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# Rule of law, not war

A movement is under way in international relations in which the rule of law is beginning to catch up with military power as a factor in global politics, writes KENNEDY GRAHAM.

Something intriguing is under way in international affairs. Over the past decade, a movement has begun, gathering speed in recent years, in which the rule of law is beginning to range alongside raw power as a credible force, at the highest levels of diplomacy and politics.

The cardinal principles of the international system in the 20th century – national sovereignty, use of force, and state responsibility – are transforming in the 21st century. The traditional law of nations, where states enjoy untrammelled and unquestioned freedoms, is ceding to an inchoate, yet increasingly potent, law of humanity where individuals possess natural rights and leaders must learn to cover their backs while formulating both domestic and foreign policy.

As Tom Cargill of London's Chatham House observes, such recent developments point to a "profound disturbance" in global affairs caused by the emergence of an international legal system. "The very idea that there might be a legal process, quite separate from politics, is causing many people in many countries to rethink how they approach international relations".

In the post-Cold War era, a series of epochal crises – Yugoslavia and Rwanda, Afghanistan and Iraq, Somalia and Sudan – have set in motion fundamental change that is shaping the emerging global community.

enforcing the UN's disarmament decisions on Iraq, was not explicitly authorised by the Security Council and perceived by most as illegal.

In contrast, the 2001 invasion of Afghanistan was given legal cover by the council through right of individual or collective self-defence under the UN Charter. But the continued presence of the American-led Operation Enduring Freedom against terrorism is proving problematic to the rule of law. Only loosely associated with the UN-authorised international force (IASF) and beyond immediate UN control, OEF has stretched national self-defence into a global warp of logic where no limits are known on the use of military force. The 'war on something' has sought to supersede the 'war on someone', with subjective threat perception and suspect evidence providing the platform of opportunity for wars of choice.

The third two, the collapsed state of Somalia and the troubled Sudan, have caused a face-off between the international law of nations and international criminal jurisdiction over individuals. The bizarre effort by the Security Council in 1993 to have Somali warlords arrested by the UN Secretary-General, then released as the US pulled the plug, was a weak portent to what was to come.

Today, with the International Criminal Court considering charges against the president of



Use of force: Italian soldiers from a Nato-led peacekeeping force keep watch after a suicide car bomb blast outside the capital of Afghanistan, Kabul. Photo: Reuters

opinion that their use would be "generally contrary to international law".

And the council has acted in several ways to strengthen that grip, engaging through the post-Cold War era in a conscious process of self-empowerment.

In 1991 it decided, under binding powers, that a member state (Iraq) shall never acquire nuclear weapons, revoking its traditional right to withdraw from the nuclear Non-Proliferation Treaty.

In 1992, it declared that the proliferation of nuclear weapons (beyond those owned by the Five) would constitute a threat to peace, thereby according itself the right to apply binding preventive measures and use military force against any such acquisition. In 2004 that power was extended to the acquisition of nuclear weapons by private

anarchy. To others it is short-sighted and dangerous, so long as the Five defy their obligation to reduce and ultimately eliminate their own such weapons.

Secondly, the council is allowing itself full discretionary judgment in determining today what constitutes a threat to peace – internal conflict, terrorism, failure by states to respect its decisions, or unconstitutional overthrow of governments. It has even contemplated whether global health epidemics and climate change might comprise a "threat to peace". These are far wider discretionary powers for the council than the original expectation of the UN framers – of simply reacting to inter-state conflict.

Yet the trend towards Security Council empowerment works both ways. For the council refused to accord the

idealism are beginning to merge. For the 20th-century's version of Metternichian statecraft, Henry Kissinger, has recently called for a nuclear-free world. In this he was joined by three other American scions of tradition – former senior US officials George Schulz, Sam Nunn and William Perry. Meanwhile, several governments have drafted a Nuclear Weapons Convention (NWC), envisaging nuclear disarmament by all nations within a time-bound framework.

Such a treaty would, at the end of the process, render the use or possession of nuclear weapons illegal, the same fate already legislated for biological weapons 36 years ago and chemical weapons 15 years ago. Although opposed by Nato states, the NWC is supported today by a clear majority of nations at the UN General

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The first two, following the soul-searching over genocide in Africa and Europe, have generated a new norm in which nations would cede to the international community the right to intervene with force if gross and systematic human rights abuses are occurring. Under the “responsibility to protect” doctrine, while the primary responsibility to protect citizens resides with national governments, if a leader is unable or unwilling to meet that, the responsibility falls by default to the international community.

The second two, following the extended Iraq crisis of the past two decades and the terrorist attacks of 2001, have unleashed a whirlwind of doctrinal disputation over the right to use force. In 1990, a clear case of inter-state aggression resulted in a convincing display of authorised collective security to repel the invader. But the 2003 invasion, justified by the coalition as

**T**oday, with the International Criminal Court considering charges against the president of Sudan, the reach of international criminal law has touched the zenith of national authority – the head of state.

Each new doctrine – responsibility to protect; pre-emptive self-defence; individual criminal liability – is hotly contested. Together they act as weather-vanes for the shifting winds of change in contemporary international relations.

Those winds blow with different velocity – from the light zephyrs of law to the ferocious gales of unfettered power. The traditional institutional mechanism through which force is applied at the inter-state level, the UN Security Council, remains the dominant decision-making body in international affairs. Its five permanent members insist on preserving the twin symbols of their oligarchic grip – the council veto and their proclaimed right to possess nuclear weapons, notwithstanding the World Court’s

preventive measures and use military force against any such acquisition. In 2004 that power was extended to the acquisition of nuclear weapons by private (terrorist) groups.

That policy, however, is being applied selectively. Fictions of various hue are developed to provide cover for the three nuclear powers outside the NPT regime (Israel, India, Pakistan) while sanctions and diplomatic coercion are applied to alleged recalcitrant parties within it (North Korea, Iran).

Today, the US is applying pressure on New Zealand to acquiesce in a bilateral deal that may, or may not, be consonant with the spirit and letter of the NPT. In effect, the Five are according themselves the power through the UN Charter to foreclose on the traditional ‘right’ of states to withdraw from the NPT and acquire nuclear weapons themselves.

A recent EU paper has explicitly floated the notion that such council power might today be a legal norm. To some that appears sensible and reassuring, oligarchic nuclear power being preferable to global nuclear

of simply reacting to inter-state conflict.

Yet the trend towards Security Council empowerment works both ways. For the council refused to accord the right to the coalition to invade Iraq. By way of reinforcement, the international community, having witnessed UN principles being shaken to their roots, continues to insist that the Security Council alone can authorise the use of force. And the General Assembly agrees that pre-emptive self-defence, justifiable against terrorism, cannot be invoked against a suspected nuclear weapon programme. That would require council consideration and authorisation.

The council is indeed beginning to act as a prototype body of global governance. That is a linear development of traditional inter-state relations, where power between nations is calibrated among competing national interests, in the realpolitik manner that would have been intelligible to Metternich two centuries ago.

Yet, as international affairs become global, realism and

weapons 36 years ago and chemical weapons 15 years ago. Although opposed by Nato states, the NWC is supported today by a clear majority of nations at the UN General Assembly.

There is no doubt. International law is catching up, slowly but surely, on age-old, and atavistic, political freedoms – to commit aggression, to possess nuclear weapons, to order or commit crimes against humanity. The world is undergoing change.

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# Our bewildering enigma

**T**he mystery that is Winnie will never be solved; not in this lifetime.

Maybe I’m the only media person who doesn’t nurse a deep grudge against him, but I doubt it. I’d be safe, though, in guessing he has us all bewildered.

Some years back I got almost close to Winston Peters, writing a profile of him when he was still a rising star. He didn’t want to co-operate to begin with, distrust of the media had already set in, and even when he agreed to talk he was cagey. I remember him saying, “You’re not going to put me on no psychiatrist’s couch” as much for the unexpected lapse in grammar as for what he might mean.

A press conference he called at the time has stayed in my mind. He had something to say, some reason for calling the media together, but what that reason was quite eluded me. Peters sounded articulate. He was fully engaged with what he was saying. But what he said was indecipherable. It was a bit like listening to somebody mouthing words under water.

I asked veteran press gallery reporters what they made of it, since I couldn’t follow what he’d

**Rosemary McLeod**



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either. He can be a great communicator – or maddeningly opaque. That is his problem.

I don’t think you could wholly dislike Peters as a man. Those other journalists didn’t. But one by one, they all asked me what I made of him – and not because they had worked him out. They hadn’t, and neither did I, though there were moments when I felt I almost had a clue – and lost it.

Peters is sincere still, I have no doubt of it, and it seems ironic, because of what has happened to him since, that he was especially lyrical to me about his love of the Westminster parliamentary tradition. He was so idealistic, unlike his former colleague and fellow MP Michael Laws. When I interviewed him for the profile, he was cynical.

sense of humour, and a pleasant – if rather staccato – vocal delivery does no harm. I noticed at the time that although Peters’ suit-and-tie dress was immaculate, he had a hole in the sole of his shoe. That was a bit endearing, maybe: he hadn’t the time to look after himself properly, he was human. But it also suggested to me that he hadn’t quite got himself together. Small details can be eloquent – or misleading. I noted it only because it was dissonant. It didn’t fit his image.

In Peters’ current troubles he is, as usual, attacking the media. So are some media commentators, among them his former NZ First colleague, Laws. I noted last week’s comments by the Prime Minister that Peters is deeply upset over the current investigations into NZ First’s management of donations. She

understanding and compassion are not the media’s brief.

No, we are not nice, but we are useful. It’s our job to watch the theatre of power, and make sure it behaves according to its rules. We suited Peters when he embroiled the country in the Winebox affair. Without the media, New Zealanders would not have understood just what was at stake, and why. We’ve been handy, too, at recording his witticisms and policies, and when he’s called his many press conferences over the years. He didn’t complain in good times, and it’s not the media’s job to be his friend – or anyone else’s.

We need an open, carping, criticising, unfaithful media, and it needs more freedom, not less, to poke its collective nose into the business of everyone in public office. My main criticism of the press gallery is that it collectively knows so much it doesn’t tell the public – but in reality, it can’t. Journalists are bound by libel laws and the many strategies lawyers use to gag us, or force us to tell half stories.

I can’t see the health in all this. It leads to rumour, half truths and innuendo. Ultimately, they cause more

# IS IT

