

# THE UNITED NATIONS SECURITY COUNCIL IN THE POST-COLD WAR ERA

*In need of reform?*

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**List of abbreviations**

|                  |   |
|------------------|---|
| ECOWAS           | Economic Community Of West African States   |
| EU               | European Union  |
| G8               | Group of Eight  |
| High-level Panel | High-level Panel on Threats, Challenges and Change                                |
| ICJ              | International Court of Justice  |
| ILO              | International Labour Organization   |
| NATO             | North Atlantic Treaty Organization  |
| RES              | Resolution  |
| SC               | Security Council  |
| UçK              | Ushtria Çlirimtare e Kosovës (Kosovo Liberation Army)                             |
| UK               | United Kingdom  |
| US               | United States   |
| USA              | United States of America  |
| UN               | United Nations  |
| UN Doc.          | UN Document   |
| UN Docs          | UN Documents  |
| UNCC             | United Nations Compensation Commission  |
| USSR             | Union of Soviet Socialistic Republics   |
| Working Group    | Working Group on Equitable Representation on and Increase in the Security Council |

## Introduction

In 1945, after the horrific events of World War I and World War II, a new international organization was established: the United Nations. According to Article I of its Charter the United Nations were established with several purposes:

- To maintain international peace and security, and for this purpose:
  - o To take effective collective measures for the prevention of and removal of threats to peace;
  - o to suppress acts of aggression or other breaches of peace;
  - o to bring about adjustment or settlement of international disputes or situations which might lead to a breach of the peace, all by peaceful means and in conformity with the principles of justice and international law.
- to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
- to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
- to be a centre for harmonizing the actions of nations in the attainment of these common ends.

Along with the establishment of the United Nations as such, the United Nations Security Council has been established as one of its main bodies. The Security Council has been assigned with the primary responsibility for maintaining and/or restoring international peace and security. Because the Security Council would have to be able to act quickly in case of a threat to international peace and security, it has been decided that only 11 member states (of which 5 permanently) are represented in the Council. Furthermore, the Council has been granted important competences. First of all, the Security Council has been authorized to take enforcement measures if necessary. Such enforcement measures can consist of non-military sanctions such as trade measures, an arms embargo, an air embargo or diplomatic sanctions, but can also consist of military sanctions such as blockades or other operations by the air, sea or land forces of the members of the United Nations.<sup>1</sup> Secondly, the Security Council can authorize regional organizations (such as NATO) to use force.<sup>2</sup> Beside these important competences, Article 51 of the Charter demands states to inform the Security Council immediately in situations where they used force in self-defence. All

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<sup>1</sup> W. van Genugten and others, *The United Nations of the future: globalisation with a human face*, Amsterdam: KIT-Publishers 2006, p. 123.

<sup>2</sup> Article 53, UN Charter, see also D. Sarooshi, *The United Nations and the development of collective peace and security: the delegation by the UN Security Council of its Chapter VII powers*, Oxford: Oxford University Press 1999, p. 248.

previous implies that in 1945 a system of collective security was created in which the United Nations Security Council has been made the world monopolist in determining when and to what extent force can be used.<sup>3</sup> It is important to notice that the Security Council not only can decide to use force against a state, if this state constitutes a threat to international peace and security. Also in situations where the domestic situation can be considered as a threat to the international peace and security, the Security Council can decide to use force.<sup>4</sup> In the latter case the Security Council will mainly intervene for humanitarian purposes.<sup>5</sup>

According to the information provided by the United Nations, today the functions that the Security Council ought to fulfil are very much alike those in 1945.<sup>6</sup> This claim is strengthened by the fact that since it came into force in 1945, the UN Charter hardly ever has been amended seriously. The only amendment of any significance that has been made with respect to the Security Council was that the number of non-permanent members increased from 6 to 10.<sup>7</sup> This leads to the conclusion that, according to the United Nations, the Security Council still has the primary responsibility in maintaining and/or restoring international peace and security and in addition to this the Security Council should still function as the world monopolist with regard to the moment when and to what extent the use of force is allowed.

However, the world we live in today can not be compared with the world at the time the Security Council was established any longer, if it is only because it is more than a decade since the end of the Cold War. Therefore, the question whether in the post-Cold War era the Security Council is able of taking primary responsibility with regard to maintaining and/or restoring peace and security in the world is very relevant. The significance of this question even has been strengthened after there has been a lot of discussion with respect to the Security Council's functioning in recent cases such as the military intervention by NATO in Kosovo in 1999 and the United States' invasion in Iraq in 2003. Consequently, this master thesis will examine the problems the United Nations Security Council has to deal with in its capacity of the body that holds the primary responsibility

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<sup>3</sup> Sarooshi 1999, p. 1, N.D. White, 'The will and authority of the Security Council after Iraq', *Leiden Journal of International Law* (17) 2004-4, p. 646 and A. De Hoogh, 'De oorlog tegen Irak, de Veiligheidsraad, en Nederland', in: *Jaarboek Vrede en Veiligheid: bewapening, vredesbeweging en het Nederlandse veiligheidsbeleid*, Nijmegen: Centrum voor Internationaal Conflict-Analyse & Management, KU Nijmegen 2003, p. 27.

<sup>4</sup> The domestic nature of a situation does not constitute an obstacle to Security Council action, since according to Article 2(7) of the UN Charter the enforcement measures under Chapter VII do not come under the limit of domestic jurisdiction, see B. Conforti, *The law and practice of the United Nations*, The Hague: Kluwer Law International 2000, p. 195.

<sup>5</sup> Conforti 2000, p. 195. The willingness to invoke humanitarian concerns as a justification for the use of force seems to be a greater since the end of the Cold War, J. Currie, 'NATO's humanitarian intervention in Kosovo: making or breaking international law?', *The Canadian Yearbook of International Law* (36) 1998, p. 310-311.

<sup>6</sup> United Nations, UN Security Council Function and Powers, available at <[http://www.un.org/Docs/sc/unsc\\_functions.html](http://www.un.org/Docs/sc/unsc_functions.html)>, last visited September 12<sup>th</sup> 2006.

<sup>7</sup> G. Abi-Saab and others, *The changing constitution of the United Nations*, London: The British Institute of International and Comparative Law 1997, preface.

for maintaining and/or restoring peace and security in the post Cold-War era and how to cope with these problems best.

In order to find an answer to the research question of this thesis, I will analyse the role of the Security Council with regard to the cases just mentioned (Chapter I). On the basis of the problems which can be distracted from these case studies, proposals that are aimed at addressing the underlying problem will be discussed (Chapter II), analysed and commented, both on their contents as well as their feasibility (Chapter III). After that I will present my conclusions.

## **1 The United Nations Security Council, unilateralism and the use of force in the post-Cold War era: A case study**

During the Cold War the United Nations Security Council hardly ever used its competence to authorize the use of force.<sup>8</sup> This passive attitude of the Council can be explained by the fact that during the Cold War there was a paralysing antagonism, mainly between the two world powers: the communist USSR and the democratic United States.<sup>9</sup> Because both states could veto Security Council decisions, the Council mainly functioned as a forum for negotiation, instead as an instrument of action in that period.<sup>10</sup> With the end of the Cold War things changed: the opposing political pressures in the Security Council were very much reduced and the right to veto was not so prevalent anymore.<sup>11</sup> This mainly resulted from the disappearance of the communism, the reduction of USSR's power and the break up of the USSR into a number of separate states. This offered the United States the opportunity to dominate the Security Council. Furthermore, as the liberal ideology had become dominant in the world with the Cold War ending, the provisions of the Charter could now form the foundation of a military alliance between the major democracies with a view to the imposition of peace and respect for human rights in the world.<sup>12</sup>

As already mentioned in the introduction, this master thesis will examine the problems that the Security Council has to deal with at the moment and how to cope with them best. Therefore, the end of the Cold War as a turning point is very important, as the Security Council now functions very differently than in its first forty five years of existence. Based on two striking cases which occurred after the end of the Cold War, I will try to analyse the Security Council's current functioning. In both cases the Security Council's attitude with regard to the underlying conflict was put into question.

### **1.1 Operation Allied Force (1999)**

Kosovo was a south central province of the Yugoslav federation with an overwhelmingly ethnic Albanian population. After it lost its degree of autonomy in 1989, a long period of repression of the Kosovar population by the Serb leadership commenced. In 1993 this led to several western countries warning that ethnic cleansing and human rights abuses would not be tolerated in Kosovo.

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<sup>8</sup> De Hoogh 2003, p. 11, During the Cold War the Security Council did authorize the use of force only in three cases: the Korean War, Congo and Southern Rhodesia, White 2004, p. 645.

<sup>9</sup> C. Ryngaert, 'De hervorming van de Veiligheidsraad: tegelijk utopie en noodzaak; Samenstelling en besluitvorming in de Veiligheidsraad van de Verenigde Naties', *Jura Falconis* (38) 2002-2, also available at <<http://www.law.kuleuven.ac.be/jura/38n2/ryngaert.htm>>, p. 4.

<sup>10</sup> White 2004, p. 645-646.

<sup>11</sup> N.D. White, *Keeping the peace: the United Nations and the maintenance of international peace and security*, Manchester: Manchester University Press 1993, p. 33.

<sup>12</sup> M. Bertrand, *The United Nations: past, present and future*, The Hague: Kluwer Law International 1997, p. 117.



In 1998 the situation became even more serious with the rise of the Kosovo Liberation Army (UçK) as a significant military factor.<sup>13</sup>

In reaction to these events, the Security Council issued a resolution urging for a political settlement by the time of March 1998, also referring to the Security Council's Chapter VII authority in this matter for the first time.<sup>14</sup> This resolution was followed by the G8<sup>15</sup> demanding the Serb leadership to stop the violence against the ethnic Albanian population in Kosovo under a threat of NATO<sup>16</sup> taking military action. In September 1998 the Security Council gathered again and adopted resolution 1199, in which the Council demanded both parties to observe a ceasefire as well as to improve the humanitarian situation. The resolution however did not authorize any enforcement measures, neither under Article 42, nor under Article 53 of the UN Charter.<sup>17</sup> Instead, in resolution 1199 the Security Council decided that further action and additional measures to maintain or restore peace and stability in the region had to be considered in case the concrete measures demanded in resolution 1199 and the previous resolution on the matter, resolution 1160, would not be taken.<sup>18</sup>

The day after adopting resolution 1199 NATO, acting without Security Council authorization, threatened the Yugoslav federation with the use of force. Unfortunately, the situation in Kosovo did not improve as a result of NATO's threat and therefore NATO reacted by issuing activation orders authorizing air strikes against the Yugoslav federation to commence in four days' time. Final-hour negotiations<sup>19</sup> however led to an agreement<sup>20</sup> which was endorsed in Security Council resolution 1203.<sup>21</sup> Ultimately settlement failed and new negotiations were started at Rambouillet, which resulted in a proposal for a peace agreement. This proposal appeared to be acceptable for the Kosovar Albanian leadership, but unacceptable for the Serb leadership in Belgrade. The missed

<sup>13</sup> Currie 1998, p. 317-318.

<sup>14</sup> UN Doc. S/RES/1160. According to Article 39 of the UN Charter it is the Security Council who shall determine the existence of any threat to the peace, or act of aggression. The Security Council has absolute discretion with regard to its judgment whether there exists a threat to the peace or an act of aggression, see P.H. Kooijmans and others, *Internationaal Publiekrecht in Vogelvlucht*, Deventer: Kluwer 2000, p. 174.

<sup>15</sup> The G8 is a group of states consisting of the seven largest industrial countries of the world and Russia, see NOS, De G8 en zijn betekenis, available at <[http://www.nos.nl/nosjournaal/dossiers/live8-g8/g8\\_factsheet\\_betekenis.html](http://www.nos.nl/nosjournaal/dossiers/live8-g8/g8_factsheet_betekenis.html)>, last visited October 5<sup>th</sup> 2006.

<sup>16</sup> The North Atlantic Treaty Organization (NATO) is an alliance of 26 countries from North America and Europe, see North Atlantic Treaty Organization, What is NATO?, available at <[www.nato.int](http://www.nato.int)>, last visited October 5<sup>th</sup> 2006.

<sup>17</sup> Under Article 42 of the UN Charter member states can be authorized to use force by the Security Council, under Article 53 regional organizations can be authorized to use force by the Security Council, see also introduction.

<sup>18</sup> UN Doc. S/RES/1199 and Currie 1998, p. 318-320, 323, E. Suy, 'NATO's intervention in the Federal Republic of Yugoslavia', *Leiden Journal of International Law* (13) 2000-1, p. 198 and J. Duursma, 'Justifying NATO's Use of Force in Kosovo?', *Leiden Journal of International Law* (12) 1999-2, p. 288.

<sup>19</sup> The final-hour negotiations were initiated by United States special envoys and NATO's Secretary General, see Currie 1998, p. 320-321.

<sup>20</sup> The agreement was reached between the Yugoslav federation and the Organization for Security and Co-operation in Europe on the one hand and NATO on the other hand.

<sup>21</sup> UN Doc. S/RES/1203, see also Suy 2000, p. 200.

opportunity to reach an agreement between the two parties involved in the conflict eventually led to an increase of attacks by Serb forces against the ethnic Albanian population of Kosovo and as a result NATO's patience was at an end: 23 March 1999 it issued activation orders authorizing the commencement of air strikes (Operation Allied Force). These air strikes continued for seventy-nine consecutive days and ultimately made the Serb leadership bow for NATO demands.<sup>22</sup>

### *1.1.1 NATO's military intervention in Kosovo: A justifiable intervention*

Of course the Kosovo-crisis arose the question whether NATO's military intervention in Kosovo was legal according to international law, now any authorization by the United Nations Security Council to use force seemed to be absent. There were a number of arguments put forward by supporters of NATO's air campaign in Kosovo.<sup>23</sup>

Firstly, it has been claimed that NATO's intervention was justified based on the Security Council resolutions on the issue. Security Council resolutions 1160, 1199 and 1203 all invoked the Security Council's authority under Chapter VII of the UN Charter and in resolutions 1199 and 1203 the Security Council actually determined that the situation in Kosovo constituted a threat to peace and security in the region under Chapter VII of the Charter.<sup>24</sup> However, to justify the use of force special reference was made to paragraph 16 of resolution 1199, in which the Security Council decided that if the concrete measures demanded in resolution 1199 and in resolution 1160 would not have been taken, further action and additional measures would have to be considered to maintain or restore peace and stability in the region.<sup>25</sup> According to the advocates of this reasoning the additional measures to restore peace and stability in the region, including the possibility to use force, eventually became necessary: Although first the Security Council repeatedly had insisted to end hostilities in Kosovo<sup>26</sup>, there still were grave violations of human rights and international humanitarian law taking place in Kosovo by the time of adopting resolution 1203<sup>27</sup>, and even the settlement of the final-hour agreement, endorsed in resolution 1203, failed.<sup>28</sup> However, neither in resolution 1199, nor in the previous resolution 1160, nor in the latter resolution 1203 there was an explicit Security Council authorization for the use of force.<sup>29</sup>

<sup>22</sup> Currie 1998, p. 320-322, see also Duursma 1999, p. 288 and Suy 2000, p. 199-203.

<sup>23</sup> When discussing the Kosovo-case it has to be taken in mind again that especially since the end of the Cold War the willingness to invoke humanitarian concerns for the use of force seems to be greater, supra note 5. By far the most favoured form of humanitarian intervention is a multilateral intervention under United Nations auspices, relying upon an extended understanding of the Security Council's Chapter VII powers and a liberal reading of what constitutes a threat to international peace and security, see Currie 1998, p. 311.

<sup>24</sup> UN Docs S/RES/1160, S/RES/1199 and S/RES/1203, see also Currie 1998, p. 323 and Suy 2000, p. 198.

<sup>25</sup> Suy 2000, p. 198-199.

<sup>26</sup> UN Docs S/RES/1160 and S/RES/1199.

<sup>27</sup> Suy 2000, p. 200.

<sup>28</sup> Currie 1998, p. 321-322.

<sup>29</sup> UN Docs S/RES/1160, S/RES/1199 and S/RES/1203, see also Kooijmans 2000, p. 141.

The absence of this explicit authorization for the use of force leads us to the discussion of the next argument claiming the legality of the use of force by NATO: implicit Security Council authorization. NATO leaders have been claiming that although NATO action was not explicitly authorized by any Security Council resolution, it also was not explicitly prohibited by such a resolution. Considering the fact that during the nineties the Security Council had relied progressively on NATO as its enforcement arm in the Balkan, NATO's military intervention in Kosovo was a logical evolution of a role which NATO already exercised with approval of the Security Council. Therefore, NATO leaders declared that the military intervention was authorized implicitly by the Security Council and, as a result hereof, legal under international law.<sup>30</sup>

The third and perhaps main justification for NATO's military intervention in Kosovo relied on the necessity of NATO intervening military to stop the grave violations of human rights, the grave violations of humanitarian law and the ethnic cleansing of the ethnic Albanian population in Kosovo.<sup>31</sup> Supporters of NATO's intervention argued that a military intervention was justified as an exceptional measure to prevent an overwhelming human catastrophe, although not authorized by the Security Council.<sup>32</sup> The more so as the Security Council did not seem to be able to carry out its responsibility for maintaining peace and security as a result of unreasonable threats to veto any resolution authorizing the use of force by Russia and China.<sup>33</sup> Besides, one had to take into account, as M. Van der Stoel argued, that 'keeping deposited with incontrovertible indisputable systematic violations of human rights of the most serious kind would be a denial of the main purposes of the United Nations: protecting human rights'.<sup>34</sup> These considerations should lead, according to supporters of NATO's intervention, to the conclusion that a unilateral<sup>35</sup> forcible intervention on humanitarian grounds, such as NATO's in Kosovo in 1999, has to be regarded as legal under international law.<sup>36</sup>

Finally, in continuation of the previous argument, the possibility of a new norm of customary law emerging from NATO's intervention has to be discussed. It has

<sup>30</sup> R. Thakur, *The United Nations, peace and security: from collective security to the responsibility to protect*, Cambridge: Cambridge University Press 2006, p. 207, in addition NATO leaders claimed that NATO's resort to force was a critical comment on the institutional hurdles to effective and timely action by the United Nations.

<sup>31</sup> Duursma 1999, p. 289, see also K. Naumann, 'Global Insights – NATO, Kosovo and military intervention', *Global governance: a review of multilateralism and international organizations* (8) 2002-1, p. 14.

<sup>32</sup> Duursma 1999, p. 289, this was the United Kingdom's consideration.

<sup>33</sup> Currie 1998, p. 323, Russia and China, in a move disquietingly reminiscent of the Cold War era, had clearly signalled their intent to veto any resolution authorizing the use of force.

<sup>34</sup> M. van der Stoel, *Conflictpreventie: de lessen van Kosovo en Macedonië* (inaugural speech Catholic University Brabant, Tilburg), Tilburg: Catholic University Brabant 2002, p. 14, see also Currie 1998, p. 326 and Thakur 2006, p. 207, according to Van der Stoel such attitude would incite the danger other regimes follow the same policy of violating human rights and international humanitarian law gravely.

<sup>35</sup> Unilateralism means that action is being taken outside the appropriate structures of the international organization, De Hoogh 2003, p. 27.

<sup>36</sup> Van der Stoel 2002, p. 14-15 and Currie 1998, p. 326, 331.

been said that NATO's intervention could have set the precedent for this. NATO represents a significant cross-section of the international community and therefore NATO's intervention in Kosovo in 1999 should be considered as a significant state practice.<sup>37</sup> As there also seemed to have been sufficient 'opinio iuris' for a unilateral forcible intervention on humanitarian grounds at that time, one should be very hesitant in calling NATO's intervention illegal.<sup>38</sup> Of course, only future instances of state practice can be the key to judge on the legality of NATO's military intervention in Kosovo in retrospect: was NATO making or breaking international law?<sup>39</sup>

### *1.1.2 NATO's military intervention in Kosovo: A breach of international law*

Contrary to all the arguments in favour of the legality of NATO's air campaign in Kosovo in 1999, the arguments below have been used to claim the illegality of NATO's military intervention.

The first argument for claiming the illegality of NATO's military intervention is simply the fact that any Security Council authorization under Article 42 or Article 53 of the Charter to use force was absent.<sup>40</sup> Although resolutions 1160, 1199 and 1203 sometimes have been invoked as resolutions authorizing the use of force in case the Yugoslav federation did not comply with its obligations<sup>41</sup>, the threat with a veto by Russia and China<sup>42</sup> clearly indicated that there was no intent by the Security Council to authorize the use of force. This implies that there was no sufficient majority in the Security Council that supported the view that the use of force was allowed under existing Security Council resolutions, or otherwise would feel for an explicit authorization for the use of force in a new Security Council resolution.<sup>43</sup> It was therefore plainly a choice of the Security Council not to authorize the use of force against the Yugoslav federation.<sup>44</sup> A direct consequence hereof is that NATO violated its own Treaty, as Article I of this Treaty states that NATO member states must 'refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations', and in addition did set a dangerous precedent.<sup>45</sup> In fact, military intervention without Security Council resolution can play into the hands of the

<sup>37</sup> Currie 1998, p. 323-330.

<sup>38</sup> Case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), *ICJ Reports*, 1985, p. 29, par. 27: for customary law emerging under international law, it is required that state practice becomes custom. In addition there should be general acceptance of such custom laying down a legal duty ('opinio iuris').

<sup>39</sup> Currie 1998, p. 323-330.

<sup>40</sup> Supra note 17.

<sup>41</sup> Paragraph 1.1.1.

<sup>42</sup> Supra note 33.

<sup>43</sup> Article 27, UN Charter, see also Van Genugten and others 2006, p. 125 and B.T. van Ginkel and R.A. Wessel, 'Collectieve veiligheid vs. unilateralisme: de toekomst van de VN-Veiligheidsraad', in: *Jaarboek Vrede en Veiligheid: bewapening, vredesbeweging en het Nederlandse veiligheidsbeleid*, Nijmegen: Centrum voor Internationaal Conflict-Analyse & Management, KU Nijmegen 2003, p. 59-60, the authorization to use force only exists in case at least nine out of fifteen Security Council members, including all permanent members, agree on the matter.

<sup>44</sup> Currie 1998, p. 323-324 and Duursma 1999, p. 295-295 and Suy 2000, p. 199.

<sup>45</sup> Duursma 1999, p. 288.

dangerous development that states take the opportunity to use NATO's intervention in Kosovo for justifying their own military intervention, which in reality is not based on humanitarian grounds, but instead on power politics.<sup>46</sup>

The argument described above seems to weaken the first two arguments in favour of the legality of NATO's intervention in Kosovo at one go. In fact the Security Council itself has emphasized in the preamble of resolution 1203 that 'under the Charter of the United Nations, primary responsibility for the maintenance of peace and security is conferred on the Security Council'. This reference was not contained in the previous resolutions on the matter and therefore, in the light of NATO preparing for military action, should likely be understood as a criticism of any unilateral military action which undermines the system of collective security.<sup>47</sup>

However, what about the claim NATO's unilateral humanitarian intervention was necessary to stop the grave violations of human rights and international humanitarian law? The legal concept of humanitarian intervention requires that the use of force must be proportionate to the violations of the rights defended and cease as soon as these violations end. Therefore, the necessity of military action to obtain the required results is of major importance for the legality of NATO's use of force in Kosovo. In this sense the fact that NATO could have known that its use of force would increase the deportations and the refugee crisis and the fact that the air strikes also brought along an extra number of casualties and terrorist attacks has for opponents of NATO's intervention been a reason to believe that even NATO's main argument for taking military action will not hold: Its air strikes did not pass the test of necessity and proportionality.<sup>48</sup> Moreover, this argument would make the discussion whether NATO's use of force was authorized by the Security Council superfluous in advance, as the use of force under international law has to meet both requirements of necessity and proportionality at any time.<sup>49</sup>

Finally, is there a possibility of a new norm of customary law emerging from NATO's intervention?<sup>50</sup> Some have been arguing that even in the wake of the Cold War and the rise of humanitarian concerns weakening the unconditional principle of non-intervention, no state practice in support of a right of unilateral forcible humanitarian intervention existed. Of course they agree that there were some ambiguous situations concerning the legality of a unilateral humanitarian

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<sup>46</sup> Van der Stoel 2002, p. 15, see also Duursma 1999, p. 294-295.

<sup>47</sup> Suy 2000, p. 200 and Duursma 1999, p. 289.

<sup>48</sup> Van Genugten and others 2006, p. 164 and Duursma 1999, p. 292.

<sup>49</sup> The assumption is that in case the Security Council authorizes the use of force, the use of force will *ipso facto* be proportionate and necessary, see Van Genugten, 'answer to the question whether the use of force, authorized under Article 42 or 51 of the UN Charter, has to be proportional and necessary' (e-mail correspondence), October 6<sup>th</sup> 2006. This implies that the use of force under international law has to be necessary and proportionate at any time.

<sup>50</sup> However, more arguments could be put forward to claim the illegality of NATO's military intervention in Kosovo, see Duursma 1999, p. 291.

intervention<sup>51</sup>, but in general they claim they have been viewed as illegal by many states and observers unless they were sanctioned by the United Nations or justified as legitimate self-defence.<sup>52</sup> Other commentators instead have been arguing that there is no question of a rule of customary international law which can justify an intervention outside the UN Charter, and that it seems sensible to appeal to the principle of necessity in these cases. According to this second group, the principle of necessity can be invoked by states in cases where human rights and international humanitarian law are violated so gravely that there is a need and a right to intervene when the official United Nations system is paralysed.<sup>53</sup> In spite of a new norm of customary law emerging from NATO's intervention should this be the case, opponents of NATO's air campaign however have been claiming that because NATO's use of force did not meet the principles of necessity and proportionality, there still is no reason justifying NATO's resort to force in Kosovo.

### *1.1.3 Loopholes in collective security: The unreasonable use of the veto power leading to unilateral use of force*

In 1945 a system of collective security was laid down in the UN Charter and, as a major part of this system, the Security Council was made the monopolist in when and to what extent force could be used.<sup>54</sup> However, the humanitarian intervention by NATO in Kosovo has shown that the system of collective security does not always work properly. In previous paragraphs I have tried to explain that NATO's military actions in Kosovo in 1999 were not explicitly authorized by the Security Council under Article 42 or 53 of the UN Charter and that it is at least debatable whether there was a right to act unilaterally on humanitarian grounds. This leads to the unavoidable question: How could it happen that NATO decided to use force unilaterally, although the use of force was not explicitly authorized by the Security Council?

The Security Council for sure engaged actively in the matter, especially since resolution 1160 was adopted in March 1998. The Security Council more than once expressed its concerns and tried to accomplish a political settlement between the Kosovar leadership and the Yugoslav federation. Above all the use of force on the side of the Yugoslav federation and the Kosovo Liberation Army should stop, which eventually was demanded in resolution 1199. However, as mentioned, neither in resolution 1160, nor resolutions 1199 and 1203 the Security Council

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<sup>51</sup> For instance the military intervention by ECOWAS in Liberia (1990), see Currie 1998, p. 313.

<sup>52</sup> Currie 1998, p. 309, 316-317 and Naumann 2002, p. 13. Currie refers with regard to this to authors like J-P. L. Fonteyne and R. Higgins.

<sup>53</sup> Van Genugten and others 2006, p. 159-160. Van Genugten refers with regard to this to the author G. Molier. The World Summit Agreement 2005 strengthens the development of a new international norm regarding humanitarian protection by describing the 'responsibility to protect' in terms of UN action and at the same time seems to strengthen the case for unilateral action in the absence of UN action in case of extreme human rights abuses, see A.L. Bannon, 'The responsibility to protect: The UN World Summit and the question of unilateralism', *Yale Law Journal* (115) 2006-5, p. 1157.

<sup>54</sup> *Supra* note 3.

authorized the use of force.<sup>55</sup> Nevertheless, there were grave violations of human rights and international humanitarian law taking place in Kosovo, which asked for an adequate reaction by the Security Council in order to stop them. Unfortunately enough the Security Council could not reach agreement on the use of force as a result of unreasonable threats of Russia and China to veto any such authorization. Those two countries, in a move disquietingly reminiscent of the paralysing antagonism during the Cold War, had clearly signalled their intent to veto any resolution authorizing the use of force.<sup>56</sup> Therefore, the unreasonable use of the right to veto clearly prevented the Security Council from acting adequately in a case where such attitude was required. As a consequence NATO had two options of choice. The first option of choice was to intervene militarily and try to stop grave violations of human rights, although outside the structure of the United Nations and at the risk of violating international law. The second option of choice was to watch from the sideline how many innocent people were chased away, tortured and killed. Despite the absence of a clear legal basis NATO chose for the first option, which is defensible and understandable.

Nevertheless, NATO would probably not have acted unilaterally if the Security Council had dealt with the situation purely on fair grounds, instead of being paralysed by the unreasonable use of the veto power by two of its permanent members.<sup>57</sup> It is because of the latter NATO was encouraged to take over control over the matter and, in absence of any authorization to use force, to intervene unilaterally on humanitarian grounds. As already mentioned, many have defended NATO's attitude as being a necessity to stop the human tragedy in Kosovo. It consequently should be emphasized that the heart of the problem has not been NATO deciding to intervene militarily outside the United Nations' structures. Instead, the heart of the problem is that the Security Council could not fulfil its duty to act in time of a threat to international peace and security, mainly due to the unreasonable use of the veto power by some of its members. It was paralysed in a situation which asked for an adequate reaction and consequently NATO rightly decided to use force unilaterally to stop the human tragedy. Anyhow, such situations should be prevented as much as possible, because the unilateral use of force in the international spheres constitutes a threat to the system of collective security in general and to the Security Council's position in particular. Paragraph 1.3 will discuss why.

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<sup>55</sup> UN Docs S/RES/1160, S/RES/1199 and S/RES/1203.

<sup>56</sup> *Supra* note 33.

<sup>57</sup> If the Security Council would have dealt with the situation on fair grounds, this probably would have resulted in an authorization to use force in order to stop the human rights abuses.

## 1.2 Operation Iraqi Freedom (2003)

In 1991, after the first Persian Gulf War, the Security Council demanded Iraq to disarm in resolution 687. Serious consequences could follow if Iraq would not comply with its obligations. However, as years passed by it became obvious that Iraq did not intend to comply with its obligations under resolution 687. As a result the United States and the United Kingdom decided to take measures by bombing military targets in Iraq, although in retrospect these measures were not very effective. Again years passed by without the situation altering, until 2003. A while after the terrorist bombings in the United States in 2001, Iraq became a hot topic again, at least for the United States.<sup>58</sup> The true reasons for this leave room for speculation. Some say the United States' economic interests underlay the renewed attention for Iraq<sup>59</sup>, others say that after non-compliance of Iraq with its obligations under resolution 687, the United States' patience was at an end, others state that the United States after 9-11 felt a need to personify the 'enemy' since there still was no trace of Usama bin Laden at that time.<sup>60</sup> All reasons seem to be plausible, the true reason(s) perhaps never will be revealed. However, two things are for sure: At the time the United States aimed their visor at Iraq, there was little evidence for Iraq producing or planning to use new weapons of mass destruction. In addition to this, little evidence could be found for Iraq taking part in the terrorist bombings of 9-11.<sup>61</sup> Anyhow, in spite of the fact that the other three permanent members of the Security Council did not feel much for military action against Iraq at that moment, the United States, together with there ally the United Kingdom, got ready for such action near the end of 2002.<sup>62</sup>

In the same period of time, on November 8<sup>th</sup> 2002, resolution 1441<sup>63</sup> was adopted unanimously by the Security Council of the United Nations. Resolution 1441 was adopted under Chapter VII of the UN Charter and recognized that non-compliance with this resolution by Iraq had to be considered as a threat to international peace and security. Main purpose of resolution 1441 was the disarmament of Iraq, after the Council concluded that Iraq was in material breach of its obligations with relation to the weapons inspections in Iraq and its disarmament. Hereto the Security Council decided to start a very strict weapons inspection regime and offered Iraq one final opportunity to comply with its disarmament obligations under the relevant resolutions of the Council. Resolution 1441 decided that if Iraq would hinder the weapons inspectors and/or would not comply with its disarmament obligations, the Security Council had to be informed

<sup>58</sup> N. Schrijver, 'Irak en de Veiligheidsraad: is een oorlog voorkomen?', *Nederlandsch Juristenblad* (77) 2002-42, p. 2094.

<sup>59</sup> P. Custers, 'Feigned and true reasons for the war of aggression against Saddam Hussain's Iraq', *Anti-militaristic magazine AMOK*, June 2003, available at <[www.petercusters.nl/Campaigning&style\\_id](http://www.petercusters.nl/Campaigning&style_id)>, p. 3.

<sup>60</sup> Schrijver 2002, p. 2094.

<sup>61</sup> Schrijver 2002, p. 2094, Custers 2003, p. 2 and C. Gray, *International Law and the use of force*, Oxford: Oxford University Press 2004, p. 180-181.

<sup>62</sup> Schrijver 2002, p. 2094.

<sup>63</sup> UN Doc. S/RES/1441.



immediately. Hereafter the Council would immediately convene to consider the situation. Important to notice is the fact that Security Council resolution 1441 made explicit reference to two previous Security Council resolutions: Resolution 678 (1990) and resolution 687 (1991).<sup>64</sup>

Resolution 678 authorized Member-States to use force to uphold and implement resolution 660 (1990)<sup>65</sup>, which condemned the Iraqi invasion in Kuwait and demanded Iraq to withdraw its forces from Kuwait, and to restore international peace and security in the area. After allied forces indeed military intervened in the conflict between Iraq and Kuwait, resolution 687 was adopted by the Security Council.<sup>66</sup> In this resolution the Security Council imposed a series of obligations on Iraq, including the obligation to give up all nuclear, chemical, and biological weapons programmes and weapons stockpiles, precursors and missiles with a range over 150 kilometres.<sup>67</sup> These obligations enabled the Security Council to establish a formal ceasefire between Iraq and Kuwait and its allies.<sup>68</sup>

After the adoption of resolution 1441 discussions on how to interpret resolution 1441 started. Did resolution 1441, in combination with previous relevant Security Council resolutions such as resolution 678 and resolution 687, allow the use of force against Iraq if Iraq would not take its final opportunity under resolution 1441? In the viewpoint of the United States and the United Kingdom it did.<sup>69</sup>

### *1.2.1 Interpreting Resolution 1441: The American view*

The letter that the United States addressed to the Security Council on March 20 2003, the day the so-called 'coalition of the willing' started the war against Iraq, describes best why the United States claimed that the use of force was allowed under the existing resolutions 678, 687 and 1441. In their letter the United States stressed that resolution 687 imposed a number of obligations on Iraq in order to be able to establish a ceasefire. These conditions also contained the obligation to disarm extensively. According to the United States it had long been recognized and understood that if Iraq was in material breach of its obligations under resolution 687, the basis for the ceasefire would be removed and the authority to use force under resolution 678 came fully into force again. The United States founded this argument by claiming that such reasoning 'had been the basis for coalition use of force in the past and had been accepted by the Council, for example, by the Secretary-General's public announcement that

<sup>64</sup> UN Doc. S/RES/1441, see also Schrijver 2002, p. 2094-2095 and De Hoogh 2003 p. 7, 20.

<sup>65</sup> UN Doc. S/RES/660.

<sup>66</sup> UN Docs S/RES/678 and S/RES/687, see also De Hoogh 2003, p. 12-13 and R. Wedgwood, 'Agora: Future implications of the Iraq conflict – The fall of Saddam Hussein: Security Council mandates and pre-emptive self-defence', *The American Journal of International Law* (97) 2003-3, p. 3.

<sup>67</sup> Wedgwood 2003, p. 3.

<sup>68</sup> UN Docs S/RES/678 and S/RES/687, see also De Hoogh 2003, p. 12-13 and Wedgwood, p. 3.

<sup>69</sup> De Hoogh 2003, p. 12-13, J.P.J. Wielink and M. Zieck, 'Veiligheidsraad-resolutie 1441 en de vraag naar de rechtmatigheid van unilateraal militair geweld tegen Irak', *Nederlandsch Juristenblad* (77) 2002-45/46, p. 2240-2241, Wedgwood 2003, p. 4.

coalition forces had received a mandate for the Council to use force according to resolution 678'.<sup>70</sup>

Then the United States went on reasoning by stressing that resolution 1441 affirmed that Iraq continued to be in material breach of its disarmament obligations under resolution 687 and that the Security Council, acting under Chapter VII, repeatedly warned Iraq for serious consequences as a result of its continuous violations of its obligations. Resolution 1441 offered Iraq a final opportunity to comply, i.e. to present a currently accurate, full and complete declaration of all aspects of its weapons of mass destruction programmes, but also stated that non compliance by Iraq with resolution 1441 would constitute a further material breach.

According to the United States Iraq did not take its final opportunity offered in resolution 1441 and clearly committed additional violations. Therefore, the United States concluded that the basis for the ceasefire had been removed and the use of force was authorized under resolution 678.<sup>71</sup>

### *1.2.2 Interpreting Resolution 1441: No Security Council authorization to use force*

As became clear in paragraph 1.2.1, the United States claimed the use of force was allowed under existing Security Council resolutions 1441, 678 and 687. However, did these resolutions offer a sufficient legal basis for the attack by the United States on Iraq, launched March 20<sup>th</sup> 2003? The American interpretation can be criticized for several reasons and the reference made by the United States to existing resolutions 1441, 678 and 687 in order to justify the use of force against Iraq without any further authorization by the Security Council, appears to be untenable.<sup>72</sup>

First of all, the main purposes for which the Security Council authorized the use of force against Iraq in the early nineties already had been achieved by the time the United States aimed at attacking Iraq in 2003. Those purposes were the implementation of Security Council resolution 660 (withdrawal of Iraqi troops from Kuwait) as well as restoring peace and security in the area (which was achieved by the withdrawal of the Iraqi troops!).<sup>73</sup>

Furthermore, it is important to notice that the conditions for a ceasefire between Iraq and Kuwait and its allies were not set up as a treaty between Iraq and all the

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<sup>70</sup> S/2003/351: 'Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, see also De Hoogh 2003, p. 12-13.

<sup>71</sup> S/2003/351: 'Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, see also De Hoogh 2003, p. 12-13.

<sup>72</sup> Schrijver 2002, p. 2094.

<sup>73</sup> De Hoogh 2003, p. 14-15.

allied states separately, but as a Security Council resolution.<sup>74</sup> This implies that only the Security Council should determine whether Iraq was in material breach with its obligations under resolution 687. Analogy with a bilateral treaty between Iraq and the Security Council would therefore be defensible here: Iraq has its obligations towards the Security Council under resolution 687, instead of towards separate allied states like the United States and the United Kingdom. At the time the Security Council determined that Iraq failed to comply, it therefore had to be the Security Council deciding whether the ceasefire would end to exist. Such a decision should not be taken by individual member states, like the United States did on March 20<sup>th</sup> 2003.<sup>75</sup> The mere fact that one or more of the Security Council's members considered the answer by the Security Council on Iraq's material breach of its obligations as not sufficient, did not justify those members to use force against Iraq on their own account.<sup>76</sup>

Finally, statements made immediately after adopting resolution 1441 by government representatives of Security Council members also point in the direction that the United States were not authorized to use force against Iraq on the basis of these resolutions. All these statements pointed to the fact that resolution 1441 contained no authorization for the use of force against Iraq. Even the United States, in contrast to what they declared in their letter to the President of the Security Council d.d. March 20<sup>th</sup> 2003, declared the resolution contained no 'automaticity' with respect to the use of force.<sup>77</sup> Therefore, there could be no doubt that a new Security Council session was required when Iraq was in material breach of its obligations under resolution 1441. A new resolution then could authorize the use of force.<sup>78</sup> Indeed, the words of paragraph 12 of resolution 1441 seem to be very clear: the Security Council would convene immediately if Iraq did not comply with its obligations to disarm or would hinder the weapons inspectors. The Council then would consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security. Here no trace can be found of any authorization of the use of force without any further Security Council resolution.<sup>79</sup>

In addition to all previous arguments one should take notice of the fact that the United States together with Spain and the United Kingdom introduced a draft resolution to the Security Council<sup>80</sup> in which was decided that Iraq had failed to take its final opportunity to comply, afforded to it by resolution 1441. According

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<sup>74</sup> UN Doc. S/RES/687.

<sup>75</sup> De Hoogh 2003, p. 17-18 and Schrijver 2002, p. 2094.

<sup>76</sup> Wielink and Zieck 2002, p. 2241.

<sup>77</sup> In addition the United States declared that 'if the Security Council fails to act decisively in the event of further Iraqi violations, this resolution does not constrain any Member State from acting to defend itself against the threat posed by Iraq or to enforce relevant United Nations resolutions and protect world peace and security.'

<sup>78</sup> De Hoogh 2003, p. 20-21 and Wielink and Zieck 2002, p. 2241.

<sup>79</sup> UN Doc. S/RES/1441, see also Schrijver 2002, p. 2095.

<sup>80</sup> S/2003/215: 'Spain, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution'.

to the draft resolution this meant the ceasefire of resolution 687 would end to exist. There is no doubt that the text of this draft resolution implicated the possibility of using force against Iraq.<sup>81</sup> The simple fact that the United States introduced this draft resolution to the Security Council could be an indication that even the United States were not convinced of the reasoning which they ultimately used to justify the use of force.<sup>82</sup> Instead of this, it seems that the United States also believed an extra Security Council resolution was required to justify the use of force against Iraq.<sup>83</sup>

### *1.2.3 Loopholes in collective security: Permanent members having the power to act unilaterally due to the veto power*

After having discussed Kosovo earlier, Iraq 2003 again has demonstrated that there can emerge situations in which the Security Council is confronted with its weaknesses when the use of force is at stake. The United States attacked Iraq without any Security Council authorization to use force and therefore violated international law.<sup>84</sup> How could this happen?

Analysing the run-up to the actual use of force by the United States against Iraq, one has to admit that the system of collective security initially worked quite well. The Security Council functioned as the central forum for negotiation on how to cope with the situation and in addition with the question whether and when force could be used in case Iraq did not comply with its obligations under existing Security Council resolutions. Nevertheless, in the end the Security Council could not reach agreement. Perhaps a pity, but also not very unusual as the Security Council only can adopt a resolution in case there is a sufficient majority supporting it.<sup>85</sup> As far as the Iraq-crisis is concerned the outcome of the procedure meant that the use of force was not allowed as there was no sufficient majority in the Security Council that supported the view the use of force against Iraq was allowed under existing Security Council resolutions or otherwise would feel for an explicit authorization for the use of force in a new Security Council resolution. The resemblance with the Kosovo-crisis is obvious here.<sup>86</sup>

<sup>81</sup> Van Ginkel and Wessel 2003, p. 51.

<sup>82</sup> Supra notes 70 and 71.

<sup>83</sup> Supra note 80.

<sup>84</sup> With regard to this, it is appropriate to mention that the military invasion by the United States in Iraq can not be justified with an appeal to the right of self-defence under Article 51 of the UN Charter. Article 51 of the UN Charter states that: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations'. International law accepts that the notion 'armed attack' encompasses an actual armed attack and, to certain extent, an immediate threat of such an armed attack (pre-emptive self-defence). However, actions against threats which could occur somewhere in the future (preventive self-defence) can not be justified with an appeal to Article 51 of the UN Charter. See Van Genugten and others 2006, p. 133. It has already been mentioned that in the case of Iraq there was no armed attack or an immediate threat with such an attack. See supra note 61. See also infra note 91.

<sup>85</sup> Van Ginkel and Wessel 2003, p. 59-60, 66, see also supra note 43.

<sup>86</sup> Supra notes 43 and 44.

In spite of the fact that the use of force was not allowed by the Security Council, under leadership of the United States, some countries decided to use force against Iraq anyway. This attitude confronted the Security Council, just like the case of NATO's military intervention in Kosovo, again with the phenomenon of unilateralism.<sup>87</sup> One perhaps supposes that in a system of collective security in such case immediately Security Council mechanisms come into operation which would call the United States to order. However, at the moment the Security Council was established the great powers of the time, under which the United States, insisted that no Security Council resolutions could be adopted not only against the will of one of them, but even against one of them. Therefore, the veto power was a condition made by those great powers for participating in the United Nations.<sup>88</sup> As a consequence a situation has emerged in which the great powers because of their right to veto on the one hand are forced into intensive negotiations,<sup>89</sup> but on the other hand also have the power to use force unilaterally with impunity in case no agreement on the authorization of the use of force can be reached between them. Most and fore all because they have the power to veto any Security Council decision calling them to order.<sup>90</sup> The United States therefore were able to attack Iraq without risking countermeasures by the Security Council. Moreover one should be aware of the fact that in the post-Cold War era there is no viable countervailing power to cajole the United States into a more multilateral approach. The United States emerged as the world's single superpower and appropriated itself the right to attack anywhere, anytime and anyone that in its estimation poses a potential threat to United States' national security.<sup>91</sup> Putzel putted it aptly by saying that 'the invasion of Iraq established its commitment to act pre-emptively, against the United Nations and in disdain for international law. It was a declaration of empire.'<sup>92</sup>

All this explains how it could happen that the United States, together with its allies, decided to start a military campaign against Iraq, despite not being authorized by the Security Council to use force. The next paragraph, it is

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<sup>87</sup> Supra note 35, Van Genugten and others p. 126-127 and Van Ginkel and Wessel 2003, p. 65.

<sup>88</sup> Ryngaert 2002, p. 2, see also paragraph 2.1, Simpson, *Great Powers and Outlaw States*, Cambridge: Cambridge University Press 2004, p. 192 and White 1993, p. 11.

<sup>89</sup> Ryngaert 2002, p. 24.

<sup>90</sup> See also Simpson 2004, p. 188: 'The P5 enjoy complete de facto immunity from the enforcement jurisdiction of the Security Council while other states are subject to increasingly intrusive doctrines of intervention'. On the question whether it is possible to avoid the position whereby a permanent member violates UN principles, thereby causing a threat to or breach of the peace itself, and then by the use of the veto prevents Council action or condemnation, White states that the answer must be negative. According to White, here the core of the veto power, which is to prevent enforcement action being taken against a permanent member (the negative facet of the veto), is represented, see White 2004, p. 668.

<sup>91</sup> J. Putzel, 'Cracks in the US empire: unilateralism, the 'war on terror' and the developing world', *Journal of International Development* (18) 2006-1, p. 70-72, see also The White House, The National Security Strategy of the United States of America, available at <<http://www.whitehouse.gov/nsc/nss.html>>, last visited October 16<sup>th</sup> 2006, in addition the National Security Strategy states that although the US will 'strive to enlist the support of the international community we will not hesitate to act alone, if necessary, to exercise our right of self-defence by acting pre-emptively against such terrorists, to prevent them doing harm against our people and our country.' See also supra note 84.

<sup>92</sup> Putzel 2006, p. 81.

mentioned earlier, now will deal with the question why the unilateral use of force constitutes a threat for the system of collective security in general and the position of the Security Council in particular.

### 1.3 Unilateralism: A threat for collective security

The similarities between the Kosovo-crisis and the Iraq-crisis are evident. Both cases demonstrate that the system of collective security still is very much alive. The United Nations Security Council functioned during the Kosovo-crisis as well as the Iraq-crisis as the central forum for negotiation and discussions on whether and when force should be used were mainly held here.<sup>93</sup> Not a bit it were events in which states passed over the Security Council and decided to use force without consulting all Security Council members.<sup>94</sup> However, in the end the negotiations and consultations in the Security Council did not result in any authorization to use force, which at least in Iraq made the military intervention illegal under international law.<sup>95</sup> Yet in both cases states decided to intervene militarily. Such use of force has been taken outside the structures of the United Nations and therefore has to be marked as unilateral use of force.<sup>96</sup>

The Security Council has to deal with this phenomenon as it is likely to lead to an increase of very serious situations not being considered as a threat to international peace and security and an increase of sanctions being imposed by individual states, which makes such sanctions ineffective in advance. Furthermore, military actions probably will only be carried out by powerful states, without having the consent of the appropriate body, the Security Council. Consequently, collective action will be replaced by individual action and states striving for their own will and good will be the norm instead of the exception.<sup>97</sup> Besides, unilateralism will also be a danger to the current definition of self-defence. States will claim, to justify what is really unilateral use of force, that they used force in self-defence at occasions where there in fact was no armed attack or even an imminent threat of such an attack.<sup>98</sup> Therefore, if force will be used unilaterally more often, the more it will threaten the system of collective security in general and the Security Council's central position in particular.<sup>99</sup>

However, unilateralism may be a threat to the system of collective security of the United Nations, in recent times it can not be rejected without a blow either. Firstly, one could think of situations in which grave violations of humanitarian law

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<sup>93</sup> Paragraphs 1.1.3 and 1.2.3.

<sup>94</sup> Van Ginkel and Wessel 2003, p. 59.

<sup>95</sup> The fact is the United States could not justify their use of force with an appeal to self-defence under Article 51 of the UN Charter, see supra note 84.

<sup>96</sup> Supra note 35.

<sup>97</sup> De Hoogh 2003, p. 26-27.

<sup>98</sup> Van Ginkel and Wessel 2003, p. 62-64.

<sup>99</sup> Supra note 3.

and/or human rights can not be prevented or stopped as a result of a Security Council which is paralysed for instance by unreasonable vetoes by one or more of its permanent members.<sup>100</sup> In this sense it may be questionable whether NATO's military intervention was legal under international law, as explained in paragraph 1.1, in any case it raises the question whether unilateral forcible interventions should not be granted an explicit legal status under certain circumstances.<sup>101</sup> It seems to be morally just to intervene military if it is without a doubt that human rights and/or international humanitarian law are violated gravely in a specific area in the world.

The second reason for not rejecting unilateral use of force deals with the fact that in recent times some states feel more threatened than others. The United Nations' Secretary-General Annan putted it aptly by saying that unilateralism can not be simply rejected 'unless we face up squarely to the concerns that make some states feel uniquely vulnerable, since it is those concerns that drive them to take unilateral action'.<sup>102</sup> In this sense one can under certain circumstances perhaps understand the unilateral use of force by for instance the United States, as the United States in particular after 9-11 feel threatened by terrorist attacks. To be more specific: the United States using force under the preventive right of self-defence, which is prohibited under international law and in fact has to be considered as using force unilaterally<sup>103</sup>, can be very well understood in the light of the United States trying to obstruct terrorists from succeeding.<sup>104</sup>

After everything that has been said so far it now is time to search for solutions. Important to mention again is that the unilateral use of force in Kosovo in 1999 and against Iraq in 2003 offer no evidence at all for the deterioration of the United Nations' system of collective security.<sup>105</sup> As a consequence solutions should be aimed at upholding the system of collective security on the one hand and minimizing the unilateral use of force on the other hand. By studying the cases on Kosovo and Iraq this Chapter has demonstrated that mainly the veto power is the breeding ground for the unilateral use of force. On the one side because it can be paralysing the Security Council, which, as the case study on Kosovo has proven, can lead to very uncomfortable situations in cases where a veto is casted on unreasonable grounds. On the other side the veto power brings along that permanent members of the Security Council have the power to use force unilaterally with impunity, because they have the power to veto any Security Council decision calling them to order. The latter especially applies to the

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<sup>100</sup> Supra note 33 and paragraph 1.1.3.

<sup>101</sup> Van der Stoel 2002, p. 15.

<sup>102</sup> Van Ginkel and Wessel 2003, p. 65-66.

<sup>103</sup> Van Genugten and others 2006, p. 133 and De Hoogh 2004, p. 27.

<sup>104</sup> According to the so-called Bush-doctrine the United States is allowed to take military actions against potential threats and future threats, which comes down to the preventive right of self-defence. See Van Ginkel en Wessel 2003, p. 64.

<sup>105</sup> Paragraphs 1.1.3, 1.2.3 and 1.3.

United States as the only remaining superpower in the world.<sup>106</sup> By searching for solutions eventually the research question should be answered: Which are the problems that the United Nations Security Council has to deal with, in its capacity as the body holding the primary responsibility for maintaining and/or restoring international peace and security in the post-Cold War era and how to cope with these problems best?

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<sup>106</sup> Paragraphs 1.1.3 and 1.2.3.



## **2 The veto power as the main breeding ground for unilateralism: The initiatives on veto reform**

In Chapter I it has been said that the unilateral use of force constitutes a threat to the system of collective security in general and the United Nations Security Council in particular, for the reasons put forward there. In addition to this, it has been said that solutions should aim at upholding the system of collective security on the one hand while minimizing the unilateral use of force on the other hand. The case studies on Operation Allied Force and Operation Iraqi Freedom have demonstrated that those solutions should offer an answer to the incapability of the Security Council to act adequately as a result of (threats with) vetoes. Furthermore, they should offer an answer to the power that permanent members possess to act unilaterally with impunity, mainly due to their power to veto Security Council decisions calling them to order.<sup>107</sup> It is the Security Council's political character which can be considered as its Achilles' heal.

Now the time to search for solutions dealing with the threat of unilateralism for collective security has come. In the course of time, especially since the end of the Cold War and at the dawn of the new millennium, the United Nations made many proposals on the reform of the organization. These proposals also related to the Security Council, being the body holding the primary responsibility for maintenance of peace and security in the world, and almost consequently also the veto power of the permanent members of the Security Council. Important to notice is that United Nations' proposals on Security Council reform have not been solely focussed on the decrease of unilateral use of force as such. Instead, there are two other major considerations leading the debate on Security Council reform: The financial, military and diplomatic contribution states make to the United Nations on the one hand and on the other hand the overall 'representativeness' of the Council.<sup>108</sup> Therefore, it can not be ruled out that a certain proposal with regard to Security Council reform could resolve the problem of misrepresentation in the Council, while not resolving the problems related to the phenomenon of unilateralism.

With this in mind, this Chapter will investigate which proposals would have an influence on reducing the negative aspects of the permanent members veto power for the United Nations system of collective security. First, it will discuss the United Nations' initiatives on changing the veto power. Then proposals made by experts will be discussed. It is worth mentioning that the questions of how to reduce the paralysing effect of (unreasonable) vetoes and how to prevent permanent members of the Security Council from using their power to act

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<sup>107</sup> Paragraphs 1.3, 1.1.3 and 1.2.3.

<sup>108</sup> Y.Z. Blum, 'Proposals for UN Security Council reform', *American Journal of International Law* (99) 2005-3, p. 632-633, in addition the Razali reform paper pays special attention to the Security Council's transparency, see Global Policy Forum, Razali Reform Paper, available at <[www.globalpolicy.org/security/reform/raz-497.htm](http://www.globalpolicy.org/security/reform/raz-497.htm)>, last visited October 12<sup>th</sup> 2006.

unilaterally are very much interlinked. Putting it differently, one could argue that unreasonable (threats with) vetoes could prevent the Security Council from acting adequately in situations where it is expected to intervene. Consequently permanent members are encouraged to use force unilaterally. They are able to do so because they possess the power to act unilaterally with impunity as a result of their power to veto Security Council decisions calling them to order. The Kosovo-crisis is a clear example hereof, as the unreasonable threats with vetoes of Russia and China paralysed the Security Council on which NATO, in which the United States have a major influence, reacted by intervening military outside the United Nations' structures.<sup>109</sup> Therefore, it is necessary that the United Nations also pay attention to 'the concerns that make some states feel uniquely vulnerable', as Kofi Annan stated.<sup>110</sup> With respect to this, the United Nations should not only try to alter the veto power to reduce the danger of unilateralism for collective security, but the United Nations should also make the fight against terrorism and weapons of mass destruction a top priority. However, proposals relating to the United Nations combating terrorism and the development of weapons of mass destruction fall outside the scope of this thesis and will not be discussed. This thesis will concentrate on the main breeding ground for the unilateral use of force: The veto power.

## 2.1 The genesis of the veto power

The foundations for the United Nations system have been laid in the wartime councils of the great allied powers at Moscow (1941), Yalta (1944) and in the technical agreements of Dumbarton Oaks (1944). At these, in retrospect very decisive, councils all the smaller states were excluded from participation. At first, only the United States, the USSR and the United Kingdom participated, however at Dumbarton Oaks also China was added.<sup>111</sup> At these conferences the great allied powers decided that an international organization had to be established in which a policing mechanism<sup>112</sup> would have to be the central element of the international organization and in which they were to possess exclusive enforcement capacity over a disarmed majority. Putting it differently: The great allied powers envisaged an international organization under their supreme direction.<sup>113</sup> They justified their special position in this new world organization with several reasons. Firstly, they argued that it was justified to grant more extended rights to those states which had the heaviest obligations. The great powers took a great burden during World War II and as a consequence claimed to have a unique role in preserving peace. Therefore, the great allied powers were of the opinion that they had come to embody the general interest. Secondly, it was argued that substantial sovereign

<sup>109</sup> Paragraph 1.1.

<sup>110</sup> Van Ginkel and Wessel 2003, p. 65-66.

<sup>111</sup> After World War II France was added to the group of 'great allied powers' as a reward for General Charles de Gaulle's opposition to the Axis Powers, see Van Genugten 2006, p. 28.

<sup>112</sup> This policing mechanism eventually became 'the Security Council'.

<sup>113</sup> Simpson 2004, p. 170.

equality could best be preserved by resort to legalised hegemony. In order to secure the sovereignty and existence of small states, great powers claimed it was necessary to establish some sort of a hierarchically based centralized international organization. Finally, the great powers wanted to prevent a new world organization from making the same mistakes as its predecessor, the League of Nations.<sup>114</sup> The League of Nations was known for its fatal dispersal of power and the overall lack of centralized, mandatory authority. The great powers were determined to avoid that the new world organization would have the same characteristics. Therefore, it was a necessity that all great powers participated in it<sup>115</sup> and that the enforcement potential of the organization was sufficient. For these reasons the great allied powers agreed that they were to be the principal players in the new organization.<sup>116</sup>

Accordingly, already during the conferences of Moscow, Yalta and Dumbarton Oaks the great powers clearly emphasized that they would not participate in a world organization if they were not awarded a better position than other members.<sup>117</sup> Because the smaller states still remembered the shortcomings of the League of Nations and realized that the great powers would all have to participate in the new world organization in order to make it effective, in the end a compromise was reached: A Security Council would be established in which five member states<sup>118</sup> were granted a permanent seat as well as the veto power, whilst other member states could take a non-permanent seat.<sup>119</sup> However, especially when it came down to the right to veto, the smaller states were forced hands. Although smaller states made efforts to reduce the impact of the veto power as much as possible, such efforts were obstructed by the great powers. The great powers emphasized that unless the voting provision was accepted, there would be no organization.<sup>120</sup> The permanent members desired to leave no loopholes to prevent their use of veto,<sup>121</sup> due to the fact that they were anxious that majority voting on security issues combined with the strong enforcement powers might lead to a situation in which one or more of them could be obliged to provide military support for an action which it did not support.<sup>122</sup> Additionally, they desired to prevent themselves from being the potential objects of collective

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<sup>114</sup> Simpson 2004, p. 170-171, 175.

<sup>115</sup> In the League of Nations certain key powers were absent from the elite arm of the organization, see Simpson 2004, p. 171.

<sup>116</sup> Simpson 2004, p. 175.

<sup>117</sup> Ryngaert 2002, p. 2, see also Simpson 2004, p. 192.

<sup>118</sup> The five permanent seats were for the United States, the USSR, the United Kingdom, China and France.

<sup>119</sup> Ryngaert 2002, p. 2.

<sup>120</sup> White 1993, p. 11. Because there was a widespread acceptance that the great powers occupied a special position in the international legal order, the majority of smaller states accepted the need for the special voting rights of the great powers in the Charter and therefore focused their energies on softening the effects of the veto, see Simpson 2004, p. 168, 181.

<sup>121</sup> White 1993, p. 10.

<sup>122</sup> Simpson 2004, p. 175, 181, see also Kooijmans 2000, p. 172 and Ryngaert 2002, p. 24.

measures.<sup>123</sup> In this sense the veto power links up with the idea that conflicts between great powers have to be resolved in a non-violent manner.<sup>124</sup>

## 2.2 The practice of the veto power through the years

It has become clear that the (unreasonable) use of vetoes can be a paralysing factor for Security Council decision-making and in addition gives permanent members the power to act unilaterally with impunity. As a result it encourages permanent members of the Security Council to act unilaterally. In order to make the Security Council a more effective body or affect the permanent members' inviolability due to their right to veto, the veto power has to be reconsidered. Although the right to veto is considered by many as a highly undemocratic and anachronistic right<sup>125</sup>, the right to veto will not and hardly can be abolished. Changing the UN Charter in that sense will require the support of all of the permanent members (Article 108 of the UN Charter), however the political reality is that this is very unlikely to happen. Abolishing the right to veto even could encourage states, particularly the United States, to act outside the United Nations and the rules of the UN Charter.<sup>126</sup> As a consequence proposals to abolish the right to veto will not be interesting. Instead of this, solutions with regard to the right to veto should be aimed at defining more specific rules on its use, whilst the right to veto itself will be maintained. Along this line efforts should be made to increase the Security Council's effectiveness and affect the inviolability of permanent members due to their veto power. Consequently, the danger for collective security that states will use force unilaterally should be reduced.

Important to mention is that in the Cold War era there have been made some nuances with regard to the veto power. Already in 1949 the General Assembly dealt with the problem of the so-called 'double veto' by issuing resolution 267 (III)<sup>127</sup>. According to Article 27 of the UN Charter permanent members only have the power to veto substantive matters. As a consequence, the adoption of decisions on procedural matters does not necessarily require the concurring votes of all permanent members.<sup>128</sup> With regard to this, it has to be emphasized that the preliminary question whether or not a question is procedural itself is a non-procedural question. This might lead to a 'double veto': A permanent member of the Security Council can veto any attempt to treat a question as procedural, and then proceed to veto any draft resolution dealing with that question.<sup>129</sup> It was therefore that resolution 267(III) categorized a number of matters either as

<sup>123</sup> White 1993, p. 10, see also Ryngaert 2002, p. 2.

<sup>124</sup> Ryngaert 2002, p. 2.

<sup>125</sup> Van Genugten 2006, p. 126, see also the Report of the High-level Panel on Threats, Challenges and Change, 'A More secure World: Our Shared Responsibility' (UN Doc. A/59/565), 29 November 2004, par. 256, available at <http://www.un.org/secureworld> and infra note 182.

<sup>126</sup> Van Genugten 2006, p. 28-29, 126.

<sup>127</sup> UN Doc. A/RES/267 (III), 14 April 1949.

<sup>128</sup> Article 27(2-3), UN Charter, see also White 1993, p. 10.

<sup>129</sup> P. Malanczuk, *Akehurst's modern introduction to international law*, London: Routledge 2004, p. 374.

'substantive' or as 'procedural'.<sup>130</sup> This division was made to prevent permanent members from regarding a, in reality, procedural matter first to be substantive in order to then veto the matter under Article 27(3) of the UN Charter.<sup>131</sup>

Furthermore, in 1950 the so-called 'Uniting for Peace Resolution'<sup>132</sup> has been deciding that in case the Security Council would be paralysed, the General Assembly could take over its tasks.<sup>133</sup> It stated 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'.<sup>134</sup> The 'Uniting for Peace' procedure can be a useful tool to circumvent a permanent member which vetoes a Security Council decision and is in the clear international minority. However, there are limits attached to this procedure. First of all, once a matter with regard to international peace and security is brought before the General Assembly, a two-thirds majority is required for the General Assembly to take a decision. Secondly, and instead of Security Council decisions which are obligations<sup>135</sup>, General Assembly decisions are 'only' recommendations<sup>136</sup>. Yet the necessary support for the use of force in the General Assembly might have a moral and political weight which is sufficient to judge it 'legal', although not authorized by the Security Council. As a result of this, the action would certainly be regarded as legitimate in such a case.<sup>137</sup> Up to this moment the 'Uniting for Peace' procedure has been applied in a number of cases, the last time with regard to the General Assembly's request to the International Court of Justice for an advisory opinion on the legality of the construction of a wall in occupied Palestinian territory.<sup>138</sup>

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<sup>130</sup> Already in 1945 the great allied powers listed certain questions which would be regarded as procedural and certain other questions which would be regarded as non-procedural. Cases of doubt were expected to be rare, see Malanczuk 2004, p. 374. However, in 1949 the General Assembly still felt a need to do deal with the 'double veto'.

<sup>131</sup> Ryngaert 2002, p. 23.

<sup>132</sup> UN Doc. A/RES. 377 A (V), 3 November 1950.

<sup>133</sup> Ryngaert 2002, p. 24.

<sup>134</sup> UN Doc. A/RES. 377 A (V), 3 November 1950.

<sup>135</sup> Article 25(3), UN Charter: 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.

<sup>136</sup> Article 10, UN Charter: 'The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters'.

<sup>137</sup> T. G. Weiss, 'The Illusion of UN Security Council Reform', *The Washington Quarterly* (26) 2003-4, p. 147-161, available at <[http://www.twq.com/03autumn/docs/03autumn\\_weiss.pdf](http://www.twq.com/03autumn/docs/03autumn_weiss.pdf)>, p 155. Views are divided about the wisdom of raising the use of force outside the Security Council. Many countries, particularly some European and developing countries, are reluctant or even unwilling to acknowledge the legitimacy of military force that is not specifically sanctioned by the Council, even for humanitarian purposes, Weiss 2003, p. 155.

<sup>138</sup> Van Genugten 2006, p. 126.

Finally, a practice has been developed in which abstention from voting on Security Council decisions does not constitute a veto. Only a negative vote from one of the Security Council's permanent members can block Security Council decisions. In its Namibia advisory opinion<sup>139</sup> the International Court of Justice regarded this practice as a practice which developed in customary law and which changed the written rule of Article 27(3) of the UN Charter on this point.<sup>140</sup> The Court namely pointed out that 'for a long period the voluntary abstention of a permanent member has consistently been interpreted as not constituting a bar to the adoption of resolutions by the Security Council'.<sup>141</sup>

Nevertheless, the permanent members did not always obey the rules concerning the right to veto. First of all, the permanent members of the Security Council have disregarded the obligation to abstain from voting if they were parties to a dispute being dealt with by the Security Council under Chapter VI. Article 27(3) of the UN Charter obliges permanent members to abstain from voting on substantive issues, in case they are party to the dispute underlying the voting. In such cases permanent members often have claimed to have only an interest in the dispute, which does not suffice to be called a 'party' to the dispute under Article 27(3) of the UN Charter.<sup>142</sup> Secondly, the permanent members of the Security Council developed a practice which enabled them to use the veto to defeat any sort of proposal under Chapter VI or VII, unless it was clearly procedural.<sup>143</sup> Although all permanent members have been obeying General Assembly resolution 267 (III),<sup>144</sup> they have always been reserving the right to use the veto in all other circumstances, whether substantive or procedural in essence. Of course this is contrary to Article 27(2) of the UN Charter, in which it is decided that decisions of the Security Council on procedural matters shall be made by the affirmative vote of nine members, without the permanent members having a right to veto.<sup>145</sup>

### 2.3 United Nations' initiatives on veto reform

Since the end of the Cold War the number of vetoes has decreased dramatically.<sup>146</sup> In spite of this, the Kosovo-crisis has demonstrated that the paralysing antagonism in the Security Council which existed during the Cold War still has its remains in the Security Council's functioning today. The unreasonable

<sup>139</sup> 'Legal Consequences for states of the continued presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council resolution 276 (1970)', Advisory Opinion, *ICJ Reports*, 1971.

<sup>140</sup> Van Genugten 2006, p. 125 and Ryngaert 2002, p. 23.

<sup>141</sup> 'Legal Consequences for states of the continued presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council resolution 276 (1970)', Advisory Opinion, *ICJ Reports*, 1971, par. 19.

<sup>142</sup> White 1993, p. 11.

<sup>143</sup> White 1993, p. 11.

<sup>144</sup> Ryngaert 2002, p. 23.

<sup>145</sup> White 1993, p. 11.

<sup>146</sup> Annexes I and II, see also White 1993, p. 11, Gray 2006, p. 204 and the introduction of Chapter I.

use of the veto power still exists and it is the paralysing effect unreasonable vetoes have on the Security Council's functioning that encourages states like the United States to act unilaterally. Furthermore, the Iraq-crisis has demonstrated that the veto power also has to be criticized for giving states the power to act unilaterally with impunity as a result of their power to veto Security Council decisions calling them to order. Therefore, post-Cold War proposals with regard to the power to veto will be discussed hereafter.

### 2.3.1 *The Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council*

After the Cold War, discussions on Security Council reform became more persistent. Several heads of state or government claimed that there was a new balance of power and in addition that 'the veto powers which guarantee an exclusive and dominant role for the permanent members of the Council are contrary to the aim of democratising the United Nations and must, therefore, be reviewed in line with the reform of the United Nations aimed at bringing about greater democratisation and transparency in the work of all the United Nations bodies'.<sup>147</sup> Such statements eventually led to the General Assembly adopting a resolution<sup>148</sup> entitled 'Questions of equitable representation on and increase in the membership of the Security Council'.<sup>149</sup> In this resolution the Secretary-General was requested to invite the member states to submit written comments on a possible review of the membership of the Security Council. After the Secretary-General in July 1993 presented these written comments to the General Assembly, in December 1993 the General Assembly decided to establish the Open-ended Working Group on the Question of Equitable Representation on and increase in the Membership of the Security Council (hereafter: the Working Group).<sup>150</sup> The Working Group was established as the forum in which negotiations were held on Security Council reform. Each year the Working Group presented a report on the progress of the work.<sup>151</sup> In these reports the right to veto was an important issue, next to the composition of the Security Council.

Analysing the reports of the Working Group<sup>152</sup> with regard to the right to veto, a number of recommendations are predominate. These can be summarized as follows:

<sup>147</sup> Tenth Conference of Heads of State and Government of Non-Aligned Countries (1-6 September 1992), Final Document (A/47/675), 6 September 1992, available at <http://domino.un.org/unispal.nsf>, Chapter II, par. 32.

<sup>148</sup> UN Doc. A/RES/47/62, 11 December 1992.

<sup>149</sup> B.T. van Ginkel and R.A. Wessel, 'Bestuurlijke vernieuwing van de VN-Veiligheidsraad: wereldwetgever of achterhaald instituut', *Jaarboek Vrede en Veiligheid: bewapening, vredesbeweging en het Nederlandse veiligheidsbeleid*, Nijmegen: Centrum voor Internationaal Conflict-Analyse & Management, Radboud Universiteit Nijmegen 2004, p. 15-16.

<sup>150</sup> UN Doc. A/RES/48/26, 3 December 1993.

<sup>151</sup> Van Ginkel and Wessel 2004, p. 15-16.

<sup>152</sup> Global Policy Forum, Reports of the GA Working Group on Security Council Reform, available at <<http://www.globalpolicy.org/security/reform/reports.htm>>, last visited October 30<sup>th</sup>.

- *The right to veto should only apply to Chapter VII action;*<sup>153</sup>

The difference here with the current situation is that the permanent members of the Security Council under this proposal would no longer be able to veto decisions on substantive matters under Chapter VI of the UN Charter.<sup>154</sup> In 1945 already, at the San Francisco conference, the smaller powers argued that the right to veto should only apply to Chapter VII, but that argument was lost.<sup>155</sup> It has been revisited on numerous occasions by the Working Group. No justification can be found for permanent members vetoing resolutions proposed under Chapter VI, which deals with the peaceful settlement of disputes. Although at the Yalta conference the 'chain of events' theory<sup>156</sup> was posited, it may be said that already then this theory was objectionable. Nowadays the 'chain of events' theory still is discreditable.<sup>157</sup> The Working Group has made this suggestion by proposing to amend the Charter, but also by urging the permanent members of the Security Council to limit the exercise of their veto power to actions taken under Chapter VII of the Charter, which obviously does not require a Charter amendment.<sup>158</sup> Of course the latter in case the former appears to be unfeasible.

- *A single veto should not prevent action on a proposal which has achieved the required majority;*<sup>159</sup>

In the current Security Council decision-making only one permanent member can block the decision-making by casting a negative vote.<sup>160</sup> Proposed is that such a single negative vote by one of the permanent members should be insufficient to prevent the action, for instance by requiring negative votes from at least two permanent members to prevent the action from being taken. When implementing this proposal a Charter amendment is required.<sup>161</sup> After all, Article 27(3) of the UN Charter decides that 'Decisions of the Security Council on all other matters

<sup>153</sup> See the reports of the Working Group under: A/AC.247/4 (a), 12 July 1995, sect. V, par. 17. A/50/47, 13 September 1996, sect. C, par. 31. A/51/47, 8 August 1997, annex II, par. 4(a). A/52/47, 24 August 1998, annex III, sect. VI(A), par. 26(a-i). A/55/47, 20 July 2001, annex IV, sect. I, par. 11 and annex V, sect. I, par. 4. A/56/47, 13 June 2002, annex IV, sect. II(A1-b), par. 5 and sect. II(A2-b), par. 3. A/57/47, 20 June 2003, annex IV, sect. II(A1-b), par. 5 and sect. II(A2-b), par. 3. All reports available at <<http://www.globalpolicy.org/security/reform/reports.htm>>.

<sup>154</sup> Compare Article 27(3), UN Charter.

<sup>155</sup> At San Francisco the Australian delegate argued for instance that 'the Council has a duty rather than a right to conciliate disputants' and that it was essential that no member should have a right to veto resolutions aimed solely at pacific settlement of disputes', White 1993, p. 10.

<sup>156</sup> The 'chain of events' theory argues that a Chapter VI resolution might be a first step to a Chapter VII resolution, White 2004, p. 668. At Yalta permanent members declared that any pacific measures 'may initiate a chain of events which might in the end require the Council under its responsibilities to invoke measures of enforcement', White 1993, p. 11.

<sup>157</sup> White 2004, p. 668.

<sup>158</sup> Supra note 153.

<sup>159</sup> See the reports of the Working Group under: A/AC.247/4 (a), 12 July 1995, sect. V, par. 17. A/52/47, 24 August 1998, annex III, sect. VI(A), par. 26(a-ii). A/55/47, 20 July 2001, annex V, sect. I, par. 6, 12, 16. A/56/47, 13 June 2002, annex IV, sect. II(A2-b), par. 4. A/57/47, 20 June 2003, annex IV, sect. II(A2-b), par. 4. All reports available at <<http://www.globalpolicy.org/security/reform/reports.htm>>.

<sup>160</sup> Article 27(3), UN Charter.

<sup>161</sup> Supra note 159.



shall be made by an affirmative vote of nine members including the concurring votes of the permanent members'. In contrast with the developed practice that abstention from voting does not constitute a veto<sup>162</sup>, a practice that a single veto should not prevent Security Council action will conflict too much with the current wordings of the UN Charter. As far as the former is concerned, the UN Charter can be interpreted in a way which is consistent with such practice.<sup>163</sup> As far as the latter is concerned, a different interpretation of the text of Article 27(3) will not suffice.

- *Current permanent members could exercise voluntary restraint and make unilateral declarations not to use the veto in certain situations and on certain issues;*<sup>164</sup>

By making unilateral declarations permanent members are invited to limit the use of their right to veto. During discussions in the Working Group observations were made that some of the proposed measures to limit the scope of the veto even could be implemented without a Charter amendment. Instead such measures could be implemented through revisions of the Provisional Rules of Procedure of the Security Council, current practices within the Council and General Assembly resolutions. With regard to these observations, it was also proposed that the permanent members of the Security Council, as a goodwill gesture, could exercise voluntary restraint and make unilateral declarations not to use the veto in certain situations and on certain issues.<sup>165</sup> However, apart from whether such declarations would be useful or have any practical effect, it is obvious that any kind of voluntary restraint depends on the eagerness of the permanent members of the Security Council to make it.

- *The possibility to cast a negative vote without that vote constituting a veto if the member so declares should be introduced;*<sup>166</sup>

In the current situation there is no possibility for permanent members to cast a negative vote, without that vote constituting a veto. Proposed is that it should be up to the permanent members to decide whether their negative vote constitutes a veto. Therefore, the Working Group urges the Security Council or the General

<sup>162</sup> Supra notes 139-141.

<sup>163</sup> An abstention does not approve nor object a certain resolution to be taken. Whether an abstention can be considered as a 'concurring vote' in the sense of Article 27(3) of the UN Charter is therefore, at least for as far as the text of Article 27(3) of the UN Charter is concerned, open for interpretation.

<sup>164</sup> See the reports of the Working Group under: A/AC.247/4 (a), 12 July 1995, sect. V, par. 19. A/52/47, 24 August 1998, annex III, sect. VI(A), par. 26(c-i). A/55/47, 20 July 2001, annex IV, sect. I, par. 10. A/56/47, 13 June 2002, annex IV, sect. II(A1-b), par. 1, 8. A/57/47, 20 June 2003, annex IV, sect. II(A1-b), par. 1, 8. All reports available at <<http://www.globalpolicy.org/security/reform/reports.htm>>.

<sup>165</sup> Working Group on the Security Council (1995): Observations on Clusters I and II (A/AC.247/4 sect. V, para. 18, 19).

<sup>166</sup> See the reports of the Working Group under: A/52/47, 24 August 1998, annex III, sect. VI(A), par. 26(c-ii). A/55/47, 20 July 2001, annex IV, sect. I, par 9, 17. All reports available at <<http://www.globalpolicy.org/security/reform/reports.htm>>.

Assembly to explore the proposal for a provision enabling a permanent member to cast a negative vote without that vote constituting a veto if the member so declares. Such practice does not require a Charter amendment.<sup>167</sup> This practice may change the written rule of Article 27(3) of the UN Charter, just like the practice of abstention also has developed into customary law.<sup>168</sup> Putting it differently: If the Security Council for a long period consistently does not interpret a negative vote of one of the permanent members as constituting a veto if the member so declares, this practice might develop into customary law.<sup>169</sup>

- *The Security Council or the General Assembly should provide a legal definition of what constitutes a 'procedural matter' or clear criteria as to what is of a procedural nature in the sense of Article 27(2) of the UN Charter;*<sup>170</sup>

Although the General Assembly adopted resolution 267 (III) in 1949, in which a number of matters were categorized either as 'substantive' or 'procedural', it has been mentioned that the permanent members developed a practice which enabled them to use the veto to defeat any sort of proposal under Chapter VI or VII, unless it was clearly procedural.<sup>171</sup> By providing a legal definition of what constitutes a 'procedural matter' in the sense of Article 27(2) of the UN Charter, the Security Council and/or the General Assembly should prevent that a matter which in essence is 'procedural' will be vetoed by one of the permanent members. In the lack of a legal definition, the Working Group argues that clear criteria for determining which matters are of a procedural nature should be developed. According to the Working Group those decisions referred to as of procedural nature could be based on a number of criteria. The first criterion relates to all decisions adopted in the application of provisions that appear in the Charter under the heading 'procedure'. The second criterion relates to all decisions concerning the relationship between the Security Council and other organs of the United Nations, or by which the Security Council seeks the assistance of other organs of the United Nations. The third criterion relates to all decisions related to the Security Council's internal functioning and the conduct of business. The fourth criterion relates to all decisions that bear a close analogy to decisions included under the above-mentioned criteria would be referred to as of procedural nature. The fifth and final criterion relates to certain decisions instrumental in arriving at or in following up a procedural decision. Both initiatives, providing a legal definition of what constitutes a procedural matter as well as developing clear

<sup>167</sup> Supra note 166.

<sup>168</sup> Working Group on the Security Council (2001), Suggestions that would not require amendment of the Charter (A/55/47, 20 July 2001, annex IV, sect. I, par. 17).

<sup>169</sup> Paragraph 2.2.

<sup>170</sup> See the reports of the Working Group under: A/52/47, 24 August 1998, annex III, sect. VI(A), par. 26(b-i, ii). A/55/47, 20 July 2001, annex IV, sect. I, par. 7, 8, 13, 18 and annex V, sect. I, par. 9. A/56/47, 13 June 2002, annex IV, sect. I (A1-b), par. 7 and sect. II(A2-b), par. 1. A/57/47, 20 June 2003, annex IV, sect. I (A1-b), par. 7 and sect. II(A2-b), par. 1. All reports available at <<http://www.globalpolicy.org/security/reform/reports.htm>>.

<sup>171</sup> Paragraph 2.2.

criteria as to which matters are of a procedural nature, do not require a Charter amendment.<sup>172</sup>

- *The veto should be exercised only when permanent members consider the question of vital importance, taking into account the interests of the United Nations as a whole. Permanent members should in this case always provide written justifications to the General Assembly;*<sup>173</sup>

The obligation for permanent members to explain why it is vetoing a resolution would make it more difficult to do so and thus bring about substantial progress towards using the right of veto more responsibly.<sup>174</sup> A justification for such a practice was formulated by Joschka Fischer, Germany's Federal Minister for Foreign Affairs. He argued that 'According to the Charter, the Security Council acts with the mandate and on behalf of all the United Nations member states. But hitherto they have not been entitled to learn why a State has exercised its right of veto. This is not only neither democratic nor transparent, but also makes it easier for States to veto a draft resolution unilaterally for national rather than international interests'. As a result Joschka Fischer argued that the introduction of an obligation of a permanent member to explain why it will be vetoing a draft resolution would make it more difficult for a permanent member to do so. Therefore, this would result in substantial progress towards using the right to veto more responsibly. 'Why should not the General Assembly assume more responsibility in future, too?'<sup>175</sup>

- *The right to veto should be subject to suspension on specific occasions, as defined by a prescribed qualified majority in the General Assembly.*<sup>176</sup>

This suggestion relates to the 'Uniting for Peace' procedure, which has been discussed above.<sup>177</sup> This proposal also enhances the role of the General Assembly in matters of international peace and security and therefore ties up with Joschka Fischer's idea to give the General Assembly more responsibility with regard to the maintenance of international peace and security in the future.<sup>178</sup> With regard to this proposal, Uruguay stated in a working paper that in the light of democratising

<sup>172</sup> Working Group on the Security Council: Suggestions, with reference to the veto, in annex XI to the report of the Open-ended Working Group of 25 July 2000 (A/54/47), that would not require amendment of the Charter (A/55/47), annex IV, sect. I, para 8, 13, 18.

<sup>173</sup> See the reports of the Working Group A/55/47, 20 July 2001, annex IV, sect. I, par. 6, 16. A/56/47, 13 June 2002, annex IV, sect. II(A1-b), par. 3, 4. A/57/47, 20 June 2003, annex IV, sect. II(A1-b), par. 3, 4. All reports available at <<http://www.globalpolicy.org/security/reform/reports.htm>>.

<sup>174</sup> Working Group on the Security Council: Suggestions, with reference to the veto, in annex XI to the report of the Open-ended Working Group of 25 July 2000 (A/54/47), that would not require amendment of the Charter (A/55/47), annex IV, sect. I, para 6.

<sup>175</sup> Letter dated 31 March 2000 from the Permanent Representative of Germany to the President of the General Assembly in his capacity as Chairman of the Working Group, concerning the introduction of an obligation to explain the use of a veto (A/AC.247/2000/CRP.4).

<sup>176</sup> See the reports of the Working Group under: A/52/47, 24 August 1998, annex III, sect. VI(A), par. 26(a-iii). A/55/47, 20 July 2001, annex V, sect. I, par. 11. All reports available at <<http://www.globalpolicy.org/security/reform/reports.htm>>.

<sup>177</sup> Ryngaert 2002, p. 24-25.

<sup>178</sup> Supra note 175.

the United Nations, the General Assembly's position should be strengthened and that this goal 'has been expressed unanimously in numerous statements and declarations'. Furthermore, Uruguay pointed out that 'most of the democratic constitutions of the member states provide for the right to veto by the executive branch in order to establish a balance between the executive and legislative branches'. Therefore, Uruguay argued that it, in conformity with this practice, would be appropriate to apply the veto power in respect of the relationship between the Security Council and the General Assembly. Consequently it proposed that the right to veto should be subject to suspension on specific occasions as defined by a prescribed qualified majority in the General Assembly.<sup>179</sup> For this proposal to take effect it is however required to amend the UN Charter.<sup>180</sup>

It has been mentioned that in all proposals of the Working Group a lot of attention has been given to the composition of the Security Council. According to the Working Group the Security Council should be enlarged in order to make it more representative. Without a doubt the Working Group has been standing firm against a possible expansion of the right to veto to new permanent Security Council members. This was emphasized in a paper by the Chairman of the Working Group<sup>181</sup>, Tan Sri Razali Ismael, by stating that 'an overwhelming number of member states consider the use of veto in the Security Council anachronistic and undemocratic, and have called for its elimination' and that 'the new permanent members of the Security Council shall have no provision of the veto power'.<sup>182</sup>

### 2.3.2 *The High-level Panel on Threats, Challenges and Change*

With the new millennium coming up there seemed to be a new momentum for a push towards Security Council reform. Firstly, the United Nations Millennium Declaration<sup>183</sup> stated that the efforts to achieve a comprehensive reform of the Security Council in all its aspects were to be intensified. This statement was followed by the United Nations' Secretary-General pronouncing in his speech for the General Assembly in December 2003 the establishment of a High-level Panel on Threats, Challenges and Change (hereafter: the High-level Panel), which should give a reflection on the rules regarding the use of force as well as analysing the functioning of the Security Council and making recommendations for Security Council reform. Eventually, in December 2004 the High-level Panel

<sup>179</sup> Question of the veto: working paper by Uruguay, 17 June 1996 (A/AC.247/1996/CRP.14).

<sup>180</sup> Supra note 176.

<sup>181</sup> Also known as the 'Razali Reform Paper', Global Policy Forum, Razali Reform Paper, available at <[www.globalpolicy.org/security/reform/raz-497.htm](http://www.globalpolicy.org/security/reform/raz-497.htm)>, last visited October 12<sup>th</sup>.

<sup>182</sup> 'Razali Reform Paper', par. 4.

<sup>183</sup> United Nations Millennium Declaration (UN Doc. A/RES/55/2), 18 September 2000.

presented its report 'A More Secure World: Our Shared Responsibility'<sup>184</sup> to the Secretary-General.<sup>185</sup>

When discussing Security Council reform, the High-level Panel as well as the Working Group paid a lot of attention to the enlargement of the Security Council in order to make it more representative, democratic and accountable.<sup>186</sup> In addition the High-level Panel also mentioned its considerations on the right to veto. The High-level Panel emphasized that there is no practical way of changing the existing members' veto. However, the High-level Panel also pointed out that the right to veto has an anachronistic character.<sup>187</sup> Therefore, a few recommendations were made:

- *Permanent members should use their right to veto only in matters where vital interest are genuinely at stake;*<sup>188</sup>

From the very start of the United Nations it was clear that the use of the right to veto should be limited to matters of vital importance to a permanent member. The San Francisco Declaration<sup>189</sup> namely proclaimed that 'it is not to be assumed, however, that the permanent members would use their 'veto' power wilfully to obstruct the operation of the Council'. Afterwards, in 1948, the United Kingdom exhorted the remaining permanent members to use the right to veto only in case they considered the question 'of vital importance, taking into account the interests of the United Nations as a whole, and to state upon what ground this condition to be present'. The General Assembly took over this statement in General Assembly Resolution 267. However, up to this moment implementation of the declaration that permanent members would only use their right to veto when vital interests are at stake has proven to be fundamentally problematic.<sup>190</sup> It is therefore that the High-level Panel urges the permanent members of the Security Council once again to limit the exercise of the veto power to matters where vital interests are genuinely at stake.<sup>191</sup>

<sup>184</sup> Report of the High-level Panel on Threats, Challenges and Change, 'A More secure World: Our Shared Responsibility' (UN Doc. A/59/565), 29 November 2004, available at <http://www.un.org/secureworld>.

<sup>185</sup> Van Ginkel and Wessel 2004, p. 16.

<sup>186</sup> Annex III.

<sup>187</sup> Report of the High-level Panel on Threats, Challenges and Change, 'A More secure World: Our Shared Responsibility' (UN Doc. A/59/565), 29 November 2004, par. 256, available at <http://www.un.org/secureworld>. Also in the proposals of the High-level Panel new permanent members shall have no provision of the veto power, see par. 256 of the report.

<sup>188</sup> Report of the High-level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' (UN Doc. A/59/565), 29 November 2004, par. 256, available at <http://www.un.org/secureworld>.

<sup>189</sup> 'Statement by the Delegations of the Four Sponsoring Governments on Voting Procedure in the Security Council', June 7 1945, United Nations Conference on International Organization Documents vol. XI, p. 754, see J. Wouters and T. Ruys, 'Security Council Reform: A New Veto for a New Century?', *Royal Institute for International Relations*, Brussels: Academia Press 2005, available at <<http://www.irri-kiib.be/paperegm/ep9.pdf>>, p. 5.

<sup>190</sup> The paralysing effect the veto power had during the Cold War is in this sense the best example, see the introduction to Chapter I.

<sup>191</sup> Wouters and Ruys 2005, p. 29.

- *Permanent members should refrain from the abuse of the veto in cases of genocide and large-scale human rights abuses;*<sup>192</sup>

The threat of permanent members to use the veto has been one of the main sources for causing some of the worst tragedies during the existence of the United Nations. In Rwanda 800,000 people were killed during a genocide, while the United States and France blocked the establishment of an intervention force. In Kosovo, it has been discussed in Chapter I, Russia and China made it clear that they would veto any resolution authorizing the use of force, despite the fact that an ethnic cleansing of the Albanese Kosovar population was going on. Most recently, Russia and China threatened to use their right to veto with regard to Darfur, where thousands of civilians were murdered and raped by Arab militias. It needs no further explanation that such veto exercise as described above should be prevented and indeed such vetoes are not reconcilable with the aims of the Charter. After 1945 international humanitarian law as well as international human rights have made an enormous progress, which eventually emerged in the so-called 'responsibility to protect'<sup>193</sup>. Putting it differently, one could say that the veto power was created to ensure co-operation between the world's great powers and definitely not to hide grave violations of human right and international humanitarian law under the cloak of national interest. Therefore, the High-level Panel appeals to the permanent members of the Security Council to refrain from the use of veto in cases of genocide and large-scale human rights abuses.<sup>194</sup>

- *Introducing a system of 'indicative voting'.*<sup>195</sup>

Members of the Council could call for a public indication of positions by members on a proposed action. Under this indicative vote, 'no' votes would not have a veto effect and the final tally of the vote would not have any legal force. The second formal vote on any resolution would take place under the current procedures of the Council.<sup>196</sup> According to the High-level Panel a system of 'indicative voting' could considerably increase the Security Council's accountability.<sup>197</sup>

After the High-level Panel presented its findings, the Secretary-General of the United Nations also presented a report in March 2005: 'In Larger Freedom'. The Secretary-General based this report on the High-level Panel report and supported

<sup>192</sup> Report of the High-level Panel on Threats, Challenges and Change, 'A More secure World: Our Shared Responsibility' (UN Doc. A/59/565), 29 November 2004, par. 256, available at <http://www.un.org/secureworld>.

<sup>193</sup> States have a duty to protect the welfare of their inhabitants. When a state fails to fulfil this commitment, the international community must step in, see Wouters and Ruys 2005, p. 32.

<sup>194</sup> Wouters and Ruys 2005, p. 16-18, 31-32.

<sup>195</sup> Report of the High-level Panel on Threats, Challenges and Change, 'A More secure World: Our Shared Responsibility' (UN Doc. A/59/565), 29 November 2004, par. 257, available at <http://www.un.org/secureworld>.

<sup>196</sup> So the actual vote would be preceded by a non-binding vote, Wouters and Ruys 2005, p. 23.

<sup>197</sup> Report of the High-level Panel on Threats, Challenges and Change, 'A More secure World: Our Shared Responsibility' (UN Doc. A/59/565), 29 November 2004, par. 257, available at <http://www.un.org/secureworld>.

its views on Security Council reform. He then urged the United Nations member states to take a decision on this important issue before the summit in September 2005.<sup>198</sup> However, despite this statement the outcome document of the 2005 Summit did not give an indication of Security Council reform in the near future at all. It only stated that 'we<sup>199</sup> support early reform of the Security Council – an essential element of our overall effort to reform the United Nations – in order to make it more broadly representative, efficient and transparent and thus to further enhance its effectiveness and the legitimacy and implementation of its decisions. We commit ourselves to continuing our efforts to achieve a decision to this end.'<sup>200</sup>

#### 2.4 Proposals on veto reform outside the United Nations' structures

Discussions with regard to veto reform are not only being held within the United Nations. In literature as well there has been given attention to veto reform and the question of how this privilege should be dealt with nowadays. With regard to veto reform, many authors have based their comments on the proposals made by the Working Group and the High-level Panel. At least many of them do not present additional proposals to alter the right to veto. Perhaps this is understandable if one thinks of the broad scale of proposals on veto reform which have been discussed within the United Nations. However, some authors do present or mention additional recommendations to those presented by the Working Group or the High-level Panel. In the light of the question of how to alter the veto power in order to reduce the danger of unilateralism for the system of collective security, these alternatives are worth mentioning after having discussed the proposals made by the Working Group and the High-level Panel earlier on. Some important additional suggestions which have been made in literature are the following:

- *Eliminating the 'reverse veto'*;<sup>201</sup>

One of the major problems with regard to the right to veto is the fact that a change of sanctions imposed by the United Nations and a change of the use of force authorized by the United Nations requires a new Security Council resolution. However, such a new resolution falls within the normal procedures of the Security Council and therefore can be vetoed by the permanent members. As a consequence it seems as if sanctions once imposed by the United Nations are irreversible. Especially in cases of emergency there is no time to consider whether

<sup>198</sup> Report of the Secretary-General, 'In Larger Freedom: towards development, security and human rights for all (UN Doc. A/59/2005), 21 March 2005, available at [http://www.un.org/ga/59/hl60\\_plenarymeeting.html](http://www.un.org/ga/59/hl60_plenarymeeting.html), par. 167-170.

<sup>199</sup> The 'Heads of State or Government'.

<sup>200</sup> 2005 World Summit Outcome (UN Doc. A/RES/60/1), 24 October 2005, par. 152-154.

<sup>201</sup> D.D. Caron, 'The Legitimacy of the Collective Authority of the Security Council', *The American Journal of International Law* (78) 1993-4, p. 577-588.

the imposed measures are indeed efficient or necessary. Because usually the permanent members take the initiative for a resolution, non-permanent members often have no other option than to support the resolution, mainly as a result of the fact that they do not have the time or the means to come up with other solutions to the underlying case. Abolishing the right to veto in cases where sanctions are revisited would be appropriate, as the initial decision would then be less irreversible. Therefore, it has been proposed by Caron that, for as far as the voting procedure is concerned, it is necessary to make a distinction between the power to start an action and the power to alter or end the action. With regard to the first, the Security Council decides with a qualified majority with permanent members having the right to veto. With regard to the latter, the Security Council would decide with a qualified majority without permanent members having the possibility to cast a veto.<sup>202</sup> Removing the 'reverse veto' does not require a Charter amendment. Instead, according to Caron the approach would be 'to incorporate in any resolution taking a decision a modified voting procedure for future use in terminating the action taken'.<sup>203</sup>

- *Enhancing the 'sunset provisions'*;<sup>204</sup>

Sanctions imposed by the Security Council automatically end in case they do not have a clear purpose anymore. The assessment whether this is the case would be delegated to a subsidiary body, without having the right to veto. The 'sunset provisions' therefore are in line with eliminating the 'reverse veto'.<sup>205</sup> This practice has been used already in 1991 when the United Nations Compensation Commission (UNCC) for Iraq was established as a subsidiary body of the United Nations.<sup>206</sup> The UNCC was set up after in Resolution 687 the Security Council determined that 'Iraq, without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait'. In paragraph 18 of the resolution, the Security Council also decided 'to create a fund to pay compensation for claims that fall within paragraph 16 above and to establish a Commission that will administer the fund'. The Governing Body of the UNCC determines its policy and

<sup>202</sup> Ryngaert 2002, p. 25.

<sup>203</sup> Caron 1993, p. 584. Caron argues that the Council first, if it so desired, could simply designate a termination date or terminating events for any authorization. This approach waives not only the veto, but the voting altogether. Secondly and more importantly, the Security Council on at least one occasion has essentially altered its voting procedure via a resolution, see Caron 1993, p. 584-585 and infra note 207.

<sup>204</sup> Caron 1993, p. 585.

<sup>205</sup> Ryngaert 2002, p. 25.

<sup>206</sup> The UNCC was established with UN Doc. S/RES/687, paragraphs 16 and 18. On May 20th 1991 the Security Council approved S/RES/692 which set up the UNCC in Geneva, see Global Policy Forum, Oil for Food: the True Story, available at <<http://www.globalpolicy.org/security/sanction/iraq1/oilforfood/00gresh.htm>>, last visited November 22<sup>nd</sup> 2006.



consists of 15 representatives of the Security Council members. However, for the Governing Council to take decisions 'only' a majority of 9 is required. The right to veto is excluded from decision-making.<sup>207</sup> It is obvious that establishing such subsidiary bodies, without the representatives of the permanent members of the Security Council having the right to veto, limits the scope of the veto power as such.

- *Allowing the General Assembly, states, organizations, and individuals to evaluate the legality of the exercise of the veto, as well as the consequences of its use, by having clear legal limitations on the right to veto.*<sup>208</sup>

Although it is without formal avenues of accountability, the current system, whereby world opinion performs the function of review to a certain extent, would enhance the authority of the Security Council.<sup>209</sup> Having clear limitations on the right to veto results in the fact that Security Council decision-making becomes more transparent, especially as regards the adoption of resolutions. Such legal limitations could, for example, be formulated by the General Assembly by summing up certain situations as not being appropriate for the use of veto, for instance situations of large-scale human rights abuses. By having such legal limitations the world opinion will be more able to determine whether or whether not a permanent member abuses its right to veto Security Council decisions. Putting it differently: By having legal limitations on the right to veto it is much easier to decide what constitutes an abuse of the right to veto. Whether the assessment by the world opinion that a permanent member of the Security Council abused the right to veto has its positive effects on the future use of the veto power by that permanent member, will be discussed in Chapter III.

- *Establishing a mechanism allowing for a veto to be overruled in the advent of genocide, ethnic cleansing or large-scale massacres of civilians.*<sup>210</sup>

In 2004 the European Parliament suggested to create a possibility to circumvent the veto power in cases where genocide, war crimes and crimes against humanity are at stake. Therefore, the European Parliament proposed that an independent body dealing with legitimacy under international law would assess whether one or more of the above mentioned crimes take place. Such an independent body could be the International Court of Justice or the International Criminal Court. It would be also possible to create a so-called Commission of Inquiry, whose task it is to judge on the nature and scope of the ongoing crisis. If this commission is of the

<sup>207</sup> Global Policy Forum, Oil for Food: The True Story, available at <<http://www.globalpolicy.org/security/sanction/iraq1/oilforfood/00gresh.htm>>, last visited November 22<sup>nd</sup> 2006.

<sup>208</sup> White 2004, p. 668.

<sup>209</sup> White 2004, p. 668.

<sup>210</sup> Wouters and Ruys 2005, p. 33.

opinion that one of the crimes mentioned above take place, the permanent members of the Security Council will be prohibited to use their right to veto. Such a commission could be established by creating a new organ under the authority of the General Assembly on the recommendation of the Secretary-General. Another option would be that this commission falls under the Human Rights Council, which has replaced the Human Rights Commission. Anyhow, if the body were to be placed directly or indirectly under the General Assembly, it is doubtful whether such competence would not violate Article 12 of the UN Charter. Article 12 states that 'while the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests'. Therefore, it appears necessary to incorporate the creation and mandate of such a body in the UN Charter.<sup>211</sup> According to Article 108 of the UN Charter such incorporation requires the support of the permanent members of the Security Council. Above all, the newly established commission should be non-political and should consist of legal experts. Perhaps it should be possible that the actions of the commission would be subjected to a two-third majority vote in the Security Council, with the veto power not applicable, in order to preserve an institutional balance. In any case, there seems to be no morally acceptable argument against this proposal.<sup>212</sup> Nevertheless, it is already worth mentioning that this will be no guarantee that such a proposal indeed will be implemented. The fact is that each proposal on veto reform, the proposal to establish a mechanism allowing for a veto to be overruled in the advent of large-scale human rights abuses as well, goes along with a decrease of the power permanent members have in Security Council decision-making. Consequently, whether permanent members are willing to support proposals on veto reform remains doubtful, despite the fact that there is no morally acceptable argument against some of these proposals on veto reform. Chapter III will discuss this matter more deeply.

There is consensus among authors that the right to veto hardly can be abolished.<sup>213</sup> In fact, some of them mention the positive effects as well. According to them, when discussing recommendations on veto reform, it should be taken into consideration that the right to veto is an incentive to negotiate until an agreement is reached and prevents permanent members from taking part in

<sup>211</sup> Wouters and Ruys 2005, p. 33.

<sup>212</sup> Wouters and Ruys 2005, p. 33-34.

<sup>213</sup> Van Genugten 2006, p. 28-29, White 2004, p. 671, Ryngaert 2002, p. 19, Weiss 2003, p. 151, Wouters and Ruys 2005, p. 21 and C. Esposito, 'Right of Veto in the Security Council. Is it untouchable?', available at <<http://www.fride.org/eng/Publications/Publication.aspx?Item=676>>, p. 2. See also paragraph 2.2. However, according to authors like Köchler abolishing the veto power is the only way by which United Nations' credibility can be recovered, H. Köchler, 'The United Nations and International Democracy: The Quest for UN Reform', *Paper presented at the final meeting of the research network on 'The Political Theory of International Democracy' at the University of Cambridge (UK), 29 March 1996*, available at <<http://hanskoechler.com/unid.htm>>, p. 7 and H. Köchler, 'The Voting Procedure in the United Nations Security Council: Examining a Normative Contradiction in the UN Charter and its consequences on International Relations', *Studies in International Relations, XVII* (1991), available at <[http://www.i-p-o.org/Koechler-Voting\\_Procedure-UN\\_Security\\_Council.pdf](http://www.i-p-o.org/Koechler-Voting_Procedure-UN_Security_Council.pdf)>, p. 34.

military operations against their will.<sup>214</sup> Nigel D. White stated this by saying that 'a balance must be achieved between limiting the exercise of the veto and its positive aspects, that it ensures that Council action has the support of the most powerful states'.<sup>215</sup>

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<sup>214</sup> Ryngaert 2002, p. 24, Van Genugten 2006, p. 127, White 2004, p. 671. See also paragraph 2.1. The latter prevents that decisions will be made that later on will not be implemented due to lack of necessary means to achieve such purpose, Esposito 2005, p. 2.

<sup>215</sup> White 2004, p. 671.

### 3 How to alter the veto power?

Despite all efforts, mainly by the Working Group and the High-level panel, no actual progress on Security Council reform has been made up to this point.<sup>216</sup> In 1997 the Working Group was close with the so-called 'Razali Reform Paper'. This proposal for Security Council reform was widely supported at first, but stranded nevertheless when medium-sized countries feared for a devaluation of their position if new permanent seats were added to the Security Council.<sup>217</sup> A few years later the proposals made by the High-level Panel on Security Council reform also stranded, although the Secretary-General urged the international community to reach agreement on Security Council reform before the 2005 World Summit.<sup>218</sup> However, with regard to reducing the paralysing effect of the veto power on Security Council decision-making on the one hand and on the other hand affecting the inviolability of the permanent members due to their veto power, one should put into question whether the failure to agree on Security Council reform is really a pity.

With respect to the desire to increase the effectiveness of the Security Council it is incompatible to increase the number of (permanent) Security Council seats at the same time.<sup>219</sup> In case of an enlarged Security Council, more states take part in Security Council negotiations. Additionally, any enlargement of the Security Council with non-permanent members will strengthen the position of the General Assembly in comparison with the Security Council. Consequently, there could be a danger that these two bodies polarize, which eventually will damage the effectiveness of the Security Council.<sup>220</sup> Apparently, this slows down the decision-making process in the Security Council and will eventually encourage powerful states, like the United States, to act outside the United Nations' structures. Therefore, it is appropriate to argue that enlargement of the Security Council will reduce its effectiveness. As a consequence, the gain of limiting the scope of the veto power for the effectiveness of the Security Council, at least partly, disappears. However, in spite of this it seems as if the United Nations proposals mainly aim at enlarging the Security Council to make it a more representative body.<sup>221</sup>

<sup>216</sup> Paragraph 2.3.2.

<sup>217</sup> Van Ginkel and Wessel 2004, p. 16-17 and Global Policy Forum, Razali Reform Paper, available at <[www.globalpolicy.org/security/reform/raz-497.htm](http://www.globalpolicy.org/security/reform/raz-497.htm)>, last visited October 12<sup>th</sup>. See also UN Doc. A/RES/53/30.

<sup>218</sup> Supra notes 198 and 200.

<sup>219</sup> Schrijver argues that it is doubtful whether any enlargement of the Security Council would leave the effectiveness of the Security Council untouched, see N. Schrijver, *Bij een zestigste verjaardag: de toekomst van het Handvest van de Verenigde Naties* (inaugural speech Leiden University, Leiden), available at <<http://www.wetenschapsagenda.leidenuniv.nl/index.php3?c=356>>, p. 10. It is already mentioned in the introduction of Chapter II that the two leading considerations on Security Council reform are the financially, military and diplomatic contribution states make to the United Nations and on the other hand the overall 'representativeness' of the Council, supra note 108.

<sup>220</sup> Ryngaert 2002, p. 19-20. Non-permanent members have been mandated by the General Assembly. An increase in such members would give the General Assembly a real controlling function over the Security Council, see Ryngaert 2002, p. 20.

<sup>221</sup> Paragraphs 2.3.1 and 2.3.2.

Nevertheless, when assessing the proposals on veto reform regarding their consequences for increasing the Security Council's effectiveness as well as for affecting the inviolability of the permanent members due to their veto power, Security Council enlargement will not be taken into consideration. This thesis does not deal with the representativeness of the Security Council, but, based on the outcome of the case study in Chapter I, it tries to find an answer to what will be the main question posed in this Chapter: How to alter the veto power in order to reduce the danger for collective security that states will use force unilaterally? Therefore, it suffices to mention that such enlargement may have negative effects on the Security Council's effectiveness, mainly for the reasons put forward above. This chapter firstly assesses all proposals on their merits. Then it divides all proposals on veto reform into two groups: Proposals with regard to 'hard law' and proposals with regard to 'soft law'. Along this division it will be investigated which proposals are rather feasible and which are not. Finally, it will be investigated whether any softening of the veto power along the line of one of the proposals on veto reform would have prevented the problems that the United Nations Security Council had to deal with, holding the primary responsibility for maintaining or restoring international peace and security during the Kosovo-crisis and the Iraq-crisis.

### 3.1 Assessing the proposals on veto reform

Although many have argued that it would be best that the veto would be abolished<sup>222</sup>, it has been argued in this thesis that this will not be a realistic option and that it is even doubtful whether this would be ideal, as the veto power also has some major positive aspects.<sup>223</sup> With regard to the latter, the veto power forces the permanent members into intensive negotiations, in which they have to take each others interests into consideration.<sup>224</sup> As a consequence, the veto power is an incentive to reach agreement on matters of international peace and security and discourages the most powerful states, especially the United States as the world's single superpower, to act outside the United Nations' structures.<sup>225</sup> Besides, it is worth mentioning that the veto power also prevents situations in which a permanent member is forced to provide military support for an action of which it is not in favour, due to majority voting in the Security Council.<sup>226</sup> Such situations would damage the authority of the Security Council, mainly as a result of the discord between the permanent members. Anyhow, this paragraph now will assess all proposals made by the Working Group and the High-level Panel on veto

<sup>222</sup> Köchler 1996, p. 7, Köchler 1991, p. 34 and 'Razali Reform Paper', par. 4.

<sup>223</sup> Supra notes 124, 126, 214 and 215.

<sup>224</sup> Supra note 89.

<sup>225</sup> Ryngaert 2002, p. 24 and supra notes 124 and 106. As a result of the veto power no resolutions can be adopted by the Security Council with which the United States can not identify. Abolishing the veto power would make this rather possible and may lead to the United States, supported by their overwhelming military and economic capacity, ignoring Security Council decisions adopted against their will and acting increasingly outside United Nations' structures. See supra note 91.

<sup>226</sup> Supra notes 122, 214 and 215 and infra note 236.

reform, mainly with regard to their ability to reduce the danger of unilateral use of force for the system of collective security as much as possible by making the decision-making of the Council under Chapter VII more effective. With regard to affecting the power permanent members of the Security Council have to use force unilaterally with impunity, because they have the power to veto any Security Council decision calling them to order, only two proposals appear to be relevant. As a consequence these proposals relate to the problems which the Security Council encountered during the Iraq-crisis in 2003.<sup>227</sup>

### *3.1.1 Proposals without significant beneficial effects*

Some proposals that have been made by the Working Group, the High-level Panel as well as the experts would not have a clear effect on reducing the danger that states will use force unilaterally due to an ineffective Security Council. First of all the suggestion that the right to veto should apply to Chapter VII action only<sup>228</sup> is not very useful when it comes down to reducing the danger of unilateralism for collective security. Although the scope of the veto power indeed will be limited by excluding Chapter VI action from the veto power, it is Chapter VII of the Charter under which the Security Council has the possibility to authorize the use of force. Nevertheless, under this proposal the veto power remains fully intact as regards Chapter VII. Therefore, permanent members still will have the option to veto a draft resolution authorizing the use of force. Putting it differently: In cases where the Security Council is expected to act and more particularly is expected to authorize the use of force, under this proposal it still would be subject to (threats with) vetoes. It needs no further explanation that the danger states will use force unilaterally as a result of a paralysed Security Council will not be reduced as this proposal leaves open the possibility to cast a veto on unreasonable grounds under Chapter VII.<sup>229</sup> Besides this, it should be remarked that one might think that this proposal would perhaps affect the inviolability by which permanent members can use force unilaterally. However, like all sanctions that can be imposed by the Security Council fall under Chapter VII of the UN Charter<sup>230</sup>, this proposal does not have any significance in that sense: If this proposal would be adopted the veto power remains to be applicable under Chapter VII of the Charter and accordingly it would still be impossible to impose sanctions on one of the permanent members of the Security Council.<sup>231</sup>

<sup>227</sup> Paragraph 1.2.

<sup>228</sup> Paragraph 2.3.1.

<sup>229</sup> White underlines this by arguing that, although legal restrictions on the veto should be extended to prevent the veto of resolutions regarding the peaceful settlement of a dispute (Chapter VI), the real problem is how to prevent the veto from operating to block legitimate Chapter VII resolutions. With regard to this, he also argues that 'a more practical question is how the problem whereby a permanent member vetoes a Chapter VII resolution for illegitimate reasons that have nothing to do with the issue at hand and nothing to do with preventing enforcement action from being taken against it can be avoided', see White 2004, p. 667-668.

<sup>230</sup> Articles 39-41, UN Charter.

<sup>231</sup> White indicates that extending legal restrictions on the veto to prevent the veto of Chapter VI decisions does not avoid the position whereby a permanent member violates UN principles, thereby causing a threat to or breach of the peace itself, and then by the use of the veto prevents Council action or condemnation, see supra notes 90 and 228.

Secondly, the proposal stating that the Security Council or the General Assembly should provide a legal definition of what constitutes a procedural matter, or clear criteria as to what is of a procedural nature in the sense of Article 27(2) of the UN Charter<sup>232</sup>, will also not have a clear effect on reducing the danger that states use force unilaterally. Although this proposal in the light of Article 27(2) has to be welcomed,<sup>233</sup> matters with regard to Security Council authorization to use force are clearly substantive.<sup>234</sup> In accordance with Article 27(3) of the UN Charter, such matters will remain to be subject to the veto power under this proposal.<sup>235</sup> Consequently, a single permanent member would still have the ability to paralyse Security Council decision-making, which eventually may lead to states using force unilaterally in situations where the Council was expected to act.

### 3.1.2 *Proposals with beneficial effects theoretically*

There also have been made proposals which, although having an effect on reducing the danger of unilateralism for collective security, yet should be put in perspective. In this regard several proposals on veto reform are relevant. For instance it has been proposed that a single veto should not prevent action on a proposal which has achieved the required majority.<sup>236</sup> Without a doubt it will be progress when a single permanent member does not have the ability anymore to block Security Council decision-making.<sup>237</sup> However, it is doubtful whether implementation of this proposal indeed will lead to a much more effective Security Council. In the aftermath of the Cold War, the Security Council still is divided into two power blocks: The United States and the United Kingdom on the one hand and Russia and China on the other.<sup>238</sup> The question that becomes relevant with regard to the underlying proposal is to what extent these states will back each other in Security Council voting. It is not unthinkable that in cases where the United States are intending to use their veto, they will be followed by

<sup>232</sup> Paragraph 2.3.1.

<sup>233</sup> Supra note 128.

<sup>234</sup> The veto power was designed to prevent permanent members to take part in military operations against their will. It ensures that Security Council action has the support of the most powerful states, see supra notes 214 and 215. Therefore, matters with regard to authorizing the use of force are always subject to the veto and consequently substantive. See also Better World Campaign, About the UN – UN Structure. Security Council, available at <[http://www.betterworldcampaign.org/about\\_the\\_un/security\\_council.asp](http://www.betterworldcampaign.org/about_the_un/security_council.asp)>, last visited December 8<sup>th</sup> 2006 and PBS, Kofi Annan – Center to the Storm. Who does what?, available at <<http://www.pbs.org/wnet/un/who/security.html>>, last visited December 8<sup>th</sup> 2006.

<sup>235</sup> Supra note 128.

<sup>236</sup> Paragraph 2.3.1.

<sup>237</sup> Van Genugten argues that for a majority decision of the Security Council to be opposed, it would be ideally if vetoes are pronounced by at least two permanent members, see Van Genugten 2006, p. 133.

<sup>238</sup> At least the Kosovo-crisis and the Iraq-crisis have proven that the antagonism between those two 'power blocks' has not been completely vanished. See introduction Chapter I, paragraph 1.2 and supra note 33. Recently, cases with regard to North Korea and Iran indicate the same, see NOS, V-Raad verdeeld over sancties Noord-Korea, available at <[http://www.nos.nl/nosjournaal/artikelen/2006/7/5/050706\\_noord\\_korea\\_raket.html](http://www.nos.nl/nosjournaal/artikelen/2006/7/5/050706_noord_korea_raket.html)>, last visited December 8<sup>th</sup> 2006 and NOS, De opstelling van de V-Raad, available at <[http://www.nos.nl/nosjournaal/dossiers/iran/iran\\_standpunten.html](http://www.nos.nl/nosjournaal/dossiers/iran/iran_standpunten.html)>, last visited December 8<sup>th</sup> 2006.

the United Kingdom and the other way around.<sup>239</sup> The same counts for Russia and China. Whether the proposal that a single veto should not prevent action on a proposal which has achieved the required majority would have much practical effects is therefore doubtful. Furthermore, this proposal is relevant for affecting the inviolability by which permanent members can use force unilaterally. As it matters, this proposal would definitely deal with the impossibility to impose sanctions on one of the permanent members. By adopting that a single veto does not longer prevent the Security Council from taking a decision which has achieved the required majority, it becomes possible to impose countermeasures on a permanent member which for instance has been using force illegally. If the other permanent members wish to impose such measures, the single veto by the permanent member will be not sufficient anymore to block such a decision.<sup>240</sup>

A second recommendation which has an effect on increasing the Security Council's effectiveness under Chapter VII, but yet should be put in perspective, is that proposing for a possibility to cast a negative vote without that vote constituting a veto if the permanent member so declares.<sup>241</sup> Although it may be awkward that such a possibility does not exist, it is highly doubtful whether permanent members would make use of such a possibility very often. Especially with regard to proposed actions under Chapter VII permanent members will not 'only' cast a negative vote, without that vote constituting a veto. Because decisions taken by the Security Council under Chapter VII often have the most drastic consequences, for instance authorizing a military intervention, permanent members that are against the proposed action will use their power to block it.<sup>242</sup> Therefore, the relevance of this proposal for Security Council actions under Chapter VII, such as the authorization of the use of force, will be almost zero. Accordingly, this proposal is not likely to significantly reduce the danger that states use force unilaterally as a result of a paralysed Security Council.

Finally, proposals have been made that try to make Security Council decisions subject to public accountability and transparency. Among others, it has been proposed that permanent members should be asked to provide written justifications to the General Assembly whenever the right to veto is used and to introduce a practice of 'indicative voting'.<sup>243</sup> It is questionable whether the implementation of such practices would lead to actual progress with regard to reducing the danger of unilateralism for collective security, mainly because such

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<sup>239</sup> Note that the United Kingdom is United States' greatest ally in the Western Hemisphere, see Global Policy Forum, Japan to Become the Britain of the Far East, available at <<http://www.globalpolicy.org/empire/analysis/2005/0224japan.htm>>, last visited December 8<sup>th</sup> 2006.

<sup>240</sup> Putting it differently: it is possible to avoid the so-called 'negative facet' of the veto power, as defined by White, see supra note 90.

<sup>241</sup> Paragraph 2.3.1.

<sup>242</sup> Take in mind again that the veto power was designed to prevent that majority voting on security issues combined with the strong enforcement powers of the Council might lead to a situation in which one or more of them could be obliged to provide military support for an action which it did not support, see supra note 122.

<sup>243</sup> Paragraphs 2.3.1 and 2.3.2.



proposals lack formal avenues of accountability. However, if a practice such as 'indicative voting' will clearly demonstrate that a veto has been casted on unreasonable grounds, governments of permanent members yet will be sensitive for public opinion to a certain extent. This will especially be the case for governments of truly democratic states. Since the power of those governments has been derived from their citizens, those governments will be hesitant to lose support and will, at least to certain extent, behave like their citizens expect them to.

### *3.1.3 Proposals with significant beneficial effects*

In spite of the proposals just mentioned, suggestions with regard to veto reform have been made which should be undoubtedly welcomed in the light of making the Security Council more effective under Chapter VII. In the first place, progress will be made with the proposal of the Working Group stating that the right to veto should be subject to suspension on specific occasions, as defined by a prescribed qualified majority in the General Assembly.<sup>244</sup> For instance if this proposal would be implemented, situations of large-scale human rights abuses will probably not be subject to the veto power anymore. As a result, the Security Council will be more able to decide to authorize the use of force to intervene and stop such abuses, as the Council decides by qualified majority. Putting it differently: In cases where the Security Council is expected to authorize the use of force to restore peace and security, under this proposal the General Assembly will be able to increase the likeliness of Security Council action by suspending the veto power.

Furthermore, the proposal made by Caron to eliminate the so-called 'reverse veto' will also have a positive effect on the effectiveness of the Security Council under Chapter VII.<sup>245</sup> Because permanent members may fear that an authorization to use force is irreversible due to the fact that it only can be altered or ended with a qualified majority in the Security Council with the veto power being applicable, they perhaps decide to veto the proposed action. However, permanent members will be less hesitant to agree on the imposed measures, knowing that these measures can be altered or ended if necessary. In fact, by creating the possibility to alter or end the imposed measures by a qualified majority without the veto power being applicable, it will be much easier to do so. With respect to this, it has to be taken into consideration that, as has been said in Chapter II, especially in cases of emergency, such as human rights abuses, there is no time to consider whether imposed measures are indeed efficient or necessary.<sup>246</sup> However, by implementing this proposal the threshold for the Security Council to authorize the use of force in cases of large-scale human rights abuses will be lowered, which as a consequence reduces the danger that states decide to use force unilaterally.

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<sup>244</sup> Paragraph 2.3.1.

<sup>245</sup> Paragraph 2.4.

<sup>246</sup> Supra notes 201 and 202.

The proposal to enhance the 'sunset provisions' is in line with the abolition of the 'reverse veto' is.<sup>247</sup> Under that proposal it would be a subsidiary body consisting of representatives of the fifteen Security Council members, deciding with a qualified majority without the veto power being applicable, whether the imposed measures should be altered or ended.<sup>248</sup> Obviously, its positive effects on the Council's effectiveness are more or less the same as is the case with abolishing the 'reverse veto'.

Quite differently, but yet commendable, is finally the suggestion to establish a mechanism allowing for a veto to be overruled in the advent of genocide, ethnic cleansing or large-scale human rights abuses.<sup>249</sup> Because an independent body may prohibit permanent members to use the veto power under matters of genocide, human rights abuses and ethnic cleansing under this suggestion,<sup>250</sup> the use of vetoes on unreasonable grounds will be partly suppressed. In any case, situations with regard to human rights violations would be excluded from the veto power, which makes the Security Council more able to act adequately in such situations and will reduce the danger states decide to use force outside the United Nations' structures due to the fact that the Security Council is unable to act adequately.

#### *3.1.4 Proposals applying to the reason of the permanent members*

Still there are a number of suggestions which have not been analysed on their merits up to this point, namely those appealing to the permanent members of the Security Council to use the right to veto more responsibly. The Working Group for instance argued that the permanent members could exercise voluntary restraint and make unilateral declarations not to use the veto in certain situations and on certain issues.<sup>251</sup> In addition, the High-level Panel urged the permanent members to use their right to veto only in matters where vital interests are genuinely at stake<sup>252</sup> and that they should refrain from abusing of the veto in cases of genocide and large-scale human rights abuses.<sup>253</sup> All proposals appealing to the permanent members to use their right to veto more responsibly would have a positive effect on reducing the paralysing effect of the veto power on Security Council decision-making under Chapter VII, if the permanent members would honour such appeal. In that case, unreasonable vetoes would not be casted anymore and as a consequence the Security Council would be able to act adequately in cases such as large-scale human rights abuses. However, it fully depends on the permanent members whether they are willing to make such voluntary restraint on the use of the veto power or whether they are willing to

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<sup>247</sup> Paragraph 2.4.

<sup>248</sup> Supra notes 204 - 207.

<sup>249</sup> Paragraph 2.4.

<sup>250</sup> Supra note 210.

<sup>251</sup> Paragraph 2.3.1.

<sup>252</sup> Paragraph 2.3.2.

<sup>253</sup> Paragraph 2.3.2.

obey incentives not to use their right to veto in cases of large-scale human rights abuses, as in the case of the Kosovo-crisis.<sup>254</sup> It therefore now has become inevitable to discuss the feasibility of all proposals with regard to veto reform.

### 3.2 The feasibility of the initiatives on veto reform

It has been just mentioned that all proposals appealing to the permanent members of the Security Council to use their right to veto more responsibly would have a positive effect on reducing the paralysing effect of the veto power on Security Council decision-making if they would obey such incentives, but that it is highly doubtful whether they are willing to do so. In this context the difference between 'hard law' and 'soft law' becomes very relevant. Before analysing the proposals on their respective feasibility, it therefore first will be explained what the difference between these two notions is.

#### 3.2.1 *'Hard law' and 'soft law'*

It is possible to divide the proposals and recommendations of the Working Group and the High-level Panel into two groups. The first group consists of proposals and recommendations with regard to so-called 'hard law'. The second group consists of proposals and recommendations with regard to 'soft law'. What is the difference between these two groups?

'Hard law' consists of measures with legally binding force. According to Wellens and Borchardt certain elements need to be present in order to speak of 'hard law':

- *'The binding requirement of certain conduct or omissions is formulated by subjects who are vested with the necessary authority and according to pre-established procedures;*
- *the addressees of these rules of conduct are informed of their existence, are prepared to acknowledge their authority, and are able and willing to effectively comply with them;*
- *the rules of conduct entail a restriction of future freedom of action and are therefore sufficiently exact; and*
- *certain means of exhortation of the addressee to follow the directives embodied in his or her obligation.*<sup>255</sup>

If all these elements are present it is appropriate to speak of an obligation.<sup>256</sup> Those who disregard such obligation can be held accountable.<sup>257</sup> Putting it

<sup>254</sup> Paragraph 1.1.

<sup>255</sup> Mörth refers with regard to these elements in U. Mörth, *Soft law in governance and regulation : an interdisciplinary analysis*, Cheltenham: Elgar 2004, p. 17 to K. Wellens and G. Borchardt, 'Soft Law in European Community Law', *European Law Review* (14) 1989, p. 280.

<sup>256</sup> Mörth 2004, p. 17.

differently: Enforcement mechanisms are always present with regard to 'hard law'. As a consequence most legislative texts belong to 'hard law'.<sup>258</sup>

In contrary to all rules belonging to 'hard law', there are also measures that have not been adopted according to the legal framework for formal law. Nevertheless, these measures create expectations and are meant to be binding, although not as a matter of law. Such measures eventually have been identified and referred to as 'soft law'.<sup>259</sup> 'Soft law' can be defined as law consisting of rules of conduct that, in principle, have no legally binding force but which nevertheless may have practical effects.<sup>260</sup> Such rules rely on persuasion instead of punishment and promote change in attitude and behaviour within the legal community.<sup>261</sup> It is therefore that a breach of 'soft law' does not constitute a violation of international law in the strict sense, and thus not entail state responsibility.<sup>262</sup> 'Soft law' encompasses various instruments such as agreements, declarations, communication, codes of conduct, recommendations, resolutions, guidelines, notices and positions.<sup>263</sup>

'Soft law' can be considered as the only alternative whenever at an international level 'hard law' is not possible as a result of the absence of political will.<sup>264</sup> Although 'soft law' is not legally binding, it is morally and often also considered to be politically binding<sup>265</sup> as it reflects the 'mores' of the international community, which are accepted and promoted by society at large. Apart from its reliance on public accountability as well as transparency, 'soft law' often turns out to be 'backdoor' legislation: 'Soft law' may develop into general principles of law or even customary law.<sup>266</sup> According to Article 38 of the Statute of the International

<sup>257</sup> W. Kälin, *How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework* (Presentation at Roundtable Meeting Ralph Bunche Institute for International Studies CUNY Graduate Center December 19, 2001), available at <<http://www.brook.edu/fp/projects/idp/articles/Kaelin12-19-01.pdf>>, p. 7.

<sup>258</sup> International Labour Organization, *Legislation and Policies*, available at <<http://www.ilo.org/public/english/protection/trav/aids/laws/index.htm>>, last visited November 2<sup>nd</sup> 2006.

<sup>259</sup> Mörth 2004, p. 16. Mörth refers with regard to this definition of 'soft law' law to Francis Snyder in F. Snyder, *Soft Law and Institutional Practice in the European Community*, *EUI Working Paper Law* 93/5, p. 2.

<sup>260</sup> Mörth 2004, p. 16. According to Cini, see M. Cini, 'The Soft Law approach: Commission rule-making in the EU's state aid regime', *Journal of European Public Policy* (8) 2001-2, 192-207, this definition is broad enough to cover both an international and an EU understanding of soft law, see Mörth 2004, p. 16.

<sup>261</sup> W. Witteveen and B. van Klink, 'Why is Soft Law really Law? A Communicative Approach to Legislation', *Regelmaat* 1999, p. 126-140, also available at <<http://rechten.uvt.nl/bartvanklink/softlaw.pdf>>, p. 126.

<sup>262</sup> Kälin 2001, p. 6.

<sup>263</sup> Mörth 2004, p. 16.

<sup>264</sup> R. Blanpain, additional comments on various lectures ('Geneva Lectures' 2006), 6-9 March 2006 and R. Blanpain and M. Colucci, *The globalization of labour standards: the soft law track*, The Hague, Kluwer Law International 2004, p. 40.

<sup>265</sup> Mörth argues that 'rules of conduct with no legally binding force are often politically binding, which sometimes leads to legal effects', see Mörth 2004, p. 17.

<sup>266</sup> Blanpain and Colucci 2004, p. 41, 122.

Court of Justice both are considered to be legally binding sources of international law.<sup>267</sup> Consequently there is a possibility that 'soft' becomes 'hard'.

### 3.2.2 *Assessing the feasibility of the proposals on veto reform*

It needs no further explanation that, in principle, veto reform by changing the legally binding rules has to be preferred over veto reform without changing these legally binding rules. Therefore, proposals on veto reform involving a Charter amendment are the most useful to achieve that the veto power will have a less paralysing effect on Security Council decision-making and that permanent members are unable to act with impunity any longer. Proposals requiring a Charter amendment are for instance the suggestion that the right to veto should only apply to Chapter VII action, the suggestion to suspend the right to veto on specific occasions and the suggestion that a single veto should not prevent action on a proposal which has achieved the required majority, as defined by a prescribed qualified majority in the General Assembly.<sup>268</sup> However, in order to amend the Charter the support of all permanent members is required.<sup>269</sup> Article 108 of the UN Charter cites that 'Amendments to the present Charter shall come into force for all members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council'.

The problem that will be encountered in case the effort is made to change the binding rules on the veto power by amending the Charter is evident. Permanent members will probably not be prepared to curtail the power they all derive from their right to veto Security Council decisions. However, the answer whether veto reform by amending the Charter is feasible can only be determined by investigating the permanent members' attitude towards Charter amendments with regard to the veto power. In this context especially the attitude of the United States is very important. This is mainly the case because of all permanent members, the United States in particular have the ability to use force unilaterally, since in the post-Cold War era there is no viable countervailing power to cajole the United States into a more multilateral approach. After the Cold War the United States emerged as the world's single superpower.<sup>270</sup> Besides, recent history, i.e. the Kosovo-crisis and the Iraq-crisis, has proven that the United States take the view of a world as a state of nature, in which states act out of

<sup>267</sup> Article 38(1-b), Statute of the International Court of Justice: 'The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply international custom, as evidence of a general practice accepted as law'. Article 38(1-c), Statute of the International Court of Justice: 'The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply the general principles of law recognized by civilized nations'.

<sup>268</sup> Paragraphs 2.3 and 2.4.

<sup>269</sup> Paragraph 2.2.

<sup>270</sup> Supra note 91.

self-interest and strive for maximizing their power as much as possible.<sup>271</sup> Accordingly, the United States will object to any softening of their power to veto Security Council decisions.<sup>272</sup> Moreover it should be mentioned that although the United Kingdom, France and Russia no longer can be considered major powers, the right to veto ensures them a substantial voice in international politics. Consequently these permanent members as well will not allow that the right to veto will be curtailed.<sup>273</sup> Putting it differently, one could say that the permanent members of the Security Council, in essence, all defend the rights they once were awarded and therefore they will not allow their right to veto to be curtailed or abolished.<sup>274</sup>

Now 'hard law' with regard to veto reform appears to be impossible, the question is whether 'soft law' perhaps offers an alternative.<sup>275</sup> Therefore, incentives such as to exercise voluntary restraint and to make unilateral declarations not to use the veto in certain situations and on certain issues, to use the veto power only in matters where vital interests are genuinely at stake and to refrain from the abuse of the veto in cases of genocide and large-scale human rights abuses now become very relevant.<sup>276</sup> The common denominator of all such incentives is that they urge permanent members of the Security Council to use the right to veto responsibly.

Perhaps it is hard to see why permanent members would exercise a voluntary restraint on the use of the right to veto, how such voluntary practice could contribute to the effectiveness of the Security Council, and how it can be achieved that permanent members no longer will be able to use force with impunity. Indeed, at first sight it seems as if the significance of voluntary restraint by means of, for instance, unilateral declarations is void, mainly because it lacks avenues of formal accountability.<sup>277</sup> However, it is described in paragraph 3.2.1 that such declarations, although not legally binding, are morally and politically

<sup>271</sup> T. Hobbes and others, *Leviathan*, Amsterdam: Boom 2002, p. 183-188.

<sup>272</sup> De Hoogh 2003, p. 27. In a US reaction to UN reform Department of State undersecretary for Political affairs Burns stated that 'while Security Council reform is an important issue, we cannot let discussion on expansion divert our attention from, and delay on, other important, more urgently-needed UN reforms. It is our conviction that no single area of reform should be addressed to the exclusion of others', see J.R. Crook, 'Contemporary Practice of the United States Relating to International Law - U.S. Views on UN Reform, Security Council Expansion', *American Journal of International Law* (99) 2005-4, p. 907. This could be interpreted as a decent way of saying that Security Council reform, and therefore veto reform, is not what the United States strive for.

<sup>273</sup> Weiss 2003, p. 151. The High-level Panel also encompassed representatives of the five permanent members, which declares why the High-level Panel for instance did not recommend to abolish the veto right, see G. Melloan, The UN Can't Be Reformed, But It Can Be Bypassed, *The Wall Street Journal*, 7 December 2004, available at <[http://online.wsj.com/article\\_print/0,,SB110238185170892763,00.html](http://online.wsj.com/article_print/0,,SB110238185170892763,00.html)>, p. 2.

<sup>274</sup> Weiss 2003, p. 151, Wouters and Ruys 2005, p. 3, 22 and J. Wouters and T. Ruys, 'De hervorming van de Veiligheidsraad: op zoek naar een Europees perspectief', *Institute for International Law, K.U. Leuven*, Leuven: Institute for International Law, K.U. Leuven 2005, p. 5.

<sup>275</sup> 'Soft law' can be considered as the only alternative in case at the international level 'hard law' is not possible as a result of the absence of political will, see paragraph 3.2.1.

<sup>276</sup> Paragraphs 2.3 and 2.4. For pragmatic reasons many EU-member states are in favour of such voluntary restraint on the use of the veto power as well as an increased responsibility, see Wouters and Ruys 2005, p. 5.

<sup>277</sup> Supra note 260.

binding.<sup>278</sup> Therefore, the significance of such measures of 'soft law' for reducing the danger that permanent members will use force unilaterally should not be underestimated, mainly for the two reasons given in paragraph 3.2.1: Firstly, they rely on public accountability and transparency, secondly measures of 'soft law' often turn out to be 'backdoor' legislation.<sup>279</sup> Therefore, such 'soft law' proposals deserve serious consideration. The more so since permanent members probably rather want to make seemingly harmless unilateral declarations on exercising restraint on the use of veto power, than to agree with changing the binding rules with regard to the veto power.

However, would permanent members indeed be willing to exercise voluntary restraint on the use of the veto power? One might expect that they are, but reality appears to be different. Permanent members even reject 'soft law' on rules with regard to the veto power and consequently are unwilling to exercise voluntary restraint on the use the veto power. This finds expression by the fact that they even appear to be unwilling to restrain from the use of the right to veto under Chapter VI of the Charter voluntarily.<sup>280</sup>

Finally, a number of proposals have not been assessed yet with regard to their feasibility. As is the case with the feasibility of the proposals already discussed above, their feasibility as well depends on the co-operation of the permanent members of the Security Council. Unfortunately, as we have seen, this gives little hope. With regard to this, it has to be remarked that establishing a mechanism that allows for a veto to be overruled in the advent of genocide, ethnic cleansing or large-scale massacres of civilians<sup>281</sup> requires to be incorporated in the Charter, if such mechanism should fall under the authority of the General Assembly.<sup>282</sup> Of course such incorporation can only be achieved with the support of the permanent members.<sup>283</sup> Furthermore, the introduction of a system of 'indicative voting'<sup>284</sup>, although it does not require a Charter amendment, can only be implemented by the Security Council itself. The Security Council has to adopt such system in its Provisional Rules of Procedure and as a consequence, such proposal needs its support.<sup>285</sup> In addition, the possibility to cast a negative vote if

<sup>278</sup> Supra note 265.

<sup>279</sup> Supra note 266.

<sup>280</sup> Advisory report of the Advisory committee on issues of International Public Law (CAVV) and the Advisory Council on International Affairs (AIV) on Humanitarian Intervention, 31 March 2000, paragraph IV.2, p. 18.

<sup>281</sup> Paragraph 2.4.

<sup>282</sup> Wouters and Ruys 2005, p. 33. Otherwise there is the danger of violating Article 12 of the Charter, stating that 'while the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests'.

<sup>283</sup> Article 108, UN Charter, see also paragraph 2.2.

<sup>284</sup> Paragraph 2.3.2.

<sup>285</sup> The Security Council adopts its own Provisional Rules of Procedure. Because such decisions are procedural they fall under Article 27(2) of the UN Charter and consequently can not be vetoed by one of the permanent members, however can be adopted by a qualified majority (nine out of fifteen votes). The current Provisional Rules of Procedure of the Security Council can be found under UN Doc. S/96/Rev.7, available at <<http://www.un.org/Docs/sc/scrules.htm>>.

the member so declares<sup>286</sup> can be implemented without Charter amendment. However, in this situation too it is up to the permanent members of the Security Council to decide whether they adopt such practice.<sup>287</sup> Finally, also with regard to the so-called 'reverse veto' and 'sunset provisions'<sup>288</sup>, some remarks can be made regarding their feasibility. Removing the 'reverse veto' can be achieved without any Charter amendment, since dealing with a threat to veto on an action that already has been taken or authorized does not require such. Instead of this, a resolution should incorporate such modified voting procedure for future use in terminating the action taken.<sup>289</sup> With regard to the 'sunset provisions', it should be mentioned that the bodies dealing with the assessment whether sanctions do not have a clear purpose anymore are subsidiary to the Security Council and as a result have to be established by the Security Council.<sup>290</sup> Due to the huge input of the permanent members in Security Council decision-making it is doubtful whether such bodies actually will be established a lot.<sup>291</sup>

### 3.3 Back to Kosovo and Iraq: Would proposals on veto reform have prevented the unilateral use of force?

The case studies on Kosovo and Iraq<sup>292</sup> have demonstrated that the veto power is a major problem with regard to the threat unilateralism constitutes for the system of collective security. Firstly, it is able to paralyse the Security Council in cases where it is expected to act,<sup>293</sup> secondly it ensures that permanent members can use force with impunity.<sup>294</sup> Against this background, Chapters II and III have been dealing with proposals on veto reform, their merits and their feasibility. Since the case studies on Kosovo and Iraq brought this definition of the problem before the limelight, it now is fully justified to examine whether the proposals, if implemented, would have prevented the unilateral use of force by NATO and the United States.

#### 3.3.1 *The Kosovo-crisis, what if?*

Paragraph 1.1 has demonstrated that the catastrophic humanitarian situation in Kosovo in 1999 asked for an effective Security Council, which would be able to end the grave violations of human rights and international humanitarian law. However, as a result of threats with vetoes on unreasonable grounds by Russia and China, the Security Council turned out to be paralysed on the 'moment

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<sup>286</sup> Paragraph 2.3.1.

<sup>287</sup> Paragraph 2.3.1.

<sup>288</sup> Paragraph 2.4.

<sup>289</sup> Caron 1993, p. 584.

<sup>290</sup> Supra note 204.

<sup>291</sup> Paragraph 2.4.

<sup>292</sup> Chapter I.

<sup>293</sup> Paragraph 1.1.3.

<sup>294</sup> Paragraph 1.2.3.



suprême'.<sup>295</sup> Would the Security Council be able to act effectively if one or more of the proposals would have been implemented by that time already?

The assessment of the proposals on veto reform on their merits in paragraph 3.1 clearly indicates that several proposals would have had a positive effect on the course of events in Kosovo, at least if these proposals would have been implemented already by that time. The more so since several proposals made by the Working Group, the High-level Panel and experts directly deal with the problem that a veto will prevent the Security Council to act adequately during a humanitarian crisis.

With regard to this, a mechanism allowing for a veto to be overruled in the advent of genocide, ethnic cleansing or large-scale massacres of civilians<sup>296</sup> would have circumvented the unreasonable threats with vetoes by Russia and China and would have enabled the Security Council to authorize the use of force in order to stop the humanitarian disaster in Kosovo. As explained in paragraph 2.3 such mechanism would be non-political and only consisting of legal experts. Such mechanism therefore would form an unprejudiced opinion based on the matter, instead of being entangled by power politics clearly reminiscent to the Cold War era.<sup>297</sup> Consequently, such mechanism would undoubtedly have overruled any possible veto to authorize the use of force to stop the grave violations of human rights which were taking place, for instance by means of ethnic cleansing.<sup>298</sup>

Furthermore, the course of events in Kosovo perhaps would have been different if the General Assembly, deciding by a two thirds majority, would have had the opportunity to suspend the veto power on specific occasions.<sup>299</sup> The General Assembly then had the power to decide that as a result of the clear humanitarian catastrophe which was taking place in Kosovo, the veto power of the permanent members would be suspended. Consequently, Russia and China would not have been able to paralyse Security Council decision-making by unreasonable threats to veto any authorization to use force and therefore the Security Council would be able to act adequately and authorize the use of force to stop the humanitarian disaster. In such situation NATO did not have to decide to use force outside the United Nations.

Finally, it is obvious that if all permanent members would have been obeying appeals to refrain from the use of veto in cases of genocide and large-scale human rights abuses<sup>300</sup>, or to only use the right to veto in cases where vital interest are genuinely at stake<sup>301</sup>, Russia and China would not have threatened

<sup>295</sup> Paragraph 1.1.3 and supra note 33.

<sup>296</sup> Paragraph 2.3.

<sup>297</sup> Supra note 33 and paragraph 1.1.3.

<sup>298</sup> Supra note 31.

<sup>299</sup> Paragraph 2.3.1.

<sup>300</sup> Paragraph 2.3.2.

<sup>301</sup> Paragraphs 2.3.1 and 2.3.2.

with or used their veto power.<sup>302</sup> Such attitude as well would have enabled the Security Council to act adequately and eventually authorize the use of force in order to stop the grave violations of human rights and international humanitarian law in Kosovo.

However, proposals on veto reform which at first sight seem as if they would have had a positive influence on the Security Council's effectiveness in Kosovo, but in practice would not have had such positive effects have also been made. For the course of events in Kosovo it would have made no difference if at least two vetoes were necessary to block Security Council decision-making.<sup>303</sup> Exactly for the reason set out in paragraph 3.1, if a single veto did not prevent the Security Council from taking action, in this situation the Security Council would not have been more effective: the Security Council still consists of power blocks. For the Kosovo-crisis this would have meant that Russia and China would have vetoed any authorization to use force to stop the ethnic cleansing. As a consequence, this proposal would not have prevented NATO from using force unilaterally.

Finally, it is doubtful whether enhancing transparency with regard to Security Council decision-making, for instance by providing written justifications to the General Assembly if a veto is going to be casted<sup>304</sup> or by introducing a system of indicative voting<sup>305</sup>, or removing the 'reverse veto'<sup>306</sup> eventually would have prevented NATO from using force unilaterally. It has been mentioned before that decisions under Chapter VII are the most far-reaching of all decisions the Security Council can take.<sup>307</sup> It is therefore likely that Russia and China would not have been impressed by such measures and would have casted the veto, if this appeared to be necessary, anyway.

Nevertheless, the Security Council would have been able to act adequately and consequently would have prevented NATO from using force unilaterally with regard to the Kosovo-crisis, if the mechanism allowing for a veto to be overruled in the advent of genocide, ethnic cleansing or large-scale massacres of civilians had been in place. The same is true for the General Assembly having the opportunity to suspend the veto on specific occasions, as defined by a prescribed qualified majority in the General Assembly. These two proposals, at least if they had been implemented by that time already, would leave the permanent members no choice in whether they were or were not able to use their veto on the matter. In any case, in Kosovo the veto would have not been applicable as a result of the grave violations of human rights.

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<sup>302</sup> After all by threatening to use the veto on unreasonable grounds these states did not act responsibly with regard to their power to veto Security Council resolutions.

<sup>303</sup> Paragraph 2.3.1.

<sup>304</sup> Paragraph 2.3.1.

<sup>305</sup> Paragraph 2.3.2.

<sup>306</sup> Paragraph 2.4.

<sup>307</sup> Paragraph 3.1.2.

### 3.3.2 *The Iraq-crisis, what if?*

The case-study on Iraq has demonstrated that permanent members have the power to use force unilaterally with impunity, as a result of the fact that they can veto any Security Council resolution calling them to order.<sup>308</sup> With this in mind, the United States decided to attack Iraq without a previous Security Council resolution to use force. It became clear in paragraph 3.1.2 that, after it has become clear that abolishing the veto power has turned out to be impossible, only one proposal on veto reform that is relevant to this question at hand has been made: The proposal that a single veto should not prevent action on a proposal which has achieved the required majority in the Security Council.<sup>309</sup> Would the United States have been prevented to attack Iraq if a single veto was not enough to block Security Council decision-making?

It has been explained earlier that this proposal would definitely deal with the impossibility to impose sanctions on one of the permanent members. A single veto namely will no longer be sufficient to block a resolution which imposes countermeasures on a permanent member that has been using force unilaterally, such as was the case with the United States when they attacked Iraq. Because of their fear that sanctions could be imposed by the Security Council, at first sight it seems as if the United States would have acted more reluctantly, regarding the question whether or whether not to invade Iraq without an authorization to use force.

However, it has been mentioned several times that the United States emerged as the world's single superpower and that there is no countervailing power to cajole the United States into a more multilateral approach.<sup>310</sup> Its economic and military power rises above all other states.<sup>311</sup> Consequently, the United States do not have to care about the United Nations' structures very much. As a result, and in spite of the fact that the underlying proposal really has its positive effects regarding the affection of the permanent members' inviolability, it is highly doubtful whether the United States would have acted differently if this proposal already had been implemented by the time they invaded Iraq.

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<sup>308</sup> Paragraph 1.2.3.

<sup>309</sup> Paragraph 2.3.1.

<sup>310</sup> Supra note 91.

<sup>311</sup> Note that the United States are the largest contributor to the United Nations budget. Currently it pays about 22% of the United Nations' regular budget, see Global Policy Forum, Regular Budget Payments of Largest Payers 2006, available at <<http://www.globalpolicy.org/finance/tables/reg-budget/large06.htm>>, last visited December 6<sup>th</sup> 2006 and United Nations Association of the United States of America, US Financial Contributions to the United Nations System: Fiscal Year 2005 Request, available at <<http://www.unausa.org/site/pp.asp?c=fvKRI8MPJpF&b=328791>>, last visited December 6<sup>th</sup> 2006.

## 4 Conclusion

The case studies on Kosovo and Iraq have demonstrated that the veto power plays a central role with regard to the problems the United Nations Security Council has to deal with in the post-Cold War era.

First of all, the Kosovo-crisis has shown that situations can emerge in which the Security Council is expected to act, for instance in the clear presence of grave violations of human rights and international humanitarian law, but that the Security Council is paralysed due to the (unreasonable) use of the veto power by one or more of its permanent members. Eventually, such situations may lead to states (rightly) deciding to use force unilaterally, which eventually happened in the case of Kosovo when NATO decided to take military measures in order to stop the human tragedy in Kosovo.<sup>312</sup>

Secondly, the case study on Iraq has demonstrated that due to their veto power permanent members can use force with impunity. As a result, situations in which permanent members decide to act outside the United Nations' structures can emerge, as was the case with the United States and the United Kingdom when they invaded Iraq in 2003.<sup>313</sup> Both aspects of the veto power can be considered to be negative. They both increase the danger that states will use force unilaterally and as a consequence they constitute a threat to the system of collective security of the United Nations.<sup>314</sup> Therefore, it is necessary to deal with these negative aspects of the veto power.

In Chapter II it has been demonstrated that there have been made many proposals on Security Council reform and that, besides the enlargement of the Security Council in order to make it a more representative body, the veto power played an important role in these proposals. All proposals with respect to the veto power had in common that they aimed at limiting the scope of the veto power, since it appeared to be impossible as well as undesirable to completely abolish the veto power.<sup>315</sup> However, in order to deal with the negative aspects of the veto power as formulated in Chapter I, being the unreasonable use of the veto power as the paralysing factor for Security Council decision-making and the inviolability of permanent members as a result of their veto power, not all proposals appeared to be equally effective. In order to reduce the danger that unilateralism constitutes for the system of collective security of the United Nations, preferably both these negative aspects should be dealt with.

With respect to this, Chapter III demonstrated that with regard to the ineffectiveness of the Security Council due to the (unreasonable) use of the veto

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<sup>312</sup> Paragraph 1.1.

<sup>313</sup> Paragraph 1.2.

<sup>314</sup> Paragraph 1.3.

<sup>315</sup> Paragraph 2.2.

power, mainly proposals such as eliminating the 'reverse veto' and establishing a mechanism allowing for a veto to be overruled in the advent of genocide, ethnic cleansing or large-scale human rights abuses would have to be preferred.<sup>316</sup> Regarding the impunity of the permanent members due to their veto power, the only proposal that would have a positive effect is the proposal that a single veto should not prevent a decision that has achieved the required majority in the Security Council to be taken.<sup>317</sup> As a result of the effect of soft law, obviously it would also be a step forward if permanent members were willing to exercise voluntary restraint on their right to veto and use the veto power more responsibly.<sup>318</sup>

Now the question looms up what kind of veto reform the permanent members at least are willing to agree with. The answer can be formulated short and snappy: precious little. Even when it comes down to exercising voluntary restraint on the veto power the permanent members of the Security Council appear to be unwilling.<sup>319</sup> Considering that implementation of any proposal on veto reform, whether it relates to 'hard law' or 'soft law', requires co-operation of all permanent members, one may conclude that veto reform is unlikely to happen in the near future.

To some this may be unacceptable and a shame, taking in mind that since the early nineties efforts to alter the veto power of the permanent members of the Security Council already have been made.<sup>320</sup> However, one shall not forget that the system of collective security of the United Nations was based on the support of the permanent members of the Security Council from the very beginning. Therefore, the system of collective security of the United Nations will survive for as long as it has the support of the permanent members.<sup>321</sup> As long as permanent members are not be prepared to fumble the slightest bit on their veto power, the international community has only two options of choice: On the one side it can accept the situation as it is, on the other side it can withdraw its support to the United Nations. Putting it differently: There is a choice between a United Nations with failures, or no United Nations at all. It is obvious that the first option is the only reasonable option.

Is veto reform a hopeless quest then, given the fact that the permanent members of the Security Council are not willing to co-operate? To a certain extent it is indeed, however one option which perhaps offers a first step in the right direction remains: pinning the initiative on veto reform on the United States. It has been mentioned that the United States are the only remaining superpower and there is

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<sup>316</sup> Paragraph 3.1.3.

<sup>317</sup> Paragraph 3.1.2.

<sup>318</sup> Paragraph 3.2.

<sup>319</sup> Paragraph 3.2.2.

<sup>320</sup> Paragraph 2.3.1.

<sup>321</sup> Ryngaert 2002, p. 2.

no single other state that has the power to cajole the United States into a more multilateral approach. It is the only state that, due to its military and economic power, actually is capable of acting unilaterally without having to be afraid of risking countermeasures by the United Nations.<sup>322</sup> By making the United States fully responsible for veto reform at least two things will hopefully be achieved. Firstly, the United States will, under pressure of the international community, have to make a proposal on veto reform, which will set veto reform in motion. Secondly, it will be achieved that the support for the underlying proposal of the most important member of the United Nations, for the United States are the only remaining true superpower among all permanent members of the Security Council, will be ensured in advance.<sup>323</sup>

Along this line, there may be some hope towards a more effective Security Council. Discussions with regard to the Security Council's representativeness consequently would have to be postponed indefinitely. Such discussions are of minor importance as the international community for upholding the system of collective security first should ensure that the Security Council is as effective as possible. Only when this has been achieved, which will be no picnic as has been demonstrated in this thesis, the representativeness of the Security Council should be an issue again. If this strategy will not be followed, there is a risk that the international community bites off more than it can chew, which eventually may lead to a deadlock on Security Council reform.

Considering the research question of this thesis again, perhaps that in a few years or even decades the permanent members' willingness to reform the veto power has increased. Until then, the only alternative seems to be to make the United States fully responsible for proposals on veto reform in the hope that this would set veto reform in motion.

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<sup>322</sup> Paragraph 1.2.3. Recently Kofi Annan held his farewell speech (d.d. 12 December 2006). In this speech he urged the United States to be aware of their special position as the world's single superpower. With regard to this, he has been inciting the United States to act less outside United Nations' structures in the future. See NRC Handelsblad, Annan maant VS in toespraak, available at <[http://www.nrc.nl/buitenland/article571243.ece/Annan\\_maant\\_VS\\_in\\_toespraak](http://www.nrc.nl/buitenland/article571243.ece/Annan_maant_VS_in_toespraak)>, last visited December 30<sup>th</sup> 2006.

<sup>323</sup> Note that the United States urged the new Secretary-General of the United Nations, Ban Ki-moon, to continue with reforming the United Nations, see NOS, Ban Ki-moon neemt leiding VN over, available at <<http://www.nos.nl/nos/artikelen/2007/01/art000001C72D4BC2AED088.html>>, last visited January 4<sup>th</sup> 2007.

**Bibliography****Literature:**

Abi-Saab and others 1997

G. Abi-Saab and others, *The changing constitution of the United Nations*, London: The British Institute of International and Comparative Law 1997.

Bannon 2006

A.L. Bannon, 'The responsibility to protect: The UN World Summit and the question of unilateralism', *Yale Law Journal* (115) 2006-5, p. 1157-1166.

Bertrand 1997

M. Bertrand, *The United Nations: past, present and future*, The Hague: Kluwer Law International 1997.

Blanpain 2006

R. Blanpain, additional comments on various lectures ('Geneva Lectures' 2006), 6-9 March 2006.

Blanpain and Colucci 2004

R. Blanpain and M. Colucci, *The globalization of labour standards: the soft law track*, The Hague, Kluwer Law International 2004.

Blum 2005

Y.Z. Blum, 'Proposals for UN Security Council reform', *American Journal of International Law* (99) 2005-3, p. 632-648.

Caron 1993

D.D. Caron, 'The Legitimacy of the Collective Authority of the Security Council', *The American Journal of International Law* (78) 1993-4, p. 552-588.

M. Cini, 'The Soft Law approach: Commission rule-making in the EU's state aid regime', *Journal of European Public Policy* (8) 2001-2, 192-207.

Conforti 2000

B. Conforti, *The law and practice of the United Nations*, The Hague: Kluwer Law International 2000.

Crook 2006

J.R. Crook, 'Contemporary Practice of the United States Relating to International Law - U.S. Views on UN Reform, Security Council Expansion', *American Journal of International Law* (99) 2005-4, p. 906-907.

Currie 1998

J. Currie, 'NATO's humanitarian intervention in Kosovo: making or breaking international law?', *The Canadian Yearbook of International Law* (36) 1998, p. 303-333.

Custers 2003

P. Custers, 'Feigned and true reasons for the war of aggression against Saddam Hussain's Iraq', *Anti-militaristic magazine AMOK*, June 2003, available at <[www.petercusters.nl/Campaigning&style\\_id](http://www.petercusters.nl/Campaigning&style_id)>.

Duursma 1999

J. Duursma, 'Justifying NATO's Use of Force in Kosovo?', *Leiden Journal of International Law* (12) 1999-2, p. 287-295.

Esposito 2005

C. Esposito, 'Right of Veto in the Security Council. Is it untouchable?', available at <<http://www.fride.org/eng/Publications/Publication.aspx?Item=676>>.

Van Genugten and others 2006

W. van Genugten and others, *The United Nations of the future: globalisation with a human face*, Amsterdam: KIT-Publishers 2006.

Van Ginkel and Wessel 2003

B.T. van Ginkel and R.A. Wessel, 'Collectieve veiligheid vs. unilateralisme: de toekomst van de VN-Veiligheidsraad', in: *Jaarboek Vrede en Veiligheid: bewapening, vredesbeweging en het Nederlandse veiligheidsbeleid*, Nijmegen: Centrum voor Internationaal Conflict-Analyse & Management, KU Nijmegen 2003, p. 47-66.

Van Ginkel and Wessel 2004

B.T. van Ginkel and R.A. Wessel, 'Bestuurlijke vernieuwing van de VN-Veiligheidsraad: wereldwetgever of achterhaald instituut', *Jaarboek Vrede en Veiligheid: bewapening, vredesbeweging en het Nederlandse veiligheidsbeleid*, Nijmegen: Centrum voor Internationaal Conflict-Analyse & Management, Radboud Universiteit Nijmegen 2004, p. 1-27.

Gray 2004

C. Gray, *International Law and the use of force*, Oxford: Oxford University Press 2004.

Hobbes and others 2002

T. Hobbes and others, *Leviathan*, Amsterdam: Boom 2002.



De Hoogh 2003

A. De Hoogh, 'De oorlog tegen Irak, de Veiligheidsraad, en Nederland', in: *Jaarboek Vrede en Veiligheid: bewapening, vredesbeweging en het Nederlandse veiligheidsbeleid*, Nijmegen: Centrum voor Internationaal Conflict-Analyse & Management, KU Nijmegen 2003, p. 7-28.

Kälin 2001

W. Kälin, *How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework* (Presentation at Roundtable Meeting Ralph Bunche Institute for International Studies CUNY Graduate Center December 19, 2001), available at <<http://www.brook.edu/fp/projects/idp/articles/Kaelin12-19-01.pdf>>.

Köchler 1996

H. Köchler, 'The United Nations and International Democracy: The Quest for UN Reform', *Paper presented at the final meeting of the research network on 'The Political Theory of International Democracy' at the University of Cambridge (UK), 29 March 1996*, available at <<http://hanskoechler.com/unid.htm>>.

Köchler 1991

H. Köchler, 'The Voting Procedure in the United Nations Security Council: Examining a Normative Contradiction in the UN Charter and its consequences on International Relations', *Studies in International Relations, XVII*, available at <[http://www.i-p-o.org/Koechler-Voting\\_Procedure-UN\\_Security\\_Council.pdf](http://www.i-p-o.org/Koechler-Voting_Procedure-UN_Security_Council.pdf)>.

Kooijmans 2000

P.H. Kooijmans and others, *Internationaal Publiekrecht in Vogelvlucht*, Deventer: Kluwer 2000.

Malanczuk 2004

P. Malanczuk, *Akehurst's modern introduction to international law*, London: Routledge 2004.

Melloan 2004

G. Melloan, 'The UN Can't Be Reformed, But It Can Be Bypassed', *The Wall Street Journal*, 7 December 2004, available at <[http://online.wsj.com/article\\_print/0,,SB110238185170892763,00.html](http://online.wsj.com/article_print/0,,SB110238185170892763,00.html)>.

Mörth 2004

U. Mörth, *Soft law in governance and regulation: an interdisciplinary analysis*, Cheltenham: Elgar 2004.

Naumann 2002

K. Naumann, 'Global Insights – NATO, Kosovo and military intervention', *Global governance: a review of multilateralism and international organizations* (8) 2002-1, p. 13-18.

Putzel 2006

J. Putzel, 'Cracks in the US empire: unilateralism, the 'war on terror' and the developing world', *Journal of International Development* (18) 2006-1, p. 69-86.

Ryngaert 2002

C. Ryngaert, 'De hervorming van de Veiligheidsraad: tegelijk utopie en noodzaak - Samenstelling en besluitvorming in de Veiligheidsraad van de Verenigde Naties', *Jura Falconis* (38) 2002-2, p. 225-286, also available at <<http://www.law.kuleuven.ac.be/jura/38n2/ryngaert.htm>>.

Sarooshi 1999

D. Sarooshi, *The United Nations and the development of collective peace and security: the delegation by the UN Security Council of its Chapter VII powers*, Oxford: Oxford University Press 1999.

Schrijver 2002

N. Schrijver, 'Irak en de Veiligheidsraad: is een oorlog voorkomen?', *Nederlandsch Juristenblad* (77) 2002-42, p. 2094-2095.

Schrijver 2005

N. Schrijver, *Bij een zestigste verjaardag: de toekomst van het Handvest van de Verenigde Naties* (inaugural speech Leiden University, Leiden), available at <<http://www.wetenschapsagenda.leidenuniv.nl/index.php3?c=356>>.

Simpson 2004

Simpson, *Great Powers and Outlaw States*, Cambridge: Cambridge University Press 2004.

Snyder 1993

F. Snyder, *Soft Law and Institutional Practice in the European Community*, *EUI Working Paper Law* 93/5.

Van der Stoel 2002

M. van der Stoel, *Conflictpreventie: de lessen van Kosovo en Macedonië* (inaugural speech Catholic University Brabant, Tilburg), Tilburg: Catholic University Brabant 2002.

Suy 2000

E. Suy, 'NATO's intervention in the Federal Republic of Yugoslavia', *Leiden Journal of International Law* (13) 2000-1, p. 193-205.

Thakur 2006

R. Thakur, *The United Nations, peace and security: from collective security to the responsibility to protect*, Cambridge: Cambridge University Press 2006.

Wedgwood 2003

R. Wedgwood, 'Agora: Future implications of the Iraq conflict – The fall of Saddam Hussein: Security Council mandates and pre-emptive self-defence', *The American Journal of International Law* (97) 2003-3, p. 1-10.

Weiss 2003

T. G. Weiss, 'The Illusion of UN Security Council Reform', *The Washington Quarterly* (26) 2003-4, p. 147-161, available at <[http://www.twq.com/03autumn/docs/03autumn\\_weiss.pdf](http://www.twq.com/03autumn/docs/03autumn_weiss.pdf)>.

Wellens and Borchardt 1989

K. Wellens and G. Borchardt, 'Soft Law in European Community Law', *European Law Review* (14) 1989, p. 267-321.

White 1993

N.D. White, *Keeping the peace: the United Nations and the maintenance of international peace and security*, Manchester: Manchester University Press 1993.

White 2004

N.D. White, 'The will and authority of the Security Council after Iraq', *Leiden Journal of International Law* (17) 2004-4, p. 645-672.

Wielink and Zieck 2002

J.P.J. Wielink and M. Zieck, 'Veiligheidsraad-resolutie 1441 en de vraag naar de rechtmatigheid van unilateraal militair geweld tegen Irak', *Nederlandsch Juristenblad* (77) 2002-45/46, p. 2240-2241.

Witteveen and Van Klink 1999

W. Witteveen and B. van Klink, 'Why is Soft Law really Law? A Communicative Approach to Legislation', *Regelmaat* 1999, p. 126-140, also available at <<http://rechten.uvt.nl/bartvanklink/softlaw.pdf>>.

Wouters and Ruys 2005

J. Wouters and T. Ruys, 'Security Council Reform: A New Veto for a New Century?', *Royal Institute for International Relations*, Brussels: Academia Press 2005, available at <<http://www.irri-kiib.be/paperegm/ep9.pdf>>.

Wouters and Ruys 2005

J. Wouters and T. Ruys, 'De hervorming van de Veiligheidsraad: op zoek naar een Europees perspectief', *Institute for International Law, K.U. Leuven*, Leuven: Institute for International Law, K.U. Leuven 2005.

**Electronic sources:**

Better World Campaign

Better World Campaign, About the UN – UN Structure. Security Council, available at <[http://www.betterworldcampaign.org/about\\_the\\_un/security\\_council.asp](http://www.betterworldcampaign.org/about_the_un/security_council.asp)>, last visited December 8<sup>th</sup> 2006.

Van Genugten 2006

W. van Genugten, 'answer to the question whether the use of force, authorized under Article 42 or 51 of the UN Charter, has to be proportionate and necessary' (e-mail correspondence), October 6<sup>th</sup> 2006.

Global Policy Forum

Global Policy Forum, Razali Reform Paper, available at <[www.globalpolicy.org/security/reform/raz-497.htm](http://www.globalpolicy.org/security/reform/raz-497.htm)>, last visited October 12<sup>th</sup> 2006.

Global Policy Forum

Global Policy Forum, Razali Reform Paper, available at <[www.globalpolicy.org/security/reform/raz-497.htm](http://www.globalpolicy.org/security/reform/raz-497.htm)>, last visited October 12<sup>th</sup> 2006.

Global Policy Forum

Global Policy Forum, Japan to Become the Britain of the Far East, available at <<http://www.globalpolicy.org/empire/analysis/2005/0224japan.htm>>, last visited December 8<sup>th</sup> 2006.

Global Policy Forum

Global Policy Forum, Reports of the GA Working Group on Security Council Reform, available at <<http://www.globalpolicy.org/security/reform/reports.htm>>, last visited October 30<sup>th</sup>.

Global Policy Forum

Global Policy Forum, Oil for Food: The True Story, available at <<http://www.globalpolicy.org/security/sanction/iraq1/oilforfood/00gresh.htm>>, last visited November 22<sup>nd</sup> 2006.

## Global Policy Forum

Global Policy Forum, Regular Budget Payments of Largest Payers 2006, available at <<http://www.globalpolicy.org/finance/tables/reg-budget/large06.htm>>, last visited December 6<sup>th</sup> 2006.

Global Policy Forum, Changing Patterns in the use of the veto in the Security Council, available at <<http://www.globalpolicy.org/security/data/vetotab.htm>>, last visited January 4<sup>th</sup> 2007.

Global Policy Forum, Changing Patterns in the use of the veto in the Security Council, available at <<http://www.globalpolicy.org/security/data/vetogph2.htm>>, last visited January 4<sup>th</sup> 2007.

## International Labour Organization

International Labour Organization, Legislation and Policies, available at <<http://www.ilo.org/public/english/protection/trav/aids/laws/index.htm>>, last visited November 2<sup>nd</sup> 2006.

## North Atlantic Treaty Organization

North Atlantic Treaty Organization, What is NATO?, available at <[www.nato.int](http://www.nato.int)>, last visited October 5<sup>th</sup> 2006.

## NOS

NOS, V-Raad verdeeld over sancties Noord-Korea, available at <[http://www.nos.nl/nosjournaal/artikelen/2006/7/5/050706\\_noord\\_korea\\_raket.html](http://www.nos.nl/nosjournaal/artikelen/2006/7/5/050706_noord_korea_raket.html)>, last visited December 8<sup>th</sup> 2006.

## NOS

NOS, De opstelling van de V-Raad, available at <[http://www.nos.nl/nosjournaal/dossiers/iran/iran\\_standpunten.html](http://www.nos.nl/nosjournaal/dossiers/iran/iran_standpunten.html)>, last visited December 8<sup>th</sup> 2006.

## NOS

NOS, De G8 en zijn betekenis, available at <[http://www.nos.nl/nosjournaal/dossiers/live8-g8/g8\\_factsheet\\_betekenis.html](http://www.nos.nl/nosjournaal/dossiers/live8-g8/g8_factsheet_betekenis.html)>, last visited October 5<sup>th</sup> 2006.

NOS, Ban Ki-moon neemt leiding VN over, available at

<<http://www.nos.nl/nos/artikelen/2007/01/art000001C72D4BC2AED088.html>>, last visited January 4<sup>th</sup> 2007.

NRC Handelsblad, Annan maant VS in toespraak, available at <[http://www.nrc.nl/buitenland/article571243.ece/Annan\\_maant\\_VS\\_in\\_toespraak](http://www.nrc.nl/buitenland/article571243.ece/Annan_maant_VS_in_toespraak)>, last visited December 30<sup>th</sup> 2006.

PBS

PBS, Kofi Annan – Center to the Storm. Who does what?, available at <<http://www.pbs.org/wnet/un/who/security.html>>, last visited December 8<sup>th</sup> 2006.

United Nations

United Nations, UN Security Council Function and Powers, available at <[http://www.un.org/Docs/sc/unsc\\_functions.html](http://www.un.org/Docs/sc/unsc_functions.html)>, last visited September 12<sup>th</sup> 2006.

UN Security Council

UN Security Council, Provisional Rules of Procedure of the Security Council, available at <<http://www.un.org/Docs/sc/scrules.htm>>, last visited December 6<sup>th</sup> 2006.

United Nations Association of the United States of America

United Nations Association of the United States of America, US Financial Contributions to the United Nations System: Fiscal Year 2005 Request, available at <<http://www.unausa.org/site/pp.asp?c=fvKRI8MPJpF&b=328791>>, last visited December 6<sup>th</sup> 2006.

The White House

The White House, The National Security Strategy of the United States of America, available at <<http://www.whitehouse.gov/nsc/nss.html>>, last visited October 16<sup>th</sup> 2006.

**Relevant Security Council Resolutions:**

UN Doc. S/RES/660 (1990) Iraq-Kuwait.

UN Doc. S/RES/678 (1990) Iraq-Kuwait.

UN Doc. S/RES/687 (1991) Iraq-Kuwait.

UN Doc. S/RES/692 (1991) Iraq-Kuwait.

UN Doc. S/RES/1160 (1998) on the letters from the UK (S/1998/223) and the US (S/1998/272).

UN Doc. S/RES/1199 (1998) on the situation in Kosovo (FRY).

UN Doc. S/RES/1203 (1998) on the situation in Kosovo.

UN Doc. S/RES/1441 (2002) the situation between Iraq and Kuwait.

**Relevant General Assembly Resolutions:**

UN Doc. A/RES/267 (III) (1949) The problem of voting in the Security Council.

UN Doc. A/RES. 377 A (V), 3 November (1950) Uniting for Peace.

UN Doc. A/RES/47/62 (1992) Question of equitable representation on and increase in the membership of the Security Council.

UN Doc. A/RES/48/26 (1993) Question of equitable representation on and increase in the membership of the Security Council.

UN Doc. A/RES/53/30 (1998) Security Council: Increase in membership.

UN Doc. A/RES/55/2 (2000) Millennium declaration.

UN Doc. A/RES/60/1 (2005) 2005 World Summit Outcome.

**Relevant Articles UN Charter:**

Articles 12, 27, 39, 40, 41, 42, 53 and 108, UN Charter.

**Relevant Article Statute International Court of Justice:**

Article 38.

**International Court of Justice:**

'Legal Consequences for states of the continued presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council resolution 276 (1970)', Advisory Opinion, *ICJ Reports*, 1971.

Case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), *ICJ Reports*, 1985.

**Other Relevant UN Documents:**

'Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council' (UN Doc. S/2003/351).

'Spain, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution' (UN Doc. S/2003/215).

Tenth Conference of Heads of State and Government of Non-Aligned Countries (1-6 September 1992), Final Document (UN Doc. A/47/675), 6 September 1992, available at <http://domino.un.org/unispal.nsf>.

Report of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council for 1995 (UN Doc. A/49/47): Observations on Clusters I and II (UN Doc. A/AC.247/4), available at <http://www.globalpolicy.org/security/reform/reports.htm>.

Report of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council for 1996 (UN Doc. A/50/47), available at <http://www.globalpolicy.org/security/reform/reports.htm>.

Report of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council for 1997 (UN Doc. A/51/47), available at <http://www.globalpolicy.org/security/reform/reports.htm>.

Report of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council for 1998 (UN Doc. A/52/47), available at <http://www.globalpolicy.org/security/reform/reports.htm>.

Report of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council for 2000 (UN Doc. A/54/47), available at <http://www.globalpolicy.org/security/reform/reports.htm>.

Report of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council for 2001 (UN Doc. A/55/47), available at <http://www.globalpolicy.org/security/reform/reports.htm>.

Report of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council for 2002 (UN Doc. A/56/47), available at <http://www.globalpolicy.org/security/reform/reports.htm>.



Report of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council for 2003 (UN Doc. A/57/47), available at <<http://www.globalpolicy.org/security/reform/reports.htm>>.

Report of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council for 2004 (UN Doc. A/58/47), available at <<http://www.un.org/Depts/dhl/resguide/scvote.htm>>.

Letter dated 31 March 2000 from the Permanent Representative of Germany to the President of the General Assembly in his capacity as Chairman of the Working Group, concerning the introduction of an obligation to explain the use of a veto (UN Doc. A/AC.247/2000/CRP.4), available at <<http://www.globalpolicy.org/security/reform/reports.htm>>.

Question of the veto: working paper by Uruguay, 17 June 1996 (UN Doc. A/AC.247/1996/CRP.14), available at <<http://www.globalpolicy.org/security/reform/reports.htm>>.

Report of the High-level Panel on Threats, Challenges and Change, 'A More secure World: Our Shared Responsibility' (UN Doc. A/59/565), 29 November 2004, available at <<http://www.un.org/secureworld>>.

Report of the Secretary-General, 'In Larger Freedom: towards development, security and human rights for all' (UN Doc. A/59/2005), 21 March 2005, available at <[http://www.un.org/ga/59/hl60\\_plenarymeeting.html](http://www.un.org/ga/59/hl60_plenarymeeting.html)>.

**Other Relevant Documents:**

Advisory report of the Advisory committee on issues of International Public Law (CAVV) and the Advisory Council on International Affairs (AIV) on Humanitarian Intervention, 31 March 2000, available at <[www.aiv-advies.nl](http://www.aiv-advies.nl)>.

## Annex I

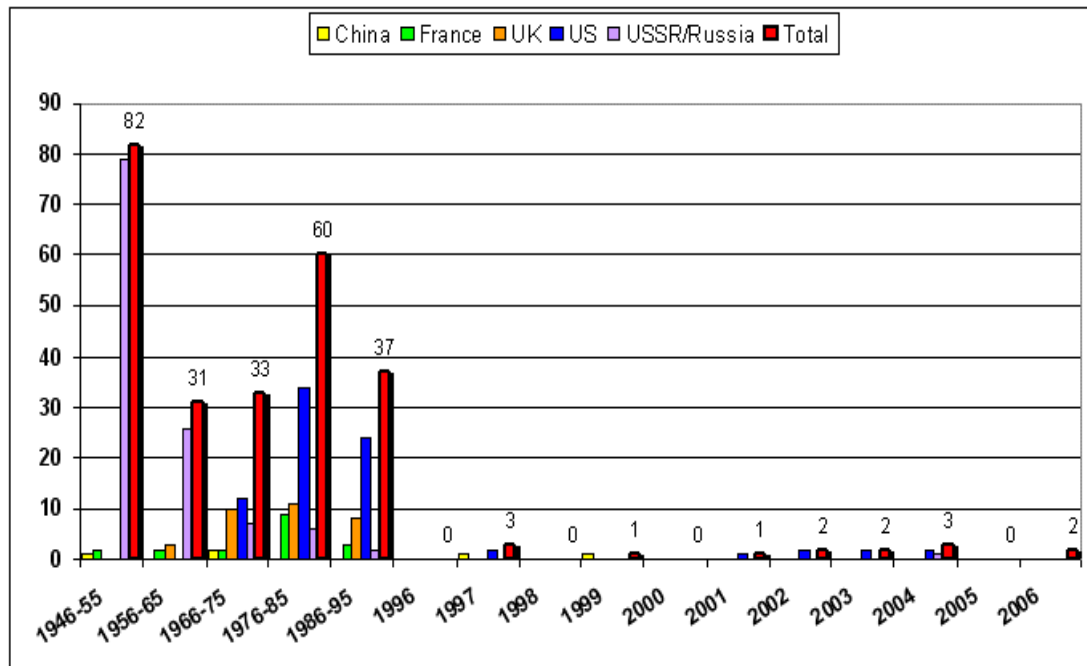
## Changing Patterns in the use of the veto in the Security Council

| Period         | China      | France    | Britain   | US        | USSR/<br>Russia | Total      |
|----------------|------------|-----------|-----------|-----------|-----------------|------------|
| <b>Total</b>   | <b>4-5</b> | <b>18</b> | <b>32</b> | <b>82</b> | <b>122</b>      | <b>259</b> |
| <b>2006</b>    | -          | -         | -         | 2         | -               | 2          |
| <b>2005</b>    | -          | -         | -         | -         | -               | -          |
| <b>2004</b>    | -          | -         | -         | 2         | 1               | 3          |
| <b>2003</b>    | -          | -         | -         | 2         | -               | 2          |
| <b>2002</b>    | -          | -         | -         | 2         | -               | 2          |
| <b>2001</b>    | -          | -         | -         | 2         | -               | 2          |
| <b>2000</b>    | -          | -         | -         | -         | -               | 0          |
| <b>1999</b>    | 1          | -         | -         | -         | -               | 1          |
| <b>1998</b>    | -          | -         | -         | -         | -               | 0          |
| <b>1997</b>    | 1          | -         | -         | 2         | -               | 3          |
| <b>1996</b>    | -          | -         | -         | -         | -               | 0          |
| <b>1986-95</b> | -          | 3         | 8         | 24        | 2               | 37         |
| <b>1976-85</b> | -          | 9         | 11        | 34        | 6               | 60         |
| <b>1966-75</b> | 2          | 2         | 10        | 12        | 7               | 33         |
| <b>1956-65</b> | -          | 2         | 3         | -         | 26              | 31         |
| <b>1946-55</b> | 1          | 2         | -         | -         | 80              | 83         |

Source: Global Policy Forum, Changing Patterns in the use of the veto in the Security Council, available at <<http://www.globalpolicy.org/security/data/vetotab.htm>>, last visited January 4<sup>th</sup> 2007. For detailed information on the negative votes of permanent members at public meetings of the Security Council, see the report of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council for 2004 (UN Doc. A/58/47), Annex III, available at <<http://www.un.org/Depts/dhl/resguide/scvote.htm>>.

## Annex II

## Veto Use in the UN Security Council 1946-2006



Source: Global Policy Forum, Changing Patterns in the use of the veto in the Security Council, available at < <http://www.globalpolicy.org/security/data/vetogph2.htm>>, last visited January 4<sup>th</sup> 2007.

**Annex III****Security Council reform: Models A and B**

| <i>Regional area</i>      | <i>No. of States</i> | <i>Permanent seats<br/>(continuing)</i> | <i>Proposed new<br/>permanent seats</i> | <i>Proposed<br/>two-year seats<br/>(non-renewable)</i> | <i>Total</i> |
|---------------------------|----------------------|---|---|--|--------------|
| Africa                    | 53                   | 0                                       | 2                                       | 4  | 6            |
| Asia and Pacific          | 56                   | 1                                       | 2                                       | 3  | 6            |
| Europe                    | 47                   | 3                                       | 1                                       | 2  | 6            |
| Americas                  | 35                   | 1                                       | 1                                       | 4  | 6            |
| <b>Totals<br/>model A</b> | <b>191</b>           | <b>5</b>                                | <b>6</b>                                | <b>13</b>  | <b>24</b>    |

| <i>Regional area</i>      | <i>No. of States</i> | <i>Permanent seats<br/>(continuing)</i> | <i>Proposed<br/>four-year<br/>renewable seats</i> | <i>Proposed<br/>two-year seats<br/>(non-renewable)</i> | <i>Total</i> |
|---------------------------|----------------------|---|---|--|--------------|
| Africa                    | 53                   | 0                                       | 2   | 4  | 6            |
| Asia and Pacific          | 56                   | 1                                       | 2   | 3  | 6            |
| Europe                    | 47                   | 3                                       | 2   | 1  | 6            |
| Americas                  | 35                   | 1                                       | 2   | 3  | 6            |
| <b>Totals<br/>model B</b> | <b>191</b>           | <b>5</b>                                | <b>8</b>  | <b>11</b>  | <b>24</b>    |

Source: Report of the High-level Panel on Threats, Challenges and Change, 'A More secure World: Our Shared Responsibility' (UN Doc. A/59/565), 29 November 2004, par. 252-253, available at <<http://www.un.org/secureworld>>.