ACHIEVING INTERNATIONAL SECURITY AND ORDER. A REALISTIC APPROACH TO THE EFFECT OF PROPOSALS OF REFORM OF THE UNITED NATIONS

Andrés Téllez Núñez*
Pontificia Universidad Javeriana**

Abstract

For the last ten years, the United Nations Organization has been discussing the need of reform[1], and that discussion has become more important as the world lives now –contrary to the purposes of international law– an evident situation of insecurity and disorder[2].

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* *Abogado*, Pontificia Universidad Javeriana; *LL.M.*, Georgetown; *Traductor e Intérprete Oficial* (inglés-español-inglés), Universidad Nacional De Colombia; *Profesor de Derecho Internacional Público*, Facultad de Ciencias Jurídicas, Pontificia Universidad Javeriana. *Coordinador Académico*, Departamento de Derecho Económico, Facultad de Ciencias Jurídicas, Pontificia Universidad Javeriana.

** Calle 40 # 6-23, piso 6°, Facultad de Ciencias Jurídicas, Bogotá – Colombia.

1 The United Nations reform process began in 1997. *See* United Nations Organization [online] Available at http://www.un.org/reform

2 Current global critical and problematic spots are: Iraq, Afghanistan, North Korea, Iran, Sudan, Israel, Colombia, Spain, India and Pakistan.

In analyzing the problem of effectiveness of international law and international rules dealing with security and defense[3], it is worth asking whether not only the institutions and structure of the United Nations Organization (UN) shall be reformed, but also whether its legal and juridical constitution, that is, the United Nations Charter (hereinafter the UN Charter) shall be reformed as well. And the answer is yes, but cautioning that any reform will have only a political impact, that sometimes will be tantamount to a juridical one and sometimes not[4].

After summing up some proposals brought in by some States as well as the overall reform project, this essay tries to explain the international law that is effective, by ultimately identifying an axiom, and by briefly suggesting some proposals that take into account a point of balance between a set of realistic international norms and the current geopolitical scenario, which entails mainly two groups of entities: first, a set of democratic regimes versus a set of non-democratic regimes; and second, a set of high income entities versus a set of middle and low income entities[5]. Such political and economic reality

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3   The purpose of this manuscript is not to analyze the effectiveness of private international law or of international law related to issues different than international order and security. Rather, this paper is focused on what is called *jus ad bellum.*

4   In other words, what is on paper will almost never transcend into a reality.

5   "For operational and analytical purposes, the World Bank's main criterion for classifying economies is gross national income (GNI) per capita. In previous editions of our publications, this term was referred to as gross national product, or GNP. Based on its GNI per capita, every economy is classified as low income, middle income (subdivided into lower middle and upper middle), or high income. Other analytical groups based on geographic regions are also used (…) The Bank's analytical income categories (low, middle, high income) are based on the Bank's operational lending categories (civil works preferences, IDA eligibility, etc.) (…) Classification by income does not necessarily reflect development status (…) Income group: Economies are divided according to 2005 GNI per capita, calculated using the World Bank Atlas method. The groups are: low income, $875 or less; lower middle income, $876 - $3 465; upper middle income, $3 466 - $10 725; and high income, $10 726 or more" *See* The World Bank [online] Available at http://www.worldbank.org/wdi2006/contents/Section1.htm.

makes the functioning of the UN Charter —as designed today— a failing one as it does not respond justly and efficiently to the challenges of the current situation[6].

This essay that seeks to answer questions related to the United Nations reform effectiveness is divided in two sections. The first section is the introductory one where the state of the question and the definition of some terms are presented. The second section which is divided in two sub-sections contains a synthesis that explains the state of the question and the analytical part where the reader will find the bulk of my essay and my main suggestions regarding the state of the question.

Key words: Law; International Law; Effectiveness; Foreign Policy; UN Charter; United Nations.

SEGURIDAD Y ORDEN INTERNACIONALES. APROXIMACION REALISTA AL EFECTO DE LAS PROPUESTAS DE REFORMA DE LAS NACIONES UNIDAS

RESUMEN

En los últimos diez años la Organización de Naciones Unidas ha discutido la necesidad de reformarse y esa discusión se ha tornado más importante en la medida en que el mundo vive ahora —contrario a la misión del derecho internacional— una evidente situación de inseguridad y desorden.

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6   In fact, let us mention some of the major international crises of the last ten years (that is the period between 1996 and 2006) with respect to which UN's relative incapacity to act has been evident: Former Yugoslavia; attacks against US interests in 1998 and 2000 (for example the attack against the "USS Cole" in 2000); Kosovo in 1999; terrorist attacks against the US in 2001; humanitarian crisis in Darfur, the invasion of Iraq in 2003 and the continuous Palestinian-Israeli conflict (2005-2007).

Al analizar el problema de la efectividad del derecho internacional público y de las reglas internacionales relacionadas con seguridad y defensa, vale la pena preguntarse si no sólo las instituciones y estructuras de la Organización de Naciones Unidas deben ser reformadas, sino también ser reformada su constitución legal y jurídica, es decir, la Carta de la Organización de Naciones Unidas. Y la respuesta es sí, pero advirtiendo que cualquier reforma tendrá sólo un impacto político, que algunas veces será equivalente a uno jurídico y algunas veces no.

Luego de presentar en forma resumida las propuestas de algunos Estados así como el proyecto de reforma, este ensayo trata de explicar el derecho internacional que es efectivo por vía de la identificación de un axioma, y mediante la sugerencia de algunas propuestas que tengan en cuenta un punto de equilibrio entre un conjunto de normas internacionales realistas y el escenario geopolítico actual, que implica básicamente dos tipos de entidades: primero, un grupo de regímenes democráticos versus un grupo de regímenes no democráticos; y segundo, un conjunto de entidades con ingreso alto versus un conjunto de entidades con ingreso medio o bajo. Dicha realidad política y económica hace que el funcionamiento de la Carta de la ONU —en la forma en que está diseñada hoy— sea precario en la medida en que no responde de manera justa y eficiente a los retos de la situación actual.

Este ensayo está dividido en dos secciones. La primera sección es introductoria, y en ella se presenta el estado de la cuestión y las definiciones de términos. La segunda sección que está dividida en dos subsecciones contiene una síntesis que explica el estado de la cuestión y una parta analítica en donde el lector encontrará el cuerpo más importante de mi ensayo y mis principales sugerencias acerca del estado de la cuestión.

Palabras clave: *derecho, derecho internacional, efectividad, política internacional; Carta de la ONU; Naciones Unidas.*

1. INTRODUCTION

A reform of the UN and of the UN Charter is needed. Nonetheless, and regardless of a reform being approved through the different UN structures, powerful entities and not powerful entities particular features and behavior in the international arena cannot be overlooked. The powerful in the end will determine whether such reforms

transcend into action or not. Below the state of the question of this essay as well as some term-definitions are presented.

1.1. STATE OF THE QUESTION

The UN Charter is not a just or a sufficient response to current geopolitical problems and it does not take into account economic and political factors. Therefore, a set of realistic provisions that take into account the constant achievement of international order and security shall be found in order to be included in a reform. However most of the times, even with some structures being reformed, an entity with greater relative political power will apart itself from the mandates of pre-agreed normative instruments.

1.2. DEFINITIONS

Balance[7]: Equilibrium. For purposes of this paper and for purposes of international law, balance means the equilibrium between economic factors and political factors in the drafting and application of international legal instruments.

Democratic Empire[8]*:* Any political entity that is a democracy and that has greater relative political power. Democracy for purposes of this paper is the "government of the people, by the people, for the people"[9] where freedom is guaranteed and is paramount.

Entity[10]*:* Any player in the international political arena.

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7   But the word "balance" shall also be referred —throughout this essay— to the just allocation of forces in order to achieve "collective security."

8   For purposes of this paper, today the "Democratic Empire" is the United States of America.

9   Gettysburg Address by ABRAHAM LINCOLN (November 19, 1863).

10 But from a philosophical point of view, an entity is an essential reality considered from a formal viewpoint.

Foreign Policy[11]: the theory and action taken by a Nation outside of its boundaries.

International Constitution[12]: For purposes of this article, the United Nations Charter.

International Law Effectiveness[13]: Coincidence between actions and what is just regardless of whether is written.

International Policy[14]: Sum of theories and actions taken by Nations outside of their boundaries.

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11   The main difference between foreign policy and international law is explained by
     HENKIN as follows: "[f]irst, law is politics. Students of law as well as students of
     politics are taught to distinguish law from politics. Law is normative and binding,
     and failure to abide by legal obligations invites legal remedies and brings other legal
     responses; politics suggests freedom of choice, diplomacy, bargaining,
     accommodation. In fact, however, the distinction between law and politics is only a
     part truth. In a larger, deeper sense, law is politics. Law is made by political actors,
     through political procedures, for political ends. The law that emerges is the resultant
     of political forces; the influences of law on state behavior are also determined by
     political forces (…) International law is the normative expression of a political system.
     To appreciate the character of international law and its relation to the international
     political system, it is helpful to invoke (though with caution) domestic law as an
     analogue. Domestic (national) law such as the law of the Netherlands, of the United
     States, or of Nigeria, is an expression of a domestic political system in a domestic
     (national) society (…) Similarly, analogously, international law is the product of its
     particular 'society,' its political system." *See* HENKIN cited by DAMROSCH and others.
     DAMROSCH F., LORI. HENKIN, LOUIS. SCHACHTER, OSCAR, *International Law. Cases and
     Materials*, St. Paul, Minnesota, West, 2001, p. 1.

12   The non-existence of an international constitution has been one of the arguments
     used by some to deny the existence of international law. In fact as said by DAMROSCH
     and others "[i]nternational law has had to justify its legitimacy and its reality. Its title
     to law has been challenged to the ground that, by hypothesis and definition, there can
     be no law governing sovereign states. Skeptics have argued that there can be no
     international law since there is no international legislature to make it, no international
     executive to enforce it, and no effective judiciary to interpret it and to develop it, or to
     resolve disputes about it. International law, it has been said, is not 'real law,' since it
     is commonly disregarded, states obeying it only when they wish to, when it is in
     their interest to do so." *See* DAMROSCH F., LORI. HENKIN, LOUIS. SCHACHTER, OSCAR,
     International Law. Cases and Materials, St. Paul, Minnesota, West, 2001, p. 16.

13   Here it shall be pointed out, that according to Saint THOMAS AQUINAS there might be
     laws that are unjust. *See* Saint THOMAS AQUINAS, *The Summa Theologica*, Part II,
     Section I, Question 90.

14   International policy is different than foreign policy in the sense that international
     policy is not one that is exclusive or proper of any Nation or State in particular but

International Rule[15]*:* A norm governing the behavior of Nations outside of their boundaries.

International Rules Effectiveness: Coincidence between what is written and actions taken by Nations.

Order[16]: A juridical value that varies according to a determined historical context and that is evidenced whenever the inter-subjective behavior of human beings is adjusted to a set of principles guaranteeing a minimum of conditions necessary for a normal cohabitation. It is one of the juridical values with less hierarchy.

Public International Law: The set of regulations either written or consuetudinary

> "ascertained and determined through the actual methods used by States to give effect to their political wills."[17]

Realism[18]: An approach taken by some international legal scholars that analyze state current state of affairs by observing and explicating actual facts which are the bases of their conclusions.

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rather the complex set of actions in the international arena that may result in binding or non-binding decisions.

15   Here I talk about rules to make a distinction from laws. A law therefore will always be just whilst a "rule" will not always be just. *See* note 14.

16   The hierarchy of values was studied by ABELARDO TORRÉ who gave this definition. Therefore it may be considered a typical juridical axiological definition.

17   International law may be briefly defined as the law governing the relations between Nations or the "inter-governmental law" as said by MOORE. The definition presented on the chapter of definitions is presented only for purposes of the overall state of the question of this essay and is based on the SCHACHTER's International Law in Theory and Practice article cited by DAMROSCH AND OTHERS IN DAMROSCH F., LORI. HENKIN, LOUIS. SCHACHTER, OSCAR, *International Law. Cases and Materials*, St. Paul, Minnesota, West, 2001.

18   To that respect Abbott in explaining the intersection between the theory of international relations and international law says that a "realistic" approach, at least from the international relations point of view is that that "has dominated IR since before World War II. Realists treat states as the principal actors in international politics. States interact in an environment of anarchy, defined as the absence of any central government able to keep peace or enforce agreements. Security is their overriding goal and self help their guiding principle. Under these conditions, differences in power are usually

Security[19] : Juridical value evidenced by means of effectively protecting rights and duties of a community.

International Law vs. International Rule: The underlying distinction brought first by Saint THOMAS AQUINAS. Hence, what is legal is not necessarily just. What is just is not necessarily legal.

2. INTERNATIONAL SECURITY AND ORDER. A PROPOSAL OF REFORM OF THE UNITED NATIONS CHARTER

The origins of the UN and of the UN Charter reflect the world's situation at the beginning of the second half of the XX Century. In a way it reflects the then bi-polar world. Today there's no bi-polarity anymore but rather there's only one superpower. Therefore it is worth asking whether UN Charter provisions are just per se and effective. It is worth asking also whether they can be effective. Below I present both a synthesis and an analysis of this essay's state of the question by showing a brief UN history reference as well as a summary of the UN Charter security and order landmark provisions. I finish this essay laying out some proposals that need to be analyzed in conjunction with this paper axiomatic conclusion: international justice depends upon the acting of a democratic entity with greater relative power; in other words, a democratic empire.

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sufficient to explain important events. Realists concentrate on interactions among major powers and on matters of war and peace. Other issues-even related issues like war crimes are secondary." *See* DAMROSCH F., LORI. HENKIN, LOUIS. SCHACHTER, OSCAR. International law.cases and materials . St. Paul, Minnesota. West. 2001. p. 53.

19   *See* Note 17.

2.1. SYNTHESIS[20]

2.1.1. HISTORY

The UN Charter was drafted over two bases and/or requirements: on the one hand the KELLOG-BRIAND Pact requirement outlawing war except for defense purposes; and on the other hand, the collective defense principle derived from Article 16 of the League of Nations[21].

The name "United Nations" was firstly introduced by the then President of the United States, FRANKLIN D. ROSSEVELT in the so-called "Declaration by United Nations" dated January 1, 1942 in which 26 nations reaffirmed their intention to fight the "Axis powers."

But several international organizations had been created prior to the United Nations Organization. In fact, the International Telecommunications Union was founded in 1865, and the International Telegraph Union and the Universal Postal Union in 1874 (today they are UN specialized agencies). Likewise, by the end of the XIX Century, a conference was held in The Hague which resulted in the Convention for the Pacific Settlement on International Disputes and established the Permanent Court of Arbitration.

Nonetheless, the direct antecessor of the UN was the so-called League of Nations which failed as it did not prevent the occurrence of the Second World War[22].

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20 This part of the essay seeks to present a brief summary of the attempts of reform of the United Nations Charter (a synthesis thereof) which will be examined and analyzed in the next parts of the paper.

21 *See* MOORE, JOHN, *National Security Law*, Durham, North Carolina, Carolina Academic Press, 1990, p. 73.

22 In fact, and as said by Bowett in "The Law of International Institutions" cited by DAMROSCH and others the League "[a]fter an initial success in dealing with the Graeco-Bulgarian crisis of 1925, and a less spectacular achievement in the Chaco dispute of 1928, (…) witnessed the invasion of Manchuria in 1931, the Italo-Abyssinian War of 1934-35, the German march into the Rhineland in 1936, into Austria in 1938, into Czechoslovakia in 1938, the Soviet Union's invasion of Finland in 1939 and, finally, the German invasion of Poland in 1939." *See* DAMROSCH F., LORI. HENKIN, LOUIS. SCHACHTER, OSCAR, *International Law. Cases And Materials*, St. Paul, Minnesota, West, 2001, p. 927.

In 1945 the representatives of 50 countries met in San Francisco and drafted the UN Charter which was signed on June 26, 1945. The UN came into existence on October 24, 1945

"when the Charter had been ratified by China, France, the Soviet Union, the United Kingdom, the United States and by a majority of other signatories."[23]

2.1.2. THE CHARTER OF THE UNITED NATIONS AND THE MAINTENANCE OF WORLD SECURITY AND ORDER

2.1.2.1. UN Charter provisions scope

The main purpose of the UN, as set forth in the UN Charter Preamble is "to maintain international peace and security."[24]

Article 2 of the UN Charter sets out the following principles: A principle of sovereign equality; a principle of good faith; a principle of peaceful solution of disputes; a principle outlawing the threat or use of force; a principle of assistance of the UN from members as well as from non-members; and finally a principle of respect for State sovereignty.

One could argue that all provisions contained in the UN Charter are directly related to the maintenance of world security and order. But I will focus on the provisions dealing with the most express manifestation of threat to security: those addressing the use of force.

To that respect, as said by MCDOUGAL and FELICIANO:

"[t]he conception of permissible coercion, complementary to that of non-permissible, is characterized by multiplicity of reference. One reference is to all coercion which is implicit in and concomitant to the ordinary

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23 *See* United Nations Organization [online] Available at http://www.un.org/aboutun/unhistory/

24 United Nations Charter. Preamble. To this respect, it is worth asking what is the legal nature of peace, which may be broadly defined as the absence of war: Peace might be cataloged as a juridical interest that shall be protected by any constitution of any type.

interaction of states, and which does not rise to the level and degree of prohibited coercion. Another and more common reference is to coercion of high degree of intensity, including the most comprehensive and violent uses of military instruments, when employed in individual or group defense against unlawful coercion (…) The UN Charter explicitly mentions and preserves this permission to resort to force in response to unauthorized coercion, describes it as an 'inherent right,' and recognizes that permissible coercion may be exercised by the target state individually or b a collectivity of states, without prior authorization from the organized community (although, of course, subject to its subsequent appraisal). A third reference is to coercion exercised in fulfillment of or in accordance with certain commitments and permissions of members to participate in political measures required or authorized by the general security organization to prevent or repress impermissible coercion."[25]

Article 2 (4) of the UN Charter provides:

"All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."

Article 51 of the UN Charter states that

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

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25   *See* MOORE, JOHN, *National Security Law*, Durham, North Carolina, Carolina Academic Press, 1990, p. 88.

These two articles shall be interpreted in accordance to the provisions contained in Chapter V of the UN Charter[26] that assign the duties of the Security Council.

2.1.2.2. *UN reform main issues and the perspective of developing and developed nations*

2.1.2.2.1. OVERVIEW

The reform of the UN has dealt mainly with the following issues[27]:

- Management

- Representation

- Internal structures overhaul

As said by former UN Secretary-General KOFI ANNAN:

"in a world of inter-connected threats and opportunities, it is in each country's self interest that all of these challenges (causes of security, development and human rights). Hence, the cause of larger freedom can only be advanced by broad, deep and sustained global cooperation among States. The world needs strong and capable States, effective partnerships with civil society and the private sector, and agile and effective regional and global intergovernmental institutions to mobilize and coordinate collective action. The UN must be reshaped in ways not previously imagined, and with a boldness and speed not previously shown."[28]

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26   *See* United Nations Organization [online] Available at http://www.un.org/aboutun/charter

27   Those three issues are consistently reviewed throughout the different documents of reform prepared by the Secretary-General of the United Nations. *See* United Nations Organization [online] Available at http://www.un.org/mandatereview/executive/html.

28   *See* United Nations Organization [online] Available at http://www.un.org/mandatereview/executive/html.

But none of those issues —the ones laid out in the Secretariat proposed reform-related documents— have tackled the concerns and problems necessary to give an effective and efficient response or solution to the problems of international insecurity and disorder.

In fact, at least apart from the calls of some developed and developing nations to have more representation at the Security Council, the structure itself and mechanisms set forth in the UN Charter have not been so far put to the test of reform, or the attempts of reform have been stalled. Nonetheless, the Secretariat,

"fully embraces a broad vision of collective security. The threats to peace and security in the 21st century include not just international war and conflict, but terrorism, weapons of mass destruction, organizational crime and civil violence. They also include poverty, deadly infections, disease and environmental degradation (…) Collective security today depends on accepting that the threats each region of the world perceives as most urgent are in fact equally so for all (…) The Security Council should adopt a resolution setting out the principles to be applied in decisions relating to the use of force and express its intention to be guided by them when decided whether to authorize or mandate the use of force."[29]

Likewise, one of the criticisms the UN has received in the last years, particularly from those who apparently break international law on a regular basis, has been the inefficiency associated with the deliberative process inside the UN structures. In the report prepared by the then Secretary-General, it is said that,

"the General Assembly should take bold measures to streamline its agenda and speed up the deliberative process. It should concentrate on the major substantive issues of the day, and establish mechanisms to engage fully and systematically with civil society."[30]

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29 *See* United Nations Organization [online] Available at http://www.un.org/mandatereview/executive/html.

30 Ibid

As to the Security Council, the report concludes that it,

"should be broadly representative of the realities of power in today's world."[31]

2.1.2.2.2. THE PERSPECTIVE OF DEVELOPED AND DEVELOPING NATIONS

The perspective of developed and developing nations as to the reform of the UN has had to do with two main aspects: on the one hand, budget (and that linked to the powers and faculties of the different structures of the UN) and on the other hand, representation.

As to budgetary issues, a question worth asking is how to balance the power of "big donors"[32] inside the Organization versus other players who are not big donors simply because they have no political or economic power.

In fact, back in 2005, the G-77 expressed its views regarding the proposals made by ANNAN. All of the concerns pointed out to one single problem: the powerful will continue to dictate the march and decisions of the UN[33]. But, developed nations, such as the United States —at least under the direction of the now former US Ambassador to the UN— expressed their views as well as their interests being the group of nations "that provide the bulk of the organization's funding."[34]

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31   The report outlines two models of representation. Model "A" and Model "B." Model A proposes adding six new permanent seats, with no veto, and three new two-year term elected seats. Model B creates a new category of eight seats, renewable every four years, and one new two-year non-renewable seat.

32   The major contributors of the UN are the United States; Japan; Germany; France; United Kingdom, Italy and Canada. *See* Global Policy Forum [online] Available at: http://www.globalpolicy.org/finance/tables/reg-budget/large06/htm

33   The vision of the G-77 group was reflected in a UN GA draft resolution. *See* Eye on the UN [online] Available at http://www.eyeontheun.org/assets/attachments/documents/draf_res_fifth_comm_4-18-06_G-77

34   Statement by former U.S. Ambassador to the United Nations Mr. JOHN Bolton made on May 2, 2006 before the U.S. House Government Reform Subcommittee on National Security, Emerging Threats, and International Relations. *See* U.S. State

As to representation, one may ask whether it is enough to make a classic conception of international law effectiveness possible. It is true that nations such as Germany, Brazil, India and other countries have continuously requested more representation, particularly at the Security Council. The question of representation —at least political— will be addressed in the analytical section of this article.

2.2. Analysis

2.2.1. International terrorism as material source and as construction and interpretation criterion

Upon the occurrence of the terrorist attacks against the United States in September of 2001, terrorism as fact, a situation already tackled since the seventies by diverse international instances, came again to be the main element in creating, interpreting and applying the different inter-nations legal instruments.

So, the international public disorder in opposition to international public order came to be identified not with the threatening presence of its disruption, but rather with current terrorist attacks and terrorist threats.

The classical concept of war from the international law point of view started to be influenced by the phenomenon of terrorism, and what is being done and has been done by the different entities in order to fight it.

Hence, in the first years of the XXI Century the world has witnessed wars which common generic elements with major conflicts such as the First World War and the Second World War are very little[35].

Department [online] Available at http:// www.usinfo.state.gov/xarchives/ display.html?p=washfile-english&y=2006&m

35   The conflicts that the world has witnessed in the last ten years have little resemblance to the major conflicts of the XX Century: that is the First World War and the Second World War (and in many respects: causes of the conflict, length of the interventions,

The series of armed attacks and invasions the planet has witnessed in the second half of the XX Century and the first years of the XXI Century have one element in common: on the one hand, a problematic zone in a greater or lesser degree (thus, we find high intensity conflicts as well as low intensity conflicts[36]) and on the other hand, a group of States and/or entities or one leading State acting or omitting action[37].

I refer in particular to the acting of the United States. Hence, no conflict or international problem that have occurred in that period of time has been strange to the foreign policy of that State or of an international organization where that State has a direct influence[38].

Nonetheless, the question that one has to ask is how it is possible to make that the criterion of interpretation and even the actual and real source of law not be the fact of terrorism as an isolated event, but rather the seeking of international order and security, without setting aside the existence of an entity (in this case, the United States) with greater relative political power[39].

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players, etc.). In fact, after the reorganization of the world after the Second World War it is the Middle East the region of the world with more prevalence to conflicts in which "major powers" have been involved.

36   A "low-intensity conflict" is that in which there is a war of national liberation, a guerilla warfare, a revolutionary war, a small war, which are usually confined to the boundaries of one country.

37   Usually the States leading action –either military or not- are nations members of the Group of the Seven or G-7 which is composed of the world largest economies: U.S., Japan, Germany, U.K., France, Italy and Canada.

38   As there is no absolute power, relative power for purposes of this article is one that features on the one hand economic might and on the other hand, military might. Today, the entity with greater relative political power (entailing of course, economic and military power) is the United States of America.

39   The political power of the United States is directly associated with its being the world's largest and most advanced economy. In fact, its GDP is US$12.98 trillion compared to that of Japan (world's second largest economy) which is US$4.22 trillion. *See* Central Intelligence Agency [online] Available at http:// www.cia.gov/cia/ publications/factbook/geos/us.html

Would that be possible? I believe that that is possible. And I try to answer that question by saying that the effort of trying to condense in an international Constitution a set of provisions reflecting universal values and principles is laudable, but it is neither practical nor effective, and why not say it, realistic[40].

If the bottom line is that effective international law (referred to global order and security) ought to be and is the consuetudinary one —and we specifically refer to the international law dealing with international order, peace and security— to think about a rational-normative instrument does not come to be very practical.

The international Constitution and the structures and organs created by it work out, but not in the sense that classic international jurist expects to.

What is then the function of that international Constitution? The answer is simple. It has a *representation* function, but not an *action* function (although representation is a sort of action, here we refer to executive action —even with the use of force—)[41].

The States parties to the institutional mechanisms created by the international Constitution will not subject their behavior (and such lack of submission exists regardless of their having previously submitted their consent to be bound by the international Constitution) when they have a greater relative political power and when they see first hand that their security is or may be threatened.

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40   *See* note 19.

41   But ALLEN S. WEINER, international law professor at Stanford U. Law School seems to suggest otherwise: "[b]ecause the Security Council operates on the basis of established legal norms and participatory processes, its decisions —including its decisions to use force— will continue to carry far greater legitimacy than unilateral exercises of force. Unlike the development of doctrines that would expand unilateral rights to use force, the multilateral nature of collective security also provides an important safeguard against a descent into an unstable and dangerous security environment in which the use of force is essentially governed only by considerations of policy, and not by law." *See* WEINER, ALLEN S., "*The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?*" 59, *Stanford Law Review* 415, 2006.

Thus, effective public international law, that that is legitimate, even against the substantive and adjective provisions contained in the international Constitution will be that exerted by the entity with greater relative political power and which political regime is a democratic one. That is contrary to the case in which an entity with greater relative political power and which political regime is not a democracy wants to make international law effective; in that case, the effective international law will be —ought to be— that contained in the rational-normative instrument, in that case, the international Constitution[42].

Current reality is that the entity with greater and relative political power is a democratic regime. So, effective international law will be, can be and ought to be that exerted and made effective by that entity[43].

Such assertion may find several political and legal opponents. They would argue that it is not possible to make such assertion, if considered that the achievement of justice, order and security has been sometimes non-existent whenever the United States has acted or has not acted[44].

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42   But SARAH WILLIAMS citing Balakrishnan Rajagopal's stance says that he "considers that the domination of international law by lawyers and judges has led to a 'juro-centric' approach that over-emphasizes the role of lawyers and the decision-makers of formal institutions and neglects the contribution of the masses to the origins of legal rules and institutions." *See* WILLIAMS, SARAH, "*Has International Law Hit the Wall? An Analysis of International Law in Relation to Israel's Separation Barrier.*" 24 *Berkeley J. Int. Law* 192,2006.

43   The assertion of why a democracy is the preferable political regime is based on pure observation of the political, social, economic and cultural record of democracies around the world versus non-democracies. As to why democracies (in the sense of government of the people, by the people and for the people in a frame of freedom) are my preferred type of political regime two variables are considered: on the one hand, an economic variable (going through the World Bank list of richest and largest economies where one can see that all of them are democracies), and on the other hand a viewpoint on international conflicts that are rarely conducted by democracies against non-democracies. *See also* (for reports and essays) www.freedomhouse.org

44   There is no international force. There is no international police. Who —then— has that duty?

But my argument is not that one. The argument is not that every time the entity with greater relative political power acts or does not act, international rules are not or stop being effective. The argument rather is that the effectiveness of what is internationally just is achieved as long as the United States acts or does not act[45].

Even when the behavior of the United States has been reprehensible on many occasions[46], the ultimate line of argument when carrying out the mandates of its foreign policy will be the achievement and fulfillment of a juridical norm (and that even if there is extra-legal behavior), and all because of the existence of a democratic system[47].

Such assertion is based on concrete examples. A review of the behavior of the United States in two cases. First, Kosovo in 1999. Second, Iraq in 2003[48]. Of course, the reader may argue that one cannot overlook the hidden and surreptitious interests of any given human community. The motivation is given by a complex set of interests, but the compliance of what is internationally just —with flaws and errors of course— can only be obtained and demanded by a democracy with greater relative political power. And it not only can be. It only is obtained and demanded by a democracy with greater relative political power[49].

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45 It is worth asking what would have happened in some of the last international crises had the U.S. not acted: Kuwait would be the property of Iraq; Haiti would still be living a humanitarian crisis; Kosovo's tragedy would have been greater. But as well, some other crises would be much less grave had the U.S. not acted.

46 The Vietnam incursion, the Rwanda inaction, perhaps the invasion of Iraq and the lack of an "exit strategy" are in my opinion major foreign policy blunders of the U.S.

47 Democracies rarely attack or almost never attack other democracies. For evidence of this assertion *see* MOORE, JOHN, "*Solving the War Puzzle: Beyond the Democratic Peace*," (U.S.) *Military Law Review*, vol. 182.

48 In the first case a far grave humanitarian crisis was avoided thanks to the action of NATO forces even with the lack of authorization from the UN Security Council. In the second case, a coalition leaded by the United States and the United Kingdom invaded Iraq in March 19, 2003. Subsequently SADDAM HUSSEIN, the Iraqi dictator was captured and sentenced to death for crimes against his own people.

49 IMMANUEL KANT himself implied that democracies will naturally try to avoid war. A term to describe a situation in which democracies do not attack or rarely attack other

2.2.2. PROPOSALS. CONCLUSIONS (AXIOMATIC)

2.2.2.1. PROPOSALS

The following are proposals of UN Charter reform. But I warn that they will have only a political impact that sometimes will have a juridical impact (in the sense that actions will coincide with what is written) and sometimes —most of the times— not.

- One semi-permanent[50] Security Council membership to a nation of the developing world from each continent proposed by the major regional organization.

- International crises involving alleged or actual crimes against humanity under the terms of international legal instruments, shall not require ex-ante Security Council authorization for taking action as long as it is demonstrated ex-post the necessity of the action.

- International crises involving alleged or actual crimes against humanity under the terms of international legal instruments shall require ex-ante Security Council authorization but under an expeditious and fast process —a 30-day maximum one— and even with the vote of Security Council non-members as long as the entity taking action is a democracy and is supported only by democracies (additional input shall be given by the world's largest and most representative human rights organizations).

- A provision to be included in the form of a legitimacy cause authorizing the use of force or the threat of use of force as long

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democracies is called "democratic peace" which in some way international relations realism theorists attack.

50   Semi-permanent which means for a preset period of time.

as that use of force or threat of use of force comes from a democracy that is a permanent member of the UN Security Council and that is supported by at least the two largest democracies of each continent[51].

2.2.2.2 Conclusions (axiomatic)

The international Constitution may be left as it is now both formally and structurally. Perhaps, more representation shall be given to nations that have requested that continuously such as Brazil and India. As well, the deliberative process might be speeded up. But the planet shall know for good that effective law, what is internationally legitimate is only real and actual as long as is demanded by a democracy with greater relative political power.

And as to the argument that common good or order or security are not pursued but rather only few economic and political interests are, I can respond yes, but at the same time I say that being a democracy the one pursuing that, there is a closer approach to the achievement of international security and order.

International justice in the sense of international law made effective, and in a field so delicate and grave such as the achievement of international order and security, a field so political as well, effective public international law can only be possible when a democratic regime pursues it.

So, what is internationally just is achieved whenever there is discussion and debate (that only regarding international security and order) in the formal structures (which reinforces the internal democratic structures at the international ambit). So, what is just is a reality whenever there are structures where States have a voice and a right to a vote. But let us be aware that formal structures, "rationally normalized," will transcend into reality and actions and to what is

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51 Another option would be to have a permanent member only from one continent for a pre-set period of time. But that might be unfair or unjust with other nations.

just through the action of the entity with greater relative power that is a democratic regime[52].

And it is worth warning that I am not trying to justify juridical reality[53]. The foregoing only responds to axiomatic recognitions that try to explicate the problem of effectiveness of public international law entailing order and security using a realistic approach.

Furthermore, developing nations, although with political voice and the right to vote will only be able to express their political assent or discontent but due to their own situation will have to support the action of the entity with greater relative political power —as long as is a democracy— which will tend to defend the weaker side.

POSSIBILITIES

1. *Ideal scenario (the Ought To Be world) which will be evidenced only in few cases.*

Internal democratic regime + International or external democratic regime = Concerted multilateral international action.

2. *Actual scenario (the real-actual one) which will be evidenced in most of the cases.*

Internal democratic regime + International or external democratic regime= International action of a bunch of few or a unilateral one.

3. A non-pursued scenario and that will result in war:

Internal non-democratic regime + International or external democratic regime = Unilateral international action.

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52   *See* note 44.

53   The purpose of this essay is not to justify current reality but to explicate it. So, not because something occurs, then it *ought to occur*.

Possibility 2 is the one evidencing the almost full international law effectiveness (but public international law referred to global security and order). And that even when the formal structures and adjective rules haven't been observed. This is the closest the planet can get to achieving what is internationally just.

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