contras would have been simple mercenaries under the American control. The Court described the conflict as an hybrid situation where civil war kept pace with international conflict. Indeed, the international feature was the use of force by the United States against Nicaragua, whereas the internal factor concerned the operations totally made by the contras forces. Therefore, for the first reason law of humanitarian intervention should have been applied, whereas as far as the internal element was concerned, they should have appealed to Nicaragua's domestic law. The United States and the insurgents constituted two separate forces allied with each other, which were fighting two separate conflicts. So, the International Court refused collective self-defense as justification requested by the United States and it asserted that the aid and military assistance to rebels would not have constituted such an "armed attack" to allow self-defense counter-measures. Taking away the justification of self-defense from the United States, they would have been condemned whenever they have carried out military or paramilitary activities in Nicaragua, breaking not only the prohibition

(41) ICJ, *Militarv and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), merits, *judgment*, 27 June 1986, I.C.J. Reports, 1986, par. 187

of the use of force, but also the prohibition of non-intervention in internal affairs of one State. Then, the Court declared that the United States had not set up contras forces, as sustained by Nicaragua, and consequently the activities could not be directly condemned to the United States. However, the amount of assistance required to transform simple State intervention into an effective alliance with the insurgents during a civil war was not specified. In that situation, the Court took up a traditional and conservative approach, stressing the need for the effective existence of a previous armed attack before laying claim to the right of self-defense. At the same time, it highlighted the fact that not all the recourses to force had to be considered armed attacks: not all the types of recourse to force were believed sufficient enough to justify the self-defense.

Since art. 2(4) does not clarify the real meaning of "threat", the International Court of Justice insisted that the mere act of arming would not be included in the explanation of "threat" contained in the prohibition.(42) "The notions of *threat* and *use of force* by the virtue of art. 2(4) of the UN Charter are interrelated to the extent that "if the use of force is illegal in a determined situation, consequently the threat of using force is illegal as well."(43) As François Dubuisson and Anne Lagerwall report in their essay "*Que signifie encore l'interdiction de recourir à la menace de la force?*"(44), the text of art. 2(4) implies that the threat results illegal when the use of force is also considered illegal. "The threat becomes illegal when it is undertaken in a situation when there is no justification for the use of force, that is, when it is not authorized by the Council or it is not included in the right of self-

(42) ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), merits, *judgment*, I.C.J. Reports, 1986, par. 227
(43) CEDIN – Paris 1., *L'Intervention en Irak et le droit international*, sous la direction de Karine Bannelier, Pedone, Paris, 2004, p. 88
(44) v. *supra*, p. 83

defense."[45] If we recall the two elements that are taken into consideration in customary international law, that are the objective custom of States (*diurnitas*) ("constant repetition of a behavior by the majority of States")[46] and the subjective *opinio iuris sive necessitatis*,[47] that is, that the unwritten norm followed by States must have been recognized as having a compulsory nature,[48] in the procedures of *Nicaragua's Case*, both parties agreed that "the principles as to the use of force incorporated in the United Nations Charter correspond[ed], in essentials, to those found in customary international law. The Parties thus both [took] the view that the fundamental principle in this area [was] expressed in the terms employed in Article 2, paragraph 4, of the United Nations Charter."[49] However, the Court considered necessary confirming the existence of a general *opinio juris* concerning the binding nature of the customary prohibition of interstate force. Although the Court mainly dwelt upon the *opinio juris* of States, it still struggled to examine also the manners in which governments acts: the omission of recourse to force, however, was not correlated to the indisputable fact that the use of force kept influencing the international relations.

Starting from the violation of the prohibition of the use of force, we can deduce some consequences:

- the State that resorts to force in an illegal way must pay the

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(45) v. *supra*, p. 88-89

(46) N. RONZITTI, *Introduzione al Diritto Internazionale,* IV ed., Giappichelli Editore, Torino, 2013, p. 162

(47) The common law's procedure expresses through a so-call passive will, that is through an emulative or adhering process by the States regarding juridical parameters already in force or in the making in the community. […] What is requested to the States […] is to adopt a behavior with the awareness that its consequences have already been provided by a juridical norm in force for long time. In fact, the customary behavior […] requires the *opinio juris* in accordance with a juridical behavior adopted by other States or by all the international community (*diurnitas*). (M. PANEBIANCO, *Diritto Internazionale Pubblico*, III edizione, Editoriale Scientifica, Napoli, 2011, p. 194)

(48) D. CARREAU, F. MARRELLA, *Droit International*, XI ed., Pedone, Parigi, 2012, p. 312

(49) ICJ, *Militarv and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), merits, *judgment*, I.C.J. Reports, 1986, par. 188

damage caused by its armed intervention. For example, this principle was applied towards the United States in the above-cited case where the large-scale assistance to the insurrectionary forces corresponded to a violation of the prohibition;

- third parties can abstain from adopting law of neutrality and helping, instead, the State who is victim of the aggression. "Herein lay perhaps the most significance difference between a war and a case of aggression-and-self-defense: that a war activates law of neutrality, thereby making impartiality mandatory on the part of third parties; while aggression-and-self-defense situations allow third parties to be partial (towards the victim State, of course)."(50) For example, third parties, in such situation, can supply the victim State with munitions or financial supplies;
- any achievement by the State that acts illegitimately is not recognized by the international system of States;
- who commits an illegal use of force can be judged by an international tribunal with the charge of crimes against the peace (International Criminal Tribunal). The last trials of *ad hoc* International Tribunals were the ones for the crimes committed in ex-Jugoslavia and in Rwanda. They were created by the Security Council with the resolutions n. 827/1993 and n. 955/1994;
- finally, it is possible that the Security Council may authorize an armed action to Member States to put an end to the illegal activity.

There are many reasons in favor of the persistent effectiveness of the prohibition of the use of force: firstly, all the countries categorically

(50) S. NEFF, *War and the Law of Nations: a General History*, Cambridge University Press, Cambridge, 2005, p. 320

consider the use of unilateral force illegal, excepting self-defense; secondly, "when a State recurs to force illegitimately, all the others firmly opposed it, repudiating the action";[51] thirdly, States that resort to force believe in the prohibition insofar they need to legally justify themselves for their actions, as the case of *Military Activities in Nicaragua* underlined. In support to legitimacy, "States that resort to force might be driven by the necessity of transforming the law in force"[52] and those who employ the force are aware that it is illegal from the beginning, restricting their actions in terms of range and scope of the operations. Furthermore, methods of peaceful solutions to controversies are preferred, instead the use of force; and finally, States are convinced to follow the prohibition for several reasons, for example, the eventuality of "mutual assured destruction" and the current costs of war in comparison with the benefits they might get.

Unlike the previous League of Nations, the Security Council is entrusted with the power of imposing economic sanctions against aggressor States (art. 41) and of starting a military action in order to submit the aggression on behalf of the Members of the organization (art. 42).

The "force" specified in the article is the one employed "in international relations", carried out outside the State territory, in particular in the territory of other States or in territories that are not under the sovereignty of any State. Moreover, the prohibition concerns the force used "against territorial integrity or political independence" or "in any other manner that is not compatible with the aims of the United States." This last condition wants to forbid the threat or the use of force even when the territorial integrity or the political independence of one State are not violated or when there is incompatibility with the aims of the organization drafted in art. 1.

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(51) C. FOCARELLI, *Diritto Internazionale,* vol. I, II ed., CEDAM, Padova, 2012, p. 720-721
(52) v. *supra*

1.4. Articles 37, 39, 41 and 42: the role of the Security Council

With the institution of the United Nations and the adoption of the Charter as legal basis for general international law, States decided to entrust the Security Council, and consequently its 15 members, with the main task of maintaining international peace and security complying with the principles and the aims of the Charter. "The Security Council in its ordinary role of peacemaker and global police (*defensor pacis*) has at its disposal a series of powers variously structured following the tasks involved and the phases of its intervention."(53) Chapter VII, in particular, regulates the most important tasks entrusting the Council with increasingly growing and specific powers compared to the seriousness of the threat to peace – or of its violation.(54)
In fact, by the virtue of art. 37, included in chapter VI:

> "1. [s]hould the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council. 2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider

(53) M. PANEBIANCO, *Diritto Internazionale Pubblico*, III ed, Editoriale Scientifica, Napoli, 2011, p. 344
(54) B. CONFORTI, *Le Nazioni Unite*, VIII ed., CEDAM, Padova, 2010, p. 202-205

appropriate."[55]

Therefore, the primary responsibility concerning the maintenance of international peace and security is up to the Security Council, as also stated in the following art. 39 of the Charter. In fact, art. 39, sets the conditions for the 15 members to adopt peaceful or military measures considered in the following provisions. In accordance with the article, the Council shall verify the existence of:

> "[...] any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."[56]

Art. 39 uses the compulsory expression "*shall*" in order to describe the task of the Council in the field of collective security: in fact, members must prove the existence of a threat to the peace, a breach of the peace or an act of aggression. They must release recommendations or decide the actions to actuate so as to reestablish or maintain international peace or security. In such a period of globalization when each event could be considered danger for international security, it is difficult to decide in the most general way which the limits of the Council's discretion are regarding the evaluation of the practice of its coercive powers. So, the problem must be solved case by case. In fact, the Security Council can judge any situation as a threat to peace, but then the Member States in their whole (*uti universi*, States are considered supervisors of the international system's interest) are entitled to give their consensus on that matter. The legitimacy stops to exist when a large part of States opposes the Council. When the Council decides the

(55) Art. 37, UN Charter
(56) Art. 39, UN Charter

existence of preconditions to undertake an action at its complete discretion, then it must decide, again at its discretion, the practice of acting, that is, which measures must be taken into account. Art. 39 ratifies that the Council can issue recommendations with the aim of facilitating a peaceful solution among the parties. In other words, art. 39 restates that, even facing such situations related to chapter VII, the Council can exercise its conciliating role, suggesting Member States procedures and guideline's methods or terms of regulation.(57) In accordance with art. 40, the organism can adopt "provisional" and urgent measures, which are restricted in time with the aim of preventing a "worsening of the situation" (cease-fire in internal or international conflicts, the liberation of prisoners, the troop withdrawal, etc...) In particular, art. 41 concerns measure with sanctioning nature and they are undertaken against a State that, according to the Security Council, unsettles or threatens international peace or might be considered an aggressor. Concretely, Member States put them into action on Council's request.(58) As far as art. 41 is concerned, it gives the Security Council the power of adopting not only recommendations, but also binding decisions and it allows the adoption of "measures not involving the use of armed force", imposing them to Member States:

> "[t]he Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the

(57) B. CONFORTI, *Le Nazioni Unite*, VII ed., CEDAM, Padova, 2005, p. 186
(58) v. *supra*, p. 192

severance of diplomatic relations."[59]

"Member States are obliged to implement such measures only if they are preceded by «decision». [...] If the Council believes that sharper measures are needed to face the situation or if the measures in art. 41 have proven to be inadequate, the Council can wage a real and effective operation of international police through air, naval or ground forces."[60] Art. 42 provides that the Council can fall back on measures implying the use of force:

> "[s]hould the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."[61]

In the primary project of the Charter, the Council was entitled directly to undertake military operations thanks to the arrangement of military contingents made available by Member States. Therefore, the authors wanted to assign a centralized competence of "international police" to the Council, which was subject to regulation. The purposes outlined in art. 42 not only centralize the power of deciding that force must be employed, but also the supervision of military operations.[62] Since the draft had never been realized, in the legal praxis the Council ended up creating *ad hoc* UN military missions for maintaining peace or

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(59) Art. 41, UN Charter
(60) N. RONZITTI, voce *Forza (uso della)*, in *Dig./pubbl.*, sez. IV. Il capo VII della Carta delle Nazioni Unite e il sistema di sicurezza collettiva, vol. VII, Torino, 1991, p. 21
(61) Art. 42, UN Charter
(62) B. CONFORTI, *Le Nazioni Unite*, VII ed., CEDAM, Padova, 2005, p. 202-203

authorizing Member States to undertake coercive operations. Today the Council is limited to approve and control the operations made by national contingents.

Until the invasion of Kuwait by Iraq in 1991, the Council often proved to be reluctant to invoke chap. VII of the Charter, or any article, as basis for its authority. Since the outbreak of the First Gulf War, the long series of resolutions taken from then on clearly proved the change of policy by the Security Council in the post-Cold War era. Moreover, these resolutions were particularly important for the evolution of Charter's law. The first resolution, which marked the new tendency, was the famous SCR 660 of 2 August 1990: the Council demonstrated the existence of "*a breach of international peace and security*" and, acting under articles 39 and 40, it condemned the invasion, demanding an immediate and unconditional withdraw of Iraqi forces. Then, the SCR 660 was followed by SCR 678, which authorized Member States to use all necessary means in order to support and implement SCR 660 and all the following relevant resolutions. This last important resolution constituted the specific warrant for the implementation of collective self-defense, outlined in art. 51.

1.5. Art. 51 and the right of self-defense

Chapter VII of the UN Charter recognizes and preserves the customary international right of self-defense. In the international system where the central authority and the processes of implementation are less efficient than in internal law, the use of the right of self-defense (as means to protect its own juridical rights) became

particularly important. “The self-defense is expressly contemplated in art. 51 of the UN Charter as exception to the general prohibition of the use of force in international relations,”(63) which declares that:

> “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the practice of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”(64)

The general prohibition of aggressive war significantly changed the concept of self-defense and it firmly established its juridical concept. Consequently, art. 51 became the main pillar of the right of self-defense in all its forms, both the individual self-defense, the one which the attacked State resorts to, and the collective one, that is, the one which other States assisting the attacked State. Art. 51 is considered “inherent right” of each State. The right of self-defense as the only exception to the use of force must be read with art.2, par. 3 and 4 of the Charter concerning the solution for controversies “*as peaceful means*” and the prohibition of the use of force.(65)

As specified, art. 51 considers self-defense a right: the State that finds itself victim of an armed attack has the right to use the unilateral force

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(63) N. RONZITTI, voce *Forza (uso della)*, in *Dig./pubbl.*, vol. VII, Torino, 1991, p. 6
(64) Art. 51, UN Charter
(65) A. CASSESE, *Diritto Internazionale*, a cura di P. GAETA, II ed., Il Mulino, Bologna, 2006, p. 384

and such decision is at risk and discretion. However, the right is controlled in terms of implementation and it refers only to UN Member States. The right of self-defense, that is, the armed reaction by one State against an armed attack by an another one, can be invoked "*if an armed attack occurs against a Member of the United Nations*" and works "*until the Security Council has taken the measures necessary to maintain international peace and security.*" "A threat to peace can derive from the danger of hostilities between two States, but also from a situation inside a State, where, for example, a civil war is in progress. […] A breach of the peace is generally constituted by the outbreak of hostilities between two States."(66) The self-defense does not require any previous UN authorizations, it can be summoned immediately before an armed attack and, finally, it can be canceled once the Council decides to take the necessary measures. The action provided by chapter VII has no time restrictions, although it can require constant references to the original UN order to analyze the exact framework and range of the legal license to use the armed force.

Self-defense in interstate relations can be described as the legitimate use of force, mainly of the counter-force, under the conditions required by international law, that is, in response to a previous illegal use of force. In particular, the issue whether the use of force in anticipation of an armed attack is allowed as included in the concept of self-defense is highly contested. Indeed, the concept of self-defense is certainly one of the most controversial issues of international law. (67)

It is inevitable that a certain degree of self-protection is allowed to a State before an organized coercive action by the UN Member States might be undertaken and it is led in the first place through the self-defense. The range of the legal practice of the right of self-defense lies

(66) N. RONZITTI, *Introduzione al Diritto Internazionale,* IV ed., Giappichelli Editore, Torino, 2013, p. 450

(67) A. CASSESE, *International Law*, II ed., Oxford University Press, Oxford, 2005, p. 354-55

under the strict control of the system of States and it expresses the attempt to centralize the international use of force. The requisite of **proportionality**, often represented as the core of self-defense, belongs to the main criteria that derives from the customary norm of self-defense. Together with necessity and immediacy, it is a crucial prerequisite for the juridical approval for the use of force with a defensive aim. These limits are not outlined in any article of the Charter, "but are part of international customary law. [...] Commentators agree on a few basic uncontroversial principle: necessity and proportionality mean that self-defense must not be retaliatory or punitive; the aim should be to halt and repel an attack."(68) The customary law of self-defense requires that practice must be proportioned to threat, in particular in terms of range and scope: a State can use only a certain degree of force if it is necessary to overthrow the attack and reestablish the *status quo*.(69) The problem that arises here is that a comparison between the *quantum* of force used by the enemy and the counter-force to be used can be made only *a posteriori*. In fact, the range of force used in response to the armed attack could be in excess compared to the force inflicted by the starting illegal attack. Consequently, the prerequisite of proportionality, intended as approximation of the total force used by both parties, can cause problems if it is considered the yardstick to determine the legality of a potential war of self-defense. A war of self-defense is the most extreme and lethal action that one State has the possibility to use; consequently, it cannot be allowed as justification for a weak cause. Only when the starting armed attack is considered serious enough, the victim State is free to wage a war.

Necessity represents a further essential condition to the practice of

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(68) C. GRAY, *International Law and the Use of Force*, 2nd edition, Oxford University Press, Oxford, 2004, p. 121

(69) I. BROWNLIE, *International Law and the Use of Force by States*, Oxford University Press, Oxford, 1963, p. 261-262

self-defense. The rule of necessity and its range is certainly the most important prerequisite to be analyzed and evaluated by the requesting State. The requisite of necessity, which must not be confused with the "*state of necessity*" as justification for an international offense, implies that the resort to force is allowed only if other ways to the aim's attainment of self-defense (that is, the turning down of the attack) do not subsist.(70) In the evaluation of the necessity, many other extra-juridical factors must be taken into consideration as, for example, the scope and the power of the parties involved, the nature of their purposes, the values and the rights violated by the illegal coercion.

The last condition that self-defense requires to be practiced is **immediacy**, that is, a reasonable period of time that follows the attack. In other words, self-defense cannot be started after the attack has ended, but only when the attack is in progress, taking into account the geographic distance of the place of armed forces relocation acting in self-defense.(71) This implies that the illegal armed attack must be still in progress and its goal must not have been still realized. In fact, if self-defense is undertaken once the offensive action of the enemy has ended, it might be considered act of aggression by States. However, the immediacy does not imply that the defensive action must be carried out in few hours or few days since the attack; in fact, the process of developing defensive counter-measures might require lot of time, like several weeks or even months. So, the delay can be justified by special circumstances of each particular case (peaceful measures, geographic distance). The First Gulf War in 1991 shows that the use of counter-force in self-defense can start also half a year after the armed attack. In that specific case, the requisite of immediacy was not violated as the Iraqi government obstructed the many attempts of solving the conflict

(70) N. RONZITTI, *Introduzione al Diritto Internazionale*, IV ed., Giappichelli Editore, Torino, 2013, p. 426

(71) C. FOCARELLI, *Diritto Internazionale,* vol. I, II ed., CEDAM, Padova, 2012, p. 729

in a peaceful manner.

The requisites of necessity and proportionality correspond to customary international law, as the International Court of Justice stated in the cases about *Military activities in Nicaragua* of 1986, *Oil Platforms* of 2003 and the advisory opinion about the *Use of Nuclear Weapons* of 1996. In the predominant doctrine, non- immediate or non-proportioned military actions are considered "armed reprisals."

One condition of practice clearly expressed in art. 51 is the obligation for Member States to inform the Security Council about the activities of self-defense, which were undertaken. Before the case on *Military Activities in Nicaragua*,(72) the activities undertaken by States were rarely communicated to the Council; later States began to report their acts with the intention of justifying the legal fact if they were acting in self-defense.

We must remember that in art. 51 there is the term *"armed attack"* and not *"aggression"* in order to restrict the practice of self-defense exclusively in response to an armed attack. There is no doubt that the armed attack is considered a particular way of aggression, or better say a *sui generis* aggression: in fact, the aim of aggression is considered wider than the aim of a mere armed attack. Only the most extreme and most serious ways of aggression considered armed attack justify the force for self-defense. Aggression was outlined in res. 3314(73) by the General Assembly on 14 December 1974 and it was considered the connecting point between art. 2(4) and art. 51. In accordance with the resolution, the aggression is:

"the use of armed force by a State against the sovereignty,

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(72) ICJ, *Militarv and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), merits, *judgment*, I.C.J. Reports, 1986

(73) *Definition of Aggression*, United Nations General Assembly Resolution 3314 (XXIX), 14 December 1974, consulting at https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement, visited on 21/04/2016

territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition" (art. 1), among which "the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof."(74)

"In order to implement the right of self-defense, a particularly qualified violation of art. 2(4) must be verified, that is, an *armed attack* must have occurred."(75) Nevertheless, there are still doubts about which type of armed attack might justify self-defense. As demonstrated, the aggression does not include only the armed attack, but also other ways of using force as the deployment of forces or the permission to one State of using its own territory for aggressive actions against a third part. Moreover, "art. 3 of the resolution concerning the definition of aggression considers illegal an attack against the air or commercial fleet of a State, including it in the acts that constitute aggression."(76) Although there are some similarities between the armed attack and the aggression, we can find significant differences, in particular concerning the procedural nature that must be kept in mind. The greatest difference concerning the aggression is that the decision of its emergence is a responsibility of the Security Council. On the contrary, the armed attack is especially determined by the victim State, which is the only temporary judge of the consequences. In the case on *Military and Paramilitary Activities in and against Nicaragua*, the Court of Justice distinguished "the most grave forms of the use of force (those

(74) Art. 1-3, par. a, *Definition of Aggression*, United Nations General Assembly Resolution 3314 (XXIX), 14 December 1974, consulting at https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement, visited on 21/04/2016
(75) N. RONZITTI, voce *Forza (uso della)*, in *Dig./pubbl.*, vol. VII, Torino, 1991, p. 6
(76) N. RONZITTI, voce *Forza (uso della)*, in *Dig./pubbl.*, vol. VII, Torino, 1991, p. 7

constituting an armed attack) from other less grave forms",[77] pointing out that *minoris generis* attacks, like the supply of weapons and the logistic assistance to the insurgents acting in another State, do not belong to the attacks that justify self-defense. Only the aggressive actions are defined as armed attacks and not "mere cross-borders accidents."[78] Still referring to the case, self-defense can be justified in response to an "indirect armed aggression" (the attack committed by a State through the sending of armed groups not involved in its armed forces, but acting on behalf of the State through actions of armed force as long as the attack is as serious as an effective armed attack led by regular forces). "Therefore, the sending of armed groups or irregular forces or mercenaries by a State on its behalf is considered armed attack if they carry out acts of such seriousness to be compared to a real armed attack made by regular forces."[79] On the contrary, the activities of single terrorists is not regarded as armed attack. According to professor Massimo Panebianco, in fact, the private nature of such individuals only allows the practice of internal repression by the victim State, as well as the penal and police's cooperation with the aim of crime prevention and the extradition or punishment of the terrorists.[80] If we take into consideration the recent legislation of certain State, in fact, the terrorist acts are punished "by the combined figure of personal violation of domestic law (terrorism as crime) and international law (state terrorism) towards States, which are tolerant or supporting or involved with terrorism. Such position is justified as reaction to "terrorist war" meant as means to intimidate or constrain civil population or government bodies to influence its political

(77) ICJ, *Militarv and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), merits, *judgment*, I.C.J. Reports, 1986, par. 191
(78) B. CONFORTI, *Diritto Internazionale*, X ed., Editoriale Scientifica, Napoli, 2014, p. 415
(79) N. RONZITTI, *voce Forza (uso della),* in *Dig./pubbl.*, vol. VII, Torino, 1991, p. 7
(80) M. PANEBIANCO, voce *Legittima Difesa II) DIR. INTERN.,* in *Enc. giur.,* vol. XXI, Roma, 1990, p. 6

activities."[81]

Backing to self-defense, the process is composed of two phases. The first stage occurs when the operation of recourse to self-defense is let to the discretion of the victim State and any third party ready to oppose the aggressor: the acting State decides whether the occasion requires the practice of forcible measures in self-defense and, if it is so, which specific steps must be carried out. In the second and last stage, a competent international forum must have the power to inspect the whole flow of events and evaluate the legality of the used force. The decisive issue is to which competent international forum is currently assigned the task to inspect the legality of any forcible measures carried out by a State relying on self-defense. One of the greatest achievement of the UN Charter is the assignment of the task of inspections concerning the request of self-defense by a Member State to the Security Council. The Council is the only international authority mentioned in art. 51 ("measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council [...]").

The measures of implementation of the right of self-defense must be immediately reported to the Council, which, in turn, analyzes the case and all the relevant facts, although it is not obliged to start a process of verification of the facts. The ways of action feasible by the organism are numerous:

- it can allow its retrospective approval to the practice of self-defense;
- it can allow general cease-fire;
- it can request troop withdrawal to the original lines;
- it can insist on the end of the unilateral action of the defensive State, replacing it with measures of collective security;

(81) v. *supra*

- it can decide that the State committed in the so-called self-defense is actually the aggressor.

In any case, the decision adopted by the Security Council concerning the issue binds all the Member States: once the Council orders a Member State to abstain from any use of force, to withdraw its troops or to comply with cease-fire, the Member State is obliged to act under the Council guidelines and it cannot invoke self-defense any longer. "Self-defense has a deadline: it must finish as soon as the Security Council has taken the necessary measures to maintain international peace and security."(82) If the Council is paralyzed or fails in taking the necessary measures, the juridical position is obvious: a Member State practicing the right of self-defense can go on with the use of force. As political entity, the Council can choose to give up the interests of one individual State on behalf of more general interests of international peace.

Some wars raise several common doubts under different aspects. Nobody question that the facts that violate the general rules of international law are considered illegal ones (with "international offense" we mean the behavior of a State, or other actors of international law, breaking an international norm that involves an obligation on which the State depends).(83) However, we must recognize that an illegal fact can become a precedent for the creation of a new rule, according to the element of *opinio iuris*: indeed, a new rule often originates from an illegal fact. If the *opinio iuris* is in favor of the new rule, the legality wavers. The future of the norm mainly depends on the reaction of other juridical actors and of the international jurists facing the violation.

Art. 51 includes also the collective self-defense, which shares the

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(82) N. RONZITTI, voce *Forza (uso della)*, in *Dig./pubbl.*, vol. VII, Torino, 1991, p. 7
(83) M. PANEBIANCO, *Diritto Internazionale Pubblico*, III ed., Editoriale Scientifica, Napoli, 2011, p. 434

essential presupposition with the concept of "*collective security*": the recourse to force against an aggression can be waged also by who is not directly and immediately involved. Indeed, the collective security acts on behalf of a decision issued by an authority of the United Nations. Whereas both individual and collective self-defense in accordance with art. 51 are allowed only in response to an armed attack, the collective security can be set in motion any time the Council declares that a threat, a breach of the peace or an act of aggression exists. This issue leads to an unequivocal crossroads concerning the use of interstate force according to the Charter. In fact, on one hand any Member State or group of States are allowed to resort to force in international relations, although only under extraordinary circumstances of legal response to an armed attack and subject of a revision by the Council. On the other hand, the Council embodies the power of employing force on behalf of collective security: the Council can use force to contrast any kind of aggression, not necessarily an armed attack, and moreover it can respond to a mere threat to peace, too. In the practice of collective security, the Council is not only free to decide whether and how using force, but also it is free to determine when and against whom using it. However, we must recall that the Council is a political body, not a juridical one, and consequently its decisions are influenced by political motivations and they do not necessarily correspond to juridical considerations. Therefore, it can determine a threat to peace (which must not be confused with the threat of force in art. 2(4)) as a situation that may appear to others not so disturbing for the international security's equilibrium. However, a Council's decision that declares that there might be a threat to peace is decisive and all the Member States are obliged to accept the verdict.

"In order to implement the collective self-defense, the existence of a previous obligation – for example, a treaty on regional defense – between the two States that act in self-defense is therefore

necessary"[84] Another requirement needed in the case of collective self-defense is the request of intervening by the victim State: States, excluded the attacked one, cannot unilaterally verify the existence of the attack and intervene in it. As stated by the Court of Justice in the case *Military Activities in Nicaragua*, the victim State "is entitled to ascertain whether there was an armed attack and it is up to consider whether it is worthwhile reacting without the assistance of other States or instead it is convenient asking for help to another actor of international law."[85]

So, the problem is whether art. 51 is the only source of self-defense in international law or art. 51 dictates only certain conditions for the implementation of a preexisting inherent right of self-defense. UN Members did not introduce art. 51 with the aim of defining the individual right of self-defense, but with the aim of clarifying the position concerning collective agreements for mutual self-defense. Summarizing, although the Charter recognized the existence of an inner right of self-defense, it does not regulate all the aspects of the subject in question, for example the range of implementation or the amount of force allowed during a legal practice of self-defense. These doubts demonstrate that customary international law continues to exist alongside the law of treaty as far as self-defense is concerned.

1.6. The preemptive self-defense

The concept of "preemptive self-defense", which asserted itself particularly after the terrorist attacks of 11 September 2001 in

(84) v. *supra*, p. 359
(85) N. RONZITTI, voce *Forza (uso della)*, in *Dig./pubbl.*, sez. I., L'uso della forza da parte degli Stati individualmente considerati, vol. VII, Torino, 1991, p. 11

American administrations, goes far beyond the basic meaning of self-defense theorized in the UN Charter. In fact, the intention is to apply a sort of "principle of precaution" with regard to recourse to force: according to this doctrine, a State can freely resort to force in any moment against whom represent or might represent a threat to its security in a future more or less forthcoming. The uncertainty concerning the reality or the quality of threat, however, must not interfere with military intervention.(86) Adding the word "preemptive" to the right of self-defense, in this case the United States transformed a principle traditionally defensive into a concept radically offensive.

The main problem is that the doctrine of preemptive self-defense has no support neither on a customary norm before art. 51, nor on art. 51 and nor on a further norm based on the practice of States.

Nowadays all the States must follow art. 51 and the fundamental question is its interpretation. Those who support the doctrine of preemptive self-defense often asserted that the article does not exclude the possibility of a preemptive military action in case of simple threat. For example, referring to the English version, the expression *"if an armed attack occurs"* is assumed that it cannot be interpreted as *"if, and only if, an armed attack occurs"*. This reasoning, however, does not belong to the interpretation of the article. Indeed, the article establishes the previous existence of an *"armed attack"* as *sine qua non* condition. So, the effective existence of an armed aggression constitutes a *sine qua non* condition to the practice of self-defense, instantly banning the "anticipatory" or "preemptive" theories. Furthermore, as far as the article's aim is concerned, international law does not intend to "protect State", giving it the right to resort to force against everything that can be considered threat. Instead, its aim is to create a particularly strict exception to the prohibition of the use of

(86) CEDIN – Paris 1., *L'Intervention en Irak et le droit international*, sous la direction de Karine Bannelier, Pedone, Paris, 2004, p. 11

force, limiting it to the only case of a material existence of an armed aggression. The purpose of the Charter, drafted at the end of the Second World War, had never been to grant States with a general right of armed self-help whenever they would have felt threatened.(87) On the contrary, its goal was to limit the unilateral recourse to force in international relations in order to "*save succeeding generations from the scourge of war, establishing, in this way, a system of collective security*." A further problem regarding the preemptive action is that it is based on a subjective judgment about the existence of a threat and therefore it is difficult to know whether this threat is plausible and whether the preemptive action against it is required. In this situation, the State that invokes preemptive self-defense should be able to declare (as it happened with the United States and the United Kingdom in the war against Iraq) that only a total war, which includes the invasion of the enemy's territory and the removal of its government, can constitute an efficient defense against the several risks and dangers.

Right after the stipulation of the Charter, the Member States asked themselves whether accepting "preemptive" self-defense, that is, the armed reaction to the mere threat or risk of third-party armed aggression. In the custom and the doctrine, still today the definition of preemptive self-defense relates to the definition expressed by the American Secretary of State Webster in an annotation in 1841 addressed to the United Kingdom concerning the *Caroline Affair*.

The *Caroline Affair*(88) deals with the accident that happened in 1837 when, during a rebellion in Canada against the English domination, the rebels made preparations in the American territory for a rebellious

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(87) "Self-defense must not be confused with self-help, which sometimes is appealed in order to justify coercive measures by one State against another one with the aim of maintaining or restoring a violated right. These measures of self-help are executive measures that may be related to other legal basis, but they are not included in the precise and restrictive context of self-defense." (J. COMBACAU, S. SUR, *Droit International Public*, V ed., Montchrestien, Paris, 2005, p. 634)

(88) G. BADIALI, *Testi e documenti per un corso di diritto internazionale*, III ed., Maggioli ed., Rimini, 1989, p. 208 ss.

action against English authorities.(89) The English forces entered the American territory and destroyed the Caroline ship used for the assistance's supplies to the insurgents, besides the killing of two American citizens. Facing the United States protests, Great Britain invoked self-defense and self-preservation, accusing the United States of failing to prevent the adoption of appropriate measures to Caroline ship in the assistance of the rebels in Canada. The American Secretary of State Webster replied on 24th April, 1841, denying the existence of the requisite of necessity so that English action could be justified:

> "under these circumstances, and under those immediately connected with the transaction itself, it will be for Her Majesty's Government to show what state of facts, and what rules of national law, the destruction of the Caroline is to be defended. It will be for that Government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."(90)

This definition originated a restricted law of preemptive action, which is still relevant in international law, since it was not followed by any armed attack. The preconditions established in the *Caroline Affair* were extended also to the general right of self-defense, since the right of preemptive self-defense was only a type of the more general customary right of self-defense and the conditions for both rights were the same: necessity, immediacy and proportionality. In addition, later these conditions were stated also by the International Court of Justice when affirmed that:

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(89) C. FOCARELLI, *Diritto internazionale,* vol. I, II ed., CEDAM, Padova, 2012, p. 723
(90) *Letter of Mr. Webster to Mr. Fox* (April 24, 1841), in 29 BRITISH AND FOREIGN STATE PAPERS, 1840-41 at 1137-38 (1857)

> "[t]here is a specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law."(91)

In the case of preemptive self-defense, however, it is reasonable to add two further conditions: firstly, an action of preemptive self-defense could be justified only if the Council was not able to implement a positive action; secondly, the State against which the action of preemptive self-defense was undertaken had to violate international law.

In the custom of the second postwar period, States repeatedly affirmed and keep affirming that the so-called preemptive self-defense is banned, in particular as far as the reaction to mere hypothetical attacks is concerned. Nevertheless, States began to adopt increasingly reasonable positions concerning self-defense, keeping in consideration that preemptive action might deem more and more necessary in a world where the supply of nuclear weapons is available to a larger number of States. The case of Iraq showed how the majority of States was not willing to accept the doctrine of "preemptive self-defense." "Concerning the debates only within the Council, we can observe that there is a massive opposition to unilateral recourse to force and at the same time there is an effort of reaffirming of the central role of Council and of multilateralism regarding the maintenance of international peace and security."(92)

The restrictive school of thought, which has been developing during the last years, affirms that self-defense, excluding the preemptive one, must be interpreted in a rigorous way. This tendency is related to art.

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(91) ICJ, *Militarv and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), merits, *judgment*, I.C.J. Reports, 1986, par. 176

(92) CEDIN – Paris 1., *L'Intervention en Irak et le droit international*, sous la direction de Karine Bannelier, Pedone, Paris, 2004, p. 64 ss.

51 and customary international law and it asserts that there is no right of self-defense without a previous armed attack. In the possibility of a potential attack, in fact, a State can prepare to it only by the preparation of the opposition. However, a significant number of experts in public law declared that the position according to which the custom right of self-defense must also include the use of force in anticipation of an attack in specific circumstances.

Preemptive self-defense, if authorized in accordance with the UN Charter, would require the legitimization of a more detailed *lex scripta* since the opportunities for a possible abuse of it are incomparably greater. When a war of preemptive self-defense is justified, the case must be supervised in a more specific and more careful manner by the Security Council. In fact, defining with certainty that an armed attack can be imminent is extremely hard since every errors of judgment can lead to a useless and unjustified conflict. In addition, the main problem is that governments could easily consider their adversaries potential aggressors with the aim of obtaining the green light for aggression in the name of preemptive self-defense. Consequently, the act of self-defense must be always exposed to an international study and control.(93) The majority of the UN Member States considers that a wider notion of self-defense, with the preemptive action included, could be a danger for the international balance. Once the States confirms the existence of the right of preemptive self-defense, it is clear that there is an absolute need for a clear regulation of the legal limits so that whoever makes use of the right will be able of a legal evaluation instead of a mere question of personal judgment. A State might find itself in a position of preemptive self-defense when it faces an illegal armed attack or in particular illegal threats of the use of force

(93) I. BROWNLIE, *International Law and the Use of Force by States*, Clarendon Press, Oxford, 1983, p. 257-261, p. 366-367; C. GRAY, *International Law and the Use of Force*, Oxford University Press, Oxford, 2004, p. 98-99

by another State. This situation relieves States from having to respect the general obligation of abstaining from force facing the aggressor. The State threatened by an imminent attack, in such situations, does not have at its disposal any means, but the recourse to armed force in order to stop it. However, the international system highlights that there must be a clear and effective danger of an imminent attack and not a simple general preparation by the enemy.(94) During the Second Gulf War, the United States, Great Britain and Spain used several strategies that could have supported their assumptions concerning Saddam Hussein's Iraq. Firstly, they presented facts considered valid: in first place, there were evidences that proofed that Iraq government owned weapons of mass destruction; secondarily, the regime in power in Iraq was supposed to have relationships with the terrorist group, Al-Qaida (highly improbable evidence that had never been verified); finally, Saddam's government was a dictatorial and highly warmongering, particularly bloodthirsty towards the internal opposition. According to all these evidences reported by the Bush administration, the Iraqi regime and the ownership of WMDs might have represented a threat for the international regime. But could these elements have justified the recourse to self-defense? And moreover, could international law have authorized the use of force to suppress a tyrant from then on? Assuming we can answer to these questions in an affirmative away, could this recourse to force have been unilaterally prosecuted without the approval of the Security Council?

(94) B. CONFORTI, *Le Nazioni Unite*, VIII ed., CEDAM, Padova, 2010, p. 219-225

CHAPTER 2

THE FIRST GULF WAR, 1991

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2.1. Foreword: The UN back to the center of the international system

The invasion and occupation of Kuwait by Iraq was the first case in which a Member State tried to overcome and annex another State from the institution of the United Nations. The consequences never seen before caused by this unusual situation needed innovative measures, which gave a new practical character to the Charter's concepts concerning the maintenance of international peace and security. “After

decades of paralysis caused by the Cold War, the Security Council appeared to have been revitalized: in fact, it took center stage and the establishment of a new world order, however improbable, appeared possible."(1)

Through sanctions and other executive measures, through efforts to establish program for disarmament and controls on weapons, through provision of humanitarian assistance and programs in the affected areas such as the border demarcations, through compensation for damages caused by enemy invasions and programs of promotion and protection of human rights, the UN began to act as "peacemaker, peacekeeper" and "peace-builder". In fact, no other crisis in the UN history received such attention and were put into practice by the Security Council in such a short time: from the beginning of the invasion on 2 August 1990, to the end of November, the entity adopted 12 resolutions by the virtue of chapter VII of the Charter, covering different aspects of the event, in particular regarding articles 39, 40 and 41.

In this way, the invasion of Kuwait aroused a set of events that changed the UN role into supervisor of the world order and the various forms of peace operations used for that specific purpose. The invasion was more than the simple crossing of borders by an army in the Arab peninsula: indeed, it meant also the transgression of two pillars of international system: the prohibition of aggression and the global interest on constant supply of oil coming from the Persian Gulf. In the post-Cold War context, ultimately the invasion proved to be a fatal miscalculation. During this course of events, not only the Iraq's future, but also the UN's one, was transformed.

The First Gulf War "revealed immediately the strategic nature of the Middle-East area from the point of view of the interests of Euro-Mediterranean and Euro-Atlantic areas, also confirmed in the NATO's

(1) R. ZACKLIN, *The United Nations Secretariat and the use of force in a unipolar world: power v. principle*, Cambridge University Press, Cambridge, 2010, p.7

summit in Prague (11.26.2002) concerning the interconnection of the EU's South-Eastern area, that is, the area of Southern Balkans of Danube's river, the Black Sea and, more precisely, Turkey."(2)

2.2. The invasion of Kuwait

Before and after the invasion, Saddam Hussein made it clear that he was perceiving an international conspiracy against him, which had the aim of weaken Iraq both on the international and domestic level according to the dictator. The attention of the media to the Iraqi nuclear program and the further efforts to block dual-use technology's exports by the United States and Great Britain were seen as part of a larger effort to weaken Iraq. While Saddam was perceiving Iraqi internal policy and economic situation increasingly deteriorating during 1989, the events on the international stage strengthened his growing sense of crisis, especially the fall of Communist States in Eastern Europe raised his fears concerning the future of his own regime. In particular, "[b]y early 1990, Saddam was convinced that his regime was being targeted. The shift in Iraqi foreign policy came in the early months of 1990 and it culminated with the occupation of Kuwait in August 1990. Saddam's unwillingness to accept a negotiated solution to the Kuwait crisis [...] provides further evidence for the hypothesis that it was fear of domestic destabilization that was the most important factor prompting his decision to invade."(3)

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(2) M. PANEBIANCO, *Diritto Internazionale Pubblico*, III ed., Editoriale Scientifica, Napoli, 2011, p. 386
(3) L. FAWCETT, *International Relations of the Middle East*, 3rd ed., Oxford University Press,

From February to June 1990, Iraqi government lodged several political, territorial and financial complaints against Kuwait. Iraq accused Kuwait of having illegally extracted oil along the 120km of border, consciously depreciating in this way the price of crude oil and depriving Iraq from the resources to pay its debts and facilitating the recovery caused by the eight-year war against Iran. Moreover, Kuwait was charged of illegal possession of Warba, Bubiyan and Failaka islands in the Persian Gulf, which were obstructing Iraq's access to Gulf waters.(4) Although Iraq benefited from the access to Gulf through Shat al Arab, it did not own any significant harbors and 26 miles of Gulf shoreline did not seem adequate enough for the dictator's aspirations.(5) However, the official motivation, restated several times by Saddam, was that Iraq and Kuwait had the same ethnic and historic identity and so, Iraq wanted to claim the Kuwait's belonging to the Iraqi national community. But Kuwait replied that all those accusations did not have any basis of truth.

The meetings that took place on 31st July, between the Prince of Kuwait and the Vice-President of the Iraqi Revolutionary Command Council, ended up unsuccessful and on 2 August 1990 the Iraqi armed forces under Saddam Hussein's command crossed the neighboring borders of Kuwait and they occupied the country, taking the control to everyone's surprise. On 8 August 1990 the annexation of Kuwait to the Iraqi territory was officially announced. The United Nations reacted to the Iraqi armed aggression very quickly through a series of resolutions by the Security Council that seemed to follow to the letter the progression of the coercive measures outlined in chapter VII of the UN Charter. “The well equipped but poorly managed and deployed Kuwaiti military

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Oxford 2013, p. 291-292

(4) UNITED NATIONS, *The United Nations and the Iraq-Kuwait conflict, 1990-1996*, United Nations, New York: Department of public information, 1996, p. 14-15

(5) M. D. MALONE, *The international struggle over Iraq: politics in the UN Security Council 1980-2005*, Oxford University Press, Oxford, 2006, p. 55-56

was able to muster little resistance to overwhelming Iraqi numbers buttressed by the key element of surprise."(6)

"Facing such a serious violation of the prohibition stated in art. 2(4) of the Charter, the Security Council firstly condemned the invasion, the occupation and the annexation of Kuwaiti territory and then ordered Iraq to immediately and unconditionally withdraw all its forces from that territory."(7) Learned the news, the Council members immediately set to work. When the Council formally met, all the delegations supported SCR 660, which firstly established that:

> "The Security Council, alarmed by the invasion of Kuwait on 2 August 1990 by the military forces of Iraq, determin[es] that there exists a breach of international peace and security as regards the Iraqi invasion of Kuwait."(8)

Later, acting according to articles 39 and 40 of the Charter, they laid the foundations for the next strategy within the Security Council with the aim of revoking the Iraqi aggression and asking for an immediate and unconditional withdraw of the invading troops:

> "The Security Council […] acting under Articles 39 and 40 of the Charter of the United Nations, 1. condemns the Iraqi invasion of Kuwait; 2. demands that Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990; 3. calls upon Iraq and Kuwait to begin immediately intensive negotiations for the resolution f their differences and supports all efforts in this regard, and especially those of the League of Arab States; 4. decides to meet again as

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(6) v. *supra*, p. 57-58
(7) V. STARACE, voce *Uso della forza nell'ordinamento internazionale II),* in *Enc. giur.,* vol. XXXVII, Roma, 1994, p. 8
(8) UN SC Res. n. 660/1990, *Iraq-Kuwait*, 2 August 1990, S/RES/660 (1990)

necessary to consider further steps to ensure compliance with the present resolution."[9]

The spirit of a rediscovered cooperation among superpowers appeared on 3 August with the combined declaration by the two Ministers of Foreign Affairs, the American James Baker and the Russian Eduard Shevardnadze, who condemned the Iraqi invasion as a "blatant aggression", violating the basic norm of civil conduct[10] and they invoked a total arms embargo. The invasion of Kuwait caused a quick and dramatic shift in the behavior of the majority of States towards the Ba'thist government. The Iraqi delegates abroad, once welcomed in diplomatic and economic associations, suddenly were coldly rejected by their ex allies. The major Western powers immediately feared a threat to oil supplies of Saudi Arabia and, more generally, of the Gulf. "Some smaller States were concerned that if the invasion went unchecked, their own more powerful neighbors might someday follow Iraq's example." On 5 August the President George H. W. Bush tried to obtain the consensus of the Council for the actuation of compulsory economic sanctions against Iraq, excluding medicines and food supplies from the embargo. The breaking of international law by Iraq originated an alliance that went beyond the traditional political divisions, allowing the creation of a coalition where the permanent members of the Security Council allied not only among themselves, but also with Turkey as well as key Arab States, Syria included.[11] Another signal of how times had changed was the approval of the request of the UN economic embargo to Iraq by the Security Council, which allowed the authorization on 6 August 1990 by SCR 661:

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(9) v. *supra*
(10) B. KELLER, *The Iraqi Invasion: Moscow joins U.S. in criticizing Iraq*, in The New York Times, 04.08.1990, consulting at in http://www.nytimes.com/1990/08/04/world/the-iraqi-invasion-moscow-joins-us-in-criticizing-iraq.html, visited on 10/05/2016
(11) S. GRAHAM-BROWN, *Sanctioning Saddam: the politics of intervention in Iraq*, I.B. Tauris, New York, 1999, p. 56

> "[t]he Security Council reaffirming its resolution 660 (1990) of 2 August 1990, deeply concerned that the resolution has not been implemented and that the invasion by Iraq of Kuwait continues, [...] acting under Chapter VII of the Charter, [...] 3. decides that all States shall prevent: (a) the import into their territories of all commodities and products originating in Iraq or Kuwait exported there-from after the date of the present resolution; [...] 4. decides that all States shall not make available to the Government of Iraq, or to any commercial, industrial or public utility undertaking in Iraq or Kuwait, any funds or any other financial or economic resources."(12)

Mainly drafted by the United States, the resolution freezed Iraqi financial assets abroad and forbade imports and exports, only allowing health and, in humanitarian circumstances, food supplies. SCR 661 also set in motion a new logic of coercion, which was no longer related to articles 39 and 40 of the Charter, but it acted under chapter VII. In addition, the resolution established a Sanctions Committee to supervise the implementation of operations and sanctions in particular. This Committee played a crucial role in the relationships between Iraq and the Security Council in the years that would follow.(13)

SCR 661 marked an important step by the Council that changed from the classic political-military approach into a more legal-normative one, imposing standards of conduct to its Member State, which would be then monitored by a normative institution.

Due to the false steps made by Saddam Hussein's government, on 9 August it was easy for his rivals to guarantee the unanimous adoption

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(12) UN SC Res. n. 661/1990, *Iraq-Kuwait*, 6 August 1990, S/RES/661 (1990), par. 3

(13) M. D. MALONE, *The international struggle over Iraq: politics in the UN Security Council 1980-2005*, Oxford University Press, Oxford, 2006, p. 59

of SCR 662 that, recalling the previous SCR 660 and 661, asked again for the immediate withdraw of Iraqi troops and it condemned the annexation. The resolution also highlighted that any excuse stated by Saddam had no legal effectiveness and that Member States would not have to recognize the annexation.

On 12 August 1990 Kuwait wrote to the President of the Security Council and, invoking its inherent right of self-defense, it informed him that "Kuwait has requested some nations to take such military or other steps as are necessary to ensure the effective and prompt implementation of Security Council resolution 661 (1990)."(14) The dispositions specified in SCR 661 were enlarged on 25 August 1990 with SCR 665 that, after having requested the full implementation of SCR 660, 661, 662 and 664, imposed a naval block in the Persian Gulf and also in the Aqaba's Gulf ("The Security Council [...] 1. calls upon those Member States co-operating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to hall all inward and outward maritime shipping").(15) The dispositions were also enlarged with SCR 670 that expanded the block to other means of transport, included air force ("The Security Council [...] 4. decides also that all States shall deny permission to any aircraft destined to land in Iraq or Kuwait, whatever its State registration, to overfly their territory.")(16)

Keeping pressure on Iraq, on 13 September the Council, "deeply concerned that Iraq has failed to comply with its obligations under Security Council resolution 664 (1990)", adopted SCR 666 that drafted the guidelines for medical transfer and humanitarian assistance through the block ("The Security Council [...] 6. Directs the Committee that in

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(14) UNITED NATIONS, *The United Nations and the Iraq-Kuwait conflict, 1990-1996*, United Nations, New York: Department of public information, 1996, p. 16

(15) UN SC Res. n. 665/1990, *Iraq-Kuwait*, 25 August 1990, S/RES/665 (1990)

(16) UN SC Res. n. 670/1990, *Iraq-Kuwait*, 25 September 1990, S/RES/670 (1990), par. 4

formulating its decisions it should bear in mind that foodstuffs should be provided through the United Nations in co-operation with the International Committee of the Red Cross or other appropriate humanitarian agencies")[17] and reminded Iraq of its responsibility concerning foreign civilians' security in the territory ("The Security Council [...] 2. Expect Iraq to comply with its obligations under resolution 664 (1990) in respect if third-State nationals and reaffirms that Iraq remains fully responsible for their safety and well-being.")[18]

The use of economic sanctions to compel Iraq to withdraw from Kuwait had great support by States that saw these measures as an alternative to military action. However, the main members of the Security Council, the United States and Great Britain, were not willing to wait and see if the embargo would persuade Iraq to leave Kuwait. The embargo was effective in economic terms: it was clear that Iraqi economy was substantially damaged. However, it was not equally clear if the embargo could have led to a change on political level. The debate regarding the effectiveness of economic sanctions in the long term and a possible recourse to force only if absolutely necessary seemed, in fact, not so convincing.[19]

Until the outbreak of military action against Iraq, Saddam did not show any interest towards a negotiated solution that included any about face for his part. The dictator's position demonstrated both the essence and the rhythm of the constant escalation of UN decisions against Iraq, which culminated with the adoption of SCR 678 that authorized military intervention. On 15 January 1991 the Council issued SCR 678, the most important text planned by the authority in the immediate post-Cold War, that stated that:

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(17) UN SC Res. n. 666/1990, *Iraq-Kuwait*, 13 September 1990, S/RES/666 (1990), par. 6
(18) v. *supra*, par. 2
(19) S. A. ALEXANDROV, *Self-Defense Against the Use of Force in International Law*, Kluwer Law International, The Hague, 1996, p. 267 ss.

> "[t]he Security Council [...] noting that, despite all efforts by the United Nations, Iraq refuses to comply with its obligations to implement resolution 660 (1990) and the above-mentioned subsequent relevant resolutions [...] acting under Chapter VII of the Charter, 1. demands that Iraq comply fully with resolution 660 (1990) and all subsequent relevant resolutions, and decides, while maintaining all its decisions, to allow Iraq one final opportunity, as a pause of goodwill, to do so" and authorized the use of force against Iraq: "the Security Council [...] 2. authorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements the above-mentioned resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area."(20)

The vote to SCR 678 (12 in favor, 2 against, Cuba and Yemen, and one abstain, China) represented only the fourth time in the history of the United Nations when Council decided to authorize the recourse to military force (in 1950 in Korea, in 1966 in South Rhodesia with SCR 221/1966, in 1990 in Kuwait with SCR 665/1990).(21) On the same day, the General Secretary, Pérez de Cuellar, made one last appeal to Iraq trying to prevent the impending disaster. Even though SCR 678 did not clearly declare the authorization to the use of force by the cooperating States with Kuwait, everybody intended the meaning of the authorization "to use all the necessary means" as an expression to guarantee a full implementation of the Council's decisions. "It seemed justified to think that the Security Council, with SCR 678/1990, did

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(20) UN SC Res. n. 678/1990, *Iraq-Kuwait*, 29 November 1990, S/RES/678 (1990), par. 2
(21) UNITED NATIONS, *The United Nations and the Iraq-Kuwait conflict, 1990-1996*, United Nations, New York: Department of public information, 1996, p. 22-23

anything, but jointly implement art. 42,[22] with the aim of evaluating the necessity of a coercive action against Iraq, and art. 53, par. 1[23] with the aim of authorizing States to undertake such action."[24] In paragraph 1, the Council decided to allow Iraq "one final opportunity, as a pause of goodwill" with the purpose of fully implementing SCR 660 and all the following resolutions. If Iraq would have not stuck to the agreement, as the Council declared in paragraph 2, Member States would cooperate with Kuwaiti government and the authorization of using "all the necessary means" would be allowed in order to support and implement the resolutions and "to restore international peace and security in the area."[25] By the virtue of SCR 678 and since Iraq did not comply with the obligations specified by the deadline, at 03.00 a.m. between 16 and 17 January 1991, the air offensive of the coalition led by the United States, called *Operation Desert Storm*, began. American, British, Saudi Arabian and Kuwaiti airplanes bombed the targets in Iraq and Kuwait, as the United States officially communicated to the Security Council at the beginning of hostilities. The operation *Desert Storm* had as objective the extensive bombing to destroy the infrastructures of Iraqi defense with main priority to the centers of command and control, governmental buildings, bridges, power plants and further strategic sites. Iraqi nuclear installations were pulverized during the bombing. "In this way there was a case of the use of force

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(22) Art. 42 of the UN Charter rules that: "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.", consulting at http://www.un.org/en/sections/un-charter/un-charter-full-text/index.html, visited on 11/05/2016

(23) Art. 53, par. 1, of the UN Charter rules that: "The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council […]", consulting at http://www.un.org/en/sections/un-charter/un-charter-full-text/index.html, visited on 11/05/2016

(24) V. STARACE, voce *Uso della forza nell'ordinamento internazionale II),* in *Enc. giur.,* vol. XXXVII, Roma, 1994, p. 8

(25) UNITED NATIONS, *The United Nations and the Iraq-Kuwait conflict, 1990-1996*, United Nations, New York: Department of public information, 1996, p. 22-23

by members *authorized* by the Security Council. [...] We must notice that this exception to the prohibition outlined in art. 2(4) of the Charter lies on the assumption that the Security Council does not have any armed forces to wage the necessary coercive action; so, it is an exception to this prohibition that might be defined as *conditioned*."(26)

On 15 February the Iraqi Revolutionary Command Council, having beard four weeks of constant air bombing, invoked the possibility of withdrawal from Kuwait, setting some concerning that proved to be unacceptable by the Coalition. President Bush rejected the proposal encouraging Iraqi population to force Saddam to step aside. On 22 February the American President gave Iraq an ultimatum: unless Iraq had started its withdrawal by 24 hours, the ground war would have begun. Iraq did not take into consideration the ultimatum and the ground campaign started on 24 February, deploying 200.000 Coalition's troops that quickly overcame the Iraqi defense.

Armed intervention, highly requested by President George H. W. Bush, underpinned American traditional doctrines during the Cold War. In fact, over the decades, the United States often used the reestablishment of democracy as justification to their own military interventions in several countries. Specially during the Cold War period, the US relied on the anti-communist justification, which wanted to legitimate armed intervention for the maintenance of democracy in States with dictatorial regime. Moreover, the United States felt legitimated to recourse to armed intervention when a threat to the life and security of American citizens in a third country, usually not a democratic one, emerged. In a situation where military administration or radical bodies of a State terrorize their own citizens, hold foreign hostages and create an atmosphere of fear and violence, the United States has always been willing to consider legitimate intervention against those illegal regimes

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(26) V. STARACE, voce *Uso della forza nell'ordinamento internazionale* II), in Enc. giur., vol. XXXVII, Roma, 1994, p. 8

to restore the law and order and to protect their own citizens, regardless the status of humanitarian intervention according to international law.(27) Consequently, facing a situation that was created from such breaking of international law, the United States felt compelled to act.

The military operations, firstly limited to air war, became also a ground war after the ultimatum's deadline and Kuwait was liberated in 100 hours. The first Iraqi line was soon destroyed. After 48 hours of battle, Baghdad's radio announced that Iraqi troops were ordered to withdraw from Kuwait according to SCR 660. The United States replied by restating that Iraq should respect all the 12 relevant resolutions. By 27 February 1991, Iraqi forces were withdrawn and Kuwait was liberated. The 5 permanent members requested the unconditional acceptance of all resolutions concerning the crisis and when there finally was the implementation, President Bush declared the end of the hostilities from midnight of 27 February 1991, with the coalition's troops that occupied almost 15% of Iraqi territory.

Saddam Hussein declared its cease-fire in 28 February 1991.(28) On 2 March a formal picture for a definitive cease-fire was depicted in SCR 686, in which Iraq was asked firstly to "(a) rescind immediately its actions purporting to annex Kuwait", secondly to "(b) accept in principle its liability under international law for any loss, damage or injury arising in regard to Kuwait and third States and their nationals and corporations", thirdly to"(c) immediately release under the auspices of the International Committee of the Red Cross, Red Cross Societies or Red Crescent Societies all Kuwaiti and third-States nationals" and "(d) immediately begin to return all Kuwaiti property seized by Iraq." Moreover, it was asked to "(a) cease hostile or

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(27) H. MAX, *International law and the United States military intervention in the Western hemisphere*, Kluwer Law International, The Hague, 1997, p. 132 ss.

(28) C. FOCARELLI, *Le Contromisure nel Diritto Internazionale*, Giuffrè Editore, Milano, 1994, p. 263

provocative actions by its forces against all Member States" and finally to "(c) arrange for immediate access to and release of all prisoners of war."(29)

At this point, the American President announced the suspension of hostilities and the Security Council proclaimed the preparatory conditions for the cease-fire on 2nd March with the adoption of SCR 686. The final terms were prescribed to Iraq only on 3rd April with SCR 687. By the adoption of the latter, the UN affirmed itself as fundamental actor regarding the disarmament.

SCR 687 represented one of the most complex and wide-range set of decisions ever taken by the Council and "it created the first precedent where the disarmament was unilaterally imposed to a State through a UN act."(30) The text, which was the longest that the Council had ever adopted, tried to include Iraq in postwar measures, which had the purpose of the reestablishment of durable peace and stability in the area. In fact, "the disarmament imposed on Iraq by SCR 687 should not be considered a sanctioning measure, but rather a measure aimed to prevent the recourse to new aggressive policy and consequently to the maintenance of peace in the region."(31) At the same time, executive measures, which included the sanction regime and the Council's authorization to use all the necessary means to ensure international peace and security, remained operative.

Through SCR 687 the embargo on Iraqi exports of oil and the ban on all the imports to Iraq, with some humanitarian exceptions, kept working. Furthermore, the resolution ensured the creation of an additional institution entrusted by the Security Council to control if Iraq would respect their obligations regarding biological and chemical weapons and ballistic missiles: the special committee, later known with the

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(29) UN SC Res. n. 686/1991, *Iraq-Kuwait*, 2 March 1991, S/RES/686 (1991)
(30) N. RONZITTI, *Diritto Internazionale nei Conflitti Armati*, Giappichelli Editore, Torino, 2011, p. 326-27
(31) v. *supra*

acronym UNSCOM.[32] In addition, in order to remove a new future threat to international peace and security, the Council decided to destroy all the installations capable of an eventual mass destruction, with particular attention to biological and chemical weapons and ballistic missiles. Iraq was forbidden to appropriate, produce and use any nuclear weapons and their components.[33] The institutionalization is often a signal of the evidence that one wants to give to a purpose and of the willingness to assign some relevant means to the achievement of such purpose. UNSCOM was entrusted with two main tasks: identification and destruction of all Iraqi armaments forbidden by the virtue of SCR 687 and the direction of an efficient plan of control and constant inspections aimed to prevent Iraqi rearmament in the near future. Therefore, not only had UNSCOM regulatory functions, as it happened with the previous supplementary bodies, but also it was entrusted with operational functions.

2.3. The legal consequences

As already seen, the Security Council can take biding decisions in the virtue of art. 41. Those decisions, which are taken in the context of Chap. VII, commit Member States to adopt coercive measures not entailing the use of force against a specific State (for example, sanctions). Since the end of the Cold War, the Security Council undertook a sharper behaviour by adopting acts that can be assimilate

(32) UN SC Res. n. 687/1991, *Iraq-Kuwait*, 3 April 1991, S/RES/687 (1991), par. 9
(33) S. A. ALEXANDROV, *Self-Defense Against the Use of Force in International Law*, Kluwer Law International, The Hague, 1996, p. 276

to real international treaties, but still in the way of decisions. Unlike the treaties, those decisions commit Member States as soon as the Council adopt them.(34) In general, the five permanent members of the Council ruled the decision process about Iraq, together with the limited role by other members. However, the growing disagreement among the Council's members and the lack of a clear policy by the United States in the post-Gulf War period showed that permanent members often appeared to react rather than taking the initiative of their actions in response to the recurring attempts by Iraq to weaken, evade or put an end to the sanction regime. However, three potential goals of sanctions against Iraq, taken into consideration by some States, could be identified:

1. accepted by France, Russia and China, the sanctions were intended to change the behavior of Iraqi government according to the guidelines imposed by SCR 687 (the removal of WMD, the recognition of Kuwaiti sovereignty and its original borders);
2. the fall of Iraqi regime explained in particular in American and British policies (economic sanctions, however, were not able to achieve this goal in the course of seven years);
3. since it was evident that Saddam's regime could not meet all the requirements required by the embargo's revoke, the sanctions would remain in force until the regime's fall; in the meantime, in fact, they would have a sort of “containment” and “keeping under pressure” towards Saddam.

The violation of territorial integrity received wide support in order to contrast it, despite the diversity of ways of action by the different States: who tended to military intervention and who limited itself to the

(34) N. RONZITTI, *Introduzione al Diritto Internazionale*, IV ed., Giappicchelli Editore, Napoli, 2013, p. 178; B. CONFORTI, Le Nazioni Unite, VIII ed., CEDAM, Padova, 2011, p. 411-412

economic sanctions.

However, what followed was that collective military intervention did not remove Hussein's government, as someone hoped, but originated an unexpected internal conflict. As Sarah Graham-Brown affirms, "[t]he dilemmas, which were created by such unexpected second phase of the crisis appeared inside Iraq, had great relevance for following conflicts in which international community was involved. Since this particular internal conflict was caused by international military intervention, did the international community have a duty to intervene again? The United States justified its decision not to intervene in Iraq by affirming that it was beyond the range of action expected by the Security Council and that it could lead to further losses and get «bogged down» by internal political conflict."(35) Military reinforcement of humanitarian troops at the borders, establishment of a safe harbor inside Iraq and use of no-fly zone with aim of protection were dramatic starts however necessary by international practice when Iraqi population was at risk in an internal conflict. But, those measures hid serious doubts and hesitation still inside the States' coalition concerning the judgment of such intervention. The international cohesive action without any precedents towards an aggression against a bordering State was explained by the Kuwait's status, oil producer and ally to Western powers. The will of principal members of the Council to deploy copious military forces made the case unusual. Until then, decisions whether intervening in a particular conflict were influenced by the level of commitment showed by some members of Council. American involvement was often crucial to the mobilization of international resources both military and humanitarian and logistical. The resolutions, such as SCR 688, could set a precedent for international responses to civil wars, massive repression and humanitarian crisis.

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(35) S. GRAHAM-BROWN, *Sanctioning Saddam: the politics of intervention in Iraq*, I.B. Tauris, New York, 1999, p. 332

The experience of using smart economic sanctions to force States reluctant to peaceful negotiations turned out to have serious difficulties in the implementation of a non-violent form of international pressure.
However, as we have already seen, in early 1991, coercive actions concerning Iraqi disarmament and peaceful intentions were far away from being fully and appropriately implemented. The country became more and more poor and suffering due to the serious social problems, whereas no clear political alternative to Ba'thist regime emerged. At the same time, using military force authorized by the UN as an alternative to sanctions equally proved to have some disadvantages, questioning the effectiveness of different international means of government coercion and civil population's protection.
The war against Iraq explained that the measures of collective self-defense and the measures of restoring international peace and security could become part of the same effort. In fact, collective security could be achieved both through collective self-defense according to art. 51 of the Charter, and through executive measures in accordance with articles 39-50, regarding the fact that the Security Council could act by the virtue of art. 48 and authorize some States to commit themselves to collective measures of self-defense or measures of collective execution.

States often wondered if the armed forces of the coalition had constituted the UN forces expected for collective security, but actually the Security Council had never established a UN force aimed to fight against Iraq. What happened was that the Council conclusively determined the verification of Iraqi invasion against Kuwait and, consequently, it authorized the recourse to force to coalition in assistance to Kuwait. The use of force by the coalition against Iraq was legitimated by the UN body in the field of collective self-defense and not as collective security. In order to better understand these doubts it is necessary to focus on the statement: “the use of force to liberate

Kuwait did include not self-defense, but, rather, the interpretation and the implementation of the resolution of the Security Council."[36] SCR 678 pointed out that the Council gave its approval to the voluntary use of collective self-defense by the coalition's members, although it abstained from disposing a real and concrete UN army as instrument of collective security. The cornerstone of the resolution was just the potential approval to a future armed action. Considering that the operations of the coalition's forces were a manifestation of collective self-defense, once SCR 660 had been adopted, the authorization to the attacks against Iraq in accordance with SCR 678 was technically no longer necessary. In fact, art. 51 itself would have been sufficient for the authorization of the recourse to coalition's force in response to an Iraqi armed attack. But if we consider political and psychological effects, SCR 678 had an incalculable consequence: internationally, it strengthened the solidarity among the coalition and domestically, it mobilized the public opinion about the political support to the action against Iraq.

The UN involvement in Iraq-Kuwait crisis provided an important test for the authority as the main guarantor for international peace and security. The invasion of Iraq allowed the UN to highlight its strengths and its skills and to give a constant relevance and vitality to the organization. However, the decisive actions undertaken by the Council during this crisis did not prove to be a deterrent to similar acts of aggression.[37]

According to the General Secretary, the failure of avoiding war was seen as a failure of collective diplomacy. If, at first sight, the recourse to armed intervention seemed to justify the relevance of collective

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(36) B.M. CARNAHAN, *Protecting Nuclear Facilities from Military Attack: Prospects after the Gulf War*, 86 AJIL 524, 527 (1992) in Y. DINSTEIN, *War, Aggression and Self-Defense*, Cambridge University Press, Cambridge, 2011, p. 300

(37) UNITED NATIONS, *The United Nations and the Iraq-Kuwait conflict, 1990-1996*, United Nations, New York: Department of public information, 1996, p. 111

security's system, with a deeper analysis, the actions seemed to include the seeds of future difficulties, which showed a series of important weaknesses far from reflecting the inherent forces of the UN system.(38) The Iraq-Kuwait conflict was the first real test for the UN in the post-Cold War period. The Secretary declared the, in his opinion:

> "international security can only be collective in nature, and that a military Power cannot engage in hostilities without multilateral support, without the support of other States and without the legitimacy that only the United Nations can confer on its actions"(39)

In this way, multilateralism should not be confused with a sort of individualism as means to mask the pursuit of national or regional interests.

The war against Iraq proved that the international system of Member States, and not individual States involved in an action of self-defense, can decide on the legality of right of self-defense and it can judge necessary and proportional the undertaken action.(40) In the First Gulf War, the coalition against Iraq was legitimized to recourse to force after the Council had determined the existence of a breach of international peace and security in accordance with art. 39 and 40 of the UN Charter with the aim of freeing Kuwait and making Iraq unable to pursue its policy of aggression. Moreover, the war showed that the collective self-defense is an essential part of the system of collective security and that the measures of collective self-defense undertaken by the Council can be interrelated with the measures of restoring

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(38) R. ZACKLIN, *The United Nations Secretariat and the use of force in a unipolar world: power v. principle*, Cambridge University Press, Cambridge, 2010, p. 10-11
(39) v. *supra*, p. 12
(40) S. A. ALEXANDROV, *Self-Defense Against the Use of Force in International Law*, Kluwer Law International, The Hague, 1996, p. 278 ss.

international peace and security in the same effort. The Gulf War in addition demonstrated that self-defense can provide for the legal basis for an action of collective security. We can conclude by saying that the action carried out in collective self-defense by or on behalf of the United Nations is essentially a collective action to maintain or restore international peace and security and it can be needed to the same purpose of an executive measure by the Security Council. The historical development that led the system of States from self-conservation and self-help to the adoption of necessary measures to restore international peace and security by the Security Council is a clear manifestation of how the evolution of legal regulation of the use of force limited the aim permission of the use of the recourse to unilateral force.

CHAPTER 3

THE SECOND GULF WAR, 2003

TABLE OF CONTENTS: 3.1. Foreword: 9/11 and the new concept of terrorism – 3.2. The Bush Doctrine, the National Security Strategy and Colin Powell's speech to the UN – 3.3. SCR 1441 and the Anglo-American invasion in Iraq – 3.4. The illegal use of force against Iraq

3.1. Foreword: 9/11 and the new concept of terrorism

The attacks in New York and Washington D.C. committed by the terrorist organization Al-Qaida on 11 September 2001 against the United States and American citizens dramatically changed the framework of international security. For a short period after 09/11, States believed that the geopolitical ramification of the attacks would have strengthen the UN as the central multilateral organization for the

maintenance of international peace and security. Even within the US administration, for a period, they believed that a "war on terror" could not be waged without the cooperation of States thanks to a multilateral approach.(1)

The Security Council, in response to the terrorist attacks, adopted SCR 1368 and SCR 1373 respectively on 12 and 28 September 2001: SCR 1368 defined the terrorist attacks of 09/11 as threat to international peace and security, laying the legal foundation for an action in accordance with chapter VII. So, it was evident that Council's members were willing to accept the legitimacy of the action in self-defense against the terrorist attacks. Both resolutions stated, in their respective introduction, that the Security Council was "determined to combat by all means threats to international peace and security caused by terrorist acts"(2) and that recognized "the inherent right of individual or collective self-defense in accordance with the Charter."(3)

One of the main problems for the repression of terrorist attacks is related to the fact that the different conventions were not able to implement a uniform system for the repression, even though they met on several measures, for example the obligation for States to condemn the actions, to bring to trial or extradite the authors of the actions, to reinforce the international cooperation, etc... For the first time in general terms, SCR 1373 imposed an almost legislative program of fight against terrorism entrusting individual States with the responsibility of repression and firmly condemning any State supporting terrorist acts or groups.(4) Not only was the resolution

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(1) R. ZACKLIN, *The United Nations Secretariat and the use of force in a unipolar world: power v. principle*, Cambridge University Press, Cambridge, 2010, p. 135-137

(2) UN SC Res. n. 1368/2001, *Threats to international peace and security caused by terrorist attacks*, 12 September 2001, S/RES/1368 (2001); UN SC Res. n. 1373/2001, *Threats to international peace and security caused by terrorist attacks*, 28 September 2001, S/RES/1373 (2001)

(3) C. GRAY, *International Law and the Use of Force,* 2nd edition, Oxford University Press, Oxford, 2004, p. 159 ss.

(4) G. LHOMMEAU*, Le droit international à l'epreuve de la puissance americaine*, L'Harmattan, Paris, 2005, p. 140-141; C. DI STASIO, *La Lotta multilivello al Terrorismo Internazionale, Garanzia*

innovative because of its legislative impact, but also because it strengthened the executive powers of the Council thanks to the creation of a very powerful mechanism: the *Counter-terrorism Committee* (CTC). The Committee had the duty of monitoring the execution of the resolution and it received the reports concerning the status of execution by the Member States.(5) "Member States immediately responded to the challenge given by the fight against terrorist financing changing their criminal justice systems aimed to introduce the crimes of terrorism and terrorist financing. The number of reports presented to the *Counter-Terrorism Committee* showed how States had started internal processes to fulfill the resolution."(6) Although the resolution contributed to limit terrorist attacks and threats, some States did not provide the Security Council for the necessary information about potential terrorist movements in their territory. In fact, some States did not include the financing of terrorism as a crime in their national criminal systems; some others did not include the duty of reporting dubious operations concerning the financial institutions; finally, some other States lack a system for freezing the assets.(7) Furthermore, the implementation of penal sanctions was exclusively up to internal law. In fact, SCR 1373 imposed some remarkable changes in the domestic system of each Member States.(8) Consequently, if the rule of conduct is implied in international law, the series of norms concerning the repression is exclusive responsibility of national law, unfortunately originating incoherence on international level. One year after the 09/11 attacks,

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di Sicurezza versus tutela dei diritti fondamentali, Giuffrè Editore, Milano, 2010, p. 127-28

(5) C. DI STASIO, *La Lotta multilivello al Terrorismo Internazionale, Garanzia di Sicurezza versus tutela dei diritti fondamentali*, Giuffrè Editore, Milano, 2010, p. 149-50; the CTC was rivitalized by SCR 1535 of March 2004 that instituted the *Counter-terrorism Committee Executive Directorate* (CTED).

(6) S. DE VIDO, *Il Contrasto del Finanziamento al Terrorismo Internazionale, Profili di diritto internazionale e dell'Unione europea*, prefazione di F. MARRELLA, CEDAM, Padova, 2012, p. 80

(7) S. DE VIDO, *Il Contrasto del Finanziamento al Terrorismo Internazionale, Profili di diritto internazionale e dell'Unione europea*, prefazione di F. MARRELLA, CEDAM, Padova, 2012, p. 81

(8) v. *supra*, p. 64-65

SCR 1373 was described by the President of the Security Council as "a historic resolution. In it, we made the fight against terrorism a mandatory obligation of the international community, consistent with the United Nations Charter and international law."(9)

Therefore, Member States agreed on the minimum level of cooperation concerning countering terrorism with the aim of implementing an effective repression by different national laws and, in this context, the UN fulfills a fundamental role in coordinating them. "Although the clear differences among the definitions on terrorism laid out in domestic legal systems or in the acts of regional organizations, the cooperation concerning international counter-terrorism, and even more the combating the financing of the phenomenon is firmly carrying out."(10) The purpose of such cooperation is to avoid, or at least limit, the organization, the exhortation, the financing or the tolerance towards terrorist activities against other States. Despite everything, this cooperation appears as necessary consequence for the fight against terrorism and it can assume different shapes. Thanks to its role of legislation and coordination, the UN imposes itself as guarantor of a really effective fight against terrorism universally. In fact, it is set at the heart of the international juridical system aimed to uproot the phenomenon, thanks to its role of sanction at its disposal. However, the putting into practice of such juridical means highlights the lack of the UN in fighting terrorism. This inability to impose an efficiently fight was further highlighted after 09/11 attacks and Anglo-American armed intervention in Iraq in 2003.

After 11 September, in fact, the psychological shock allowed the United States to firmly impose, even through action of intimidation, its

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(9) *Statement* of the President of Security Council, S/PRST/2002, 11 September 2002 in S. DE VIDO, *Il Contrasto del Finanziamento al Terrorismo Internazionale, Profili di diritto internazionale e dell'Unione europea*, prefazione di F. MARRELLA, CEDAM, Padova, 2012, p. 65

(10) S. DE VIDO, *Il Contrasto del Finanziamento al Terrorismo Internazionale, Profili di diritti internazionale e dell'Unione europea*, prefazione di F. MARRELLA, CEDAM, Padova, 2012, p. 15

new political line highly wanted by the neoconservatives and by the newly elected President George W. Bush. Bush administration, in fact, gradually decreed:

- a “war against terrorism” implying changes in the political regime in the name of democracy;
- the institution of a new model of Middle-East in compliance with Washington's interests;
- a doctrine of preemption aimed to pre-emptively eliminate real or supposed threats.(11)

The international reaction that followed the 09/11 attacks was an impressively unity among governments in condemning such actions. In addition to SCR 1368 adopted by the Council, NATO invoked art. 5 of its treaty for the first time in its history, claiming that the attack to the United States was an attack to all the NATO members, which had to get ready to act in collective self-defense. In the immediate post-09/11, however, there was some confusion in defining the exact range of the right of using self-defense against terrorism and, more specifically, whether this right could be invoked unilaterally, too. The agreement among the few affirming that the legal right to recur to force against terrorist attacks had already been established and the majority that instead accepted it for the first time after 09/11 as a new evolution of the interpretation of art. 51 lasted temporarily. In fact, it ended up in a disagreement whether using or not the force against Iraq. According to some States, the right of self-defense against terrorist attacks was a simple pursuit of the wider right of self-defense in force; according to others, the right had to be considered a new right based on a

(11) G. CHALIAND, *L'Amerique en guerre: Irak-Afghanistan*, ed. Du Rocher, Monaco, 2007, p. 40

reinterpretation of art. 51 of the UN Charter.(12) However, the interpretation of "terrorist attack" was particularly difficult: there were some doubts whether it was related to the concept of "armed attack". In fact, the concept of self-defense against non-State actors was a complicated issue before 09/11.(13) The theory generally accepted referred to the *Definition of Aggression*, applied by the International Court of Justice in Nicaragua's case: the use of force employed by individuals constituted an armed attack only if an aggression occurred "sending by or on behalf of a State of armed band, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to acts of aggression."(14) After 09/11, President Bush declared that the United States would not distinguish between terrorists and who were financing them. Furthermore, the US would treat any country that was protecting or hosting terrorists as hostile regime to its nation.(15)

3.2. The Bush Doctrine, the National Security Strategy and Colin Powell's speech to the UN

In November 2001, President Bush released a military order where he declared that terrorist attacks realized against the United States went

(12) C. GRAY, *International Law and the Use of Force,* 2nd edition, Oxford University Press, Oxford, 2004, p. 159 ss.
(13) C. GRAY, *International Law and the Use of Force*, 2nd edition, Oxford University Press, Oxford, 2004, p. 165
(14) ICJ, *Militarv and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), merits, j*udgment*, I.C.J. Reports, 1986, par. 195
(15) C. GRAY, *International Law and the Use of Force,* 2nd edition, Oxford University Press, Oxford, 2004, p. 165-66

far beyond the context of the mere criminal activity, creating “a state of armed conflict” that implied the use of American military forces instead of traditional practices of national law-enforcement.(16) Soon it became evident to a greater part of States that the campaign against terrorism launched by the US would have taken an offensive tendency, referring to the typical ideology of the just war. In fact, American intentions were not only to reject the attacks, but also “to prevent and deter further attacks” as President Bush would declare later.

President George W. Bush, following the precedents left by his father in the previous crisis of the Gulf War in 1990-'91, felt legitimized to demand the UN authorization regarding military and control actions after 09/11 attacks. In the American President's point of view, since the terrorists could use secret and surprise attack without considering where and when, the only defense would come from finding and stopping them before they could be able to launch their attack. However, the reaction against terrorism could not result in the use of force against a State with the consequent killing of thousands of innocent lives. On the contrary, States must undertake all the preemptive and repressive measures against the individuals who commit and organize such a crime.(17) Like the international collective response concerning the First Gulf War in 1991 had been legally based on Security Council and General Assembly's resolutions, also the collective armed response led by Americans against the terrorist attacks began with an unimpeachable source by the legal authority.

The foreign policy in Bush administration, especially since 11 September 2001, seemed to find its legitimacy in the process of enlargement of the concept of international and national security. Indeed, this process wanted to justify military actions in increasingly

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(16) *Military Order of 13 Nov. 2001*, 41 ILM 252-5 (2002) in S. C. NEFF, *War and the law of nations: a general history*, Cambridge University Press, Cambridge, 2005, p. 388

(17) B. CONFORTI, *Le Nazioni Unite*, VIII ed., CEDAM, Padova, 2011, p. 219-220

numerous and different situations, allowing a possible marginalization of international organizations, based on the unadaptability facing the new challenges to security.

The renewal of security's concepts and theories went back to post-Cold War period: although security kept its military dimension, it expanded including even economic, environmental and energetic aspects.(18)

09/11 attacks put all the elements of American security in a new light: the shock caused by terrorism changed the perception of prevention, according to which the United States started to feel entitled to undertake actions even before an effective and imminent threat to peace and security had appeared both against the US and on an international level.

The doctrine of preemptive war presented by US President George W. Bush during his speech at West Point's Military Academy in June, 2002, and officialized three months later in the *National Security of the United States* document, wants to show a clear will by the United States to overcome the obligations set by the network of international and regional institutions since 1945, rejecting any confinements in the field of international legality.

The US republican administration decided to deny the contents and the usefulness of the legality on behalf of a more adaptable international ethics. In this way, the United States wanted to restrict the UN competence to some subordinate roles of charitable and humanitarian type aimed to follow only the hegemonic unilateralism of the United States and its satellite allies.

If we take into consideration the Iraq's case, the inadequacy of action showed by the UN was impressively backed up by the incapacity of the organization to put an end to Ba'thist dictatorship or to achieve the disarmament of the country after 1991. According to the American

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(18) CEDIN – Paris 1., *L'Intervention en Irak et le droit international*, sous la direction de Karine Bannelier, Pedone, Paris, 2004, p. 136

administration, this incapability would have indirectly authorized unilateral armed intervention. In fact, it would have legitimized what the theorists like Russel Wiegly calls *American Way of War*, that is, a war waged by ignoring the political considerations of the postwar in favor of a radical purpose with a "crusade" tendency, pursued through the mobilization of a massive military power.(19) It is true that several UN resolutions were adopted in the Iraq's crisis; however, those resolutions did not authorized war, which triggered the occupation, neither the occupation itself.

"Bush administration criticized the containment policy (based on inspections, controls, military pressure and sanctions after the resolution of December 1999), affirming that it was not enough to manage the case of Iraq's WMDs. Instead, it embarked on a quick campaign of armed counter-proliferation. In the US opinion, this campaign was legitimized by the SCR approved in November 2002, which would represent the decisive method to ensure the uprooting of WMDs in Iraq."(20) The main concern of the US administration was the proliferation of WMDs. The attempt of attack to World Trade Center in 1993, later failed, and the Tokyo subway sarin attack in 1995 were considered by the Americans clear evidence of the involvement of new actors in the increasingly expanding development and use of WMDs. The principal preoccupation of President Bush based itself on the fear that Saddam's regime could have shared his program with international terrorist groups, allowing a possible attack to the United States without leaving any proof of it. The idea was that a preemptive attack against a State, which was pursuing biological weapons, would not only remove the stocks of such State, but also would be a deterrent attack for other States. The United States hoped that a preemptive offense against a

(19) CEDIN – Paris 1., *L'Intervention en Irak et le droit international*, sous la direction de Karine Bannelier, Pedone, Paris, 2004, p. 141

(20) H. BLIX, *Disarmare l'Iraq. La verità su tutte le menzogne*, Einaudi, Torino, 2004, p. 10-11

State, for example Iraq, would dissuade also other countries from the pursuit of biological and chemical weapons, making the potential costs of such chase clear.

The adoption of the doctrine of preemptive self-defense triggered the risk that States could start using the threat of terrorism as a simple excuse to abandon their domestic protection of human rights and moreover to change the doctrine of international law regarding compulsory intervention by third parties. Specifically, it seemed that the United States were approaching towards a new concept of war on terror in order to justify the institution of the foundations for a new world order and to support the military intervention towards unstable governments.(21) In fact, the concept of preemptive action violated all the international norms and in the context of Iraqi conflict it could not be justified as the United States believed. The preemptive use of force, as a matter of fact, does not own any legal basis in public international law if the State in question has not previously been targeted of armed attack, nor in case of preemptive attack. In fact, Iraq did not threaten any State, nor deploy troops for such purpose; moreover, Iraq could not be military to the United States as far as the military forces were concerned. Thus, the notion of "preemptive self-defense" weakened the fundamental principle of international law that considered illegal the recourse to armed force with the only exception of self-defense.

What became clear once the US administration decided to expand its response post-09/11 starting from a simple identification of international terrorism *stricto sensu* and its legal international control was that the situation suddenly became polycentral, splitting into a set of different smaller problems.

On 17 September 2001, President George W. Bush, six days after the

(21) C. GRAY, *International Law and the Use of Force,* 2nd edition, Oxford University Press, Oxford, 2004, p. 188

terrorist attacks in New York and Washington D.C., officialized his speeches made in the previous six months. President Bush wanted to highlight the attempt of the new American administration to define a new approach towards the maintenance of international peace and security was outlined. Those speeches were later published in *The National Security Strategy of the United States of America* that inspired the speech released at the Accademic Board in West Point, on 1 June 2002, which became later the key document. Recalling the Cold War period, marked by the famous "balance of terror" caused by nuclear threat between the two superpowers, the American and the Soviet one, the President kept on identifying the new contemporary threats coming from the "rogue States" and from terrorism.(22)

The *National Security Strategy* defined a new doctrine of preemptive war that went beyond the simple anticipation of an imminent threat allowing to wage a war to remove any regime that could set a future threat. This document could be considered as a sort of an ideological *manifesto* of how in the last years States had decided to disregard the authorizations without taking into consideration the appropriate legality of their actions according to general international law.(23)

In January 2002, in his first State of the Union address, President Bush had already included Iran, Iraq and North Korea, together with their terrorist allies, in his famous "Axis of Evil". In West Point he announced his willingness to fight for "a peace that promotes freedom": in fact, the United States could not afford to "remain idle when danger gathers" or "let [their] enemies strike first".

> "The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend

(22) E. MCWHINNEY, *The September 11 terrorist attacks and the invasion of Iraq in contemporary international law: opinions on the emerging new world order system*, M. Nijhoff, Boston, 2004, p. 33
(23) P. PICONE, *Comunità Internazionale e obblighi "erga omnes"*, Jovene Editore, Napoli, 2006, p. 347

> ourselves, even if uncertainty remains as to the time and place of enemy's attack. To forestall or prevent such hostile attacks by our adversaries, The United States will, if necessary, act preemptively."(24)

The President continued declaring that:

> "[w]hile the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country."(25)

It was clear how such strategy wanted to support the US will to back out of the constricting multilateral framework, rejecting, in this way, the limits given by the circumstances of international law.(26) Firstly the Clinton administration and later the Bush administration, both agreed on the fact that national security should not depend on any external constraints, then reducing the UN authority to subordinate role of charitable and humanitarian sort.

Besides the principal features of "rogue States", Bush highlighted that "they were determined to purchase WMDs with the aim of using them as threats or with the aim of offensively achieving their aggressive projects"; "they promoted terrorism all over the world"; and they refused "the basic human values and felt hatred towards the United States and everything was related to them". President Bush, then, clearly announced that the appropriate US responses to such threats

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(24) *US Adoption of New Doctrine of Use of Force*, 97 AJIL 203-5, 2003 in S. C. NEFF, *War and the law of nations: a general history*, Cambridge University Press, Cambridge, 2005, p. 329

(25) *The National Security Strategy of the United States*, September 2002, consulting at http://www.state.gov/documents/organization/63562.pdf, visited on 22/05/2016

(26) G. LHOMMEAU, *Le droit international à l'epreuve de la puissance americaine*, L'Harmattan, Paris, 2005, p. 41

would not involve the traditional concepts of deterrence, as it happened during the Cold War. But, the bigger the threats, the more preemptive actions would be required in order to defend the nation. In September 2002, Bush presented to the US Congress the current situation as an "opportunity to extend the benefits of freedom across the globe."(27) He made clear, in addition, that "the allies of terror were the enemies of civilization" and that the United States would keep them into consideration. Moreover, the *National Security Strategy* explicitly defined Iraq as a "rogue State" in the same section in which he had affirmed that the Unites States would act preemptively, if necessary, using its new military forces changed "to conduct rapid and precise operations to achieve decisive results."(28)

The innovation of the *Strategy* was the transition of a planning from a threat-based security model into the elaboration of a capabilities-based model. This meant that if an enemy had the "capabilities" (as for example the WMDs in Iraq) to inflict an aggression against the United States, it would be judged as threatening State *ipso facto* and the United States would feel entitled to fight back until the destruction or the full dismantlement of the "capabilities". The strategy, elaborated in September 2002 in the wider intention of global war on terrorism, had possible military intervention in Iraq as precise aim. The document had the purpose, in fact, to convince a larger part of States of the necessity to contrast the Iraqi threat and to confirm the American will towards the global war against terrorism.(29)

The *Strategy* outlined three new primary threats, which were likely to deteriorate the survival of international order: the terrorism, the

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(27) *The National Security Strategy of the United States*, September 2002, consulting at http://www.state.gov/documents/organization/63562.pdf, visitato il 22/05/2016

(28) *The National Security Strategy of the United States*, September 2002, consulting at http://www.state.gov/documents/organization/63562.pdf, visited on 22/05/2016

(29) A. MACLEOD, D. MORION, *Diplomaties en guerre: Sept États face à la crise irakienne*, CEPES, Montreal, 2005, p. 201-202; R. KHALIDI, *La Ressurrezione dell'Impero: l'America e l'avventura occidentale in Medio Oriente*, Bollati Boringhieri, Torino, 2004, p. 25

proliferation of WMDs and the dictatorship of such “rogue States”. If nobody contested the threat caused by a possible link between terrorism and WMDs, on the contrary, there were numerous those who demanded a more inclusive definition of security and of the potential risks of instability related to it. In the immediate post-09/11 the divergent consideration regarding those threats, however, was not matter of a concrete debate within the community of States: while someone quietly highlighted the necessity of a global practice on war against terrorism along with the Americans, the general opinion concerning such issue was the silence. From the point of view of Washington, this lack of explicit reaction authorized the Americans to think that the basis for a compromise on the legal use of force were shared among the community.(30)

The aim of Bush administration was to demonstrate to the other States, supported by some evidence, that the inspectors in charge of Iraq's disarmament did not work adequately and that they were targeted by Iraqi authorities. The task was conferred to Colin Powell, the American Secretary of State, who called the Security Council for an extraordinary meeting on 5 February 2003. In front of the institution, Colin Powell wanted to convince the entire community that war was not only a whim by the United States, but it was necessary to global security.
The speech, which was broadcast live on television and seen by millions of viewers, focused on the possession of evidence concerning mobile installations for production of chemical weapons. The Secretary of State exposed satellite photos to the UN Assembly, affirming that it was unchallengeable and undeniable that Iraq was still in substantial violation of its obligations, as drafted in previous resolutions, in particular in SCR 1441. Then, the Secretary showed a laboratory tube

(30) A. MACLEOD, D. MORION, *Diplomaties en guerre: Sept États face à la crise irakienne*, CEPES, Montreal, 2005, p. 29

which seemed to contain a lethal gas, and another phial with some white powder, which later was presented as evidence of anthrax. Later, he made the assembly hear some recorded registrations in Arab language that proofed, according to the Secretary, that Iraqis were hiding the weapons from UN inspectors.

In this way, the Security Council became a forum for a vigorous American diplomatic campaign able to get the majority of the delegations for potential intervention in Iraq authorized by the UN and led by the United States. Colin Powell mainly focused on the possession of WMDs and biological weapons with the capacity of being launched in 45 minutes by Iraq. On the basis of this statement, the situation required "a united response by the community of democracies." On 5 March 2003, the Ministers of Foreign Affairs of France, Germany, Russia met in Paris and sent a letter to the Council where they demanded to concentrate on peaceful means to achieve the aim of "a full and concrete disarmament of Iraq." Threatening to use their veto power as permanent members, France and Russia declared that they "would not let a proposed resolution pass that would authorize the use of force."(31)

The supposed evidence used to witness Iraqi program of biological weapons presented by Colin Powell, that is, the presence in Iraqi territory of two mobile laboratories photographed from satellites, reminded the practice adopted during the Cuban missile crisis in 1962. Both CIA and DEA reported those statements in a joined document later released on 28 March 2003. However, none of the different teams of inspections in Iraq found evidence of biological weapons in those labs. The sites taken into account were analyzed by the team UNMOVIC (*United Nations Monitoring, Verification and Inspection Commission*) and the samples were examined in order to find possible

(31) P. A. MELLO, *Democratic participation in armed conflict: military involvement in Kosovo, Afghanistan, and Iraq*, Macmillan, Houndmills, 2014, p. 144-145

traces of chemical and biological agents. The UNMOVIC was different from the precedent UNSCOM inasmuch it was not composed by "detached" functionaries of the States, but by "specialists in mission" depending from the Council according to art. 100 of the Charter.(32) In neither cases convincing evidence that confirmed the existence of forbidden activities were found. "The trucks for the «decontamination», which American analysts believed having identified by the pictures, according to the UN inspectors could have been some water tanks. Moreover, the presence of a «line of trucks» near an «installation related to biological weapons» could have something to do, according to the analysis of the experts, with the seasonal delivering of vaccines. In fact, in the past years, the site has not been linked to the production of biological agents with military aims, but to the warehouses of seeds."(33) In September 2003, the two executive directors of UNSCOM (United Nations Special Commission) and UNMOVIC (*United Nations Monitoring, Verification and Inspection Commission*), respectively Rolf Ekeus and Hans Blix, affirmed that, during the inspections between 1994 and 1998, Iraqi policy, as far as the biological weapons were concerned, consisted of building the capacity to produce weapons in the future. Iraqi policy did not concern the storage and consequently it could not generate possible problems with the practice. Moreover, they asserted that Iraq had destroyed all its chemical and biological weapons in the '90s, even though they did not fully report all the procedures of destruction. Despite the results, which turned out constantly negative on the capacity Iraqi biological weapons, Bush and the English Prime Minister Blair repeatedly disregarded the work done by UNMOVIC. Only in April 2004 Colin Powell finally admitted that he was wrong about the mobile laboratories and he apologized saying that he had

(32) P. PICONE, *Comunità Internazionale e obblighi "erga omnes"*, Jovene Editore, Napoli, 2006, p. 350
(33) H. BLIX, *Disarmare l'Iraq, La verità su tutte le menzogne*, Einaudi, 2004, Torino, p. 151

received guarantees by CIA.

So, President Bush and his entourage deceived American citizens and the whole global public opinion. Their lies marked, according to professor Paul Krugman, "the worst scandal in American political history – worse than Watergate, worse than Iran-contra."(34)

The Iraqi installations for the production of WMDs resulted fictional and unfounded, as well as the link between the Hussein's government and the terrorist group Al-Qaida, in addition to the possession of uranium secretly acquired by Niger. The final confirmation on the absence of WMDs in Iraqi territory came later by David Kay, UN inspector, close to CIA and the one who argued the most the thesis of their existence during Bush administration.(35)

Two purposes motivated the United States: firstly, the concern often expressed by Richard Cheney of preventing any link between "rogue States" and international terrorism.(36) This preoccupation had already existed during Clinton administration in 1997 when the Secretary of Defense, William Cohen, claimed that the United States were facing regional actors, which had available third-type weapons, terrorist groups and religious sects, which tried to gain power through the acquisition and utilization of WMDs. President Bush later declared that his greatest fear was that those States could find a "*hors la loi* State" that gave them the necessary technology. In the neoconservative ideology just elected, this "*hors la loi* State" could be Saddam

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(34) P. KRUGMAN, *Standard Operating Procedure*, in *The New York Times*, published on 03.06.2003, consulting at http://www.nytimes.com/2003/06/03/opinion/standard-operating-procedure.html, visited on 03/06/2016

(35) I. RAMONET, *Irak: histoire d'un desastre*, Paris: Galilee, 2005, p. 86

(36) "The hostility against Iraqi government was a typical feature of the ideology of the neocon intellectuals. As a matter of fact, they acted as shock troops of Bush administration aiming to conquer the public opinion's approval to an aggressive war against Iraq. This hostility was shared by a major part of the administration, such as the Vice President Cheney, the Secretary of Defense Rumsfeld and the National Security Advisor Condoleeza Rice." R. KHALIDI, *La Resurrezione dell'impero: l'America e l'avventura occidentale in Medio Oriente*, Bollati Boringhieri, Torino, 2004, p. 11

Hussein's Iraq. The second motivation was the taking of control of Gulf area and of its hydrocarbon reserves. A large part of public opinion was convinced that the invasion of Iraq did not have any purpose, but the appropriation of oil. Indeed, more than two thirds of oil reserves are concentrated under the ground of seven States set along the Gulf coast: Iran, Iraq, Kuwait, Saudi Arabia, Bahrain, Qatar and United Arab Emirates. According to developed countries, and in particular the United States, this area has always played and it is still playing a crucial geopolitical role thanks to its energetic resources, possessing one of the essential key for their growth and their way of life. Consequently, any destabilization of Gulf States has been considered a threat to the essential interests of the United States. Colin Powell and the administration's desire was that Iraq would continue to act as a counterweight to Iran, the main rival for the United States in the area. If Iraq had been divided in Sunni, Shiite and Kurdish groups, it would have not contributed, therefore, to the desired stability in the Middle East and the only way to avoid this situation was to conquer and occupy the country in question.

The determination of the United States to recur to force against Iraq in response to its several and repeated violations of the system outlined with the cease-fire in SCR 687 and its non-cooperation with UN inspectors was increased by numerous protests by American administration of possible links between Saddam and the terrorist organization of Al-Qaida. Although there were no real proofs of a direct involvement of Saddam in 09/11 attacks, the announcements about the supposed links were clearly planned in order to justify the attack against Iraq in the wider framework of war on terrorism.(37)

(37) C. GRAY, *International Law and the Use of Force,* 2nd edition, Oxford University Press, Oxford, 2004, p. 180 ss

3.3. SCR 1441 and the Anglo-American invasion in Iraq

The Gulf War of 2003 waged by the United States against Iraq cannot be defined, properly speaking, as a susceptible precedent likely to be used in the recognition of the "right of intervention" or preemptive self-defense against such "rogue States". The war started a period of deep decline of international law similar to period of the 19th and 20th century.

With the fall of the Berlin wall and, consequently, of the Soviet Union in 1991, the United States winded up in an unprecedented position where they did not have any rivals in the first time after 50 years. With the extraordinary victory of the neoconservative republicans, the United States had the impression that it would be useful to take advantage of this hegemony with the purpose of shaping the world along the best interests of Washington. In fact, the neoconservative policy was affected by two main concepts: security in the post-09/11 period and an ideological feeling of moral mission, whose roots dated back to the very origin of the American republic. As a consequence, predominance allowed the US to impose a unilateral policy on the international system.

Military intervention waged on 20 March 2003 against Iraq was preceded by a series of statements and warnings that expressed the clear intention to recur to force against the Arab State if it had not complied with a set of obligations mainly regarding its disarmament. This intention was formulated both by the Security Council, when it adopted SCR 1441, and by the United States and its allies during several official speeches. Whereas the legitimacy of the threat by the organization did not raise any doubts, the behavior of the United States

and England was highly contested, since it was contrary to the principle of the prohibition of the threat of force defined in art. 2, par.4. Therefore, the Iraqi crisis was exposed as the beginning of the slackening of the principle that forbade the threat to the recourse to force.(38) During a speech made on 8 February 2003, the General Secretary revealed his concern about a potential war in Iraq.(39) The global system had the duty of preventing it: the General Secretary exhorted Member States not to abandon the multilateral approach in the framework of Iraqi issue. It was well-known that Iraq did not comply with its obligations that he had accepted with SCR 687, in particular the ones regarding the WMDs, but it was a problem that concerned the whole international system and not only a problem regarding a single State. In fact, the UN, in accordance with the legislation of the Charter, has the duty to use up all the possibilities of peaceful solution before recurring to the use of force.(40)

In front of the General Assembly in September 2002, President Bush stated that the United States were absolutely sure that Saddam owned nuclear weapons. The President added that they had to do anything possible to prevent that that moment came and he described Saddam's regime as a serious and collective danger.

In the meeting in Hanover on 8 September 2002, French President Jacques Chiraq and the German Chancellor Gerhard Schroeder released a joined announcement that categorically pointed out that France and Germany would not take part to any armed intervention against Iraq without the legal authorization by the Council. The French-German statement was immediately followed by the declaration of the Canadian Prime Minister, Jean Chrétien, in which he asserted that the Canadian

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(38) CEDIN – Paris 1., *L'Intervention en Irak et le droit international*, sous la direction de Karine Bannelier, Pedone, Paris, 2004, p. 93-94

(39) R. ZACKLIN, *The United Nations Secretariat and the use of force in a unipolar world: power v. principle*, Cambridge University Press, Cambridge, 2010, p. 143

(40) v. *supra*, p. 142-143

government would adopt the same position. Those assertions marked a change of direction in the policy of the use of force by the three Western major powers and members of G8, which were related to the United States regarding NATO's interventions.(41)

As already explained in the previous chapters, a State employed a threat to recourse to force by the virtue of art. 2, par. 4, when it expressly states its willingness to use armed force against another State precisely identified, in the hypothesis that the latter does not submit to particular conditions or it does not assume a specific behavior. In the framework of the Gulf crisis, American and English authorities frequently showed such intention towards Iraq. The determination of recurring to armed force by the United States became indisputable when the Congress on 11 October 2002, approved a resolution, which asserted that:

> "[t]he President is authorized to use all means that he determines to be appropriate, including force, in order to enforce the United Nations Security Council Resolutions referenced above, defend the national security interests of the United States against the threat posed by Iraq, and restore international peace and security in the region."(42)

Analyzing the resolution, President George W. Bush affirmed that Saddam Hussein "had to disarm himself – or, for the sake of peace, we would lead a coalition to disarm him."(43)

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(41) E. MCWHINNEY, *The September 11 terrorist attacks and the invasion of Iraq in contemporary international law: opinions on the emerging new world order system*, M. Nijhoff, Boston, 2004, p. 68
(42) *S.J.Res.45 - Further Resolution on Iraq*, 107th US Congress (2001-2002), consulting at https://www.congress.gov/bill/107th-congress/senate-joint-resolution/45?q=%7B%22search%22%3A%5B%22Iraqi+Resolution%22%5D%7D&resultIndex=218, visited on 22/05/2016
(43) *Bush Says Confronting Iraq is Matter of National Security*, radio broadcast to the Nation, 12

In the same year, the United States and Great Britain arranged further troops along the borders adjacent to Iraq. The strategic dispatch of military troops in the area were sufficient to justify the will by the United States to use force if Iraq had not followed its demands.

On 8 November 2002, after 8 weeks of negotiation and serious pressure by the US, the Security Council approved SCR 1441, based on a draft presented by the UK and the United States, which demanded to impose a new series of inspection regimes in Iraq. The resolution recalled all the previous ones and, in particular, the commitment by all the Member States to maintain Iraq's sovereignty and its territorial integrity. Moreover, by the virtue of chapter VII of the Charter, the resolution declared that Iraq was still remaining in violation of the obligations requested by the relevant resolutions, especially by SCR 687.(44)

Although the resolution did not authorize the use of "all the necessary means" as it happened in previous situations, for example in SCR 678 that was the legal basis for multilateral intervention on behalf of Kuwait in 1991, the Security Council stated that:

> "1. [...] Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687 (1991), in particular through Iraq's failure to cooperate with United Nations inspectors and the IAEA, and to complete the actions required under paragraphs 8 to 13 of resolution 687 (1991)."(45)

However, the Council:

October 2002, consulting at http://iipdigital.usembassy.gov/st/english/texttrans/2002/10/20021007213220eichler@pd.state.gov0.9141504.html#axzz49QCQaipp, visited on 22/05/2016

(44) P. A. MELLO, *Democratic participation in armed conflict: military involvement in Kosovo, Afghanistan, and Iraq*, Macmillan, Houndmills, 2014, p. 141-142

(45) UN SC Res. n. 1441/2002, *Situation between Iraq and Kuwait*, 8 November 2002, S/RES/1441 (2002), par. 1

> "2. [d]ecides, while acknowledging paragraph 1 above, to afford Iraq, by this resolution, a final opportunity to comply with its disarmament obligations under relevant resolutions of the Council; and accordingly decides to set up an enhanced inspection regime with the aim of bringing to full and verified completion the disarmament process established by resolution 687 (1991) and subsequent resolutions of the Council."(46)

With it, the Council established a set of obligations towards Iraq regarding the disarmament of the country, reminding that SCR 678 had already authorized Member States to use force aimed to free Kuwait and:

> "13. [r]ecalls, in that context, that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations."(47)

The resolution did establish a regime of enforced inspections, but it did not authorize the recourse to force by Member States. After Member States had voted, both the American delegate, John Negroponte, and the English one, Jeremy Greenstock, highlighted that the document did not imply an automatic recourse to force if Iraq had failed to fulfill its obligations. Moreover, they declared that the case should have firstly discussed within the Council.(48)

The resolution offered a final opportunity to Iraq to commit to the obligations with the aim of achieving the process of the full and

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(46) v. *supra*, par. 2
(47) UN SC Res. n. 1441/2002, *Situation between Iraq and Kuwait*, 8 November 2002, S/RES/1441 (2002), par. 13
(48) P. A. MELLO, *Democratic participation in armed conflict: military involvement in Kosovo, Afghanistan, and Iraq*, Macmillan, Houndmills, 2014, p. 142

verified disarmament, as established in SCR 687. In addition, it gave 30 days to Iraqi regime to fulfill its duties of disarmament. In case of failure in the fulfillment of the obligations and in the full cooperation of the realization, it would have been reported to the Security Council.

The United States opted for armed intervention putting into practice the resolution of the US Houses of Congress in October 2002 (the *Authorization for the Use of Military Force against* Iraq) that recalled the implied authorization and self-defense, allowing the President "to use the armed forces of the United States [...] in order to defend its national security against the continuing threat posed by Iraq."(49) Although they went on asserting that the recourse to military force was necessary and legitimized by the Council's resolutions related to the First Gulf War, the General Secretary Kofi Annan, a few days before the war had been waged, declared that any unilateral action taken outside the Council would not be in compliance with the UN Charter.

In the circumstances in which SCR 1441 was approved, it was immediately clear that the expression "serious consequences" was related to the possibility to use military force against Iraq. Therefore, the threat seemed to be included in the prospective of a future authorization to recur to force by the Council, appearing perfectly legal. If American and English threats had been strictly part of the logic of SCR 1441 and they had not considered other recourse to force, except the one authorized by the Council, consequently, they would have been perfectly compatible with the Charter.(50) However, the clear expression of the threat to unilaterally recur to force, in case of missed authorization by the Council, emerged also in American and English statements. In fact, according to several official declarations, the majority of States understood that the lack of any authoritative

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(49) C. GRAY, *International Law and the Use of Force*, 2nd edition, Oxford University Press, Oxford, 2004, p. 182

(50) CEDIN – Paris 1., *L'Intervention en Irak et le droit international*, sous la direction de Karine Bannelier, Pedone, Paris, 2004, p. 96-97

resolution by the five permanent members would not have kept the United States from using force against Iraq, if the latter had not adjusted to the relevant resolutions.(51) Due to the nature of those declarations, the United States proved to be willing to wage a unilateral military attack in a way that was not in compliance with the Charter. Consequently, their threats about military intervention resulted contrary to art, 2, par.4, too.

Iraqis did not understand that the inspections should not have been considered punishment, but as opportunity to make themselves credible in the eyes of the world. According to Hans Blix, the executive director of the *United Nations Monitoring, Verification and Inspection Commission* (UNMOVIC), Iraq did not make the best out of the opportunity that was given to it, affirming that, still at the beginning of the new millennium, it did not seem to have agreed to the duty of disarmament positively. In fact, the disarmament was imposed only with the aim of allowing Iraq to gain the world's confidence and to live in peace. From what was analyzed during the period of inspections, in principle Iraq decided to cooperate with the inspectors allowing them the requested access, but this was not enough. In fact, it was essential showing the same willingness regarding substantial issues, in order to fulfill the process of disarmament in a more specific way.(52)

The inspectors appointed by the United Nations in accordance with SCR 1441 for the control of WMDs in Iraq territory firstly reported that there were some delays by the regime in the cooperation. In

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(51) The official speeches released by President George W. Bush can be consulted in the official White House's archives at https://georgewbush-whitehouse.archives.gov/index.html, in particular *President Urges Congress to Pass Iraq Resolution Promptly* (24/09/2002) consulting at https://georgewbush-whitehouse.archives.gov/news/releases/2002/09/20020924-1.html, *President Delivers "State of the Union"* (28/01/2003) consulting at https://georgewbush-whitehouse.archives.gov/news/releases/2003/01/20030128-19.html, *U.S. Secretary of State Colin Powell Addresses the U.N. Security Council* (05/02/2003) consulting at https://georgewbush-whitehouse.archives.gov/news/releases/2003/02/20030205-1.html and *President Says Saddam Hussein Must Leave Iraq Within 48 Hours* (17/03/2003) consulting at https://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030317-7.html, visited on 06/06/2016

(52) H. BLIX, *Disarmare l'Iraq, la verità su tutte le menzogne,* Einaudi, 2004, Torino, p. 136

addition, at the beginning of the activities, Iraq did not assume an active approach that was requested by the new system of inspections. However, the inspectors did not find any effective proofs of WMDs. Many forbidden weapons were missing and only an active and immediate cooperation by the Iraqi government could have helped. The cooperation had an improvement in February 2003; even though the US and UK stated that Iraq remained in violation of international law, a similar declaration by the Council had never come out. The countries that required the use of force did not refer only to SCR 1441 as justification to military activities; however, they continued to affirm that a second resolution would not have been necessary. The crucial fact was that SCR 1441 did not expressly declare that a further resolution would be necessary to authorize the recourse to force: in fact, paragraph 12 of resolution only demanded that the Council should meet to "consider the situation". As a consequence, States were free to recur to force unilaterally if once again Iraq was substantial violating the cease-fire regime. Despite that, the United States and England made several attempts to pledge a further resolution.(53) So, the Council stood divided between who, like the US and UK, wanted a single resolution that authorized the use of force and who, like Russia, China, Germany and France, was not willing to accept the compromise, preferring a further resolution. Therefore, if a peaceful solution resulted simply impossible, a second resolution that would support SCR 1441 would have at least legitimized the military action and given to the whole crisis, to the next crisis and to the efforts of reconstruction a total different aspect. The United States wanted to ensure a success in the crisis acting in a particular way: it wanted the unanimity and a UN decision and, until the approval of SCR 1441 in mid-November, many congressmen in the US administration thought to have it. All of this

(53) C. GRAY, *International Law and the Use of Force,* 2nd edition, Oxford University Press, Oxford, 2004, p. 272-273

was part of the general strategic of coercive diplomacy that President Bush had carefully started in the early 2002.

On 20 March 2003, the United States waged the armed conflict against Iraq, claiming to participate with a coalition of other 44 countries, thus starting *Operation Iraqi Freedom*. On 9 April, only three weeks after the invasion, the US military forces entered Baghdad and the Iraqi government was defeated. The entire invasion was seen as a farce by the public opinion: on the political level, the Washington's coalition was composed by the United States, Great Britain and Spain, whereas on the military level consisted of the US, the UK and Australia. It was the first time after the Vietnam war that the United States had gone to war without a support by its major allies. American policy had already been in the process of transformation before 09/11 attacks: the US decided to approach a more resolute behavior towards the immediate crisis that affected them (for example the attack in World Trade Center in 1993 or the dissolution of Jugoslavia in 1991-'92). This attitude went together with the growing awareness of feeling no longer compelled to pursue what the Americans considered their national interests. The policies of containment, the main cornerstone of the American foreign policy especially during the Cold War, were believed inadequate for facing modern threats. The election of George W. Bush and the emergence of the neoconservative administration coincided with a new approach of the military policy. The “revolution in the military affairs” was becoming a reality for Bush's republicans: information technology, satellite surveillance and communication, together with a dramatic precision in targeting started to expand in the late '90s with the purpose of offering concrete projects aimed to fight new kinds of war with small, lethal and precise armed forces.

The historians of international relations and jurists often wondered,

immediately after the beginning of the hostilities, whether the criteria of the *just war* could be applied to the Second Gulf War. As far as the first condition was concerned, the *just cause*, many times during his declarations President Bush described the Iraqi regime as serious danger for the entire community, in particular for the United States, supported by Saddam's constant effort to gain WMDs. Thus, the US felt having the right of preemptive self-defense since Iraq kept owning WMDs and it did not fulfill the obligations imposed by the resolutions. However, Iraq had not perpetrated any aggression against the United States or England as to justify the right of self-defense or any kind of *bellum justum* doctrine. None of the arguments made by President Bush to attack Iraq authorized self-defense in accordance with art. 51 of the Charter. Therefore, the war failed to identify the first element of the *bellum justum* doctrine. If we consider the second condition, that is, the competent authority, we can see that the resolution did not explicitly authorize the recourse to armed force. Since Iraq had not fully followed its obligations in accordance with SCR 687, SCR 1441 claimed that Iraq remained in concrete violation of such resolution. Thus, judging whether such minor violation was a legal justification to the recourse to armed force was not a task to be entrusted to the individual members. The last requisition in the *bellum justum* doctrine is the right intention: the reasons at the root of military action should not inflict useless sufferings to the victim State and the State that wages the war would have to use a reasonable amount of force to achieve the good cause. Moreover, the decision of waging war had to be essentially aimed to the national protection in order to obtain a fair and lasting peace. In the case of the United States and Iraq, they declared to wage intervention for a good reason that was the Iraq's disarmament and the protection of the States from the serious danger of the WMDs proliferation under the

Iraqi control and, as a consequence, under the control of potential terrorist groups.(54)

In particular, the failure of finding significant traces of WMDs in Iraqi territory created several serious questionings about the intentions of going to war.

The violation of human rights by Iraqi regime was another relevant cause used by Bush administration with the purpose of justifying the recourse to force. Without any doubt the whole system of States saw in Saddam a dictator who controlled a brutal regime and committed mass violations against his own population. However, the regular violations of human rights before the invasion of Kuwait, the disregard of the most relevant conventions concerning the international armed conflicts during the Iraq-Iran war in 1980-88, the employment of certain forbidden weapons, like anthrax or cyanide gas, against its citizens and, above all, against the Kurds in the well-known Halabja chemical attack in 1988, were ignored by Western States for political reasons for years. The criterion of good intention, both in the traditional doctrine and in the contemporary one, needed to reinforce the condition that States could act in a concrete defensive action, instead of venturing in military intervention with the excuse of self-defense. As a consequence, in this particular situation, the requisite was highly violated by President Bush: the unilateral recourse to force "did not meet the common criteria of *just war* – just cause; competent authority and right intention, or exceptions to Article 2(4) of the UN Charter."(55)

Following the collapse of the Ba'thist regime of Saddam, the Security Council decided to approve SCR 1483 in May 2003 with which it wanted to remark upon the right of Iraqi population to freely determine its own political future. The text of the resolution highlighted a

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(54) M. T. KAROUBI, *Just or unjust war?: International Law and Unilateral Use of Armed Force by States at the Turn of the 20th Century*, Ashgate, Burlington, 2004, p. 209

(55) M. T. KAROUBI, *Just or unjust war?: International Law and Unilateral Use of Armed Force by States at the Turn of the 20th Century*, Ashgate, Burlington, 2004, p. 212

compromise among the United States and Great Britain and France, Russia and China, who, contrary to the Anglo-Americans, wanted to avoid a further *post-facto* validation characterizing SCR 1244/1999 about NATO intervention in Kosovo. More than normative, SCR 1483 had political value: after some negotiations, in fact, the United States and Great Britain were declared occupying powers (a definition that, at the beginning, had not been accepted by the coalition's States):

> "[n]oting the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538) and recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the "Authority")."(56)

On 1 May 2003, the US announced that the principal military operations were ceased; however, the coalition forces would have stayed in Iraq as long as necessary to assist the Iraqi population in building the new political institution and reconstructing the country.(57)
After the official end of the principle hostilities, occupying powers instituted the *Coalition Provisional Authority* (CPA), that was a temporary authority having as purpose the administration of the occupying country and the creation of a process of transition in order to establish a democratic regime with the support of the UN Security Council.
Considering the individual responsibility of the States regarding the Iraq's occupation, the statement expressed in the resolution was

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(56) UN SC Res. n. 1483/2003, *Situation between Iraq and Kuwait*, 22 May 2003, S/RES/1483 (2003)
(57) C. GRAY, *International Law and the Use of Force,* 2nd edition, Oxford University Press, Oxford, 2004, p. 278

important because intervention was defined as an Anglo-American campaign and not as a venture wanted by the UN.

Whereas the military operations about the mere invasion of Iraq were excellently arranged and planned and also performed, plans of warring occupation that followed the victory had not the same success as well. In fact, on the scene there was no plan for an occupation that concerned the restoration and the renewal of the essential services in the territories occupied by the coalition. Moreover, one of the most surprising post-victory neglects by the Western powers was the failure in protecting the national archaeological treasures, considered the finds of the "cradle of civilization" that were part of the common heritage of mankind according to the UN. According to Edward McWhinney, "[t]he lapse, here, seemed to have been due to excessive compartmentalization of thinking and planning on the invasion, within the Washington administration, and a failure to separate the problem-situation into its two key components – the military, in the strict sense of the word [...]; and the military occupation."(58)

The army that managed the Iraqi insurrection was not well military or culturally arranged for this particular aim: it only represented an extraordinary means to oppress the Saddam's armies and to occupy Baghdad. The plan of President Bush's policy (that was to guarantee a strategic victory of the policy wanted by Washington, that is, reshaping the Middle East in the best interests of the US and its ally in the area, Israel) implied the success in Iraq. France and Russia tried to prevent the American unilateralism, highlighting the potential risk that the doctrine of preemptive self-defense could cause. Indeed, this doctrine threatened the international rules patiently developed and put into practice; despite that, the United States wanted to keep safe its freedom

(58) E. MCWHINNEY, *The September 11 terrorist attacks and the invasion of Iraq in contemporary international law: opinions on the emerging new world order system*, M. Nijhoff, Boston, 2004, p. 81-82

of action.

Consequently, the war in Iraq in 2003 denoted a breaking point between the US and the rest of the States. Outside the American administration, jurists seemed to agree on the fact that the doctrine of preemptive war was widely rejected and that it received little international support. In 2004, fearing a dangerous precedent for future conflicts, the General Secretary Kofi Annan entitled a high-level group to analyze the possible threats to global security and to draft recommendations for a suitable collective response to those threats. Whereas the committee approved the right of self-defense against imminent threats, it firmly denied any concepts of "preemptive self-defense" against "non-imminent" threats.

The American presumption conceived by its military superiority and by the disregard towards all the norms of international law originated a wave of anti-americanism almost comparable to the propaganda against the war in Vietnam. Although public opinion's mobilization and pacifist manifestations doubled among many countries, nothing could block, or at least limit, the plan of aggression that Bush had in mind, intended as "crusade against the evil."

3.4. The illegal use of force against Iraq

What we saw after the unilateral recourse to military action by the United States and England against Iraq divided the juridical opinion between the supporters of the Charter's prohibitions of non-intervention and non-use of force and the supporters of the legal limits allowed by

the right of self-defense, as art. 51 established.

Once the Anglo-American invasion had begun and the direct battle was concluded on 15 April 2003, a new series of problems came out, in particular the emergence of some problems that had not been actually foreseen by the two powers in their original projects. Traditional law of warring occupation was well-known in its most significant principles. However, the situation of Iraq was not considered a "state of war" according to the classical methods. In fact, some of the juridical irregularities must be recalled in the legal status of the regime of post-war occupation. However, if we accept that the situation left in Iraq after 5 April 2003 might be considered a sort of warring occupation *de facto* with the defeat of the Saddam's armies, the relationships between the occupying powers and Iraqi population should be clarified more in detail.(59)

The military occupation in this specific circumstance resulted illegal because it was a consequence of an illegal recourse to force: the foreign presence and the practice of American prerogatives without any legal right violated the territorial integrity of Iraq and the right of the civilians to institute the governmental bodies. The main problem was that Iraqi citizens and the country had to be able to exercise their sovereignty, but this was not possible due to the presence of the coalition forces on the ground.(60) The massive opposition to war and the recognition of the illegal tendency of intervention by the majority of the States specified that the armed action could not be considered a precedent for the creation of a new juridical international order. The US experience in Iraq did anything, but highlight the precarious nature of the instruments of law as basis of the international order. In fact, in international relations the right of force still prevails on the system: the

(59) E. MCWHINNEY, *The September 11 terrorist attacks and the invasion of Iraq in contemporary international law: opinions on the emerging new world order system*, M. Nijhoff, Boston, 2004, p. 17

(60) CEDIN – Paris 1., *L'Intervention en Irak et le droit international*, sous la direction de Karine Bannelier, Pedone, Paris, 2004, p. 311

submission of the juridical framework to the political sphere explains that the issue of the legality quickly fades out and the issue of legitimacy would take over.(61)

The controversy related to the US administration's decision to lead a coalition with the aim to invade Iraq dramatically divided the global opinion and led to deep discords that had not appeared since the end of the Second World War between America and part of Europe. In particular, France and Germany were identified by the US as the leaders of the opposition and a new division within the West concerning the development of the international system emerged.
In fact, since the creation of the United States in 1945, no founder States, permanent member of the Security Council and one of the oldest global democracies has brutally broken the international legality in order to become a “criminal State”. The global order was overturned not by the hierarchy of powers, but by their political values. On 20 March 2003, the Security Council stated that Iraq would have not represented such an immediate threat to justify an immediate war. In fact, self-defense assumed the existence of a previous armed aggression that Iraq, not having participate to the 09/11 attacks, had not committed.(62) President Bush justified the invasion with the need to discharge Saddam Hussein's dictatorship from those territories. Even though the excuse could be praiseworthy, according to the Charter, it did not legitimize a unilateral decision to recur to force. Indeed, it would open the way to a set of unilateral military activities that would legitimize, with regard to foreign policy, the “law of the jungle” or the “law of the strongest” and consequently the defeat of international law.

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(61) CEDIN – Paris 1., *L'Intervention en Irak et le droit international*, sous la direction de Karine Bannelier, Pedone, Paris, 2004, p. 99 ss.
(62) E. MCWHINNEY, *The September 11 terrorist attacks and the invasion of Iraq in contemporary international law: opinions on the emerging new world order system*, M. Nijhoff, Boston, 2004, p. 68-69; I. RAMONET, *Irak: histoire d'un desastre*, Paris: Galilee, 2005, p. 141-142

A great part of the public opinion thought that Iraq, subjugated to more than 12 years of dramatic embargo, to restriction of its air sovereignty, to constant bombings and permanent surveillance, could hardly represent an “imminent threat” to its neighbors or, even less, to the rest of the world. As a consequence, Iraq was believed a weak country in the common opinion.

The argument in the US and UK's point of view that the previous resolutions could provide the legal basis for armed intervention found great opposition by other States and international jurists.

Despite the significant changes on international level in the last 50 years, the general prohibition of the use of force is believed as one of the biggest achievements in international law in the 20th century and as the *sine qua non* that reinforces the norm of legality in the international relations. From its appearance in the Kellogg-Briand Pact, the prohibition was included in the UN Charter in art. 2, par.4. As we saw in the first chapter, the regulation of the use of force is not complicated: one general rule and two exceptions. However, a series of causes makes it more complicated. Firstly, there are significant differences in the interpretation concerning the framework of the inherent right of self-defense and of the restriction to which any State can legally employ force in anticipation of an attack. Secondly, the system of collective security did not evolve according to the conditions originally envisaged by the authors of the Charter, even though the practice intervened to remedy this limit. The collective implementation was designated to Member States acting under the authority of the Security Council. This development can be seen as proof of the fact that the regulation of the use of force is susceptible to changes and constant adaptation to new conditions, provided that the prohibition remains the principle statement. Thirdly, sometimes States invoked the derogation of the prohibition which is not provided by the Charter, whereas they affirmed they were acting according to customary law.

The most noticeable example is the right of use of force with humanitarian aims.

The reason why England and the United States suggested intervention was that the previous UN resolutions on Iraq would have authorized it. In particular, three resolutions (two dated the First Gulf War and the third approved in the context of the recent crisis) would lay the legal foundation for justifying the use of force. All these resolutions were adopted under chapter VII of the Charter, which authorized the Council to employ several measures, included the use of force (art. 39). Among those resolutions, SCR 678 of 29 November 1990 provided for the employment of force against Iraq with the aim to free Kuwait, although military intervention would have been legal even without it by justifying the coalition would as collective self-defense.(63) This resolution was later recalled by England and the United States in the last crisis in 2003 and its large formulation would have supported their legal position especially in the light of the next practice of the Security Council.(64)

The Anglo-American coalition justified their own actions with the SCR 687/1991 that was approved at the end of the First Gulf War and established the conditions for the cease-fire. This resolution made clear that the international peace and security were not restored yet, despite the liberation of Kuwait. The Council imposed a variety of measures to Iraq, among which the acceptance of inviolability of the borders; the destruction and removal of all biological and chemical weapons under the international supervision; the obligation not to get or develop nuclear weapons of any kind; Iraqi responsibility of several types of war damages and the institution of the United Nations Compensation

(63) C. GRAY, *International Law and the Use of Force*, 2nd edition, Oxford University Press, Oxford, 2004, p. 273-274

(64) G. LHOMMEAU, *Le Droit International à l'epreuve de la puissance americaine*, L'Harmattan, Paris, 2005, p. 79-82

Committee (UNCC) for the complaints regarding this responsibility.(65)
The most recent resolution used by the United States and England was the debated SCR 1441, approved by the Council on 8 November 2002. The five permanent members voted the resolution at the unanimity: with the expression "serious consequences", France, Russia and China intended that they would vote a new resolution explicitly authorizing the use of force, whereas in President Bush's opinion was an open fire to war.(66)
SCR 1441 was the result of intense negotiations inside the UN. One of the most controversial points was whether it included an automatic authorization to the use of force in case of non-fulfillment by Iraq. The authorizations to the use of force shall be clearly expressed and the text of SCR 1441 by itself, as well as the conditions in which it was approved, resulted particularly lacking in supporting the opinion that would have conferred *prima facie* a legal warrant to use force. However, the United States and England reaffirmed that the resolution had to be read together with the other resolutions that had preceded it. What further complicates the debate was the fact of depending on an interpretation with an "open ending" of SCR 678, which was full of constitutional controversies. In fact, the Security Council can delegate the implementation to Member States, but not the decision whether the implementation should or not take place.
The debate on the legality of war, already uncertain, appeared seriously weakened by the failure of finding WMDs on the Iraq ground. The little that was found concerning the programs of WMDs from the end of the conflict could, in the best-case scenario, supports the conclusion that the declaration by the Iraqi government to the Council was "full, detailed and complete", as requested by SCR 1441.

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(65) C. GRAY, *International Law and the Use of Force*, 2nd edition, Oxford University Press, Oxford, 2004, p. 274-275
(66) I. RAMONET, *Irak: histoire d'un desastre*, Paris: Galilee, 2005, p. 52

CHAPTER 4

THE CURRENT SITUATION

TABLE OF CONTENTS: 4.1. The current situation in Iraq – 4.2. The UN today: are reforms necessary? – 4.3. The reform of the Security Council – 4.4. Conclusions

4.1. The current situation in Iraq

Few precedents were seen in the recent history where Western dominant powers sent their armies abroad with the aim of launching a successful military campaign, discharging a dictator and facing and coexisting with constant internal hostilities and cynicism towards the whole venture.(1) Therefore, the entire operation undertaken during the Second Gulf War is still controversial. With the intervention against

(1) CEDIN – Paris 1., *L'intervention en Irak et le droti international*, Pedone, Paris, 2004, p. 299

Iraq, the unilateralism reached the point of the biggest expansion, but also the point of the biggest degeneration.(2) The war may be part of a larger American action against a "compulsive empire"; or it may be seen as an effect of the Transatlantic break; or as a typical example of a reaction by a great power against an evident threat. Historians and analysts, however, included American intervention in a crisis where the major actors overrated their diplomatic actions, originating a critical situation that escalated in an increasingly inevitable war. In fact, although the Anglo-American coalition defeated Iraqi armies in about 26 days, earning the peace was way more difficult than winning the war. The successful coalition did not seem to own the abilities and the necessary means to impose an effective warring occupation, which could restore the minimum law conditions for the civilians. Furthermore, the coalition did not own the means to establish a new Iraqi government that might be internationally recognized with a place inside the General Assembly. The Western invaders were not received as liberators of a tyrannical government by local population. Instead of a quick victory followed by an equally quick exit strategy, the invasion created a long occupation that was highly expensive both in financial and human terms. Having chosen to avoid multilateral approach, the two Western superpowers understood that other States were not willing to engage with the financial support or with the human cost, in particular with human lives involved in the maintenance of the occupation of an unfriendly population. In order to ensure the logistic and financial support by the key actors of the international system, it would have been convenient if the management and the operational direction had been offered to the UN, so that the post-war reconstruction would have gone on a multinational basis in accordance with the UN Charter. The activities carried out without the supervision

(2) P. PICONE, *Comunità Internazionale e obblighi "erga omnes"*, Jovene Editore, Napoli, 2006, p. 380

of an UN authority left the country with serious legal consequences concerning the norms of warring occupation, which in such particular case was a *de facto* occupation gained without any legal endorsement in accordance with the Charter.(3)

The purpose of the coalition was, however, to recreate the State apparatus and to set up a legal government that would hold the practice of sovereignty. Any effort to split Iraqi territory would be contrary to the fundamental principles of international law, which were confirmed by the Council's resolutions before and after Anglo-American intervention. The Americans wanted to ensure their presence *in situ* until the establishment of a democratic government elected on the basis of a new Constitution, happened with SCR 1511/2003.

The post-war condition created in Iraq has few precedents from the adoption of the UN Charter. It was not the first time that a State, after 1945, had invaded another State in order to overturn its existing government. However, the conceit of staying there for an indeterminate period of time without any international permission was a new and particularly serious fact that caused a sensation among the entire community. The American occupation diverged from any other previous situation: indeed, its origin, its duration and the preset aims and the efforts to accept the *de facto* situation by the States constituted the decisive features of the entire operation. The *Iraqi Freedom Operation* was preceded by a debate on international level that lasted several months: the community had to decide all together whether recurring to the use of force so that Iraq would adapt to the obligations regarding the WMDs. Among the principal features of such military occupation we must consider that:

- it was not intended to annex all or part of the Iraqi territory;

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(3) E. MCWHINNEY, *The September 11 terrorist attacks and the invasion of Iraq in contemporary international law: opinions on the emerging new world order system*, M. Nijhoff, Boston, 2004, p. 72-73

- it led to the dissolution of the preexisting governmental apparatus;
- it was not the result of a decision made by a competent international organization;
- it could be part of a timeless logic: in fact, the occupation was aimed to the realization of some goals and it was not restricted by any kind of delays in time;
- it wanted to overcome the juridical prescriptions derived by the *jus in bello*;
- only some of the activities carried out by foreign armies took advantage by a Council's authorization.

The military occupation is a *de facto* situation: the legal regulation that derives from the Le Hayle and Geneve's law does not constitute, however, a juridical justification to the occupying presence. The juridical categorization of the military presence in a territory that before the hostilities was not under control of the current occupying country does not refer to the implementation of the *jus in bellum* norms. On the contrary, it refers to the *jus ad bellum* norms, including the sovereignty and the territorial administration. In this case the military occupation resulted illegal because it was the result of the illegal recourse to force, since the foreign presence and the implementation of the tasks of public power without any juridical right conditioned the territorial integrity of Iraq and the right of Iraqi population to dispose for itself. As a consequence, the means to put an end to such illegal situation was the withdrawal of the occupying institutions and forces and, eventually, their replacement with a transitory administration managed by the UN.(4)
The consequence that followed was the need to entrust Iraqi population

(4) CEDIN – Paris 1., *L'Intervention en Irak et le droit international*, Pedone, Paris, 2004, p. 311

with the capacity of exercising its sovereignty, a practice that at that time was exercised by the foreign administration. In order to do so, a process of normalization regarding the institutional procedures was required. SCR 1511/2003 wanted to set a limit to the American occupation in the draft highly wanted by France. Nevertheless, the United States decided that they would guarantee its presence until the institution of a government democratically elected with the aim of managing and influencing the whole process of democratization.(5)

Thus, the post-war situation in Iraq was the outcome of the great ignorance by Bush administration concerning the Iraqi realities and more generally the Middle East. Once again, it was the consequence of the culture of force imposed by a superpower that concerned only the present, without taking into consideration the past or the future. The anarchy that lasted for a decade clearly showed that the Bush administration and its English allies took into account only the military victory and not the postwar period. Moreover, according to its statements, President Bush Jr. foretold that the UN would have been relegated to an insignificant role in international relations if it had not implement the necessary measures after Iraq.(6) Contrary to this bad prediction, the postwar showed an unexpected success by the UN: the absence of WMDs pointed out that the international organization obtained the demilitarization of Iraq through peaceful means, without the necessity to wage armed intervention during the '90s. Arousing a war to overturn a regime, even though it was brutal, without previous aggression, without the desire by the population taken into account and finally without the request by bordering States, was an undertaking full of risks.

The difficulties faced in the immediate post cease-fire in Iraq by the two invading States in restoring and the maintaining the minimum

(5) *v. supra*, p. 311-312
(6) *v. supra*, p. 314

conditions of public order upon a frequently hostile population that did not cooperate, helped to reconsider some strict juridical positions within the debates of the Security Council in February and March 2003. The problem that occurred was that the void of power in Mesopotamian region left by the sudden disappearance of Saddam Hussein's highly centralized dictatorship quickly destabilized the preexisting balance of power painfully achieved during the years between Iraq and its neighbors. The evident lack of any plausible political party able and ready to fill the gap in the international jurisdiction worsened the old "centrifugal" positions inside a State already split both ethnically and culturally from its origins dated back to the First World War.(7)

According to professor Larry Diamond from the University of Stanford "[t]he first and foremost of these errors concerned security: the Bush administration was never willing to commit anything like the forces necessary to ensure order in postwar Iraq. From the beginning, military experts warned Washington that the task would require [...] «hundreds of thousands» of troops. For the United States to deploy forces in Iraq at the same ratio to population as NATO had in Bosnia would have required half a million troops. Yet the coalition force level never reached even a third of that figure."(8)

Continuing in the process of downward spiral, Washington had to deal with the fragmented reality in the territory, having to abandon as a consequence its obsession with the artificial borders and allowing the different Iraqi and Syrian entities to undertake their process of self-determination.

From its foundation as modern State in 1920, Iraq rarely assisted to

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(7) E. MCWHINNEY, *The September 11 terrorist attacks and the invasion of Iraq in contemporary international law: opinions on the emerging new world order system*, M. Nijhoff, Boston, 2004, p. 75-76

(8)L. DIAMOND, *What Went Wrong in Iraq*, in Foreign Affairs, Sept./Oct. 2004, Council on Foreign Affairs, consulting at https://www.foreignaffairs.com/articles/iraq/2004-09-01/what-went-wrong-iraq, visited on 13/09/2016

long periods of peace and stability. The post-Saddam Iraq that emerged after the US invasion in 2003 had to be different from the previous years. Failed the mission of disinterment of WMDs, the US spent an enormous amount of resources to compensate for their mistakes and pursue the pluralism, stability, prosperity, democracy and moreover good governance. However, the operation failed: in fact, it strengthened a new category of élites that drew their legitimacy almost exclusively from ethnic-sectarian purposes rather than perspectives of truth, redemption, norms of law and national unity.

At the present, in a large part of the Middle East a sad truth emerges: decades of misrule made several societies divided among ethnic-sectarian positions. In the last year, since the election of Prime Minister Haider Al-Abadi in September 2014, the situation has worsened. According to the recent UN inquiry, *Report on the Protection of Civilians in the Armed Conflict in Iraq: 11 December 2014 – 30 April 2015*,(9) "Iraq is going through its worst crisis since the 2011 withdrawal of US troops. Isis captured Iraq's second-largest city of Mosul and the majority of Western Anbar province in 2014 and still holds large parts of the country, though Iraqi forces have made progress in recent months with the help of a US-led air campaign."(10) Islamic State intensified its power: Mosul was conquered in June 2014; nowadays the international system is concerned about how difficult may be to free Iraq in short time and the terrorists were incentivized to conquer Ramadi, too, the capital of Anbar's region. In the last period, a grassroots mobilization that tries to promote the minority rights and the

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(9) *Report on the Protection of Civilians in the Armed Conflict in Iraq: 11 December 2014 – 30 April 2015*, United Nations Assistance Mission for Iraq (UNAMI) and the Office of the United Nations High Commissioner for Human Rights (OHCHR), consulting at http://www.ohchr.org/Documents/Countries/IQ/UNAMI_OHCHR_4th_POCReport-11Dec2014-30April2015.pdf, visited on 10/08/2016

(10) *Iraq conflict leaves nearly 15,000 civilians dead over last 16 months*, Associated Press in New York, in The Guardian, 14 July 2015, consulting at https://www.theguardian.com/world/2015/jul/14/iraq-conflict-leaves-nearly-15000-civilians-dead-over-last-16-months, visited on 10/08/2016

dialog among the different religions has popped up. Since 23 July 2015, Baghdad has been the scene of popular protests that express "general exasperation at the corruption and mismanagement of the post-2003 government. [...] These protests quickly turned into a massive popular movement vilifying Iraq's post-invasion regime and demanding radical reforms. [...] Demonstrators denounce the sectarian and corrupt nature of the post-invasion political system in Iraq, which has institutionalised ethno-religious quotas and empowered an incompetent and self-interested political elite mainly hailing from exile and conservative Shi'a Islamist groups."(11) In the morning of 17 October 2016, Iraqi Prime Minister Haider al Abadi waged the offensive to reconquer Mosul, the second largest city in Iraq occupied by the Islamic State. The campaign to retake Mosul was officially underway. Iraqi officials planned "an array of efforts by Iraqi security forces, allied militias, Kurdish forces and air support from the United States"(12) In the first hours of the offensive, the principal action was the advance by Kurdish forces on outlying villages east of Mosul and the Islamic State released at least five suicide bombs. According to the action plan, the Kurdish peshmergas had the aim to expel the jihadists out of the villages in the North-East of Mosul, while the Iraqi army should cut off the supplies line in the North-West that connects Mosul with the territory controlled by the Islamic State in Syria. The Iraqi Prime Minister is confident: a heterogeneous front composed by some tens of thousands of soldiers, supported by an international coalition of 60 States should be able to overcome few thousands of jihadists (between 3000 and 4.500 according to the American evaluations). According to Sirwan Barzani,

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(11) Z. ALI, *Young grassroots activism on the rise in Iraq: voices from Baghdad and Najaf*, in Open Democracy, May 2016, consulting at https://www.opendemocracy.net/arab-awakening/zahra-ali/young-grassroots-activism-on-rise-in-iraq-voices-from-baghdad-and-najaf, visited on 10/08/2016

(12) B. DENTON, M. R. GORDON, *At the Mosul Front: Traps, Smoke Screens and Suicide Bombers*, in The New York Times, 17 October 2016, consulting at http://www.nytimes.com/2016/10/18/world/middleeast/mosul-iraq-isis-kurds.html, visited on 20/10/2016

a Peshmerga brigadier general, the battle of Mosul could take two months. In fact, the freeing of Mosul would turn out a long battle probably due to the fact that the militants of the Islamic State would start an urban guerrilla warfare once the Iraqi troops had entered the city. (13) It could take weeks or even months, but the recapture of Mosul is now a certainty. Economic capital of the Islamic State and one of its essential elements for its strategy, the loss of Mosul would mean the end, at least in the short terms, of the project of territorial conquer of the IS in Iraq.(14) According to the UN, the main concern regards the civilians involved in the offensive. In fact, "United Nations humanitarian agencies operating in Iraq are bracing for what could be a displacement catastrophe requiring the largest and most complex global response in 2016."(15) According to the UN Office for the Coordination of Humanitarian Affairs (OCHA), "up to one million people may be forced from their homes due to the military operation against Islamic State, […] of which 700,000 may be in need of shelter assistance and up to 200,000 may be displaced within the first two weeks of the operation."(16) This situation is described as "one of the worst-case scenarios requiring the largest and most complex humanitarian operation in the world in 2016, or a catastrophe resulting in one of the largest man-made displacement crises in recent years."(17)

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(13) A. DAMON, N. P. WALSH, T. HUME, E. McKIRDY, *Mosul offensive: Retaking city will take two months, says Peshmerga general*, in CNN, 19 October 2016, consulting at http://edition.cnn.com/2016/10/18/middleeast/mosul-isis-operation-iraq/, visited on 20/10/2016
(14) A. SAMRANI, *Mossoul tombera sûrement, mais après?*, in L'Orient-Le Jour, 18 October 2016, consulting at http://www.lorientlejour.com/article/1013197/mossoul-tombera-surement-mais-apres-.html, visited on 20/10/2016
(15) UNITED NATIONS, *UN aid agencies brace for possible displacement 'catastrophe' caused by military offensive in Mosul*, in UN News Center, 18 October 2016, consulting in http://www.un.org/apps/news/story.asp?NewsID=55328#.WA4xN-CLTIW, visited on 20/10/2016
(16) UNITED NATIONS, *UN aid agencies brace for possible displacement 'catastrophe' caused by military offensive in Mosul*, in UN News Center, 18 October 2016, consulting in http://www.un.org/apps/news/story.asp?NewsID=55328#.WA4xN-CLTIW, visited on 20/10/2016
(17) UNITED NATIONS, *UN aid agencies brace for possible displacement 'catastrophe' caused by military offensive in Mosul*, in UN News Center, 18 October 2016, consulting in http://www.un.org/apps/news/story.asp?NewsID=55328#.WA4xN-CLTIW, visited on 20/10/2016

Neither the United States nor England were able to anticipate the problems that they would have faced during the consolidation of their occupation in Iraqi territory after the fall of Saddam's dictatorship. Some misleading decisions, for example the decision of demolishing Iraqi army after the conquer of Baghdad, exacerbated the situation and the related consequences even more. The resistance against the coalition's occupation, the rage of many Iraqis in front of the American response to violence and the onslaught of bombings and killings against the international and Iraqi institutions transformed the process of democratization into a "joke". By 2005, even the intellectuals near to the Arab world saw the Iraqi "democracy" as an example of "fitnah" (disorder or chaos). Some Arab autocrats, as Mubarak in Egypt, started to use Iraq as matter of discussion against the expansion of freedom.

Therefore, the United States found stranded in an expensive and weakening war of counter-insurrection that exhausted its resources and its consideration, whereas it strengthened the power of Iran in such area at its expenses. At the end of 2008, Bush administration negotiated an agreement regarding the status of the military forces with the Iraqi Prime Minister Nouri al-Maliki that defined the withdrawal of American troops from Iraq by the end of 2011. However, the departure of the American military contingents did not correspond to a total withdrawal from the Gulf: the US still keeps military presences all over the smaller Gulf States and a substantial navy presence in the area. Nevertheless, the withdrawal of armies marked the end of the American attempts to achieve a hegemonic position over the region.(18) The invasion of Iraq was the first step of an ambitious project of transformation of the balance of power in the Arab area and, in addition, of the internal policies of the Gulf States. The hegemonic lusts of the United States in Iraq would have been taken as a model of

(18) L. FAWCETT, *International Relations of the Middle East*, 3rd ed., Oxford University Press, Oxford 2013, p. 300

political change by the other Arab States, too, in particular by Iran and Saudi Arabia.

From 2003 the goal of the American presence in Iraq was a process of state-building, although the US did not have any skills, or any local knowledge to put it into practice. After several false starts, hard efforts were made to build the institutions of governance and legitimize them through democratic elections. The only successes of this process gained by the US were in the Green Zone around Baghdad and in some areas of South Iraq populated by the Shiites. The state-building process had not so much impact on the Sunni areas of Western and North-Western Iraq, whereas the Kurdistal Regional Government (KRG) in the North-East remained the stablest area in the region.

The series of events and facts that characterized the passage of the millennium, in particular 2003, changed Iraq from a regional power owing the second-largest oil reserves into a dissolution of entities with a weak government, an unstable national identity and little ambitions regarding the reconstruction. Instead of becoming a regional power, Iraq was transformed into a scene of regional fights by other Arab States.(19)

4.2. The UN today: are reforms necessary?

Since 1990, the role of the United Nations in international and national conflicts has clearly changed starting from operations mainly focused on the maintenance of peace to operations of peace

(19) L. FAWCETT, *International Relations of the Middle East*, 3rd ed., Oxford University Press, Oxford 2013, p. 314-315

consolidation. Whereas the maintenance of peace appeared more as a passive activity, the consolidation and reinforcement of peace, meant as active intervention in situations where peace had not been achieved, characterized the most important UN actions of the '90s. Such operations resulted way riskier, both in military and political terms, and they required large supplies of military staff and assets, which major powers had always been reluctant to provide for in the long term. Either the situation was a low-profile conflict or a war on a large scale, the UN tasks included and are still including the protection of civilians from peril and the satisfaction of their food and medical needs.(20)

From 1990 there were great changes in the responses by the United Nations and its Member States to civil wars and prolonged conflicts. The political and military power of the Security Council's members allowed them to choose whether and how intervening in the conflicts. All in all, those considerations still appear the primary basis for the priorities of foreign and national policy and sometimes for the domestic interests of governments, too. The main complication in formulating an UN reform as coherent as possible to the period is due to the fact that the threats that hit nowadays the world and its community do not correspond to the threats taken into consideration by the founding fathers of the Charter nor to those that would occur in the next 50 years. The historical events that characterized the different periods of time made the several proposals complex and contradictory. According to the political historian Paul Kennedy, "[a] complete collapse of the United Nations is not going to happen – so many nations and peoples have invested in it to prevent that happening. On the other hand, a massive constitutional restructuring of the world body as advocated in many radical reform schemes is also not possible right now, even if its

(20) S. GRAHAM-BROWN, *Sanctioning Saddam: the politics of intervention in Iraq*, I.B. Tauris, New York, 1999, p. 346-347

merits are undeniable."[21] Indeed, the success of UN to survive to the Cold War and in the affirmation as the essential part of the international system is due to two factors. The first one is its adaptability: the UN knew how to adjust its shape and its functions to the changes of international politics, like when it carved out a role in the process of decolonization or when it introduced the idea of *peace-keeping*, which was not envisaged by the Charter. The second factor is the moderation: the UN has never tried to do what it could not or should not. If the chapter VII had been literally implemented, during the Cold War we could have risked to be involved in a third world war every time that the superpowers had entered in conflict, as the Cuban crisis or in Afghanistan.[22]

However, the main problem that has occurred until now is that, when the Council decided to intervene using sanctions and providing for humanitarian assistance, States had demonstrated little sense of strategic leading as far as the resolution of problems and the intrinsic causes of conflicts were concerned. The main lesson that the international system can learn is that the "fast solutions" do not work: economic sanctions, military force or humanitarian assistance would never be able to solve the series of national and regional problems (the Iraqi case was one of them) unless clear and shared analysis of the long term consequences came first. This could definitely have led to peace in the long term, to stability and, hopefully, to a more open-minded style of government. In the exact moment when the community finds itself to face new threats to international peace and security, it is forced to create international organizations, perhaps in a different way from the already existing ones that might no longer satisfy the needs. Since the fact that currently the only international organization able to

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(21) P. KENNEDY, *The Parliament of Man: The Past, Present, and Future of the United Nations*, First Vintage Books Edition, New York, 2006, p. 244

(22) *L'ONU ha compiuto mezzo secolo*, XII legislatura, Camera dei Deputati, 9 gennaio 1996, in La Riforma dell'ONU, N. ANDREATTA, Arel, Roma, 2005, p.58

maintain the world order is the United Nations, it is necessary to make it work in the best way possible with the aim of ensuring a peaceful stability among the humankind.
Sharing Paul Kennedy's point of view:

> "humankind requires something out there that is more than egoistical nation-states. Today and into the future we will need a United Nations organization, duly modified from the world of 1945 but still recognizable to its founding fathers and still dedicated to their lofty purposes."(23)

One of the principle problems clearly revealed by the Second Gulf War is that the will of political action by the UN is still led primarily by the internal programs of the most powerful States, rather than the common set of problems of the entire community. Although several political arguments supported the victim population as far as the abuses committed by its own government were concerned, such violations were not included among the concerns that led the politics. In fact, in the case of Iraq, the separation between rhetoric and reality was particularly evident.(24) Thus, it derived that a great power, like the United States, would never be restricted by a unilateral action undertaken by an organization or by international opinion. With the Second Gulf War, States realized that the UN would never be able to stop an act of war waged by a superpower without the eventuality to burst another world war.
Right after the fall of the Iraqi regime in 9 April 2003, the United States refused to confer the task of managing the postwar situation to the UN, relegating in this way the organization to a secondary role that

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(23) P. KENNEDY, *The Parliament of Man: The Past, Present, and Future of the United Nations*, First Vintage Books Edition, New York, 2006, p. XVII
(24) S. GRAHAM-BROWN, *Sanctioning Saddam: the politics of intervention in Iraq*, I.B. Tauris, New York, 1999, p. 348

consisted in supplying of humanitarian aids still under the control of the US. Limiting the institution to tasks purely humanitarian and concerning the management of the *Oil For Food Program*,[25] ("the program that allowed the sale of certain amounts of Iraqi oil on international markets and that directed the proceeds to the purchase of essential goods for the Iraqi population, trying to avoid an humanitarian catastrophe"[26]), already begun in 1996 after the Iraqi invasion of Kuwait, the authority of the organization grew more and more with the evolution of the resolutions, in particular with SCR 1500 of 14 August 2003, which:

> "[d]ecides to establish the United Nations Assistance Mission for Iraq to support the Secretary-General in the fulfillment of his mandate under resolution 1483 in accordance with the structure and responsibilities set out in his report of 15 July 2003, for an initial period of twelve months."[27]

However, the circumstances related to Iraqi conflict highlighted once again the passiveness of the Council. Already in 1990 the normative production of the Council was considerably reduced. After SCR 1441, the Council entered a phase of hibernation, preferring the passivity rather than action. In the specific case of the Anglo-American invasion in Iraq, the five permanent members could have addressed a warning to the United States in the form of resolution by the virtue of chapter VII, declaring that the President Bush's intentions would have been a threat to international peace and security. Obviously, such resolution would have never been adopted because the United States would have used its

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(25) G. LHOMMEAU, *Le Droit International à l'epreuve de la puissance americaine*, L'Harmattan, Paris, 2005, p. 82-83
(26) A. DE GUTTRY, F. PAGANI, *Le Nazioni Unite: Sviluppo e riforma del sistema di sicurezza collettiva*, Il Mulino, Bologna, 2005, p. 48
(27) UN SC Res. n. 1500/2003, *Situation between Iraq and Kuwait*, 14 August 2003, S/RES/1500 (2003)

veto power, but then the General Assembly would have taken the control supporting the position adopted by the United States. In fact, in case of block by the Council as a consequence of the veto of one of the permanent member, they could take into consideration the recourse to the well-known resolution 377 of the General Assembly approved on 3 November 1950, *Uniting For Peace*, which states that:

"[...] if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security."(28)

After the Second Gulf War, the UN did not impose itself as the first responsible for restoring of peace, but, even worse, largely contributed to legalize the committed act through the approval of SCR 1483 on 22 May 2002. In fact, the resolution gave the United States and England an official recognition for their occupation:

> "[n]oting the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538) and recognizing the specific authorities, responsibilities, and obligations under applicable

(28) *United Nations General Assembly Resolution n. 377 A (V)*, 3 November 1950, in G. LHOMMEAU, *Le Droit International à l'epreuve de la puissance americaine*, L'Harmattan, Paris, 2005, p. 83-84

international law of these states as occupying powers under unified command (the "Authority")."[29]

Therefore, the resolution provided for a sure legitimacy to the war waged without authorization and the taking of control of Iraq by the United States, officially entrusting them with the rebuilding of postwar Iraq, the exploitation of the oil reserves and the management, in cooperation with the UN, of a political process that would lead to the elections and the formation of a democratic government. At this point, the United States was not the simple occupying power anymore, but it became "the Authority".[30]
Nevertheless, the Council adopted on 10 October 2003 SCR 1511 through which recognized a temporary nature to the regime of the Anglo-American occupation:

"[r]eaffirms the sovereignty and territorial integrity of Iraq, and underscores, in that context, the temporary nature of the exercise by the Coalition Provisional Authority (Authority) of the specific responsibilities, authorities, and obligations under applicable international law recognized and set forth in resolution 1483 (2003), which will cease when an internationally recognized, representative government established by the people of Iraq is sworn in and assumes the responsibilities of the Authority."[31]

Are the United Nations effectively in crisis? Unfortunately, it is not a news that for a long time its adversaries have hoped for an existential crisis and have wondered about the *raison d'être* of the organization

(29) UN SC Res. n. 1483/2003, *Situation between Iraq and Kuwait*, 22 May 2003, S/RES/1483 (2003)
(30) G. LHOMMEAU, *Le Droit International à l'epreuve de la puissance americaine*, L'Harmattan, Paris, 2005, p. 84-85
(31) UN SC Res. n. 1511/2003, *Situation between Iraq and Kuwait*, 16 October 2003, S/RES/1511 (2003), par. 1

that, since the end of the Cold War, has gone from light to shade, from a euphoric initial moment to the crisis of Anglo-American unilateral action in 2003. In fact, the fall of the Communist block made the world believe, for a short time, that it would be possible to build a new global order where the UN would achieve an absolute prominently place. As a matter of fact, the management of the crisis of the First Gulf War in 1991 allowed to support the new ambitions of the organization and the powers of the Security Council.(32) However, after 25 years of negotiations with Iraq, at the end of 2005, the Council had completely changed. The activities of the five permanent members in the last quarter of the century outlined a set of political developments on global level and their effects on practice and prospects of the institution. During this period of time, the Council carried out several tasks, for example Cold War peacemaker, new world order policeman, weapons inspector and sanctions enforcer, with its highest climax in 1990-91 during the invasion of Kuwait. However, the inability in successfully managing the Iraqi crisis in 2002-2003 should make the entire community reflect: probably, the incapacity of seeing the intention of the dangerous behavior by Iraq as a common problem that needed a shared solution highlighted the tendency of each permanent members to consider the value of the Council something purely exploitable.(33)

It is by now confirmed that the United States had violated international law; nevertheless, they are certainly not the only one to have violated the international legality over the last 60 years. However, the American case allows us to wonder about how international law will be able to keep an efficient role facing the US power, which has the intention to cross the limits imposed by law. But how far can the United States

(32) R. POPA, *La mission de desarmement de l'ONU en Irak: bilan d'une experience sans precedent*, Pedone, Paris, 2005, p.1-2
(33) M. D. MALONE, *The international struggle over Iraq: politics in the UN Security Council 1980-2005*, Oxford University Press, Oxford, 2006, p. 266-267

afford to break the laws of international law?[34]

The American impunity is also clarified by the refusal by the US to ratify the statute of the International Criminal Court and consequently to see its own citizens judged by an international jurisdiction. In particular, this immunity was hallowed in the United Nations framework by the indisputable proof of the submission of the organization to the American superpower.[35] With the American Service Members' Protection Act (ASPA Act),[36] presented for the first time on 8 May 2001 and signed by President Bush on 2 August 2002, the United States categorically refuses to recognize the jurisdiction of the International Criminal Court against its citizens. This American exception involves also the members of the American armies mainly deployed all over the world aimed to protect their national fundamental interests, in addition to the President of the United States. One more time this event testifies a feeling of superiority of the United States, which considers the protection of their national interests a justification to the governmental decisions against international law, taking advantage in this way of the immunity and leaving their responsibility untouched. Moreover, the ASPA Act sets a general ban on American cooperation towards the Court concerning American courts, local governments and the federal government, including the prohibition of transferring any citizen to the Court, both American or foreign resident in the US or anyway in the territory; the prohibition of any Court's inquiries in the American territory; the prohibition of allocating American funds to arrests, detentions, extraditions or pursuits of American citizens. In addition, the Act prevents the transfers of files about national security to the Court and forbids the military

(34) G. LHOMMEAU, *Le Droit International à l'epreuve de la puissance americaine*, L'Harmattan, Paris, 2005, p. 23-24

(35) *v. supra*, p. 168-169

(36) *H.R.4775 - 2002 Supplemental Appropriations Act for Further Recovery From and Response To Terrorist Attacks on the United States*, 107th United States Congress (2001-2002), consulting at https://www.congress.gov/bill/107th-congress/house-bill/4775, visited on 10/08/2016

cooperation with great part of the States that had ratified the Rome Statute: according to this principle, no kind of American military assistance can be provided to a Member State of the Criminal Court.
Once again, the American disregard towards international law is clear: the United States places itself on top of the international system of those who wanted to impose them an international jurisdiction. It keeps backing out of the rules about responsibility that are implemented to other States, but at the same time it acts as the guarantors of the implementation. Thanks to immunity to its citizens and war on terrorism, the national interest allows them any sort of contradiction.(37) However, we can notice that the United States had never opposed to the putting into practice of the international criminal jurisdiction and, on the contrary, it is clear that it had been one of the principle supporters of the International Criminal Courts since 1945. Nevertheless, the *sine qua non* condition of its support lies on the maintenance of an effective control of operation and competence of those jurisdictions: in fact, the US agrees on the mobilization in favor of the fight against impunity only if it is able to achieve the assurance of a real control on the international repression processes. Its aim has always been originated by national interests, using its right of veto at the expense of the whole community, if necessary.

We have seen that one of the greatest weaknesses of the UN is the inability neither of controlling States nor putting pressure on them when they commit offenses. In other words, the community assisted to the implementation of the principle "having double standards" facing two different States, more specifically towards the United States: we cannot help noticing that States have different influences on the international system and it is well-known by now that the UN does not

(37) G. LHOMMEAU, *Le Droit International à l'epreuve de la puissance americaine*, L'Harmattan, Paris, 2005, p. 170-173

work at the same manner if the offenses are committed by Chile, Pakistan or United States. Ultimately, the UN cannot effectively condemn the Unites States since it plays a great role inside the organization (25% of the total grants given to the UN come from the United States, keeping also in mind the veto power). Furthermore, taken into account its status of global superpower once the Soviet Union fell apart, the United States plays a role so important on the international scale so that the UN could take the risk of originating international tensions or, even worse, the risk of an eventual US withdrawal from the organization.

In front of those considerations, therefore, it is evident that the international juridical order is no longer complying to the current international concerns. Consequently, the United States, aware of this state of affairs, abuses of international law at the discretion of its interests, knowing that it is not exposed to any kind of sanctions by the UN.(38)

If the US were able to find a justification to its unilateral actions among the blanks of the UN system, however, it cannot consider itself successful in replacing or making the UN obsolete. In front of the lacks of the existing juridical means, the United States, in particular after 09/11, searched for some substitutes. Despite everything, their intervention revealed to be failures, often breaking the rules of international law in order to justify its armed intervention. In a simple way, the diplomatic negotiation often proves to be an excuse for States that want to recur to force and it is sometimes considered unappropriated.(39) Certainly, some cases where the diplomatic regulation is clearly impossible exist, but an individual State cannot

(38) *v. supra*, p. 175-177
(39) G. LHOMMEAU, *Le Droit International à l'epreuve de la puissance americaine*, L'Harmattan, Paris, 2005, p. 177-180

decide unilaterally and even less it cannot regulate the controversies with the recourse to armed force. This practice clearly shows the fact that the United States, aware of the UN limits, of the norms envisaged by the Charter and of its power of sanction, has always tried and it is still trying to bypass and pass over it.(40) According to professors Andrea de Guttry and Fabrizio Pagani, "in a project of world order based on law there is no room for actions waged outside the rules of the system. Today, according to several observers, the United States may put in doubt this system's construction, in a quest of redefinition of the sources of international law."(41)

At this point it is an ascertained and fully approved fact that the composition of the current Security Council does not represent at its best the different tendencies of international relations: India, Brazil and South Africa, for example, are excluded. Moreover, it is known that the European Union is over-represented. But the doubt that often we have wondered about is whether there had been different consequences if Germany and Spain at the time of the Second Gulf War would have been absent and replaced with Brazil and India. The experience of the Council in Iraq shows that an enlargement of the authority would not have provided any benefit. In fact, according to Simon Chestermen, a Security Council with a wider representation could prove to be more equitable, but not for this reason it would be also more efficient: in fact, the decision-making processes within a commission, in this particular case the Security Council, are more difficult if they are carried out by a large group rather than a smaller one.(42)
Since its institution, the UN's goal has been to act as the guarantor of

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(40) *v. supra*, p. 177-180
(41) A. DE GUTTRY, F. PAGANI, *Le Nazioni Unite: Sviluppo e riforma del sistema di sicurezza collettiva*, Il Mulino, Bologna, 2005, p. 109
(42) M. D. MALONE, *The international struggle over Iraq: politics in the UN Security Council 1980-2005*, Oxford University Press, Oxford, 2006, p. 280

international peace and security, but the national particularisms, the new stakes, the new challenges to international security and the new actors that have appeared on the world stage made its job difficult and the organization has quickly resulted not sufficient enough. Nevertheless, the UN played and is still playing an important role in the protection of populations in particular situations of crisis. However, from the beginning, the sovereign States had the opportunity to adapt their norms in accordance with their national priorities and, in order to legitimize those changes, they justified with the need of protecting their national interests. But how far can States limit public freedoms on behalf of the domestic security of their country? It is in this framework that the UN must play its role and it is important that the international conventions keep existing with the aim to contextualize the field of action of different States and to set limits to international sovereignty. Moreover, if the United States wants to see its controlling position still accepted on the long term by the majority of States, it absolutely must take into account the institutions and international law. This is what Joseph Nye calls "the paradox of American power"(43) that is, the combination of a dominant position with a forced cooperation on the international stage. Indeed, countries like the United States that feel legitimize to break the rules of international law without any kind of sanctions, with the time goes by they tend to lose prestige and their influence on the community if they decide to give up the legitimization of their activities by international law.(44)

(43) J. S. NYE, *The Paradox of American Power. Why the world's Only Superpower Can't Go It Alone*, Oxford, Oxford University Press, 2002
(44) G. LHOMMEAU, *Le Droit International à l'epreuve de la puissance americaine*, L'Harmattan, Paris, 2005, p. 187-189

4.3. The reform of the Security Council

The recent events tragically underline the lack of an efficient and functioning juridical world order: the system of collective security drafted by the UN Charter keeps showing its vulnerabilities and the system of international law was not able to limit or prevent the recourse to force. In fact, the inherent problem of international law lies in the lack of coherence between the UN and the specialized organizations. The framework of the UN proves to be necessary and essential for the safety of world balance, but it must find its skills of adapting to international changes in order to preserve a reliability that nowadays has been questioned. From its constitution, the narrowness of the body and the opportunity of the right of veto by permanent members proved to be two of the most controversial elements concerning the insufficient legitimacy and absence of representativeness in the Council. Furthermore, the problem of representation is worsened by the fact that permanent members are still the original five and possible change or enlargement have been taken into consideration only in recent years. Either in the point of view of Western countries or in those of the developing or emerging countries, currently, the five permanent members are not able to represent at their best the requests by the entire system of States. According to Paul Kennedy's opinion, “in the last 50 years the UN was repeatedly accused of failure, from Congo to Kosovo. Actually, the major powers failed because they were not able to show the way, provide resources and ensure an appropriate leadership. If the Security Council is blocked, how can a peace process be efficient? The rules for the adhesion to the Council are old-fashioned and inadequate, as shown by the rejection of the proposals to ensure a permanent seat to States like India, Brazil and South Africa. […] The world has changed since 1945 and the renewal

must be made also in the international organizations. This does not mean that the UN are done, but that they achieved the historical minimum in terms of reliability. What can we do to instill a new life in the United Nations and make them work more efficiently? The UN has to be changed at the top and it needs to commit itself more in the field, in the practice and at the basis."(45)

Nowadays the UN appears as an international need outclassed by its ambitions and by the Member States that compose it. The organization has gradually fallen into disuse, proving to be ineffective in protecting the international peace and security, especially since the downfall of the bipolar system in the '90s. In fact, starting from this period of time, the international system found itself in front of a set of transformations, making a debate on the Council's reform necessary. The increase of the members belonging to the organization, the increased political influence of some developing States on the international stage and the end of the Cold War allowed a relaunch of the UN role and of its main body. In De Guttry and Pagani's opinion, "the political nature of international relations, and in particular of the United Nations, causes that any changes, even the limited ones, are analyzed in the light of the interests of the different Member States or groups of Member States. Therefore, through the reform proposals, a precise political agenda is trying to be affirmed with the purpose of changing or restoring the internal balances of the organization. The enlargement of the composition of an institution, or the modification of a decision-making system are analyzed according to the prospect of which State and interests are strengthened or weakened in their ability to influence."(46) In September 2002, the Presidents and the Prime Ministers at the Millennium Summit suggested again "a fast reform of

(45) P. KENNEDY, *Settant'anni portati male per le Nazioni Unite*, in Internazionale, 10/16 luglio 2015, num. 1110, anno 22, p. 38

(46) A. DE GUTTRY, F. PAGANI, *Le Nazioni Unite: Sviluppo e riforma del sistema di sicurezza collettiva*, Il Mulino, Bologna, 2005, p. 81

the Security Council and its enlargement in order to expand its representation, its efficiency and its legitimacy." An appropriate reform proved to be and is still proving to be necessary to give back the UN the role of guarantor that it deserves and to redefine a new system of global security. However, according to the General Secretary's opinion, any potential agreement about a project that allows the expansion of the Council still seems to slip away from Member States. The UN, during its 70 years of activity, was influenced by different political balances that occurred over time, transferring in this way the international system where the organization had been working into the topics in the agendas. For example, the bipolarism caused by the Cold War influenced the international relations until 1989, highly restricting the capacity of action of the Council. The current historical period, however, assisted to the stabilization of a unipolar system, particularly focused on the American hegemony. Over the last ten years, the United Nations have been increasingly discredited and put in a secondary role in front of the growing power of some States, among which the US. Today, the foundations of the organization are obsolete and the UN depends too much on its members in order to be really effective. The composition of the Security Council defined in art. 23, composed by 15 members, 5 permanent ones (China, the United States, France, the United Kingdom and Russian Federation) and 10 non-permanent, elected every two years, does not represent anymore the current reality of the global community. The Council has been untouched in its structure and its practice for more than 50 years, whereas the international framework has been hit by new actors, new events and new technologies, as well as the global geopolitical order in post-Cold war period. These statements caused that the legitimacy of the Council had been called into question one more time.

As already explained, the Council is the only international authority that owns the competence to legalize and authorize the recourse to

armed force, if necessary (chapter VII UN Charter). The increase of multinational intervention, undertaken either following an authorization or without it, accentuated the perception that the Council is no longer an inevitable step for the armed actions. The main criticism addressed to the Council concerns its composition that is based on a principle of efficacy, but it does no longer ensure an equal representation of all the States in the international system. Currently the global community is facing new challenges and new problems to which the Council is not prepared yet. The entity, as we saw in the Second Gulf War, does not even own any means to ensure the implementation of its own decisions and as a consequence the effectiveness of the UN actions depends on the good intention of Member States. In fact, Member States are at the same time both the strength and the weakness of the organization: in the first case they are the strength when the means to act are given to them, whereas they are the weakness when they block the Council's decision or withdraw their means. The decision-making ability of the UN body, characterized by the veto power, in fact, depends actually on the abilities of each Member States to achieve the consensus. The right of veto, since the institution of the authority, affirms the supremacy of the national interests upon the whole system when it is not used for the sake of the system as its whole, but in respect of the interests of their owners. Thus, the problem of the UN is that is unable to act when the interests of the main powers are at stake. Moreover, not having any means of action, the organization must fall back on States to implement the coercive measures previously decided.(47)

The definition and the conception of the role imposed to the United Nations are closely related to the concept of security on the global scale: a potential definition of a new global system should thus prepare the ground for a harmonization of the different conceptions of the UN

(47) G. LHOMMEAU, *Le Droit International à l'epreuve de la puissance americaine*, L'Harmattan, Paris, 2005, p. 195-196

role regarding international security. However, in order to result possible and effective, the reform must be realistic. One of the biggest challenges that the UN has had to deal since the end of the Cold War has been the containment of the American power. We must recognize to the US the fact that it was able, over the years, to put the global organization at the service of its policy. The collective responsibility was taken away from the United Nations conferred by chapter VII of the Charter and the institution was relegated to a subordinate role, mainly a role of safeguard in the countries destroyed by conflicts that could not be avoided.(48)

It appears evident that the main issue was not the relevance of the system of collective security, but the reorganization facing contemporary conflicts. Until now, the discussion on the Security Council's reform has been mainly focused on its enlargement. Despite the political difficulties, the debate shows an indisputable relevance since it concerns the representativeness and consequently the legitimacy of the Council that is part of an organization composed by 190 members. On one hand, the expansion of the Council may constitute a new allocation that could have some beneficial effects as far as the ability of mobilizing the States is concerned. Indeed, we know that several peace operations, for example, are not fully implemented due to the insufficiency of resources. However, on the other hand, a precipitous widening of the Council would risk to damage its flexibility. This is why that the future of this reform seems highly uncertain.

The Iraqi case revived the two conflicting tendencies that marked the recent development of law and international relations. On one hand, we assist to a national debate on the need of reinforcing the international institutional frameworks beside the overcoming of the period of

(48) v. *supra*, p. 198-199

horizontal conflicted and disorganized relationships among the States. On the other hand, the violence of power that distinguishes the relational nature keeps playing a primary role in interstate relationships. Mainly focusing on the Council's functioning, these behaviors lead both to a reinforcement of the entity itself and therefore to the centralization of the military compulsion and to the weakening of powers and the persistence of unilateralism.(49)

A reform is necessary: the reform must gather all the different points of view of the conditions that may lay the foundation for the progressive realization of a better integration of global society. Therefore, reducing the reform and the global security system to the mere democratic condition of States would result disliked by the entire community.

"In the face of this situation, the common opinion reached the certainty, of which Annan was the spokesperson, that we had to remedy the weaknesses of the UN through a wide-ranging reform that, starting from the re-examination of the tasks of the organization, should work towards the reinforcement of the institutional structure and the operational skills."(50)

On 12 November 2003, the General Secretary Kofi Annan designated a commission composed of 15 high-level international figures to draft a complete proposal on the UN reform with a report. The High-level Panel on Threats, Challenges and Change Report was transmitted on 2 December 2004 to the General Secretary Kofi Annan. In the fourth part *A more effective United Nations for the twenty-first century*, the challenge that it wanted to give was "to increase both the efficacy and the reliability of the Security Council and, even more important, to improve its ability and its will to act when threats occur."(51) What was

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(49) CEDIN – Paris 1., *L'Intervention en Irak et le droit international*, Pedone, Paris, 2004, p. 61

(50) *La Riforma delle Nazioni Unite*, Contributi di Istituti di ricerca specializzati, Settembre 2005, a cura di R. ALCARO, M. COMELLI, R. MATARAZZO dell'Istituto Affari Internazionali (IAI), pag. 1

(51) N. ANDREATTA, *La Riforma dell'ONU*, Arel, Roma, 2005, p. 136

requested was a greater involvement in the decision-making process of those who mostly contribute under the financial, military and diplomatic profile. In addition, the most representative Member States should be integrated in the decision-making process, in particular the most representative as far as the developing realities are concerned:

> "248. Thus, the challenge for any reform is to increase both the effectiveness and the credibility of the Security Council and, most importantly, to enhance its capacity and willingness to act in the face of threats. This requires greater involvement in Security Council decision-making by those who contribute most; greater contributions from those with special decision-making authority; and greater consultation with those who must implement its decisions. It also requires a firm consensus on the nature of today's threats, on the obligations of broadened collective security, on the necessity of prevention, and on when and why the Council should authorize the use of force."(52)

The financial and military contributions provided to the UN by some of the five permanent members, in fact, proved to be moderate compared to their particular status. Furthermore, non-permanent members of the Council did not contribute to the activity of the organization in accordance with the Charter.

> "249. (b) They should bring into the decision-making process countries more representative of the broader membership,

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(52) *A More Secure World: Our Shared Responsibility,* Report of the Secretary-General's High Level Panel on Threats, Challenges, and Change, United Nations, 2004, Part 4: A more effective United Nations for the twenty-first century, p. 80, consulting at http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf, visited on 10/08/2016

especially of the developing world."[53]

The expansion regarding the Council's composition has currently become a necessity. In the report dated December, 2004, two alternatives are developed, which are presented as model A and B and both include an allocation of the seats among the four major regional areas (Africa, Asia and Pacific, Europe and Americas). The "model A" proposal of reform recalls the "2+3" model, currently considered one of the most realistic options, if it supports by the analogous expansion of the non-permanent members.

> "252. Model A provides for six new permanent seats, with no veto being created, and three new two-year term non-permanent seats, divided among the major regional areas [to Africa: 2 new permanent seats and 4 two-year non-renewal seats; to Asia and Pacific: 2 new permanent seats and 3 two-year non-renewal seats; to Europe: 1 new permanent seat and 2 two-year non-renewal seats; to Americas: 1 new permanent seats and 4 two-year non-renewal seats]."[54]

The proposal drafted by the Panel rises to 6 new permanent members, adding another seat to the African continent compared with the classic "2+3" model (this model suggested entrusting Japan and Germany with a permanent seats and adding three permanent seats to the developing countries, one for each continent: Asia, Africa, Latin America). Moreover, the model was one of the two proposals suggested by the General Secretary in March 2005.[55] The model A has no intention to create further veto powers, but three new two-year non-renewal seats.

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(53) *v. supra*
(54) *v. supra*, p. 81
(55) A. DE GUTTRY, F. PAGANI, *Le Nazioni Unite: Sviluppo e riforma del sistema di sicurezza collettiva*, Il Mulino, Bologna, 2005, p. 122-123

As far as the creation of the category of semi-permanent members is concerned, the suggestion is proposed again by the High-level Panel as "model B":

> "253. Model B provides for no new permanent seats but creates a new category of eight four-year renewable-term seats and one new two-year non-permanent [and non-renewable] seat, divided among the major regional areas [to Africa: 2 four-year renewable seats and 4 two-years non-renewable seats; to Asia and Pacific: 2 four-year renewable seats and 3 two-years non-renewable seats; to Europe: 2 four-year renewable seats, 1 two-years non-renewable seat; to Americas: 2 four-year renewable seats, 3 two-years non-renewable seats]."(56)

This proposal does not contemplate new permanent seats, but it creates a new category of four-year renewable seats and two-year non-permanent (and non-renewable) seats.(57) Through a modification of art. 23 of the Charter, the reform suggests creating, within the category of non-permanent members, a distinction between the eight of them that would stay in the Council for four years and the others, extended to eleven members, that would have a traditional two-year mandate. [...] The project of the Panel is related to the reform proposed by Italy on 30 June 1993, formulated by Ciampi's government. The proposal requested that "a second one of about 10 seats should be added to the group of permanent members with the veto power. These seats should be allocated to the States of all the five continents that mostly contribute to the aims of the organization. Such contribution may be

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(56) *A More Secure World: Our Shared Responsibility,* Report of the Secretary-General's High Level Panel on Threats, Challenges, and Change, United Nations, 2004, Part 4: A more effective United Nations for the twenty-first century, p. 81, consulting at http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf, visited on 10/08/2016

(57) N. ANDREATTA, *La Riforma dell'ONU*, Arel, Roma, 2005 p. 138-139

made on the basis of financial support [...] or it may concern their massive dimensions, population and the efficiency of the internal jurisdiction [...]; or on the basis of the high level of their cultural contribution and the advanced technology of their mass media. [...] These States, which should not exceed the number of 20, would alternate as members of the Council, ensuring in this way a semi-permanent presence within the body."(58)

Moreover, the Panel proposes a redefinition of the regional groups and a logic merger of the Western Europe and the East Europe into an only one area. In this way, the most influential countries, chosen among the principal contributors, of the different world areas could stay in the Council for several years, potentially becoming *de facto* permanent members.(59)

> "255. The Panel was strongly of the view that no change to the composition of the Security Council should itself be regarded as permanent or unchallengeable in the future. Therefore, there should be a review of the composition of the Security Council in 2020, including, in this context, a review of the contribution (as defined in para. 249 above) of permanent and nonpermanent members from the point of view of the Council's effectiveness in taking collective action to prevent and remove new and old threats to international peace and security."(60)

The reform models try to foster to a great contribution to international peace and security so that the General Assembly can elect "the

(58) *La Proposta dell'Italia*, Risposta del governo Ciampi – ministro degli Esteri Nino Andreatta – al questionario inviato dal Segretario generale dell'ONU, Boutros Boutros-Ghali, 30 giugno 1993, in *La Riforma dell'ONU*, N. ANDREATTA, Arel, Roma, 2005, p. 104

(59) A. DE GUTTRY, F. PAGANI, *Le Nazioni Unite: Sviluppo e riforma del sistema di sicurezza collettiva*, Il Mulino, Bologna, 2005, p. 125

(60) *A More Secure World: Our Shared Responsibility,* Report of the Secretary-General's High Level Panel on Threats, Challenges, and Change, United Nations, 2004, Part 4: A more effective United Nations for the twenty-first century, p. 82

members of the Council preferring those States that, in their relevant regional area, are in the top three of the financial contributors to the regular balance; or as alternative those who are the three contributors of troops or peace-keeping missions in their own regional area."(61)

Closely related to the issue of the Council's expansion, we find the question of the reform related to the decision-making process of the institution, particularly the veto power assigned to the permanent members. "In fact, we saw how the reform is closely connected together with the problem of the veto power. Indeed, the increase of the permanent members or the creation of the category of semi-permanent members immediately raised the issue whether they are extended to the veto power of which the current P-5 benefit."(62) Although over the recent years the use of the right of veto has dramatically reduced, it has not lost its relevance: the veto expressed in the informal meetings or the simple use of threat continues to influence the decisions inside the Council. The High-level Panel Report recommends that any reform proposals should not include the expansion of the right of veto to the future permanent members.

> "256. Neither model involves any expansion of the veto or any Charter modification of the Security Council's existing powers. […] We see no practical way of changing the existing members' veto powers."(63)

In fact, the allocation of the veto power to future permanent or semi-permanent members involves serious systemic problems. According to

(61) N. ANDREATTA, *La Riforma dell'ONU*, Arel, Roma, 2005 p. 139
(62) A. DE GUTTRY, F. PAGANI, *Le Nazioni Unite: Sviluppo e riforma del sistema di sicurezza collettiva*, Il Mulino, Bologna, 2005, p. 129
(63) *A More Secure World: Our Shared Responsability,* Report of the Secretary-General's High Level Panel on Threats, Challenges, and Change, United Nations, 2004, Part 4: A more effective United Nations for the twenty-first century, p. 82, consulting at http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf, visited on 10/08/2016

professors De Guttry and Pagani, the higher the number of members with veto power, the higher the difficulty to approve decision and the smaller the efficiency of the Council, causing a zero-sum game between the Council's representation and its ability to act.(64) However, the creation of a class of permanent or semi-permanent members without the disposition of the right of veto, whereas it is would be keep for the original members, would greatly reduce the sense of the reform. In fact, these seats would result *minor juris* members: their ability to influence the Council's decision would stay limited as long as the elimination of the right of veto for the current members is not implemented. Any kind of reform, however, must pass through the consensus and support of the current members, which share a sort of "conservative" interests in common. For example, none member of the five permanent ones is willing to give up its own seat and consequently its own veto power, or more in general it is willing to accept a restriction of the latter. Therefore, the stance of these States makes the reform process within the Council difficult: they can obstruct any Charter's revision and at the same time they do not demand any specific national interest, but the maintenance of the current one. If the United States, during the Bush Senior and Clinton administration, had proposed the entry of Japan and Germany and the expansion to a State of each vast region of the South of the world, in recent times the US does not seem interest in a potential reform. Particularly, the assignation of one seat to Japan and Germany has been the subject of the debate for a long time, since they have been considered the obvious candidates for a potential enlargement and they have gradually laid claim to such position with great vigor. "Recently, the positions of Berlin and Tokyo have become more assertive: Germany and Japan have publicly expressed their aspirations, drafting a common report with India and Brazil in

(64) A. DE GUTTRY, F. PAGANI, *Le Nazioni Unite: Sviluppo e riforma del sistema di sicurezza collettiva*, Il Mulino, Bologna, 2005, p. 133

December 2004."[65] The big developing States, in fact, first of all Brazil, India and South Africa, required a permanent seat with full veto power.

Although the General Secretary suggested the adoption of prompt decisions before the Summit in 2005, this was not possible due to the constant disagreements among States. As far as the Council's reform is concerned, the Summit, held in September 2005 in New York, ended up with nothing, since incompatible points of view popped up among the three main groups: G4, African Union and *United for Consensus*. "These disagreements are still appearing nowadays, making the achievement of a compromise very difficult."[66]

On 6 July 2005 the G4, that is, the group of the four main countries that strive for a permanent seat – Brazil, Germany, India and Japan – gave an acceleration to the debate on the Council's reform, formally presenting a draft of resolution to the General Assembly.[67] The G4 proposal provided for the enlargement of the Council from 15 to 25 members – therefore with one seat more than the General Secretary's proposal – of which 11 permanent members (the current five plus six new ones) and 14 non-permanent members (the current ten plus four new ones). The right of veto would be limited to the current 5 members for a period of 15 years at least, at the end of which an extension involving also new permanent members would be potentially taken into consideration. The aim declared by the G4 was to achieve again a political, economic and demographic balance inside the Council, confirming the definitive overcoming of the international balance based

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(65) *v. supra*, p. 147

(66) P. PRESCHERN, *La Riforma del Consiglio di Sicurezza dagli anni '90 ad oggi: Problemi e Prospettive*, Documenti IAI, Istituto Affari Internazionali, consulting at http://www.iai.it/sites/default/files/iai0911.pdf, visited on 10/08/2016, p. 6

(67) UN General Assembly, *Brazil, Germany and India: draft resolution on Security Council reform (A/60/L.46)*, 9 January 2006, consulting at http://www.centerforunreform.org/sites/default/files/G4%20A%3A60%3A46.pdf, visited on 10/08/2016

on the balance of power appeared after the Second World War.(68)

The African Union, on the contrary, composed of 53 members, addressed towards a regional approach "aimed to the recognition of a primary role of the African continent inside the Council. In order to achieve this objective, the group demanded to assign two permanent seats and three new non-permanent seats to the African continent taken into consideration that it is not equally represented within the body, despite the fact that much of the Council's job is carried out in Africa and for Africa."(69)

The third position was adopted by the group *United for Consensus*, created in 2005 on a proposal by Italy and it was clearly contrary to a potential increase of the permanent members and therefore to the G4's suggestion. The group had as declared aim "the achievement of consensus as wide as possible for any reform regarding the UN Charter."(70) The countries belonging to the *United for Consensus* demanded "a Council's enlargement up to 25 members (adding 20 non-permanent members with two-year mandate to the current five permanent) according to the following allocation of non-permanent seats: 6 to Africa, 4 to Latin America and Caribbean, 3 to Western Europe and 2 to East Europe."(71)

However, also these different proposals were not well accepted by the main powers, in particular by the United States, that proved to be always hostile towards a change of the *status quo* and, especially, towards an excessive enlargement of the Council, giving no support to the candidacy of Germany as permanent member. After all, the United

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(68) *La Riforma delle Nazioni Unite*, Contributi di Istituti di ricerca specializzati, Settembre 2005, a cura di R. ALCARO, M. COMELLI, R. MATARAZZO dell'Istituto Affari Internazionali (IAI), pag. 11

(69) P. PRESCHERN, *La Riforma del Consiglio di Sicurezza dagli anni '90 ad oggi: Problemi e Prospettive*, Documenti IAI, Istituto Affari Internazionali, consulting at http://www.iai.it/sites/default/files/iai0911.pdf, visited on 10/08/2016, p. 6

(70) *v. supra*

(71) Uniting for Consensus, *Draft resolution on the Reform of the Security Council*, 21 June 2005, consulting at in http://www.un.org/press/en/2005/ga10371.doc.htm, visited on 10/08/2016

States has always mainly focused on the efficiency rather than the representation of the Council.

Given the political and economic importance that these States gained over the last years and their ability of representing the South of the world, any reform has the duty to take into account their political interests. Nevertheless, these countries are hampered because the regional rivalries do not allow them to stand out as the only one candidate or anyway as an acceptable candidate for other States of the area.

As far as the five permanent members' points of view are concerned, “France and England officially declared themselves in favor of the assignation of the permanent seat proposed to Germany, clearly supporting the G4 proposal.” The position of the remaining three, instead, is less defined. Firstly, although Russia did not adhere to any reform proposal, it supported the assignation of a permanent seat to Germany. Secondly, China did not see kindly the G4 proposal because it is historically contrary to the assignation of a permanent seat to India and Japan and moreover it did not endorse any other proposals. Finally, the United States approved a Council's enlargement more limited than the one supposed in the three presented drafts and in particular the US did not want more than one or two new permanent members. However, the US agreed that the expansion should be limited to five new members or less with only one or two permanent. One of them should go to Japan, to which President Bush gave explicit and public support. The other one should be elected taking into consideration the regional representation, which would exclude Germany – Western Europe has already been represented by two countries – and perhaps India. The entry to the Security Council of such reliable partner as Japan was seen favorably by Washington. In fact, thanks to the increase of its prestige and political influence, Japan could better limit the ambitions of China, whose interests in Western Pacific have proved to be more and more in

conflict or in competition with the American ones. The over-representation of Europe in the Council could cause a strategic concentration able to contrast more efficiently the American interests on issues that divide the US administration from Europe – for example the International Criminal Court, the Kyoto Protocol as well as the Partial Test Ban Treaty (PTBT), not to mention of the armed action in Iraq (even though also Europe is divided on its inside about this issue). Moreover, with the permanent entry of a new European country into the Council, all the Western-Europe States represented in the Council would own a permanent seat. Therefore, the US are afraid that this may influence other regional groups to request for a similar space in the authority, causing an expansion of unacceptable proportions for Washington.(72)

The jurists who have been dealing with the UN reform have mainly focused on understanding whether the reform should concern the future of an international system only composed of democracies or whether we should reform the framework where all States coexist and cooperate without considering their level of democratic progress. The main supporter of this theory was especially the American neoconservative administration that had the promotion of democracy worldwide among its main purposes. However, as we have assisted, the putting aside of international organizations resulted to be dangerous and insolent. The global democracies cannot shape the wide non-democratic areas on their image: States cannot impose democracy, on the contrary the democracy must necessarily come from a long internal process.
The reform must aim to a feasible project and not to a perfect and utopian construction without an effective implementation: we must

(72) *La Riforma delle Nazioni Unite*, Contributi di Istituti di ricerca specializzati, Settembre 2005, a cura di R. ALCARO, M. COMELLI, R. MATARAZZO dell'Istituto Affari Internazionali (IAI), pag. 32

make the UN more efficient and representative not only gathering the democracies within a new organization, but also setting strict conditions to belong to it. It must overcome the mere improvement of the Secretariat's working and management, the General Assembly and Council's reform.(73)

In accordance with the decision approved in the 62th session of the General Assembly on 18 September 2008 on the subject *Question of equitable representation on and increase in the membership of the Security Council and related matters*, the intergovernmental negotiations on the Council's reform started in New York in February 2009, following the informal session of the General Assembly.(74) Beside the three main groups that had popped up in the Summit in 2005 and that had been still divided on the key issue of the reform, the group of the five permanent members was added, too, that is, those States substantially in favor of keeping the *status quo*. The G4 group confirmed again its proposal expressed at the World Summit of 2005, that has the member increase as the key issue of the reform. Increasing only the number of the non-permanent members would not be enough "because, although it would make the Council more representative, it would not increase the efficiency neither of its decisions nor its actions. Only expanding the category of permanent members, adding those States that prove to own the ability and the necessary resources to face the current challenges, the reform would be efficacious."(75) As far as the veto power is concerned, "disputable to the G4's opinion that it

(73) G. LHOMMEAU, *Le Droit International à l'epreuve de la puissance americaine*, L'Harmattan, Paris, 2005, p. 201-202

(74) UN General Assembly, Decision 62/557 on the *Question of equitable representation on and increase in the membership of the Security Council and related matters*, 15 September 2007, in UN General Assembly, *Resolutions and decisions adopted by the General Assembly during its 62nd session*. Volume 3 (A/62/49Vol.III), p. 106, consulting at http://www.centerforunreform.org/sites/default/files/62%3A557.pdf, visited on 10/08/2016

(75) P. PRESCHERN, *La Riforma del Consiglio di Sicurezza dagli anni '90 ad oggi: Problemi e Prospettive*, Documenti IAI, Istituto Affari Internazionali, consulting at http://www.iai.it/sites/default/files/iai0911.pdf, visited on 10/08/2016, p. 9

must be restricted to the current permanent members for a period of at least 15 years, India expressed some terms on this issue. In fact, it affirmed that it would be difficult to improve the working of the Council if the new permanent members were not entrusted with the right of veto."(76)

As far as the African Union's proposal is concerned, "it was confirmed in the AU Summit in Addis Abeba in February 2009. Regarding the membership, the reform provides for an expansion to 26 members – one more than the G4's proposal – of which 11 permanent seats and 15 non-permanent ones. The suggested allocation of seats is the following one: the African Union should have 2 permanent seats (assigned by the African Union itself) and 5 non-permanent seats (one for each sub-region: North Africa, Central Africa, Western Africa, East Africa and South Africa, practically two more than the ones already owned); Asia should have 2 permanent seats and 1 non-permanent one; to East Europe should be assigned 1 non-permanent seat; to Latin American and Caribbean 1 permanent and 1 non-permanent seat; and finally to Western Europe 1 permanent seat. The illusory unity of African States is however weakened by the strong internal tensions, especially by a deep disagreement concerning the names of which States could be assigned for the permanent seats. In particular, the division between the Arab States of North Africa and the rest of the continent deeply affects the decision. […] The principle difference with G4's proposal concerns the right of veto. In fact, in principle most part of the African States is contrary to the right of veto but, in case it has to be maintained, they have asked that each permanent member of the Council could own it."(77)

In the 2005 World Summit, the persistence of the disagreements among the UN Member States on the nature of the threats against international

(76) *v. supra*
(77) *v. supra*, p. 10

peace and security in addition to the debate on the opportunity of the use of force by the United States, as well as the wish to achieve some concrete reform proposals led the General Secretary to create the group of 16. The Report of 16 set forth again an expanded conception of collective security, suggesting a series of recommendations regarding the prevention of threats against international peace and security and the maintenance and consolidation of peace. They proposed more specific parameters to identify the different categories of threats and employment of force as well as parameters to define international terrorism. Moreover, the Group suggested a certain number of reforms that dealt with the UN organisms(78): reinforcement of the General Assembly in its main role as principle deliberative authority, reviewing its work method during the meetings; expansion of the Council's composition; creation of a Committee for the reinforcement of peace; promotion and implementation of regional organizations regarding the prevention, maintenance and reinforcement of peace; reform of the Economic and Social Council; launch of the Committee of human rights; Secretariat's reinforcement and professionalization and proposal as Vice-Secretary charged of problems regarding peace and security; modification or suppression of a certain number of Charter's provisions.(79) The report focused particularly on the reasons that may justify the enlargement of the concept of collective security. They involve different issues:

- the first reason recalls the well-known limit of the classical concept of collective security that consists of relying on the military approach for the security of States;
- the second reason is related to a set of changes that the world faced after the institution of the UN, as the total suppression of

(78) *Resolution adopted by the General Assembly n. 60/1, 2005 World Summit Outcome*, 24 October 2005, consulting at http://www.ifrc.org/docs/idrl/I520EN.pdf, visited on 10/08/2016
(79) A. HASBI, *ONU et ordre mondial: reformer pour ne rien changer*, L'Harmattan, Paris, 2005, p. 95-98

conflicts among great powers, decolonization and the massive expansion from 51 to 191 members between 1945 and 2005. The end of the Cold War opened to new favorable outlooks, but the effects of 09/11 attacks that caused the American aggression against the Talibans and in particular against Iraq clearly showed the lack of preparation by the UN facing new threats;

- thirdly, the emergence on the global scene of new challenges caused by a diversification and a worsening of the threats that the world is not able to face. These new challenges, like poverty, diseases, environmental decay, WMDs, civil wars, terrorism, transnational organized crime, reveal the limits to the self-help of the States taken individually.(80)

The widening of the concept of security, therefore, must overcome the original concept of the scourge of war among States as principle threat and it must also involve threats in economic and social terms, as civil conflicts and violence within States, the proliferation and the risk of the employment WMDs, etc... In fact, these threats affected the entire humankind. Then, the widening of the concept of collective security must go together firstly with an action on the political level regarding the conditions of the employment of force and secondly with an action on the economic and social level regarding the connection between security and economic development and freedom. In order to fight against poverty and other curses, the General Assembly insisted on the relevance of the development as multifunctional means to fight poverty, diseases, environmental decay, civil wars and organized crime. The fourth part of the report regards the UN reform: the aim was to make the organization more efficient through a set of reforms that involve the different UN institutions. For example, the General Assembly must abstain from endless and recurrent discussions on issues often

(80) *v. supra*, p. 98-99

negligible; the agendas must be simplified and the participation to the commission work must be regulated. As far as the Council is concerned, the report suggested to expand to 24 the number of Council's members instead of the current 15.(81)

In fact, the principle problem concerns the fact that an organism composed of only 15 members, like the Security Council, which has the aim of representing the whole community, will never be able to give a precise picture of the entire society in its different components. Indeed, the five permanent members are no longer enough to represent the current reality. However, rather than its composition, we should reconsider the right of veto, a crucial instrument for Council's tendencies. It would be thoughtful to create three new seats within the organism related to the three big geographical developing areas: Africa, Asia and Latin America. At the same time, giving a seat to Germany would result as an over-representation of the European Union, despite its difficulties to express as a unique voice on the international scene. The increase of the number of votes required for the adoption of a Council's resolution would allow to reinforce the influence of non-permanent members, giving them the opportunity of using a sort of collective veto, which allow to avoid that only one State may be able to block the adoption of the resolution. In fact, the antidemocratic nature of the veto power was often criticized in the framework of an organization based on the sovereign equality among its members. Since the suppression of the right of veto is impossible even though it was requested by some States of the South, we should instead reconsider an efficient use of law so that all the members and not only the permanent ones could benefit from it.(82)

Despite the change of administration, the United States has not already

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(81) P. DELDIQUE, *Fin de partie à l'ONU: les reformes de la dernière chance*, JC Lattes, Paris, 2005, p. 34-35

(82) G. LHOMMEAU, *Le Droit International à l'epreuve de la puissance americaine*, L'Harmattan, Paris, 2005, p. 207-208

support any reform proposal nor it has presented a new one. “The US is in principle in favor of an expansion of the Security Council that takes into account the ability of States to provide for the maintenance of international peace and security and it supports the creation of one or two additional permanent seats, even though it has clearly declared itself for the seat for Japan, as it did during the Bush administration. […] Obama's interest in ensuring a greater role to the developing States was clear: already in 2007 he highlighted the need of a Council's reform that would allow a greater involvement of Asian, African and South African States (besides Japan, Brazil and India, he suggested Nigeria and South Africa, too).”(83)

The reform must not be only restricted to the Council, but it will have to have a more global nature, including bureaucracy, the UN means and also the UN role regarding the economic and social development. Besides an improvement of Council's working methods and the transparency of the decision-making process, the reform should create secondary organisms with the aim of managing the crisis, the military administration and the economic aspect of the conflicts.(84)

4.4. Conclusions

The tendency of the international system is to try to technically resolve the problems caused by the deeply political mutations: the UN crisis is anything but the crisis of the international order itself. On one

(83) P. PRESCHERN, *La Riforma del Consiglio di Sicurezza dagli anni '90 ad oggi: Problemi e Prospettive*, Documenti IAI, Istituto Affari Internazionali, consulting at http://www.iai.it/sites/default/files/iai0911.pdf, visited on 10/08/2016, p. 15

(84) G. LHOMMEAU, *Le Droit International à l'epreuve de la puissance americaine*, L'Harmattan, Paris, 2005, p. 210-211

hand, the new economic powers are trying to get into the Five élite that own the veto power and that control the multilateralism according to their interests. On the other hand, the majority of other members that, on behalf of equity, is claiming the democratization of international relations and a more equitable global order aimed to the improvement of the tragic effects caused by globalization.(85) We are in front of a dual position, made by skepticism and employment of UN services where each individual State or group of States are trying to satisfy their own interests before the community ones. In fact, it is known that the great powers always tried to profit by the organization in order to legitimize some of their actions or to use the institution as forum for the propaganda of a particular ideology, policy or world vision. The UN internationalism represents a necessary haven for weak States, deprived of a system of alliances able to protect them. If the aim of the global powers is to obtain a principally political benefit by the UN and therefore they employ it for their propaganda, the developing countries count on the organization to support a real mechanism of promotion of their development and to put into practice an international order more equitable and more fair.(86) The current period of time is marked by a competition between the United States, which wants to control the world, and other powers, which try to oppose it, or at least to negotiate the conditions. The new problems claim a satisfying place in the international system. The US, which rule the institutions from the end of the Second World War, firmly believe that the post-Cold War order is an order based on the American ideology since it was its political and economic model that had defeated the Communism and the Third World. In this way, the new order turns out to be split between a necessary multilateralism among States and a declared universalism.

(85) A. HASBI, *ONU et ordre mondial: reformer pour ne rien changer*, L'Harmattan, Paris, 2005, p. 14-15
(86) *v. supra*, p. 38-39

More specifically, the world order is divided between the United States' pursuit of preserving its *status quo* and the chase of imposing its order, dualism that became clearer after 11 September 2001.

The Anglo-American war against Iraq marked the apex of the disagreements on the United Nations and multilateralism. The multilateral system keeps fulfilling its original function that is forcing the main powers in an international forum with the aim of prevent the risk of clash among them and all the other aims are related to this project of primary relevance.

The end of the Cold War gave the impression of having relaunched the process of collective security with the immediate mobilization of the UN during Kuwait invasion and the authorization of the use of force. It is relevant that the Council developed an activity never seen before: the number of resolutions grew from an average of 15 to 60 per year and the number of sanctions doubled seven times since 1989. However, the United Nations remained blocked facing some relevant conflicts, for example the Israeli-Palestinian conflict, the Rwanda genocide, the ethnic cleansing in the Bosnian War, etc... In fact, the greatest operations were made by the main powers and not by the UN. Since the First Gulf War a “coalition war” dominated by the United States is still occurring. Since the principle powers gradually developed and are still developing the will to fight against contemporary threats against international peace and security, the United States proves to be weakened by this factor. In fact, since these powers are able to fully control the multilateralism, they developed unilateralism by assembling coalitions, as in the case of the Second Gulf War, or by putting into practice some armies for fast intervention like in Kosovo where States decided to assemble autonomous armies for a quick reaction. Therefore, the United Nations seems to become an option not so relevant regarding the maintenance of peace and security and it seems not to be the main institution anymore as implied by the approach started in 1945.

CONCLUDING CHAPTER

The successful reaction to the Iraqi invasion in Kuwait in 1991 by the coalition composed by the UN Member States highlighted the fact that the persistence of interstate force must not necessarily imply the disappearance of the juridical norm expressed in art. 2 of the UN Charter. War of aggression is currently banned both by the customary international law and conventional international law and it constitutes a crime against peace. Unfortunately, the prohibition of the use of force has little influence on the current conduct of States. In order to make wars of aggression disappear in near future, the international system of States must establish some effective measures of collective security. As far as collective security systems are concerned, preventing the aggression and the illegal use of force are the fundamental targets. If the UN system may appear a "perfect representative of a collective security system, [...] the UN was never a true collective system."(1) "In fact, whereas in a perfect collective security order, States cannot refuse to submit to a collective action, being all subjected "to the impositions of sanctions in the event they committed an act of aggression", in the UN arrangement, the circumstances revealed themselves differently, as

(1) A. C. AREND, R. J. BECK, *International Law and the Use of Force: beyond the UN Charter paradigm*, Routledge, London, 1993, p. 51

we saw.[2] As long as the project of collective security drafted in the UN Charter fails in working properly, States will be left alone in facing with an illegal use of force, continuing to invoke the right of self-defense in response to an armed attack. Therefore, self-defense virtually took the place of collective security, rather than being a temporary measure waiting for the employment of collective security. So, the real center of gravity of the United Nations moved from art. 39 to art. 51. As shown in the First Gulf War, even when the Security Council unanimously wants to reject the aggression and to restore the international peace and security, a coalition carrying the standards of collective self-defense must be created in order to achieve the aim.

The use of force is the fundamental test bench for international law, since peace prevention remains both the essential value and the primary aim of international juridical system. Although there is no surety that the system of collective security will be able to play a central role in future international crises, we must remember that the marginal role that the Security Council had in those crises was historically the exception rather than the rule. We cannot leave out the relevance of the fact that, during those crises, the Security Council was the primary forum where problems were discussed and where the decisions were made. Especially regarding Iraqi crisis in 2003, we can see, once knowing the events, that the American armed intervention was a result of a worried administration that, following the events of 09/11, saw the prevention of a potential unconventional attack on its territory as key purpose of its national security. Whereas the strategic challenge originated by WMDs and terrorism can be fought and overcome through an efficient juridical system of counter-proliferation, it has no juridical foundation to justify the use of force as strategic means in order to improve an imperfect peace. Unfortunately, the American doctrine of

(2) v. *supra*, p. 52

freeing Iraqis and Afghans proved to be more difficult than what Bush administration had expected. Even before Obama's election in 2008, the American project of shaping the Middle East according to a process of democratization and modernization faded away. Even though Bush and Obama lowered their expectations, they persisted in maintaining armed forces on Arab ground with the aim of supervise the national order and unity instead of promoting an essential political and social change. The victory of the First Gulf War made the United States believe that another campaign would have been successful. On the contrary, the difficulties that emerged after 09/11 left the US army ill-equipped. When the US army realized that the occupation had nothing to do with what was expected (no quicker attacks and decisive victories), the United States seemed to face a repetition of the Vietnam war (1975) on a smaller scale.

From the invasion of Iraq, it is essential to understand the nature of war that the armies are fighting, starting from a detailed analysis of the specific cultural and social framework. Firstly, irregular wars indicate that counter-insurrection is not a military activity, but it is instead a political process where populations are the main element at stake and not the target: we must understand a certain society, so that the final analysis could make sense. Moreover, irregular wars show that we must comprehend the reasons of the adversary: in fact, a miscalculation could lead to negative political consequences due possibly to war sufferings. In order to solve these problems smart political and military plans are necessary, in addition to the deployment of special troops motivated to stay on the ground as long as they can get to know the environment and the local culture. Then, we must highlight that these wars are better waged by those who belong to the countries taken into account: in fact, these combatants have some reasons to fight that are not only related to the economic issue. However, the most serious consequence caused by the Iraqi war is to consider irregular war in

foreign territory by Western powers a proof that the latter cannot undertake it on the long term. Human losses, public opinion and their influence on our highly wealthy society fight enemies ready to sacrifice themselves and populations that can bear privation and suffering that we can hardly remember. Nowadays, the US administration must realize that in such situations where American armies cannot win or where too much resources required, the US forces should be withdrawn. Consequently, from the Gulf War in 2003 we can assume that no unwanted military occupation can coexist with the process of democratization. In fact, it changes progressively the politic development of the area at issue. Moreover, in the most cases military occupation can strengthen the patriotism as defense answer, besides provoking and encouraging despotic tendencies.(3) Rather than deterring international terrorism, the Iraqi occupation tragically stimulated and relaunched it. The bonds between the old Saddam's regime and the radical Islamist networks of Al-Qaida never existed according to analysts' opinions, but experts admit that occupied Iraq, following the "victory" of the US, became what Jessica Stern calls "a sanctuary of terrorists."(4) The preemptive war of the neoconservative administration made some internal tensions re-emerge whereas they were believed disappeared with the end of the Cold War. The American intellectual Noam Chomsky analyzed the international "new deal": "highly wanted by Washington, the war against Iraq was waged despite the opposition expressed by international public opinion. In fact, public opinion believed that such aggression would have led to a WMDs proliferation and to a dissemination of terrorism. These risks were believed by Bush administration as negligible compared to the prospect of taking the

(3) R. KHALIDI, *La Resurrezione dell'Impero: l'America e l'avventura occidentale in Medio Oriente*, Bollani Boringhieri, Torino, 2004, p. 80
(4) J. STERN, *How America created a Terrorist Haven*, in The New York Times, 20 August 2003, consulting at http://www.nytimes.com/2003/08/20/opinion/how-america-created-a-terrorist-haven.html?_r=0, visited on 10/08/2016

control of Iraq, of waging the first “preemptive war” and of reinforcing his domain on the American domestic scene.”(5)

As we saw after 09/11 attacks, globalization gave the opportunity to religious and social movements that generally tend to violence, to transform rhetorical attacks against the normative system into armed attack targeting central powers. As a consequence, this transformation concerned not only Member States, but the whole system of collective security, forcing the Security Council to adopt a preemptive tendency. The implementation of resolutions such as SCR 1373/2001 on counter-terrorism and SCR 1540/2004 on non-proliferation of WMDs let the Council acquire a legislative role, even though such power was not conferring to it. Thus, these approaches worsened the debate whether the Council is suited to such juridical-normative role.

The concrete prevention against proliferation and terrorism requires a regularization and more specifically an effective management: in fact, unilateral armed force can be employed only exceptionally as last resort and must be protected from the risk of abuse. Norms and institutions of counter-proliferation and counter-terrorism on international scale are not well developed at the moment. Nowadays, it is evident that a multilateral effort concerning the proliferation must receive a political priority and that any other methods to handle it would prove to be ineffective. We must recognize that the only alternative is to try to build improved and more effective international institutions. Perhaps, besides the structural changes of the UN, States must fight in order to insert most part of the principles that the General Assembly went on declaring during the years in the Charter, such as principles regarding the maintenance of international peace and security and international measures of counter-terrorism and counter

(5) N. CHOMSKY, *L'autisme de l'Empire*, Le Monde diplomatique, mai 2004, consulting at https://www.monde-diplomatique.fr/2004/05/CHOMSKY/11171, visited on 10/08/2016

proliferation.[6]

As Hans Blix affirmed, at this point, States cannot erase the war in Iraq. Among the countless negative aspects in the final outcome (human and asset losses, the expenditure of loads of millions, the damages to the UN and to NATO, the reliability of some political leaders) we must try to understand which lessons we can draw from this event. The first positive point is the fall of one of the most bloodthirsty and cruelest dictator that the world has met after the Second World War, even though it was not the preset goal nor the accepted justification. However, on the other hand, a negative consequence of American intervention caused by the mistakes made during the occupation was that more and more countries and people started considering the United States a domineering superpower and lots of Arabs and Muslims experienced the occupation as a humiliation, feeling that strengthened hatred and consequently a further wave of terrorism.[7]

States such as the United States that in the past wanted to recur to armed intervention had an alternative, which the Council had expressed during several meetings: they could have considered the request of giving more time to inspectors. In fact, if convincing proofs of supposed prohibited weapons or programs for their production had emerged, or if the inspectors had faced a non-cooperation by Iraqi government, the Council would have been able to support armed intervention of preemptive sort. In absence of such support, not only had the legitimacy of intervention been compromised, but also the reliability of those governments suffered a bad blow and lots of damages were caused to the authority of the Security Council.[8]

A posteriori, the war in Iraq cannot be justified simply sustaining that

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(6) B. CONFORTI, *Le Nazioni Unite*, VIII ed., CEDAM, Padova, 2010, p. 22
(7) H. BLIX, *Disarmare l'Iraq, La verità su tutte le menzogne*, Einaudi, Torino, 2004, p. 258-59
(8) v. *supra*, p. 265

it was a good opportunity to dismiss a dictator: this thesis does not legitimize the sufferings that populations such Kurds and Shittes had to bear during the period of war. States cannot go to war in order to dismiss a weakened dictator: a State should wage a war with the aim of carrying out a political project related to its power expansion, or with the aim of reinforcing its security or its economic benefits.

Nowadays, wars have become more and more terrible, destructive and devastating as far as human cost is concerned, besides economic, environmental and health care's costs. For a long time, the international system of States has condemned wars for dynasty, religious wars and wars for the supremacy of the race. States got to a point where they must also condemn economical and commercial wars, asymmetrical wars besides the wars of the strongest against the weakest. Will war be able to become eternal? The answer to which we all hope is definitely negative. As Roucek declares, war is “a symptom of the decline of contemporary civilization.”(9) Human and interstate relations must be based on different values, for example equality, social justice, freedom, peaceful solutions to controversies, fair trade relations, mutual cultural and religious respect, etc... The commitment that everybody must undertake is the fight against brutalities and the reaffirmation of the system of public international law. Nowadays, war must not be considered as Clausewitz's expression “war is the continuation of politics by other means.” This expression that tried to legitimate war and to justify violence must be rejected if mankind wants to evolve, overcome wars and organize an improved world. States accept justice and peace among countries only if these values depend on the appropriate running of the rules of law. If we take into account the last wars, when force is employed on a large scale (when we are facing a concrete international or civil war and not an isolated event of use of

(9) J. S. ROUCEK, *War as a Symptom of the Decline of Contemporary Civilization*, International Behaviour Scientist, vol. 5, n. 1, March 1973, p. 52-56

force) and the UN system is no longer able to manage it, perhaps we must acknowledge that international law, including customary and UN one, exhausted its function. Therefore, war cannot be judged juridically, but only on political and moral level. The set of events of the last decade shows that a juridical order can have some omissions and that it is not true that a final regulation exists according to which everything that is not prohibited is consequently permitted.(10)

Questioning about the place and the role of the United States on the current international scene allows to analyze the ability of this institution in organizing and controlling international relations in the near future. The future of international law can be understood and foreseen only if we take into account the power of the United States, which is the only one able to impose a world order according to its project at the moment in time. However, subsequent to the war in Iraq, we must affirm that the war on terrorism cannot left place for a global system shaped on the American internal model: the United States cannot keep on unilateralism without the support of other States and the global public opinion.

If the survival of an international juridical picture is necessary, especially aiming to limit and control the individual ambitions of States, the system cannot remain like the current one. As a matter of fact, years of using the right of veto has blocked "nearly all possible actions by the Security Council against aggression."(11) Only a large UN reform will be able to restore a real balance in the global order. But this long-awaited reform is subject of several controversies. The war against Iraq must not absolutely become a precedent and the United Nations must find the necessary resources in order to enforce international legality. It appears that nowadays international law is

(10) B. CONFORTI, *Diritto Internazionale*, X ed., Editoriale Scientifica, Napoli, 2014, p. 418-19
(11) A. C. AREND, R. J. BECK, *International Law and the Use of Force: beyond the UN Charter paradigm*, Routledge, London, 1993, p. 57

progressively its feature of neutrality and equity, becoming in this way a simple means for the domination. Before that, international relations dealt with three different phases over the history. Firstly, the global system faced a period of classic international law based on the coexistence aimed to the regulation of the conditions of mutual diplomatic relations and on the enforcement of national sovereignty aimed to the peaceful coexistence among States. Secondly, the period of modern international law appeared: it was based on the cooperation caused by an evolution of international relations towards wider domains, such as economic and social ones, which needed active cooperation. Finally, nowadays, there is the risk that the community will have to tackle a sort of international law based on the control by the strongest State. This State will supervise the enforcement among other States and other individuals of international law, without being controlled by anyone. Other States would make this process easy by enforcing international law among each others, taking into consideration the pursuit of the legal ways to guarantee their mutual relations.(12) For a long time the United States has requested to the global community that international law should be reinterpreted according to the current circumstances, for example allowing measures of preemptive self-defense against threats caused by WMDs that, when they are not under the control of brutal regime such as Saddam's, can be anyway under terrorist control. In particular, the attacks of 2001 and their juridical consequences, included the US war against Iraq, took the debate concerning the influence of the United States in international law back into fashion. Even though this issue has previous origins, terrorist attacks led it to a remarkable radicalization and to a revitalization of its importance. The radicalization emerged after that the US administration had claimed rights in the *National Security*

(12) P. KENNEDY, *The Parliament of Man: The Past, Present, and Future of the United Nations*, First Vintage Books Edition, New York, 2006, p. 51-55, 64-65

Strategy in September 2002 that were never seen before. On the other hand, the refocus on the issue is found in the transition from "softer" problems, such as economic globalization and its political consequences, for example ethnic conflicts, to "harder" problems, such as war on terrorism. According to some States, the current role played by the United States raises the question of knowing if the nature of international law could be changeable. Particularly, the system of States wonders whether the United States can impose itself as supervisor and lawmaker of the world, besides wondering whether it breaks or broke some juridical international norms, changing at the same time international law from a traditional egalitarian nature into a juridical order that is structurally hierarchical.(13)

As far as the Council's reform is concerned, it cannot be postponed any longer due to a set of factors related to the constant evolution of the international stage. However, deep divergences still persist especially concerning the composition of the institution and the balance between permanent and non-permanent members. Furthermore, the point of view of the United States regarding the reform remains uncertain: even though the issue was considered relevant by the Former President Obama who, unlikely its predecessor, was willing to commit himself in the negotiations on the reform, Washington had never taken a real position. For almost 20 years Italy has proposed a common position on European level: in fact, it has highlighted the need of a greater coordination among UE countries concerning the positions and initiatives that they must assume within the Council. Having as aim the reinforcement of a European common foreign policy together with the defense of its own status within the UN system, Italy has always opposed to the creation of new permanent seats. However, it is in favor

(13) C. DI STASIO, *La Lotta multilivello al Terrorismo Internazionale, Garanzia di Sicurezza versus tutela dei diritti fondamentali*, Giuffrè Editore, Milano, 2010, p. 493-496; C. GRAY, *International Law and the Use of Force*, 2nd edition, Oxford University Press, Oxford, 2004, p. 279-281

of an enlargement of the institution through the increase of non-permanent seats and the reinforcement of the regional dimension. According to Italy, a larger European coordination among the intergovernmental negotiations would be desirable, in addition to the possible achievement of a shared position among European countries. In fact, like in other frameworks, Europe can give the right impulse for relaunching the multilateral cooperation unless it finds a greater unity and internal cohesion.(14)

The 21st century saw that the United Nations performances concerning the peacekeeping and enforcement operations did not end in great successes. If we recall crises such as in Bosnia and Rwanda, "it will take a long time, and many more future successes in peacekeeping by the world body"(15) in order to regain reliability in the eyes of the world. As stated above, the main consequence that we can draw by the Iraqi war in 2003 is that the superpower of the United States "could not be constrained from unilateral action by international organization and opinion"(16) doing things that smaller powers could not. Unfortunately, this fact confirms that not all Member States are treated equally within international organizations and that more specifically the United Nations will never be able to prevent "warmaking" waged by a superpower. We cannot foresee the future but we know that in the near one the United Nations should face new threats to international peace and security taking into consideration the political and geographic circumstances of a specific crisis. The United Nations is an organization affected by 60 years of history and nowadays its meaning and purposes are completely different from the ones intended by its founding fathers: its nature is constantly changing. For this reason,

(14) P. PRESCHERN, *La Riforma del Consiglio di Sicurezza dagli anni '90 ad oggi: Problemi e Prospettive*, Documenti IAI, Istituto Affari Internazionali, consulting at http://www.iai.it/sites/default/files/iai0911.pdf, visited on 10/08/2016, p. 21-22

(15) P. KENNEDY, *The Parliament of Man: The Past, Present, and Future of the United Nations*, First Vintage Books Edition, New York, 2006, p. 110

(16) v. *supra*, p. 111

suggesting advances is extremely hard: a total collapse of the institution is not going to happen, but a partial and gradual change is the greatest urgency at this moment in time. The world balance is no longer the one settled after the Second World War: the tendency and the character of international relations are changing faster than at any time since 19th century and so do international organizations. In fact, just the condition that the number of States has triplicated between the years in which the Charter was drafted and the current period can justify the adoption of substantial changes if the statutory norms.(17) The current permanent Member States could not afford to get stuck in an obsolete world order. In conclusion, "it was not enough to denounce unilateralism." The challenges that the world will have to face in the near future must be dealt effectively only through collective action. The *High Level Panel on Threats, Challenges and Change* was drafted with this aim.(18) The new challenges that affect humankind such as international terrorism as well as the issue concerning failed States cannot be tackled by one State alone, even though it is powerful. States must share international action in addition to a joined police work, shared intelligence and heavy pressure on ambiguous governments in order to improve their power to action with an enforced cooperation. A multilateral and multitool approach is recommended with the aim of handling each different crisis: States cannot deal with crises with a general strategy that covers all the different ones, but each case must be taken into consideration by analyzing its own context, too. In order to better tackle emergencies, one solution could be that "the Council, after consulting interested members of the General Assembly, should give the secretary-general the power to appoint a country coordinator and instruct all parts of the UN organization to cooperate with that

(17) B. CONFORTI, *Le Nazioni Unite*, VIII ed., CEDAM, Padova, 2010, p. 22
(18) C. GRAY, *International Law and the Use of Force,* 2nd edition, Oxford University Press, Oxford, 2004, p. 2

office for the larger purpose of restoring the sovereignty and advancing the quality of life of a collapsed State."[19] The several reform proposals are influenced by regional political jealousies and rivalries that do not allow a concrete consideration of the issue. A simpler and astuter way to advance the reform draft could be "an amendment to the UN Charter that would merely raise the number of rotating members from its present ten to around 18 or 19" without "any conditions about four-year or two-year membership." A second option could be a revision of art. 23, par. 2[20] concerning the "restraint that non-permanent members have to retire after two years."[21] Even though the article is useful because it gives an opportunity to every member, States should be allowed to keep on with their conduct, if they had worked well previously. Moreover, the General Assembly could solicit the Permanent Five to agree on using the veto power only as a measure of last resort related to issues of peacekeeping and warmaking that directly affect national security interests. Modest changes to the UN Charter with respect to the Council's members would prove to be "a step in the right direction [...] in light of our changing world", gaining wider agreement than the drafts that have been proposed in the last decade.[22] A single and general draft of potential reform is impossible to achieve due to the complex nature of the United Nations and "reforms will, or should, come piecemeal." Gradual and modest reforms, if accepted by the main powers that control the UN, would result the first steps towards a right and equal improvement of the international system.

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(19) P. KENNEDY, *The Parliament of Man: The Past, Present, and Future of the United Nations*, First Vintage Books Edition, New York, 2006, p. 264
(20) Art. 23, par. 2 of the UN Charter rules that: "The non-permanent members of the Security Council shall be elected for a term of two years. In the first election of the non-permanent members, however, three shall be chosen for a term of one year. A retiring member shall not be eligible for immediate re-election."
(21) P. KENNEDY, *The Parliament of Man: The Past, Present, and Future of the United Nations*, First Vintage Books Edition, New York, 2006, p. 251-52
(22) v. *supra*, p. 252

Bibliography

- CEDIN – Paris 1., *L'Intervention en Irak et le droit international*, Pedone, Paris, 2004
- P. CORNISH, *The Conflict in Iraq 2003*, Macmillan, Houndmills, 2004
- P. W. GALBRAITH, *La Fine dell'Iraq, Come gli Stati Uniti hanno distrutto il Paese che intendevano liberare*, Mondadori, 2007
- S. GRAHAM-BROWN, *Sanctioning Saddam: the politics of intervention in Iraq*, I.B. Tauris, New York, 1999
- KOLLIOPOULOS, *La Commission d'indemnisation des Nations Unies et le droit de la responsabilité internationale*, L.G.D.J., Paris, 2001
- P. LUIZARD, *La Questione Irachena*, Feltrinelli, 2003
- D. M. MALONE, *The international struggle over Iraq: politics in the UN Security Council 1980-2005*, Oxford University Press, Oxford, 2006
- E. MCWHINNEY, *The September 11 terrorist attacks and the invasion of Iraq in contemporary international law: opinions on the emerging new world order system*, M. Nijhoff, Boston, 2004
- P. A. MELLO, *Democratic participation in armed conflict: military involvement in Kosovo, Afghanistan, and Iraq*, Macmillan, Houndmills, 2014
- R. POPA, *La mission de desarmement de l'ONU en Irak: bilan d'une experience sans precedent*, Pedone, Paris, 2005
- UNITED NATIONS, *The United Nations and the Iraq-Kuwait conflict, 1990-1996*, United Nations, New York: Department of public information, 1996

- R. ZACKLIN, *The United Nations Secretariat and the use of force in a unipolar world: power v. principle*, Cambridge University Press, Cambridge, 2010
- J. J. VILMER, *Ethique des Relations Internationales*, Presses Universitaires de France, Paris, 2013
- G. PARIGI, *Iraq. Una questione aperta*, Bietti, 2009
- S. VILLALPANDO, *L'emergence de la communauté internationale dans la responsabilité des Etats*, Presses Universitaires de France, Paris, 2005
- Y. DINSTEIN, *The Conduct of Ostilities under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2004
- Y. DINSTEIN, *War, Aggression and Self-Defence*, Cambridge University Press, Cambridge, 1994
- E. NEWMAN, A. SCHNABEL, *Recovering from civil conflict: Reconciliation, Peace and Development*, Routledge, 2014
- L. FAWCETT, *International Relations of the Middle East*, Oxford University Press, Oxford, 2009
- R. CHARVIN, *La guerre anglo-américaine contre l'Irak et le droit international: "Apocalypse Law"*, Actualité et Droit International, Avril 2003, http://www.ridi.org/adi/articles/2003/200304cha.htm
- L. VAN DE HOLE, *Anticipatory Self-Defence Under International Law*, American University International Law Review 19, no. 1 (2003): 69-106
- M. HILAIRE, *International law and the United States military intervention in the Western hemisphere*, Kluwer Law International, The Hague, 1997
- S. DE SANCTIS, *Guerra del Golfo, Problematiche giuridiche e riflessi militar-penalistici*, Jovene Editore, Napoli, 1993

- MIELE, *La Guerra Irachena secondo il diritto internazionale: articoli, saggi, documenti*, CEDAM, 1991
- Z. Y. BLUM, *Eroding the United Nations Charter*, M. Nijhoff Publishers, Boston, 1993
- J. KITTRICH, *The Right of Individual Self-Defense in Public International Law*, Erscheinungsjahr, 2008
- S. D. BAILEY, S. DAWS, *The procedure of the UN Security Council*, Clarendon Press, Oxford, 1998
- G. CHALIAND, *L'Amerique en guerre: Irak-Afghanistan*, ed. Du Rocher, Monaco, 2007
- MACLEOD, D. MORION, *Diplomaties en guerre: sept états face à la crise irakienne*, CEPES, Montreal, 2005
- RAMONET, *Irak: histoire d'un desastre*, Paris: Galilee, 2005
- COLONOMOS, *La morale dans les relations internationales: rendre des comptes*, O. Jacob, Paris, 2005
- N. KREIPE, *Les autorisations données par le Conseil de Securité des Nations Unies à des mesures militaires*, L.G.D.J., Paris, 2009
- G. LABRECQUE COWANSVILLE, *La force et le droit: jurisprudence de la Cour internationale de Justice*, Bruylant, Brussels, 2008
- M. T. KAROUBI, *Just or unjust war?: International Law and Unilateral Use of Armed Force by States at the Turn of the 20th Century*, Ashgate, Burlington, 2004
- S. KUYAMA, M. R. FOWLER, *Envisioning reform: enhancing UN accountability in the twenty-first century*, United Nations University Press, Paris, 2009
- K. IDRIS, M. BARTOLO, *A better United Nations for the new millennium: the United Nations system - how it is now and how it should be in future*, Kluwer law international, The Hague,

2000

- F. FUKUYAMA, *America at the crossroads: democracy, power, and the neoconservative legacy*, Yale University Press, London, 2007
- S. C. NEFF, *War and the law of nations: a general history*, Cambridge University Press, Cambridge, 2005
- M. A. ORAIZI, *La culpabilité americaine: assaut contre l'empire du droit international public*, L'Harmattan, Paris, 2005
- G. LHOMMEAU, *Le droit international à l'epreuve de la puissance americaine*, L'Harmattan, Paris, 2005
- G. NOLTE, *Le droit international face au défi americain*, Pedone, Paris, 2005
- HASBI, *ONU et ordre mondial: reformer pour ne rien changer*, L'Harmattan, Paris, 2005
- P. DELDIQUE, *Fin de partie à l'ONU: les reformes de la dernière chance*, JC Lattes, Paris, 2005
- GRAY, *International Law and the Use of Force,* 2nd edition, Oxford University Press, Oxford, 2004
- BROWNLIE, *International Law and the Use of Force by States*, Oxford University Press, Oxford, 1963
- S. A. ALEXANDROV, *Self-Defense Against the Use of Force in International Law*, Kluwer Law International, The Hague, 1996
- N. LUBELL, *Extraterritorial Use of Force Against Non-State Actors*, Oxford University Press, Oxford, 2010
- J. T. JOHNSON, *Ethics and the Use of Force*, Farnham: Ashgate Publishing Ltd, 2011
- P. KENNEDY, *The Parliament of Men: The Past, Present, and Future of the United Nations*, First Vintage Books Edition,

New York, 2006

- DE GUTTRY, F. PAGANI, *Le Nazioni Unite: Sviluppo e riforma del sistema di sicurezza collettiva*, Il Mulino, Bologna, 2005
- S. DE VIDO, *Il Contrasto del Finanziamento al Terrorismo Internazionale, Profili di diritto internazionale e dell'Unione europea,* prefazione di F. MARRELLA, CEDAM, Padova, 2012
- H. BLIX, *Disarmare l'Iraq. La verità su tutte le menzogne*, Einaudi, Torino, 2004
- *La Riforma delle Nazioni Unite*, Contributi di Istituti di ricerca specializzari, Settembre 2005, A cura di Riccardo Alcaro, Michele Comelli, Raffaello Matarazzo dell'Istituto Affari Internazionali (IAI), http://www.iai.it/sites/default/files/pi_a_c_030.pdf
- P. PRESCHERN, *La Riforma del Consiglio di Sicurezza dagli anni '90 ad oggi: Problemi e Prospettive*, Documenti IAI, Istituto Affari Internazionali, http://www.iai.it/sites/default/files/iai0911.pdf
- N. ANDREATTA, *La Riforma dell'ONU*, Arel, Roma, 2005
- PAPAUX, E. WYLER, *L'Éthique du Droit International*, Presses Universitaires de France, Parigi, 1997
- FOCARELLI, *Le Contromisure nel Diritto Internazionale*, Giuffrè Editore, Milano, 1994
- P. PICONE, *Comunità Internazionale e Obblighi "erga omnes"*, Jovene Editore, Napoli, 2006
- DI STASIO, *La Lotta multilivello al Terrorismo Internazionale, Garanzia di Sicurezza versus tutela dei diritti fondamentali*, Giuffrè Editore, Milano, 2010

Articles:

- M. LYNCH, *Obama and the Middle East, Rightsizing the U.S. Role*, Foreign Affairs, September/October 2015 https://www.foreignaffairs.com/articles/middle-east/obama-and-middle-east
- S. SIMON, J. STEVENSON, *The End of Pax Americana, Why Washington's Middle East Pullback Makes Sense*, Foreign Affairs, November/December 2015 https://www.foreignaffairs.com/articles/middle-east/end-pax-americana
- KHEDERY, *Iraq in Pieces, Breaking Up to Stay Together*, Foreign Affairs, November/December 2015 https://www.foreignaffairs.com/articles/iraq/2015-09-22/iraq-pieces
- L. DECLICH, *Dove sventola la bandiera nera*, "Le Maschere del Califfo", editoriale Limes, settembre 9/2014
- M. PAOLINI, *Il Califfato e i giochi petroliferi iracheni*, "Le Maschere del Califfo", editoriale Limes, settembre 9/2014
- L. DECLICH, *Stato Islamico, l'architettura del terrore*, "Chi ha paura del Califfo", editoriale Limes, marzo 3/2015
- E. C. DEL RE, *Contro le miserie del presente, i curdi di Iraq (e Siria) sognano in grande*, "Chi ha paura del Califfo", editoriale Limes, marzo 3/2015
- G. PARIGI, *L'Iraq è diviso in tre parti*, "La Radice Quadrata del Caos", editoriale Limes, maggio 5/2015
- CARLOS, *In Iraq Washington e Teheran restano agli antipodi*, "Le Guerre Islamiche", editoriale Limes, ottobre 9/2015
- G. PARIGI, *Il Califfato, ovvero l'arrocco sunnita in Siraq*, "La Strategia della Paura", editoriale Limes, dicembre 11/2015

- N. PEDDE, *Teheran, Baghdad e i molti padri dello Stato Islamico*, "La Strategia della Paura", editoriale Limes, dicembre 11/2015
- L. DIAMOND, *What Went Wrong in Iraq*, in Foreign Affairs, Sept./Oct. 2004, Council on Foreign Affairs, https://www.foreignaffairs.com/articles/iraq/2004-09-01/what-went-wrong-iraqhttps://www.foreignaffairs.com/articles/iraq/2004-09-01/what-went-wrong-iraq

UN Documents:

- UN Secretary – General, The Political Transition in Iraq: Report of the fact-finding mission
- R. T. PICKERING, R. J. SCHLESINGER, *Iraq: One Year After, Report of an Independent Task Force on Post-Conflict Iraq*, Council on Foreign Relations, March 2004
- M. WELLER, *Iraq and Kuwait: The Hostilities and the Aftermath*, Grotius, Cambridge, 1993
- *Report on the Protection of Civilians in the Armed Conflict in Iraq: 11 December 2014 – 30 April 2015*, United Nations Assistance Mission for Iraq (UNAMI) and the Office of the United Nations High Commissioner for Human Rights (OHCHR), consultabile in http://www.ohchr.org/Documents/Countries/IQ/UNAMI_OHCHR_4th_POCReport-11Dec2014-30April2015.pdf, visitato il 10/08/2016
- *High Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsability*, http://www.un.org/en/peacebuilding/pdf/historical/hlp_more

_secure_world.pdf

International Law handbooks:

- C. FOCARELLI, *Diritto Internazionale*. I, II ed., CEDAM, Padova, 2012
- N. RONZITTI, *Introduzione al Diritto Internazionale,* IV ed., Giappichelli ed., Torino, 2013
- D. CARREAU, F. MARRELLA, *Droit International*, XI ed., Pedone, Parigi, 2012
- D. CARREAU, F. MARRELLA, *Diritto Internazionale*, Giuffrè, Milano, 2016
- M. PANEBIANCO, *Diritto Internazionale Pubblico,* III ed., Editoriale Scientifica, Napoli, 2011
- B. CONFORTI, *Diritto Internazionale*, X ed., Editoriale Scientifica, Napoli, 2014
- B. CONFORTI, *Le Nazioni Unite*, VII ed., CEDAM, Padova, 2005
- B. CONFORTI, C. FOCARELLI, *Le Nazioni Unite*, VIII ed., CEDAM, Padova, 2010
- CASSESE, *Diritto Internazionale*, a cura di P. GAETA, II ed., Il Mulino, Bologna, 2006
- CASSESE, *International Law*, II ed., Oxford University Press, Oxford, 2005
- D. AMOROSO, *L'ABC delle Nazioni Unite*, Editoriale Scientifica, Napoli, 2012
- G. BADIALI, *Testi e documenti per un corso di diritto internazionale,* III ed., Maggioli ed., Rimini, 1989
- N. RONZITTI, *Diritto Internazionale dei Conflitti Armati*, IV

edizione, G. Giappichelli Editore, Torino, 2011

Law encyclopedias:

- *Enciclopedia del diritto*, edita da Giuffrè, Milano,
- *Digesto Italiano*, edito dalla Utet, Torino
- *Enciclopedia Giuridica*, edita dall'Istituto dell'Enciclopedia italiana Treccani, Roma