CHAPTER 5

INSTITUTIONAL MODES OF CONFLICT MANAGEMENT

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Historical and Theoretical Overview

Contemporary practices in international conflict management are directly related to the evolution of the modern state system. That system resulted from the breakup of medieval European Christendom, and its historical landmarks were the 1648 Peace of Westphalia and the 1713 Treaty of Utrecht. However, it was not until the nineteenth century that a series of factors arose that enabled, and motivated, states to pursue organized means of managing international conflict. These factors included a continuing expansion and solidification of nation states, the emergence of improved communication, an increasing interdependence between states, and the recognition on the part of statesmen that some form of institutional method for conflict management was required.

The first major development in the management of international conflict was the establishment of the Council of Europe, which evolved out of a series of big power conferences in Europe beginning with the Congress of Vienna in 1815. This development, spurred by the ruinous Napoleonic Wars, changed the face of international relations by providing a forum for multilateral diplomacy rather than the traditional bilateral diplomacy. Although the European powers were unable effectively to manage their affairs within the concert system, they did, however, establish the precedent for further multilateral conferences.

The next major step in this area resulted from The Hague Peace Conferences of 1899 and 1907. These two conferences helped pave the way for the realization of the principle of universality. The 1907 Conference, for example, involved representatives from forty-four states, including most of the Latin American republics. As a result, smaller states were given the opportunity to enjoy at least superficial equality with the great powers. Perhaps the greatest achievement of the statesmen at The Hague was establishing the precedent that collective diplomacy should be oriented toward the further development and codification of international law, the formulation of procedures for the peaceful settlement of disputes, and the promotion of the principle that peaceful solutions might be urged and facilitated by disinterested states in international disputes.

The establishment of the League of Nations after World War I was a fundamental step forward in the development of a role for international organizations in the management of conflict. The founders of the League, horrified by the carnage of the war, sought to establish for the first time a system of collective security to prevent future conflict.

The concept of collective security in its ideal form institutes a system whereby a collective measure is taken against a member of a community of states that has violated certain community defined standards. In the ideal of the system, there are three constituent elements: first, the determination by a community of states of the core standards that are sought to be maintained as part of the *status quo* of the community; second, the determination by an authorized representative of the community that a core standard has been violated in a particular case; and third, the binding determination by the authorized representative of what measures should be taken as part of the automatic response of the community to the violation by the recalcitrant state.

The system instituted by the League of Nations (LON) Covenant only contained the first two of these elements. The aim was nonetheless noble. In the words of its chief advocate, President Woodrow Wilson, the League sought to establish "not a balance of power, but a community of power; not organized rivalries, but an organized common peace."[1] To this end, Article 16 of the LON Covenant conferred on the League Council, in many ways the executive organ of the League, the right to impose economic sanctions against a member state that had resorted to an "illegal" war in violation of Articles 12, 13, and 15 of the Covenant. Accordingly, the first and second elements of our ideal collective security system—the determination by the community of states of those standards it wants to protect and the authorization, in our case, of the LON Council to determine a case of violation—were satisfied.

However, the third element was not present. The LON collective security system left to member states the decision whether to implement a recommendation of the LON Council imposing military sanctions against a recalcitrant state. The Council did not possess the authority under the LON Covenant to impose a binding obligation on member states to carry out military sanctions against a designated target state; it only had the power of recommendation. The LON Council did, however, have the competence under the Covenant to require states to apply commercial and financial measures against a state. But even where these economic sanctions were in practice imposed against an aggressor state they were only partial and thus were not effective (for example, the determination by the LON Council that Italy had resorted to an illegal war against Abyssinia, now Ethiopia, within the meaning of Article 16 of the LON Covenant led the Council only to impose temporary and partial economic sanctions against Italy, which due to their limited scope proved wholly ineffective). More generally, the collective security system of the League was not used by states in favor of a policy of appeasement and the world descended into World War II.

The League was not a total failure, however, because it laid the groundwork for the modern-day United Nations (UN). The UN learned from both the successes and failures of the League. The UN Charter not only provides disputants with a variety of mechanisms they can use to resolve their disputes peacefully, but also establishes a modified form of collective security that in large part contains the three elements of the ideal system set out above as well as providing a role for regional arrangements as part of the global collective security system.

The United Nations System

[1] Woodrow Wilson, address to the U.S. Senate, Jan. 22, 1917, *in* 40 THE PAPERS OF WOODROW WILSON 536 (Arthur S. Link ed., 1982).

The UN Charter was formulated against the backdrop of the devastation and suffering caused by World War II. Its terms reflect a determination to provide an international institution that could control and even prevent conflict. The latter, in particular, was to be accomplished by the UN taking the approach, reflected in the Charter, that peace, economic and social progress, and human rights are indivisible.

The way the UN was to control conflict was through specific institutional arrangements under the Charter. At the heart of it all was the requirement that the use of force by states be limited to legitimate self-defense;[2] force may not be used against the territorial integrity or political independence of a state "or in any other manner inconsistent with the Purposes of the United Nations."[3] Accordingly, the UN Charter permitted self-defense and also, in certain limited circumstances, the control of conflict through regional arrangements.[4] But central to the Charter was the resolve that it would be realistic to enjoin states not to use force save in self-defense, because collective security would be used to control inter-state conflict. This collective security was to be provided by the UN itself.[5]

The pages that follow examine the institutional arrangements for the control of conflict provided by the UN Charter, and show how, in the face of the failure to establish the intended machinery, alternative institutional arrangements—often not clearly envisaged in the Charter—have developed. Also examined is the increasingly important role that regional arrangements play in managing conflict.

Membership of the United Nations

At the inception of the UN there were fifty-one members. Today there are 193, with the newest member, the Republic of South Sudan, joining in 2011. The admission of states to UN membership was in the early years of the UN the cause of great controversy. There were disputes as to whether a properly qualified applicant—a peace-loving state that accepts the obligations of the Charter and is able and willing to carry them out—could be refused admission.[6] There have also been controversies over the status of "divided" states, such as Vietnam, Korea, and Germany; difficulties with the succession of membership resulting from the dissolution of a state, such as the former Yugoslavia where there was no accepted successor state and all emergent states were required to apply for UN membership; controversy over the status of Palestine, which failed to obtain sufficient support in the Security Council to become a member state in 2011 but was granted the status of an observer by the General Assembly in 2012; and concern over whether the very small states can meet all the requirements of membership, although the general policy has been in favor of universality of membership.

The great swelling of the membership of the UN has led in turn to demands that the membership of certain non-plenary organs be enlarged. The Security Council originally consisted of eleven members, of whom five (the United States, United Kingdom, France, Russia (previously held by the former Soviet Union), and China) are permanent

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[2] *See* U.N. CHARTER art. 51.

[3] *See id.* art. 2, para. 4. The intended complementary structure of these articles and the problems that have arisen with their interpretation and application are examined in the previous chapter.

[4] *See id.* arts. 52-54.

[5] *See id.* arts. 39-50.

[6] *See id.* art. 4.

members.[7] In 1965, the Security Council was enlarged to fifteen members, with ten seats available for nonpermanent members, while at the same time the Economic and Social Council was enlarged from eighteen to twenty-seven members. There has continued to be some pressure both for further enlargement of the Security Council and, more controversially, for a redistribution and expansion of seats reserved for permanent members. As a consequence, the General Assembly adopted Resolution 48/26 on December 10, 1993, which established an Open-ended Working Group to "consider all aspects of the question of increase in the membership of the Security Council."[8] However, any changes in the membership of the Security Council require an amendment of the Charter, which under Article 108 can only take place with the consent of "all the permanent members of the Security Council." Such changes would significantly alter the institutional workings of the Security Council and the voting balance between permanent and nonpermanent members, and, moreover, no agreement has emerged as to the strongest claimants for special status. Thus, the impetus for change in membership has lost some momentum. Reform efforts in more recent years have focused on making the Security Council's working methods more transparent and attempts to introduce guidelines for the exercise of the veto power.

The Security Council

Security Council Decision-Making

The decisions of the Security Council were intended to be reached by formal application of the voting provision of Article 27 of the Charter, paragraph 3 of which provides for the veto power of the permanent members. Although less formal methods of decision-making have evolved, the veto has remained an important tool employed by the permanent members to achieve their own interests.

The veto power was originally given to the permanent members to ensure their unanimity in relation to the use by the Security Council of its enforcement powers under Chapter VII of the Charter. There was, however, criticism made by other states at the San Francisco Conference that there was considerable potential for abuse of the veto power in relation to non-Chapter VII decisions. In response, four of the permanent members, the United States, United Kingdom, former Soviet Union, and China adopted a non-binding statement (also subscribed to by France) that sought to provide a safeguard against the abuse of the veto.[9] This statement implied that the veto would only be used in relation to non-Chapter VII decisions when a matter was such that it may eventually lead to the use by the Council of its Chapter VII enforcement powers. This was known as the "chain-of-events" theory.

The general question of the abuse of the veto remains, however, unresolved. The chain-of-events formula has proved to be unworkable and is not in practice applied to decisions as to whether particular votes are or are not procedural. The veto power has been used by all the permanent members in circumstances in which the chain-of-events theory is not objectively applicable (i.e., when there was no prospect, even on the basis of a possible chain-

[7] *See id.* art. 23, para. 1.
[8] G.A. Res. 26, U.N. GAOR, 48th Sess., Supp. No. 28, U.N. Doc. A/Res/48/28 (1993).
[9] *Statement by the Delegations of the Four Sponsoring Governments on Voting Procedure in the Security Council*, Doc. 852, III/1/37 (1), 11 U.N.C.I.O. Docs. 711 (1945).

of-events, of enforcement measures being invoked). Examples here include the vetoes that have been cast in order to prevent the adoption by the Council of resolutions that were to reprimand the actions of a permanent member; to criticize a friendly power (for example, the former Soviet Union over the Indian invasion of Goa (1961) and the United States over Israel (1976, 1983, and 1995)); to reappoint the UN Secretary-General (the United States over the reappointment of Boutros Boutros-Ghali in 1996); to send military observers to a country (China over the sending of military observers to Guatemala in 1997); and to extend the duration of a UN peacekeeping force (the U.S. veto on June 30, 2002, of the proposed extension of the duration of the UN peacekeeping force in Bosnia-Herzegovina (UNMIBH) due to concerns that U.S. troops may be subject to future prosecution before the International Criminal Court).

The requirement of Article 27(3) that a party to a dispute abstain from voting (and, *a fortiori*, from casting a veto) is honored in the breach. It has not been found possible to maintain an effective distinction in practice between "situations" (where the party involved could vote) and "disputes" (where, by virtue of Article 27(3), the party involved could not). Occasional voluntary abstentions from voting—and thus, in the case of a permanent member, from the possibility of casting a veto—have been greatly outweighed by (often unchallenged) votes cast by states directly involved in disputes.

The threat or use of a veto has in a number of cases constituted a barrier to the effective use of the UN collective security system with the consequence that action has been taken by the General Assembly (in the case of Korea where the veto of the former Soviet Union prevented the Security Council from overseeing the UN authorized military action), military action has been taken by states acting outside the UN system (in the case of the NATO bombing campaign in Kosovo in 1999 after the threat of a Russian veto blocked attempts by the Security Council to respond to the humanitarian crisis, see further below), or the Security Council has been deadlocked (in the case of repeated Russian and Chinese vetoes of resolutions in 2011-2014 regarding proposed military action in Syria to respond to massive human rights violations of the civilian population).

From the late 1940s until the mid-1960s it became well accepted in UN practice that, notwithstanding the wording of Article 27(3), an abstention was not tantamount to a veto and could not prevent a resolution from being adopted. This practice introduces a degree of flexibility that promotes the effective functioning of the Council, since it allows a permanent member to express mild disapproval of, or withhold its support from, a proposed resolution without having to prevent its adoption by casting a negative vote. Controversy about the matter was resumed, however, in the late 1960s, in part as a result of the enlargement of the nonpermanent membership of the Security Council. The fact that the amended Article 27 now permitted a nonprocedural resolution to be passed by the affirmative vote of *nine* members (out of a total membership of fifteen) meant that a nonprocedural resolution could now be adopted without the positive concurrence of even a single permanent member. Some contended that this unforeseen result must mean that abstention by a permanent member was not to be treated as a "concurring vote" within the meaning of Article 27(3), since otherwise it vitiates the idea that the permanent members should act collectively to manage conflict. For example, when Rhodesia declared its unilateral declaration of independence from the United Kingdom in 1965, Portugal took the view that Council resolutions calling for mandatory economic sanctions were not validly adopted, because of the abstention of one or more of the permanent members (France and the United Kingdom). This was a view that was supported by South Africa. However in a case that ensued before the International Court of Justice, the South African argument was effectively rejected by the Court, since it failed to regard Council resolutions adopted in the face of abstention by one or more permanent members as being invalid.[10] As such, the International Court affirmed that an abstention by a permanent member is not equivalent to a veto.

Diverse views are still held on the question of whether the absence of a permanent member is analogous to an abstention. Western States took the view that the absence of the delegate of the former Soviet Union from discussions on the complaint of aggression in Korea did not invalidate the resolutions passed. Some writers have emphasized textual problems in concluding that "concurring votes" under Article 27(3) cannot occur if a member is absent. Others have emphasized policy considerations militating against this interpretation.

> The practice that abstention is not a veto permits the United Nations to operate most effectively for the purposes of collective security for which it was designed. In contrast, a decision that absence is a veto, . . . would permit a single permanent member of the Security Council [to paralyze the Council] by its wilful refusal to participate in the deliberations of the Council . . . .[11]

Over the years attempts have been made in the UN to limit the impact of the veto. An early example, the Uniting for Peace Resolution of the General Assembly, is dealt with below. Leading up to the 2005 World Summit, the High-Level Panel on Threats, Challenges and Change called on the permanent members "in their individual capacities, to pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses".[12] In 2013, France suggested having a "code of conduct" regarding the veto, but this idea has not gained the support of the other permanent members.[13] Informal changes in practice within the Council have had more impact on the use of the veto than these formal attempts at reform. The most important change has been the increased use of decision-making by consensus. Routine decisions will sometimes be expressed by the President of the Council as having been adopted by the Council without there having been a vote. In cases of consensus decision-making, the text of a resolution, or statement made by the President on behalf of the Council, is usually worked out in informal consultations and then circulated as a written document or declared by the President in open meeting to have been approved. The defining element of a consensus decision is that no vote has been taken.

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Questions for Discussion

1. What are the arguments for and against the permanent members having a veto power as provided for in Article 27(3)?

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[10] *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (June 21).

[11] Myres S. McDougal & Richard N. Gardner, *The Veto and the Charter: An Interpretation for Survival*, 60 YALE L.J. 258, 285 (1951).

[12] A/56/565, 2 December 2004, para 256.

[13] Laurent Fabius, 'A Call for Self-Restraint at the U.N.', *New York Times* (4 October 2013) .

2. How was it to be determined whether a matter is or is not "procedural" within the meaning of Article 27(3)? What different method of determination has evolved in practice?

3. What is the position under Article 27(3) when one or more permanent members are absent during a nonprocedural vote? Or abstains on such a vote? Can they be deemed to have cast an affirmative vote in these circumstances? What are the policy considerations that lead you to your view in each case?

4. Should the veto power be available to permanent members when a situation concerns genocide, crimes against humanity or war crimes?

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Security Council Powers

Article 24(1) of the Charter gives the Security Council the primary responsibility for the maintenance of international peace and security, and its decisions in this regard are binding on all UN members pursuant to Article 25 of the Charter. More on the secondary responsibility of the General Assembly in relation to peace and security can be found in the section on the General Assembly.

Article 24(2) leaves room for argument as to whether the Security Council, acting to maintain peace and security, must be able to base its actions on the specific powers enumerated in Chapters VI, VII, VIII, and XII, or whether the Security Council has available to it more general powers to act under Article 24(1) so long as it is acting in accordance with the Purposes and Principles of the UN. This ambiguity was apparent from the outset and arose in sharp fashion in connection with the Security Council's consideration of the Trieste question.

Oscar Schachter, *The Development of International Law through the Legal Opinions of the United Nations Secretariat,*

25 BRIT. Y.B. INT'L L. 91, 96-97, 101 (1948)

> Stated in general terms, the Council was faced with the following question: in carrying out its responsibility for the maintenance of international peace and security, is the authority of the Council limited to the exercise of the specific powers granted in Chapters VI, VII, VIII, and XII of the Charter?
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> This issue was raised as a consequence of the arrangements for a free territory of Trieste which had been agreed upon by the Council of Foreign Ministers after prolonged discussion. Under these arrangements (which were embodied in various Annexes to the draft peace treaty with Italy), the Security Council was to assume important responsibilities in regard to the Free Territory; in particular, it was to: (a) ensure the integrity and independence of the territory; (b) appoint the Governor who would be responsible to the Council and subject to its instructions; (c) determine when the Permanent Statute shall enter into force; (d) have the right to amend the Permanent Statute. The Council of Foreign Ministers (which for this purpose included the representatives of

> France, the USSR, the UK, and the USA) requested the Security Council to approve the instruments relating to Trieste and to accept the responsibilities which would devolve upon it under them.
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> At the Security Council meeting two of the representatives raised a question as to the authority of the Council to accept these responsibilities. While they did not doubt that the question of Trieste related to peace and security they maintained that the Council's responsibility could only be exercised through the specific powers granted for that purpose in Chapters VI, VII, VIII, and XII. In their opinion the specific powers did not confer upon the Council sufficient authority under the circumstances to enable it to exercise the governmental functions stipulated in the Trieste documents. In response to this contention the Secretary-General presented a brief oral statement to the Council expressing his views regarding the constitutional issue raised. In his opinion the Security Council was not limited to the specific powers laid down in the chapters mentioned; the Council had, he suggested, a power to maintain peace and security conferred upon it by Article 24 which is wide enough to enable it to assume the responsibilities arising from the agreements relating to Trieste. . . .
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> . . . Article 24 is being construed as a grant of authority which is quite separate and distinct from the specific powers granted elsewhere. Moreover, it appears to have been accepted that the action taken by the Council under this residuary power may be considered as creating binding obligations under Article 25. Whether or not this interpretation is justified by the text, it seems likely, on the basis of the precedents already established, that the Council will be prepared to fall back on Article 24 as a general source of authority. But this does not mean that Article 24, broad though it is in its language, will be considered as giving the Council a *carte blanche* in matters of peace and security. In the first place it is clear from the text of paragraph 2 of this Article that the Council's power is limited by the purposes and principles set forth in Articles 1 and 2. In the second place . . . Article 24 has not actually been utilized as a substitute for the more specific provisions of the Charter; it has rather been regarded as a reservoir of authority, to be invoked only in those cases which, like Trieste, relate to peace and security but which do not fall within the framework of the more detailed provisions of the Charter. . . .
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> If limited in this manner, the interpretation of Article 24 as conferring residuary power would seem to be a justifiable constitutional development, in keeping with the basic principle that the Council should have broad and flexible authority, within the purposes and principles of the Organization, to act effectively in the varied circumstances which might involve threats to the peace.

These early views were confirmed by the International Court when it came to consider the UN's purported revocation of the mandate that South Africa held over South West Africa. The Security Council had adopted Resolution 276 (1970) affirming General Assembly Resolution 2145 (XXI) that had purported to terminate the mandate. Various arguments arose in the subsequent case before the International Court about the legality and legal effect of these resolutions, including the absence of specific powers in the Charter authorizing mandate revocation by the Security Council.

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970),

1971 I.C.J. 16 (June 21)

109. … The Security Council, when it adopted these resolutions, was acting in the exercise of what it deemed to be its primary responsibility, the maintenance of peace and security, which, under the Charter, embraces situations which might lead to a breach of the peace (Art. 1, para. 1). . . .

110. As to the legal basis of the resolution, Article 24 of the Charter vests in the Security Council the necessary authority to take action such as that taken in the present case. The reference in paragraph 2 of this Article to specific powers of the Security Council under certain chapters of the Charter does not exclude the existence of general powers to discharge the responsibilities conferred in paragraph 1. Reference may be made in this respect to the Secretary General's Statement presented to the Security Council on 10 January 1947, to the effect that "the powers of the Council under Article 24 are not restricted to the specific grants of authority contained in Chapters VI, VII, VIII and XII . . . the Members of the United Nations have conferred on the Security Council powers commensurate with its responsibility for the maintenance of peace and security. The only limitations are the fundamental principles and purposes found in Chapter I of the Charter."

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Comments

1. In addition to the Council's specific powers to maintain peace and security that are referred to in Article 24(2), the Council also has specific powers relating to the establishment of UN subsidiary organs[14] and the specification of conditions for participation in its meetings by nonmembers of the Council or nonmembers of the UN.[15]

2. An important additional source of powers that the Security Council enjoys are the implied powers of the UN under the Charter. On these implied powers, the International Court of Justice, in its Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* case, stated:

> 25. . . . The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as "implied" powers. As far as the United Nations is concerned,

[14] *See* U.N. CHARTER art. 29. This power provided in part the basis, for example, for the establishment of the UN International Criminal Tribunals for the former Yugoslavia and Rwanda as subsidiary organs of the Council.

[15] *See id.* art. 32.

the [International] Court has [in the previous *Reparations* case] expressed itself in the following terms in this respect:

'Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties. This principle of law was applied by the Permanent Court of International Justice to the International Labour Organization in its Advisory Opinion No.13 of July 23rd, 1926 (Series B, No.13, p.18), and must be applied to the United Nations.' (*Reparation for Injuries Suffered in the Service of the United Nations* (1954).[16]

3. The concept of implied powers has in practice proved of considerable importance to the Security Council being able to maintain or restore peace and security, supplementing such provisions as Articles 24, 29, and 40 of the Charter. Examples are seen in the legal basis for the Security Council to establish UN peacekeeping forces, to delegate its Chapter VII enforcement powers to member states, to establish *ad hoc* international criminal tribunals, and to establish UN transitional administrations to govern a state or part of the territory of a state often in post-conflict situations where state institutions have collapsed and there is a widespread lack of law and order.

4. The issue of potential judicial review by the International Court of Justice of Security Council resolutions adopted under Chapter VII of the Charter has attained prominence since the decisions of the Court in the *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), Provisional Measures*,[17] and the *Case Concerning the Application of the Genocide Convention (Bosnia and Herzegovina v. Yugoslavia), Provisional Measures*.[18] In the former case, it was asked whether the Court has the competence to review the legality of an Article 39 determination by the Council; while in the latter case the issue was whether a Council resolution imposing an arms embargo on Bosnia might be reviewed on the ground that it impaired Bosnia's right of self-defense against an alleged genocidal aggressor. As both of these Orders were issued at the provisional measures stage, there was no definitive resolution of these issues by the Court.[19] This controversial issue of potential judicial review has, nonetheless, generated considerable academic comment, much of which is in favor of some form of judicial review. For further information, see the section Judicial Review of Security Council Measures in the Selected Bibliography. In a different context, the European Court of Justice (ECJ) has reviewed the implementation of Security Council resolutions with respect to the listing of individuals (see the discussion of the *Kadi* case below).

5. Since the establishment of the International Criminal Court (ICC) in 2002, the Security Council has had a role in referring situations to the ICC Prosecutor where it believes one or more crimes (genocide, crimes against humanity or war crimes) appears to have been committed.[20] This referral is done by way of a resolution under Chapter VII of the Charter. The Security Council has referred the situation in Darfur, Sudan (Resolution 1593 of 2005) and in Libya (Resolution 1970 of 2011) to the ICC Prosecutor and investigations have commenced.

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[16] Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1966 I.C.J. 66 (July 8).
[17] 1992 I.C.J. 3.
[18] 1993 I.C.J. 3.
[19] Both Orders are available from the ICJ web-site: http://www.icj-cij.org.
[20] Article 13(b) of the ICC Statute. Under Article 16 of the Statute, the Security Council may suspend an investigation or prosecution for a

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Questions for Discussion

1. What powers are available to the Security Council?

2. What is the basis for the doctrine of implied powers? Is the rationale for the existence of this doctrine cogent?

3. What are the arguments for and against the International Court of Justice being able to review the exercise by the Security Council of its Chapter VII powers? What is the essential precondition for the Court to be able to hear such a case? (In order to answer these questions, you will need to read the articles in the section Judicial Review of Security Council Measures in the Selected Bibliography.)

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Security Council Enforcement Measures to Maintain or Restore Peace & Security

The collective security powers of the Security Council are contained in Chapter VII of the Charter. The Charter requires that in order to be able to use these enforcement powers, the Council must make a determination, pursuant to Article 39, that there exists "a threat to the peace, breach of the peace or act of aggression." It was not originally envisaged that these threats to the peace would come from non-state actors, but this perception has now changed and the Council has in a number of cases determined that threats to the peace are being caused by non-state actors.

Once it has made an Article 39 determination, the Council can then prescribe what measures are necessary for the restoration of peace and security. These measures will involve the Council using its other powers under Chapter VII, which include the authority to order provisional measures to be taken by a state[21] and the authority to impose economic and military sanctions against a state.[22] Although the Council usually refers to Chapter VII in express terms in a resolution that invokes Chapter VII powers, it does not, however, usually make an express reference to the specific articles of Chapter VII on which it is basing its action.

Article 39 of the Charter

ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT

255, 257 (1994)

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period of 12 months by passing a resolution under Chapter VII.

[21] *See* U.N. CHARTER, art. 40.

[22] *See id.* arts. 41-42.

It is clear that the envisaged sanctions provided for by Articles 41 and 42 are for the maintenance or restoration of international peace and security. It is further clear that measures under Articles 41 and 42 depend upon there having been a finding under Article 39 of the existence of any threat to the peace, breach of the peace, or act of aggression. No matter how much one may wish it otherwise, no matter how policy-directed one might wish choice between alternative meanings to be, there is simply no getting away from the fact that the Charter *could* have allowed for sanctions for gross human-rights violations, but deliberately did not do so. The only way in which economic or military sanctions for human rights purposes could lawfully be mounted under the Charter is by the legal fiction that human-rights violations are causing a threat to international peace. That was the technique introduced long ago when economic sanctions were introduced against Rhodesia; it is still the technique being used in today's ever more complex problems in Iraq and Somalia. When the Government of Ian Smith declared its Unilateral Declaration of Independence (UDI) in Rhodesia, this was regarded as the act of a racist minority government, designed at perpetuating the inferior position of the black majority. That internal act was deemed by the Security Council to constitute a threat to international peace. Thus the scene was set for the application of Chapter VII of the UN Charter. Advantage was taken of the fact that the immediate neighbours of Rhodesia were so deeply resentful of the UDI that a hostile response could have been envisaged—and so, it was said, objectively there was a threat to the peace, and economic sanctions could be mounted.

. . . .

. . . The fact that [in later cases such as Iraq and Somalia] the pictures of suffering appear on our television screens, rightly outraging public opinion around the world, makes more likely the possibility that such [Article 39] characterizations will occur even where the national interests of the military active Security Council members are not directly involved. Such has been the case in Somalia. In Resolution 794 (1992) the Security Council determined that the 'magnitude of the human tragedy caused by the conflict in Somalia' constituted a threat to international peace and security. The United Nations had already sought to provide peace-keeping support for the humanitarian operations, through the establishment of the United Nations Operation in Somalia (UNOSOM). It now declared the situation a threat to international peace and authorized 'the use of all necessary means' to establish a secure environment for humanitarian relief operations. Acting under Chapter VII of the Charter, the Council authorized the participation of states in such an effort, within a unified command. The task was essentially taken on by the United States.

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Comments

1. The Charter does not itself define a threat to the peace, breach of the peace, or act of aggression. The reason for this was deliberate: to give the Council a wide discretion in making Article 39 determinations. Although in 1974 the General Assembly did adopt a resolution on the Definition of Aggression,[23] the resolution has not been used in

[23] G.A. Res. 3314, U.N. G.A.O.R., 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (1974).

any systematic way by the Security Council in its determinations, though individual members may invoke it in support of their claims and it has been used as the basis for the definition of aggression in the amendment to the Statute of the ICC. This was adopted at the ICC Review Conference in 2010 but will not enter into force until after 2017..

2. The Council will often make an Article 39 determination in a resolution by using the language of Article 39 (that a particular situation constitutes a threat to or breach of the peace) without making an express reference to this Charter provision in its resolution.

3. The Security Council has made Article 39 determinations in a number of cases with differing causes. These include, for example, human rights violations occurring within a state (Southern Rhodesia), large-scale human suffering occurring within a state (Somalia and Rwanda), an attack by one state against another (Korea and Iraq), the protection of the delivery of humanitarian relief supplies within a state (Somalia, Bosnia, and Albania), and the restoration of democracy in a state (Haiti). Since the terrorist attacks of September 11, 2001, the Security Council has become the focus for multilateral efforts to eradicate terrorism. The Council has discussed HIV/AIDS, climate change and sexual violence as threats to international peace and security.[24]

4. An Article 39 finding involving a state does not necessarily entail a finding that the state is a "wrongdoer." The Security Council often determines that a situation is a threat to the peace, or even that events are a breach of the peace, without characterizing any of the parties as being at fault.

Obviously, when the finding is of aggression, it is hard to avoid the incidental determination that a state is a wrongdoer. However, the Council has applied the label of aggression very sparingly in the majority of recent cases where it has made an Article 39 determination. Despite having made a number of early determinations that "aggressive acts" had been committed by Southern Rhodesia and South Africa, and a few such additional determinations in incidents concerning Benin, Tunisia, and Iraq,[25] the Security Council has not made a determination using the term aggression since 1990. The latter determination was in Resolution 667 of September 16, 1990,[26] where the Council, as part of its response to Iraq's invasion of Kuwait, strongly condemned "aggressive acts perpetrated by Iraq against diplomatic premises and personnel in Kuwait, including the abduction of foreign nationals who were present in those premises," but it failed, however, to characterize more generally Iraq's invasion of Kuwait as an act of aggression. A possible reason for this may be to avoid the long-lasting stigma that accompanies such a label being applied to a state.

* * *

Questions for Discussion

1. What role does Article 39 play in the UN collective security system?

2. How have Article 39 determinations by the Council changed over time, and, in your view, to what extent have these changes been positive?

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[24] Repertoire of the Practice of the Security Council 17th Supplement 2010-2011, Part VII.

[25] UN Secretariat Study, HISTORICAL REVIEW OF DEVELOPMENTS RELATING TO AGGRESSION, U.N. Doc. PCNICC/2002/WGCA/L.1, paras. 383-404, *available at* http://www.un.org/law/ica/documents/aggression/aggressiondocs.htm.

3. To what extent can a Security Council resolution that determines a particular situation to constitute a threat to the peace be challenged before the International Court of Justice on one or both of the following grounds: (a) that the situation in question does not constitute a threat to the peace; and (b) that there has been an alleged procedural illegality by the Council in adopting the resolution? (In order to answer this question, you will need to read the articles in the section Judicial Review of Security Council Measures in the Selected Bibliography.)

* * *

Article 40 of the Charter

The Security Council can require member states to comply with provisional measure orders, since a decision made pursuant to Article 40 attracts the application of Article 25 of the Charter and as such is binding on member states. Such orders have, for example, been made by the Council in the following circumstances: to call upon a State to comply with conditions as stipulated by the International Atomic Energy Agency (IAEA) (Iran in Council Resolution 1696 (2006));[27] to require a state to withdraw its invading troops from another state (Iraq's troops from Kuwait in Council Resolution 660 (1990));[28] to call for a cease-fire between warring parties (Iran and Iraq in Council Resolution 598 (1987));[29] and to demand an end to foreign military intervention (Turkey's invasion of Cyprus in Resolution 353 (1974)).[30] With the exception of Resolution 660, the record of the Council in taking further enforcement measures to ensure compliance with its provisional measure orders has not been good.

* * *

Article 41 of the Charter: Economic and Other Sanctions

For the first four decades of the UN, the Security Council rarely imposed sanctions under Article 41 of the Charter. That situation radically changed in the 1990s, with sanctions under Article 41 becoming one of the principal tools of the Security Council in its efforts to maintain international peace and security. Three developments can be identified: (1) a movement from global to targeted sanctions; (2) the growth of a 'sanctions architecture' within the UN; and (3) controversies over judicial control and review of the implementation of sanctions.

The Classic Model of Economic Sanctions: Southern Rhodesia

The first economic sanctions regime imposed by the Security Council was that employed in the wake of the Rhodesian Unilateral Declaration of Independence (UDI) from the United Kingdom in 1965.

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[26] S.C. Res. 667, 55th Sess., 2940th Mtg., U.N. Doc. S/Res/667 (1990).
[27] S.C. Res 1696 (2006).
[28] S.C. Res. 660, 55th Sess., 2932d Mtg., U.N. Doc. S/Res/660 (1990).
[29] S.C. Res. 598, 52d Sess., 2750th Mtg., U.N. Doc. S/Res/598 (1987).
[30] S.C. Res. 353, U.N. SCOR, 29th Sess., Special Supp. 1-2A, at 3, U.N. Doc. S/Supplements (1974).

The regime in the case of Southern Rhodesia started out in the form of a recommendation and was then changed by the Council in subsequent resolutions to become mandatory. In Security Council Resolution 217 (1965), the Council said of the UDI: "its continuance in time constitutes a threat to international peace and security," and states were urged "to do their utmost in order to break all economic relations with Southern Rhodesia, including an embargo on oil and petroleum products."[31] These terms can be contrasted with those used in the series of resolutions that followed Resolution 217 (1965):

Security Council Resolution 221,

U.N. SCOR, 21st Sess., Special Supp. No. 1,
Jan.-Dec., at 5, U.N. Doc. S/Supplements (1966)

The Security Council,

. . . .

Gravely concerned at reports that substantial supplies of oil may reach Southern Rhodesia as the result of an oil tanker having arrived at Beira and the approach of a further tanker which may lead to the resumption of pumping . . . with the acquiescence of the Portuguese authorities,

Considering that such supplies will afford great assistance and encouragement to the illegal regime in Southern Rhodesia, thereby enabling it to remain longer in being,

1. *Determines* that the resulting situation constitutes a threat to the peace;
2. *Calls upon* the Portuguese Government not to permit oil to be pumped through the pipeline from Beira to Southern Rhodesia;
3. *Calls upon* the Portuguese Government not to receive at ports oil destined for Southern Rhodesia;
4. *Calls upon* all States to ensure the diversion of any of their vessels reasonably believed to be carrying oil destined for Southern Rhodesia which may be en route for Beira;
5. *Calls upon* the Government of the United Kingdom of Great Britain and Northern Ireland to prevent, by the use of force if necessary, the arrival at Beira of vessels reasonably believed to be carrying oil destined for Southern Rhodesia, and empowers the United Kingdom to arrest and detain the tanker known as *Joanna* V upon her departure from Beira in the event her oil cargo is discharged there.

Security Council Resolution 232,

U.N. SCOR, 21st Sess., Special Supp. No. 1,
Jan.-Dec., at 7, U.N. Doc. S/Supplements (1966)

The Security Council,

. . . .

Acting in accordance with Articles 39 and 41 of the United Nations Charter,

[31] S.C. Res. 217, U.N. SCOR, 20th Sess., Supp. Jan.-Mar., at 8, U.N. Doc. S/Supplements (1965).

1. *Determines* that the present situation in Southern Rhodesia constitutes a threat to international peace and security;

2. *Decides* that all States Members of the United Nations shall prevent:

(*a*) The import into their territories of asbestos, iron ore, chrome, pig-iron, sugar, tobacco, copper, meat and meat products and hides, skins and leather originating in Southern Rhodesia . . . ;

(*b*) Any activities by their nationals or in their territories which promote or are calculated to promote the export of these commodities from Southern Rhodesia . . . ;

(*c*) Shipment in vessels or aircraft of their registration of any of these commodities originating in Southern Rhodesia and exported therefrom after the date of this resolution;

(*d*) Any activities by their nationals or in their territories which promote or are calculated to promote the sale or shipment to Southern Rhodesia of arms, ammunition of all types, military aircraft, military vehicles, and equipment and materials for the manufacture and maintenance of arms and ammunition in Southern Rhodesia;

(*e*) Any activities by their nationals or in their territories which promote or are calculated to promote the supply to Southern Rhodesia of all other aircraft and motor vehicles and of equipment and materials for the manufacture, assembly, or maintenance of aircraft and motor vehicles in Southern Rhodesia; the shipment in vessels and aircraft of their registration of any such goods destined for Southern Rhodesia; and any activities by their nationals or in their territories which promote or are calculated to promote the manufacture or assembly of aircraft or motor vehicles in Southern Rhodesia;

(*f*) Participation in their territories or territories under their administration or in land or air transport facilities or by their nationals or vessels of their registration in the supply of oil or oil products to Southern Rhodesia;

notwithstanding any contracts entered into or licenses granted before the date of this resolution;

3. *Reminds* Member States that the failure or refusal by any of them to implement the present resolution shall constitute a violation of Article 25 of the Charter;

. . . .

5. *Calls upon* all States not to render financial or other economic aid to the illegal racist regime in Southern Rhodesia;

6. *Calls upon* all States Members of the United Nations to carry out this decision of the Security Council in accordance with Article 25 of the United Nations Charter; . . .

Comments

1. The imposition of economic sanctions is useful in most cases since it will often provide diplomatic and other processes the time they need to try and resolve a situation before the next step of military force is ordered by the Security Council against the recalcitrant state. It may even lead a recalcitrant state to cease its offending actions that have been the cause of the threat to peace. Where, however, economic sanctions are not, or do not look as if they

will be, successful then the use of military force is an important, final, collective security measure. These are the two stages that the Security Council employed against Iraq. When the economic sanctions imposed against Iraq by Resolutions 661 (1990) and 670 (1990) appeared unlikely to compel Iraq to withdraw from Kuwait,[32] the Security Council in Resolution 678 (1990) authorized UN member states to use military force against Iraq.[33]

2. Since the end of the Cold War, the Security Council has imposed mandatory economic sanctions regimes against a number of states and entities within states. These include a comprehensive regime imposed against Iraq by Council Resolutions 661 (1990) and 670 (1990) and against the Federal Republic of Yugoslavia and the Bosnian Serb Party by Resolutions 757 (1992), 787 (1992), 820 (1993), and 942 (1994).[34] However these cases of comprehensive sanctions regimes are rare as the Security Council has moved from global to more targeted sanctions.

3. In addition to the classic type of economic sanctions regime directed at a specific state or entity within a state, the Security Council has imposed obligations on all UN member states to prevent and suppress terrorism and take action to cut off financing for international terrorism. The Council used its Article 41 power to impose such obligations on states when it adopted Resolution 1373 (2001). This Resolution also establishes a Counter-Terrorism Committee to monitor implementation by states.[35]

From Global to Targeted Sanctions

During the 1990s, controversies over the negative humanitarian consequences of global economic sanctions on civilian populations led to the increased use of targeted sanctions against a state or entities within a state. For example, consider: arms embargoes;[36] the suspension of civil aviation links;[37] the freezing of overseas assets;[38] and bans on imports from, or exports to, the target state of key products like petroleum[39] and diamonds.[40] The Council has sought to develop "smart sanctions" that target even more specifically the members of the government whose actions have caused the imposition of the economic sanctions. This has, for example, led the Council to impose travel restrictions against senior members of UNITA and adult members of their immediate families,[41] the freezing of funds and financial resources of all officers of the Haitian military and their immediate families and those

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[32] S.C. Res. 661, 45th Sess., 2933d mtg., U.N. Doc. S/RES/661 (1990); S.C. Res. 670, 45th Sess., 2943d mtg., U.N. Doc. S/RES/670 (1990).

[33] S.C. Res. 678, 45th Sess., 2963d mtg., U.N. Doc. S/RES/678 (1990).

[34] S.C. Res. 757, 47th Sess., 3082d mtg., U.N. Doc. S/RES/757 (1992); S.C. Res. 787, 47th Sess., 3137 mtg., U.N. Doc. S/RES/787 (1992); S.C. Res. 820, 48th Sess., 3234th mtg., U.N. Doc. S/RES/820 (1993); S.C. Res. 942, 49th Sess., 3928th mtg., U.N. Doc. S/RES/942 (1994).

[35] The ongoing work of the Counter-Terrorism Committee is *available at* http://www.un.org/Docs/sc/committees/1373.

[36] All the territories of the Former Yugoslavia: S.C. Res. 713, 46th Sess., 3009th mtg., U.N. Doc. S/RES/713 (1991); Libya: S.C. Res. 748, 47th Sess., 3063d mtg., U.N. Doc. S/RES/748 (1992); Somalia: S.C. Res. 733, 47th Sess., 3108th mtg., U.N. Doc. S/RES/733 (1992); Liberia: S.C. Res. 788, 47th Sess., 3138th mtg., U.N. Doc. S/RES/788 (1992); the military junta in Haiti: S.C. Res. 841, 48th Sess., 3238th mtg., U.N. Doc. S/RES/841 (1993); the National Union for the Total Independence of Angola (UNITA) in Angola: S.C. Res. 864, 48th Sess., 3277th mtg., U.N. Doc. S/RES/864 (1993); Rwanda: S.C. Res. 918, 49th Sess., 3377th mtg., U.N. Doc. S/RES/918 (1994); the military junta in Sierra Leone: S.C. Res. 1132, 52d Sess., 3822d mtg., U.N. Doc. S/RES/1132 (1997); the Taliban in Afghanistan: S.C. Res. 1333, 55th Sess., 4251st mtg., U.N. Doc. S/RES/1333 (2000); and Eritrea and Ethiopia: S.C. Res. 1298, 55th Sess., 4144th mtg., U.N. Doc. S/RES/1298 (2000).

[37] Libya: S.C. Res. 748, 47th Sess., 3063d mtg., U.N. Doc. S/RES/748 (1992); and the Taliban in Afghanistan: S.C. Res. 1267, 49th Sess., 4051st mtg., U.N. Doc. S/RES/1267 (1999).

[38] Libya: S.C. Res. 883, 48th Sess., 3312th mtg., U.N. Doc. S/RES/883 (1993); the *de facto* government in Haiti: S.C. Res. 841, 48th Sess., 3238th mtg., U.N. Doc. S/RES/841 (1993); UNITA in Angola: S.C. Res. 1173, 43d Sess., 3891st mtg., U.N. Doc. S/RES/1173 (1998); and the Taliban and Osama bin Laden in Afghanistan: S.C. Res. 1267, 49th Sess., 4051st mtg., U.N. Doc. S/RES/1267 (1999); and S.C. Res. 1333, 55th Sess., 4251st mtg., U.N. Doc. S/RES/1333 (2000), respectively.

[39] Sierra Leone: S.C. Res. 1132, 52d Sess., 3822d mtg., U.N. Doc. S/RES/1132 (1997); and Haiti: S.C. Res. 841, 48th Sess., 3238th mtg., U.N. Doc. S/RES/841 (1993).

[40] Angola: S.C. Res. 1173, 43d Sess., 3891st mtg., U.N. Doc. S/RES/1173 (1998).

employed by or acting on their behalf,[42] and the imposition of travel restrictions on members of the military junta in Haiti and adult members of their families.[43]

Individuals may be the subject of sanctions regimes in one of two ways. First, there are individuals who are listed on the basis of their position and affiliation to a State or a faction within a State.[44] Second, individuals may be targeted because they oppose the State as rebels in an internal conflict, as designated terrorists or are otherwise associated with such designated persons.[45]

By subjecting individuals to sanctions, the Security Council has pierced the veil of the State and largely removed these individuals from the protection of their domestic legal system.[46] Criticisms of the impact of the sanctions on the rights of individuals has led the Security Council to reform its listing regime in order better to guarantee individuals rights in the implementation of sanctions.

‘Sanctions architecture’ within the UN

When establishing a sanctions regime, the Security Council creates sanctions committees to monitor and oversee the implementation of the measures. In the case of a comprehensive sanctions regime, the sanctions committee is responsible for determining whether specific goods fall within the humanitarian exceptions that are provided by these regimes, and thus whether they can be lawfully exported to the target state.[47] In order to ensure that fair and clear procedures exist for listing and delisting individuals and entities on sanctions lists as well as for granting humanitarian exemptions, the Security Council adopted resolution 1730 (2006) by which it requested the Secretary-General to establish a Focal Point to receive de-listing requests. Petitioners, other than those whose names are inscribed on the list created pursuant to resolutions 1267 (1999), 1333 (2000) and 1989 (2011) (the Al-Qaida Sanctions List), can submit de-listing requests either through the focal point process or through their State of residence or citizenship.[48]

In Resolution 2083 (2012) the Council authorized the Focal Point to receive travel ban and assets freeze exemption requests in relation to those individuals or entities on the Al-Qaida Sanctions List. Resolution 2161 (2014)

[41] S.C. Res. 1127, 42d Sess., 3814th mtg., U.N. Doc. S/RES/1127 (1997).
[42] S.C. Res. 917, 39th Sess., 3376th mtg., U.N. Doc. S/RES/917 (1994).
[43] S.C. Res. 1132, 52d Sess., 3822d mtg., U.N. Doc. S/RES/1132 (1997).
[44] See, eg, S.C. Res 1171 (1998) (listing members of the military junta in Sierra Leone).
[45] See, eg, S.C. Res 2083 (2012) (listing of individuals, groups, undertakings and other entities associated with Al-Qaida).
[46] Alain Pellet and Alina Miron, ‘Sanctions’ (2013) MPEPIL para 38.
[47] In the case, for example, of the humanitarian exceptions provided in relation to the Iraqi sanctions, see the work of the sanctions committee *available at* http://www.un.org/Docs/sc/committees/IraqKuwait/IraqSanctionsCommEng.htm.
[48] Pursuant to footnote 1 of the annex to S.C. Res. 1730 (2006) a State can decide that, as a rule, its citizens or residents should address their de-listing requests directly to the Focal Point.

authorized the Focal Point to receive communications from individuals removed from the Al-Qaida Sanctions List and those claiming to have been subjected to the sanctions measures mistakenly.

Another significant step has been the establishment in Resolution 1904 (2009) of the Office of the Ombudsperson.

Larissa van den Herik, 'Peripheral Hegemony in the Quest to Ensure Security Council Accountability for its Individualized UN Sanctions Regimes' (2014) *Journal of Conflict and Security Law* (footnotes omitted)

> Initially, the institute of the Ombudsperson was primarily geared towards offering individuals a certain access and possibility to be heard. The main powers of the Ombudsperson were confined to information gathering and engaging in a dialogue. On the basis of these functions, when approached with a delisting request, the Ombudsperson would 'draft a Comprehensive Report that will exclusively: (a) summarize … all information available to the Ombudsperson … (b) describe the Ombudsperson's activities … (c) based on an analysis of all information available to the Ombudsperson and the Ombudsperson's observations, lay out for the Committee the principal arguments concerning the delisting requests'. Subsequently, it remained up to the Sanctions Committee to approve or reject the delisting request through its normal decision-making procedures. The powers of the Ombudsperson were significantly expanded in Resolution 1989 when it was vested with the power to make recommendations for delisting which in principal take effect unless overturned unanimously by the Sanctions Committee or, if referred, by a majority in the Security Council. The Ombudsperson has thus contributed to greater accountability for the 1267/1989 Al Qaeda sanctions regimes by increasing the transparency of the listing process through providing better insight into the underlying reasons and, to a more limited extent, evidence for the listings. The Security Council's acceptance of independent external scrutiny over its own decisions and those of the sanctions committees was unprecedented and should therefore not be taken lightly, even if the modalities of review were still modest. In Resolution 2083, the Security Council reaffirmed its support to the Ombudsperson and it called on states to encourage individuals and entities to approach the Ombudsperson with their delisting petitions rather than regional and national courts.
>
> The procedural reforms made in the context of the 1267/1989 Al Qaeda regime have had a certain spillover effect to other sanctions regimes, but this has generally been confined to improvements of the listing procedure and only to a much more limited extent for amendments regarding delisting. Overall, a certain trend towards greater juridification of sanctions regimes in their design can be discerned. Even if some sanctions regimes, such as the non-proliferation regimes, remain deeply political, other regimes, particularly the human rights and civil conflict regimes, are partly designed around listing criteria which are connected to international legal norms. Moreover, all sanctions committees currently operate on the basis of guidelines which prescribe some modest transparency standards in the form of notification requirements

and requests to prepare narrative descriptions with reasons for the proposed listing. In contrast, the delisting innovations in the form of the Ombudsperson have been confined to the 1267/1989 Al Qaeda regime and were not extended to other regimes. In fact, when this regime was parted in two separate regimes, the Al Qaeda regime and the Taliban regime, individuals listed under the Taliban sanctions regime were henceforth excluded from the Ombudsperson's mandate.

Apart from the limited scope of her mandate, the institute of the Ombudsperson has also been criticized as being insufficient in other respects. Crucial deficiencies of the Ombudsperson from a legal perspective remained that the institute was not a judicial entity, that the mandate was too short (initially 18 months, currently 30 months), and mostly the possibility of overturn of recommendations by the sanctions committee or the Security Council.[64] For these reasons, the Special Rapporteur for Counter Terrorism deemed the reforms unsatisfactory and criticized the absence of an effective remedy at UN level. The Rapporteur emphasized that national and regional courts had engaged with the matter as a direct consequence of this lacuna. These decentralized courts generally reviewed the Security Council implementation measures. In so doing, they ostensibly respected the Security Council prerogative and refrained from undertaking direct review of the sanctions regime or the listings at UN level. However, given the lack of any real discretion on the part of states in implementing the sanctions, a court decision which annuls the implementing measures creates a direct Article 103 conundrum for the implementing state since the primary Security Council obligation to list and implement remains in existence. Furthermore, the potential of these decentralized courts to engage in any real substantive review is curtailed by the inaccessibility of the information and evidence that underlies the decision to list at UN level.

Judicial review as a form of Security Council accountability?

The impact of targeted sanctions on the fundamental rights of individuals and the limited options for challenging the listing regime has led to litigation in European and national courts seeking to annual the domestic acts implementing Security Council sanctions. The most famous case on the human rights implications of sanctions imposed on individuals has been the *Kadi* case decided by the European Court of Justice. (ECJ)[49] Mr Kadi had spent more than a decade on the sanctions list established by SC Resolution 1267, thereby being subjected to an asset freeze and travel ban, before being delisted by the UN 1267 Sanctions Committee on 5 October 2012. His case, which went through various phases (*Kadi I* and *Kadi II*), was the first case in which the ECJ reviewed an EC regulation that implemented

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[49] CFI EU, Yusuf and Al Barakaat International Foundation v Council and Commission Case T-306/01 Judgment, 21 September 2005; CFI EU, Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities Case T-315/01 Judgment, 21 September 2005; CJ EU, Yassin Abdullah Kadi, Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities Joined Cases C-402/05 P and C-415/05 P Grand Chamber, Judgment, 3 September 2008; CJ EU, Yassin Abdullah Kadi v Commission Case T-85/09 General Court Judgment, 30 September 2010; CJ EU, European Commission and Others v Yassin Abdullah Kadi, Joined cases C-584/10 P, C-593/10 P and C-595/10 P Grand Chamber Judgment 18 July 2013. See also the opinions of the Advocate General (who presents a public and impartial opinion to the case before the Court), Opinion of Advocate General Poiares Maduro, Case C-415/05 (above), 23 January 2008; Opinion of Mr Advocate General Bot, Joined cases C-584/

UN sanctions against a designated individual. It is also the first case in which the ECJ annulled such a regulation. The litigation triggered a re-examination of the individualized sanctions regimes and the relationship between international and European law.

Erika de Wet, 'From *Kadi* To *Nada*: Judicial Techniques Favoring Human Rights Over United Nations Security Council Sanctions' (2013) 12 *Chinese Journal of International Law* (footnotes omitted)

> The Kadi dispute . . . initially unfolded in 2005 before the then still Court of First Instance (currently known as the General Court) of the EU. This court considered Mr. Kadi's listing to be immune from judicial scrutiny, as it originated from a binding UNSC sanctions regime that left no discretion for implementation.17 From there Mr. Kadi launched a successful appeal (. . . Kadi CJEU I) to the Court of Justice of the European Union (CJEU). The CJEU formally separated the implementing measures at EU level from the measures taken by the UNSC and the Al Qaida sanctions committee. It applied a dualist approach in as far as it engaged in review of the implementing measures, without formally challenging the primacy of the UNSC measures at the international level. This formal separation was motivated by the fact that within the EU legal order fundamental rights (such as the right to judicial protection), formed an integral part of the general and constitutional order which could not be sacrificed. The CJEU then ordered the implementing measures to be annulled, due to the fact that the EU authorities did not communicate any reasons to Mr. Kadi regarding his listing, nor had they afforded him any opportunity to be heard.
>
> Subsequently the EU provided Mr. Kadi with a summary of reasons that has been made available by the Al Qaida sanctions committee and allowed him a hearing, but only to dismiss his response and reinstate the sanctions on the EU level. Mr. Kadi once again turned to the General Court which - following the line of reasoning of the CJEU - determined that the reasons forwarded to Mr. Kadi were too vague to allow for meaningful review. The measures implementing the UNSC sanctions at EU level were therefore once again struck down.
>
> This decision gave rise to another appeal to the CJEU, this time by the European Commission and Council of the EU and which was decided on 18 July 2013. Supported by several EU member states, the appellants urged the CJEU to reconsider its position that judicial immunity should not be granted to EU listings that give effect to the Al Qaida sanctions regime. According to this line of argument, the EU was under a strict obligation to give effect to these obligations and had been left with no discretion regarding the manner of implementation, as a result of which these measures should be immune from judicial review. Realizing perhaps that the CJEU was highly unlikely to reverse its position on the lack of immunity of the implementing measures (which it indeed reaffirmed rather summarily), the appellants further attempted to

10 P, C-593/10 P and C-595/10 P (above), 19 March 2013.

lower the level of scrutiny applied during judicial review. This was inspired by the fact that the EU institutions lacked any margin of discretion in relation to the manner of implementing the measures stemming from the Al Qaida sanctions regime. However, this argument failed to impress the court which retained its high level of scrutiny in reviewing and striking down the reasons submitted by the EU organs in relation to Mr. Kadi's listing.

European Commission and Others v Yassin Abdullah Kadi, Joined cases C-584/10 P, C-593/10 P and C-595/10 P Grand Chamber Judgment 18 July 2013, para 134

The essence of effective judicial protection must be that it should enable the person concerned to obtain a declaration from a court, by means of a judgment ordering annulment whereby the contested measure is retroactively erased from the legal order and is deemed never to have existed, that the listing of his name, or the continued listing of his name, on the list concerned was vitiated by illegality, the recognition of which may re-establish the reputation of that person or constitute for him a form of reparation for the non-material harm he has suffered.

* * *

Questions for Discussion

1. Does the fact that resolutions under Article 41 may be binding suffice to make UN economic sanctions legally effective? Is domestic legal action required by your country to make such a resolution internally operative? Why is this important?

2. What are the advantages and disadvantages of the Security Council's recent preference for targeted sanctions?

3. To what extent has the *Kadi* case exposed the shortcomings of the UN 'sanctions architecture'? To what extent should the Security Council strive to balance the achievement of the guaranteeing of human rights of individuals with the use of sanctions as an effective tool in the maintenance of international peace and security?

4. The Security Council's sanctions regime has led to claims that the Council suffers from a significant accountability deficit. It functions largely behind closed doors and with little transparency to the UN's general membership or to the broader public. While the Council has become increasingly active in the administration and regulation of matters that once used to be the exclusive domain of States, this shift in governance functions has not been accompanied by the creation of a mechanism meaningfully to review the exercise of the Council's powers. How can the accountability of the Security Council be improved?

* * *

Article 42 of the Charter: Military Enforcement Action

The collective use of force as a military sanction does not operate in the way originally intended by the UN Charter.

The Original Charter Framework

ROSALYN HIGGINS, PROBLEMS AND PROCESS:
INTERNATIONAL LAW AND HOW WE USE IT
263-66 (1994)

It is envisaged under Chapter VII of the UN Charter that the Security Council, once it has determined the existence of a threat to the peace, breach of the peace, or act of aggression, will recommend or decide upon enforcement measures to maintain or restore international peace and security. As we have seen, Article 41 provides for economic and diplomatic sanctions; and Article 42 allows for military action by air, sea, or land forces. Article 43 then provides that all UN members undertake to make available to the Security Council, 'on its call and in accordance with a special agreement or agreements', armed forces, assistance, and facilities. These agreements were to govern the numbers and types of forces, their location and readiness, and were to be concluded 'as soon as possible' between the Security Council and individual members of the United Nations, or groups of members. Some forty-five years later these agreements have not been concluded. The deep divisions between East and West that emerged immediately after the war made it impossible to proceed. There was no agreement upon the circumstances in which military enforcement measures would be used.

In the face of the failure of the Security Council to be able to proceed as envisaged under Article 42, the question immediately arose as to the authority of the Security Council to act under Article 42. Is the ability of the United Nations to act under Article 42 dependent upon agreements for the provision of UN forces being reached under Article 43? The Soviet Union insisted that Articles 42 and 43 have to be read together, and that, in the absence of the latter, the former was inoperative. No military action by the Security Council could be envisaged. . . .

. . . For the Soviet Union, it [military action without Article 43 agreements] was not legally possible. For the West, it was a practical reality that military enforcement was not available in the absence of agreements under Article 43. The Secretary-General, after the establishment by the General Assembly of the UNEF [the UN peace-keeping force in the Middle East] in 1956, emphasized that it went to Egypt with the consent of that country, and could not operate without that consent. He continued:

> This does not exclude the possibility that the Security Council could use such a force within the wider margins provided under Chapter VII of the United Nations Charter. I would not for the present consider it

> necessary to elaborate on this point further, since no use of the Force under Chapter VII . . . has been envisaged.

He thus left open the point as to whether enforcement action under Article 42 could, as a matter of Charter law, occur in the absence of agreements under Article 43. . . .

. . . .

Although the position about Article 42 action in the absence of Article 43 agreements has been left open, it has popularly been supposed that such action was not possible. It has been a short step from the practical difficulty of attempting Article 42 actions to a general assumption that such actions were legally impossible. I have never regarded that view as correct. Peace-keeping action was deemed sufficient and appropriate for the world we lived in. While this political reality was undeniable, I never understood why the legal possibilities under Article 42 were deemed unavailable. It has consistently been my view that the consequence of the failure to conclude agreements under Article 43 was that UN members could not be compelled to provide forces and assistance under Article 42. But I could see no reason of legal analysis which proscribed any member or members from volunteering forces and the Security Council being able to use them under Article 42. It would remain a matter of political judgment for the Security Council, on any given occasion, to decide if it was preferable to provide for peace-keeping (now read into Article 40) or for military enforcement (under Article 42).

What was for many years a matter of academic interest has now come back into focus in the context of the Iraqi invasion of Kuwait. Are there legal constraints upon the Security Council ordering enforcement action under Article 42? Those states who preferred to avoid UN military sanctions offered reasons other than a legal inability to rely on Article 42. This has been true both of those who wished to avoid military action altogether, and those who preferred to use collective self-defence. On 25 September 1990 Soviet Foreign Minister Shedverdnaze spoke in the Security Council on the importance of reviewing the possibilities under Article 43, of seeing whether, in the face of the improved relations between East and West, agreements could not now be reached. But it was not suggested that the absence to date of such agreements ruled out the possibility of action under Article 42. Indeed, such action was specifically envisaged in the strong speech of the Soviet Foreign Minister. The community of interest between the West and the Soviet Union conspired to put aside the common assumption of the previous forty-five years—that military sanctions could not be authorized in the absence of the agreements envisaged under Article 43. The prudence of the Secretary-General and the International Court of Justice in leaving this issue open, while focusing on peace-keeping, was apparent; and in my view the right legal answer has at last been arrived at (albeit without any apparent serious public consideration). In the absence of Article 43 agreements, no UN member can be compelled to provide military forces or assistance; but action under Article 42, by those who are willing to participate, can properly be authorized by the United Nations and carried out under UN command. It would also seem perfectly possible for such action to be authorized by the Security Council as an enforcement action under Article 42, even if it was to be carried out by UN members not under a unified UN command. And this was effectively the position achieved by Security Council Resolution 678 (1990) on the Gulf.

The Delegation By the Council of its Chapter VII Powers to UN Member States

The Security Council has in a number of different cases "authorized" member states to use military force as part of a collective security response to achieve the Council's objectives. What the Security Council is doing in substantive terms in these cases is "delegating" certain of its Chapter VII powers (including its Article 42 power) to states rather than merely "authorizing" states to use force.

DAN SAROOSHI, THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY

13-15 (1999)

An authorization . . . represent[s] the conferring on an entity of a very limited right to exercise a power, or part thereof; or the conferring on an entity of the right to exercise a power it already possesses, but the exercise of which is conditional on an authorization that triggers the competence of the entity to use the power. While the case of a delegation will usually represent an unencumbered right to exercise the same power as the delegator: in many cases a power of broad discretion. It is this single characteristic of a delegation of power—the transfer of a power of discretionary decision-making—that allows it to be distinguished in general terms from an authorization.

. . . In the case of an authorization by the Council of States to use force, the Council is not, in legal terms, simply making an authorization, but upon closer examination is in fact delegating to Member States its Chapter VII powers. The Council may be using the term 'authorization', but what it is doing in substance is delegating its Chapter VII powers to Member States. In the case where the Council 'authorises' States or a regional arrangement to use force to achieve, for example, certain humanitarian objectives and in so doing transfers certain of its own discretionary powers under Chapter VII in order to do so, then this is, applying our earlier discussion, a delegation of power from the Council since it involves a transfer of the Council's own powers of discretionary decision-making, and as such is subject to the legal framework governing a delegation of Chapter VII powers.

Even the case of what may at first seem to be an authorization by the Security Council of UN Member States to exercise their inherent right of individual or collective self-defence as provided for by Article 51 of the Charter will usually involve a delegation of power. Once there is an authorization by the Security Council of military action, it is unlikely that the Council is simply authorising individual or collective self-defence measures. Those cases where such a use of force would be justified by reference to authorized self-defence would not be many since in most cases where the Council becomes involved the stated objectives of the military action are much broader than those which would be justified under the right of self-defence of States, whether under Article 51 of the Charter or under customary international law. In this case, States may act in a way—in terms of *jus ad bellum*—which is not otherwise allowed under the law of self-defence. For example, in the case of the Security Council's authorization of Member States to use force in response to Iraq's invasion of Kuwait, the Council in resolution 678 authorized States not only to repel Iraq's armed attack but also to 'restore international peace and security in the area'. Accordingly, States were empowered to take action which went beyond what is allowed by the concept of self-defence in international law. In this way, what initially may have been the exercise by States of their right to individual or collective self-defence changed with the involvement of the Council. With the passage of resolution 678 the Council had moved past a simple authorization of collective self-defence into a delegation of its own discretionary powers to UN Member States. This provides an example then of the more general point that it is rare for there to be collective self-defence authorized by the Security Council unless it is patent from the face of the resolution that this is all the Council is authorizing and that there is no mention of States taking action to maintain or restore international peace and security. The involvement of the Council will, in most cases, necessarily confer a collective security nature on an operation. There is, accordingly, a presumption that where the Council authorises the use of force by States then this represents a delegation by the Council of its Chapter VII powers and not just a reaffirmation of States' right to use force in self-defence.

The Council does not, however, possess an unconstrained competence to delegate its Chapter VII powers to UN member states. There are important limitations that exist.

DAN SAROOSHI, THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY

153-58 (1999)

There are inherent dangers in the practice of the Council delegating Chapter VII powers to Member States. The main danger is that those Member States will exercise the delegated powers to achieve their own self-interest and not that of the UN. . . . This is contrary to the very reason for centering in the UN the responsibility for maintaining and restoring international peace and security: to regulate the use of force by States to attain their national ends.

This issue of self-interest is not, however, always antithetical to the collective security purpose for which a Chapter VII power is delegated to Member States. . . . The problem, as outlined above, arises however when the interests of a State are in conflict with those of the UN, as defined by the Security Council. However, the existence of limitations on the competence of the Council to delegate Chapter VII powers to Member States provides a safeguard against such a potentially negative consequence of a delegation of Chapter VII powers. There are two types of limitations on the competence of the Council to delegate Chapter VII powers to UN Member States.

The first involves a limitation on the competence of the Council to be able to delegate certain of its Chapter VII powers to Member States. These substantive limitations have already been explained in Chapter 1 and prohibit the delegation by the Council of certain of its Chapter VII powers. [The primary one being the Council's Article 39 power of determination—that a threat to, or breach of, the peace exists or has ceased to exist.]

The second—what are termed conditions for a lawful delegation—only regulate the way in which the Council should delegate its powers and do not as such prohibit the delegation of a particular power.

. . . [The most important of these is that] there must be a certain minimum degree of clarity in the resolution which delegates the power. Put differently, the objective for which the power is being delegated must be clearly specified. . . .

. . . The setting by the Council of detailed objectives of the military operation and the capacity to change these objectives at any time enables the Council to exercise in an effective fashion its overall authority and control over an operation. This position has been reflected in numerous statements by Members of the Security Council and the Secretary-General. . . .

. . . .

This requirement of the Council to specify in some detail the political objectives of the operation cannot be circumvented by the provision of a vague and ambiguous objective. This consideration attains even more importance when attention is paid to the fact that the delegation by the Council of its Chapter VII powers to Member States is a 'conditional delegation'. We recall from Chapter 1 the legal position that the Council cannot delegate to another entity the competence to decide when a threat to, or breach of, international peace and security has come into existence or has ceased to exist. It thus follows that it is not for the delegate to decide when the objective which the Council has stated has been fulfilled and therefore when the delegation of powers ceases to exist. This power of decision is within the sole domain of the Council and cannot be delegated. That is, the delegation of powers continues to exist until such time as the objective which the Council has specified in the resolution which delegates powers has been fulfilled. Upon the fulfilment of this objective the delegation of powers will automatically cease. Thus the Council by specifying the objective for which the power is being delegated is in fact stipulating when the delegation of power terminates. . . . This automatic termination of a delegation of powers is a necessary control on the exercise of delegated Chapter VII powers since it provides a convenient way of terminating a delegation without the requirement of another decision by the Council, which is of course subject to the veto. This guards against the use of a veto in the Council by a Permanent Member to prevent the termination of a delegation of powers and as such is a further guarantee against a Permanent Member exercising delegated powers to achieve its own interests.

* * *

Comments

1. The UN Charter does not expressly give the Security Council the competence to delegate its Chapter VII powers to UN member states such that they can carry out and command military enforcement action on behalf of the

Council. As a matter of implied powers, however, the Council does possess this competence and can delegate its Chapter VII powers to UN member states either by means of a decision or recommendation.[50] In either case there is no compulsion on states to act upon these powers potentially delegated to them, since, as set out above, the nonconclusion of Article 43 agreements means that the Council cannot obligate states to participate in military enforcement action.

2. It has been easier in the post-Cold War era for members of the Security Council to reach agreement on the existence of threats to the peace than it has been for them to agree on how to act in responding to these threats. Nonetheless, in most cases agreement has subsequently been reached to allow those states who wish to take action to deal with a threat to the peace to be able to do so. This has not meant, however, that there is no subsequent disagreement between states over the type of action that should be taken. A good example of this is the case of Iraq where, in response to its invasion of Kuwait in August 1990, there was widespread agreement among states that military action if necessary had to be taken to counter this invasion. However, after Iraqi troops were driven out of Kuwait there arose the more problematic issue of how best to deal with the continuing threat posed by Saddam Hussein to peace and security. There has been division and disagreement among states on the next course of action.

DAN SAROOSHI, THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY

174, 177-80, 182-83, 185-86 (1999)

2. The case of Iraq

. . . .

Resolution 678 was adopted by the Council acting under Chapter VII of the Charter due to the desire to take stronger measures to ensure the immediate withdrawal of Iraqi forces from Kuwait. The relevant sections of resolution 678 read as follows:

Acting under Chapter VII of the Charter [the Security Council],

1. *Demands* that Iraq comply fully with resolution 660 (1990) and all subsequent relevant resolutions, and decides, while maintaining all its decisions, to allow Iraq one final opportunity, as a pause of goodwill, to do so;
2. *Authorizes* Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the foregoing resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area;

. . . .

4. *Requests* the States concerned to keep the Security Council regularly informed on the progress of action undertaken pursuant to paragraphs 2 and 3 of the present resolution;

. . . .

[50] *See* DANESH SAROOSHI, THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY 143-53 (1999).

(b) The powers delegated to Member States by resolution 678

The passage of resolution 678 saw the delegation to Member States of the power to use force to achieve the Council's stated objective, and the power of command and control over the forces carrying out the military enforcement action.

(i) The delegation to Member States of the power to use force

Article 2(4) of the Charter proscribes the threat or actual use of force by States against the territorial integrity or political independence of any State. However, a delegation by the Council of its military enforcement powers has an empowering effect that operates to allow States to use force to achieve the Council's stated objectives. This represents a delegation by the Council to Member States of its powers under Article 42 to 'take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.'

The issue of greatest concern with respect to this delegation of Chapter VII power is that the Council is purporting to delegate to Member States a very broad power of discretion to use force without specifying clearly the objectives for which it is delegating its powers. We recall that resolution 678 states '[The Council authorizes] Member states co-operating with the Government of Kuwait . . . to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area'. The objectives specified by the Council thus include the implementation of resolution 660 (the immediate and unconditional withdrawal by Iraq of 'all its forces to the positions in which they were located on 1 August 1990') and all subsequent resolutions; and the restoration of international peace and security in the area. The first objective is relatively clear and seems to have operated as a substantive limitation on action by Member States in their exercise of delegated powers. The decision to end hostilities was made when Iraq had been driven out of Kuwait and had agreed to accept all relevant UN resolutions.

The second objective, however, is of considerable more concern. It seems clear that the Council is purporting to delegate to Member States the competence to decide when international peace and security in the region has been restored. However, as pointed out above in Chapter 1, the Council does not possess the competence to delegate to Member States the power to decide that a threat to, or breach of, international peace and security has either started or has ceased to exist. The decision whether a particular matter constitutes a threat to the peace and the decision when to terminate military enforcement action must always rest with the Security Council. . . . The purported delegation by the Council of this broad power to Member States is unlawful. It is on the basis of this unrestricted character of the power delegated by resolution 678 that commentators have correctly questioned the lawfulness of the resolution. This does not, however, render the whole of resolution 678 unlawful, but only the delegation of powers to Member States for the objective of restoring international peace and security in the region.

In practice, however, the Security Council did play an important role in the termination of the delegation of powers. The success of the coalition force in expelling Iraq from Kuwait saw the US command declare a temporary cease-fire after the full retreat of Iraqi forces from Kuwait and the restoration to power of the legitimate Government of Kuwait. The Council subsequently passed resolution 686 which, *inter alia*, affirmed that all twelve prior resolutions continued to have full force and effect, and demanded that Iraq cease hostilities and designate military commanders to meet with counterparts from the coalition forces 'to arrange for the military aspects of a cessation of hostilities at the earliest possible time.' The Council continued by expressly stating in operative paragraph 4 that it '[r]ecognizes that during the period required for Iraq to comply with paragraphs 2 and 3 above, the provisions of paragraph 2 of resolution 678 (1990) remain valid'. This provision is clearly intended as an affirmation by the Council that the delegation of military enforcement powers to Member States continues to have force. It places the legality of any subsequent use of force to achieve the objectives of the Council in its previous resolutions, including resolution 678, and the conditions stated in resolution 686 beyond any doubt. However, the terms of resolution 686 were superseded by the terms of the formal cease-fire of the Council in resolution 687. The terms for a permanent cease-fire were stated by the Council in resolution 687 and these were accepted by Iraq. . . .

. . . [T]he delegation of Chapter VII powers to Member States was terminated by conclusion of the formal cease-fire between Iraq and the UN, the terms of which were specified in resolution 687. Nowhere in its terms, unlike resolution 686, does resolution 687 expressly preserve the right of Member States to use force under resolution 678. In fact, the conclusion of the cease-fire, of which resolution 687 was an essential part, terminated the delegation of powers in resolution 678 to Member States of the competence to use force. . . . Accordingly, in the absence of a Council resolution which expressly delegates powers of military enforcement to Member States, action to enforce the terms of resolution 687, although possibly desirable, would be legally doubtful. This problem is a symptom of the deeper issue of the lack of clear specification by the Council of the goals for which it was delegating its Chapter VII powers to Member States.

. . . .

(ii) The command and control of forces in the Gulf War

It seems clear that in resolution 678 the Council delegated to Member States operational command and control over their own forces carrying out military enforcement action. The resolution does not require or envisage any form of operational command or control being exercised by the Security Council over the forces from Member States. This represents a delegation of the Council's power of command and control under Article 46 of the Charter to Member States. . . . Moreover, the Council did not specify in resolution 678 any form of command structure. Accordingly, the coalition forces were free to identify their own military commander and command structure. The Member States participating in the action decided to form a coalition with the United States in overall command. . . . This does not mean, however, that the exercise of the delegated powers is left solely to the discretion of Member States. . . . The Security Council will always retain overall authority and control over the exercise of Chapter VII powers it has delegated to UN Member States. Accordingly, the Council could at any time decide to terminate the delegation of powers or even decide that the powers should be exercised in another way. This has particular relevance, for example, in the context of a proportionate use of force being used to attain the Council's stated objectives. The Council could at any time have, for example, required States to change the level of force being used by Member States in the Gulf in the exercise of their delegated powers.

ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT

259 (1994)

The military action in Iraq was undertaken under Security Council authorization, but by coalition forces acting under unified command. At the end of hostilities, Security Council Resolution 686 specified a list of requirements that had to be met for a cease-fire to come into effect. The right of the coalition forces 'to use all necessary means' remained in effect for the moment. Security Council Resolution 687 addressed matters subsequent to the cease-fire. But it was still expressly stated to be under Chapter VII of the Charter, and referred to such matters as the verified dismantling of Iraq's nuclear and offensive military capability, the provision of reparations, and (again) the repatriation of Kuwaiti and third-party nationals.

May force be used to require compliance with the terms of Resolution 687? And, if so, upon Security Council authorization only, or directly by the coalition forces? In January 1993 the Secretary-General reported violations of the Kuwait frontier by Iraq, and interferences by Iraq with UN flights being undertaken in connection with the weapons-inspection programme. Although the Security Council passed no resolution, it issued a statement read by its President demanding that the flights not be interfered with and warning of 'serious consequences which would ensue from failure to comply with its obligations'. The authorization in Resolution 678 to use 'all necessary means' was, in the context of the statements made in the Security Council, an authorization to use force. But the 'serious consequences' warning of the President of the Council in January 1993 cannot, in my view, be read as an authorization to coalition members to use force without further reference if interference with UN flights did not abate.

In the event, a series of military actions followed by some of the coalition parties—the United States, France, and the United Kingdom—in January 1993. Only one such action, directed against a target fifteen miles from Baghdad, was said by the United States to be linked to non-compliance by Iraq of its obligations under the Security Council resolutions. Other actions, taken in the no-fly zones set up to protect the Kurds and Shias, were explained in the language of self-defence. France and the United Kingdom, perhaps feeling on safer legal ground, emphasized their entitlement to patrol these zones for UN authorized purposes; and the danger to these missions when Iraq continued to fly within the zones, or to lock radar on to coalition aircraft, or to endeavour to shoot them down. Such responses are to be tested by the traditional criteria of self-defence. There is no entitlement in the hands of individual members of the United Nations to enforce prior Security Council resolutions by the use of force.

Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*,

93 AM. J. INT'L L. 124, 124-27, 144-45, 154 (1999)

INTRODUCTION

In January and February 1998, various United States officials, including the President, asserted that unless Iraq permitted unconditional access to international weapons inspections, it would face a military attack. The attack was not to be, in Secretary of State Madeleine Albright's words, "a pinprick," but a "significant" military campaign. U.S. officials, citing United Nations Security Council resolutions, insisted that the United States had the authority for the contemplated attack. Representatives of other permanent members of the Security Council believed otherwise; that no resolution of the Council authorized U.S. armed action without its approval. In late February, UN Secretary-General Kofi Annan traveled to Baghdad and returned with a memorandum of understanding regarding inspections signed by himself and the Iraqi Deputy Prime Minister. On March 2, 1998, the Security Council, in Resolution 1154, unanimously endorsed this memorandum of understanding.

In the March 2 meeting, no country asserted that Resolution 1154 authorized the unilateral use of force, and a majority stated that additional Council authorization would be necessary before force could be used. Only after that meeting did U.S. officials claim otherwise; Ambassador Bill Richardson said the UN vote was a "green light" to attack Iraq if President Clinton should decide that Iraq was not living up to the agreement. This assertion in the face of the Security Council's pointed refusal to grant such authority views the Council as a source of the authority to use force, but not as an instrument for limiting its use. With at least one notable exception, however, the United States did not claim to be entitled to use force without the Council's authorization to compel Iraqi compliance with the UN inspection obligations. Rather, U.S. and British officials argued that Resolution 678 of 1990, which empowered the United States and other states to use force against Iraq, still governed and continued to provide authority to punish Iraq for cease-fire violations. This position assumed that Resolution 678's authorization to use force remained valid, albeit temporarily suspended—a loaded weapon in the hands of any member nation to use whenever it determined Iraq to be in material breach of the cease-fire. The refusal of the United States to accept limitations on its power by the Security Council thus depended on creatively interpreting the Council's resolutions to accord authority, despite the contrary positions of a majority of its members.

The U.S. and British claim highlights an important problem regarding the Security Council's method of authorizing individual member states or regional organizations to use force on behalf of the United Nations. This "contracting out" mode leaves individual states with wide discretion to use ambiguous, open-textured resolutions to exercise control over the initiation, conduct and termination of hostilities. Such states may seek to apply resolutions by the Security Council in conflict with its aims and objectives or the view of many of its members, as occurred in the 1998 Iraqi inspection crisis. This crisis thus raises questions regarding (1) whether the Security Council has authorized the use of force; (2) how the scope and extent of an authorization are determined; and (3) whether the authorization has terminated.

We argue that two fundamental values underpinning the United Nations Charter—that peaceful means be used to resolve disputes and that force be used in the interest and under the control of the international community and not individual countries—require that the Security Council retain strict control over the initiation, duration and objectives of the use of force in international relations. To ensure that UN-authorized uses of force comport with those two intertwined values, this article argues for three rules derived from Article 2(4) of the Charter: (1) explicit and not implicit Security Council authorization is necessary before a nation may use force that does not derive from the right to self-defense under Article 51; (2) authorizations should clearly articulate and limit the objectives for which force may be employed, and ambiguous authorizations should be narrowly construed; and (3) the authorization to use force should cease with the establishment of a permanent cease-fire unless explicitly extended by the Security Council.

The questions raised by the Iraqi inspection crisis of 1998 are likely to arise in the future. The claim of the U.S. Government to an ongoing UN authorization to use force against Iraq to enforce the cease-fire agreement has resurfaced often over the past seven years and is unlikely to be withdrawn. Moreover, the tendency to bypass the requirement for explicit Security Council authorization, in favor of more ambiguous sources of international authority, will probably escalate in coming years. The recent controversy over NATO's threat to intervene militarily in Kosovo raises similar issues as to the requirement for explicit authorization.

I. THE GENERAL PRINCIPLES UNDERLYING UN AUTHORIZATIONS OF FORCE

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Problems with the authorization method surface in several related areas. First, states might use force on the basis of actions by the Security Council that could impliedly be interpreted to authorize force, but where its intent to do so was unclear. For example, in 1991 the United Kingdom, the United States and France used force to provide humanitarian aid to the Kurds and to establish safe havens and no-fly zones in northern Iraq partly on the basis of ambiguous authority in Resolution 688. That resolution made no mention of military force, nor was it intended to authorize such force. The Economic Community of West African States (ECOWAS) intervened militarily in Liberia in 1990 without any explicit authorization by the Security Council, although the Council later did issue statements and a resolution approving ECOWAS's actions.

Second, states acting under the authorization of the Council might interpret their mandate to be broader than it had intended. The potential for conflict is most pronounced where the Council has delegated wide authority to a coalition of states to address a major problem, such as the Iraqi invasion of Kuwait. For example, Resolution 678, while motivated by the goal of expelling Iraq from Kuwait, also contains broad language authorizing force "to restore international peace and security in the area." That language could mean virtually anything, depending on how one defines "peace and security" and "area." During the Persian Gulf war, a dispute arose as to whether the elimination of Iraq's war-making power, a goal asserted by some of the leaders of the coalition states, was authorized by Resolution 678. The dispute over interpretation of Resolution 678 has continued to fester. In the February 1998 crisis, the United States and the United Kingdom interpreted the broad language "to restore international peace and security" as authorizing the use of force to ensure that Iraq destroyed its biological and chemical weapons—a condition not imposed upon Iraq until after the gulf war was over. Similar questions and disputes over Security Council authorizations to use force arose during the Korean War and the Bosnian and Somalian conflicts.

Furthermore, when the authorizations are not temporally limited, questions arise about their termination. As the Iraqi inspection crisis illustrates, the states acting under Security Council authorization might want to continue to employ force after the basic goal of the mission has been achieved. Conflicts often continue to simmer after hostilities have ended. A key question is whether a permanent cease-fire or other definitive end to hostilities terminates Security Council authorizations to use force.

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To uphold the principles of the Charter, the Security Council must retain clear control over authorizations to use force (with the exception of force pursuant to Article 51), even if political and military considerations require that it delegate military command to individual nations. The difficulties of controlling the scope and extent of the use of force when its employment is delegated to individual states require, at a minimum, strict control by the Council over the initiation and termination of hostilities. Such control is achieved by the application of normative rules stipulating clear Council approval of non-Article 51 uses of force and termination of that authorization when a permanent cease-fire or other definitive end to the hostilities is reached.

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IV. Cease-Fire Agreements and Security Council Authorizations of Force

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The basic Charter principles that we have outlined—peaceful resolution of disputes and Security Council control over the use of force—require that, even where there is no termination provision in the authorization to use force, that authority expires with a permanent cease-fire unless explicitly continued. Such authorization cannot be revived by the contractees unilaterally; it is for the Security Council to consider whether a breach of that cease-fire justifies a reauthorization of force.

The Effect of the UN Charter

Pre-Charter law permitted a party to a cease-fire to treat its serious violation as a material breach, entitling it to resume fighting. The United States and the United Kingdom rely on this law to argue that Iraqi violations of the inspection regime established during the cease-fire revived the Resolution 678 authorization to use force. This view ignores the prohibition on the use of force under Article 2(4), which, properly understood, "changes a basic legal tenet of the traditional armistice." Post-Charter law holds that UN-imposed cease-fires reaffirm the basic obligation of states to refrain from using force. Therefore, a violation of the cease-fire, even a material breach, is not a ground for the other party to revive hostilities, at least short of an armed attack giving rise to an Article 51 right of self-defense. As one scholar writes, "Although terms of the armistice agreements dealing with important but collateral issues such as verification regimes or implementation mechanisms may fail, the overriding obligation not to resort to force as a means of dispute settlement is deemed severable and continues to be binding."

Strong policy interests make it advisable that Security Council authorizations to use force be terminated by the establishment of a cease-fire unless explicitly and unambiguously continued by the Council itself. The overall objectives of the Charter and the changes it has wrought in the law on the use of force mandate that disputes be settled by peaceful means, if at all possible. This suggests that the end of hostilities, however that is accomplished, reestablishes the Article 2(4) obligations on all states not to use force, including in implementing cease-fire provisions, and not to do so without a new Council authorization. For example, no one would seriously claim that member states of the UN command would have the authority to bomb North Korea pursuant to the 1950 authorization to use force if in 1999 North Korea flagrantly violated the 1953 armistice.

Moreover, that rule is especially necessary when the Security Council control consists of authorizing member states to use force, a more decentralized approach than envisioned by the Charter's framers. To permit authorizations to continue after a permanent cease-fire ends hostilities would allow individual states to use force indefinitely, a result that would undermine the Council's control—particularly when the authorized states include a permanent member that could veto any Council resolution terminating the authorization. Every authorization to use force thus far has been at the behest of a permanent member of the Security Council. This trend is likely to continue. In such situations the potential use by that permanent member of what has been termed a "reverse veto" to block the Council from terminating an authorization that no longer enjoys the support of the international community undermines the Council's legitimacy and Charter-mandated control over the use of force.

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POSTSCRIPT

On December 16, 1998, the United States and the United Kingdom launched four days of air strikes against Iraq, claiming that Iraq had failed to cooperate fully with the UN weapons inspectors [as part of their cease-fire obligations]. The United States and Great Britain acted without obtaining the Security Council's authorization to use force and, thus, as this article has argued, in violation of the Charter. The United States and Great Britain argued, as they had in February, that they had legal authority to use force to respond to Iraqi cease-fire violations. Other nations again disagreed.

> The December 1998 bombing of Iraq suggests that our hopeful prediction of a strengthened role for the Security Council in controlling the use of force must be tempered by the painful reality of superpower unilateralism. . . .

The continuing debate over what action should be taken to require Iraq to comply with its cease-fire obligation to destroy its weapons of mass destruction reached a critical point in late 2002 when unilateral military action by the United States and United Kingdom against Iraq seemed likely. After considerable debate and disagreement as to whether another UN Security Council resolution beyond Resolution 687 (1991)[51] was required for states lawfully to use force against Iraq to require it to destroy its weapons of mass destruction, the Security Council finally adopted Resolution 1441 (2002).[52]

Security Council Resolution 1441

57th Sess., 4644th mtg., U.N. Doc. S/RES/1441 (2002)

Recalling all its previous relevant resolutions, in particular its resolutions 661 (1990) of 6 August 1990, 678 (1990) of 29 November 1990, 686 (1991) of 2 March 1991, 687 (1991) of 3 April 1991, 688 (1991) of 5 April 1991, 707 (1991) of 15 August 1991, 715 (1991) of 11 October 1991, 986 (1995) of 14 April 1995, and 1284 (1999) of 17 December 1999, and all the relevant statements of its President,

. . . .

Recognizing the threat Iraq's noncompliance with Council resolutions and proliferation of weapons of mass destruction and long-range missiles poses to international peace and security,

Recalling that its resolution 678 (1990) authorized Member States to use all necessary means to uphold and implement its resolution 660 (1990) of 2 August 1990 and all relevant resolutions subsequent to Resolution 660 (1990) and to restore international peace and security in the area,

Further recalling that its resolution 687 (1991) imposed obligations on Iraq as a necessary step for achievement of its stated objective of restoring international peace and security in the area,

Deploring the fact that Iraq has not provided an accurate, full, final, and complete disclosure, as required by resolution 687 (1991), of all aspects of its programmes to develop weapons of mass destruction and ballistic missiles with a range greater than one hundred and fifty kilometres, and of all holdings of such weapons, their components and production facilities and locations, as well as all other nuclear programmes, including any which it claims are for purposes not related to nuclear-weapons-usable material,

Deploring further that Iraq repeatedly obstructed immediate, unconditional, and unrestricted access to sites designated by the United Nations Special Commission (UNSCOM) and the International Atomic Energy Agency (IAEA), failed to cooperate fully and unconditionally with UNSCOM and IAEA weapons inspectors, as required by resolution 687 (1991), and ultimately ceased all cooperation with UNSCOM and the IAEA in 1998,

[51] S.C. Res. 687, 46th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991).
[52] S.C. Res. 1441, 57th Sess., 4644th mtg., U.N. Doc. S/RES/1441 (2002).

Deploring the absence, since December 1998, in Iraq of international monitoring, inspection, and verification, as required by relevant resolutions, of weapons of mass destruction and ballistic missiles, in spite of the Council's repeated demands that Iraq provide immediate, unconditional, and unrestricted access to the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC), established in resolution 1284 (1999) as the successor organization to UNSCOM, and the IAEA, and regretting the consequent prolonging of the crisis in the region and the suffering of the Iraqi people,

Deploring also that the Government of Iraq has failed to comply with its commitments pursuant to resolution 687 (1991) with regard to terrorism, pursuant to resolution 688 (1991) to end repression of its civilian population and to provide access by international humanitarian organizations to all those in need of assistance in Iraq, and pursuant to resolutions 686 (1991), 687 (1991), and 1284 (1999) to return or cooperate in accounting for Kuwaiti and third country nationals wrongfully detained by Iraq, or to return Kuwaiti property wrongfully seized by Iraq,

Recalling that in its resolution 687 (1991) the Council declared that a ceasefire would be based on acceptance by Iraq of the provisions of that resolution, including the obligations on Iraq contained therein,

Determined to ensure full and immediate compliance by Iraq without conditions or restrictions with its obligations under resolution 687 (1991) and other relevant resolutions and recalling that the resolutions of the Council constitute the governing standard of Iraqi compliance,

Recalling that the effective operation of UNMOVIC, as the successor organization to the Special Commission, and the IAEA is essential for the implementation of resolution 687 (1991) and other relevant resolutions,

Noting the letter dated 16 September 2002 from the Minister for Foreign Affairs of Iraq addressed to the Secretary General is a necessary first step toward rectifying Iraq's continued failure to comply with relevant Council resolutions,

Noting further the letter dated 8 October 2002 from the Executive Chairman of UNMOVIC and the Director General of the IAEA to General Al-Saadi of the Government of Iraq laying out the practical arrangements, as a follow-up to their meeting in Vienna, that are prerequisites for the resumption of inspections in Iraq by UNMOVIC and the IAEA, and expressing the gravest concern at the continued failure by the Government of Iraq to provide confirmation of the arrangements as laid out in that letter,

Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of Iraq, Kuwait, and the neighbouring States,

Commending the Secretary General and members of the League of Arab States and its Secretary General for their efforts in this regard,

Determined to secure full compliance with its decisions,

Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* that Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687 (1991), in particular through Iraq's failure to cooperate with United Nations

inspectors and the IAEA, and to complete the actions required under paragraphs 8 to 13 of resolution 687 (1991);

2. *Decides*, while acknowledging paragraph 1 above, to afford Iraq, by this resolution, a final opportunity to comply with its disarmament obligations under relevant resolutions of the Council; and accordingly decides to set up an enhanced inspection regime with the aim of bringing to full and verified completion the disarmament process established by resolution 687 (1991) and subsequent resolutions of the Council;
3. *Decides* that, in order to begin to comply with its disarmament obligations, in addition to submitting the required biannual declarations, the Government of Iraq shall provide to UNMOVIC, the IAEA, and the Council, not later than 30 days from the date of this resolution, a currently accurate, full, and complete declaration of all aspects of its programmes to develop chemical, biological, and nuclear weapons, ballistic missiles, and other delivery systems such as unmanned aerial vehicles and dispersal systems designed for use on aircraft, including any holdings and precise locations of such weapons, components, sub-components, stocks of agents, and related material and equipment, the locations and work of its research, development and production facilities, as well as all other chemical, biological, and nuclear programmes, including any which it claims are for purposes not related to weapon production or material;
4. *Decides* that false statements or omissions in the declarations submitted by Iraq pursuant to this resolution and failure by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution shall constitute a further material breach of Iraq's obligations and will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below;
5. *Decides* that Iraq shall provide UNMOVIC and the IAEA immediate, unimpeded, unconditional, and unrestricted access to any and all, including underground, areas, facilities, buildings, equipment, records, and means of transport which they wish to inspect, as well as immediate, unimpeded, unrestricted, and private access to all officials and other persons whom UNMOVIC or the IAEA wish to interview in the mode or location of UNMOVIC's or the IAEA's choice pursuant to any aspect of their mandates; further decides that UNMOVIC and the IAEA may at their discretion conduct interviews inside or outside of Iraq, may facilitate the travel of those interviewed and family members outside of Iraq, and that, at the sole discretion of UNMOVIC and the IAEA, such interviews may occur without the presence of observers from the Iraqi government; and instructs UNMOVIC and requests the IAEA to resume inspections no later than 45 days following adoption of this resolution and to update the Council 60 days thereafter;
6. *Endorses* the 8 October 2002 letter from the Executive Chairman of UNMOVIC and the Director General of the IAEA to General Al-Saadi of the Government of Iraq, which is annexed hereto, and decides that the contents of the letter shall be binding upon Iraq;
7. *Decides* further that, in view of the prolonged interruption by Iraq of the presence of UNMOVIC and the IAEA and in order for them to accomplish the tasks set forth in this resolution and all previous

relevant resolutions and notwithstanding prior understandings, the Council hereby establishes the following revised or additional authorities, which shall be binding upon Iraq, to facilitate their work in Iraq:

— UNMOVIC and the IAEA shall determine the composition of their inspection teams and ensure that these teams are composed of the most qualified and experienced experts available;

. . . .

— UNMOVIC and the IAEA shall have unrestricted rights of entry into and out of Iraq, the right to free, unrestricted, and immediate movement to and from inspection sites, and the right to inspect any sites and buildings, including immediate, unimpeded, unconditional, and unrestricted access to Presidential Sites equal to that at other sites, notwithstanding the provisions of resolution 1154 (1998);

— UNMOVIC and the IAEA shall have the right to be provided by Iraq the names of all personnel currently and formerly associated with Iraq's chemical, biological, nuclear, and ballistic missile programmes and the associated research, development, and production facilities;

— Security of UNMOVIC and IAEA facilities shall be ensured by sufficient UN security guards;

— UNMOVIC and the IAEA shall have the right to declare, for the purposes of freezing a site to be inspected, exclusion zones, including surrounding areas and transit corridors, in which Iraq will suspend ground and aerial movement so that nothing is changed in or taken out of a site being inspected;

. . . .

— UNMOVIC and the IAEA shall have the right at their sole discretion verifiably to remove, destroy, or render harmless all prohibited weapons, subsystems, components, records, materials, and other related items, and the right to impound or close any facilities or equipment for the production thereof; and

— UNMOVIC and the IAEA shall have the right to free import and use of equipment or materials for inspections and to seize and export any equipment, materials, or documents taken during inspections, without search of UNMOVIC or IAEA personnel or official or personal baggage;

8. *Decides* further that Iraq shall not take or threaten hostile acts directed against any representative or personnel of the United Nations or the IAEA or of any Member State taking action to uphold any Council resolution;

9. *Requests* the Secretary General immediately to notify Iraq of this resolution, which is binding on Iraq; . . .

. . . .

11. *Directs* the Executive Chairman of UNMOVIC and the Director General of the IAEA to report immediately to the Council any interference by Iraq with inspection activities, as well as any failure by

Iraq to comply with its disarmament obligations, including its obligations regarding inspections under this resolution;

12. *Decides* to convene immediately upon receipt of a report in accordance with paragraphs 4 or 11 above, in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security;
13. *Recalls*, in that context, that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations; . . .

* * *

Comments

1. The military action in Iraq in 2003 has led to national inquiries into the international legal basis for the use of force. The Dutch Committee of Inquiry on Iraq established by the Prime Minister released its 550-page report in 2010. It concluded that the Security Council resolutions on Iraq passed during the 1990s did not constitute a mandate for the US-British military intervention in 2003. Despite certain ambiguities in the text, the wording of Resolution 1441 cannot reasonably be interpreted (as the Dutch government did) as authorizing individual Member States to use military force to compel Iraq to comply with the Security Council's resolutions, without authorization from the Security Council.[53]
2. In the UK, the then Prime Minister, Gordon Brown announced on 15 June 2009 that an Inquiry would be conducted to identify lessons that can be learned from the Iraq conflict. The Iraq Inquiry was officially launched on 30 July 2009. The Chair of the Inquiry, Sir John Chilcot, explained that the Inquiry 'will consider the period from the summer of 2001 to the end of July 2009, embracing the run-up to the conflict in Iraq, the military action and its aftermath. We will therefore be considering the UK's involvement in Iraq, including the way decisions were made and actions taken, to establish, as accurately as possible, what happened and to identify the lessons that can be learned. Those lessons will help ensure that, if we face similar situations in future, the government of the day is best equipped to respond to those situations in the most effective manner in the best interests of the country.'[54] As of October 2014, the Report had not yet been released.

Questions for Discussion

1. To what extent can military enforcement action be taken by the Council under Article 42 even if agreements under Article 43 have not been concluded?

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[53] Report of the Dutch Committee of Inquiry on Iraq, 12 January 2010, available at: www.onderzoekscommissie-irak.nl.
[54] http://www.iraqinquiry.org.uk/.

2. How has the Council sought in practice to employ its military enforcement powers in the absence of Article 43 agreements? What is the legal basis for, and limitations on, this technique employed by the Council? To what extent has the Council complied in practice with these limitations in the case of Iraq?

3. Do collective self-defense measures need to be authorized by the Security Council? Are there collective self-defense measures that have been authorized by the Council? What differences are there between such measures and those where the Council has delegated its Chapter VII powers to member states?

4. Can UN member states use force on a unilateral basis in order to implement Security Council resolutions?

5. To what extent, if at all, does the conclusion of a permanent cease-fire or other definitive end to hostilities terminate a Security Council authorization to use force?

6. (i) Can States use force against Iraq to ensure that it comply with its obligations under Security Council Resolution 687? (ii) To what extent, if at all, would your answer in (i) change if Resolution 1441 had not been adopted by the Council?

* * *

Comments

1. In addition to the case of Iraq, the Security Council has delegated its military enforcement powers to member states in order to counter a use of force by a state or entities within a state in the cases of Korea, Somalia, and Bosnia.[55] With the exception of the case of Iraq, the enforcement action taken by member states was directed against non-state entities. As mentioned above, this practice represents a broadening of the original conception of a threat to the peace to include non-state actors.

2. The Security Council has also delegated its Chapter VII powers to member states to achieve a variety of other objectives. These include: the implementation by parties of an agreement that the Council has deemed is necessary for the maintenance or restoration of peace; the carrying out of a naval interdiction; and the achievement of humanitarian objectives.[56]

3. The Council has delegated its military enforcement powers to member states to ensure the implementation by parties of an agreement in the cases of Haiti (ensuring the implementation of the Governors Island Agreement)[57] and the Central African Republic (Resolution 1125 (1997),[58] to ensure the implementation of the Bangui Agreements). The case of Haiti, by way of example, is considered briefly in the extract below.

DAN SAROOSHI, THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY

233-35, 237, 243-44 (1999)

[55] *See* DANESH SAROOSHI, THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY 168-74, 187-94 (1999).
[56] For analysis of Security Council delegations to achieve the latter two objectives, see *id.* at 194-232.
[57] S.C. Res. 841, 48th Sess., 3238th mtg., U.N. Doc. S/RES/841 (1993).
[58] S.C. Res. 1125, 52d Sess., 3808th mtg., U.N. Doc. S/RES/1125 (1997).

1. The Governors Island Agreement: the restoration of democracy in Haiti

On 29 September 1991, the democratically elected government of Haiti was overthrown in a violent coup by members of the Haitian armed forces. . . . The OAS [Organization of American States] response to the coup saw a meeting of OAS Foreign Ministers resolve to recognise President Aristide and his government as Haiti's only 'legitimate' government and to recommend that all OAS Member States take specific action to isolate economically and diplomatically the '*de facto*' government which had seized control. The OAS imposed a non-mandatory trade embargo against Haiti which included the freezing of Haitian assets, the banning of arms sales, and the diplomatic isolation of the '*de facto*' government. With the failure of these and subsequent efforts of the OAS to dislodge the coup leaders in Haiti from political power, the matter was taken to the United Nations. Subsequently, in response to a request from the 'legitimate' government of Haiti, the UN Security Council passed resolution 841. Acting under Chapter VII, the Security Council imposed a universal arms embargo against Haiti; froze all overseas assets controlled by the '*de facto*' government; and threatened to impose a worldwide trade embargo against Haiti to come into force on 23 June 1993 unless the UN Secretary-General advised otherwise. The effect of these sanctions and growing international pressure, saw the head of the '*de facto* authorities' in Haiti conclude with President Aristide the Governors Island Agreement under the auspices of both the OAS and the United Nations. It was primarily the signing of this accord and the New York Pact of June 1993, which generated hopes for a possible peaceful transition to the restoration of democracy and prompted the Security Council in resolution 861 to suspend the economic sanctions imposed by resolution 841. The Governors Island Agreement provided for the return to Haiti of President Aristide, his designation of a Prime Minister, and the eventual return to democracy in Haiti. Subsequently, however, in the light of persistent breaches by the *de facto* authorities in Haiti of their obligations under these accords, the Secretary-General concluded that there was a serious and persistent lack of implementation of the Governors Island Agreement, and considered, in the light of the opinions expressed also by the Secretary-General of the Organization of American States (OAS), that it was necessary to revoke the suspension of the measures set forth in resolution 841 (1993). Accordingly, the Council decided in resolution 873 to reimpose the sanctions set forth in resolution 841, unless the parties complied with their commitments. In its resolution 917 of 6 May 1994, the Council imposed additional sanctions against Haiti and decided that the sanctions regime would not be lifted until the following events had taken place: the creation of a proper environment for the deployment of UNMIH, the retirement of the Commander-in-Chief of the Armed Forces of Haiti, and the resignation or departure from Haiti of the Chief of Staff of the Armed Forces of Haiti and the Chief of the Metropolitan Zone of Port-au-Prince.

. . . .

The Council decided that economic sanctions were not sufficient to dislodge the coup leaders from Haiti when it passed resolution 940 . . . .

4. *Acting* under Chapter VII of the Charter of the United Nations, [the Security Council] authorizes Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors

Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti, and to establish and maintain a secure and stable environment that will permit implementation of the Governors Island Agreement, on the understanding that the cost of implementing this temporary operation will be borne by the participating Member States; . . .

6. *Requests* the Secretary-General to report on the activities of the team within thirty days of deployment of the multinational force;

. . . .

[The Security Council 8. *Decides* that the multinational force will terminate its mission and UNMIH will assume the full range of its functions described in paragraph 9 below when a secure and stable environment has been established and UNMIH has adequate force capability and structure to assume the full range of is functions; the determination will be made by the Security Council, taking into account recommendations from the Member States of the multinational force, which are based on the assessment of the commander of the multinational force, and from the Secretary-General; . . .

13. Requests the Member States acting in accordance with paragraph 4 above to report to the Council at regular intervals, the first such report to be made not later than seven days following the deployment of the multinational force.]

. . . .

In terms of the effectiveness of the exercise of these delegated Chapter VII powers, early diplomatic efforts by the US saw the '*de facto* military authorities in Haiti' agree to give up their control, thus allowing the democratically elected authorities of Haiti to resume governance of the country and the [multinational force (MNF)] to enter Haiti unopposed. These forces, spearheaded by the US, entered Haiti on 19 September 1994. Accordingly, in the majority of the reports of the MNF to the Council there are statements to the effect that the threat to the MNF was low. In fact, according to some of the reports, the gradual expansion of the MNF was 'welcomed into the outlying areas by the local population.' This is the major reason for the relative success of the operation in Haiti as compared to that which took place in Somalia. The difference being that the local population was not hostile to the foreign intervention and in fact perceived the foreign forces as carrying out desirable and legitimate objectives on behalf of the international community which were of benefit to the Haitian population as a whole. Moreover, the ability of the multinational force in Haiti to work with a government perceived as legitimate by the majority of the population in Haiti was of crucial importance.

It is UN support for democracy in a more proactive manner (as a form of conflict prevention) that is, in part, the focus of Professor Norton Moore's suggested reform of the UN collective security machinery.

John Norton Moore, *Toward a New Paradigm: Enhanced Effectiveness in United Nations Peacekeeping, Collective Security, and War Avoidance,*

37 VA. J. INT'L L. 811, 814-15, 855-56,

858-59, 878, 881-89 (1997)

In an age in which peacekeeping has almost become a synonym for U.N. operations, it is easy to forget that an original central purpose of the organization was collective security against aggression in order to end war. In the words of the Preamble of the Charter, the United Nations was intended:

> [T]o save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind . . . and for these ends . . . to unite our strength to maintain international peace and security . . . .

As with the League of Nations before it, there was a belief that aggression could be ended if all the nations of the world, and particularly the major powers, would unite against any aggressor. This concept of collective security, which has an appealing and powerful logic, was to be the principal answer to war.

. . . .

If the United Nations was only episodically able to directly confront aggression, it was able to develop a variety of important roles in fact finding, mediation, truce supervision, peacekeeping, and (usually, but not always constructively) the development of international law and the promotion of human rights. And following the end of the cold war, and the successful action against Iraq's aggression, there was a short period of enthusiasm for an enhanced U.N. role in maintaining world order. This euphoria, however, quickly died in the chaos of Somalia, the genocidal "ethnic cleansing" of Bosnia, and the killing fields of Rwanda. It seems to have been succeeded by a pervasive skepticism, perhaps even deeper than that at the height of the cold war . . . . Today, when the United Nations is considered at all, the focus seems to be on avoiding "mission creep" through careful differentiation of peacekeeping and peace enforcing missions, and on the need for organizational reform that conventional wisdom sees as the root of the U.N. malaise. Paradoxically, even in the aftermath of the cold war, with the removal of many of the barriers to effective action, the future of the United Nations is challenged as never before.

. . . .

Certainly, U.N. missions should be undertaken only carefully in settings where they will be important and where they will decisively prevail. And certainly such missions should be implemented with careful attention to the precise role the United Nations is undertaking and with realistic resources and rules of engagement. Beyond these important reforms, however, I believe the root of the problem is "old thinking" in the basic paradigm with which we are approaching the United Nations, and other institutions and approaches for war avoidance. What is most needed in enhancing U.N. effectiveness is a more realistic paradigm in our thinking about the role of the United Nations, and war avoidance more generally. Perhaps, of course, there is no newer paradigm that will point the way to a more effective United Nations. If so, while we can improve certain obvious deficiencies, such as the repeated mismatch between resources and missions, we will still likely be doomed to further incrementalism and muddling through.

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Recently, Professor Inis Claude has added a brilliant insight about yet another difficulty with collective security in the real world—a problem now more evident after the at least partial removal of the cold-war veto in the Security Council. That difficulty relates to the need for a major power to take the lead when a war-fighting challenge is substantial. He points out that in both Korea and the Gulf, U.S. leadership (and also U.K. leadership in the Gulf) were essential to the successful U.N. collective security operations. While after the Gulf War popular expectations were raised of UN empowerment once the cold-war impasse had ended, he notes that removing the parking brake (i.e., the veto) does not make a car climb the hill. . . .

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While all of these real-world constraints on collective security, as sought within a U.N. framework, have cogency, I believe one of the most important problems with U.N. efforts at collective security has largely been overlooked and yet stands starkly revealed in the light of the new paradigm. The new paradigm focuses clearly on the importance of deterrence in controlling aggression and democide. While collective security is theoretically a powerful form of deterrence, as it was implemented within the League, and only to a slightly lesser extent within the United Nations, it fails to provide much deterrence. Thus, as we have seen, effective deterrence must be before the fact, must have effective sanction or war fighting ability in place or credibly deliverable to the threatened theater, and must be politically credible—if not certain.

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The democracy/deterrence (government structures) paradigm offers a new focus for this core role that should be vigorously explored. First, it suggests that the norm-creating and assistance roles of the United Nations should be focused on consistent long-run efforts at democracy building, in addition to the important, and I believe included, goal of human rights. By promoting a peaceful transition to democracy it is likely from current evidence that we will be reducing the incidence of major wars, reducing democide and famine, and even enhancing economic and environmental well-being. Second, it suggests that collective security should be refocused in a realistic deterrence framework. Collective security can only be effective in war and democide avoidance if it acts in advance in a certain and effective deterrence mode, rather than remaining a vague but unlikely possibility of after-the-fact action. Moreover, if the new hypothesis is right, then effective deterrence at the international system level is the key to less of the things, such as war and democide, we abhor, and more of the things we cherish and value, that is, enhanced world order and prosperity. And as a third major emphasis, a new paradigm that focuses on government structures suggests the importance of considering such structures in operations such as Somalia, rather than drawing artificial lines that may be counter productive in the real world. That is, a government structures paradigm suggests to us the importance of focus on government structures in U.N. operations [within a particular target-state], rather than abjuring any such focus in a cloud of non-intervention political correctness. . . .

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IV. Some Suggestions for Strengthening the United Nations to Meet the New Challenges

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B. Strengthening the Role of the Security Council: Toward Realistic Burden Sharing

There has always been an ambivalence about some members of the United Nations possessing a veto in the Security Council. . . .

Rather than regarding the Security Council as suspect [because of the veto], we would more effectively serve the goals of the United Nations by focusing squarely on the responsibilities of great powers that accompany the veto and their unique Security Council role. As one example, I believe it would have been preferable to have structured the new International Criminal Court as a tool of the Security Council, initiated in specific cases at its request, rather than as yet another Court to be created by general treaty and with the usual and critical enforcement problems that go with such an arrangement. The anomalies that go with this latter way of proceeding are to not include aggression within the general jurisdiction of the Court (thus going backward from Nuremberg and the need to add deterrence to aggression), and to include a great hole in the Statute of the Court for settings in which the nation state decides to prosecute (a provision that will work reasonably in democratic countries and not at all in those non-democratic countries committing aggression and slaughtering their people).

One reality worth noting in this connection is that a strong and effective United States is required for an effective Security Council and United Nations. As the only remaining superpower, and a nation with a unique war-fighting and logistics capability, the United States is an indispensable actor for U.N. success through time. The United States has been actively involved not only in the classic collective security actions of Korea and the Gulf, but also in most major post-Gulf War peacekeeping actions of the United Nations, including Somalia, Bosnia, Haiti, Rwanda, and now possibly the Rwanda/Zaire border area. This reality in turn presents unique problems for the United States and the U.S. military. One fact that is central to more active and effective engagement is putting to rest the pervasive myths of Vietnam that disastrous foreign policy adventures inevitably result from small commitments, and that even appropriately configured and led military forces cannot prevail against small indigenous forces. My colleague, Robert F. Turner, and I teach a seminar at Virginia dedicated to exploding these and other myths of Vietnam. Such myths, however, have a powerful hold on popular culture and amplify a national fear of foreign entanglements that resonates as far back as the Administration of George Washington.

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C. Strengthening Mechanisms for Ensuring that Operations Undertaken are Only Undertaken with Adequate Forces and Rules of Engagement to Prevail and Prevail Promptly

Settings which may require serious war-fighting, as in the Gulf, and even in Somalia and in Bosnia, must generally, with perhaps some exceptions otherwise meeting the functional requirement, be undertaken with the cooperation of a major power, such as the United States, or a major collective defense organization, such as NATO, in order to ensure adequate forces to prevail and prevail promptly. In such settings these nations or organizations will supply the command structure and must approve any rules of engagement. Similarly, collective security operations such as those in Korea and the Gulf, must be undertaken under the unitary command of the lead power. I do not propose to change that reality.

There is, however, an acute problem in settings such as the early U.N. engagement in Bosnia, where major powers in the Security Council were supporting, or even insisting on, active engagement on the ground by U.N. peacekeeping forces, without themselves being prepared to be involved in war-fighting, and in which the United Nations may be given insufficient forces to effectively carry out its mission.

To avoid such settings in which the United Nations may intervene with insufficient forces, we should seek to encourage practices and develop mechanisms which will *require* candid and careful Security Council consideration of the element of sufficiency in all of its initial deployment decisions. One simple mechanism might be to encourage a more active role for the Secretary-General, with the advice of his military advisors, in pointing out to the Council that any role for the United Nations should be undertaken only with adequate military forces and rules of engagement. We should encourage the Secretary-General, who is ordinarily a critical U.N. figure in the implementation of peacekeeping, to candidly share any specific concerns with the Security Council when he or she is asked to carry out an operation without adequate military force to prevail and prevail promptly. Perhaps a written report from the military advisor to the Secretary-General detailing the specific concerns might be made available to the Council. We might also implement a Security Council practice requiring a separate Council report, or even decision, as to the sufficiency of implementing forces and rules of engagement *prior to* any deployment decision. There are certainly other procedural possibilities for encouraging Council decisions which will ensure that deployment decisions will be taken only when the means and the will are available to carry through successfully with the mission. *Some* such procedure which the Council finds compatible should be initiated. For the underlying issue is of great importance.

In this connection, we might also note that the theory of government failure would predict that governments of states large and small may sometimes find it attractive to respond to publicity about atrocities by *seeming to* take action while not being willing to commit adequate resources to *really* take effective action. That is, national leaders may sometimes be tempted in response to domestic crosscurrents which are simultaneously urging both “action” and that “we not get involved,” to seek to take cosmetic action through the United Nations, or to externalize costs of the action (for which they get political credit) on others. This tendency is exacerbated in the many real-world settings in which selecting the right course is complex and in which powerful nations are supporting different approaches. An antidote is needed to avoid these half-hearted deployment decisions that may end up undermining present and future effectiveness of both the U.N. and the national governments involved.

D. Strengthening Measures of Deterrence and Accountability for Regime Elites

This Article has earlier urged the importance of a new and creative focus of deterrence on regime elites engaged in aggression, democide, or grave breaches of the laws of war. As a specific suggestion for pursuing this important approach, I suggest that the Security Council be asked to undertake a careful and serious review of new approaches that might be taken by states individually and by the Council itself.

The Council is a useful forum to take up this initiative for three reasons. First, the very consideration of this agenda item by the Council with respect to regime elites ordering aggression or democide should have a positive effect on deterrence. Second, I believe, consistent with my earlier argument about revitalizing the role of the Council, that some of the most effective new measures in this regard would require Council involvement and approval. Finally, undertaking such a study would give the Council, and its member governments, some new ideas for action other than the full involvement of ground forces or nothing. That sadly is too often the current dilemma.

E. More Sharply Differentiating Responses to Aggression and Defense

Collective security depends heavily on the distinction between aggression and defense. Indeed, collective security assumes some behavior against which the remainder of the international community will stand. Similarly, as the new paradigm suggests, when we begin thinking of the role of international law in deterring aggression, it becomes evident that to be an effective deterrent, as opposed to a mere placebo, the law must effectively and strongly sanction aggression, and effectively and strongly support individual and collective defense against aggression. That is, the strength with which the international system differentiates between aggression and defense, sanctioning aggression, while supporting defense, becomes crucial for the very effectiveness of international law as a normative system. For if the international system responds by treating aggression and defense as equivalent, or, even worse, it largely focuses its ire on the defensive response, then the deterrent effect of law is largely lost.

In contrast with this necessity, there is at present a pervasive climate of ignoring aggression, while focusing critically on the democratic nation defensive response. Some examples from the recent Gulf War, just to cite one setting presenting this phenomenon, are:

- Arguments that the coalition forces had no right of defense once the issue had been referred to the Security Council for action,
- Arguments that if a collective defense action does not immediately respond to an armed attack (for example, it delays three months for a necessary military build-up and an effort at peacemaking as did the coalition forces in the Gulf) that the right is lost, and
- Arguments that an occupied country (for example, the State of Kuwait following the Iraqi attack) has no one that can lawfully request collective defense assistance on their behalf following a successful blitzkrieg attack.

Sadly, all of these examples are real; they were seriously advanced by well-known international law scholars and, in one case, by the then Secretary-General of the United Nations. At the same time, there was relative silence as to the illegality of the blatant Iraqi attack from these sources. This unbalanced focus on efforts to restrain effective defense against aggression I refer to as a "minimalist" approach to the important right of individual and collective defense under the Charter. It parallels a similar "minimalist" approach to deterrence within the international relations and peace studies literature.

It is important in enhancing the effectiveness of international law as a deterrent against aggression, and in turn strengthening collective security that depends in large part on the normative structure, to more sharply differentiate aggression and defense, and to more effectively and consistently sanction aggression while supporting the defensive right. To treat the two sides of this synergy as equivalent is to doom law to irrelevance in deterring aggression.

This principle may also suggest the importance of U.N. operations taking sides, and not remaining neutral, in the face of aggression or democide. While it may be attractive to hope for non-involvement in the face of outrageous behavior, in such settings it is likely that only involvement can carry out the mission. If, for example, as has recently been reported, the same Hutu militia that had engaged in democide in Rwanda was holding hundreds of thousands of Hutu civilians in refugee camps in Zaire against their will, it is hard to understand how this largely escaped notice for two years, or why the solution to the problem was a "neutral" peacekeeping force.

F. A New Democratic Caucusing Group Within the United Nations: The "Group of Democratic Nations"

If the new paradigm is correct, with its focus on the importance of government structures, then I would propose the creation within the United Nations of a new informal caucusing group that might be called the "Group of Democratic Nations." Whether or not democratic government is the most important feature correlated with the goals of the United Nations, as is strongly suggested by the evidence today, democracy, and the democratic nations, are a critically important part of the global landscape. In a world that organizes caucusing groups within the United Nations both on a regional basis and every functional basis imaginable, it seems strange that there is no democratic nation caucusing group.

Such a "Group of Democratic Nations" could be a powerful force for democracy building and the rule of law within the United Nations. It could also usefully transcend some of the regional or functional identifications now extant in the Organization.

Importantly, such a group should be begun with participation from all regional groups and should not be aimed at any nation. Rather it should be a force for peace, human rights, economic development, environmental protection, and health and well-being on a world-wide basis.

. . . .

The United Nations should become an important forum for democracy building and rule of law engagement, as a long-run strategy to promote the goals of the United Nations. In the short run, it must become more effective in deterrence, and should more systematically consider the effects of its actions on deterrence and its own credibility to carry out its missions.

There is a world of difference between theoretical collective security and effective deterrence that enables avoidance of war and democide. The latter must be the focus for future U.N. reform.

* * *

No 'Group of Democratic Nations' has been formed within the UN, but the topic of the rule of law has been placed high on the UN agenda since Professor Norton Moore wrote this article. The General Assembly has adopted multiple resolutions on the rule of law.[59] The Security Council has held thematic debates on the rule of law[60] and adopted resolutions on, *inter alia*, women, peace and security (SC res 1325, SC res. 1820), children in armed conflict (e.g., SC res 1612), and the protection of civilians in armed conflict (e.g., SC res 1674).

Questions for Discussion

1. What reforms would you suggest to the way in which the Council at present employs its military enforcement powers to maintain or restore peace and security?

2. To what extent and in what ways should the UN promote democracy?

* * *

UN Transitional Administrations

The UN has used transitional administrations, also known as 'international territorial administration' (ITA) to govern a state or part of the territory of a state where there has been the collapse of state institutions, a widespread paralysis of governance and the breakdown of law and order. The UN Missions in Kosovo and East Timor are the leading examples of UN transitional administrations. Subsequent UN ITAs and technical assistance missions in Sierra Leone (UNAMSIL) and the Congo (MONUC) have been less ambitious in their scope. There has also been a tendency for the UN to partner with regional organizations, as in the UN African Union Mission in Darfur (UNAMID, since 2007) and the African Union Mission to Somalia (ANISOM, since 2007).

Michael J. Matheson, *United Nations Governance of Postconflict Societies,*

95 AM. J. INT'L L. 76, 77-83 (2001)

[59] A/RES/61/39, A/RES/62/70, A/RES/63/128.
[60] S/PRST/2003/15, S/PRST/2004/2, S/PRST/2004/32, S/PRST/2005/30, S/PRST/2006/28.

I. PREVIOUS UN INVOLVEMENT IN GOVERNANCE OF POSTCONFLICT SOCIETIES

. . . .

The first major UN exercise in governance came with the 1991 Agreement on a Comprehensive Political Settlement of the Conflict in Cambodia. This Agreement established a Supreme National Council—composed of representatives of the contending Cambodian factions—that delegated various governmental functions to the United Nations, which were to be exercised by a UN Transitional Authority in Cambodia (UNTAC) to be created by the Security Council. Specifically, UNTAC was given direct control over Cambodian agencies in the areas of foreign affairs, national defense, finance, public security, and information; supervision over other agencies that could influence the outcome of elections; and the right to investigate various other government organs to determine whether they were undermining the accords and, if so, to take corrective measures. This authority was limited by the requirement that UNTAC follow any "advice" approved by a consensus of the factions represented in the Supreme National Council, to the extent that it did not conflict with the Agreement. All of these aspects of UNTAC's role were added to the more traditional UN functions of enforcing a cease-fire and military demobilization, and conducting elections to establish a permanent national government.

The Security Council did not authorize these UNTAC functions pursuant to its mandatory powers under Chapter VII of the Charter; rather, the Council acted under its authority to make recommendations to states for the settlement of disputes. Therefore, the consent of the Cambodian factions was an essential ingredient of the legal basis for UNTAC's mandate. In subsequent crises during the 1990s, however, the Council regularly acted under Chapter VII, which gave its decisions the force of international obligation, with or without the consent of the states in question (or other entities).

Between the signing of the 1991 Cambodian accords and the eruption of the 1999 Kosovo crisis, the Council exercised its Chapter VII authority on many occasions to end conflicts, disarm hostile forces, restore order, punish war criminals, and the like, but it did not attempt to directly govern territories affected by a conflict. For example, the mandate of the UN force introduced into Haiti included replacement of the military regime with the elected Aristide government but not UN governance of the country. The NATO-led force introduced into Bosnia with the endorsement of the Security Council was broadly authorized to enforce the cease-fire and the redeployment of forces required by the Dayton Accords, but governance was left to the Bosnian political entities. Clearly, the United Nations was reluctant to assume the functions of governing the territory of a sovereign state if indigenous institutions were available for that purpose.

II. UN Governance of Kosovo

. . . .

On June 10, 1999, the Security Council adopted Resolution 1244, a binding decision under Chapter VII. Among other things, the resolution:

— decided on the deployment in Kosovo "under United Nations auspices, of international civil and security presences";

— authorized member states and relevant international organizations to establish the international security presence "with substantial North Atlantic Treaty Organization participation" and "under unified command and control," and empowered the security presence to use "all necessary means" to establish a safe environment and facilitate the safe return of all displaced persons;

— authorized the Secretary-General to establish "an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions"; and

— enumerated the main responsibilities of the international civil presence, which included promoting the establishment, pending a final settlement, of substantial autonomy and self-government; performing basic civilian administrative functions; supporting economic reconstruction; maintaining civil law and order; and facilitating a political process designed to determine Kosovo's future status.

The mission of the international security presence—the Kosovo Force or KFOR—was similar to the traditional role of UN-authorized forces in restoring and maintaining order and removing or demilitarizing contending forces. The mission of the international civil presence, on the other hand, was unprecedented in scope and complexity.

The Secretary-General promptly created the international civil presence—known as the United Nations Interim Administration Mission in Kosovo, or UNMIK—and appointed a special representative to direct it. The special representative then assumed "all . . . executive authority with respect to Kosovo," including the right to appoint "any person to perform functions in the civil administration in Kosovo, including the judiciary, or remove such person." He likewise asserted the authority to administer all funds and property of the FRY and the Republic of Serbia in the territory of Kosovo.

The structure he created for UNMIK reflected the heavy dependence of the operation on the efforts and resources of various states and international organizations. The mission was divided into four main components, each led by a different organization. First, a civil administration component, led by the UN Organization, was created to handle public administration and civil affairs (in particular, to revive health, education, and other public services); police (both to carry out police functions in the short term and to train and develop an indigenous force for the longer term); and judicial affairs (to reconstitute the law enforcement system, including by selecting and training judges, prosecutors, and prison personnel from all ethnic groups).

Second, an institution-building component, led by the Organization for Security and Cooperation in Europe (OSCE), assumed the tasks of promoting democratization and institution building (including the training of local administrators, the development of local political and professional organizations, and the creation of independent news media); elections (including voter registration and the development of provisional institutions for self-government); and human rights (particularly ensuring compliance with international norms by police, courts, and detention authorities).

Third, a humanitarian component, led by the UN High Commissioner for Refugees, took responsibility for humanitarian assistance (including coordination of efforts by various international organizations to provide food, shelter, and medical treatment for the many displaced Kosovars, as well as to revive agricultural production) and mine action (to identify and remove land mines and unexploded ordnance).

Fourth, a reconstruction component, led by the European Union (EU), was put in charge of the reconstruction of key infrastructure and other economic and social systems, including the development of a market-based economy, the coordination of international financial assistance, and the resolution of trade, currency, and banking matters.

The performance of all these functions required that UNMIK identify the law that would govern in Kosovo and make new law as needed, which was done through the promulgation by the special representative of a series of regulations. The first of these regulations asserted that “[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General.” It then stated that “[t]he laws applicable in the territory of Kosovo prior to 24 March 1999”—that is, the laws imposed by the FRY prior to its withdrawal from Kosovo—“shall continue to apply in Kosovo insofar as they do not conflict with” the mandate given to UNMIK by the Security Council or any regulations issued by UNMIK.

Later the special representative specifically repealed certain FRY legislation that had been adopted in 1991 concerning property rights and housing, which he found to be discriminatory. However, this action did not go far enough for Kosovar Albanians and the newly appointed Kosovar judges, who considered FRY laws to have been “part and parcel of the revocation of Kosovo’s prior autonomous status and an instrument of oppression since then.” Ultimately conceding this point, the special representative decided that, in addition to his own regulations, the law applicable in Kosovo would be the law in force in Kosovo on March 22, 1989—that is, the law of Kosovo before the FRY stripped away its autonomy.

In any event, the special representative has continued to make law for Kosovo where existing law did not suffice. By regulation, he has promulgated new law on such subjects as customs duties and taxes; currency use and regulation; the importation and sale of petroleum and other products; and the regulation of telecommunications services, banks, and nongovernmental organizations. He has created new court structures, defined their jurisdiction, and provided for the appointment and duties of judges and prosecutors.

In effect, UNMIK has functioned as a general lawmaking authority over a wide range of subjects, and will undoubtedly continue to do so as further needs and gaps in existing law are discovered. This additional activity will likely include the promulgation of new codes of criminal law and procedure to fill gaps in previous law and to ensure the availability of a fully functioning legal system to control interethnic violence as well as common crimes. New law may also be needed to enable UNMIK to administer or privatize state-owned and socially owned property with a view to encouraging economic revival and development.

Finally, UNMIK's mandate from the Security Council includes "the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo," and "[f]acilitating a political process designed to determine Kosovo's future status," taking full account of the Rambouillet accords. Those accords, which had been elaborated prior to the NATO air campaign, would have adopted an "interim Constitution" for Kosovo if the FRY had been willing to sign. Although the accords recognized that Kosovo was and would continue to be part of the FRY, that constitution would have given substantial governmental powers to a Kosovar political structure, with the exception of certain reserved areas such as monetary policy, defense, and most aspects of foreign policy. It will now fall to UNMIK to implement this aspect of the Security Council's instruction to provide for an interim autonomous political structure for Kosovo, and then to pursue an undefined "political process" to reach a "final settlement." This would be no small achievement.

III. UN GOVERNANCE OF EAST TIMOR

Within months after assuming the task of pacifying and governing Kosovo, the United Nations faced a task of comparable scope and complexity in East Timor. (In some ways it was more difficult, in that the United Nations did not have the assistance of such institutions as NATO, the EU, and the OSCE.)

East Timor had been subject to Portuguese control until 1975, when Indonesian forces occupied it over the protest of the Security Council. After many years of negotiation, Portugal and Indonesia agreed in 1999 to ask the UN Secretary-General to conduct a "popular consultation" of the East Timorese to determine whether they wanted independence or autonomy within Indonesia. This consultation took the form of a direct ballot in which the East Timorese rejected such autonomy. When this result was announced, however, anti-independence militias engaged in an intense campaign of violence and intimidation that resulted in heavy destruction in East Timor and the displacement of hundreds of thousands of civilians.

In response, the Security Council acted under Chapter VII of the Charter to authorize the establishment of a multinational force empowered to use all necessary means to restore order and facilitate humanitarian assistance. This Australian-led force, known as the International Force for East Timor, quickly restored order, but the violence had already destroyed a large number of homes and other buildings, caused the collapse of the civil administration and judicial systems, and damaged or destroyed much of the waterworks and other essential public services.

As a result, the Security Council once again decided to entrust the United Nations with the burden of governance of a territory shattered by conflict. In Resolution 1272, again acting under Chapter VII, the Council established the United Nations Transitional Administration in East Timor (UNTAET), which was given "overall responsibility for the administration of East Timor" and empowered "to exercise all legislative and executive authority, including the administration of justice." The mandate of UNTAET included establishing an "effective administration," assisting in the "development of civil and social services," and supporting "capacity-building for self-government." UNTAET would be led by a special representative "who, as the Transitional

Administrator, will be responsible for all aspects of the United Nations work in East Timor and will have the power to enact new laws and regulations and to amend, suspend or repeal existing ones."

Once appointed, the transitional administrator rapidly exercised his authority through the issuance of regulations in much the same manner as the special representative for Kosovo. In the first of these regulations, he decreed that "[u]ntil replaced by UNTAET regulations or subsequent legislation of democratically established institutions of East Timor, the laws applied in East Timor prior to 25 October 1999 [would] apply in East Timor" insofar as they did not conflict with Resolution 1272 or UNTAET directives. At the same time, he ordered that a series of Indonesian security laws no longer be applied in East Timor. In subsequent regulations, he promulgated rules for such matters as the appointment and removal of judges and prosecutors, the regulation of fiscal and budgetary matters, and currency transactions.

Similarly to UNMIK in Kosovo, UNTAET adopted as immediate priorities (apart from the restoration of order) facilitating the return and care of refugees and displaced persons, the restoration of public services through the reconstruction of essential infrastructure and the recruitment and training of administrators and civil servants, and the rebuilding of the judiciary and the law enforcement system. The revival of economic activity was also urgently required, since an estimated 80 percent of the population lacked any means of support.

As to the political and economic future of East Timor, the situation is substantially different from that of Kosovo. The international community never accepted that East Timor was a part of Indonesia or lawfully subject to Indonesian control. Further, under the accords concluded with Portugal and the United Nations in May 1999, if the Secretary-General determined that autonomy within Indonesia was not acceptable to the people of East Timor (as he did, following the "popular consultation"), Indonesia agreed to take the necessary steps to terminate its links with East Timor and transfer authority to the United Nations, which was to initiate the transition to independence. Accordingly, the Secretary-General has stated that "fundamental and urgent policy decisions" must now be made for the purpose of "setting the foundations of an independent East Timor."

Ralph Wilde, *International Territorial Administration*
How Trusteeship and the Civilizing Mission Never Went Away

(Oxford University Press, 2008) pp 192-4, 200, 203-7, 232, 234-5 (footnotes omitted)

> In order to appreciate how its policy-role is understood, it is helpful to approach international territorial administration negatively, in terms of what it is not. ITA is seen as a substitute for what is regarded as the 'normal' conduct of territorial administration: by actors whose spatial identity, as 'local', corresponds to that of the territorial unit and its population International territorial administration is being and has been used as a substitute for the involvement of 'local' actors in the activity of territorial administration, either partially or fully, because of two perceived 'problems' associated with the 'normal' model.
>
> In the first place, the use of international territorial administration is understood as a response to what might be termed a 'sovereignty problem' relating to the presence of local actors exercising administrative

control over the territory. In the second place, the use of international territorial administration is understood as a response to what might be termed a 'governance problem' relating to the conduct of territorial administration by local actors. The first perceived 'problem' concerns the identity of the local actors being substituted in the role of carrying out administration; the second perceived 'problem' concerns the quality of governance being exercised in the territory. . . .

The First Purpose: Responding to a 'Sovereignty Problem'

. . . In Leticia, West Irian, Eastern Slavonia, the Saar, and Mostar, international territorial administration was used or proposed to solve what might be called a 'sovereignty problem' understood to have been caused by the identity of certain local actors who enjoyed or might have come to enjoy administrative control. The key to appreciating how the policy-role of ITA is understood here is the link between administrative control and sovereignty. . . . [T]he question of who exercises administrative control is a crucial issue when determining issues of sovereignty-as-ownership. Sometimes, international territorial administration has been understood as a means of interfering in this sovereignty process by calibrating the level of administrative control by certain local actors, or displacing such actors completely in the role of exercising such control. In such circumstances the value of its introduction is understood through the idea that the international actor involved is 'neutral' when compared with the local actors in relation to whom the particular sovereignty dispute relates. In being explained in terms of a 'sovereignty problem' like this, the operation of international territorial administration is understood in several different ways. In Leticia, Kosovo, West Irian, and Eastern Slavonia, it was seen as a response to a concern stemming from a wider question about the status of the territory. In the Saar and Mostar, international territorial administration was regarded as the 'response' to the status question itself..

. . .

The use of international territorial administration explained in terms of a 'sovereignty problem' implies that what might be called the 'normal' sovereignty model is considered to be in some sense 'defective'. The character of this model depends on whether the sovereignty question at issue is considered internal or external. When ITA 'solves' an internal sovereignty question—who will have administrative control—as in Mostar, the perceived defect lies in the notion that the preferred model of internal sovereignty, i.e., (more or less) unified governmental structures, is absent. Equally, when ITA used for this purpose is later discontinued, as happened in Mostar in 1996 with the introduction by the EUAM of an Interim City Statute, the preferred model of internal sovereignty is considered to have been 'restored': Mostar was supposedly 'reunified'. When the use of ITA is understood in terms of addressing an 'external' sovereignty question—what the international legal status of the territory should be—the perceived 'defect' it is understood to be remedying concerns the preferred model of external sovereignty not being adopted, whether this involves the territory being a state or part of a state. Here, ITA alone does not suffice, as it cannot resolve the status question by itself; the device of 'international territorial sovereignty' is also necessary. . . .

The Second Purpose: Responding to a 'Governance Problem'

Unlike in the 'sovereignty problem' context, the perceived 'problem' here is not the identity of local actors acting in the role of the governmental authority but, rather, the conduct of governance by such actors. This problem can have two related features. Local actors may be considered practically incapable of conducting any governance at all. The perceived 'problem', therefore, is the supposed 'lack' of governance. Alternatively, there may be a concern that local actors will exercise their governmental powers in a manner that conflicts with certain policy objectives. Here, the perceived 'problem' concerns the supposed absence of 'good governance'.. . .

. . . .

In addition to filling a perceived 'vacuum' in local territorial governance, international territorial administration has been associated with broader and more ambitious purposes concerning governance. The perceived 'problems' here are concerned not with the existence of governance, but the quality of governance being performed. Four main policy objectives for governance can be identified in this use of ITA: first, the attainment of a certain status for the territorial unit concerned; secondly, a broad agenda concerning effectiveness, democracy, the rule of law, and liberal economic policy; thirdly, the furtherance of migration policy; and, fourthly, the exploitation of natural resources

.. . . .

As with the use of international territorial administration to respond to a perceived 'sovereignty problem', ideas about the use of ITA in relation to a perceived 'governance problem' are ultimately rooted, paradoxically, in the validity of that which ITA is understood to be the opposite of: the 'normal' and 'ideal' model of territorial governance conducted by local actors. When ITA is explained in terms of filling a vacuum that it did not create, governance itself is considered to be absent. When ITA projects are explained as means of displacing local actors in the activity of territorial administration, this is because the actors being displaced are deemed to be unwilling or unable to govern in a preferred manner. According to these ideas, if such problems with the 'normal' model were not considered to exist, there would be no need for ITA.

In 'reactive' models of ITA, local territorial administration is assumed to be the norm, to be corrected only when necessary to ensure conformity to certain policy objectives. In some of these cases, and in all the 'proactive' models of ITA, the assumption that local territorial administration is the ideal is also supported by the designation of the projects as temporary . . . .

IV. Conclusion

> International territorial administration is a 'policy institution' . . . because in all cases it is understood to operate in a particular manner as a matter of policy or purposes, being used to displace local actors in the activity of territorial governance because of a perceived problem either with the identity of these actors, or with the quality of governance performed by them in the territory concerned. The exceptionalist appraisal of the Kosovo and East Timor projects ignores the place of these two projects as the latest manifestations of a rather well-established pattern of international involvement in a range of issues. In understanding ITA's future potential, one cannot focus only on the idea of altering the quality of governance carried out in the territory—the 'governance problem' category—since this takes in only half the picture. Equally, focusing exclusively on situations of plenary administration and/or ITA projects involving the United Nations arbitrarily excludes other ITA projects that have been understood to serve the same purposes in the same manner. Moreover, it would seem that labelling the projects holistically as 'temporary', 'interim', 'transitional', and so forth, . . . risks ignoring projects where the temporal duration is conceived as permanent . . . and projects which, even if they are generally understood to be a temporary, are formally constituted on an indefinite basis . . . ITA—irrespective of the particular international actor involved and despite diff erent degrees of administrative involvement—has been used since the inception of the League as a device for certain policy ends.

* * *

Questions for Discussion

1. What is the legal basis for and status of UN transitional administrations established by the Security Council? What consequences flow from this status for: (i) the relationship between the Council and transitional administrations; and (ii) the relationship between a transitional administration and local entities within the territory being administered?

2. What are the types of governmental powers being exercised by UN transitional administrations? What legal limitations constrain the exercise of these powers of governance?

3. What are the constraints upon a UN transitional administrator in the exercise of a general lawmaking authority within a state?

4. Does the exercise of broad powers of governance by the UN in cases such as Kosovo and East Timor represent an impermissible interference with state sovereignty?

5. In 2005, the General Assembly and Security Council jointly established a subsidiary organ called the Peacebuilding Commission with the mandate to support peace efforts in countries emerging from conflict by, *inter alia*, advising on and proposing integrated strategies for post-conflict peace building and recovery. It is not expressly authorized to exercise administrative powers in ITAs or to supervise ITAs. What role do you see the Peace building Commission as playing in post-conflict zones?

* * *

The General Assembly

Comments

1. The General Assembly is the plenary body of the UN. The provision in Article 18(1) that “[e]ach member of the General Assembly shall have one vote” is based on the principle of sovereign equality set forth in Article 2 of the Charter. The main committees of the General Assembly, which are composed of all members of the Assembly, also operate by one state, one vote.

2. The required two-thirds majority for decision-making by the General Assembly in Article 18(2) is determined on the basis of those “present and voting.” The Rules of Procedure explain that this means members casting an affirmative or negative vote. Thus, members who abstain are not considered as voting for purposes of identifying required majorities under Article 18.

3. The primary responsibility of the Security Council for the maintenance of international peace and security does not prevent the General Assembly from exercising a secondary responsibility in the area. Under the intended scheme of things, Articles 9-14 were not intended to provide a constitutional basis for UN military activity. Military enforcement action was undoubtedly intended to be taken by the Security Council under Articles 42 and 43. The plan of Articles 10-12 was to allow the General Assembly to discuss and make recommendations on any question arising under the Charter (Article 10) or even more specifically concerning international peace and security (Article 11), save insofar as these matters were before the Security Council and that body was exercising its Charter functions in relation to them.[61] The practice has, however, been somewhat different.

The “Uniting For Peace” Resolution

UN action in Korea was made possible by virtue of the absence of the former Soviet Union from the Security Council at the critical time. This prevented the casting of a veto, though the former Soviet Union took the view that the voting rules of the Security Council invalidated a resolution passed in the absence of a permanent member. With the rapid return of the former Soviet Union to the Security Council, it was apparent that the Council would not be able to exercise control over the enforcement action in Korea. It was against this background that General Assembly Resolution 377 (V) was passed in 1950. The effect of this Resolution was to transfer to the General Assembly authority to make certain recommendations when the Security Council was unable to carry out its responsibilities. It was through this Resolution that, in the Korean action, the initiative passed from the Security Council (to which the former Soviet Union had returned) to the General Assembly—though the Unified Command had already been established by the Security Council in Resolutions 83 and 84.[62]

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[61] *See* U.N. CHARTER art. 12.
[62] S.C. Res. 83, U.N. SCOR, 5th Sess., 474th mtg., at 5, U.N. Doc. S/RES/83 (1950); S.C. Res. 84, U.N. SCOR, 5th Sess., 476th mtg., at 5,

GENERAL ASSEMBLY RESOLUTION 377, "UNITING FOR PEACE,"

U.N. GAOR, 5th Sess., Supp. No. 20, at 10, U.N. Doc. A/1775 (1950)

The General Assembly,

. . . .

A

1. *Resolves* 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. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations; . . .

D.W. BOWETT, UNITED NATIONS FORCES

290-92 (1964)

3. *The Resolution on Uniting for Peace*

. . . .

The underlying assumption of . . . section [A] of the Uniting for Peace Resolution is that the General Assembly may do by recommendation anything that the Security Council can do by decision under Chapter VII. The Communist States have always denied this, insisting that all matters concerning the use of force are reserved exclusively to the Security Council. They base this viewpoint on Articles 11(2), 43 and 47, and Article 24. The relationship between the Security Council and the General Assembly as revealed by Articles 11(2) and 43 has already been discussed above. It must be repeated that the International Court, during its advisory opinion on the *Expenses Case,* interpreted the term "action" in Article 11(2) to mean "enforcement action." Whereas this view indicates that the Assembly is free to take many other types of action without referring to the Security Council, it also implies that it may never, even by recommendation, undertake enforcement action. It is possible that the Court did not intend to convey this impression, and the point is not directly germane to its conclusions on the matter of expenses. It does, nevertheless, only mention the authority of the Assembly to take "action" under Article 11(2) when this involves the organization of "peace-keeping" operations, at the request, or with the consent, of the States concerned. At no time does the Court uphold the right of the Assembly to *recommend* enforcement measures (though it emphasizes repeatedly that only the Council may order coercive

U.N. Doc. S/RES/84 (1950).

action), either under the Charter generally or under the Uniting for Peace Resolution. Moreover, the opinion of the Court studiously avoids all mention of that Resolution, even though it was much discussed in the Pleadings.

Article 24 of the Charter provides that the members of the United Nations "confer upon the Security Council primary responsibility for the maintenance of international peace and security." In support of the Uniting for Peace Resolution attention has been drawn to the fact that Article 24 gives the Security Council only "primary" responsibility, and not exclusive responsibility in matters affecting international peace. The secondary or residual responsibility of the General Assembly is apparent, as Articles 10, 11 and 14 testify. The International Court has also upheld this view of the secondary responsibility of the Assembly under Article 24(1),[63] though without seeking to relate its comments on this point to the Uniting for Peace Resolution.

Some mention must also be made at this stage of Article 12, for its guidance on the spheres of competence of the Assembly and Council is also instructive so far as the Uniting for Peace Resolution is concerned. Under the terms of this Article the General Assembly may make no recommendation on a question while the Security Council is exercising its functions in respect of that question, unless the Security Council so requests. Article 12 does not seem to prevent the General Assembly from *discussing* a situation which is being dealt with by the Security Council, nor does it specify that the Permanent Members of the Security Council all have to favour a request from that organ that the Assembly make a recommendation. The provision in Section A of the Uniting for Peace Resolution for the convening of an emergency session of the Assembly on the vote of any seven members when the Council "fails to exercise its primary responsibility for the maintenance of international peace and security" is thus compatible with the terms of the Charter. Section A also provides for the calling of an emergency session "by a majority of the Members of the United Nations"; as this would not occur until the Council had failed to act, and the residual responsibility of the Assembly implied by Article 24(1) came into play, it cannot be accepted that this is contrary to the Charter. . . .

CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE

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Article 12 has also been gradually eroded. The General Assembly has made recommendations even when the Security Council was dealing actively with an issue. If the Security Council was not actually exercising its functions at that moment, or if a resolution was blocked by a veto, the General Assembly has assumed it is free to make recommendations, provided that these did not directly contradict a Security Council resolution. The General Assembly has accordingly passed a series of resolutions condemning certain behaviour when the Security Council could not agree on a resolution or could not take measures against a wrongdoing state. Some . . . states were unhappy at this; they said that the repetition of resolutions condemning states was a pointless rhetorical exercise. . . . [t]he General Assembly [has] regarded itself as free to call on the Security Council to lift the arms embargo on Bosnia-Herzegovina when the Security Council had been divided as to whether to do so.

Technically it may be possible to make out a case on the basis of the practice of the two bodies that this did not contravene Article 12, but it seems to be precisely the type of situation that Article 12 was designed to prevent.

The issue of the delimitation of powers between the Security Council and the General Assembly in relation to the maintenance of peace and security provided in part the basis for a claim in the *Expenses* case that the Assembly did not possess the competence to establish the first UN peacekeeping force in the Middle East (UNEF I). The International Court did not rely on the Uniting for Peace resolution in reaching its decision in the *Expenses* case.

Certain Expenses of the UN,

1962 I.C.J. 151, 163-65 (July 20)

This argument [on expenses] leads to an examination of the respective functions of the General Assembly and of the Security Council under the Charter, particularly with respect to the maintenance of international peace and security.

. . . .

The responsibility conferred [on the Council by Article 24 of the Charter] is "primary," not exclusive. This primary responsibility is conferred upon the Security Council, as stated in Article 24, "in order to ensure prompt and effective action." To this end, it is the Security Council which is given a power to impose an explicit obligation of compliance if for example it issues an order of command to an aggressor under Chapter VII. It is only the Security Council which can require enforcement by coercive action against an aggressor.

The Charter makes it abundantly clear, however, that the General Assembly is also to be concerned with international peace and security. Article 14 authorizes the General Assembly to "recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the purposes and principles of the United Nations". The word "measures implies some kind of action, and the only limitation which Article 14 imposes on the General Assembly is the restriction found in Article 12, namely, that the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so. Thus while it is the Security Council which, exclusively, may order coercive action, the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations; they are not merely hortatory.

. . . .

The argument supporting a limitation on the budgetary authority of the General Assembly with respect to the maintenance of international peace and security relies especially on the reference to "action" in the last sentence of Article 11, paragraph 2. This paragraph reads [in part] as follows:

[63] In the *Certain Expenses* case, see extract below.

> "The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it . . . and, except as provided in Article 12, may make recommendations with regard to any such question to the State or States concerned or to the Security Council, or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion."

The Court considers that the kind of action referred to in Article 11, paragraph 2, is coercive or enforcement action. This paragraph, which applies not merely to general questions relating to peace and security, but also to specific cases brought before the General Assembly by a State under Article 35, in its first sentence empowers the General Assembly, by means of recommendations to States or to the Security Council, or to both, to organize peacekeeping operations, at the request, or with the consent, of the States concerned. This power of the General Assembly is a special power which in no way derogates from its general powers under Article 10 or Article 14, except as limited by the last sentence of Article 11, paragraph 2. This last sentence says that when "action" is necessary the General Assembly shall refer the question to the Security Council. The word "action" must mean such action as is solely within the province of the Security Council. It cannot refer to recommendations which the Security Council might make, as for instance under Article 38, because the General Assembly under Article 11 has a comparable power. The "action" which is solely within the province of the Security Council is that which is indicated by the title of Chapter VII of the Charter, namely "Action with respect to threats to the peace, breaches of the peace, and acts of aggression". If the word "action" in Article 11, paragraph 2, were interpreted to mean that the General Assembly could make recommendations only of a general character affecting peace and security in the abstract, and not in relation to specific cases, the paragraph would not have provided that the General Assembly may make recommendations on questions brought before it by States or by the Security Council. Accordingly, the last sentence of Article 11, paragraph 2, has no application where the necessary action is not enforcement action.

The practice of the Organization throughout its history bears out the foregoing elucidation of the term "action" in the last sentence of Article 11, paragraph 2. Whether the General Assembly proceeds under Article 11 or under Article 14, the implementation of its recommendations for setting up commissions or other bodies involves organizational activity—action—in connection with the maintenance of international peace and security. Such implementation is a normal feature of the functioning of the United Nations. Such committees, commissions or other bodies or individuals, constitute, in some cases, subsidiary organs established under the authority of Article 22 of the Charter. The functions of the General Assembly for which it may establish such subsidiary organs include, for example, investigation, observation and supervision, but the way in which such subsidiary organs are utilized depends on the consent of the State or States concerned.

The Court accordingly finds that the argument which seeks, by reference to Article 11, paragraph 2, to limit the budgetary authority of the General Assembly in respect of the maintenance of international peace and security, is unfounded.

Frustration with the deadlock in the Security Council over the situation in Syria in 2011-12 led the General Assembly taking the step of passing a resolution 'deploring the failure of the Security Council' to take effective action in Syria, with a large majority (133 Member States) voting in favour of the resolution.

GENERAL ASSEMBLY RESOLUTION 66/253B,

U.N. GAOR, 66th Sess., 3 August 2012

The General Assembly,

Expressing its deep concern at the lack of progress towards implementation of the six-point plan, and deploring the failure of the Security Council to agree on measures to ensure the compliance of Syrian authorities with its decisions,

. . .

4. *Demands* that all parties immediately and visibly implement Security Council resolutions 2042 (2012) and 2043 (2012) in order to achieve a cessation of armed violence in all its forms by all parties, thereby creating an atmosphere . . .

8. *Stresses again* the importance of ensuring accountability and the need to end impunity and hold to account those responsible for human rights violations, including those violations that may amount to crimes against humanity;

9. *Encourages* the Security Council to consider appropriate measures in this regard;

* * *

Questions for Discussion

1. What is the delimitation of powers between the Security Council and the General Assembly in relation to the maintenance or restoration of peace and security?

2. What are the arguments for and against the legality of the Uniting for Peace Resolution? Are some parts of the Resolution lawful while others are not?

3. How important is the debate about the legal status of this Resolution? What military action has the General Assembly been involved in? Does the legality of this action depend upon the Uniting for Peace Resolution? In what

other ways, if any, may the General Assembly hold the Security Council accountable for its action or inaction on international peace and security?

* * *

UN Peacekeeping

Peacekeeping has become one of the most successful contributions of the UN to conflict management. These forces now carry out wide-ranging functions that include the following: observance of cease-fires, truces, and armistices; frontier control; interpositionary functions; security functions in zones placed under UN control; assistance in the restoration of law and order (including in some cases a function similar to policing); and plebiscite duties.

The main principles that govern UN peacekeeping today were established at its inception: the requirement of consent from both the host state (the state on whose territory the force is to be stationed) and the states contributing forces; and the limitation that peacekeepers should not use military force in a proactive manner.

The UN Charter does not, however, provide in express terms for peacekeeping operations, and this led to the questioning in the early years of its constitutional basis.

Constitutional Basis

ROSALYN HIGGINS, PROBLEMS AND PROCESS:
INTERNATIONAL LAW AND HOW WE USE IT
174-76 (1994)

The West looked for alternatives to allow the United Nations some role in keeping the peace. It was argued that the failure of the Security Council to agree on the establishment of a UN Force meant only that the peace could therefore not be enforced; nor could UN members be *compelled* to offer troops. But if, the argument went, the peace could be kept not by enforcing it, but by policing a territory at the *request* of a state; and if other UN members *volunteered* for such a police force, then such action could be taken. While it was not what the Charter had envisaged, it was not prohibited by it, and it was directed towards a Charter objective—peace. This was the view of the United States and the West generally, and was supported by those relatively few Third World countries who were already UN members.

It was not, however, the view of the Soviet Union and its allies. They took the view that the Charter had very specific provisions for the use of force by the United Nations, exemplified by the agreements on UN forces to be agreed under Article 43, and it followed that, if those procedures could not be acted upon, alternatives *not* provided for in the Charter were necessarily unlawful. There were two further points of contention. The Charter envisaged, through the control given to the intended Military Staff Committee (i.e. the Chiefs of Staff of the Big

Five), that an effective veto would obtain over the operations of a UN force. But a police force operating outside the envisaged Charter plans would avoid control by veto, and indeed would be under the day-to-day control of the Secretary-General. Was this not to move beyond what the founding instrument had intended?

Further, it was contended by supporters of the idea of UN peacekeeping that a UN police force could be ordered not only by the Security Council, but even by the General Assembly, should the operation of the veto in the Security Council make it impossible for that body to act. These ideas were acceptable to the West, which could at that time with ease command a majority in voting in UN bodies, and which had confidence in the Secretary-General. They were totally unacceptable to the Soviet Union, which, finding itself in a constant minority, needed to rely on the veto whenever possible.

It was against this background that the first UN peace-keeping force was established in 1956. After the UK-French-Israeli intervention in Suez, and the use by the United Kingdom and France of the veto to prevent a condemnatory resolution in the Security Council, Secretary-General Dag Hammarskjold proposed the establishment of a UN peace-keeping force by the General Assembly. This force would oversee a cease-fire and would monitor the withdrawal of the British, French, and Israeli forces from Egyptian territory. The invading forces and Egypt all welcomed the idea of such a force. The Soviet Union, while obviously wishing the United Kingdom and France out of Suez, was opposed to the idea of the UN Emergency Force (UNEF) for the reasons of principle that I have outlined. When the costs of UNEF were distributed among UN members, in the same proportions and way as other UN expenses, the Soviet Union and its allies refused to pay, as did France. From the outset the financing of UN peace-keeping was insecure and problematic.

The peace-keeping activity itself was successful, however. UNEF did indeed oversee the withdrawal of all foreign troops, and kept the peace in that area from 1956 to 1967. It was followed by the successful UN Observer Group in the Lebanon in 1958 (UNOGIL), and many other UN peace-keeping operations around the world—in the Congo, Indian subcontinent, Cyprus, and elsewhere. The idea of peace-keeping has taken deep roots.

ROSALYN HIGGINS, 1 UNITED NATIONS PEACEKEEPING 1946-1967,

262-63, 265 (1969)

The question of whether the General Assembly could legally establish a peacekeeping force was essentially interwoven with the question of the "consent" of the host state; for the majority view has been that enforcement action against a state may well be reserved to the Security Council, but UNEF represents "policing" action which, far from being carried out against a state, depends upon the specific consent of the host government. This, it has been contended, is perfectly appropriate for the Assembly to authorize. Nor, it should be added, was UNEF established in order to compel a withdrawal by the British, French, and Israeli forces.

In his second and final report on the plan for setting up of an Emergency Force, the Secretary-General touched on some of these constitutional issues:

QUESTIONS OF PRINCIPLE

. . . .

9. Functioning, as it would, on the basis of a decision reached under the terms of the [General Assembly] resolution 337(V) "Uniting for Peace", the Force, if established, would be limited in its operations to the extent that consent of the parties concerned is required under generally recognized international law. While the General Assembly is enabled to *establish* the Force with the consent of those parties which contribute units to the Force, it could not request the Force to be *stationed* or *operate* on the territory of a given country without the consent of the Government of that country. This does not exclude the possibility that the Security Council could use such a Force within the wider margins provided under Chapter VII of the United Nations Charter. I would not for the present consider it necessary to elaborate this point further, since no use of the Force under Chapter VII, with the rights in relation to Member States that this would entail, has been envisaged.

. . . .

30. By mid-September 1957, UNEF will have completed ten months of duty, during which it has been called upon to undertake important responsibilities involving a considerable variety of tasks. The Command for the Force, established by General Assembly resolution 1000 (ES-I), was to "secure and supervise the cessation of hostilities in accordance with all the terms of General Assembly resolution 997 (ES-I)." The General Assembly, in resolution 1001 (ES-I), approved guiding principles for the organization and functioning of the Force, as set forth in the Secretary-General's report of 6 November 1956 (A/3302), whereby, as must follow from its status under the Charter, the Force could not be stationed or operate on a country's territory without that country's consent.

31. The Force, which has an international character as a subsidiary organ of the General Assembly, as affirmed in its regulations, was not established to undertake enforcement actions. While UNEF has a military organization, it does not use all normal military methods in achieving the objectives defined for it by the General Assembly. . . .

ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT

264-65 (1994)

[T]he International Court of Justice had in an advisory opinion in 1962 [the *Expenses* case] to address certain legal problems concerning the financing of UN peace-keeping. Dealing there with the issue of whether the expenses of the UNEF in Suez and of the UN operation in the Congo were to be considered as expenses of the organization within the meaning of Article 17(2) of the Charter, the Court felt constrained to address first the question of the lawfulness of those actions (though that was not in terms the question it was asked). It emphasized that each of the actions was lawful because it was *not* an action under Article 42 but rather a peace-keeping action, in which the UN military role was at the request of the host state, and not directed against the host state. The Court examined the effect of the failure to conclude agreements under Article 43 of the Charter.

But, as it had found UNEF and ONUC not to be enforcement actions under Article 42, it only asked itself the narrower question of whether *peace-keeping* action was permissible in the absence of Article 43 agreements. Answering that in the affirmative, the Court [in the *Expenses* case] said:

> It cannot be said that the Charter has left the Security Council impotent in the face of an emergency situation when agreements under Article 43 have not been concluded . . . it must lie within the power of the Security Council to police a situation even though it does not resort to enforcement action against a State . . . .

D.W. BOWETT, UNITED NATIONS FORCES

415 (1964)

It may . . . be deduced [based on Chapter VII] that legally the Security Council may recommend or decide upon action to safeguard international peace, even on the territory of a State which is not responsible for the breach or threat thereto, much less for an aggression, and that where the Council *decides* that such action is necessary the State must accept the presence of a United Nations Force.

However, in advancing this view it has to be conceded that an alternative view is possible, namely that the requirement of consent can only be eliminated when the action taken is in the nature of an enforcement action and that *all* peace-keeping operations, whether under Chapter VI or Chapter VII of the Charter, and whether based on a decision or recommendation of the Security Council, require the consent of the territorial State. It has further to be conceded that practice to date under Chapter VII has always been in situations in which such consent existed. Moreover, the International Court of Justice placed great stress on the existence of consent to the presence of ONUC when dealing with the *Expenses* Case, and this has been the approach consistently adopted by the Secretary-General. This, then, is weighty evidence which cannot be ignored. However, the fact remains that the Charter does not specifically require consent from the territorial State to any operations undertaken pursuant to a *decision* under Chapter VII, and Article 25 may on one construction be regarded as a giving of consent in advance by all Members.

See also the extract from the *Expenses* case in the section on the General Assembly, above.

* * *

Comments

1. UN peacekeeping forces are UN subsidiary organs. Moreover, all UN peacekeeping forces have been established under the authority of the Security Council, with the exception of UNSF and UNEF I that were established by the General Assembly.

2. UN peacekeeping does not, at least in theory, involve the use of military "enforcement action" against a state. This does not, however, preclude the characterization of the establishment and operation of peacekeeping forces as being an exercise by the Council of its Chapter VII powers, since not every measure under Chapter VII has to involve military enforcement action. As the International Court stated when discussing the legality of UN peacekeeping operations in the *Expenses* case: "Articles of Chapter VII of the Charter speak of 'situations' as well as disputes, and it must lie within the power of the Security Council to police a situation [i.e., conduct peace-keeping] even though it does not resort to enforcement action against a State."[64] The characterization of UN peacekeeping as a Chapter VII measure is also supported, importantly, by the subsequent practice of the Security Council. When establishing peacekeeping forces, the Council has very often made an Article 39 determination, the prerequisite for the use of its Chapter VII powers. Examples of this practice include the following: Resolutions 425 (1978)[65] and 426 (1978)[66] in the case of the UN Force in Lebanon (UNIFIL); Resolutions 743 (1992),[67] 947 (1994),[68] and 982 (1995)[69] in the case of the UN Protection Force in the former Yugoslavia (UNPROFOR); Resolution 990 (1995)[70] in the case of the UN Confidence Restoration Operation in Croatia (UNCRO); and Resolution 998 (1995)[71] in the case of the Rapid Reaction Force (part of UNPROFOR). See further below the discussion on 'militarized peacekeeping'.

3. The requirement of consent from both host state and troop contributing states is well-established as a fundamental principle of UN peacekeeping. More difficult, however, has been the question of a state withdrawing its consent to a UN peacekeeping operation already in place. In May 1967 the Egyptian Government asked for UNEF contingents to be pulled back from their locations. Secretary-General U Thant treated this effectively as a request for withdrawal, and decided that UNEF could not remain in Egypt without its consent. From a legal perspective, this decision is difficult to justify, since the Secretary-General ordered UNEF's withdrawal from Egypt without obtaining the authorization of the General Assembly, the political organ that had established the Force. In the report of the Secretary-General on the matter, it was contended that the Secretary-General had undertaken all reasonable consultation with the Advisory Committee on UNEF and the troop-contributing states that could have been expected under the circumstances. The report points to the failure of the Advisory Committee to convene the General Assembly and the practical difficulties in so doing as a large part of the justification for the unilateral decision that was taken. However, these considerations are of a pragmatic nature and do not address the relevant issue: whether the Secretary-General had the competence to terminate a UN peacekeeping mission.[72] 4. According to the UN, as of September 1, 2002, there have been fifty-five peacekeeping operations since 1948, although it would seem that this figure includes all observer and other peacekeeping related missions.[73] UNEF I was the first UN peacekeeping force. It has been followed by a large number of other operations which include, for example: UN Security Force in West

[64] Certain Expenses of the United Nations, 1962 I.C.J. 151, at 167 (July 20).
[65] S.C. Res. 425, 33d Sess., 2075th mtg., U.N. Doc. S/RES/425 (1978).
[66] S.C. Res. 426, 33d Sess., 2075th mtg., U.N. Doc. S/RES/426 (1978).
[67] S.C. Res. 743, 47th Sess., 3055th mtg., U.N. Doc. S/RES/743 (1992).
[68] S.C. Res. 947, 49th Sess., 3434th mtg., U.N. Doc. S/RES/947 (1994).
[69] S.C. Res. 982, 50th Sess., 3512th mtg., U.N. Doc. S/RES/982 (1995).
[70] S.C. Res. 990, 50th Sess., 3527th mtg., U.N. Doc. S/RES/990 (1995).
[71] S.C. Res. 998, 50th Sess., 3543d mtg., U.N. Doc. S/RES/998 (1995).
[72] *See* ROSALYN HIGGINS, 1 UNITED NATIONS PEACEKEEPING 1946-1967, 366-67 (1969); and the section Secretary-General's Role in the Conduct of UN Peacekeeping Operations, below.
[73] Factual details on these and all UN peacekeeping operations are available at http://www.un.org/Depts/dpko/dpko/ops.htm.

Irian (UNSF) 1962; [74] UN Operation in the Congo (ONUC) 1960;[75] UN Force in Cyprus (UNFICYP) 1964;[76] UNEF II (1973); UNIFIL (1978); UN Mission in the Central African Republic (MINURCA) 1998; UN Interim Administration Mission in Kosovo (UNMIK) 1999; UN Mission in Ethiopia and Eritrea (UNMEE) 2000; and UN Mission of Support in East Timor (UNMISET) 2002

5. UN military observers predated UNEF I. These observers are generally not armed and operate with the consent of the parties to report on the status of the conflict and in some cases compliance with Security Council demands (for example, UN Iraq-Kuwait Observation Mission (UNIKOM) 1991) and cease-fire obligations (for example, UN Observer Mission in Georgia (UNOMIG)), as well as in some cases the monitoring of the operations of a multinational force that is exercising delegated Chapter VII powers (for example, the UN Mission in Haiti (UNMIH) was given such a monitoring role by Council Resolution 940 (1994)[77]). The first military observer group was attached to the UN Special Committee on the Balkans (UNSCOB) in 1947.[78] Large numbers of UN military observer groups have since been used by the Council. Examples include: UN Treaty Supervision Organization, 1949;[79] UN Observer Group in Lebanon (UNOGIL) 1958;[80] UN Yemen Observation Mission (UNYOM) 1963;[81] UN Military Observer Group in India and Pakistan (UNMOGIP) 1949;[82] UN India-Pakistan Observation Mission (UNIPOM) 1965;[83] UN Angola Verification Mission (UNAVEM I) 1988; and UNCRO 1994.

6. The constitutional issues relating to UN peacekeeping and the political considerations that underlay them led to a financial crisis when the former Soviet Union and France refused to pay for UNEF I and ONUC on the basis that these operations were incorrectly funded by the General Assembly from the UN's general budget. This led to an Advisory Opinion on the matter being requested from the International Court of Justice in the *Expenses* case. As set out in the extract above, the International Court clearly dismissed the arguments of France and the former Soviet Union thereby affirming both the constitutionality of UN peacekeeping and the General Assembly's budgetary assessment.

Since that time peacekeeping finances have been raised essentially on a voluntary basis (though UNIFIL's mandate in 1978 made reference to the collective obligation to finance peacekeeping). This has proved extremely unsatisfactory. A small group of states have essentially borne the financial burden of UN peacekeeping, and successive Secretaries-General have had to operate within intolerable financial constraints and endless uncertainty.[84]

These difficulties as well as proposals for reform of the financing of peacekeeping have been highlighted in the more general UN proposals for reform of peace operations that are set out below.

7. UN forces consist of national contingents under the command of their national officers. Military discipline is a matter for these national officers, and for the military law of the troop-contributing state. The duty of these

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[74] ROSALYN HIGGINS, 2 UNITED NATIONS PEACEKEEPING 93-149 (1970).
[75] ROSALYN HIGGINS, 3 UNITED NATIONS PEACEKEEPING 1-470 (1980).
[76] ROSALYN HIGGINS, 4 UNITED NATIONS PEACEKEEPING 77-419 (1981).
[77] S.C. Res. 940, 49th Sess., 3413th mtg., U.N. Doc. S/RES/940 (1994).
[78] *See* ROSALYN HIGGINS, 4 UNITED NATIONS PEACEKEEPING 5-73 (1981).
[79] ROSALYN HIGGINS, 1 UNITED NATIONS PEACEKEEPING 5-216 (1969).
[80] *Id.* at 535-603.
[81] *Id.* at 609-70.
[82] ROSALYN HIGGINS, 2 UNITED NATIONS PEACEKEEPING 315-417 (1970).
[83] ROSALYN HIGGINS, 3 UNITED NATIONS PEACEKEEPING 421-69 (1980).
[84] For details of how a number of peacekeeping operations have in fact been financed, see Chapter XI in each of Volumes 1-4 of ROSALYN HIGGINS, UNITED NATIONS PEACEKEEPING.

national officers is, however, to the UN and not to their national governments. These officers are responsible to the UN Force Commander, who is appointed by the Secretary-General.

8. It is standard procedure for an agreement to be entered into between the UN and the host state. This Status of Forces Agreement (which is virtually identical for all UN forces) provides for the international status of the UN force and its general immunity from local jurisdiction. It seeks to provide an appropriate balance between the international mandate given to the force and the sovereignty of the host state.

* * *

Questions for Discussion

1. What is the legal basis for UN peacekeeping operations conducted under the authority of (i) the Security Council; and (ii) the General Assembly?

2. Why has nearly all UN peacekeeping emanated from the Security Council? Why have the potential powers of the Assembly, identified by the International Court in the *Expenses* case, been so little used?

3. To what extent can UN peacekeeping forces be deployed in a state that has not consented to their deployment? If a state has consented to the deployment of UN peacekeeping forces, but then subsequently withdraws its consent, must the force be withdrawn as a matter of law?

4. To what extent can UN peacekeeping forces be used to carry out military enforcement action?

* * *

The Secretary-General’s Role in the Conduct of UN Peacekeeping Operations

It has to date been the consistent practice of the Council to delegate to the Secretary-General the power to determine the composition of, and exercise operational (day to day) command and control over, UN peacekeeping forces.

The Security Council, however, retains overall control over, and responsibility for, UN peacekeeping forces. The Council will often require the Secretary-General to submit periodic reports on the basis of which the Council can choose to exercise its overall control over a particular force by issuing instructions to the Secretary-General.

As the legal basis for, and mandate of, a UN peacekeeping force are rooted in a resolution of either the Council or the Assembly, it follows that the Secretary General does not possess the competence unilaterally to terminate a UN peacekeeping force—a subsidiary organ under the overall authority and control of another UN principal organ—or change its mandate unless these powers have been expressly delegated to him or her by the relevant principal organ.

The UN Secretary-General will also conclude on behalf of the UN both an agreement setting out the terms and conditions under which troops are contributed by member states to a particular peacekeeping force (Status of Forces Agreement) and an agreement between the UN and the state or states on whose territory the forces are to be stationed (Host-State Agreement).

Dan Sarooshi, *The Role of the UN Secretary-General in UN Peace-Keeping Operations*,

20 AUSTRALIAN Y.B. INT'L L. 279, 289-94 (1999)

(b) The exercise of command and control powers over UN peace-keeping forces

. . . .

As early as 1956, in the case of UNEF, the Secretary-General exercised strategic and political control over a UN peace-keeping force. Similarly, in the second case of UN peace-keeping, in the Congo, the Secretary-General exercised authority and control over ONUC, the Secretary-General having made it clear that command and control over ONUC lay exclusively in the hands of the UN and not the host State or any contributing or other Member State. In the case of the Congo, the consequences of the delegation of command and control powers by the Council to the Secretary-General had two major consequences. First, it led to intense criticism of the role of the Secretary-General, and even led some States, notably the former Union of Soviet Socialist Republics (USSR), to call for the replacing of a single Secretary-General by a "troika", and a separate proposal to transfer operational control from the Secretary-General to a "unified African command" directly responsible to the Security Council. Both these proposals failed to gain significant support among UN Members. Second, and more serious, was the consequence that States that contributed troops to the peace-keeping force attempted to force changes in the policies of the Secretary-General. Such attempts to force changes in policy are not of course objectionable when conducted within the confines of a deliberative political organ of the UN such as the Council. However once States have contributed troops to a peace-keeping force, the attempt by States to pressure the Secretary-General either by threatening to cease to execute the orders of the UN Command, or to impose unilaterally the conditions on which their national contingents can be used, are all of dubious legality. As explained above, if a State holds a differing interpretation of the mandate of a peace-keeping force from that of the Secretary-General the appropriate forum to raise the issue is the Council. A State cannot instruct its national commander who is part of a UN peace-keeping force to disobey the orders of the Force Commander, the Secretary-General's delegate.

The absence of a legal requirement for the Secretary-General to take into consideration the views of Member States in the way that he or she exercises the command and control powers which he or she has been delegated is subject to the practical consideration that UN peace-keeping forces are consent based. Accordingly, the Secretary-General in practice will have to take into consideration, to some extent at least, the views of States that have contributed troops to such a force. This political requirement saw, in the cases of UNEF and ONUC, the establishment of "Advisory Committees" constituted of States that had contributed troops to the peace-keeping forces. . . . The use of Advisory Committees remains a desirable institutional innovation that the Secretary-General or Security Council should re-institute. This would help prevent the case where commanders of a national contingent receive instructions from their national command structure that are contrary to those issued by the UN Force Commander.

The Secretary-General exercises command and control over peace-keeping forces in practice by use of a Special Representative and a Force Commander. These UN Officials, as part of the UN Secretariat, are under the authority and control of the Secretary-General. The mandate of the Special Representative is usually formulated by the Secretary-General or, in exceptional cases, by the Council itself. The usual practice is that the Council simply endorses the plan put before it by the Secretary-General.

The Special Representative exercises political control over UN peace-keeping troops in the field; while the Force Commander translates the political directives emanating from the Secretary-General and the Special Representative into military commands that are given to the national commanders of each national contingent. In every peace-keeping operation the Secretary-General delegates powers—either through the Special Representative or directly—to the Force Commander. The *Summary Study* by Secretary-General Hammarskjold in respect of UNEF states that the Force Commander is the principal agent of the Secretary-General within the area of operations. These broad sub-delegations of power by the Secretary-General to a Special Representative and a Force Commander are not *prima facie* unlawful. The reason for this derives from the status of Special Representatives and Force Commanders as part of the UN Secretariat, under the authority and control of the Secretary-General. As a result the Council, through the Secretary-General, can exercise unchallengeable authority and control over the decisions of the delegate. This position is important since, as noted above, the Council can delegate a broad power of discretion only if it retains the right to change decisions, or a policy approach to decision-making, by its delegate. . . .

The delegation by the Secretary-General of powers of command and control over peace-keeping forces to a Special Representative and Force Commander is a necessary and important way in which the effective exercise of delegated Chapter VII powers can be carried out. This is borne out by the extensive practice of the Secretary-General in making such delegations. An important recent element of this practice has been the delegation to a Special Representative and Force Commander of the competence to order the use of force in defence of UN peace-keepers.

(c) The competence to order the use of force in defence of UN peace-keepers

It is generally accepted that the use of force by UN peace-keepers in self-defence is lawful. It is not proposed to enter into discussion here of the outer limits of this right. The present discussion is limited to examining the role of the Secretary-General when a power to use force in defence of UN peace-keepers has been given by the Council to entities external to the UN. The Council has delegated such a power to other entities in respect of the UN Protection Force (UNPROFOR) in Bosnia. The Council in resolution 836 provided:

> that . . . Member States, acting nationally or through regional organizations or arrangements, may take, under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR, all necessary measures, through the use of air power, in and around the safe areas in . . . Bosnia . . . to support UNPROFOR in the performance of its mandate . . . .

> The resolution makes clear in other provisions that Member States and regional organizations can use air power to respond to attacks on both UNPROFOR and the UN declared "safe-areas" in Bosnia. What is not so clear, however, from the terms of the resolution is who should decide when force should be used. The Secretary-General took this decision upon himself as, in effect, the representative of the UN. After noting in a report to the Council that NATO had confirmed its willingness to offer "protective air power in the case of attack against UNPROFOR in the performance of its overall mandate, if it so requests", the Secretary-General further noted: "It is of course understood that the first decision to initiate the use of air resources in this context will be taken by the Secretary-General in consultation with the members of the Security Council." This report, and thus the Secretary-General's interpretation, was expressly adopted by the Council in resolution 844 . . . the adoption by the Council of a Secretary-General's report where a specific interpretation is made of a delegated mandate is taken by the Secretary-General to represent an affirmation by the Council of that interpretation. In any case the consent of the Secretary-General is required by law. The position of the Secretary-General as Commander-in-Chief of UN peace-keeping forces means that any use of force in defence of UN peace-keepers, here "close air support", would require either his or her consent or that of his or her Special Representative or Force Commander who may have been delegated this power of decision-making. The practice of the UN and NATO in the former Yugoslavia has been in accordance with this legal position. . . .

* * *

Questions for Discussion

1. To what extent is it the Secretary-General who exercises command and control over UN peacekeeping forces?

2. To what extent is the UN Secretary-General able to exercise command and control powers over: (i) a force carrying out military action in defense of UN peacekeepers; and (ii) a UN peacekeeping force that is carrying out military enforcement action?

3. Can the Secretary-General withdraw unilaterally a UN peacekeeping force from a state where the host-state terminates its consent to the deployment of the force?

* * *

Future Mandates, Reform of UN Peacekeeping Forces and 'Militarized Peacekeeping'

Classic UN peacekeeping as set out above still continues, but it has also had to evolve in order to be effective in a number of difficult situations. UN peacekeeping forces have been deployed in situations of civil war where consent has not existed on the ground, and this has led to circumstances where peacekeeping forces have had to use force. The UN under the leadership of then Secretary-General Kofi Annan sought to incorporate lessons learned from these cases into its ongoing peacekeeping operations.

Kofi Annan, *Peace-Keeping in Situations of Civil War*,

26 N.Y.U. J. INT'L L. & POL. 623, 623-28 (1994)

Bosnia, Cambodia, Somalia: these three names alone will vividly recall the extensive relationship that has rapidly developed between peace-keeping and civil war. . . .

. . . .

Operations addressing situations of civil war account for nine of our seventeen current missions. Of the last eight missions deployed, seven are devoted to it. With one exception, all of these missions have come into being within the last five years.

Civil war situations are responsible for an exponential increase in our growth: where only two peace-keeping missions were deployed in our first five years, nineteen have been mounted in the last five.

Finally, the definition of peace-keeping itself has been forced to expand with the rest of the parameters. For more than forty of our forty-five years, peace-keeping was broadly understood to involve the use of multinational military personnel, armed or unarmed, under international command and with the consent of the parties, to help control and resolve conflict between hostile states and between hostile communities within a state.

In the last five years, however, hardly a single one of these parameters has remained untouched. The need for consent of the parties was overridden by humanitarian concerns. Volatile situations in the field made it necessary to expand the definitions of both self-defense and justified use of force. Even the range and nature of international command is being hotly debated.

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Two missions offer clear and crucial lessons concerning the use of peace-keeping in situations of civil war: Somalia and Bosnia.

Somalia

Looking back over our involvement in Somalia, three points strike us immediately. First, the instability inherent in civil war makes a purely humanitarian response both dangerous and impractical. Second, all three forms of intervention open to the international community—humanitarian, security and political—must be closely and carefully coordinated if our presence is to be effective. Third, unified and unquestioned command and control is imperative if the mission is to function effectively and casualties are to be minimized.

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Three elements have been inextricably linked in pursuing UNOSOM's [the UN peace-keeping operation in Somalia] goals—humanitarian, political, and security. Handled well, they can ensure the mission's progress; handled poorly, they constitute only a vicious circle. If security is present, humanitarian aid reaches those who need it, political instability is diminished, and restoration can move forward. If security is absent, humanitarian aid is blocked, suffering is accentuated, violence increases, political stability is weakened, and the situation is exacerbated.

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The need for a secure environment remains an essential element in civil war peace-keeping operations. It makes the difference between a vicious circle and a constructive continuum. We must never again allow security to predominate to the point where we are seen as going to war with the people we have gone to help. But, on the other hand, we must never again subordinate security to the point where the aid we send serves only to enrich the sources of suffering and suppression. We must ensure that we are part of the solution and not part of the problem. . . .

The stability sought in UNOSOM's mandate, however, is not dependent solely upon security, but also upon the degree of unity and cohesion within the mission itself. As long as military plans must be rearranged to accommodate national interests and egos, as long as the Force Commander does not have full authority to assign tasks or missions to subordinate commanders, and as long as home governments need to be consulted before field contingents move, the strength of the mission and the security of the people will suffer.

The most painful of all the lessons that civil war peace-keeping has taught us is that Chapter VII operations cannot be undertaken half-heartedly. A clear sense of objectives, parameters, and risks is essential at the commencement of the mission, not only because of the direction it gives, but also because of the sustained support which it provides at moments of crisis. Had legislatures and publics had to face the fact that a peace enforcement operation in Somalia might involve armed intervention and lead to casualties on both sides, they might well have been far more reluctant to intervene. But had the urgency of the appeal overridden that reluctance, it is likely that casualties, when they did occur, would not have caused the kind of exodus we are now witnessing.

Bosnia

Bosnia presents an interesting contrast to Somalia; the United Nations, having been perceived as too aggressive in the latter, is seen as too passive in the former.

Bosnia, too, raises crucial questions. What are the limits of the peace-keeper's role? How can we identify the best moment to intervene? Is a treatment that is symptomatic rather than curative plausible and justifiable in the eyes of the international community?

Peace-keepers in Bosnia have guaranteed the delivery of humanitarian aid, helped in the evacuation of displaced persons, and remained present in towns under siege to deter attacks upon them. They have not attempted to enforce peace. They have not used violence in repelling those who have interfered with their ability to carry out their mandate, except that they have, when feasible, fired back when fired upon. They have not taken up arms against those who have broken one cease-fire after another, one truce after the next. They have not been mandated to do so.

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Peace can be neither coerced nor enforced. There must be a genuine desire for peace among the warring parties. Whether out of conviction or out of exhaustion, they must want peace. No system can achieve it when leaders use negotiation not to end conflict but merely to prolong it to advantage. And no agreement, however well-intentioned, can guarantee peace while those who sign it see greater benefit in war.

Rosalyn Higgins, *Peace and Security. Achievements and Failures*

6 EUR. J. INT'L L. 445, 449-50, 455-60 (1995)

III. The Third Phase: Developments since the End of the Cold War

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. . . The Secretary-General issued his *Agenda for Peace*, a bold initiative in which specific proposals were made for new UN roles and new UN methods. In the peace and security area a remarkable new typology was offered—without ever in terms rejecting the old categories of 'enforcement' and 'peace-keeping'. The talk was now of peace-making, peace-building, peace enforcement, humanitarian assistance. In all of these, apparently, there was to be peace-keeping support. By implication, peace-keeping was thus no longer to be confined to overseeing ordered and agreed cease-fires. It could—apparently in the absence of the classic essential precondition of its deployment (along with consent), deliver humanitarian aid, provide for the introduction of democratic elections, facilitate the monitoring of human rights. UN peace-keeping had in fact already been deployed in support of some of these tasks—but with the prior agreement of the parties both for a cessation of hostilities and the achievement of the agreed outcome. The role of UNTAG in Namibia and ONUVEN in Nicaragua at the end of the decade met with a substantial success. The former operated on the basis of South Africa's consent to the Namibia peace plan; the latter on the basis of the Guatemala Agreements. But *Agenda for Peace* essentially removed the condition of prior agreements to be firmly in place.

Agenda for Peace further spoke of the need for military support of such operations, opening the way to an enforcement element *within* peace-keeping operations—thus setting aside the long-standing distinction between enforcement and peace-keeping. . . .

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IV. The Next Phase: A Call for Stocktaking

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While it is, in my view, lamentable that States have failed to seize the opportunity offered by the end of the Cold War so far as effective UN enforcement is concerned, the lessons that the UN itself seems to draw from the Bosnia debacle (and indeed from the very different lessons of the failure in Somalia) are disturbing. Instead of deciding by reference to objective criteria the category of UN action required, the contemporary thinking seems to be resolutely against differentiation, with events being allowed to dictate the character of the operation, which might change from moment to moment, or have within it totally irreconcilable elements:

> [T]he principles and practices which had evolved in the Cold War period suddenly seemed needlessly self-limiting. Within and outside the United Nations, there is now increasing support for 'peace-keeping with teeth'. When lightly armed peace-keepers were made to look helpless in Somalia and Bosnia, member states and public opinion supported more muscular action. . . . Today's conflicts in Somalia and Bosnia have fundamentally redrawn the parameters. It is no longer enough to implement agreements or separate antagonists; the international community now wants the United Nations to demarcate boundaries, control and eliminate heavy weapons, quell anarchy, and guarantee the delivery of humanitarian aid in war zones. These are clearly the tasks that call for 'teeth' and 'muscle', in addition to the less tangible qualities that we have sought in the past. In other words, there are increasing demands that the United Nations now enforce the peace, as originally envisaged in the Charter. (Kofi Annan in NATO REVIEW 4 (October 1993).)

Several observations may be made, beyond noting the tendency to conflate all experience, to reject all differentiation. Any demands that 'the United Nations now enforce the peace, as originally envisaged in the Charter', will certainly *not* be met by treating situations requiring enforcement as requiring 'muscular peace-keeping'. That is *not* what the Charter envisaged. What the Bosnia experience shows is that when States put peace-keepers in place—including those with the prime mandate to deliver humanitarian aid—then all realistic prospect of 'enforcing the peace' has gone. The enforcement of the peace of the victims of violation of Article 2(4) had already effectively been put aside by this selection of method of UN operation.

And insofar as resolutions make some later provision for protection, such as the establishing of safe havens, enforcement of these provisions also becomes intertwined with the protection of the UN personnel. Thus Resolution 836 authorized UNPROFOR '*acting in self defence*, to take the necessary measures, including the use of force, to reply to bombardments against the safe areas by any of the parties'. (Italics added). The safety of the peace-keepers becomes in effect the sole consideration. And, even then, fear of reprisals against national contingents serving in the UN operation becomes the dominant factor, and there is no realistic 'enforcement' of any sort—even when the NATO capability and the Security Council authority to act has been put in place. In February 1994 the killing of 68 civilians in Sarajevo by mortar fire led to an unprecedented response. The UNPROFOR Commander threatened to call in NATO airstrikes against Serb gun positions in the hills surrounding Sarajevo unless the guns were removed from range or placed under UN control. The ultimatum was complied with. In early April 1994 NATO executed two air support missions directed against Bosnian Serbs in the Goradze area. The request was made by UNPROFOR to protect UN military observers and liaison officers on the ground, but it also contributed to ending the Serb shelling of the city. But the UN has not followed up on that experience of the importance of credible enforcement. In later comparable circumstances of flagrant violations of the safe areas, ultimata for compliance have been indicated and ignored, with no military consequence and at the end of 1994 the siege of Bihac (another 'safe area') and associated shelling and loss of life went unpunished. The violations were instead responded to by improved UN offers on the diplomatic front.

The failure to protect the designated safe areas publicly revealed the profound disagreements within the expanded UN peace-keeping system. NATO had put in place the capacity to respond to UN requests for air strikes. But when these were asked for by the Nordic battalion in Tuzla, they received neither the support of the UN Commander in Bosnia, Sir Michael Rose, nor of Mr. Akashi, the Secretary-General's Special Representative. The UN policy was that such strikes could take place only when an attack was in progress. It hardly needs to be said that, with the sort of NATO-UN arrangement in existence, that condition will hardly if ever be met. The policy is an invitation for frequent attacks on the UN of short duration. NATO publicly expressed its disquiet at UN prevarication.

In May 1995 a negotiated truce ended, with the seizure by the Bosnian Serbs of heavy weapons that had been handed over to the UN and the use of such weapons in the Sarajevo 'safe area'. NATO airstrikes were once again ordered. The Bosnian Serbs responded by seizing 370 UN peace-keepers as hostages. This crisis was eventually resolved by diplomacy. The UN insisted that it had made no promises in order to secure the release of the hostages. But no overt promises need to be made—no one can doubt that the UN cannot in the future envisage even very occasional airstrikes while its peacekeepers are in place.

And the lesson still has not been learned. The lesson is that mixed mandate actions are doomed to failure. Rather than acknowledge this, the response was an attempt by the United Kingdom, France and the Netherlands to establish a UN Rapid Reaction Force, whose function—never entirely clear—was said to be to protect UNPROFOR from a repeat of the humiliations of May 1995 and perhaps also to be part of a NATO operation for the withdrawal of UNPROFOR, should that later be decided upon. But its role was clearly not in any direct sense to protect civilians in the various 'safe areas' or to ensure the fulfilment of UNPROFOR's mandate generally. Indeed, the Secretary-General's Special Representative was at pains to assure the Bosnian Serbs that the new UN unit would present no threat to them. If NATO's involvement already represented a mixed mandate in the former Yugoslavia, then the proposed Rapid Reaction Force constituted a further mixing of the mandate. . . .

. . . Some tentative conclusions may be advanced. . . .

6. There is little advantage, and considerable disadvantage, in setting classic peace-keeping on one side in favour of the new 'mixed function peace-keeping' enumerated in *Agenda for Peace* and since. Again, this has served to sow the seeds of uncertainty and confusion, while placing in jeopardy—perhaps irredeemably—all that had so painstakingly been built up over the years in the UN peace-keeping operations.

7. No peace-keeping force should be put in the field without prior agreement on a cease-fire and a realistic political prospect of the seriousness of that undertaking. The key peace-keeping function should remain the security of the peace on the ground. Only then should ancillary functions be added. Humanitarian assistance, electoral observation, human rights monitoring should be additional to the securing of peace, and not *in lieu* of it. Never again should the UN engage in a form of peace-keeping which endeavours to provide food while allowing the slaughter to continue.

Due to criticism of the mandates and management of UN peacekeeping operations from academic, government, and other sources, the UN Department of Peacekeeping Operations established in 1995 its Lessons Learned Unit. The Unit is charged with drawing lessons from past peacekeeping efforts in order to help in the planning of future operations and the conduct of ongoing ones. An important report produced by this Unit concerned the UN Operation in Somalia (UNOSOM I & II), an operation that was given a military enforcement mandate.

THE COMPREHENSIVE REPORT ON LESSONS LEARNED FROM UNITED NATIONS OPERATION IN SOMALIA (UNOSOM),

April 1992-March 1995, *available at* http://www.un.org/depts/dpko/lessons/UNOSOM.pdf

Part II: Application of Lessons Learned from the United Nations Operation in Somalia General Framework

79. Shortly after the establishment of UNOSOM in 1992, the United Nations office responsible for peacekeeping operations was reorganized and renamed the Department of Peacekeeping Operations (DPKO). Its objective was to improve the capacity to plan, conduct and manage peacekeeping operations. The reorganization brought the political, operational, logistics, civil police, demining, training, personnel and administrative aspects of peacekeeping operations under one umbrella.

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Lesson 1. There is need for a clear and practicable mandate.

81. An effective peacekeeping operation commences with a clearly defined and practicable mandate. This lesson has been well learned in the United Nations, resulting in some successes in subsequent peacekeeping operations as well as some tragedies. In Haiti, this lesson was partially applied. The United Nations did not get involved in the operation there until it was made very clear what exactly it was required to do. This contributed in part to the effective manner in which the operation has been conducted.

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83. The formulation of a clear and practicable mandate for a peacekeeping operation remains the responsibility of the Security Council. The Secretariat regularly provides the Council with information on situations under consideration. In addition, the Council has increased the number of its own fact-finding missions to areas of conflict to assist it in determining its action.

84. These missions have enabled the Council to determine new mandates or adjust existing ones. For example, it was after the Council mission to Somalia in October 1994 that the members determined that the UNOSOM mandate must be terminated. . . .

Lesson 2: Chapter VII and Chapter VI operations should not co-exist, and transition from Chapter VII to Chapter VI must be smooth.

85. It has been acknowledged that the United Nations is not yet capable of launching a large-scale enforcement action and that whenever in the foreseeable future it is necessary to launch such an operation under Chapter VII, it should be done by either a single State, as occurred in Rwanda in France's Operation Turquoise, or by a coalition of States, as was done early in Haiti.

86. There is wide agreement that it was a mistake in Somalia for a Chapter VII operation (UNITAF) to co-exist with a Chapter VI operation (UNOSOM I). This lesson was well applied in Haiti, where a multinational force with Chapter VII powers was phased out before a Chapter VI operation, UNMIH [UN Mission in Haiti], was deployed.

87. It was evident from Haiti that a peacekeeping operation should only follow a peace enforcement operation when conditions are secure, and that it should be granted robust rules of engagement to ensure that no party takes advantage of the change-over. Transition from peace enforcement to peacekeeping should be closely coordinated with the Secretariat to avoid the chaotic situations which developed in the transition from UNITAF to UNOSOM II. This seems to have been done in the transition from the multinational force to UNMIH.

Lesson 3: Peacekeeping forces should not enter a conflict area if there is no political will among the parties towards reconciliation.

88. Since a peacekeeping force has no enforcement powers, it should only be deployed when the parties to a conflict have consented, as occurred with the deployment of the United Nations Operation in Mozambique (ONUMOZ) and the United Nations Angola Verification Mission (UNAVEM III). . . .

89. When an operation is established in a failed state, it may often be necessary to undertake civic activities and assist in repairing or developing political and economic infrastructures. This may require, as was done in Mozambique, funding for political parties to make them viable and encourage them to move from the use of arms to reconciliation.

Lesson 4: Mandates must be matched with the means to implement them.

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Lesson 6: Operation in the field should be based on a fully developed, integrated structure headed by the SRSG [Special Representative of the UN Secretary-General].

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Lesson 9: Command and control must be unified, and channel of command and directives clear.

116. The Secretary-General has addressed this issue in his Supplement to "An Agenda for Peace". The need for a unified command has become more apparent in the light of the UNOSOM experience. Effective command and control in peacekeeping operations demands that parallel command structures should be vigorously discouraged and that the normal unified command and control system should always apply. In order to discourage troop contingents from seeking direction from their home Governments, rules of engagement should be made as clear as possible and all operations should be within the Security Council mandate that establishes an operation.

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Lesson 13: There must be clear guidelines for disarmament and demobilization, and these activities must be carried out with the agreement of the parties.

On March 7, 2000, Secretary-General Annan convened a high-level panel to undertake a comprehensive review of UN peace and security activities and to present a set of recommendations to assist the UN in conducting such activities in the future. A key part of the Report of the Panel (known as the 'Brahimi Report') concerned proposals for reform of UN peacekeeping operations..

Report of the Panel on United Nations Peace Operations,

55th Sess., Provisional Agenda Item 87,
S/2000/809, at viii-xiii, 2-3, 10-12, 16, 20, U.N. Doc. A/55/305 (2000)

Executive Summary

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Implications for peacekeeping: the need for robust doctrine and realistic mandates

The Panel concurs that consent of the local parties, impartiality and the use of force only in self-defence should remain the bedrock principles of peacekeeping. Experience shows, however, that in the context of intra-State/transnational conflicts, consent may be manipulated in many ways. Impartiality for United Nations operations must therefore mean adherence to the principles of the Charter: where one party to a peace agreement clearly and incontrovertibly is violating its terms, continued equal treatment of all parties by the United Nations can in the best case result in ineffectiveness and in the worst may amount to complicity with evil. No failure did more to damage the standing and credibility of United Nations peacekeeping in the 1990s than its reluctance to distinguish victim from aggressor.

In the past, the United Nations has often found itself unable to respond effectively to such challenges. It is a fundamental premise of the present report, however, that it must be able to do so. Once deployed, United Nations peacekeepers must be able to carry out their mandate professionally and successfully. This means that United Nations military units must be capable of defending themselves, other mission components and the mission's mandate. Rules of engagement should be sufficiently robust and not force United Nations contingents to cede the initiative to their attackers.

This means, in turn, that the Secretariat must not apply best-case planning assumptions to situations where the local actors have historically exhibited worst-case behaviour. It means that mandates should specify an operation's authority to use force. It means bigger forces, better equipped and more costly but able to be a credible deterrent. In particular, United Nations forces for complex operations should be afforded the field intelligence and other capabilities needed to mount an effective defence against violent challengers.

Moreover, United Nations peacekeepers—troops or police—who witness violence against civilians should be presumed to be authorized to stop it, within their means, in support of basic United Nations principles. However, operations given a broad and explicit mandate for civilian protection must be given the specific resources needed to carry out that mandate.

. . . .

Member States that do commit formed military units to an operation should be invited to consult with the members of the Security Council during mandate formulation; such advice might usefully be institutionalized via the establishment of ad hoc subsidiary organs of the Council, as provided for in Article 29 of the Charter. Troop contributors should also be invited to attend Secretariat briefings of the Security Council pertaining to crises that affect the safety and security of mission personnel or to a change or reinterpretation of the mandate regarding the use of force.

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Enhance Headquarters capacity to plan and support peace operations

The Panel recommends that Headquarters support for peacekeeping be treated as a core activity of the United Nations, and as such the majority of its resource requirements should be funded through the regular budget of the Organization. DPKO and other offices that plan and support peacekeeping are currently primarily funded by the Support Account, which is renewed each year and funds only temporary posts. That approach to funding and staff seems to confuse the temporary nature of specific operations with the evident permanence of peacekeeping and other peace operations activities as core functions of the United Nations, which is obviously an untenable state of affairs.

The total cost of DPKO and related Headquarters support offices for peacekeeping does not exceed $50 million per annum, or roughly 2 per cent of total peacekeeping costs. Additional resources for those offices are urgently needed to ensure that more than $2 billion spent on peacekeeping in 2001 are well spent. The Panel therefore recommends that the Secretary-General submit a proposal to the General Assembly outlining the Organization's requirements in full.

Following the Brahimi report, UN Member States and the UN Secretariat continued major reform efforts, including through the 'Capstone Doctrine' which set out the most important principles and guidelines for UN peacekeepers in the field (see below); Peace operations 2010 on the reform strategy of the Department of Peacekeeping Operations (DPKO); the establishment of the Peacebuilding Commission (mentioned above); and the Report of the High-level Panel on Threats, Challenges and Change on collective security for the new century.

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Some of the critical operational challenges facing peacekeeping were set out in The New Partnership Agenda: Charting a New Horizon for UN Peacekeeping (2009).

The New Partnership Agenda: Charting a New Horizon for UN Peacekeeping (2009), pp. 5-6

The challenges facing United Nations peacekeeping are spread across five important areas of activity:

SUPPORTING A CEASEFIRE AGREEMENT BETWEEN TWO OR MORE PARTIES: Long-standing monitoring and observation missions in Cyprus, the Golan, Jammu and Kashmir, and Western Sahara continue to help deter violence. These missions are limited in size, mandate and cost. But in some cases their presence may encourage Member States to divert attention away from finding a political solution. The UN mission in Lebanon illustrates how resource-intensive and challenging such operations can be in a volatile environment.

SUPPORTING A PEACE PROCESS AND NATIONAL AUTHORITIES AFTER CIVIL CONFLICT: In some countries, UN peacekeepers face distinct challenges in helping to lay the foundations for sustainable peace. A troubled transition in the Democratic Republic of the Congo and a difficult peace process between northern and southern Sudan are straining these two large missions. These missions are struggling to strengthen political processes, which depend on regional and international support. Deterring and containing violence and protecting civilians are critical and demanding parts of their task that are complicated by both gaps in capabilities and differences of view on what robust peacekeeping can and should be expected to accomplish in the face of ongoing conflict. The large and remote territories in which these missions operate increase their difficulty as well as cost.

EXTENDING INITIAL SECURITY AND STABILITY GAINS INTO LONGER-TERM PEACEBUILDING: Many UN peacekeeping missions also serve as early peacebuilders. In Haiti, Liberia and Timor-Leste, UN peacekeepers have succeeded in establishing basic security and supporting political processes. The conditions for sustainable peacebuilding are in place. National governments, supported by the UN, international financial institutions and other partners must lead in setting strategies to deliver tangible peace dividends and economic development. UN peacekeepers must improve their ability to contribute to peacebuilding and, where called upon, to coordinate a broader effort. Peacekeeping transition and exit strategies depend on countries providing for their own security, and the UN will need to find effective ways to support this goal through better rule of law and security sector reform (SSR) assistance.

PROVIDING SECURITY AND PROTECTION IN RESPONCE TO CONFLICT: In Chad and Darfur, Sudan, UN peacekeepers are trying to minimize the effects of ongoing conflict. Their activities are focused on protecting civilians and providing security for humanitarian efforts. The willingness of major parties to these conflicts to accept and cooperate with peacekeepers is critical. The scale and remoteness of the territory make these two missions among the most expensive and difficult UN operations ever. In the absence of an agreed political solution, mitigating the conflict and preventing mission failure are the only viable strategies. These missions will likely continue to require major investment of capacity and resources for years to come.

SUPPORTING OTHER PEACE AND SECURITY ACTORS, INCLUDING THROUGH CAPACITY-BUILDING: In recent years, UN peacekeepers have been tasked to contribute to the capacity of other partners to respond to conflicts. The United Nations provides technical and capacity building support to African Union (AU) peacekeeping, which includes support to AU deployments in Darfur, Sudan and in Somalia. DPKO offers military, police, judicial, prison, disarmament, demobilization and reintegration (DDR), SSR and mine action expertise to different parts of the UN system, in particular special political missions. The 2007 creation of the Department of Field Support was designed to enhance logistics, personnel and communications support to a variety of UN field presences. UN peacekeeping is currently not configured to consistently deliver comprehensive support to others. Without viable financial arrangements and technical frameworks, its ability to fulfill a capacity-building and support role will remain limited.

LOOKING AHEAD

Taken together, the challenges described above have stretched UN peacekeeping to its limits. Yet demands could well continue to increase. Volatile commodity prices and financial markets, transnational organized crime and environmental changes may lead to political and security instability where societies lack the resources to cope with such shocks. Countries emerging from conflict are

> particularly vulnerable. The risk that these threats will be met with limited or partial responses is real. The global economic crisis is forcing many governments and organizations to scale back conflict management, humanitarian and development assistance. Military and police capabilities globally are in greater demand. Stretched bilateral and regional capacities increase the likelihood of UN peacekeeping being called upon to act as an instrument of last resort, yet with fewer resources and diminished support.

A further important challenge is the militarization of peacekeeping since 1999, which was the predictable development of 'muscular peacekeeping' referred to above.

James Sloan, *The Militarisation of Peacekeeping in the Twenty-First Century* (Hart, 2011), pp. .3-5 and 282-95 (footnotes omitted)

> The term 'militarised peacekeeping' is used … to refer to a peacekeeping operation that possesses enforcement characteristics – that is to say, is authorised, explicitly or implicitly, under Chapter VII and authorised to use force beyond self-defence. Depending on the circumstances, the consent of the host state may not be a legal prerequisite to the establishment of a militarised peacekeeping operation or to the assignment of certain tasks to it; similarly, impartiality may not be a legal requirement for some or all of its tasks. . . .
>
> [T]he arguments in favour of the UN reverting to militarised peacekeeping… appear to have been animated primarily by thinking of a more wishful nature. It was considered to be so essential that peacekeepers protect those within their sphere of influence who were vulnerable in the face of a breach of security that peacekeeping mandates simply *had* to provide for this - whether or not the Organization had yet evolved such that it had the capacity to do so…. [S]ome peacekeeping operations were given the dual task of securing the restoration of peace and security in a country as well as maintaining it. Thus peacekeeping operations were, in addition to their other duties, charged with saving lives and preventing future genocide. But can such militarised peacekeeping operations work? . . .
>
> [The] UN… is fundamentally ill-suited to conducting militarised peacekeeping operations. Although some problems certainly manifest themselves in peacekeeping operations where force is limited to self-defence, where peacekeeping operations are militarised the existing problems are generally exacerbated and new problems emerge. The problems encountered by militarised peacekeeping operations are attributable to a wide variety of factors….: (1) difficulties of establishment; (2) management difficulties; (3) problems related to the need for host state consent or cooperation; and (4) problems relating to expectations. . . . .

> [T]he meris of militarised peacekeeping operations need urgently to be reconsidered. Based on their performance to date, we see that such operations are under-funded, ill-equipped and poorly managed. And there is little to indicate that this is likely to change. We also see raised expectations associated with such operations are almost inevitably dashed, at considerable cost to the reputation of peacekeeping generally and the UN as a whole.
>
> The return to a more traditional kind of peacekeeping must not be seen as an abandonment of civilians. In fact, a move away from militarised peacekeeping should lead to an improvement in the treatment of civilians, as militarised peacekeeping operations will no longer impede the establishment of quasi-enforcement operations or, where established, provide contributing states with an excuse to withdraw the quasi-enforcement operation before the security situation is well and truly restored. It must be recognised that quasi-enforcement operations are the only effective way to stop harm to civilians or restore security …. To militarise a peacekeeping operation is to ask too much of it.

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Questions for Discussion

1. To what extent, if at all, do you consider that "muscular peacekeeping" by the UN is a necessary and positive development? To what extent, if at all, has the militarization of peacekeeping gone too far?
2. To what extent has the UN incorporated the lessons learned from the cases of Somalia and Bosnia into the reform proposals for UN peacekeeping?
3. Given the wide variety of challenges facing UN peacekeeping, what other reforms would you suggest to UN peacekeeping operations and why?

* * *

The UN Secretary-General

The Secretary-General is the chief administrative officer of the UN and is given certain specific powers and functions under the Charter. The original grant of powers in the sphere of peace and security was limited, but over the years successive Secretaries-General have been instrumental in developing this all-important aspect of their work. The assumption of such powers and the occasion and manner in which they have been exercised has sometimes met with hostility, especially during the Cold War from the former Soviet Union and its allies.

The power given to the Secretary-General under Article 99 of the Charter to bring matters to the attention of the Security Council was a power not enjoyed by the Secretary-General of the League of Nations. It modified considerably the classical conception of the Secretary-General as being primarily concerned with administrative matters. The Secretary-General rarely invokes Article 99 in express terms, but he does draw the attention of the Security Council to deteriorating situations that may threaten international peace and security, usually through letters to the President of the Council. For example, in 2011 Secretary-General Ban Ki-moon noted that the situation in Libya had seriously deteriorated with the disproportionate use of force by the Libyan authorities, while informing the President of the Council of his decision to appoint a Special Envoy who would offer his good offices and explore how best to resolve the crisis in Libya.[85]

ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT

170-72 (1994)

The Secretary-General may himself, under Article 99 of the Charter, bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.. . . .

The Security Council can investigate any dispute, and over the years some use has been made of fact-finding missions. The neutral verification of the facts is not only often necessary where the facts are in dispute, but is itself a means of containing and defusing a situation. Such missions will not be able to go into the territory without the consent of the party concerned, but it will often suit a party to show that it has nothing to hide by allowing in such a fact-finding team. The early constitutional controversy as to whether the Secretary-General may himself establish a fact-finding mission, or whether this can be done only upon authorization by the Security Council, seems to be resolved in favour of the Secretary-General so to act. The success of the fact-finding missions has been variable, depending upon the co-operation of the state concerned and the quality of the team.

A wide range of dispute-settlement possibilities is envisaged in Article 33 beyond enquiry as to the facts: negotiation, mediation, conciliation, arbitration, judicial settlement, and resort to regional agencies. Sometimes assistance in the pursuit of these measures will be suggested by the Security Council itself; sometimes assistance in respect of these functions is offered by the Secretary-General, as part of his mandate. Occasionally the Secretary-General himself will put proposed solutions to the Security Council. More usually, the Security Council devises the proposals (and the tendency for initiatives to flow from the Security Council rather than, even informally, the Secretariat has become more pronounced since the improvement of East-West relations). But either way, it is often the Secretary-General who is required to make the proposals for peaceful settlement operative. This interplay is well evidenced in resolutions that have asked, in broad terms that leave maximum flexibility, the Secretary-General to use his good offices—for example, in the Netherlands-Indonesia dispute; in the enforcement of the Arab-Israeli armistice agreements; in supervising a cease-fire in Kashmir; in sending a representative to East Timor; in the Falklands dispute; the list is almost endless. The Secretary-General routinely assists in the holding of negotiations—sometimes in private, sometimes in public. He has facilitated and played an active role in direct negotiations, in a situation generally under the scrutiny of the Security

[85] UN Doc. S/2011/126.

> Council: his role in the talks between the Turkish Cypriot and Greek Cypriot authorities is a case in point. He can equally assist in indirect negotiations, where one or more of the parties is unwilling to sit down with the other. The Arab-Israeli armistice negotiations in 1949 afford an example. The Security Council has also asked the Secretary-General to provide conciliators and mediators. In the Dutch-Indonesian disputes of 1949-1954, and in the early years of the Cyprus situation, a conciliator and mediator were respectively much relied on. . . .

* * *

Comments

1. In the exercise of their political functions, Secretaries-General have engaged in negotiation and mediation on countless issues between and within states in order to prevent or mediate conflicts: this independent political role is known as the "good offices" of the Secretary-General. Examples are Hammarskjold's negotiations in 1955 with China that effected the release of U.S. airmen imprisoned by Beijing since the Korean War; U Thant's persuasion of the parties to the Yemeni civil war in 1963 to request the posting of UN observers in a demilitarized zone, and during the fighting between India and Pakistan in 1965 he took the lead both in starting negotiations and, when a truce was achieved, in creating a UN observer group to monitor it; Perez de Cuellar's successful mediation between Iran and Iraq that led to the end of their eight year war in 1988; and Boutros-Ghali's efforts in ensuring the implementation in Mozambique of the agreement to end the drawn out civil-war between government and rebel forces. The Secretary-General has often, however, not been able to prevent or resolve conflicts or has—for example, in the case of Cyprus—simply been drawn into ensuring that a stalemate situation does not descend into conflict. Former Secretary-General Kofi Annan resigned from his role as Joint Special Envoy of the UN and the League of Arab States on Syria on 2 August 2012, stating that a 'clear lack of unity' in the Security Council had 'fundamentally changed the circumstances for the effective exercise of my role…It is impossible for me or anyone to compel the Syrian government, and also the opposition, to take the steps to bring about the political process'.

2. The Secretary-General has also been involved with UN peacekeeping operations. This practice has been analyzed above in the section on UN Peacekeeping.

3. The ability of the Secretary-General to act effectively in the political sphere has depended in significant measure upon his perceived impartiality. Article 100 of the Charter seeks to ensure the impartiality of the Secretary-General and his or her staff by obliging member states not to attempt to influence the Secretary-General or his or her staff. Members of the Secretariat are also obligated not to "seek or receive instructions from any government" or any "other authority."[86]

* * *

Questions for Discussion

[86] *See* Theodor Meron, *Status and Independence of the International Civil Servant*, 47 RECUEIL DES COURS 291-384. For issues relating to the appointment of the Secretary-General, see Marjorie Whiteman, 13 DIG. INT'L L. 788-95 (1968).

1. Is the Charter description (Article 7) of the Secretariat as one of the "principal organs" of the UN justified? Which entity embodies and represents, for operational purposes, the UN Secretariat?

2. Whose interest in any situation does the Secretary-General represent? To what extent does this interest differ from that of UN member states?

3. What powers and functions can the Secretary-General exercise in relation to the maintenance of peace and security? To what extent is the Secretary-General independent in the exercise of these powers and functions from UN member states?

* * *

The Role of Regional Arrangements

The end of the Cold War has seen a Security Council that is willing to assign the roles of peace-enforcement and peacekeeping to regional arrangements. This has seen regional arrangements carry out these roles on behalf of the international community in different regions of the world. The African Union has been active in carrying out military operations in Burundi (IAMB), Sudan (AMIS, later UNAMID), Somalia (AMISOM) and the Comoros Islands (AMISEC) as well as in its efforts to deal with Chad/the Central African Republic, Côte d'Ivoire, Djibouti/Eritrea, Guinea-Bissau, Liberia, Libya, and South Sudan, including Abyei. The South African Development Community (SADC), the Central African Economic and Monetary Community (CAEMC) and the Economic Community of West African States (ECOWAS) have contributed to peacekeeping in Cote d'Ivoire, Sierra Leone, Liberia and Mali. NATO has had missions in Bosnia and Herzegovina (SFOR), Kosovo (KFOR) and Afghanistan (ISAF). The European Union has sent thousands of troops from its Member States to Bosnia and Herzegovina (EUFOR), the Former Yugoslav Republic of Macedonia (CONCORDIA), Chad and the Central African Republic (EUFOR), and the Democratic Republic of the Congo (Operation Artemis in 2003 and EUFOR in 2006).

Regional arrangements have also taken action to maintain peace on their own initiative in the Americas, Africa, and Europe. An examination of this practice by regional arrangements is carried out below. The legal parameters of action by regional arrangements to maintain peace are governed by their relationship with the Security Council, a relationship that is delineated in Chapter VIII of the Charter.

The UN—Regional Arrangement Relationship

Oscar Schachter, *Authorized Uses of Force by the United Nations and Regional Organizations,*

in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 65, 86-88 (Lori Damrosch & David Scheffer eds., 1991)

The U.N. Charter recognizes in its Chapter VIII that regional arrangements and agencies are appropriate means for maintaining peace and security, provided that their activities are consistent with the purposes and principles of the Charter. Indeed, Article 52 of the Charter requires states to make every effort to achieve peaceful settlement of "local disputes" through regional arrangements or agencies before referring such disputes to the U.N. Security Council. The idea that disputes and threats to the peace involving states within a region should preferably be dealt with primarily by regional bodies has been an early and persistent influence. At San Francisco the Security Council was perceived as a forum of last resort when states were unable to resolve conflicts between them through the peaceful means listed in Chapter VI or through regional instrumentalities.

. . . .

The Charter in Article 53 expressly directs the Security Council to utilize the regional arrangements or agencies covered by Chapter VIII for enforcement action where appropriate. The regional bodies are indirectly authorized to undertake enforcement action inasmuch as Article 53 states that they may not do so without the authorization of the Security Council. Thus the failure of the Council to grant permission for enforcement action would bar such action. A permanent member could therefore prevent enforcement action by a regional organization. Cases have come before the Security Council involving decisions of the Organization of American States (O.A.S.) to apply diplomatic and economic measures that were in the nature of sanctions as envisaged in Article 41 of the U.N. Charter. In these cases, the Council did not decide that those measures were covered by Article 53. The majority of members maintained that such non-forcible coercive measures were within the competence of individual states. Since states were free to sever trade or diplomatic relations, they could do so by concerted action under the aegis of a regional organization. The reasoning is not wholly compelling since concerted action by a regional body to impose sanctions of the kind contemplated in Chapter VII (Article 41) would appear to be within the meaning of enforcement action in Article 53.

. . . .

Apart from collective self-defense, regional organizations may institute peacekeeping operations that do not involve coercive measures against a state. This has been done in a number of cases. However, it has not always been agreed that the regional peacekeeping operation has actually received the consent of the territorial sovereign. Questions of this kind have come up where it was uncertain who, if anyone, may legitimately grant such consent in the absence of effective and recognized governmental authority. This emerged as a problem when U.S. forces together with troops from several Caribbean countries intervened in Grenada, claiming *inter alia* that they had been authorized to do so by a regional body (the Organization of Eastern Caribbean States) to bring peace and order to a country in a condition of anarchy. The General Assembly condemned the intervention as a violation of the Charter. However, there was no international criticism of a regional peacekeeping force of West African states that sought to bring an end to a bloody internal conflict in Liberia in 1990. This was clearly not an enforcement action or collective defense, nor was there an invitation from a government enjoying international recognition. A case of this kind would suggest an interpretation of peacekeeping by regional bodies that allows for a collective military intervention to help end an internal conflict when a government has been deposed or no longer has effective authority.

It is probable that peacekeeping actions and perhaps limited enforcement will be employed by regional organizations more frequently in the future. They are likely to be used to assist in monitoring and border patrol and perhaps to help to provide order to a country in internal conflict or near anarchy.

The use by the Security Council of regional arrangements to maintain or restore peace and security was promoted soon after the end of the Cold War by Secretary-General Boutros-Ghali.

An Agenda for Peace, Preventative Diplomacy, Peacemaking and Peace-keeping,

Report of the Secretary-General pursuant to the
statement adopted by the Summit Meeting of the Security Council on
Jan. 31, 1992, U.N. Doc. A/47/277-S/24111, June 17, 1992

61. The Charter deliberately provides no precise definition of regional arrangements and agencies, thus allowing useful flexibility for undertakings by a group of States to deal with a matter appropriate for regional action which also could contribute to the maintenance of international peace and security. . . . .

62. . . . In Africa, three different regional groups—the Organization of African Unity, the League of Arab States and the Organization of the Islamic Conference—joined efforts with the United Nations regarding Somalia. In the Asian context, the Association of South-East Asian Nations and individual States from several regions were brought together with the parties to the Cambodian conflict at an international conference in Paris, to work with the United Nations. For El Salvador, a unique arrangement—"The Friends of the Secretary-General"—contributed to agreements reached through the mediation of the Secretary-General. The end of the war in Nicaragua involved a highly complex effort which was initiated by leaders of the region and conducted by individual States, groups of States and the Organization of American States. Efforts undertaken by the European Community and its member States, with the support of States participating in the Conference on Security and Cooperation in Europe, have been of central importance in dealing with the crisis in the Balkans and neighbouring areas.

63. In the past, regional arrangements often were created because of the absence of a universal system for collective security; thus their activities could on occasion work at cross-purposes with the sense of solidarity required for the effectiveness of the world Organization. But in this new era of opportunity, regional arrangements or agencies can render great service if their activities are undertaken in a manner consistent with the Purposes and Principles of the Charter, and if their relationship with the United Nations, and particularly the Security Council, is governed by Chapter VIII.

64. . . . Under the Charter, the Security Council has and will continue to have primary responsibility for maintaining international peace and security, but regional action as a matter of decentralization, delegation and cooperation with United Nations efforts could not only lighten the burden of the Council but also contribute to a deeper sense of participation, consensus and democratization in international affairs.

> 65. Regional arrangements and agencies have not in recent decades been considered in this light, even when originally designed in part for a role in maintaining or restoring peace within their regions of the world. Today a new sense exists that they have contributions to make.. . .

Increasing cooperation between the UN and regional arrangements meant that the Secretary-General had enough material to provide a thematic summary of this evolving relationship three years later in his 1995 *Supplement to An Agenda for Peace* as well as being able to state the principles that should in practice govern the relationship between the UN and regional organizations when the latter are engaged in peacemaking and peacekeeping.

Supplement to an Agenda for Peace,

Report of the Secretary-General on the Work of the Organization,
U.N. Doc. A/50/60-S/1995/1, Jan. 3, 1995

> 86. Cooperation between the United Nations and regional organizations takes a number of forms. At least five can be identified: (a) Consultation: this has been well-established for some time. In some cases it is governed by formal agreements and reports are made to the General Assembly; in other cases it is less formal. The purpose is to exchange views on conflicts that both the United Nations and the regional organization may be trying to solve; (b) Diplomatic support: the regional organization participates in the peacemaking activities of the United Nations and supports them by providing diplomatic initiatives . . . and/or by providing technical input, as the Organization for Security and Cooperation in Europe (OSCE) does, for instance, on constitutional issues relating to Abkhazia. In the same way, the United Nations can support the regional organization in its efforts (as it does for OSCE over Nagorny Karabakh); (c) Operational support: the most developed example is the provision by NATO of air power to support the United Nations Protection Force (UNPROFOR) in the former Yugoslavia. For its part, the United Nations can provide technical advice to regional organizations that undertake peace-keeping operations of their own; (d) Co-deployment: United Nations field missions have been deployed in conjunction with the Economic Community of West African States (ECOWAS) in Liberia and with the Commonwealth of Independent States (CIS) in Georgia. If those experiments succeed, they may herald a new division of labour between the United Nations and regional organizations, under which the regional organization carries the main burden but a small United Nations operation supports it and verifies that it is functioning in a manner consistent with positions adopted by the Security Council. The political, operational and financial aspects of the arrangement give rise to questions of some delicacy. Member States may wish at some stage to make an assessment, in the light of experience in Liberia and Georgia, of how this model might be followed in the future; (e) Joint operations: the example is the United Nations Mission in Haiti, the staffing, direction and financing of which are shared between the United Nations and the Organization of American States (OAS). This arrangement has worked, and it too is a possible model for the future that will need careful assessment.

. . . .

88. [The principles that should govern the relationship between the UN and regional organizations when the latter are engaged in peacemaking and peace-keeping] include: . . . (b) The primacy of the United Nations, as set out in the Charter, must be respected. . . . (c) The division of labour must be clearly defined and agreed in order to avoid overlap and institutional rivalry where the United Nations and a regional organization are both working on the same conflict. In such cases it is also particularly important to avoid a multiplicity of mediators; (d) Consistency by members of regional organizations who are also Member States of the United Nations is needed in dealing with a common problem of interest to both organizations, for example, standards for peace-keeping operations.

The 2005 World Summit, the largest gathering of world leaders in history, confirmed in the Outcome Document the desire to deepen the partnership between the UN and regional organizations.

World Summit Outcome Document

U.N. Doc. A/RES/60/1, Oct. 24, 2005, paras. 93 and 170

Recognizing the important contribution to peace and security by regional organizations as provided for under Chapter VIII of the Charter and the importance of forging predictable partnerships and arrangements between the United Nations and regional organizations, and noting in particular, given the special needs of Africa, the importance of a strong African Union:

(a) We support the efforts of the European Union and other regional entities to develop capacities such as for rapid deployment, standby and bridging arrangements;

(b) We support the development and implementation of a ten-year plan for capacity-building with the African Union.

. . .

We support a stronger relationship between the United Nations and regional and subregional organizations, pursuant to Chapter VIII of the Charter, and therefore resolve:

(**a**) To expand consultation and cooperation between the United Nations and regional and subregional organizations through formalized agreements between the respective secretariats and, as appropriate, involvement of regional organizations in the work of the Security Council;

(**b**) To ensure that regional organizations that have a capacity for the prevention of armed conflict or peacekeeping consider the option of placing such capacity in the framework of the United Nations Standby Arrangements System;

(**c**) To strengthen cooperation in the economic, social and cultural fields.

An important way that the Security Council has used regional arrangements to maintain peace has been to delegate Chapter VII powers to these arrangements. This technique can lead to complex issues of *vires* for regional arrangements.

DAN SAROOSHI, THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY

250-53 (1999)

The Security Council by delegating Chapter VII powers to a regional arrangement may be authorising, depending on the terms of the delegated mandate, the use of military enforcement action against a State that is not a member of the regional community. This is consistent with the purpose of a delegation of Chapter VII powers—to maintain or restore peace by achieving the Council's stipulated objectives—and the provisions of Chapter VIII of the Charter. Article 52(1) of the Charter provides that regional arrangements can deal with 'such matters relating to the maintenance of international peace and security as [is] appropriate for regional action.' It is in this context that Article 53(1) goes on to state that the Council 'shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority.' The power of deciding whether it is 'appropriate' for the carrying out of enforcement action in a particular case is left to the Security Council. The Council has been given the primary responsibility for the maintenance of international peace and security. Accordingly, the Council possesses the competence to authorize a regional arrangement to carry out enforcement action against a State that is not a member of the particular regional arrangement if it deems that this is necessary for the maintenance of international peace and security. This competence of the Council to use regional arrangements with an external focus is an important feature of the delegation of powers to such arrangements. This is also of significance to the use of collective self-defence organizations such as NATO for the carrying out of military enforcement action under the auspices of the Council, since NATO has not until now been regarded as a regional arrangement for the purposes of Chapter VIII of the Charter: it has been seen as a collective self-defence pact. A major reason why NATO sought to characterize itself as a collective self-defence alliance was to avoid the obligation in Article 53(1) to seek prior permission from the Security Council before it could act in a particular case.

. . . .

. . . It may not always be legally possible for a regional arrangement under its constituent treaty to take up a delegation of Chapter VII powers. In such cases, a delegation of powers to a regional arrangement does not mean that the organs of that arrangement can exceed the powers they have been given by their constituent instrument. The delegation of Chapter VII powers to a regional arrangement gives the arrangement—and thus its organs—the right to exercise those powers but not in disregard of its constituent treaty. This does not of course preclude the relevant organs of a regional arrangement from deciding, according to the relevant constitutional provisions, that the arrangement will take up the delegation of Chapter VII powers. In any case, for the purposes of our current enquiry, suffice to note that the internal constitutional constraints on a regional arrangement being able to exercise delegated Chapter VII powers does not affect the lawfulness of the delegation or *the exercise of delegated powers* from the perspective of the United Nations Charter.

* * *

Questions for Discussion

1. When can regional arrangements carry out military enforcement action? When should regional arrangements carry out military enforcement action?

2. To what extent is the self-characterization of a regional entity as a Chapter VIII "regional arrangement or agency" important for the entity to be used by the Council to maintain peace and security?

3. Can a regional arrangement take military action against a state that is not a member of the arrangement?

* * *

The following materials address more specifically the role that regional arrangements can and have played in the management of conflict in the Americas (the Organization of American States), Africa (the African Union and the Economic Community of West African States), and Europe (NATO).[87]

The Organization of American States

Charter of the Organization of American States,

Signed at Bogotá, Columbia, Apr. 30, 1948, *amended* by the Protocol of
Buenos Aires 1967, by the Protocol of Cartagena de Indias 1985,
by the Protocol of Washington 1992,
and by the Protocol of Managua 1993

Article 1

The American States establish by this Charter the international organization that they have developed to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence. Within the United Nations, the Organization of American States is a regional agency.

Article 2

[87] In terms of European-based regional arrangements, it should be noted that in addition to NATO the European Union (EU) plans to expand considerably its activities in the peace and security area. The EU has decided to establish the following decision-making political and military bodies to act on its behalf in response to international crises: a Political and Security Committee, a Military Committee, a Military Staff, a Situation Centre, and a Committee for Civilian Crisis Management. The EU has also set itself the objective of being able, by the end of 2003, to deploy within sixty days, and sustain for at least one year, forces of up to 60,000 soldiers. The EU has suggested that such a rapid reaction force could be made available to provide prompt assistance for UN peacekeeping operations.

The Organization of American States, in order to put into practice the principles on which it is founded and to fulfill its regional obligations under the Charter of the United Nations, proclaims the following essential purposes:

a) To strengthen the peace and security of the continent;

b) To promote and consolidate representative democracy, with due respect for the principle of nonintervention;

c) To prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the Member States;

d) To provide for common action on the part of those States in the event of aggression; . . . .

Article 3

The American States reaffirm the following principles:

. . . .

h) An act of aggression against one American State is an act of aggression against all the other American States;

. . . .

Article 9

A Member of the Organization whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to participate in the sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization and the Specialized Conferences as well as in the commissions, working groups and any other bodies established.

John Norton Moore, *The Inter-American System Snarls in Falklands War,*

76 AM. J. INT'L L. 830, 830-31 (1982)

With the end of the fighting in the Falklands war, scholars are beginning to assess the performance of the international community during the conflict. In this assessment, it is important that the actions of the Organization of American States (OAS) not be neglected. The OAS is the oldest and most successful regional organization under the United Nations system. Time and again, as in the Cuban missile crisis, it has acted to strengthen peace and freedom in this hemisphere. The core of its success is a shared belief that force shall not be used to settle disputes in international relations, that nations attacked in violation of this principle should act together in collective defense, and that peoples are entitled to self-determination. Sadly, in its actions in the Falklands-Malvinas war, and particularly in its resolution of May 29, the OAS lost sight of these great principles.

. . . In the first article of the Rio Treaty the parties pledge "not to resort to the threat or use of force in any manner inconsistent with the provisions of the Charter of the United Nations or of this Treaty."

The Argentine invasion of the Falklands-Malvinas is in violation of this principle, regardless of the merits of the underlying Argentine claim. Moreover, the invasion is a use of force in disregard of the expressed preference of the peoples of the islands. International lawyers may be hard pressed to know whether Britain or Argentina would win sovereignty over the islands or how associated self-determination claims would be resolved if the dispute were submitted to an impartial arbiter. But there is no uncertainty on the more important issue of Argentine use of force in violation of the UN Charter and the Rio Treaty. If such use of force is not unequivocally condemned it could become a model for island and border wars all over the world, including many in Latin America. Indeed, in the background of the South Atlantic war are the more serious disputed claims to the Antarctic continent and offshore island groups south of 60° latitude, including a major dispute among Argentina, Britain, and Chile currently frozen by the Antarctic Treaty of 1959.

Against this background the OAS might have sought to reinforce the peace initiatives of the United States or to recommend that both parties accept international arbitration or jurisdiction of a Special Chamber of the International Court of Justice as Canada and the United States have done in the *Gulf of Maine* dispute. At minimum, the Organization could have endorsed Security Council Resolution 502 calling for an immediate Argentine withdrawal, a cease-fire, and negotiations by all parties. Instead, it yielded to regional pressures, one-sidedly condemned "the unjustified and disproportionate armed attack perpetrated by the United Kingdom," and called on states parties to the Rio Treaty to give support to Argentina. It also urged the United States "to refrain" from materially aiding Britain in deference to the principle of "hemispheric solidarity." No mention was made that Argentine withdrawal was required by binding Security Council Resolution 502 or that Britain was acting under Article 51 of the Charter in defense against a prior Argentinian armed attack.

This OAS resolution of May 29 is not important for its legal effect. It is clear under Article 103 of the United Nations Charter and Article 10 of the Rio Treaty that regional actions that are inconsistent either with the obligations of the Charter or with binding action taken by the Security Council in dealing with a dispute are *ultra vires* and without a legal effect. In this case the resolution of May 29 is inconsistent both with the Charter prohibition of the use of force in international relations (and the complementary right of defense against such an illegal attack inserted in Article 51 of the Charter) and with Resolution 502, particularly in its failure to call for an immediate withdrawal of Argentine forces.

But the May 29 resolution is profoundly important for the political implications of its tilt from fundamental Charter principles to a supposed overriding regionalism. Some—indeed the conventional wisdom—may say that actions such as that of May 29 are to be expected when regional solidarity is at stake or even that under the circumstances the OAS was moderate in not putting the United States more on the spot. I believe such arguments do a disservice to the greatness of the inter-American system. It is tragic failure to place enduring

> Charter and regional principles—which are the real hemispheric protection—over vague calls for “hemispheric solidarity.” The solidarity that counts is the willingness of the North and South Americans to stand together for enduring principles of self-determination and avoidance of the use of force as a means of settling international disputes.

The OAS did, however, in the later case of Haiti in 1991 take action, both unilaterally and in conjunction with the Security Council, which was directed at the maintenance of peace and security.[88] Apart from in Haiti, the OAS has not played a significant role in UN peacekeeping in recent years.

African Regional Arrangements

Regional arrangements have been used by states within Africa to try and maintain and restore peace with mixed results. The African Union (AU) in particular has become one of the most important players in regional peacekeeping. In 2013 the African Union Mission in Somalia (AMISOM) was expanded, a joint AU-ECOWAS mission was launched in Mali (AFISMA), operations against the Lord’s Resistance Army under the AU-authorised Regional Task Force (LRA RTF) continued, and the existing MICOPAX mission of the Economic Community of Central African States (ECCAS) in the Central African Republic was re-hatted into a joint AU-ECCAS operation (AFISM-CAR2). 40,641 uniformed and civilian personnel were mandated to serve in AU peace support operations and an additional 30,424 personnel in the joint AU-UN mission in Darfur (UNAMID).[89]

The African Union

The African Union was formerly known as the Organization of African Unity (OAU). The legal basis of this new organization is the Constitutive Act of the African Union, which was adopted by the African Heads of State and Government in Lome, Togo, on July 11, 2000, and which entered into force on May 26, 2001. The inaugural session of the African Union (AU) took place in Durban, South Africa, on July 10, 2002, during which there was adopted a Protocol Relating to the Establishment of the African Union Peace and Security Council (PSC) to replace the former OAU Mechanism for Conflict Prevention, Management and Resolution.

An African Peace and Security Architecture (APSA) has developed since 2002, including the PSC, an African Standby Force, a Continental Early Warning System and a Panel of the Wise. Despite the proliferation of these mechanisms, their record has been patchy: AU-deployed missions have been highly dependent on external donors; harmonization has been a significant problem; serious questions remain over AU capacity; and some of the Regional Economic Communities (RECs) are developing at a quicker pace than the AU.[90] There have also been accusations

[88] See the section on Article 42 of the Charter, above.

[89] Walter Lotze, *Strengthening African Peace Support Operations: Nine Lessons for the Future of the African Standby Force*, Center for International Peace Operations, 2 December 2013.

[90] Alex Vines, ‘A Decade of African Peace and Security Architecture’, (2013) 89 *International Affairs* 89–109.

of sexual exploitation and abuse by African Union Forces in Somalia.[91]

The Economic Community of West African States (ECOWAS)

Christine Gray, *Regional Arrangements and the United Nations Collective Security System*,

in THE CHANGING CONSTITUTION OF THE UNITED NATIONS 91, 101-02, 104, 107-08 (Hazel Fox ed., 1997)

In [Liberia in] December 1989 there was an uprising against President Doe who had been in power since 1980. The uprising was led by Charles Taylor (a former member of the Doe Government who had fled when charged with embezzlement) who came from the Ivory Coast with a small force (the NPFL). . . . By summer 1990 the rebels controlled about 90% of Liberia and were advancing on the capital, Monrovia.

It later became clear that the government had sought UN intervention in June 1990, but the Security Council did not become involved until January 1991. . . . In the absence of UN or US intervention the Economic Community of West African States (ECOWAS) stepped in. This was a hitherto little known organisation (like the OECS before its action in Grenada) of sixteen Member States, concerned with economic matters. In May 1990 ECOWAS established a Mediation Committee on Liberia and in August 1990 that Committee called for a ceasefire and established ECOMOG (ECOWAS Monitoring Group) with troops from Nigeria, Ghana, Gambia, Guinea and Sierra Leone. About 3,000 ECOMOG troops went to Liberia and secured Monrovia against the NPFL. Various attempts were made to reach a peaceful settlement; at one of these conferences it was agreed to establish an interim government under President Sawyer. He [sic] was established in Monrovia in December 1990, and a ceasefire held from December 1990 to August 1992. During this time attempts to produce a peaceful settlement continued and in October 1991 the Yamoussoukro IV agreement was accepted by the Doe forces, the NPFL and Prince Johnson. This provided for a ceasefire, the disarmament of warring parties and the encampment of all forces under the supervision of ECOMOG.

But in 1992 fighting broke out again; the NPFL forces attacked Monrovia and ECOMOG not only drove them off, it went onto the offensive and took territory formerly occupied by the NPFL. In July 1993 a Peace Agreement was agreed at Contonou, Benin; however, this ceasefire broke down in 1994.

The most obvious legal question arising—a question without an obvious answer—is what was the legal basis of the ECOMOG operation? Was the intervention under ECOMOG's own mandate, under the ECOWAS constitution and under the UN Charter and general international law?

First, ECOMOG's mandate from the ECOWAS Standing Mediation Committee was that 'ECOMOG shall assist the Committee in supervising the implementation, and ensuring strict compliance, of the ceasefire by all the parties to the conflict'. In its report to the Security Council on the establishment of ECOMOG, Nigeria said

[91] 'The Power These Men Have Over Us', Human Rights Watch Report, 8 September 2014.

that 'ECOMOG is going to Liberia first and foremost to stop the senseless killing of innocent civilian nationals and foreigners and to help the Liberian people to restore their democratic institutions. The ECOWAS intervention is in no way designed to save one part or punish another'.

> . . . [I]t is striking that not much attention was paid in the Security Council even to the question of the legality of the operation under the UN Charter. States in the Security Council debates simply assumed that ECOWAS had legally established peacekeeping forces. The ECOWAS communiques to the Security Council made no express reference to Chapter VIII but Nigeria spoke of 'ECOMOG as holding the fort for the UN in accordance with Chapter VIII'. The USA and China spoke simply of the peacekeeping forces set up by ECOWAS and appeared to assume their legality.
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> . . . .
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> . . . It [the Security Council] unanimously passed Resolution 788. This recalled Chapter VII, commended ECOWAS for its efforts to restore peace in Liberia, reaffirmed the Yamoussoukro IV Peace Agreement, condemned violations of the ceasefire and condemned the continuing armed attacks against the peacekeeping forces of ECOWAS in Liberia by one of the parties to the conflict. It 'Requests all States to respect the measures established by ECOWAS to bring about a peaceful solution to the conflict in Liberia'. The Security Council clearly assumed the legality of ECOMOG in this resolution and in its later resolutions. The latter show the growing UN involvement in attempts to end the civil war.
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> In Resolution 813, also passed unanimously, the Security Council declared itself ready to consider measures against a party to the conflict if it did not implement the Yamoussoukro IV agreement. It called on the Secretary-General and ECOWAS to arrange a meeting; it was this meeting under the auspices of the UN, ECOWAS and the OAU that eventually produced the July 1993 Peace Agreement.
>
> The Security Council subsequently established UNOMIL, a UN peacekeeping force, to complement ECOMOG. As the Secretary-General said, this was the first time the United Nations undertook a peacekeeping mission in co-operation with a force set up by another organisation. A clear understanding about the role of the different groups was crucial. Accordingly Resolution 866 provided that ECOMOG had the primary responsibility for supervising the implementation of the military provisions of the peace agreement; UNOMIL was to monitor and verify this process. The UN involvement would contribute significantly to the effective implementation of the Peace Agreement and would serve to underline the international community commitment to conflict resolution in Liberia.

The conflict in Liberia was only definitively resolved when elections were held in July 1997 with Charles Taylor emerging as the winner with 75 percent of the popular vote. This result called into question the legitimacy of the earlier enforcement action taken by ECOMOG against Taylor's forces and thereby the UN's relationship with and support for ECOMOG.

ECOWAS faced a major challenge with the situation in Mali following a *coup d'état* on 22 March 2012. The resulting political uncertainty allowed armed radical groups to gain control of northern Mali. In Resolution 2071, the

Security Council accepted the principle of an international force in northern Mali. The UN gave ECOWAS 45 days from 12 October 2012 to draw up a plan for military intervention to retake the north of Mali and Resolution 2085 approved the plan in December 2012.[92]

Security Council Resolution 2085 (2012)

U.N. Doc. S/RES/2085 (2012)

The Security Council,

9. Decides to authorize the deployment of an African-led International Support Mission in Mali (AFISMA) for an initial period of one year, which shall take all necessary measures, in compliance with applicable international humanitarian law and human rights law and in full respect of the sovereignty, territorial integrity and unity of Mali to carry out the following tasks:
(a) To contribute to the rebuilding of the capacity of the Malian Defence and Security Forces, in close coordination with other international partners involved in this process, including the European Union and other Member States;
(b) To support the Malian authorities in recovering the areas in the north of its territory under the control of terrorist, extremist and armed groups and in reducing the threat posed by terrorist organizations, including AQIM, MUJWA and associated extremist groups, while taking appropriate measures to reduce the impact of military action upon the civilian population;
(c) To transition to stabilisation activities to support the Malian authorities in maintaining security and consolidate State authority through appropriate capacities;
(d) To support the Malian authorities in their primary responsibility to protect the population;
(e) To support the Malian authorities to create a secure environment for the civilian-led delivery of humanitarian assistance and the voluntary return of internally displaced persons and refugees, as requested, within its capabilities and in close coordination with humanitarian actors;
(f) To protect its personnel, facilities, premises, equipment and mission and to ensure the security and movement of its personnel;

10. Requests the African Union, in close coordination with ECOWAS, the Secretary-General and other international organizations and bilateral partners involved in the Malian crisis, to report to the Security Council every 60 days on the deployment and activities of AFISMA, including, before the commencement of offensive operations in the north of Mali, on: (i) the progress in the . . . .

11. Emphasizes that the military planning will need to be further refined before the commencement of the

[92] Alex Vines, 'A Decade of African Peace and Security Architecture', (2013) 89 *International Affairs* 89, 105.

offensive operation and requests that the Secretary-General, in close coordination with Mali, ECOWAS, the African Union,
the neighbouring countries of Mali, other countries in the region and all other interested bilateral partners and international organizations, continue to support the planning and the preparations for the deployment of AFISMA, regularly inform the Council of the progress of the process, and requests that the Secretary-General also confirm in advance the Council's satisfaction with the planned military offensive operation. . . .[93]

The North Atlantic Treaty Organization (NATO)

The North Atlantic Treaty,

Apr. 4, 1949, arts. 1, 5-7, 5 U.S.T. 483, 34 U.N.T.S. 243

Article 1

The Parties undertake, as set forth in the Charter of the United Nations, to settle any international dispute in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered, and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations.

. . . .

Article 5

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an armed attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

Article 6

[93] ECOWAS had problems with rapidly deploying in Northern Mali. France launched a military operation (Operation Serval) in Mali following SC Res 2085. French officials declared that the intervention was at the request of the President of Mali and within the context of SC Res 2085.A Security Council Press Statement of 10 January 2013 'reiterate[d] [its] call to Member States to . . . provide assistance to the Malian Defence and Security Forces in order to reduce the threat posed by terrorist organizations and associated groups'. The United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) was established by SC Res of 25 April 2013 to support political processes and carry out security-related tasks.

For the purpose of Article 5, an armed attack on one or more of the Parties is deemed to include an armed attack:

- on the territory of any of the Parties in Europe or North America . . . ;
- on the forces, vessels, or aircraft of any of the Parties, when in or over these territories or any other area in Europe in which occupation forces of any of the Parties were stationed on the date when the Treaty entered into force . . . .

Article 7

This Treaty does not affect, and shall not be interpreted as affecting in any way the rights and obligations under the Charter of the Parties which are members of the United Nations, or the primary responsibility of the Security Council for the maintenance of international peace and security.

With the end of the Cold War, NATO has sought to define a new role for itself. An important part of this new role has been to assist the Security Council in the maintenance or restoration of peace and security.

Rosalyn Higgins, *Peace and Security. Achievements and Failures*,

6 EUR. J. INT'L L. 445, 452-53 (1995)

A major effort has been made to establish a working relationship between the United Nations and NATO, and it has been put into operation in the former Yugoslavia. The legal basis of this collaboration—as with so much that today happens under the new 'flexible pragmatism'—remains somewhat uncertain. Article 52 provides that nothing in the Charter 'precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action', provided such activities are consistent with the purposes and principles of the UN. Article 53 provides that 'The Security Council should, where appropriate, utilize such regional arrangements—or agencies for enforcement action under its authority'. NATO has never been regarded as a regional arrangement or agency, but as a collective self-defence pact. It nonetheless responded to the Security Council request to regional bodies of January 1993 to study ways and means to maintain peace and security within their areas, and ways and means to improve coordination with the United Nations. NATO's basic mandate—let alone the fact that it is not a regional organization—might have been thought to have presented a further problem. Its central mandate under Article 5 of the North Atlantic Treaty is that 'The Parties agree that an armed attack against one or more of them is considered an attack on them all'. Without formal treaty amendment to allow it either to act in circumstances other than an attack on one of the members or 'out of area', NATO has in fact systematically adopted a new role—that of 'peace support operations'. NATO had already begun its search for a new post-Cold War role, adopting its 'New Strategic Concept' at its Rome Summit in late 1992. In June 1992 NATO had determined that it would 'support peace-keeping activities under the responsibility of the Conference on Security and Cooperation in Europe'. Even before the Security Council approach of January 1993, Secretary-General Boutros Ghali had asked NATO to assist in supporting future UN resolutions in the former Yugoslavia, and had received a positive reply from NATO Secretary-General Manfred Worner, the terms of which are significant:

> We confirm the preparedness of our alliance to support, on a case by case basis and in accordance with out own procedures, peace-keeping operations under the authority of the UN Security Council, which has the primary responsibility for peace and security. We are ready to respond positively to initiatives that the UN Secretary-General might take to seek Alliance assistance in the implementation of UN Security Council resolutions.

The commitment was thus not a generalized commitment to the UN, and it was to be done by reference to NATO's own procedures—acknowledging always the Security Council's primary responsibility. Within five months, NATO was acting out of area, in circumstances other than those envisaged in its Treaty, and in circumstances that have also to be said not to be those of Article 53 of the UN Charter. NATO has been assisting the UN in relation to (a) the naval embargoes; (b) the enforcement of the no-fly zone over Bosnia; (c) the protection of UN personnel; and (d) the protection of safe zones. It is also engaged in a variety of other related functions—including contingency planning for any possible peace plan for Bosnia.[94]

NATO has, however, used military force without prior Security Council authorization. This occurred notably in the case of Kosovo where the Council was constrained from acting by the threat of a Russian veto. Nonetheless, NATO carried out extensive military air strikes against the Federal Republic of Yugoslavia, which commenced in April 1999, in order to force the Yugoslav Government to stop, *inter alia*, alleged "ethnic cleansing" in the Yugoslav province of Kosovo. The legal basis for this NATO action has been the source of considerable controversy.

Ralph Zacklin, *Beyond Kosovo: The United Nations and Humanitarian Intervention*,

41 VA. J. INT'L L. 923, 924-27, 929-30 (2001)

For the United Nations, the second attempt in the twentieth century to create an international organization of universal competence and authority to maintain international peace and security, the last decade of the century proved to be tumultuous. Beginning with the end of the Cold War and the successful reversal of Iraq's aggression against Kuwait, the fulfillment of the organization's role in maintaining peace and security through

[94] On these delegations of power, see DAN SAROOSHI, THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY, Ch. 6 (1999).

an engaged and, finally, relatively cohesive Security Council appeared to be realizable. A "New World Order" was proclaimed.

Then, in swift succession, came Somalia, Bosnia and Rwanda. The Security Council's credibility and, by extension, the credibility of the United Nations as a whole, was grievously damaged. In Somalia, what began as a humanitarian mission ended in ignominious withdrawal after a succession of failed operations. The casualties sustained by the United States and other contingents blighted peacekeeping and peace-enforcement in Bosnia, and led directly to the inability to deal with the single worst crime of the second half of the century, the genocide in Rwanda. The United Nations will live with the consequences of these failures for a very long time, even as it strives to learn from them.

By the end of the last decade, with U.N. credibility hugely diminished, if not entirely destroyed, the Security Council was unable to find a working consensus on Kosovo. A NATO-led coalition undertook an enforcement action without the prior authorization of the Security Council and not in self-defense, in violation of U.N. Charter principles, including the prohibition on the use of force, thereby plunging the organization into a political, legal, institutional, and moral crisis. The decade ended with the utility and the future of the U.N. very much in doubt.

II. The Challenge of Kosovo

NATO's actions in Kosovo presented a serious threat to the United Nations and the conception that had prevailed since 1945: that as the only universal political organization, it represented the international community of states, and that the principles contained in its Charter formed the cornerstone of international relations. Quite suddenly, fundamental principles, such as the respect for sovereignty, territorial integrity and the prohibition on the use of force except in self-defense or when authorized by the Security Council, were cast into doubt. The very fabric of organized international society as we knew it appeared to have been dissolved.

What was particularly worrisome about the NATO-led action in Kosovo was that the decision to proceed with the use of force without U.N. authorization was so overt—more so than the closest precedent at the end of the Gulf War, when the coalition intervened in northern and southern Iraq on the basis of Security Council Resolution 688. Moreover, among the countries most politically and militarily engaged in Kosovo were those who historically have most consistently upheld the principles of the U.N. Charter and the importance of the authority of the United Nations as the foundation of the present system of peace and security.

The NATO-led action in Kosovo caused considerable unease not only among member states, but also among senior U.N. Secretariat officials. This unease deepened as the bombing was stepped up, as civilian installations such as the bridges across the Danube were destroyed, innocent civilians were killed and injured, and questions began to surface about the means and method of warfare and the lack of proportionality in the use of force. It was impossible for Secretary-General Kofi Annan to remain silent. He had the difficult task of trying to defend the Charter principles and its institutional framework, while at the same time recognizing that massive and systematic violations of human rights could not be permitted to unfold without an appropriate response from the United Nations. With its credibility already severely damaged in Somalia, Bosnia, and especially in Rwanda, the U.N. could not afford to be seen as indifferent to the human suffering in Kosovo. In brief press statements at the beginning of the hostilities, the Secretary-General deplored that the situation in Kosovo had not been resolved by peaceful means, and that the Security Council had not been able to fulfill its role. However, he also made it clear that, in his view, there were circumstances in which unauthorized force could legitimately be used in the defense of peace, and in the prevention of massive and systematic violations of human rights. As events in Kosovo unfolded, the need for an authoritative and more comprehensive statement on humanitarian intervention became necessary. The occasion for such an address presented itself in The Hague on May 18, 1999, during the centennial commemoration of the first International Peace Conference.

A. The Secretary-General's Address, The Hague, May 18, 1999

The Secretary-General began his address by noting that the meeting was taking place during a time of war, a reference to the then-ongoing armed intervention regarding Kosovo. He stated that a renewal of the effectiveness and relevance of the Security Council was a cornerstone in protecting and preserving the legal regime of the U.N. Charter. It was, therefore, a cause for concern that the Security Council had been disregarded on such matters as mandatory sanctions, cooperation in disarmament and non-proliferation, and the implementation of the decisions of the Yugoslav and Rwanda war crimes tribunals. The case of Kosovo, he said, "has cast into sharp relief the fact that member states and regional organizations sometimes take enforcement action without Security Council authorization." He believed that such marginalization of the Council was regrettable. The inability of the Security Council in the case of Kosovo to unify two equally compelling interests—its primary responsibility for the maintenance of peace and the legitimacy of using force in the pursuit of peace and the defense of human rights—was a source of great danger. It was clear that "unless the Security Council is restored to its preeminent position as the sole source of legitimacy on the use of force, we are on a dangerous path to anarchy."

The core challenge of the Security Council and the United Nations as a whole was "to unite behind the principle that massive and systematic violations of human rights conducted against an entire people cannot be allowed to stand." The choice, thus, should not have been between Security Council unity and inaction in the face of genocide, as in Rwanda, and Council division and regional action, as in Kosovo.

B. The Secretary-General's Address to the General Assembly, September 20, 1999

. . . .

Some commentators and scholars attacked the U.N. Charter system as being outmoded or irrelevant. The Secretary-General took issue with this view. The Charter's principles still defined the "aspirations of peoples everywhere." "Nothing in the Charter preclud[ed] a recognition that there are rights beyond borders." The source of the dilemma lay not in deficiencies in the U.N. Charter, but in its application—more precisely applying its principles in an era during which sovereignty and human rights had taken on new meanings in relation to one another. . . .

. . . .

While the events of the last several months in Kosovo, East Timor and Chechnya have focused renewed attention on the role of the United Nations and humanitarian intervention, and while the Secretary-General's address was a timely, even bold, attempt on his part to frame the debate and provoke new thinking about a doctrine of humanitarian intervention, which may or may not be evolving normatively, thus far, very little clarity has emerged. The debate has predictably given rise to much political posturing, but it has also served to highlight a number of underlying issues, such as the imperative need for reform of the Security Council, which lies at the heart of the disenchantment of a great majority of member states.

Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention,"*

Editorial Comments: NATO's Kosovo Intervention,
93 AM. J. INT'L L. 824, 824-28 (1999)

I.

. . . The terrible facts in and relating to Kosovo in 1998-1999 are known and little disputed. The need to halt horrendous crimes against humanity, massive expulsions and war crimes, was widely recognized. NATO intervention by military force was widely welcomed, but it was also sharply criticized. And it inspired much searching of soul by students of international law.

Now that the *fait* of the NATO bombing is *accompli*, and has been assimilated into a political resolution blessed by the Security Council, the legal issues of humanitarian intervention can be addressed in comparative tranquility, and the legal lessons pursued with less urgency, and with greater wisdom.

Was military intervention by NATO justified, lawful, under the UN Charter and international law? Does Kosovo suggest the need for reaffirmation, or clarification, or modification, of the law as to humanitarian intervention? What should the law be, and can the law be construed or modified to be what it ought to be?

. . . .

III.

In my view, unilateral intervention, even for what the intervening state deems to be important humanitarian ends, is and should remain unlawful. But the principles of law, and the interpretations of the Charter, that prohibit unilateral humanitarian intervention do not reflect a conclusion that the "sovereignty" of the target state stands higher in the scale of values of contemporary international society than the human rights of its inhabitants to be protected from genocide and massive crimes against humanity. The law that prohibits unilateral humanitarian intervention rather reflects the judgment of the community that the justification for humanitarian intervention is often ambiguous, involving uncertainties of fact and motive, and difficult questions of degree and "balancing" of need and costs. The law against unilateral intervention may reflect, above all, the moral-political conclusion that no individual state can be trusted with authority to judge and determine wisely.

But, as Professor Richard Falk wrote long ago: "The renunciation of [unilateral] intervention does not substitute a policy of nonintervention; it involves the development of some form of collective intervention." The need for intervention may sometimes be compelling, and the safeguard against the dangers of unilateral intervention lies in developing bona fide, responsible, collective intervention.

Serious efforts to develop "some form of collective intervention" began soon after the end of the Cold War, when it ceased to be hopeless to pursue collective intervention by authority of the UN Security Council. In 1991 and 1992, the Security Council authorized military intervention for humanitarian purposes in Iraq and Somalia. In principle, those interventions were not justified as "humanitarian" (a term that does not appear in the UN Charter); the theory supporting such actions was that some internal wars, at least when accompanied by war crimes, and massive human rights violations and other crimes against humanity even if unrelated to war, may threaten international peace and security and therefore were within the jurisdiction and were the responsibility of the Security Council under Chapters VI and VII of the Charter. Of course, under Article 27(3) of the Charter, a Security Council resolution to authorize intervention, like other "nonprocedural" matters, was subject to veto by any permanent member. Thus, by the sum (or product) of law and politics, humanitarian intervention by any state was prohibited; humanitarian intervention was permissible if authorized by the Security Council, but a single permanent member could prevent such authorization.

Kosovo surely threatened international peace and security, as the Security Council had held in several prior resolutions. And, in 1998-1999, when negotiation and political-economic pressures appeared futile, for many Kosovo begged for intervention by any states that could do so, and by any means necessary. NATO heeded the call. It did not ask leave or authorization from the Security Council.

The reason why NATO did not seek explicit authorization from the Security Council is not difficult to fathom. Even after the Cold War, geography and politics rendered unanimity by the permanent members in support of military action (especially in the Balkans) highly unlikely. Evidently, NATO decided that not asking for authorization was preferable to having it frustrated by veto, which might have complicated diplomatic efforts to address the crisis, and would have rendered consequent military action politically more difficult.

Subsequent events confirmed that fear of the veto had not been unfounded. After the NATO action was begun, the representative of the Russian Federation proposed a resolution in the Security Council to declare the NATO action unlawful and to direct that it be terminated.

In the vote, the proposed resolution was supported by three states, including Russia and China, two of the permanent members. It was not implausible for NATO to have assumed that Russia, or China, would have vetoed a resolution authorizing military intervention by NATO.

IV.

Was the NATO action unlawful?

The Charter prohibition on intervention, even for humanitarian ends, is addressed to individual states, but what the Charter prohibits to a single state does not become permissible to several states acting together. Intervention by several states is “unilateral,” i.e., “on their own authority,” if not authorized by the Security Council. Was NATO intervention in Kosovo authorized? Was it a justifiable exception?

The argument for NATO might go something like this.

Human rights violations in Kosovo were horrendous; something had to be done. The Security Council was not in fact “available” to authorize intervention because of the Veto. Faced with a grave threat to international peace and security within its region, and with rampant crimes reeking of genocide, NATO had to act.

NATO intervention was not “unilateral”; it was “collective,” pursuant to a decision by a responsible body, including three of the five permanent members entrusted by the UN Charter with special responsibility to respond to threats to international peace and security. NATO did not pursue narrow parochial interests, either of the organization or of any of its members; it pursued recognized, clearly compelling humanitarian purposes. Intervention by NATO at Kosovo was a “collective” humanitarian intervention “in the common interest,” carrying out the responsibility of the world community to address threats to international peace and security resulting from genocide and other crimes against humanity. The collective character of the organization provided safeguards against abuse by single powerful states pursuing egoistic national interests. And action by NATO could be monitored by the Security Council and ordered to be terminated. The NATO action in Kosovo had the support of the Security Council. Twelve (out of fifteen) members of the Council voted to reject the Russian resolution of March 26, thereby agreeing in effect that the NATO intervention had been called for and should continue. And on June 10, the Security Council, in Resolution 1244 approving the Kosovo settlement, effectively ratified the NATO action and gave it the Council’s support.

V.

In my view, the law is, and ought to be, that unilateral intervention by military force by a state or group of states is unlawful unless authorized by the Security Council. Some—governments and scholars—thought that NATO too needed, but had not had, such authorization, at least ab initio. But many—governments and scholars—thought that something had to be done to end the horrors of Kosovo, that NATO was the appropriate body to do it, and perhaps the only body that could do it, and that the law should not, did not, stand in the way.

. . . .

Humanitarian intervention on the authority of the Security Council recognizes that the Charter prohibition on the use of force does not apply to the use of force “in the common interest”; it also recognizes that intervention authorized by the Security Council affords the strongest safeguard against abuse of humanitarian intervention that the contemporary political system provides. But, as Kosovo illustrated, the Council, as presently constituted and under prevailing procedures, remains seriously defective and may sometimes be unavailable for that awesome responsibility.

> NATO did not seek the Council's mantle, presumably because of the fear of the veto. We are not about to see a major restructuring in the composition of the Security Council, and we are not likely soon to see an end to the veto generally. But might we pursue an exception to the veto, as regards humanitarian intervention, in practice if not in principle?
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> That may be what Kosovo in fact achieved, in some measure. For Kosovo, Council ratification after the fact in Resolution 1244—formal ratification by an affirmative vote of the Council—effectively ratified what earlier might have constituted unilateral action questionable as a matter of law. Unless a decision to authorize intervention in advance can be liberated from the veto, the likely lesson of Kosovo is that states, or collectivities, confident that the Security Council will acquiesce in their decision to intervene, will shift the burden of the veto: instead of seeking authorization in advance by resolution subject to veto, states or collectivities will act, and challenge the Council to terminate the action. And a permanent member favoring the intervention could frustrate the adoption of such a resolution.
>
> **VI.**
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> Neither one state nor a collectivity of states should be encouraged to intervene on its own authority in expectation, even plausible expectation, of subsequent ratification or acquiescence by the Security Council. But that is likely to happen, as it did as regards Kosovo, unless the Security Council and the permanent members in particular are prepared to agree to adapt their procedures to permit the Council's consideration in advance, with the understanding that the veto would not be operative.
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> Changes in the law and in UN procedures and understandings to that end might begin with Chapter VIII of the Charter.
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> . . . .
>
> . . . The NATO action in Kosovo, and the proceedings in the Security Council, may reflect a step toward a change in the law, part of the quest for developing "a form of collective intervention" beyond a veto-bound Security Council. That may be a desirable change, perhaps even an inevitable change. And it might be achieved without formal amendment of the Charter (which is virtually impossible to effect), by a "gentlemen's agreement" among the permanent members, or by wise self-restraint and acquiescence. That, some might suggest, is what the law ought to be, and proponents of a "living Charter" would support an interpretation of the law and an adaptation of UN procedures that rendered them what they ought to be. That might be the lesson of Kosovo.

NATO's specific response in the case of Kosovo is part of a more general evolution that is taking place in the Alliance's own conception of its role in the management of conflict. It adopted strategic concepts in 1999 and in 2010. In 2011, NATO answered the UN call to the international community to protect the Libyan people from the Gaddafi regime. From March to October 2011, a coalition of NATO Allies and partners enforced an arms embargo, maintained a no-fly zone and protected civilians from attack or the threat of attack in Libya under ‘Operation Unified Protector’.

Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects,*

10 EUR. J. INT’L L. 1, 14-18 (1999)

3. NATO’s Future ‘Strategic Concept’: From ‘Out of Area’ to ‘Out of Treaty’?

. . . NATO is hammering out a new ‘strategic concept’ to define its role in the 21st century. It is to be adopted on the occasion of the Alliance’s 50th Anniversary Summit in Washington in late April 1999. . . . Nevertheless, the general direction in which the United States in particular wants the Alliance to move in the future is quite clear. For instance . . . Deputy Secretary of State Strobe Talbott had, among other things, the following to say about what he referred to as the ‘deepening’ of NATO:

> In that project [i.e., the transformation of NATO] . . . we must be ambitious. NATO was founded and designed to deal with the Soviet Union and the Warsaw Pact. That state and that alliance are gone, and so is the threat they posed . . . . This isn’t to say that NATO’s original task of collective defence is finished or that collective defence is no longer at the core of the Alliance’s mission. NATO must maintain its capability, enshrined in Art.V of the Treaty of Washington, to deter and if necessary defeat what might be called classic aggression. . . .
>
> However, that is not enough if NATO is to remain relevant to the times. With the end of the Cold War, new, less spectacular, but more diversified threats have arisen. Disputes over ethnicity, religion or territory, can, as we’ve already seen, trigger armed conflict, which in turn can generate cross-border political instability, refugee flows and humanitarian crisis that endanger European security. NATO must be able to deal with threats like these while maintaining its core function of collective defense.
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> . . . .
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> [We are not] suggesting that NATO act in splendid isolation from—or high-handed defiance of—the United Nations or the OSCE. All NATO Allies are members of both of those organizations. We believe NATO’s missions and tasks must always be consistent with the purposes and principles of the UN and the OSCE. We expect NATO and its members will continue to be guided by their obligations under the UN Charter and the Helsinki Final Act.
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> At the same time, we must be careful not to subordinate NATO to any other international body or compromise the integrity of its command structure. We will try to act in concert with other organizations, and with respect for their principles and purposes. But the Alliance must reserve the right and the freedom to act when its members, by consensus, deem it necessary.

The future role thus envisaged for NATO and the legal-institutional consequences which the proposed new concept implies for the relationship between NATO and the United Nations also became apparent in a ‘Resolution on Recasting Euro-Atlantic Security’, adopted by the North Atlantic (Parliamentary) Assembly in November 1998. In this document, the Assembly urged member governments and parliaments of the North Atlantic Alliance

> . . . .
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> d. to seek to ensure the widest international legitimacy for non-Article 5 missions and also to stand ready to act should the UN Security Council be prevented from discharging its purpose of maintaining international peace and security;
>
> e. to affirm that the inherent right of individual or collective self-defence, also enshrined in Article 51 of the UN Charter, must include defence of common interests and values, including when the latter are threatened by humanitarian catastrophes, crimes against humanity, and war crimes; . . .

. . . [T]he message which these voices carry in our context is clear: if it turns out that a Security Council mandate or authorization for future NATO ‘non-Article 5’ missions involving armed force cannot be obtained, NATO must still be able to go ahead with such enforcement. That the Alliance is capable of doing so is being demonstrated in the Kosovo crisis. Whether such a course is legally permissible is a different matter. In the November 1998 resolution of the North Atlantic Assembly, two different legal arguments can be identified in this regard. According to the first one, the right of self-defence ‘also enshrined’ in Article 51 of the UN Charter is to be interpreted so broadly as to include the defence of ‘common interests and values’. This text calls for two brief observations: to start with, the wording might create the impression that self-defence in international law has a broader scope than that foreseen in Article 51, i.e., that it is justified not only against armed attacks but beyond that specific instance also against other threats. What other menaces the authors have in mind is then made clear: attacks on ‘common [i.e. NATO] interests and values’. To thus widen the scope of self-defence, as a legal institution, is intolerable . . . from a legal point of view and does not deserve further comment. . . .

The second argument, contained in para. d. of the North Atlantic Assembly resolution, reads like a codification of the course that NATO is steering in the Kosovo crisis. . . . It is probably no coincidence that the wording chosen for para. d. is similar to that of the ‘Uniting for Peace’ Resolution of the UN General Assembly of 3 November 1950, considering the keenness of NATO to have its actions partake of UN legitimacy, so to speak. But of course, according to ‘Uniting for Peace’, it was the General Assembly, as a UN organ comprising all Member States, that was to shoulder the burden of maintaining or restoring international peace and security *in lieu* of the Security Council, not an extraneous, regional organization comprising only about 10 per cent of UN membership.

. . .

In view of the Russian position *vis-à-vis* the prospect of NATO ‘peace missions’ engaging in military enforcement out of area, a new formula has recently been put forward, according to which the necessary legal basis for non-Article 5 missions comprising the use of armed force is, ‘as a rule’, to be provided either by a mandate of the UN Security Council or by acting ‘under the responsibility of the OSCE’ . . . .

The alternative thus offered may possibly appease the Russian Federation, but it cannot satisfy the international lawyer: the OSCE has grown into a regional organization in the sense of Chapter VIII of the Charter. As such, any military enforcement action under its responsibility will require authorization by the UN Security Council . . . . Thus, such peace enforcement under the aegis of the OSCE will not only require the consent of the Russian Federation but also that of the Security Council in accordance with Article 53 para.1 of the UN Charter. From the standpoint of United Nations law, therefore, the issue is not only how to obtain the consent/participation of Russia in peace enforcement but how to achieve this at the regional level in full conformity with the Charter.

THE ALLIANCE’S STRATEGIC CONCEPT 1999,

Approved by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington DC on April 23-24, 1999,

6. NATO’s essential and enduring purpose, set out in the Washington Treaty, is to safeguard the freedom and security of all its members by political and military means. Based on common values of democracy, human rights and the rule of law, the Alliance has striven since its inception to secure a just and lasting peaceful order in Europe. It will continue to do so. The achievement of this aim can be put at risk by crisis and conflict affecting the security of the Euro-Atlantic area. The Alliance therefore not only ensures the defence of its members but contributes to peace and stability in this region.

. . . .

24. Any armed attack on the territory of the Allies, from whatever direction, would be covered by Articles 5 and 6 of the Washington Treaty. However, Alliance security must also take account of the global context. Alliance security interests can be affected by other risks of a wider nature, including acts of terrorism, sabotage and organised crime, and by the disruption of the flow of vital resources. . . .

. . . .

31. In pursuit of its policy of preserving peace, preventing war, and enhancing security and stability and as set out in the fundamental security tasks, NATO will seek, in cooperation with other organisations, to prevent conflict, or, should a crisis arise, to contribute to its effective management, consistent with international law, including through the possibility of conducting non-Article 5 crisis response operations. The Alliance’s preparedness to carry out such operations supports the broader objective of reinforcing and extending stability and often involves the participation of NATO’s Partners. NATO recalls its offer, made in Brussels in 1994, to support on a case-by-case basis in accordance with its own procedures, peacekeeping and other operations under the authority of the UN Security Council or the responsibility of the OSCE, including by making

available Alliance resources and expertise. In this context NATO recalls its subsequent decisions with respect to crisis response operations in the Balkans. Taking into account the necessity for Alliance solidarity and cohesion, participation in any such operation or mission will remain subject to decisions of member states in accordance with national constitutions.

THE ALLIANCE'S STRATEGIC CONCEPT 2010,

Adopted by Heads of State and Government

at the NATO Summit in Lisbon

19-20 November 2010

1. NATO's fundamental and enduring purpose is to safeguard the freedom and security of all its members by political and military means. Today, the Alliance remains an essential source of stability in an unpredictable world.

. . .

4. The modern security environment contains a broad and evolving set of challenges to the security of NATO's territory and populations. In order to assure their security, the Alliance must and will continue fulfilling effectively three essential core tasks, all of which contribute to safeguarding Alliance members, and always in accordance with international law:

a. Collective defence. NATO members will always assist each other against attack, in accordance with Article 5 of the Washington Treaty. That commitment remains firm and binding. NATO will deter and defend against any threat of aggression, and against emerging security challenges where they threaten the fundamental security of individual Allies or the Alliance as a whole.

b. Crisis management. NATO has a unique and robust set of political and military capabilities to address the full spectrum of crises – before, during and after conflicts. NATO will actively employ an appropriate mix of those political and military tools to help manage developing crises that have the potential to affect Alliance security, before they escalate into conflicts; to stop ongoing conflicts where they affect Alliance security; and to help consolidate stability in post-conflict situations where that contributes to Euro-Atlantic security.

c. Cooperative security. The Alliance is affected by, and can affect, political and security developments beyond its borders. The Alliance will engage actively to enhance international security, through partnership with relevant countries and other international organisations; by contributing actively to arms control, non-proliferation and disarmament; and by keeping the door to membership in the Alliance open to all European democracies that meet NATO's standards

. . .

31. Cooperation between NATO and the United Nations continues to make a substantial contribution to security in operations around the world. The Alliance aims to deepen political dialogue and practical cooperation with the UN, as set out in the UN-NATO Declaration signed in 2008 . . .

This process of reflection by NATO of its changing role and its action in Libya in 2011 raise acutely the key issue of what policy considerations should be taken into account when allocating authority between universal (i.e., the UN) and regional arrangements in the management of conflict.

John Norton Moore, *The Role of Regional Arrangements in the Maintenance of World Order,*

in 3 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER, 122, 136-40 (Cyril Black & Richard Falk eds., 1971)

Policies Favoring Universalism

The principal policies favoring universalism seem to be that states affected by decisions should have an opportunity to participate in the decision-making, that effective decision may require that competing major powers be included in security decisions, that wider decision is more likely to reflect community common interest and the corollary of this principle that major power dominance of regional organizations may sometimes result in assertion of special interests.

The first of these, that states affected by decision should have an opportunity to participate in making those decisions, is a widely shared community policy. To the extent that peace and security issues affect the whole community of states, the whole community has an interest in participating in their resolution. And in the kind of interdependent world in which we live today the quality of the international peacekeeping machinery is of concern to every nation. This policy, then, strongly suggests that at least final authority for the maintenance of world order should be vested in a universal organization.

A second policy is the desirability of representation of competing major powers in security decisions. This policy reflects the importance of avoiding conflict between the competitive nuclear powers and of ensuring effective power to implement collective decisions. To the extent that world order decisions are approved by all major powers there is less likelihood of a major power clash. There is also greater likelihood that decisions will be effectively implemented. Moreover, participation in the decision process might moderate positions even if agreement is not possible. . . . The permanent seats for the major powers in the Security Council reflect these realities

A third policy is that wider decision is more likely to reflect common community interest. There is, of course, no guarantee that a universal organization will always make just or rational decisions. The United Nations is a political arena with characteristics similar to other such arenas, and it is a mistake to idealize its decisions just because they are collective. Nevertheless, on a continuum from unilateral to universal decision there is greater likelihood that the wider the participation in decision the more the decision will reflect common community interest. As a corollary to this principle, since major powers exert disproportionate influence in a number of regional organizations, United Nations authority should be preferred as a check on assertion of special interests.

Policies Favoring Regionalism

Policies favoring regional authority include the principle that those with greater values at stake in decision ought to have greater participation in decision, the advantages of utilization of local expertise and interest, the principle of effectiveness and deference to consensual arrangements submitting local disputes to regional authority.

The first of these, the principle that those with greater values at stake in decision ought to have greater participation in decision, reflects the differential impact of decisions. If a decision affects only a particular region, then that region ought to participate in decision to the exclusion of nonregional participants. It is self-evident that in matters other than peace and security there are large areas of exclusive interests in which decision is and should be made unilaterally or regionally. Although few interests are that clearly exclusive if the issue is one affecting peace and security, nevertheless, even peace and security issues may have differential impact. Thus, the recent El Salvador-Honduras conflict presented a greater threat to the security of other Central American states than to the security of European or Asian states. Similarly, it may have posed a greater threat to the integrity of regional peacekeeping machinery than to the structure of the United Nations. Accordingly, it seems reasonable to accord the regional machinery of the OAS the initial competence to deal with the situation.

A second policy favoring regional authority is the desirability of taking advantage of local expertise, interest and capabilities. The inter-American system, the OAU, and to a lesser extent the Arab League embody dispute-settlement machinery which may be highly efficient in settling intraregional conflicts. The relatively quick and efficient OAS handling of the El Salvador-Honduras conflict is a case in point. Had the OAS been unsuccessful in obtaining a withdrawal of Salvadorian troops, then the greater effective power of the Security Council might have been required. But in the first instance at least, the OAS was almost certainly a more efficient forum for dealing with such a localized intraregional dispute than would have been the United Nations Security Council. . . .

. . . .

Summary of Criteria for Allocating Authority between Universal and Regional Arrangements

There are strong reasons for urging that a universal organization should have ultimate authority for the maintenance of peace and security. In the interdependent world in which we live, most issues of peace and security affect all of the members of the world community. Moreover, a universal forum is a more broadly based forum for the resolution of security issues, both in the sense of greater assurance that decision will reflect common community interest, and in the sense of greater effectiveness by inclusion of the major powers in the decision process. A universal security organization should encourage regional settlement of disputes, however, in situations in which the interests at stake are primarily regional, in which regional machinery offers more effective conflict management, or in which the parties to a dispute genuinely prefer a regional forum.

* * *

Questions for Discussion

1. To what extent, if at all, does the purported doctrine of humanitarian intervention provide a basis for regional arrangements to use military force to stop the commission of gross and widespread violations of human rights occurring within a state?

2. Was ECOMOG military action in Liberia lawful? Was NATO military action in Kosovo lawful? What are the similarities and differences between the military action taken by NATO in Kosovo and ECOMOG in Liberia?

3. What changes, if any, do the Kosovo case suggest should be made to decision-making by the Security Council?

4. What is NATO's evolving strategic conception of its role in the maintenance and restoration of peace and security?

5. What does the experience of the AU and ECOWAS tell us about the challenges of peacekeeping by regional organizations? To what extent should regional arrangements be a primary focus for efforts to maintain or restore international peace and security?

* * *

Responsibility to Protect

Responsibility to protect (R2P) is an emerging legal doctrine that was first developed by the International Commission on the Intervention and State Sovereignty (ICISS), established by the Canadian Foreign Minister Lloyd Axworthy and co-chaired by Gareth Evans (Australia) and Muhamed Sahnoun (Algeria). In its Report of 30 September 2001, ICISS explained basic principles of R2P as: "(A) State sovereignty implies responsibility, and the primary responsibility for the protection of the people lies with the State itself; (B) Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect".[95]

R2P was endorsed as an "emerging norm" in the 2004 Report of the High-Level Panel on Threats, Challenges and Changes.[96] The Report suggested five criteria for the determining whether an intervention based on R2P would be justified: the seriousness of the threat, the proper purpose of the military action, the fact that force as a last resort, proportionality, and the balance of consequences. Secretary-General Kofi Annan expressed his strong agreement with the concept of R2P in his 2005 Report 'In Larger Freedom: Towards Development, Security and Human Rights for All', observing that "we must embrace the responsibility to protect, and, when necessary, we must act on it".[97]

The most significant expression of recognition and support for R2P came in the World Summit Outcome Document,

[95] ICISS, 'The Responsibility to Protect', 30 September 2001, xi.
[96] 'A More Secure World: Our Shared Responsibility', 2 December 2004, U.N. Doc. A/59/565, para 53; see also paras 201-205.

adopted in October 2005 by an historic gathering of Heads of State and Government at the UN.

World Summit Outcome Document

U.N. Doc. A/RES/60/1, Oct. 24, 2005, paras. 138-9

Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

The Secretary-General appointed a Special Adviser on the Responsibility to Protect and the 'three pillars' of the responsibility to protect were formulated in the Secretary-General's 2009 Report (A/63/677) on Implementing the Responsibility to Protect:

1. The State carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement;

2. The international community has a responsibility to encourage and assist States in fulfilling this responsibility;

[97] 'In Larger Freedom', 21 March 2005, U.N. Doc. A/59/2005, paras 132, 135.

3. The international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If a State is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations.

Nonetheless, there has not yet been widespread and representative State practice on R2P and agreement on the specific criteria remains elusive.[98] Some of the controversies surrounding R2P were aired during a 2009 debate in the General Assembly.

Opening Statement

President of the General Assembly, Mr. Miguel d'Escoto Brockman

23 July 2009

After so much suffering, there is finally broad agreement that the international community can no longer remain silent in the face of genocide, ethnic cleansing, war crimes and crimes against humanity. This is a great progress. Yet there are currently situations, as in Gaza, which urgently need adequate and objective characterization, as well as the international community's responsibility to aid in their solution.

I would ask whether it was the absence of responsibility to protect that led to non-intervention in Gaza as recently as this year? Or was it, rather, the absence of the reform of the UN Security Council, whose veto power remains unchecked and its membership unreformed. Need I remind anyone here that we already have a Genocide Conventinl and various conventions on international humanitarian law, whose implementation remain erratic?

. . .

So why do many of us hesitate to embrace this doctrine and its aspirations? Certainly it is not out of indifference to the plight of many who suffer and who may yet be caused to suffer at the hands of their own governments.

The problem for many nations, I believe, is that our system of collective security has not yet evolved to the degree that can allow the doctrine of R2P to operate in the way its proponents intend, in view of the-prevailing lack of trust from developing countries when it comes to the use of force for humanitarian reasons.

. . .

Member States, as I do, clearly hold strong views on this issue. I believe this morning's discussion made it

[98] The Security Council has referred to R2P in a number of resolutions, but these have fallen short of guidelines for the implementation of the emerging norm and have been made on the premise that it is Security Council that must authorize States to use military force. See, eg, SC Res 1674 (2006), 1970 (2011), 1973 (2011), and 2150 (2014).

clear that

> the most effective and just form of avoiding large-scale human suffering certainly is not by resorting to the use of military force. . . the question still remains if the time for a full-fledged R2P norm has arrived, or whether as most of the panelists this morning felt, we first need to create a more just and equal world order, including in the economic and social sense, as well as a Security Council that does not create a differential system of international law geared towards the strong protecting, or not protecting, whomever they wish.

Comments

1. R2P does not require the Security Council or its members to put a matter on the agenda, to support a decision in the Security Council or to have a good reason for using the veto.[99] In his 2012 Report on R2P, the Secretary-General confirmed that R2P does not impose an obligation on the Security Council to act – rather, the doctrine and the Charter give the Security Council "a wide degree of latitude to determine the most appropriate course of action".[100]

2. The Council's action with regard to Libya in 2011 has highlighted the controversy over R2P. SC Resolution 1973 was hailed in certain circles as a 'successful first true test' of R2P, but the Resolution makes no express reference to the doctrine in its operative provisions.[101] In the aftermath of Gaddafi's fall some Member States have argued that non-coercive measures were not given sufficient time to have an impact on the ground and that those charged with implementing Resolution 1973 exceeded the mandate given by the Council.[102] Former Joint Envoy for Syria, Kofi Annan, has observed that Russia and China in particular feel that they were 'duped' by the Council's action on Libya in 2011: they had agreed on a resolution that they believed authorised limited measures, which was then transformed into a process of regime change.[103]

Questions for Discussion

1. To what extent is R2P a desirable development in multilateral efforts to maintain or restore international peace and security?
2. To what extent can R2P be considered as a norm of customary international law?
3. Does R2P allow a State or group of States to intervene militarily in another State if the Security Council fails to act with respect to a situation of massive human rights violations?

[99] Saira Mohamed, 'Omissions, Acts, And The Security Council's (In)Actions In Syria' (2013) Boston University International Law Journal 413, 423.
[100] Responsibility to protect: timely and decisive response, Report of the Secretary-General, A/66/874, S/2012/578 (2012), para. 54.
[101] Berman and Michaelsen argue that express invocation of R2P would have prevented rather than facilitated the adoption of Resolution 1973 (2011) and its authorisation of the use of force to protect civilians in Libya because China and Russia would have vetoed the resolution. David Berman and Christopher Michaelsen, 'Intervention in Libya: Another Nail in the Coffin for the Responsibility-to-Protect?' (2012) 14 International Community Law Review 337.
[102] Responsibility to protect: timely and decisive response, Report of the Secretary-General, A/66/874, S/2012/578 (2012), para. 54.
[103] Natalie Nougayrède, 'Kofi Annan : "Sur la Syrie, à l'évidence, nous n'avons pas réussi"', *Le Monde*, 7 July 2012.

4. How does the concept of R2P relate to the notion of 'humanitarian intervention' and NATO's action in Kosovo discussed above?

* * *

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