The Report of the UN High-Level Panel and the Use of Force

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The "Report of the High-Level Panel on Threats, Challenges and Change", submitted to United Nations Secretary General Kofi Annan on 1 December 2004, deals with some extremely interesting issues and its developments will have to be followed closely. The Report is, in fact, a necessary premise for any reform of the United Nations (UN) system that may be undertaken in 2005, the year of its 60th anniversary.

The subject that raises the most interest in Europe is undoubtedly reform of the Security Council (SC), increasing its membership and setting up a new class of permanent non-veto members. But there are also other matters of exceptional interest. Above all, the use of force, peacekeeping and peace enforcement – issues that are interconnected since only a fully operational and legitimate Security Council can aspire to carrying out its primary function, that of maintaining international peace and security.

The prohibition of the use of force and its exceptions

The Report confirms the traditional interpretation of rules on the use of force and its exceptions. On the one hand, it states that the threat or the use of force are prohibited under Art. 2.4 of the United Nations Charter. The

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Report does not support the opinion that continuous violation of this provision has undermined its cogency. On the other hand, it does confirm that there are two exceptions to the prohibition of the use of force: individual and collective self-defence and the use of force authorised by the Security Council (authorisation that can be vested upon a state or a regional organisation). In order to authorise, the SC has to adopt a resolution under Chapter VII of the UN Charter (Chapter VIII in the case of a regional organisation).

The Report rejects the idea that security can be preserved by a balance of power or by "any single superpower". The reference to the United States here is transparent. Translated into legal rules, it means that entrusting the United States with the planet's collective security would create a specific legal order under the superpower's aegis and hegemony. This would call for a derogation of the principle of the sovereign equality of states, one of the basic principles of the United Nations. While all states are bound by an absolute prohibition on the use of force, the United States would be able to resort to it to ensure global security. In other words, this would lead to the development of a "hegemonic law" – something already criticised by scholars of international law and implicitly rejected by the Panel.

Self-defence

Self-defence is, as mentioned, one of the exceptions to the prohibition on the use of force. This exception has been established by customary law and is set down in Article 51 of the United Nations Charter. Its provisions restrict self-defence to response to an armed attack. But there are two interpretations: the first is that self-defence is possible only once the attack has actually taken place; the second allows for a reaction when the attack is imminent (missiles do not necessarily have to hit the attacked state's territory; the state can react even while preparations for their launching are underway). The Report supports the latter interpretation embodied in the theory of "anticipatory self-defence". However, it rejects the doctrine of "pre-emption" theorised by US President George W. Bush in the 2002 US National Security Strategy document. According to the Report, the existence of a mere threat to security is not sufficient to legitimate an armed reaction. The attack has to be imminent. Thus, the acquisition of weapons of mass destruction by one state, while constituting a threat to security, does not give another state the right to react in self-defence. Therefore, the Report rejects the "pre-emptive self-defense" theorised by President Bush which should allow for action against "rogue states", terrorists and states possessing weapons of mass destruction.

The Report specifically states that Art. 51 of the United Nations Charter must be neither rewritten nor re-interpreted. However it does interpret Art. 51 in a way that United Nations bodies have been loath to do until now. For example, the International Law Commission has avoided taking a position on the legality of "anticipatory self-defence". The same can be said for the International Court of Justice, which has never pronounced itself on the subject, even though it has now passed judgement on numerous controversies involving the use of force and self-defence.

It should be noted that the theory of "anticipatory self-defence" is advocated mainly by the common law countries and Israel. On the European continent, scholars of international law prefer the interpretation by which self-defence is legal only after the state has suffered an armed attack. The Report, *de facto*, extends the possibility of resorting to self-defence. The states will have to take a stance on this.

Use of force authorised by the UN Security Council

The other exception to the prohibition on the use of force is recourse to armed force authorised by the UN Security Council. But in what cases can the SC authorise it? The Report gives two cases: 1) when one state poses a threat to another; and 2) when there is the threat of genocide. In this case, it asserts the "responsibility to protect", derived from an emerging norm of international law. The exemplary case is that of a humanitarian catastrophe with the territorial state unwilling or unable to end the genocide.

The notion of "responsibility to protect" is not clarified in the Report. Who is responsible? The members of the international community or the Security Council? If the SC were responsible, it is important to remember that it can authorise states to intervene but cannot oblige them. At least, this has been the practice to date and the Report does nothing to clarify the matter.

In both cases 1) and 2), recourse to the use of force is legal as long as the following five criteria are addressed:

- seriousness of threat
- proper purpose (intervention must be aimed at countering the threat and not for other purposes)
- last resort (attempts must be made to solve the question by peaceful means)
- proportional means
- balance of the consequences (action must be better than inertia).

According to the Report, these five criteria should be embodied in a

declaratory resolution of the UN SC and General Assembly. Nevertheless, such resolutions cannot change the United Nations Charter and serve only to guide the action of the states and the Council.

Of course, these criteria do not pertain (or pertain only partially) in the exercise of self-defence. In that case, reference must be made to the usual requirements of necessity and proportionality. It has recently been proposed that self-defence should be conditioned by the existence of a third criterion: immediacy. The Report does not take a position on this point, however, even though it is anything but insignificant. Think, for example, of a territory long under occupation: can the legitimate sovereign, long dispossessed, resort to self-defence?

Peacekeeping and peace-enforcement

The Report dedicates considerable attention to the question of "collective security" and its instruments: peacekeeping and peace-enforcement. While peacekeeping is a non-coercive operation (characterised by the consent of the territorial state and non use of weapons, except in self-defence, as well as impartiality towards the forces in the field), peace-enforcement is, on the contrary, a coercive operation undertaken against the state in which the operation takes place.

The Report asserts that both peacekeeping and peace-enforcement must be authorised by the Security Council. But this would be a limitation on states' freedom. Peacekeeping, based as it is on the consent of the state in which it takes place, does not in principle require any SC authorisation. True, some operations may serve multiple functions since a peacekeeping operation could turn into peace-enforcement. But this practical fact cannot distort concepts that are well founded in theory. In addition, because of the often conflictual relations between members of the Security Council, it could be more convenient to undertake peacekeeping operations without having to seek SC authorisation. What if one of the states involved did not want the operation to be "filtered" through the SC? Finally, such a peacekeeping/SC nexus would make it obligatory for operations to be carried out under the aegis of the UN and for the intervening states to report back to it.

The weak point of peacekeeping/peace-enforcement is the chronic lack of personnel, even though Art. 43 of the UN Charter sets out that member states should enter into agreements with the Security Council for putting military contingents at its disposal. The Report completely ignores Art. 43 and evidently considers it dead letter. Yet it does not go so far as to suggest its abrogation, as it does instead for other provisions such as the one on estab-

lishing the Military Staff Committee composed of SC permanent members.

In order to make up for the lack of personnel and to be able to undertake operations that require rapid action, the Report suggests that the states (either individually or through international organisations) make available readily deployable personnel. Mention is made in this context of the European Union's decision to "establish standby high readiness, self-sufficient battalions that can reinforce United Nations missions".

The role of regional organisations

Regional organisations, like states, have to receive SC authorisation to be able to use armed force, unless they are acting in self-defence in favour of one of their member states (or a third state). The Report gives a reading of Art. 53 of the UN Charter that is shared by most experts of international law: the Panel rejects the theory, applied for example by the United States during the Cuban naval quarantine (1962) and the intervention in Santo Domingo (1965) by which regional organisations need not necessarily be authorised by the SC. It is significant that the Panel admits that this authorisation can be delivered when military operations have already commenced, as occurred with the Ecowas operation in Sierra Leone.

The Report points out that NATO, while it cannot be considered a regional organisation under Chapter VIII of the UN Charter, has nevertheless carried out a number of "out-of-area" missions and is not only an organisation that ensures the defence of its members, but has become an organisation that preserves collective security. Such missions are considered positively in that they contribute to maintaining international peace and security. But the Report states that they should be approved by the Security Council and that NATO, when undertaking out-of-area operations, should be accountable to the SC for such operations. This is an implicit criticism of the NATO operation undertaken against the Federal Republic of Yugoslavia in March 1999, but which was not criticised by the UN Secretary General at the time and was legalised with the adoption of Security Council Resolution 1244 in June 1999.

The SC as a normative body

Curiously, in examining peace-enforcement, the Report does not refer to the use of force undertaken directly by the Security Council. Peace-enforcement is construed exclusively as an action taken by states with SC authorisation. It is true that the hypothesis of direct action on the part of the Security Council is purely theoretical, but this was nevertheless the original intention

of the UN Charter. The Panel evidently considers it dead letter. For peacekeeping as well, the accent is not put on operations headed by the Secretary General under delegation by the SC, of which there have been many – especially in the past. Furthermore, in the Report peacekeeping and peace-enforcement are not clearly distinguished and tend to be blurred. The Panel seems to see the SC solely as an authorising body; operations in the field are undertaken by states upon SC authorisation. Thus, the SC becomes a "normative" body, while the Charter's intention was for it to be operational. Article 42 of the UN Charter states that the SC should "undertake" operations with air, naval and ground forces to maintain or restore international peace and security. Moreover, the kind of action the SC should take in case of aggression is not adequately considered. True, in this case the states do not require authorisation in that they are acting in collective self-defence, should they decide to intervene in favour of a state that has suffered aggression. But action in self-defence is limited in time in that it should cease when the SC has taken adequate measures to restore international peace and security.

Post-conflict peacebuilding

The Report rightly devotes much attention to post-conflict peacebuilding. This has become one of the United Nations' main tasks, as shown by the efforts undertaken for the reconstruction of countries wracked by civil war and, generally, those defined as "failed states". The Panel proposes setting up a body – a Peacebuilding Commission – charged with managing post-conflict peacebuilding. This small body would be an emanation of the Security Council and would not require amendments to the UN Charter, but it would allow the principal bodies to set up subsidiary bodies (Art. 29). Post-conflict peacebuilding is not only a problem of institutional organisation, it involves such important matters as pacification and rebuilding the economy and the institutional fabric, as well as finding the funds for these tasks.

No role for the GA under the "Uniting for Peace" Resolution

The Security Council is the only body charged with maintaining international peace and security. Even though most UN Charter experts feel that this is the exclusive role of the SC, it is worth asking if the General Assembly could be entrusted with some tasks, starting out from the premise (not generally shared by scholars of international law) that the SC has a primary role and the Assembly a subsidiary one.

In the 1950s, faced with the Soviet veto, attempts were made during the Korean War to charge the General Assembly with tasks not provided for in the UN Charter. A resolution, known as "Uniting for Peace" (Res. 377-V), was passed, authorising the states that had intervened and were operating under unified US command to fly the UN flag. Pursuant to this resolution, the functions of maintaining international peace and security could be exercised by the General Assembly when the SC was paralysed and unable to take decisions because of the veto of one of the permanent members. "Uniting for Peace" was a classic Cold War product, passed by Western countries when they had the majority in the General Assembly. With the completion of decolonisation, they no longer have that majority. Although "Uniting for Peace" could have been successfully revived for the NATO intervention in Kosovo, the theory of humanitarian intervention was preferred as a justification for military operations. The Panel does not resuscitate the 1950s resolution and concentrates on the competences of the SC in the maintenance of world peace and security.

The national interest of European states

What are the points in the Report that, from a security angle, touch on the national interest of European states? There are many, especially because the Report considers the SC an authorising body and consequently gives particular importance to the role of states. The most important points can be summarised as follows:

- The notion of self-defence. Almost all continental doctrine is rooted in the theory that self-defence can be exercised only when a state has suffered an armed attack. The Report comes out in favour of the thesis by which self-defence can also be exercised when an attack is imminent. The concept of imminence is interpreted in the traditional sense and not extended, as is done in the Bush doctrine on pre-emption. States are called upon to take a stance on this point: the Report's interpretation of the notion of self-defence can be shared in light of the development of new weapons and new threats. It would be absurd to permit reaction only once a missile has already hit the territory of the attacked state and not when preparations for launching are unequivocally beginning. But note: the two interpretations of self-defence have much in common and if states take a stance on this point it will contribute to the development of international law.

However, the Report does not clarify whether an armed attack, the prerequisite for exercising self-defence, has to come from a state or can be carried out by a non-state entity such as a terrorist organisation. This has to be cleared up. Some members of the European Union participated in

Operation Enduring Freedom in Afghanistan and are therefore in favour of the second interpretation by which self-defence (in this case collective) can also be exercised if an attack has been carried out by a non-state entity. That position should be consistently maintained.

- The Report does not deal with international humanitarian law applicable to armed conflict. It would be important for another criterion to be added to the five criteria for the use of force to be incorporated in Security Council or General Assembly resolutions. This one should specify that the use of force has to be in strict conformity with international humanitarian law.
- One point contained in the Report and that should be rejected is that peacekeeping operations have to be authorised by the United Nations. If the issue is "real" peacekeeping operations, then authorisation is not required by international law. It should be recalled that the majority of EU members also belong to military organisations such as NATO that cannot subordinate their out-of-area, when peacekeeping missions are involved, to an SC authorisation. There could also be political contingencies that make a SC authorisation – subject to the veto of one of the permanent members – inadvisable. At the same time, the risk of a veto could condition the authorising resolution as the SC members would inevitably have to compromise. These considerations hold not only for NATO but also for the European Union.
- The Security Council takes on a central role when a threat that is not imminent has to be countered (otherwise it would be self-defence). In this case, state intervention should be authorised by the Security Council. There is consensus on this point. There is also agreement on the observation that the authorisation can be given when the military action is already underway because it increases flexibility. Unilateralism is reduced, while the possibilities of intervention are increased when the threat (for example, illegal possession of weapons of mass destruction by states ready to use them) actually puts international peace and security at risk. Obviously the use of armed force remains a "last resort".

It would be important for the European Union, perhaps in the framework of its Common Foreign and Security Policy (CFSP), to offer a unitary response to the Panel's Report. The Anglo-American intervention in Iraq created a sharp division between European countries (including those that were candidates for entry into the EU at the time). The European Union should now work out a unitary and coherent position. The EU has endowed itself with a strategic concept that outlines relations between the Union and the United Nations. Those relations are also underlined in the Constitutional Treaty which increases its operational capacities. A clear response to the Report is therefore a must.