

use of force

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The Security Council, Legitimacy, and the Concept of Collective Security After the Cold War

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In the aftermath of the Cold War, the U.N. Security Council is creatively fulfilling functions under Chapter VII that largely lay dormant during the first decades of the U.N. Charter. Some of these functions draw their strength from the support of the international community as a whole; others are rooted in the military strength of a few powerful states; still others rely upon impartial assessments by technical experts. Using case studies of Iraq, Somalia, and Bosnia, this Article describes the nature of these disparate functions and relates them to criticisms that the Security Council, as currently structured, lacks legitimacy. This Article suggests that such criticisms are largely misplaced because they fail to take account of the rudimentary origins of the Security Council. Rather than pursue reforms that may inhibit the ability of the Security Council to engage in conflict management, this Article advocates that greater attention be paid to strengthening the ability of the Security Council to deter threats to international peace and security before they arise.

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In these past few months a conviction has grown, among nations large and small, that an opportunity has been regained to achieve the great objectives of the Charter—a United Nations capable of maintaining international peace and security, of securing justice and human rights and of promoting, in the words of the Charter, “social progress and better standards of life in larger freedom.” This opportunity must not be squandered. The Organization must never again be crippled as it was in the era that has now passed.

— U.N. Secretary-General Boutros-Boutros
Ghali, *An Agenda for Peace*,
A/47/277-S/24111 (June 17, 1992).

I. INTRODUCTION

The political tremors produced by the collapse of Soviet communism, the dissolution of the Soviet Union, and the emergence of democracies there and in Central and Eastern Europe merit revisiting many of the assumptions upon which the post-World War II international legal order has been built. This is especially true of the United Nations, where until 1990 its existence and the Cold War went hand-in-hand, distorting the emergence of a collective security organization designed to help maintain international peace and security. Since 1990, the Security Council has passed resolutions under its U.N. Charter Chapter VII powers that both in number and in scope are unprecedented. While the function of the Security Council of consistently deploying forces under its own command to maintain or to restore forcibly international peace and security—as originally envisioned in the Charter—remains unfulfilled, a plethora of other Security Council functions that develop the blueprint of Chapter VII have now emerged, ones that vary considerably in their character. At the same time, the reawakening of the Security Council has generated criticisms of its essential structure and concerns that it is trying to do too much, too quickly.

It is essential that policy-makers and lawyers analyze the nature of the Security Council's developing functions under Chapter VII, both to understand whether the current structure of the Security Council is appropriate for undertaking these functions, and to consider directions for the Security Council to pursue in the future. This process began with the Security Council's own call for new thinking

about ways of strengthening its capacity for preventive diplomacy, peacemaking, and peacekeeping, which resulted in a remarkable 1992 survey of ideas by the U.N. Secretary-General entitled "An Agenda for Peace."¹ It is also reflected in the establishment of an open-ended committee of the 48th General Assembly to study matters related to the decision-making of the Security Council, which is to report on its progress to the General Assembly by September 1994.

Part II of this Article analyzes the Chapter VII functions pursued by the Security Council between 1990 and 1993 with respect to Iraq, Somalia, and the former Yugoslavia by dividing those functions into three discrete categories that relate to the origin of the power being exercised. Overall, the authority and power of the Security Council derives from its mandate under Chapter VII to maintain and restore international peace and security, and from the binding nature of its decisions on members of the United Nations. Yet behind this overarching power base lie more rudimentary sources of its power: the political, moral, and economic authority of the global community as a whole, the capabilities of certain major powers, and the technical expertise of independent commissions.

The first category of functions are those in which the Security Council draws upon the political, moral and economic condemnation of the global community with respect to state action that threatens or constitutes a breach of international peace. This is done by making declarations condemning certain state action and calling for remedial steps, and by imposing voluntary or mandatory political and economic sanctions. It also includes the deployment of peacekeeping forces from around the world to provide a global community presence for the monitoring of cease-fires, partition of warring factions, and other activities. In this category, the power exercised derives from weight of world opinion and concern, and the ability of the global community to isolate diplomatically and economically a state whose conduct threatens international peace.

The second category of functions are those in which major powers are authorized to enforce declarations or sanctions imposed by the Security Council. In this category, the Security Council essentially allows states to execute the will of the Security Council through the use of military force against the target state without its consent. Here, the power exercised derives from the superior military and

1. *An Agenda for Peace: Report of the Secretary-General*, U.N. GAOR, 47th Sess., U.N. Doc. A/47/277-S/24111 (1992), reprinted in 31 I.L.M. 956 (1992) [hereinafter *Agenda for Peace*].

economic resources of a select group of states capable of projecting force against a state whose conduct threatens international peace.

The third category of functions are those in which the Security Council establishes a special commission consisting of independent experts to adjudicate or perform technical tasks assigned to it by the Security Council. While the creation and mandate of the commission derives its authority directly from the Security Council, the outcome of the task assigned is essentially left in the hands of the commission itself in order to achieve a purportedly impartial, technical assessment. As such, the power exercised derives from a belief that the outcome reflects an apolitical judgment by experts, ones who are often not associated with governments, especially those implicated in the underlying conflict.

Examples of these functions are drawn from three case studies: Iraq's 1990 invasion of Kuwait and the subsequent global response to that invasion; the breakdown of civil order in Somalia leading to military intervention in 1992; and efforts during 1991-93 to address civil conflict in the former republic of Yugoslavia. These three cases provide a cross-section of situations the Security Council is likely to face in the future, involving overt aggression, covert aggression, civil war, and their consequences for civilian populations.

Part III analyzes whether the current structure of the Security Council is appropriate for undertaking these Chapter VII functions. The reawakening of the Security Council's powers has evoked complaints and criticisms that the Security Council is a tool of the major powers, particularly the United States, and that it needs to be reformed to obtain greater "legitimacy" for its decisions. Such reforms could include changing the size or composition of the Security Council; eliminating or modifying the "veto power" possessed by the current permanent members; using U.N.-commanded forces rather than nationally-commanded forces; imposing restrictions on states when the Security Council authorizes them to use force; promoting greater transparency for, and consultation with, states not represented by the Security Council (especially those most directly affected by the underlying matter); and enhancing the involvement of other U.N. organs, such as the General Assembly and the International Court of Justice. To address these criticisms, the concept of collective security as it operates for each category of functions must be considered. Criticisms regarding the legitimacy of the Security Council are at their strongest in the first category of functions—in which the Security Council purports to speak for the global community in making declarations and imposing sanctions on states—for it is here that the Security Council is the most reliant on its representation

of the global community at large and on the global community's own actions.

Criticisms regarding legitimacy are weaker in the second category of functions, in which major powers are used to enforce declarations or sanctions imposed by the Security Council. There are sound reasons for arguing that forceful leadership by the major powers—operating by consensus and without threat to their own vital interests—remains the best form of collective security to maintain peace and security after the Cold War. In this area, the quest for greater “legitimacy” should be regarded in most respects as a search for “ideal” collective security, which was rejected in constructing both the League of Nations and the Security Council as unrealistic and unworkable. There is a basis, however, for considering changes to the composition of the Security Council to reflect better contemporary power realities.

Criticisms regarding legitimacy are also weak in the third category of functions, in which the Security Council establishes special commissions, so long as the members of the commission are independent experts and the commission is structured on the basis of principles of impartiality and fairness. Where the commission has no mandate to consider and address issues raised by both sides to a conflict, including the full presentation of evidence, criticisms regarding legitimacy may be stronger.

In light of this functional analysis of the Security Council, Part IV explores avenues for future deterrence of threats to the peace. To date, the Security Council has been primarily a reactive organ, addressing threats to the peace after they arise. Yet the military and economic costs of intervening when conflict has already occurred (let alone the costs in human misery and destruction) are far greater than the costs necessary to deter threats in the first place. Since in the near-term it appears unlikely that states will increase significantly their commitment of military and economic resources to the United Nations, consideration should be given to overcoming the political and legal difficulties of providing the Security Council with a greater role in the deterrence of threats to the peace. In particular, four areas should be aggressively explored by the Security Council to enhance its ability to deter conflict: preventive diplomacy, Article 43 agreements, cooperation with regional organizations, and rule of law engagement. Although improvements in none of these areas will be easy, the sea change in activity at the United Nations suggests that now is the time to seize the day and attempt innovative efforts.

II. THE NEW WORLD OF CHAPTER VII

Throughout the era of the Cold War, Chapter VII of the U.N. Charter remained little more than a blueprint for the maintenance or restoration of international peace and security by the Security Council. Bipolar tensions frustrated efforts to use the Security Council to address threats to and breaches of the peace, thereby precluding through practice the “fleshing out” of means for implementing Chapter VII, as well as the evolution of these means based on relative success or failure. Over the first 45 years of its existence (until 1990), the Security Council passed some 650 resolutions, an average of less than eleven per year.

By contrast, during 1990-93 alone, the U.N. Security Council passed some 250 resolutions, an average of more than sixty per year.² That same time period has seen a dramatic decrease in the exercise by the permanent members of their power to prevent the passage of a resolution, the so-called “veto power.” Yet the dramatic increase in the number of Security Council resolutions is even less astonishing than the array of means within them for coercing state behavior.

There is a tendency to view all of the functions undertaken by the Security Council as being of the same nature. Certainly they all purport to seek the same objective—the maintenance or restoration of international peace and security. Yet these functions are different in the goals they seek, the methods they use, and the nature of the underlying conflict they address. One manner of differentiating security functions of the United Nations as a whole is through reference to “preventive diplomacy,” “peacekeeping,” and “peace-making,” which are the terms set upon by the Security Council during its meeting of January 31, 1992.³ The representatives at that historic meeting—the first time the Security Council met at the level of heads of state or government—called upon the Secretary-General to present recommendations on ways of strengthening and making more efficient

2. Not all of these resolutions, of course, were undertaken pursuant to Chapter VII, but a higher percentage of them were than was the case pre-1990. See Oscar Schachter, *United Nations Law*, 88 AM. J. INT'L L. 1, 12 n.30 (1994) (citing U.N. Secretariat data that 14 Chapter VII resolutions were adopted pre-1990 compared to 58 adopted 1990-93).

3. *The Responsibility of the Security Council in the Maintenance of International Peace and Security*, U.N. SCOR, 47th Sess., U.N. Doc. S/PV.3046 (1992); see *London Economic Summit Political Declarations Strengthening the International Order*, 27 WEEKLY COMP. PRES. DOC. 963, 964 (1991). (“We [the Group of Seven] commit ourselves to making the U.N. stronger, more efficient and more effective in order to protect human rights, to maintain peace and security for all and to deter aggression.”)

the United Nations in these areas, to which the Secretary-General in his "Agenda for Peace" added a fourth, "peace-building."⁴ The Agenda for Peace prompted extensive review by the Security Council⁵ and the General Assembly,⁶ and is already in some aspects being implemented by the Secretary-General.⁷

An alternative means of classifying the functions of the Security Council should be considered; one that focuses less on the outcome sought and more on the source of authority relied upon by the Security Council in taking its action. Under this approach, the functions performed by the Security Council are categorized based on their reliance on the support and participation of the global community as a whole, their reliance on the support and participation of major military powers, or their reliance on fact-finding or adjudication by independent commissions.

This Part describes the three categories of functions and provides examples of their use by the Security Council in addressing three crises from 1990 to 1993: the 1990-91 invasion of Kuwait by Iraq and subsequent restoration of peace and security in the region; the 1991-93 civil war in Somalia and the efforts by the United Nations to prevent starvation and restore security there; and the 1991-93 conflict in the territory of the former Yugoslavia. Many of these examples of action were unprecedented in the annals of the Security Council prior to 1990; all will undoubtedly be used again to address future crises.

A. Global Community Functions

The functions that most characterized Security Council Chapter VII activity during the Cold War era were those relating to declarations that sought to galvanize the political and moral support of the global community against particular state action and that indicated the steps that the target state (or states) should or must take to maintain or restore international peace and security. At times, the Security

4. *Agenda for Peace*, *supra* note 1.

5. Over the course of nine months, the Security Council met seven times to discuss the "Agenda for Peace" proposals. See *Note by the President of the Security Council*, U.N. GAOR, 48th Sess., 3225th mtg., U.N. Doc. S/25859 (1993).

6. To address this subject, the General Assembly established an informal open-ended working group whose work led to the adoption of G.A. Res. 47/120, U.N. GAOR, 47th Sess., 91st plen. mtg., Agenda Item 10, U.N. Doc. A/Res/47/120 (1993).

7. *Implementation of the Recommendation Contained in 'An Agenda for Peace': Report of the Secretary-General*, U.N. GAOR, 47th Sess., Agenda Item 10, U.N. Doc. A/47/965-S/25944 (1993).

Council would also indicate steps that other states should or must take in their diplomatic or economic relations with the target state, with the imposition of compulsory economic sanctions as the most aggressive measure used to coerce target state behavior. Although it was not envisioned explicitly in the U.N. Charter, the Security Council was also willing to authorize the deployment of peacekeeping forces at the consent of the target state(s) to allow the global community to monitor the activity of warring factions.

The ability of the Security Council to undertake these functions during the Cold War era—an era characterized by bipolar mistrust and competition—was largely because these functions intruded the least in the affairs of the target states and therefore were the least threatening to the interests of the superpowers. Declarations and even decisions of the Security Council could be (and often were) ignored by the target state. Peacekeeping forces were only imposed if it was acceptable to the target state(s); those forces were lightly armed and normally did not involve personnel from the major powers. Even economic sanctions were often porous, of questionable effectiveness, and in any event were rarely imposed.⁸

In the 1990-93 period, these functions flourished as a means of trying to coerce target state behavior, and it is likely that they will continue to be the centerpiece of Security Council activity in years to come. The common feature of these functions is their reliance on the global community for their effectiveness. When the Security Council makes a declaration or decision regarding the behavior of a target state and its acceptability under international law, the strength of that declaration or decision derives from the political and moral authority of the global community as a whole. Likewise, when the Security Council decides to impose diplomatic or economic sanctions on a target state, the effectiveness of those sanctions are directly related to their implementation by the global community as a whole. Finally, peacekeeping forces have traditionally been multinational composites

8. After Southern Rhodesia's unilateral declaration of independence in November 1965, the Security Council progressively imposed economic sanctions upon Southern Rhodesia, beginning with a call upon states to refrain from rendering any "assistance" to it, S.C. Res. 216, U.N. SCOR, 20th Sess., 1258th mtg. at 8, U.N. Doc. S/RES/216 (1965), and culminating in the imposition of comprehensive and mandatory economic sanctions. S.C. Res. 253, U.N. SCOR, 23rd Sess., 1428th mtg. at 5, U.N. Doc. S/RES/253 (1968). The sanctions were terminated with the creation of the independent state of Zimbabwe. S.C. Res. 460, U.N. SCOR, 34th Sess., 2181st mtg. at 15, U.N. Doc. S/RES/460 (1979). Similarly, the practice of apartheid in South Africa prompted the Security Council to impose first a volunteer arms embargo, S.C. Res. 181, U.N. SCOR, 18th Sess., 1056th mtg. at 7, U.N. Doc. S/RES/181 (1963), and then a mandatory arms embargo. S.C. Res. 418, U.N. SCOR, 32nd Sess., 2046th mtg. at 5, U.N. Doc. S/RES/418 (1977).

symbolic of the global interest in and commitment to the resolution of the conflict at hand. These global community functions are very much politicized and reflect the global community's concern with the impact of particular state behavior on world order. Some examples of these functions follow.

1. Declarations

The most common global community function of the Security Council is the issuance of declarations regarding state behavior. Under Charter Article 39, the Security Council may determine that particular behavior constitutes a "threat to the peace, breach of the peace, or act of aggression." In doing so, the Security Council provides an authoritative statement by the international community regarding the seriousness of an event, thereby focusing international attention on the event and encouraging the relevant parties to seek an expeditious resolution. At the same time, the Security Council triggers its ability to pursue enforcement powers under Chapter VII of the Charter.

The Security Council determined that Iraq's August 1990 invasion of Kuwait was a breach of international peace and security;⁹ that in the aftermath of Iraq's expulsion from Kuwait, the repression of Iraqi nationals causing flows of refugees and cross-border incursions was a threat to the peace;¹⁰ that the continuation of fighting in Yugoslavia was a threat to international peace and security;¹¹ and that the deteriorating situation in Somalia, involving the heavy loss of human life and widespread material damage, constituted a threat to international peace and security.¹² As stated above, it is not new for the Security Council to characterize situations as threats to the peace, but the nature of what constitutes a threat has without question evolved from a narrow sense of military threat to a broader context. In the cases of Iraq, Somalia, and the former Yugoslavia, incidents that related largely to the suffering of a civilian population, though admittedly causing flows of refugees across borders, were considered threats to the peace.

Since its inception, the Security Council has rarely spoken to the issue of whether a state has committed an "act of aggression."¹³

9. S.C. Res. 660, U.N. SCOR, 45th Sess., 2932nd mtg., U.N. Doc. S/RES/660 (1990).
 10. S.C. Res. 688, U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/RES/688 (1991).
 11. S.C. Res. 713, U.N. SCOR, 46th Sess., 3009th mtg., U.N. Doc. S/RES/713 (1991).
 12. S.C. Res. 733, U.N. SCOR, 47th Sess., 3039th mtg., U.N. Doc. S/RES/733 (1992).
 13. See, e.g., S.C. Res. 387, U.N. SCOR Resolutions & Decisions, 31st Sess., 1906th

However, with respect to Iraq and Yugoslavia, it condemned actions in a manner which made clear that it regarded Iraq and Serbia as aggressors. For instance, the Security Council condemned Iraq's invasion of Kuwait and demanded that it withdraw,¹⁴ condemned the failure of Serbia and Montenegro to refrain from interfering in Bosnia-Herzegovina,¹⁵ and condemned Croatian attacks that killed U.N. peacekeeping forces and civilians.¹⁶ The Security Council also issued non-binding statements condemning certain aggressive actions; for instance, it adopted a statement strongly condemning the Serb nationalist offensive in eastern Bosnia that was killing innocent civilians.¹⁷

Under Charter Article 40, the Security Council may indicate "provisional measures" for parties to a conflict to take in order to prevent an aggravation of a situation. In all three cases, the Security Council issued general declarations urging peaceful resolution of the conflict. These were not expressly cast as Article 40 measures, but were akin to similar declarations in the past that were considered based on Article 40. For these cases, the declarations demanded or encouraged the parties to stop fighting, to engage in and maintain cease-fires, or to pursue processes that would lead to a permanent peace. Rather than emphasizing that one party was to blame, the Security Council often assumed that the underlying problem should be resolved through negotiation; it called upon Iraq and Kuwait to negotiate a resolution of "their differences",¹⁸ urged the parties in Somalia to pursue a process of national reconciliation,¹⁹ and demanded that the parties to the conflict in the former Yugoslavia stop their fighting, adhere to a cease-fire, and negotiate a political solution.²⁰ The Security Council actively encouraged and supported

mtg. at 10 (1976) (regarding South African action against Angola). Even with respect to Korea's armed attack on South Korea in 1950, the Security Council preferred to characterize the situation as a "breach of the peace." S.C. Res. 82, U.N. SCOR, 4th Sess., 473rd mtg. at 4, U.N. Doc. S/1501 (1950).

14. S.C. Res. 660, *supra* note 9, ¶ 1-2.

15. S.C. Res. 757, U.N. SCOR, 47th Sess., 3082nd mtg. ¶ 1, U.N. Doc. S/RES/757 (1992).

16. S.C. Res. 802, U.N. SCOR, 48th Sess., 3163rd mtg., U.N. Doc. S/RES/802 (1993).

17. Julia Preston, *Security Council Condemns Serb Offensive*, WASH. POST, Mar. 4, 1993, at A20.

18. S.C. Res. 660, *supra* note 9, ¶ 3.

19. S.C. Res. 746, U.N. SCOR, 47th Sess., 3060th mtg. ¶ 9, U.N. Doc. S/RES/746 (1992); S.C. Res. 733, U.N. SCOR, 47th Sess., 3039th mtg. ¶ 4, U.N. Doc. S/RES/733 (1992).

20. See, e.g., S.C. Res. 802, U.N. SCOR, 48th Sess., 3163rd mtg. ¶ 1, 4, U.N. Doc. S/RES/802 (1993); S.C. Res. 770, U.N. SCOR, 47th Sess., 3106th mtg. ¶ 11, U.N. Doc.

the role of the Secretary-General in these processes,²¹ as well as that of regional and other organizations, such as the League of Arab States, the Organization of African Unity,²² the Conference of Security and Cooperation in Europe (CSCE),²³ the European Community, and non-governmental humanitarian relief organizations.²⁴

Other declarations were more specific as to particular actions within a country that should take place, such as the disarming of irregular forces in Bosnia-Herzegovina,²⁵ the permitting of humanitarian relief operations, the departure of foreign nationals,²⁶ the protection of diplomatic and consular personnel,²⁷ the cessation of forcible expulsions of persons from areas where they live,²⁸ and the creation of specific zones for the delivery of humanitarian supplies²⁹ or specific "safe areas" where civilians should be free from armed attacks.³⁰ At times, these specific declarations were intended to have special legal effects, such as affirming the right of self-defense,³¹ declaring the annexation of territory null and void,³² affirming the privileges and immunities to be accorded to U.N. person-

S/RES/770 (1992); S.C. Res. 752, U.N. SCOR, 47th Sess., 3075th mtg. ¶ 1, U.N. Doc. S/RES/752 (1992).

21. For Iraq, *see* S.C. Res. 660, U.N. SCOR, 45th Sess., 2932nd mtg. ¶ 3, U.N. Doc. S/RES/660 (1990); for Somalia, *see* S.C. Res. 733, U.N. SCOR, 47th Sess., 3039th mtg. ¶¶ 2-3, U.N. Doc. S/RES/733 (1992).

22. *See, e.g.*, S.C. Res. 746, U.N. SCOR, 47th Sess., 3060th mtg. ¶ 9, U.N. Doc. S/RES/746 (1992).

23. *See, e.g.*, S.C. Res. 855, U.N. SCOR, 48th Sess., 3262nd mtg. ¶ 1, U.N. Doc. S/RES/855 (1993).

24. For Yugoslavia, *see, e.g.*, S.C. Res. 770, U.N. SCOR, 47th Sess., 3106th mtg. ¶ 3, U.N. Doc. S/RES/770 (1992) and S.C. Res. 752, U.N. SCOR, 47th Sess., 3075th mtg. ¶¶ 7-8, U.N. Doc. S/RES/752 (1992).

25. S.C. Res. 752, U.N. SCOR, 47th Sess., 3075th mtg. ¶ 5, U.N. Doc. S/RES/752 (1992).

26. S.C. Res. 664, U.N. SCOR, 45th Sess., 2937th mtg. ¶ 1, U.N. Doc. S/RES/664 (1990).

27. S.C. Res. 667, U.N. SCOR, 45th Sess., 2940th mtg. ¶ 4, U.N. Doc. S/RES/667 (1990).

28. S.C. Res. 752, U.N. SCOR, 47th Sess., 3075th mtg. ¶ 6, U.N. Doc. S/RES/752 (1992).

29. S.C. Res. 757, U.N. SCOR, 47th Sess., 3082nd mtg. ¶ 17, U.N. Doc. S/RES/757 (1992).

30. S.C. Res. 824, U.N. SCOR, 48th Sess., 3208th mtg. ¶¶ 3-4, U.N. Doc. S/RES/824 (1993).

31. S.C. Res. 661, U.N. SCOR, 45th Sess., 2933rd mtg. pmb., U.N. Doc. S/RES/661 (1990).

32. S.C. Res. 662, U.N. SCOR, 45th Sess., 2934th mtg. ¶ 1, U.N. Doc. S/RES/662 (1990).

nel,³³ declaring the repudiation of debts null and void,³⁴ declaring the application of the Fourth Geneva Convention to the occupation of territory,³⁵ and altering the normal rules for determining nationality of maritime vessels.³⁶

2. Diplomatic Relations

The Security Council may also take steps to impair the diplomatic relations of a state that is responsible for threatening or breaching the peace. Once "preventive" or enforcement action is taken against a state, its rights and privileges as a U.N. member may be suspended by the General Assembly upon the recommendation of the Security Council.³⁷ If the state is a persistent violator of the principles of the Charter, the state may even be expelled from the United Nations by the General Assembly upon the recommendation of the Security Council.³⁸

Neither step was taken in the Iraq, Somalia, or Yugoslavia cases, but the Security Council did assert that Serbia and Montenegro could not claim U.N. membership based on the prior U.N. membership of the Socialist Federal Republic of Yugoslavia.³⁹ Based on the Security Council's recommendation, the General Assembly decided that Serbia and Montenegro could not continue automatically the U.N. membership of the former Socialist Federal Republic of Yugoslavia, and would have to apply for membership before it could participate in the work of the General Assembly.⁴⁰

33. *See, e.g.*, S.C. Res. 767, U.N. SCOR, 47th Sess., 3101st mtg. ¶ 15, U.N. Doc. S/RES/767 (1992).

34. S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg. ¶ 17, U.N. Doc. S/RES/687 (1991).

35. S.C. Res. 670, U.N. SCOR, 45th Sess., 2943rd mtg. ¶ 13, U.N. Doc. S/RES/670 (1990).

36. S.C. Res. 787, U.N. SCOR, 47th Sess., 3137th mtg. ¶ 10, U.N. Doc. S/RES/787 (1992).

37. U.N. CHARTER art. 5.

38. U.N. CHARTER art. 6.

39. S.C. Res. 777, U.N. SCOR, 47th Sess., 3116th mtg. ¶ 1, U.N. Doc. S/RES/777 (1992). The Security Council previously had noted that Serbia and Montenegro's claim to continue automatically the U.N. membership of the former Yugoslavia "has not been generally accepted." S.C. Res. 757, U.N. SCOR, 47th Sess., 3082nd mtg. pmb., U.N. Doc. S/RES/757 (1992). For the debate on the legal right of Serbia and Montenegro to continue as a member of the United Nations based on the membership of the former Yugoslavia, compare Yehuda Z. Blum, *UN Membership of the 'New' Yugoslavia: Continuity or Break?*, 86 AM. J. INT'L L. 830 (1992) with *Correspondents' Agora: UN Membership of the Former Yugoslavia*, 87 AM. J. INT'L L. 240 (1993).

40. G.A. Res. 47/1, U.N. GAOR, 47th Sess. (1992).

Further, the Security Council ordered states to reduce the level of their staff at diplomatic missions and consular posts in Serbia and Montenegro, to prevent persons of those states from participating in international sporting events, and to suspend scientific and technical cooperation and cultural exchanges and visits with those states.⁴¹ To protect the Government of Kuwait's status in exile, the Security Council called upon states not to recognize any regime set up by Iraq in Kuwait.⁴²

3. Economic Sanctions

The most aggressive global community function that may be taken is the imposition of compulsory economic sanctions. All states are obligated to abide by the sanctions, which either can be directed toward a particular class of goods, such as weapons and military equipment, or can cover goods generally. When an embargo of weapons occurs, it is usually designed to minimize the likelihood of continued or increased armed conflict, while a more general embargo appears designed to punish the conduct of a state and to encourage alternative behavior.

To minimize the likelihood of further armed conflict, the Security Council imposed embargoes on all deliveries of weapons and military equipment to Somalia⁴³ and to the former territory of Yugoslavia.⁴⁴ The latter embargo raised questions because it covered not just the territory of Serbia and Montenegro, which were largely blamed for the persistent fighting in Bosnia-Herzegovina, but also the territory of Bosnia-Herzegovina. Precluding the right of the Bosnian government from obtaining arms to defend itself was subsequently a part of Bosnia-Herzegovina's suit before the International Court of Justice against Serbia and Montenegro.⁴⁵

41. S.C. Res. 757, *supra* note 39, ¶ 8. Steps taken in compliance with this measure are to be reported to the sanctions committee established by Security Council Resolution 724. S.C. Res. 724, U.N. SCOR, 46th Sess., 3023rd mtg., U.N. Doc. S/RES/724 (1991).

42. S.C. Res. 661, U.N. SCOR, 45th Sess., 2933rd mtg. ¶ 9(b), U.N. Doc. S/RES/661 (1990).

43. S.C. Res. 733, U.N. SCOR, 47th Sess., 3039th mtg. ¶ 5, U.N. Doc. S/RES/733 (1992).

44. S.C. Res. 713, U.N. SCOR, 46th Sess., 3009th mtg. ¶ 6, U.N. Doc. S/RES/713 (1991).

45. Bosnia-Herzegovina's Application was filed on March 20, 1993, alleging violations by Serbia and Montenegro of the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (which entered into force Jan. 12, 1951, and to which the former Socialist Federal Republic of Yugoslavia was a party). The Application also charged violations of the U.N. Charter, the Geneva and Hague Conventions respecting

The Security Council imposed a general embargo on the import to and export from Iraq and occupied-Kuwait⁴⁶ and Serbia and Montenegro⁴⁷ of all commodities and products (including transfers of funds for such purposes), with the exception of exports to those countries of medical supplies and foodstuffs. To be effective, these embargoes called upon states to take steps to ensure compliance by their nationals, other persons in their territory, and their flag vessels and aircraft. Further, the sanctions ordered states to freeze the funds and other financial resources of the targeted states, which were primarily held by Western banks.

The Security Council requested states to report to the Secretary-General on measures taken to implement the embargoes and (in the case of Iraq) to freeze assets. The Security Council also established committees⁴⁸ to review these reports, to receive notification of and approve shipments of medical supplies and foodstuffs, to consider violations that come to its attention, and to make recommendations to the Security Council on measures that should be taken to respond to these violations.⁴⁹

Over time, the Security Council would develop means for tightening sanctions, both to enhance their effectiveness and to demonstrate continued political commitment to their objective. For instance, with respect to Iraq, the Security Council called upon states either to detain ships of Iraqi registry which enter their ports and which were used in violation of the sanctions, or to deny such ships

the laws of war, the Universal Declaration of Human Rights, and customary rules of international law. The jurisdiction of the Court was based on Article IX of the Genocide Convention. On April 8, 1993, the International Court issued a provisional order demanding that Serbia and Montenegro take measures to prevent the crime of genocide in Bosnia-Herzegovina, but did not rule on Bosnia's request to be exempted from the Security Council's arms embargo. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia-Herzegovina v. Yugo. (Serbia and Montenegro)*), 1993 I.C.J. 3 (Order of Apr. 8), *reprinted in* 32 I.L.M. 890 (1993).

46. S.C. Res. 661, *supra* note 42, ¶ 3. After Iraq's expulsion from Kuwait, the sanctions regime was modified to allow exports to Iraq of materials and supplies for "essential civilian needs." S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg. ¶ 20, U.N. Doc. S/RES/687 (1991).

47. S.C. Res. 757, *supra* note 39, ¶ 4.

48. Committees or commissions of the Security Council may be established under Rule 28 of the Provisional Rules of Procedure of the Security Council, U.N. SCOR, 38th Sess., U.N. Doc. S/96/Rev.7 (1983).

49. For Iraq, see S.C. Res. 661, *supra* note 42, ¶ 6; for Somalia, see S.C. Res. 751, U.N. SCOR, 47th Sess., 3069th mtg. ¶ 11, U.N. Doc. S/RES/751 (1992); for Yugoslavia, see S.C. Res. 724, U.N. SCOR, 46th Sess., 3023rd mtg. ¶ 5, U.N. Doc. S/RES/724 (1991).

entry to their ports.⁵⁰ The Security Council also ordered states to deny permission for any aircraft to take off from, land in or overfly their territory if the aircraft was destined to land in, or had taken off from, the target state, both with respect to Iraq and occupied-Kuwait⁵¹ and with respect to Serbia and Montenegro.⁵² When it became apparent that shipments of goods ostensibly travelling through Serbia and Montenegro to third states (transshipments) were being diverted and kept in Serbia and Montenegro, the Security Council tightened the sanctions by banning transshipments of certain key products (crude oil, coal, metals, chemicals, rubber, and motors), unless authorized by the sanctions committee on a case-by-case basis.⁵³ When sanctions violations persisted, the Security Council banned the transport of all commodities and products across the Serbia and Montenegro borders (with limited exceptions, such as humanitarian supplies), and ordered neighboring states to prevent the passage of all freight vehicles and rolling stock except at certain locations. It also ordered neighboring states to seize modes of transport owned by persons in Serbia and Montenegro or used in violation of the sanctions.⁵⁴

The objective of the sanctions shifted in the case of Iraq. In the first stage, they were imposed essentially to promote compliance with the Security Council's demand that Iraq withdraw from Kuwait. After Iraq's forcible expulsion from Kuwait, the arms embargo was maintained indefinitely,⁵⁵ but the general embargo was linked to a determination by the Security Council that Iraq had fulfilled the requirements of the post-war Iraqi weapons destruction program, and the establishment of a program for "skimming" off proceeds from Iraqi oil exports to fund a post-war compensation fund.⁵⁶

The effectiveness of economic sanctions must be viewed in light of the objective sought. If the objective is to focus attention on a

50. S.C. Res. 670, U.N. SCOR, 45th Sess., 2943rd mtg., U.N. Doc. S/RES/670 (1990).

51. *Id.* ¶¶ 2-4.

52. S.C. Res. 757, *supra* note 39, ¶ 7.

53. S.C. Res. 787, U.N. SCOR, 47th Sess., 3137th mtg. ¶ 9, U.N. Doc. S/RES/787 (1992).

54. S.C. Res. 820, U.N. SCOR, 48th Sess., 3200th mtg. ¶¶ 12-17, U.N. Doc. S/RES/820 (1993) (prohibiting also the provision of all services, financial or non-financial, to persons in Serbia and Montenegro, again with limited exceptions).

55. S.C. Res. 700, U.N. SCOR, 46th Sess., 2994th mtg. ¶ 2, U.N. Doc. S/RES/700 (1991); S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg. ¶¶ 24-29, U.N. Doc. S/RES/687 (1991).

56. S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg. ¶ 22, U.N. Doc. S/RES/687 (1991).

state, to deny it the benefits of key resources (such as assets held abroad or technology and armaments), to make a symbolic statement to the population of the target state, and to create incentives that in conjunction with other measures will help to resolve a crisis, then economic sanctions can be very effective. Certainly sanctions conducted on a global level under the auspices of the United Nations must be regarded as more effective than regional or unilateral sanctions. In the cases of both Iraq and Serbia and Montenegro, the imposition of sanctions certainly helped those countries to internalize the costs of their actions, even if they did not in themselves ultimately force those states to comply with the Security Council's requirements for the restoration of peace. If the objective, however, is to produce capitulation of the state by force of the sanctions alone, then sanctions cannot be regarded as effective.

The effect of economic sanctions on other states did not go unnoticed. In the cases of Iraq and Serbia and Montenegro, the economic effects of the sanctions on other states triggered requests for assistance from the Security Council under Article 50 of the Charter.⁵⁷ The Security Council asked the sanctions committees to examine these requests and make recommendations for appropriate action, but there were no readily available means for assisting those states.⁵⁸

4. Peacekeeping

"Peacekeeping" in U.N. parlance refers to the deployment of a U.N. presence in the field, normally involving U.N. military and/or police personnel on *ad hoc* detail from member states. Although the Charter itself does not explicitly envision such deployments,⁵⁹ during

57. See, e.g., *Note Verbale Dated 31 January 1991 from the Permanent Representative of the Syrian Arab Republic to the United Nations Addressed to the Secretary-General*, U.N. SCOR, 46th Sess., at 1, U.N. Doc. S/22193 (1991) (English version) (with respect to sanctions on Iraq); U.N. SCOR, 48th Sess., 3202nd mtg. at 8-10, U.N. Doc. S/PV 3202 (1993) (English version) (with respect to sanctions on Serbia and Montenegro).

58. Assistance to those states was provided on a bilateral basis by various states. See, e.g., James Sterngold, *Japan Offering Billions to Arabs to Help Offset Gulf Crisis Losses*, N.Y. TIMES, Aug. 23, 1990, at A1.

59. The legal basis for U.N. peacekeeping forces is not clearly set forth in the Charter. The resolution under which a U.N. peacekeeping force was dispatched to the Congo (ONUC) in 1960 does not identify any particular article of the Charter as the legal basis for the U.N. action. Secretary-General Dag Hammarskjöld regarded the deployment as authorized under Article 40 of Chapter VII. *Letter Dated 13 July 1960 from the Secretary-General Addressed to the President of the Security Council*, U.N. SCOR, 15th Sess., 1920th mtg. at 1, U.N. Doc. S/4381 (1960) (English version); see also DEREK W. BOWETT, U.N. FORCES: A LEGAL STUDY, 179-80 (1964). The United Nations Emergency Force (UNEF), dispatched after the

the Cold War era peacekeeping forces were the most visible U.N. mechanism for preventing or containing conflict. The salient features of these peacekeeping deployments were that they proceeded with the consent of the host government, with the Secretary-General as the chief operating officer, and with the *ad hoc* agreement of states in providing forces for use by the United Nations.⁶⁰ Thus, while the deployment of peacekeeping forces is the most colorful of the global community functions of the Security Council, it is not the most intrusive since target state consent is considered necessary.

Deployments of U.N. peacekeeping forces to Iraq, Yugoslavia, and Somalia largely followed these principles, with some exceptions. Under the terms of the cease-fire agreement that was accepted by Iraq, the Security Council established a demilitarized zone covering ten kilometers into Iraq and five kilometers into Kuwait. It then deployed into the zone an unarmed U.N. observer force to deter violations of the boundary and to observe any hostile actions by either state.⁶¹ The Iraq-Kuwait Observation Mission (UNIKOM) can only be terminated by a decision of the Security Council, which reviews the issue every six months. Due to Iraqi violations of the zone throughout 1992, the Security Council subsequently authorized adding mechanized infantry support to UNIKOM to prevent such violations.⁶² For the first time in U.N. peacekeeping history, UNIKOM includes representatives from all of the permanent members of the Security Council.⁶³ One unique feature of UNI-

Suez crisis, was authorized by the General Assembly presumably under Articles 10, 11, 12, and 14. See JAMES M. BOYD, UNITED NATIONS PEACE-KEEPING OPERATIONS: A MILITARY APPRAISAL 58 (1971). The validity of both ONUC and UNEF under the Charter was confirmed by the International Court of Justice in an advisory opinion of July 20, 1962. *Certain Expenses of the United Nations*, 1962 I.C.J. 151.

60. This approach was the product of a set of "guiding principles" established by the U.N. Secretary-General, Dag Hammarskjöld. *United Nations Emergency Force - Summary Study of the Experience Derived From the Establishment and Operation of the Force: Report of the Secretary-General*, U.N. GAOR, 13th Sess., Agenda Item 65(c), ¶¶ 5-19, U.N. Doc. A/3943 (1958), reprinted in ROSALYN HIGGINS, 1 UNITED NATIONS PEACEKEEPING: DOCUMENTS AND COMMENTARY 483-521 (1969).

61. *Report of the Secretary-General on the United Nations Iraq-Kuwait Observation Mission (UNIKOM)*, U.N. SCOR, 48th Sess., at 1-5, U.N. Doc. S/23106 (1993) (English version); S.C. Res. 773, U.N. SCOR, 47th Sess., 3108th mtg., U.N. Doc. S/RES/773 (1992); S.C. Res. 687, U.N. SCOR, 46th Sess., 3200th mtg., ¶¶ 5-6, U.N. Doc. S/RES/687 (1991).

62. S.C. Res. 806, U.N. SCOR, 48th Sess., 3171st mtg., ¶ 3, U.N. Doc. S/RES/806 (1993); see also *Further Special Report of the Secretary-General on the United Nations Iraq-Kuwait Observation Mission (UNIKOM)*, U.N. SCOR, 48th Sess., ¶ 2, U.N. Doc. S/25123 (1993).

63. See *Report of the Secretary-General on the United Nations Iraq-Kuwait Observation Mission*, U.N. SCOR, 48th Sess., ¶ 2, U.N. Doc. S/25514 (1993).

KOM as a peacekeeping force is that it is *not* dependent on the continuing consent of Iraq to its presence; unlike other peacekeeping operations, a decision by Iraq that it no longer consented to the presence of UNIKOM would not result in UNIKOM's withdrawal. Another unique feature is its ability to take physical action against persons who violate the condition of the border area. Separate from UNIKOM, U.N. personnel were also deployed throughout Iraq to assist in humanitarian relief operations for the Iraqi civilian population, pursuant to a memorandum of understanding between Iraq and the United Nations.⁶⁴

In early 1992, the Security Council established a U.N. Protection Force (UNPROFOR) headquartered in Sarajevo primarily to undertake patrolling functions in three United Nations protected areas (UNPAs) in Croatia, where the armed conflict had erupted.⁶⁵ After the subsequent outbreak of fighting in Bosnia-Herzegovina, UNPROFOR was forced to relocate to Belgrade and then Zagreb. Over the course of 1992-93, the Security Council gradually expanded its mandate to reflect changing conditions in the republics of the former Yugoslavia;⁶⁶ this mandate was expanded geographically by, for example, establishing a presence in Macedonia,⁶⁷ and functionally by, for example, protecting convoys of released detainees,⁶⁸ reopening the Sarajevo airport,⁶⁹ and monitoring "pink zones," meaning Serb-controlled areas lying outside the UNPAs.⁷⁰ Shortly after declaring

64. *Letter Dated 30 May 1991 From the Secretary-General Addressed to the President of the Security Council*, U.N. SCOR, 46th Sess., at 1, U.N. Doc. S/22663 (1991) (English version) (attached is the Memorandum of Understanding signed on April 18, 1991 in Baghdad between Iraq and the United Nations), reprinted in 30 I.L.M. 860 (1991).

65. S.C. Res. 743, U.N. SCOR, 47th Sess., 3055th mtg., ¶ 2, U.N. Doc. S/RES/743 (1992); *Further Report of the Secretary-General Pursuant to Security Council Resolution 721 (1991)*, U.N. SCOR, 47th Sess., ¶¶ 27-31, U.N. Doc. S/23592 (1992); S.C. Res. 740, U.N. SCOR, 47th Sess., 3049th mtg., ¶ 3, U.N. Doc. S/RES/740 (1992); *Report of the Secretary-General Pursuant to Security Council Resolution 721 (1991)*, U.N. SCOR, 46th Sess., at 15-20, U.N. Doc. S/23280 (1991) (English version).

66. See *Further Report of the Secretary-General Pursuant to Security Council Resolution 743*, U.N. SCOR, 48th Sess., at 1, U.N. Doc. S/25264 (1993) (English Version) (describing the first twelve months of UNPROFOR's activities in anticipation of the renewal of its mandate).

67. S.C. Res. 795, U.N. SCOR, 47th Sess., 3147th mtg., ¶ 2, U.N. Doc. S/RES/795 (1992).

68. S.C. Res. 776, U.N. SCOR, 47th Sess., 3114th mtg., ¶ 2, U.N. Doc. S/RES/776 (1992).

69. S.C. Res. 758, U.N. SCOR, 47th Sess., 3088rd mtg., ¶¶ 2-3, U.N. Doc. S/RES/758 (1992).

70. S.C. Res. 779, U.N. SCOR, 47th Sess., 3118th mtg., ¶ 2, U.N. Doc. S/RES/779 (1992).

the existence of six "safe areas" for the protection of civilians,⁷¹ the Security Council extended the mandate of UNPROFOR to enable it to deter attacks against those areas and to occupy certain key points on the ground to this end.⁷² Thus, UNPROFOR was also granted the ability to use force to accomplish its mission, which pushed the outer envelope of the United Nation's traditional principles for peacekeeping operations.⁷³ The experience of UNPROFOR has been very mixed. It helped to ensure a withdrawal of the Yugoslav's People's Army from Croatia, to keep the Sarajevo airport open for a period of time, and (when not prevented by hostile forces) to facilitate humanitarian relief operations. Yet, its presence only marginally served as a stabilizing force in the continuing conflict, and did not prevent the widespread human rights atrocities committed by the various warring factions.⁷⁴

In Somalia, for several months throughout 1992, the Security Council sought consent from the local warring factions for the deployment of U.N. forces to monitor cease-fires and to protect humanitarian relief workers. The Security Council first deployed a small unit of U.N. observers to monitor the cease-fire in Mogadishu and then deployed a small U.N. security force charged with protecting humanitarian relief workers in Mogadishu.⁷⁵ This U.N. Operation in Somalia (UNOSOM) was limited to the Mogadishu area and was completely ineffective in addressing the problems in Somalia, thus prompting the Security Council to authorize the more extensive U.S.-led deployment (discussed below), which did not have the consent of the Somali factions.

The deployment of peacekeeping forces in these three cases were not in themselves new developments in U.N. practice, although the number of U.N. peacekeeping deployments and the number of persons involved in those deployments has grown significantly in recent years. By the end of 1993, there were some 72,000 persons active in eighteen U.N. peacekeeping operations, only five of which began prior to the end of the Cold War.⁷⁶ The novelty lies more in the

71. S.C. Res. 824, U.N. SCOR, 48th Sess., 3208th mtg., U.N. Doc. S/RES/824 (1993).

72. S.C. Res. 836, U.N. SCOR, 48th Sess., 3228th mtg., U.N. Doc. S/RES/836 (1993).

73. S.C. Res. 807, U.N. SCOR, 48th Sess., 3174th mtg., U.N. Doc. S/RES/807 (1993).

74. See *Report of the Secretary-General Pursuant to Security Council Resolution 743*, U.N. SCOR, 48th Sess., U.N. Doc. S/25264 (1993).

75. S.C. Res. 775, U.N. SCOR, 47th Sess., 3110th mtg. ¶ 3, U.N. Doc. S/RES/775 (1992); S.C. Res. 751, U.N. SCOR, 47th Sess., 3069th mtg. ¶¶ 2-4, U.N. Doc. S/RES/751 (1992).

76. Brian Hall, *Blue Helmets, Empty Guns*, N.Y. TIMES, Jan. 2, 1994, § 6 (Magazine),

tasks assigned to the peacekeeping forces. Whereas previously their missions were oriented toward observation of cease-fires or the patrolling of buffer zones (although in some instances, such as the Congo operation, the mandate became quite broad), the Security Council was now willing in this period to see its peacekeeping forces take on more muscular roles, including the defense of relief operations. UNIKOM is particularly significant, in that its presence in the demilitarized zone is not contingent on Iraq's continuing assent, and because it would likely reengage full-scale U.N. action if Iraq were again to cross the border into Kuwait. Even highly intrusive military operations not based on the consent of a local government, such as occurred in Somalia, are often referred to as "peacekeeping." It may be that as new life is breathed into the Security Council, the traditional concept of a peacekeeping force is being blurred with non-consensual military enforcement of peace and security, a task that so far has been left by the Security Council to the forces of individual states. If a trend develops, peacekeeping operations may gradually make a partial or total shift away from being a global community function to more of a major power function, as discussed below.

In the meantime, the international community is reassessing the capabilities of the United Nations in the field of peacekeeping. There is a danger of overextension of U.N. resources and of a loss of U.N. credibility if it promises solutions that cannot be obtained, or that are undermined by the actions of one or more contributing states. Further, to the extent that U.N. peacekeepers are expected to display more vigor in their operations, there is a need to clarify their ability to protect themselves. For these reasons, the Security Council issued a statement in May 1993 that U.N. peacekeeping operations should be conducted in accordance with the following principles:

1. a clear political goal with a precise mandate subject to periodic review and to change in its character or duration only by the Council itself;
2. the consent of the government and, where appropriate, the parties concerned, save in exceptional cases;
3. support for a political process or for the peaceful settlement of the dispute;
4. impartiality in implementing Security Council decisions;

at 18, 22. (U.N. personnel are deployed in Angola, Cambodia, Cyprus, El Salvador, Georgia, Haiti, India/Pakistan, Iraq/Kuwait, Israel, Lebanon, Liberia, Mozambique, Rwanda, Somalia, Syria, Uganda, Western Sahara, and the former Yugoslavia.)

5. readiness of the Security Council to take appropriate measures against parties which do not observe its decisions;
6. the right of the Security Council to authorize all means necessary for United Nations forces to carry out their mandate; and
7. the inherent right of United Nations forces to take appropriate measures for self-defense.⁷⁷

Undoubtedly, efforts to clarify the role of U.N. peacekeeping forces will continue, taking into account the experience obtained through the variety of operations now underway.

B. Major Power Functions

The most ambitious element of Chapter VII—the deployment of military forces under the command of the United Nations to enforce the peace—was never realized during the Cold War. U.N. Charter Article 43 contemplated states placing military forces at the disposal of the Security Council pursuant to agreements between the Council and its members, but such agreements were never consummated. Other than calling upon the United Kingdom to use naval vessels to enforce economic sanctions against Southern Rhodesia in 1966 and authorizing the deployment of military forces from several states to Korea in 1950, prior to 1990 the Security Council did not unleash military force to restore international peace and security. Even in those two cases, the military operation was not under the command of the United Nations or the strategic direction of the U.N. Military Staff Committee, but rather coordinated or undertaken by a major power. As such, it evidenced the willingness of major powers to project force only if they themselves could control their forces and operate within their own rules of engagement.

The 1990-93 period saw a dramatic increase in the ability and willingness of the Security Council to authorize the use of military force to enforce its decisions. This projection of military force represents a second category of functions, which includes the enforcement of economic sanctions, the defeat of an aggressor, humanitarian intervention, and the patrolling of “no-fly” zones. It is reminiscent of the Cold War era, however, that, with the exception of UNOSOM II in Somalia (which began in May 1993), these functions still were not performed under the command of the United Nations, but by individual states led by one of the major powers, usually the

77. Note by the President of the Security Council, UN Doc. S/25859 (1993).

United States. For that reason, they may be characterized as “major power functions.” The power exercised derives not from resources inherent in either the United Nations or the global community as a whole, but from the superior military and economic resources of a select group of states, capable of projecting and willing to project force against a state whose conduct threatens international peace.

In exercising these functions, the Security Council seeks not to define legal relationships between the global community and the targeted states, but instead to require other states to enforce overall declarations and decisions of the Security Council using their own judgment as to means and methods. The importance of these functions cannot be understated; in none of the case studies did global community functions, such as the issuing of declarations or the imposition of economic sanctions, by themselves have the effect of resolving the crisis. In two of the case studies (Iraq and Somalia), however, major power functions played a dramatic role in either repelling aggression or preventing human rights catastrophes.

1. Enforcement of Economic Sanctions

Only once during the Cold War era were military forces authorized by the Security Council specifically to undertake measures to enforce the Council’s economic sanctions. In 1966, the Security Council determined that the racist situation in Southern Rhodesia constituted a threat to the peace and called upon the United Kingdom “to prevent by the use of force if necessary” the passage of naval vessels carrying oil destined for Southern Rhodesia.⁷⁸ The situation was quite unique for the Cold War era, and was the product of an isolated regime that had lost the sponsorship of the major powers by pursuing an odious path of racism. The military forces were not under U.N. command, nor even under a multinational task force; the United Kingdom alone was called upon to engage in the naval interdiction, and given authority to “arrest and detain” vessels.

In mid-August of 1990, multinational forces were deployed to the Gulf region to begin enforcing the economic sanctions imposed by the Security Council against Iraq and occupied-Kuwait. In Resolution 665, the Security Council called upon the multinational forces to “use such measures commensurate to the specific circumstance as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict

78. S.C. Res. 221, U.N. SCOR, 21st Sess., U.N. Doc. S/RES/221 (1966).

implementation" of the sanctions.⁷⁹ Based on this, a multinational coalition of naval vessels, led primarily by the United States, coordinated patrols of seas adjacent to the Strait of Hormuz and the Gulf of Aqaba, challenging, inspecting, and in some cases turning away vessels suspected of carrying commodities to or from Iraq and Kuwait. Iraq's lack of seaports and reliance on oil pipelines through Turkey and Saudi Arabia enhanced the ability to enforce the sanctions. Yet, smuggling did occur, and it was ultimately unclear whether the sanctions would force Iraqi compliance with the Security Council's demands.

For the arms-specific and general sanctions imposed with respect to the territory of the former Yugoslavia, the Security Council called upon all states, acting nationally or through regional agencies or arrangements, to "use such measures commensurate with the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations" in implementation of the sanctions.⁸⁰ Based on this, NATO and Western European Union forces moved to stop trafficking with Serbia and Montenegro through Adriatic ports, but the prevention of smuggling along the Danube River (which connects many European countries, including Serbia and Montenegro, to the Black Sea) proved difficult because of Serbia and Montenegro's ability to retaliate against the transport of other countries' commerce.⁸¹

In both cases, the states conducting such action were to report to the Secretary-General on actions taken and all states were to provide such assistance as may be necessary to support such actions. In neither case did the sanctions produce compliance by the target country in the short-term, although in both cases the sanctions did have the effect of decreasing significantly the commodities and products available to the citizens of the targeted state.

2. Fighting an Aggressor

During the Cold War era, the Security Council failed to conclude Article 43 agreements with member states that would have placed

79. S.C. Res. 665, U.N. SCOR, 45th Sess., 2938th mtg. ¶ 1, U.N. Doc. S/RES/665 (1990).

80. S.C. Res. 787, U.N. SCOR, 47th Sess., 3137th mtg. ¶ 12, U.N. Doc. S/RES/787 (1992).

81. See David B. Ottaway, *Embargo Leaks at Danube: Serbs' Threats on River Erode U.N. Sanctions*, WASH. POST, Mar. 4, 1993, at A21.

military forces at the disposal of the Security Council on an "as-needed" basis. In only one situation did the Security Council succeed in authorizing the deployment of forces to address military aggressions. In 1950, the Security Council determined that North Korea's attack on South Korea constituted a breach of the peace and recommended that states furnish "such assistance" to South Korea as may be necessary to repel the attack and "restore international peace and security in the area."⁸² These resolutions were the result of the Soviet Union's temporary absence from the Security Council in protest over the Council's refusal to seat the representatives from the People's Republic of China. Here, too, the Security Council did not deploy forces under its own command and control, but instead requested the United States to designate the commander of the forces and authorized the unified force "at its discretion" to use the United Nations flag in the course of its operations.⁸³

The post-Cold War era is seeing the same approach for major deployments of military forces. In Resolution 678, the Security Council authorized member states cooperating with Kuwait to "use all necessary means to uphold and implement" the Security Council's resolutions (which included the order that Iraq withdraw from Kuwait) and to "restore international peace and security in the area."⁸⁴ That authorization led to a massive multinational coalition, led primarily by the United States, with significant contributions by France, Great Britain, and certain Arab states, that used air, ground, and naval vessels to repel Iraq from Kuwait and, for a period of time, to occupy southern Iraq. A similar approach, albeit on a much smaller level, was taken with respect to Bosnia-Herzegovina. The Security Council authorized member states, acting nationally or through regional organizations, to take "all necessary measures, through the use of air power," in and around the six safe havens established to protect Bosnian Muslims and in support of UNPROFOR.⁸⁵

In many ways, the Iraq-Kuwait situation was unique and unlikely to recur with any frequency; certainly the spirited use of the United Nations reflected the combination of a particularly offensive act of overt aggression, a poorly conceived and executed effort by Iraq to win international support, an inward looking (and disappearing)

82. S.C. Res. 83, U.N. SCOR, 5th Sess., at 5, U.N. Doc. S/RES/83 (1950); S.C. Res. 82, U.N. SCOR, 5th Sess., at 4-5, U.N. Doc. S/RES/82 (1950).

83. S.C. Res. 84, U.N. SCOR, 5th Sess., at 5, U.N. Doc. S/RES/84 (1950).

84. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963rd mtg., U.N. Doc. S/RES/678 (1990).

85. S.C. Res. 836, U.N. SCOR, 48th Sess., 3228th mtg., U.N. Doc. S/RES/836 (1993).

Soviet Union in need of Western favor, and a clear threat to vital energy supplies upon which Western powers were dependent. Further, the resolve of the major powers to address all threats to the peace is unclear. The deteriorating situation in Yugoslavia had significant impact for the global community, but resulted in little action to engage aggressor forces.

Yet, conditions in the post-Cold War era are favorable for addressing serious threats to the peace when they do occur should any one of the major powers see it as in their interests to do so. For economic reasons, Russia and China are increasingly interested in maintaining close ties to the United States, France, and Great Britain. So long as the vital interests of none of these powers is threatened by U.N. authorization of force, such force will likely occur if any one major power is willing to bear the political and economic costs of leading the way. The key factor will be whether particular conflicts are of sufficient gravity and are capable of being resolved by the deployment of military forces with acceptable levels of risk—only then is a major power likely to seek Security Council authorization to act.

As these incidents arise, the U.N. response to the Iraq-Kuwait crisis will serve as a primary precedent. The precise legal basis for the authorization in Resolution 678 to use military force is thus of some relevance. The resolution explicitly emanated from Chapter VII, but—as is the case for many of the resolutions passed by the Security Council under Chapter VII—its origin within Chapter VII is not clear.

Resolution 678 might be viewed as a Security Council “authorization” under Article 51 for states to exercise an existing right of collective self-defense.⁸⁶ The wording of the resolution (addressing action by states cooperating with Kuwait) and the fact that the Security Council did not place the coalition forces under U.N. command or flag may support this view.⁸⁷ Yet, the nature of the power being exercised by the Security Council under this view is not entirely clear. If the power is a *grant of authority* to states to apply armed force in self-defense, the existence of that power is not evident in the language of Article 51.⁸⁸ Indeed, such an interpretation would

86. See Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 459 (1991). Professor Schachter makes the case for why Resolution 678 may be an exercise of Security Council authority under Article 51, but ultimately concludes that Resolution 678 may be read as consistent with both Article 51 and Article 42. *Id.* at 462.

87. *Id.* at 459-60.

88. Article 51 expressly recognizes that measures taken in self-defense “shall not in any

seem surprising given the origins of Article 51 as essentially a means of preserving the capabilities of regional security organizations (as opposed to enhancing the authority of the Security Council). If the power is simply an *authoritative, declaratory statement* supporting those states pursuing self-defense in a particular situation, then several issues arise. First, characterizing the Security Council decision as an “authorization” seems inappropriate. Second, one must question whether a declaratory statement by the Security Council constitutes a “preventive” or “enforcement” measure. If not, then there may be unintended but significant legal effects, in such areas as the rights and obligations of third states under Articles 2(5), 2(7), and 50. Third, if Resolution 678 was simply a declaratory statement, then the condition within Resolution 678 that Iraq had until January 15, 1991, to comply with the Security Council’s resolutions did not in fact impede the ability of Kuwait and its allies to use military force against Iraq prior to that date. Yet, the universal understanding of Resolution 678 seems to be that the Security Council prevented the use of force against Iraq until after January 15 to provide “one last chance for peace” (the coalition air campaign commenced on January 16-17). Fourth, one must question whether, as a policy matter, this would be a desirable development in U.N. practice. Casting the Security Council in the role of dispensing “*imprimatur*” for the actions of states may prove inevitable, but it is likely at the expense of efforts to enhance the Security Council’s military capabilities. Moreover, actions by states in self-defense without a Security Council “*imprimatur*” might be viewed as somehow lacking “legitimacy.”

Alternatively, Resolution 678 could be viewed as the Security Council taking “action” based on Article 42, or perhaps on the basis of Chapter VII as a whole.⁸⁹ By this view, Resolution 678 consti-

way affect the authority and responsibility of the Security Council *under the present Charter*” to take action as it deems necessary to restore international peace and security (emphasis added). Article 51 does not itself provide the Security Council such authority and responsibility; rather, the italicized phrase seems to be a reference to other parts of Chapter VII.

89. It has been argued that the Security Council has never authorized force under Article 42, because Article 42 envisions enforcement action through the deployment of U.N. forces under U.N. command. In the context of Resolution 678, see Carl-August Fleischhauer, Remarks by Carl-August Fleischhauer, U.N. Under-Secretary-General for Legal Affairs (1991), in 85 AM. SOC. INT'L L., 429, 431 (1991):

As in the Korea case, [Resolution 678] is in my view not a resolution adopted under Article 42 of the Charter, since it does not provide for a collective enforcement action by the United Nations, let alone under its command. It constitutes, however, the exercise of power of the Council under Chapter VII. See also Philippe Weckel, *L'Application du Chapitre VII de la Charte*, 1991 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 163, 191 (“Manifestement, le Conseil ne pouvait

tutes an authorization for states to take action necessary to maintain international peace and security on behalf of the Security Council: a threat to the peace had been identified in Resolution 660 and, as noted in the Preamble to Resolution 678, all of the peaceful efforts of the United Nations to obtain Iraqi compliance had failed. Support for this view over that favoring Article 51 may be found in the background to one of the Security Council's earlier resolutions—Resolution 665—authorizing maritime enforcement of the U.N. economic sanctions.⁹⁰ The reason for convening the Security Council to render that resolution was largely to respond to views of the Secretary-General and members of the Security Council (other than the United States) to the effect that the United States could not enforce U.N. sanctions as a right of collective self-defense under Article 51.⁹¹ It seems unlikely, therefore, that the Security Council convened for the purpose of simply affirming that right. Indeed, the statements of most of the Security Council members during the passage of Resolution 665 reveal a belief that the Security Council was either delegating a power to states or authorizing enforcement measures.⁹² Consequently, Resolution 665 is probably best viewed not as an affirmation of an independent right to self-defense, but rather as itself generating a right to take forcible action. Applying the

confier aux alliés du Koweït la responsabilité des mesures de coercition visées par l'article 42 de la Charte"). *But see* Schachter, *supra* note 86, at 462 ("The word 'action' [in Article 42] does not have to mean that those armed forces are under the control or command of the Council").

90. *See supra* note 79 and accompanying text.

91. The U.N. sanctions were imposed on August 6, 1990. U.S. naval forces unilaterally began enforcing the sanctions on August 16, 1990. Michael R. Gordon, *Navy Begins Blockade Enforcing Iraq Embargo*, N.Y. TIMES, Aug. 17, 1990, at A11; Eric Schmitt, *U.S. Intercepts and Frees 2 Iraqi Ships*, N.Y. TIMES, Aug. 18, 1990, at A4. At a news conference on August 16, U.N. Secretary-General Javier Pérez de Cuéllar stated that such action "would not be in accordance with either the letter or the spirit of the United Nations Charter" and its legality "would depend on whether the action taken by the American Government had been approved by the Security Council." Paul Lewis, *U.N. Chief Argues Blockade is Hasty*, N.Y. TIMES, Aug. 17, 1990, at A12 (citing Reuters report); *see also* Weckel, *supra* note 89, at 186 ("Ces actes sont orientés contre Iraq et ne servent pas directement la protection du Koweït").

92. *See* U.N. SCOR, 45th Sess., 2938th mtg. at 8-10, U.N. Doc. S/PV.2938 (1990) (Yemen: "powers are being granted" by the Security Council); *id.* at 21 (Colombia: the Security Council is "acting pursuant to Article 42"); *id.* at 37 (Malaysia: "the authority vested in the resolution by the Security Council is given guardedly"); *id.* at 46-47 (Finland: the resolution "authorizes further measures at sea by member States"); *id.* at 48 (United Kingdom: noting that the naval measures *alternatively* could be based on Article 51); *id.* at 52 (Ethiopia: resolution provides for "enforcement measures under the authority of the Security Council"). *But see id.* at 31. (United States: the resolution "lends the full weight and authority of the Security Council" to the efforts of states assisting Kuwait in the exercise of its right of self defense.)

same reasoning to Resolution 678 suggests that the Security Council did not regard authorizing the use of "all necessary means" to implement its resolutions as an affirmation of a right of self-defense.⁹³

3. Humanitarian Intervention

"Humanitarian intervention" is traditionally defined as the forcible deployment of military forces into a country without the consent of the local government to prevent the commission of severe and widespread human rights atrocities against the civilian population.⁹⁴ During the Cold War era, there were no instances in which the Security Council authorized humanitarian intervention, and the handful of instances where individual states pursued what was arguably humanitarian intervention without U.N. authorization typically met with condemnation by the global community as actions threatening world order. Most states and many legal scholars argued that the paramount interest of preventing the use of force under Article 2(4) of the Charter could not be sacrificed or derogated even in support of efforts to prevent widespread human rights atrocities.⁹⁵ Some even doubted whether the Security Council could engage in humanitarian intervention, since under Chapter VII, the Security

93. Current Secretary-General Boutros Boutros-Ghali regards Resolution 678 as a choice by the Security Council to authorize states to take measures "on its behalf." *Agenda for Peace*, *supra* note 1, ¶ 42.

94. The literature on the doctrine of "humanitarian intervention" is extensive. *See, e.g.*, TO LOOSE THE BANDS OF WICKEDNESS — INTERNATIONAL INTERVENTION IN DEFENCE OF HUMAN RIGHTS (Nigel S. Rodley ed., 1992); FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (1988); NATALINO RONZITTI, RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY (1985); HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (Richard B. Lillich ed., 1973). Articles addressing the post-Cold War practice of the Security Council include: Jarat Chopra & Thomas G. Weiss, *Sovereignty is No Longer Sacrosanct: Codifying Humanitarian Intervention*, 6 ETHICS & INT'L AFF. 95 (1992); Jost Delbruck, *A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, 67 IND. L.J. 887 (1992); Mark R. Hutchinson, Comment, *Restoring Hope: U.N. Security Council Resolutions for Somalia and an Expanded Doctrine of Humanitarian Intervention*, 34 HARV. INT'L L.J. 624 (1993); Peter Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force*, Inaugural Lecture, University of Amsterdam (Jan. 22, 1993) (transcript distributed by Martinus Nijhoff International); Ved Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti — Revising the Validity of Humanitarian Intervention — Part I*, 20 DENV. J. INT'L L. & POL'Y 305 (1992); David Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253-293 (1992).

95. *See* Ian Brownlie, *Humanitarian Intervention*, in LAW AND CIVIL WAR IN THE MODERN WORLD 217 (John Norton Moore ed., 1974). *But see* Richard B. Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in LAW AND CIVIL WAR IN THE MODERN WORLD 229.

Council could only act when there was a threat to international peace, a situation not usually implicated in internal human rights abuses.

During the 1990-93 post-Cold War period, a greater sensitivity to the importance of human rights abuses was seen in the Security Council's Chapter VII functions. In the aftermath of the war against Iraq, the rebellion and subsequent suppression of the Kurds in northern Iraq, and of the Shiites in southern Iraq, resulted in Security Council Resolution 688, which characterized the flow of refugees and cross border incursions resulting from the repression as a threat to international peace and security in the region.⁹⁶ Further, the Security Council insisted that Iraq permit access by international humanitarian organizations to all parts of Iraq. Ultimately, the Security Council's overall engagement with Iraq, including Resolution 688, led to interventions by the military forces of three major powers—the United States, France, and Great Britain—in northern Iraq in April of 1991 and in southern Iraq in August of 1992 to protect Iraqi civilians. The intervention in the north consisted of the deployment of ground and air forces to create "safe havens" for Kurds fleeing the Iraqi military, while the intervention in the south consisted of air patrols to monitor Iraqi military action against the Shiites. Explicit support for these interventions, however, is not found in the Security Council's resolutions.

The Security Council authorized the deployment of multinational forces, led primarily by the United States, to Somalia in December 1992 to establish a secure environment for humanitarian relief operations.⁹⁷ The authorization to deploy was the direct result of an offer made to the United Nations by the United States in late November 1992 to provide the personnel and logistical support necessary to carry off the operation. Unlike in Iraq, this deployment was explicitly authorized by the Security Council; like Iraq, the situation in Somalia was characterized as a threat to the peace,⁹⁸ but was in fact dominated by a concern with the internal welfare of a state's citizens. The local Somali factions did not consent to the deployment, but initially put up no resistance given the strength and size of the U.S. forces, which were joined by forces from some twenty other nations in a unified command (UNITAF). The Security Council directed the Secretary-General to attach a small UNOSOM

96. S.C. Res. 688, U.N. SCOR, 46th Sess., 2982nd mtg. pmb1., U.N. Doc S/RES/688 (1991).

97. S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg., U.N. Doc. S/RES/794 (1992); see also *Report of the Secretary-General*, U.N. Doc. S/24992 (1992).

98. S.C. Res. 794, *supra* note 97, pmb1.

liaison staff to the field headquarters of UNITAF,⁹⁹ and ultimately authorized transfer of the UNITAF operation to U.N.-commanded forces (UNOSOM II).¹⁰⁰ That transfer, which took place in May 1993, marked the first use of U.N.-commanded forces in a non-peacekeeping operation, although the situation in Somalia was unique in the lack of any existing central government capable of consenting or not consenting to a peacekeeping operation.

Unfortunately, soon after the transfer occurred, it became readily apparent that the U.N. forces in Mogadishu would have difficulty in adequately protecting themselves. An attack on U.N. Pakistani forces on June 5, 1993, left 24 U.N. soldiers dead and 56 wounded. The attack reportedly was made by forces directed by one of Mogadishu's "warlords," Mohammed Farah Hassan Aidid.¹⁰¹ The Security Council responded by unanimously reaffirming the authority of the Secretary-General to investigate the responsible parties and to secure "their arrest and detention for prosecution, trial, and punishment."¹⁰² The United States redeployed specialized forces for the purpose of capturing Aidid, but several attempts to do so during 1993 failed, leaving further casualties to U.N. and U.S. forces, and even the taking of their soldiers hostage.¹⁰³ The ease with which food relief operations could be restored contrasted dramatically with the difficulties of disarming the local factions and creating a stable political system under Somali rule. By late 1993, the United States and all the large European nations announced their intention to withdraw their forces from Somalia by early 1994, forcing the United Nations to return its focus to maintaining relief operations.¹⁰⁴

99. S.C. Res. 794, *supra* note 97, ¶ 15.

100. S.C. Res. 814, U.N. SCOR, 48th Sess., 3188th mtg., U.N. Doc. S/RES/814 (1993).

101. For information on the attack, see Tom Farer, *Executive Summary of a Report by an Independent Expert*, U.N. SCOR, 48th Sess., U.N. Doc. S/26351 (1993); *Report of the Secretary-General*, U.N. SCOR, 48th Sess., U.N. Doc. S/26022 (1993). The independent expert, Professor Tom Farer of American University in Washington, D.C., concluded that the claim that Mr. Aidid authorized the June 5 attack was supported by "clear and convincing evidence."

102. S.C. Res. 837, U.N. SCOR, 48th Sess., 3229th mtg., U.N. Doc. S/RES/837 (1993).

103. The captured soldiers were eventually released and the U.S. special forces left Somalia. John Lancaster, *Mission Incomplete, Rangers Pack Up*, WASH. POST, Oct. 21, 1993, at A1.

104. See, e.g., Julia Preston, *U.N. Hopes to Reorganize, Trim Operation in Somalia*, WASH. POST, Jan. 7, 1994, at A13; Julia Preston, *Italy, Germany Confirm Pullout from Somalia*, WASH. POST, Dec. 21, 1993, at A19; Thomas W. Lippman, *Clinton Envoy Cites Lessons of Somalia*, WASH. POST, Dec. 18, 1993, at A8 (prediction by Robert Oakley that the rival clan leaders would return to "some sort of rough-and-ready coexistence, rather than a return to all out civil war").

In Bosnia-Herzegovina, the Security Council regarded the widespread violations of international humanitarian law as a threat to international peace and security.¹⁰⁵ In August 1992, the Security Council authorized "all measures necessary" to facilitate the delivery of humanitarian assistance to Bosnia-Herzegovina¹⁰⁶ and demanded immediate access for the International Committee of the Red Cross to detention centers.¹⁰⁷ In light of the experience with Iraq, presumably these resolutions could have served as the basis for intervention by the ground forces of one or more states, but such intervention did not occur (foreign forces were present on the ground only as peacekeepers). U.S. forces did begin airdropping food and medicine to Muslim-held enclaves in Bosnia-Herzegovina in early March 1993.¹⁰⁸ Further, the Security Council authorized member states to take "all necessary measures, through the use of air power" to protect Bosnian Muslims in and around the six "safe havens," which resulted in limited airstrikes in 1994.¹⁰⁹ Those actions that were taken to protect Bosnian Muslims are not humanitarian "intervention" in the legal sense, because they were taken with the consent of the internationally-recognized government of Bosnia-Herzegovina.

A less traditional interpretation of humanitarian intervention might include decisions by the Security Council that a state should or must permit non-governmental entities, such as the Red Cross, to come into the state's territory to assist in the repatriation of individuals and the provision of food, medicine and other items. The Security

105. S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg. pmbi., U.N. Doc. S/RES/808 (1993).

106. S.C. Res. 770, U.N. SCOR, 48th Sess., 3106th mtg. at 2, U.N. Doc. S/RES/770 (1993).

107. S.C. Res. 771, U.N. SCOR, 48th Sess., 3106th mtg., U.N. Doc. S/RES/771 (1993).

108. See *Statement Announcing Airdrops Providing Humanitarian Aid to Bosnia-Herzegovina*, 29 WKLY. COMP. PRES. DOC. 318 (1993) (announcement of President Clinton that the United States would begin airdrops in coordination with the United Nations); John Lancaster & Ann Devroy, *U.S. To Continue Airdrops of Supplies to Muslims*, WASH. POST, Mar. 4, 1993, at A1, A20. The airdrops were supported by a statement of the Security Council, U.N. Doc. S/PV.3177 (1993), but were challenged by Serbia as having no basis in any of the Security Council resolutions. Letter dated 24 Feb. 1993, U.N. Doc. S/25330 (1993).

109. S.C. Res. 836, U.N. SCOR, 47th Sess., 3228th mtg., U.N. Doc. S/RES/836 (1993). In August 1993, the Secretary-General reported that the United Nations had the "initial operational capability" for the use of air power against Bosnian Serb positions. *Report of the Secretary-General*, U.N. Doc. S/26335 (1993). On April 10, 1994, UNPROFOR peacekeepers requested NATO to drop bombs on a Serb command post outside Gorazde. Jonathan C. Randal, *U.S. Jets Strike Serb Forces Near Bosnian Town*, WASH. POST, Apr. 11, 1994, at A1.

Council certainly made such decisions with respect to Iraq,¹¹⁰ Somalia,¹¹¹ and Yugoslavia.¹¹² Further, it might include the deployment of U.N. personnel to a state at the consent of that state to assist in providing relief to the local population, and this too was undertaken in Iraq, Somalia, and Yugoslavia.¹¹³ These types of actions, however, are best characterized as "humanitarian assistance" and treated separately. They do not implicate the same concerns about the use of force by states as arise for humanitarian intervention as traditionally defined.

4. No-Fly Zones

A variant on its other major power functions is the Security Council's imposition of constraints on the movement of the target state's military aircraft and sometimes even civilian aircraft, typically referred to as "no-fly zones." This type of low-level enforcement action was not used by the Security Council during the Cold War era, but it represents a highly likely function of the Security Council in the post-Cold War era. This is because while no-fly zones require the support and participation of one or more of the major powers, it is perceived by those powers as a lower level of involvement than the commitment of ground forces or the commitment of air forces for bombing operations. In other words, when a conflict arises that engages global attention, it is more likely that a major power will be willing to act by suppressing air activity, which generally entails low costs and yet may result in benefits by reducing the level of armed conflict or widespread human rights atrocities.

As part of their interventions into northern and southern Iraq to protect Iraqi Kurds and Shiites in April 1991 and August 1992, coalition forces established "no-fly zones" into which flights by Iraqi

110. See, e.g., S.C. Res. 688, U.N. SCOR, 46th Sess., 2982nd mtg., U.N. Doc. S/RES/688 (1991) (regarding assistance to repressed Iraqis); S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg. ¶¶ 30-32, U.N. Doc. S/RES/687 (1991) (regarding repatriation of Kuwaiti and third country nationals); S.C. Res. 686, U.N. SCOR, 46th Sess., 2978th mtg. ¶ 3, U.N. Doc. S/RES/686 (1991) (regarding prisoners of war).

111. See, e.g., S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg. ¶¶ 2-3, U.N. Doc. S/RES/794 (1992); S.C. Res. 746, U.N. SCOR, 47th Sess., 3060th mtg. ¶ 3, U.N. Doc. S/RES/746 (1992).

112. See, e.g., S.C. Res. 752, U.N. SCOR, 47th Sess., 3075th mtg. ¶ 8, U.N. Doc. S/RES/752 (1992).

113. Much of the agony of the situation in Bosnia during 1992-93 related to the unsuccessful efforts by U.N. truck convoys, carrying tons of food and medicine, to convince Serb forces to allow passage to Muslim-occupied towns, particularly in Eastern Bosnia, where months of siege had left the inhabitants sick and starving.

military and civilian aircraft were barred. As noted above, these interventions had no explicit basis in the resolutions of the Security Council. Ultimately, several Iraqi aircraft were shot down in these zones and Iraqi anti-aircraft missiles were attacked as a threat both to coalition planes patrolling the zones and U.N. flights into Iraq related to the weapons destruction program.

In October 1992, the Security Council explicitly established a ban on all military flights, fixed or rotary-wing aircraft, in the airspace over Bosnia-Herzegovina to ensure the safety of humanitarian flights and to assist in the cessation of hostilities.¹¹⁴ In establishing the no-fly zone, the Security Council did not assert that it was exercising its authority under Chapter VII, perhaps because the various parties to the conflict (including the Bosnian Serbs) agreed to a ban on military flights.¹¹⁵ Initially, the ban was implemented simply through a monitoring system associated with the U.N. peacekeeping operation, UNPROFOR. A Monitoring Coordination and Control Centre (MCCC) established at UNPROFOR headquarters in Zagreb received technical monitoring information from NATO; unless the flights had received prior approval from MCCC, they were reported to the Security Council.¹¹⁶ When it became apparent that Serbian aircraft violated the ban hundreds of times,¹¹⁷ the Security Council invoked Chapter VII to authorize member states, acting nationally or through regional organizations to take "all necessary measures" to ensure compliance with the flight ban, "proportionate to the specific circumstances and the nature of the flights."¹¹⁸ NATO agreed to undertake this task beginning in mid-April 1993.¹¹⁹ The

114. S.C. Res. 786, U.N. SCOR, 47th Sess., 3133rd mtg. ¶ 2, U.N. Doc. S/RES/786 (1992); S.C. Res. 781, U.N. SCOR, 47th Sess., 3122nd mtg. ¶ 1, U.N. Doc. S/RES/781 (1992).

115. The parties to the conflict agreed to the ban on military flights at the London Conference of August 26-27, 1992. See *London Conference Documents: Specific Decisions by the London Conference*, ¶ 3, reprinted in 3 U.S. DEP'T ST. DISPATCH SUPP., No. 7, at 4 (Sept. 1992); see also *Joint Declaration, Geneva, Sept. 30, 1992*, ¶ 1, reprinted in U.N. SCOR, 47th Sess., Annex 1, U.N. Doc. S/24476 (1992).

116. *Report of the Secretary-General*, U.N. SCOR, 47th Sess., U.N. Doc. S/24667 (1992).

117. See, e.g., *Note Verbale from Secretary-General Addressed to the President of the Security Council*, U.N. SCOR, 48th Sess., U.N. Doc. S/24900/Add.22 (1993).

118. S.C. Res. 816, U.N. SCOR, 48th Sess., 3191st mtg. ¶ 4, U.N. Doc. S/RES/816 (1993). For information on its implementation, see *Letter Dated 9 April 1993 from the Secretary General Addressed to the President of the Security Council*, U.N. SCOR, 48th Sess., U.N. Doc. S/25567 (1993).

119. NATO designated the action "Operation Deny Flight." See *U.S. Support of U.N. Efforts in Bosnia-Herzegovina*, U.S. DEP'T ST. DISPATCH, Vol. 4, No. 16, Apr. 1993, at 253.

rules of engagement for the flights called for identifying aircraft violating the ban, escorting them out of the zone, and only as a last resort shooting them down.¹²⁰ By the end of 1993, no aircraft had been fired upon; violations persisted, but were virtually all by low-flying helicopters transporting persons or supplies rather than combat fighter aircraft.¹²¹

C. Technical Commission Functions

The most unique functions now being performed by the Security Council are ones that were neither contemplated in the U.N. Charter nor developed during the Cold War era. These functions involve the creation of independent commissions to resolve issues of a technical nature, whether in relation to claims for damage, war crimes, boundary disputes, or weapons destruction. Most of these commissions relate to the post-war activities with respect to Iraq, but a war crimes commission was established to address the Yugoslav crisis.

The creation and mandate of these commissions is a product of a Security Council decision, typically taken in conjunction with recommendations by the Secretary-General. The Secretary-General is instrumental in the appointment of experts to the commissions, although in some instances the parties to the underlying conflict are permitted to appoint experts as well. Some commissions are charged with adjudicating claims put forth by parties on both sides of a conflict (e.g. the Iraq-Kuwait boundary commission and the Yugoslav war crimes commission), while others are directed more toward the conduct of just one side (e.g. the special commission on destruction of Iraqi weapons). Nevertheless, in all instances, the outcome of the task assigned is essentially left in the hands of the commission in order to achieve a purportedly impartial, technical assessment of what at times are extremely complex factual claims. As such, the power exercised derives from a belief that the decisions of the commissions reflect apolitical judgments of experts, who are not directly responsible to governments, especially those implicated in the underlying conflict. The proactive use of technical commissions to assist in resolving disputes is a remarkable development that in principle has tremendous potential for the Security Council.

120. Alan Riding, *NATO Agrees to Enforce Flight Ban Over Bosnia Ordered by U.N.*, N.Y. TIMES, Apr. 3, 1993, at A5; William Drozdiak, *NATO Sets Monday as Start of Bosnia Mission*, WASH. POST, Apr. 9, 1993, at A1.

121. Julia Preston, *Violations Soaring in No-Fly Zone*, WASH. POST, Jan. 15, 1994, at A16.

1. Compensation Commission

Prior to Iraq's expulsion from Kuwait, the Security Council reminded Iraq that it was liable under international law for any loss, damage or injury arising from its invasion, and invited states to collect relevant information on their claims for such losses, damages, or injuries.¹²² After the war, the Security Council used this broad principle of Iraqi liability as the basis for creating a U.N. Compensation Commission for the payment of compensation for damage claims.¹²³ The Secretary-General submitted recommendations in May 1991,¹²⁴ which were for the most part approved by the Security Council.¹²⁵

The Compensation Commission is located in Geneva and consists of a Governing Council, a Secretariat, and Commissioners. The Governing Council is the policy-making body of the Commission and consists of representatives from the fifteen members of the Security Council. It meets periodically and issues decisions regarding what types of claims are eligible for compensation, the procedures for filing and proving claims, the appointment of Commissioners, and other matters.¹²⁶ The Secretariat consists of U.N. employees responsible for providing administrative support to the Governing Council and the Commissioners, and for administering the fund from which claims will be paid. The Commissioners are independent experts drawn from around the world, including former judges of the International Court of Justice and the Permanent Court of Arbitration.

122. S.C. Res. 674, U.N. SCOR, 45th Sess., 3951st mtg. ¶¶ 8-9, U.N. Doc. S/RES/674 (1990).

123. S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg. ¶¶ 18-19, U.N. Doc. S/RES/687 (1991).

124. *Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687 (1991)*, U.N. SCOR, 46th Sess., U.N. Doc. S/22559 (1991).

125. S.C. Res. 692, U.N. SCOR, 46th Sess., 2987th mtg., U.N. Doc. S/RES/692 (1991).

126. To date, the decisions of the Governing Council have been reported to the Security Council by the President of the Governing Council. See, e.g., *Letter Dated 2 August 1991 from the President of the Governing Council of the United Nations Compensation Commission to the President of the Security Council*, U.N. SCOR, 46th Sess., U.N. Doc. S/22885 (1991), reprinted in 30 I.L.M. 1711 (1991) (initial decisions, including criteria for expediting processing of urgent claims). The President of the Governing Council provides annual reports to the Security Council regarding the activities of the Compensation Commission, including texts of the decisions of the Governing Council. See, e.g., *Letter Dated 21 September 1992 From the President of the Governing Council of the United Nations Compensation Commission Addressed to the President of the Security Council*, U.N. SCOR, 47th Sess., U.N. Doc. S/24589 (1992), reprinted in 31 I.L.M. 1018 (1992) (first annual report). For an early assessment of the Compensation Commission's activities, see John R. Crook, *The United Nations Compensation Commission — A New Structure to Enforce State Responsibility*, 87 AM. J. INT'L L. 144 (1993).

Sitting in panels of three, the Commissioners review claims assigned to them by the Secretariat based on criteria established by the Governing Council and other relevant rules of international law.¹²⁷ The Commissioners make recommendations to the Governing Council regarding the disposal of claims; the Governing Council may then approve, alter, or send back to the Commissioners those recommendations.¹²⁸ As of December 1993, the Compensation Commission had received 2.3 million claims.¹²⁹

Claims are to be paid from the compensation fund. The Security Council decided that the source of funding for the compensation fund would be a levy on Iraq's exports of oil,¹³⁰ specifically oil exported from Iraq after April 3, 1991, as well as oil exported earlier but not delivered or not paid for due to the economic sanctions regime.¹³¹ The Security Council also decided that the percentage levy should be 30%, unless the Governing Council decides otherwise.¹³² The essential assumption of these decisions, however, was that Iraq would comply with all aspects of the ceasefire and that with the lifting of the sanctions regime oil exports would occur. Because Iraq did not comply, the sanctions regime remained in place.

In order to generate funds for the compensation fund and for other U.N. activities with respect to Iraq, the Security Council authorized (notwithstanding the sanctions regime) a special scheme for "skimming" off up to 30% of the proceeds obtained from exporting \$1.6 billion of petroleum and petroleum products from Iraq over a six-month period,¹³³ but Iraq refused to conduct exports on

127. *Decision Taken by the Governing Council of the United Nations Compensation Commission*, U.N. SCOR Compensation Comm., 6th Sess., 27th mtg., Annex 1, arts. 28-31, U.N. Doc. S/24363 (1992), reprinted in 31 I.L.M. 1053 (1992).

128. *Id.* arts. 37, 38, 40.

129. *Compensation Commission: 2.3 Million Claims Filed, 1994 INT'L ARB. REP.* 8, 9. Egypt alone filed a claim on behalf of 1.2 million workers who were in Kuwait at the time of the invasions.

130. S.C. Res. 687, U.N. SCOR, 46th Sess., 2918th mtg. ¶ 19, U.N. Doc. S/RES/687 (1991).

131. S.C. Res. 692, *supra* note 125.

132. S.C. Res. 778, U.N. SCOR, 47th Sess., 3117th mtg. ¶ 10, U.N. Doc. S/RES/778 (1992); S.C. Res. 705, U.N. SCOR, 46th Sess., 3004th mtg. ¶ 2, U.N. Doc. S/RES/705 (1991).

133. See *Decision Taken by the Security Council Committee Established by Resolution 661 (1990) Concerning the Situation Between Iraq and Kuwait*, U.N. Special Comm., 51st mtg., U.N. Doc. S/23149 (1991); S.C. Res. 712, U.N. SCOR, 46th Sess., 3008th mtg., U.N. Doc. S/RES/712 (1991); *Report by the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 706 (1991)*, U.N. SCOR, 46th Sess., U.N. Doc. S/23006 (1991); S.C. Res. 706, U.N. SCOR, 46th Sess., 3004th mtg., U.N. Doc. S/RES/706 (1991); *Letter*

these terms. The Security Council then decided that states that had frozen proceeds owed to the Government of Iraq from the sale of petroleum or petroleum products on or after August 6, 1990 should transfer those funds into a U.N.-administered escrow account, up to certain amounts per country, as well as proceeds from the sale of such products in their possession. 30% of these funds are then to be transferred to the compensation fund, with the rest available to pay the cost of certain U.N. activities with respect to Iraq.¹³⁴

The nature of transnational capital and investment flows are such that when future conflicts arise there will usually be an option for seizing the financial assets of a target state as an economic sanction. The precedent set by the Iraq Compensation Commission gives the Security Council the added threat of liquidating those assets for compensating damages arising from the target state's behavior. This threat may serve to influence that behavior. Careful selection of impartial experts to serve these commissions will be important to ensure that its decisions are respected and considered authoritative.

A central question will be whether the mandate of future commissions will include receiving claims by *both* sides to a conflict, rather than just one side. In the case of the Iraq-Kuwait war, Iraq was the aggressor state and arguably all damages (committed by either side) flowed from Iraq's aggression; on this basis, the Iraq Compensation Commission in fact intends to use Iraqi funds to compensate claims for damage caused by coalition military operations. Yet, because the Compensation Commission cannot entertain claims brought by Iraq or Iraqi nationals, and does not allow Iraq to participate significantly in its work (Iraq is only permitted to submit comments on the work of the Commission), it has been criticized as unnecessarily one-sided.¹³⁵ Arguably, the Compensation Commission would be viewed as more credible if it allowed for a greater level of Iraqi participation. For instance, the Commission could do this if it addressed claims by Iraq and Iraqi nationals against the coalition allies for damage from coalition actions that were allegedly impermissible under the laws of war, such as allegations of damage

Dated 30 May 1991 From the Secretary-General Addressed to the President of the Security Council, U.N. SCOR, 46th Sess., U.N. Doc. S/22661 (1991); *Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687* (1991), U.N. SCOR, 46th Sess., U.N. Doc. S/22559 (1991). The remainder of the proceeds were to be used to finance the purchase of food, medicine, and other supplies for essential civilian needs.

134. S.C. Res. 778, *supra* note 132.

135. See, e.g., Elyse J. Garmise, Note, *The Iraqi Claims Process and the Ghost of Versailles*, 67 N.Y.U. L. REV. 840 (1992).

to civilians not incidental to legitimate attacks on military targets, or damage otherwise not in accordance with the principles of military necessity or proportionality. While many observers (including this one) see little evidence that such damage occurred,¹³⁶ opening up the process to such claims could have enhanced the credibility of the Compensation Commission and served to vindicate the views of the coalition forces. Moreover, such an approach could help reinforce adherence to the laws of war generally and help to draw the defeated state into the post-war reconciliation process in a manner that fosters the restoration of peace and security, rather than aggravate deep-seated resentment. Key drawbacks to this approach are the unwillingness of states to have their actions in self-defense scrutinized for excesses, the potential for deterring states from assisting other states in self-defense, and the need for the Commission to utilize individuals expert not just in assessing claims generally, but in assessing the necessity and proportionality of complex military tactics.

2. War Crimes

In all three case studies (Iraq, Somalia, and Yugoslavia), the Security Council reminded parties to the conflict of their obligations under international humanitarian law, including their obligations under the 1949 Geneva Conventions and the fact that parties responsible for grave breaches of the 1949 Conventions are individually responsible.¹³⁷ This may be regarded as a useful development in that it highlights the potential operation of international law not just on states, but on individuals as well, particularly those individuals that are directly involved in the decision to initiate aggression and in the conduct of war. To engage the attention of the international community in this process, the Security Council called upon states and international humanitarian organizations to collate substantiated information in their possession relating to violations of humanitarian

136. *But see* MIDDLE EAST WATCH, HUMAN RIGHTS WATCH, NEEDLESS DEATHS IN THE GULF WAR: CIVILIAN CASUALTIES DURING THE AIR CAMPAIGN AND VIOLATIONS OF THE LAWS OF WAR (1991).

137. For Iraq, see S.C. Res. 670, U.N. SCOR, 45th Sess., 2943rd mtg. ¶ 13, U.N. Doc. S/RES/670 (1990) (no explicit reference to the Geneva Conventions). For Somalia, see S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg. ¶ 5, U.N. Doc. S/RES/794 (1992). For Yugoslavia, see S.C. Res. 787, U.N. SCOR, 47th Sess., 3137th mtg. ¶ 7, U.N. Doc. S/RES/787 (1992) (no explicit reference to the Geneva Conventions); S.C. Res. 771, U.N. SCOR, 47th Sess., 3106th mtg. ¶ 1, U.N. Doc. S/RES/771 (1992); S.C. Res. 764, U.N. SCOR, 47th Sess., 3093rd mtg. ¶ 10, U.N. Doc. S/RES/764 (1992).

law, and to make the information available to the Security Council.¹³⁸

Particularly egregious reports of violations of the laws of war emerged during the conflict in the former Yugoslavia, including the use of rape as an instrument of warfare. Various states have submitted information to the Security Council about these violations,¹³⁹ including those involved in the conflict, such as Serbia and Montenegro,¹⁴⁰ Bosnia-Herzegovina,¹⁴¹ Slovenia,¹⁴² and Croatia.¹⁴³ In addition, a Special Rapporteur of the Commission on Human Rights provided reports to the Secretary-General which were transmitted to both the Security Council and the General Assembly.¹⁴⁴ It should be noted that some countries, such as China and Zimbabwe, have resisted the involvement of the Security Council in

138. For Iraq, see S.C. Res. 674, U.N. SCOR, 45th Sess., 2951st mtg., U.N. Doc. S/RES/674 (1990). For Yugoslavia, see S.C. Res. 780, U.N. SCOR, 47th Sess., 3119th mtg., U.N. Doc. S/RES/780 (1992); S.C. Res. 771, U.N. SCOR, 47th Sess., 3106th mtg., U.N. Doc. S/RES/771 (1992).

139. See, e.g., *Letter Dated 7 December 1992 From the Deputy Representative of the United States of America to the United Nations Addressed to the Secretary-General*, U.N. Doc. S/24918 (1992) (United States); *Letter Dated 5 November 1992 From the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General*, U.N. Doc. S/24791 (1992); *Note Verbale Dated 2 November 1992 From the Permanent Mission of Austria to the United Nations Addressed to the Secretary General*, U.N. Doc. S/24787 (Austria); *Letter Dated 5 November 1992 From the Permanent Representative of France to the United Nations Addressed to the President of the Security Council*, U.N. Doc. S/24768 (1992) (France); *Letter Dated 22 October 1992 From the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General*, U.N. Doc. S/24705 (1992); *Letter Dated 22 September 1992 From the Deputy Permanent Representative of the United States of America to the Nations Addressed to the Secretary-General*, U.N. Doc. S/24583 (1992).

140. See, e.g., *Note Verbale Dated 25 February 1993 From the Charge d'Affaires A.I. of the Permanent Mission of Yugoslavia to the United Nations Addressed to the Secretary-General*, U.N. Doc. S/25345 (1993); *Letter Dated 6 November 1992 From the Charge d'Affaires A.I. of the Permanent Mission of Yugoslavia to the United Nations Addressed to the Secretary-General*, U.N. Doc. S/24779 (1992) (reports of the "former Socialist Federal Republic of Yugoslavia").

141. See, e.g., *Letter Dated 18 November 1992 From the Permanent Representative of Bosnia and Herzegovina to the United Nations Addressed to the President of the Security Council*, U.N. Doc. S/24824 (1992); *Letter Dated 9 November 1992 From the Permanent Representative of Bosnia and Herzegovina to the United Nations Addressed to the President of the Security Council*, U.N. Doc. S/24797 (1992).

142. See, e.g., U.N. SCOR, 47th Sess., U.N. Doc. S/24789 (1992).

143. See, e.g., U.N. SCOR, 48th Sess., U.N. Doc. S/25702 (1993); U.N. SCOR, 47th Sess., U.N. Doc. S/24770 (1992). Reports of violations of the laws of war were not limited to human rights violations. Croatia, for example, reported plundering of its oil fields by Serb-backed insurgents. U.N. SCOR, 48th Sess., U.N. Doc. S/25703 (1993); U.N. SCOR, 48th Sess., U.N. Doc. S/25601 (1993).

144. U.N. Doc. A/47/666-S/24809 (1992); U.N. Doc. A/47/635-S/24766 (1992).

human rights issues, arguing that it interferes with the work of other U.N. organs, such as the U.N. Commission on Human Rights.¹⁴⁵

With respect to Yugoslavia, the Security Council went several steps further than in Iraq and Somalia, perhaps because its success in Yugoslavia on other fronts was quite marginal. The Security Council established through the Secretary-General a Commission of Experts—individuals of high reputation not associated with governments—to examine and analyze the information received regarding humanitarian law violations, as well as information from other sources.¹⁴⁶ The Commission of Experts determined in an interim report that grave breaches and other violations of international humanitarian law had been committed and that further fact-finding was necessary.¹⁴⁷ Based on these reports, various governments submitted proposals for the establishment of an international criminal tribunal.¹⁴⁸ In Resolution 808,¹⁴⁹ the Security Council declared that the violations of international humanitarian law in Yugoslavia constituted a threat to international peace and security, and decided that "an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."

145. See U.N. Doc. S/PV.3134, at 9-11 (1992).

146. S.C. Res. 787, U.N. SCOR, 47th Sess., 3137th mtg. ¶ 8, U.N. Doc. S/24808/Rev.1 (1992); S.C. Res. 780, U.N. SCOR, 47th Sess., 3119th mtg. ¶ 2, U.N. Doc. S/24618 (1992). For the Secretary-General's report outlining his decision to establish a five-member Commission of Experts, see U.N. SCOR, 47th Sess., U.N. Doc. S/24657 (1992). On October 26, 1992, the Secretary-General announced the appointment of the Chairman and the members of the Commission of Experts.

147. *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. SCOR, 48th Sess., U.N. Doc. S/25274 (1993).

148. U.N. Doc. A/47/920-S/25512 (1993) (Organization of the Islamic Conference); *Letter Dated 5 April 1993 From the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary General*, U.N. SCOR, 48th Sess., U.N. Doc. S/25537 (1993) (Russia); *Letter Dated 18 Feb. 1993 from the Permanent Representative of Sweden to the United Nations Addressed to the Secretary General*, U.N. SCOR, 48th Sess., U.N. Doc. S/25307 (1993) (CSCE report submitted by Sweden); *Letter Dated 17 Feb. 1993 from the Permanent Representative of Italy to the United Nations Addressed to the Secretary General*, U.N. SCOR, 48th Sess., U.N. Doc. S/25300 (1993) (the report of a commission of jurists submitted by Italy); *Letter Dated 10 Feb. 1993 from the Permanent Representative of France to the United Nations Addressed to the Secretary General*, U.N. SCOR, 48th Sess., U.N. Doc. S/25266 (1993) (the report of a committee of jurists submitted by France); *Report of the Secretary-General on the Activities of The International Conference on The Former Yugoslavia*, U.N. SCOR, 48th Sess., U.N. Doc. S/25221 (1993) (co-chairmen of the Steering Committee of The International Conference on The Former Yugoslavia).

149. S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993).

In an extraordinary report submitted to the Security Council in May 1993, the Secretary-General described the legal basis for the establishment of the tribunal, its competence and organization, the parameters of its pre-trial, trial, and post-trial proceedings, and other wide-ranging matters, with an annex setting forth a proposed statute for the tribunal.¹⁵⁰ The statute does not preempt the right of states on their own to prosecute individuals for war crimes, but does provide the tribunal with authority to issue mandatory orders regarding indicted individuals. Under the statute, the jurisdiction of the tribunal extends to grave breaches of the Geneva Conventions of 1949¹⁵¹ (but not their Protocols of 1977¹⁵²), violations of the laws or customs of war, genocide, and crimes against humanity; it does not extend to crimes of aggression. The Security Council approved the Secretary-General's report and adopted the statute of the tribunal.¹⁵³ Once the judges, prosecutors, and registry are in place, the tribunal will commence its work.

This step is very significant. All prior war crimes trials, including the Nuremberg and Tokyo war crimes trials, were not conducted under the authority of the U.N. Charter. They were conducted either under *ad hoc* international tribunals established by victorious states, or by national tribunals. For the first time, the United Nations itself is pursuing war crimes trials and, while the tribunal is temporary in nature, it could evolve into (and certainly will be a precedent for) a more permanent tribunal. Even if the tribunal remains temporary in nature, the vast number of issues it will address will have a tremendous potential for the development of international criminal law and international humanitarian law. The task of organizing and prosecuting war crimes on a scale that appears to have occurred in the former Yugoslavia is daunting and may not live up to expectations. Yet to the extent that this effort makes clear the international community's condemnation of such actions and provides

150. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993). The Secretary-General estimated the operating costs of the tribunal for one-year to be \$31.2 million. U.N. SCOR, 48th Sess., U.N. Doc. S/25704/Add.1 (1993). For a discussion of the creation of the tribunal, see James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639 (1993).

151. The four Geneva Conventions signed August 12, 1949, which respectively deal with wounded and sick on land; wounded, sick and shipwrecked at sea; prisoners of war; and civilians, appear at 75 U.N.T.S. 31, 75 U.N.T.S. 85, 75 U.N.T.S. 135, and 75 U.N.T.S. 287.

152. The two Protocols to the 1949 Geneva Conventions signed December 12, 1977, deal respectively with international armed conflicts and non-international armed conflicts.

153. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

a forum for creating an impartial record that informs the international community, that alone will represent a significant achievement. A further significance of this development is that the effort is being made while the conflict is still ongoing, and is oriented toward all parties to the conflict, not just the vanquished.

3. Boundary Demarcation

In the aftermath of the coalition victory over Iraq, the Security Council decided to "guarantee" an international boundary between Iraq and Kuwait and the allocation of certain islands,¹⁵⁴ in accordance with a 1963 agreement between the two states.¹⁵⁵ Because the agreement did not specify the precise coordinates of the boundary, the Security Council called upon the Secretary-General to make arrangements for demarcating the boundary.

The Secretary-General established a U.N. Iraq-Kuwait Boundary Demarcation Commission¹⁵⁶ consisting of three independent experts (from Indonesia, Sweden, and New Zealand) appointed by the Secretary-General, and one representative each from Iraq and Kuwait. The Commission proceeded over a series of meetings (as well as an on-site inspection) to survey and map the border area using sophisticated photographic and positioning techniques. The Commission received material and information from both Iraq and Kuwait, but Iraq discontinued its participation in protest after the first five sessions of the Commission.

The Commission completed its work in May 1993, having delineated the international boundary in geographic coordinates of latitude and longitude, and having made arrangements for the physical representation of the boundary by the emplacement of pillars and monuments. The Commission's demarcation established the Umm Qasr port complex as part of Iraqi territory, thereby allowing Iraqi access to the sea.¹⁵⁷ The Security Council affirmed the finality of

154. S.C. Res. 773, U.N. SCOR, 47th Sess., 3108th mtg., U.N. Doc. S/24488 (1992); S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/22430 (1991); see also S.C. Res. 806, U.N. SCOR, 48th Sess., 3171st mtg., U.N. Doc. S/RES/806 (1993).

155. Agreed Minutes Regarding the Restoration of Friendly Relations, Recognition and Related Matters, Kuwait-Iraq, Baghdad, Oct. 4, 1963, 485 U.N.T.S. 321.

156. See *Report of the Secretary-General*, U.N. SCOR, 46th Sess., U.N. Doc. S/22558 (1991). See also a subsequent exchange of letters between the Secretary-General and the President of the Security Council, U.N. SCOR, 46th Sess., U.N. Doc. S/22593 (1991); U.N. SCOR, 46th Sess., U.N. Doc. S/22592 (1991).

157. See *Final Report of the Boundary Demarcation Commission*, U.N. SCOR, 48th Sess., Annex, U.N. Doc. S/25811 (1993), reprinted in 32 I.L.M. 1427 (1993).

the Commission's work and reaffirmed its decision to "guarantee the inviolability" of the boundary.¹⁵⁸

The Security Council has never previously guaranteed a boundary. The precise effect of this guarantee is unclear; if either Iraq or Kuwait in the future violates the boundary, presumably the Security Council is expected to take some type of action, which clearly has a deterrent value. Overall, this use of Chapter VII to provide impartial, technical demarcation of a boundary could be very useful in other situations where boundary disputes have led or could lead to conflict.

4. Destruction of Weapons

In both Iraq and Somalia, a key element for restoring peace and security in the region was the destruction of weapons and other military equipment. In Iraq, an ambitious plan for destroying, removing, or rendering harmless Iraq's biological, chemical, missile and nuclear capabilities was launched at Iraq's expense.¹⁵⁹ Under the program, multinational teams of a Special Commission, working both with and without Iraqi cooperation, travelled to Iraqi sites in search of biological, chemical, and missile facilities and weapons, and developed the means for their destruction.¹⁶⁰ At the same time, the International Atomic Energy Agency was tasked to carry out on-site inspections of Iraq's nuclear capabilities, and to develop a plan for rendering harmless any such capabilities and for ongoing monitoring of Iraq's compliance with the 1968 Treaty on Non-Proliferation of Nuclear Weapons.¹⁶¹ Iraq was also required to agree not to use, develop, construct, or acquire such weapons in the future.¹⁶² These

158. S.C. Res. 833, U.N. SCOR, 48th Sess., 3224th mtg., U.N. Doc. S/RES/833 (1993).

159. S.C. Res. 715, U.N. SCOR, 46th Sess., 3012th mtg., U.N. Doc. S/RES/715 (1991); S.C. Res. 707, U.N. SCOR, 46th Sess., 3004th mtg., U.N. Doc. S/RES/707 (1991); S.C. Res. 699, U.N. SCOR, 46th Sess., 2994th mtg., U.N. Doc. S/RES/699 (1991); S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., ¶¶ 7-14, U.N. Doc. S/RES/687 (1991).

160. For reports of the Executive Chairman of the Special Commission to the Security Council, see U.N. SCOR, 47th Sess., U.N. Doc. S/24984 (1992); U.N. SCOR, 47th Sess., U.N. Doc. S/24108/Corr. 1 (1992); U.N. SCOR, 46th Sess., U.N. Doc. S/23268 (1991); U.N. SCOR, 46th Sess., U.N. Doc. S/23165 (1991).

161. For reports by the Director General of the IAEA to the Security Council, see U.N. SCOR, 48th Sess., U.N. Doc. S/25621 (1993); U.N. SCOR, 47th Sess., U.N. Doc. S/24722 (1992); U.N. SCOR, 47th Sess., U.N. Doc. S/23813 (1992). In addition, information on each IAEA inspection was reported separately to the Security Council.

162. S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., at 10 (1991). For reports by the Secretary-General regarding Iraq's compliance, see U.N. SCOR, 48th Sess., U.N. Doc. S/25620 (1993); U.N. SCOR, 47th Sess., U.N. Doc. S/24661 (1992); U.N. SCOR, 47th Sess., U.N. Doc. S/23801 (1992).

programs reflect a more proactive function than those of the other technical commissions; it may be more likely in the future that commissions of this type will simply assess evidence of weapons development and decide whether a state has violated its commitments under nuclear or other non-proliferation regimes.

The success of the weapons-destruction program in Iraq has been mixed. Despite erroneous declarations by Iraq of its capabilities, much damning information was uncovered by the inspection teams. Thousands of chemical weapons were destroyed; dozens of ballistic missiles along with launchers, related equipment, and production capability were destroyed; and evidence of a nuclear weapons program, including the production of lithium 6 (used in the manufacture of enhanced nuclear weapons), was uncovered. Efforts by Iraq to conceal weapons and weapons facilities, however, led the inspection teams and the United Nations to conclude that they had not uncovered all of Iraq's weapons of mass destruction, and ultimately to a determination that Iraq's actions were a "material breach" of Resolution 687, which had established the conditions for the cease-fire.¹⁶³ When the Security Council sought to impose a long-term monitoring program in which inspection teams could fly anywhere in Iraq, Iraq resisted the program for several months before agreeing, in the hope of ending the economic sanctions.¹⁶⁴

The individuals assigned to the teams sent in by the Special Commission were experts in various munitions fields. Unlike the other commissions described above, these teams for the most part were composed of experts affiliated with governments, including governments that were actively involved in the war effort against Iraq. In light of the Special Commission's reliance on Iraq's cooperation (which for the most part was poor), it is understandable that the teams were manned with individuals closely associated with major power governments and therefore capable of delivering credible challenges to Iraqi intransigence. On the other hand, the presence of these individuals undoubtedly was a source of aggravation to Iraq and provided a means for Iraq to assert that the teams were not a collective effort by the United Nations, but rather a tool of one or more states. Ultimately, Iraq successfully protested the presence on the teams of individuals associated with certain governments (such as the United States).

163. S.C. Res. 706, U.N. SCOR, 46th Sess., 3004th mtg., U.N. Doc. S/RES/706 (1991).

164. Trevor Rowe, *Iraq Accepts U.N. Plan to Monitor Its Weapons*, WASH. POST, Nov. 27, 1993, at A20.

In Somalia, the reports of the Secretary-General to the Security Council (prior to the authorization for U.S. and other forces to enter Somalia) proposed the disarming of the Somali factions as a necessary factor in restoring an environment for humanitarian relief.¹⁶⁵ Resolution 794 itself, however, did not establish this as one of the objectives of the intervention, nor did it establish an expert commission to undertake such action. Within a short period of time, however, the U.S. forces that were deployed to Somalia recognized that at least a minimal level of disarming or neutralizing of local factions was a necessary feature of the intervention. Therefore, U.S. forces proceeded to destroy or restrict certain weapons, as did U.N. forces after the commencement of UNOSOM II. The destruction of weaponry was a source of contention between the Secretary-General and the United States, with the Secretary-General believing that extensive disarmament was essential for rectifying Somalia's underlying problems, and the United States believing that the risks involved did not outweigh the benefits.

As described above, after the transfer of authority from UNITAF to UNOSOM II, UNOSOM soldiers and redeployed U.S. soldiers became exposed to extensive attacks in Somalia. In retrospect, although it would have been a high risk vocation, complete disarmament of the Somali factions perhaps should have been accomplished during the UNITAF phase to provide a secure environment within which U.N. forces could operate. If the UNITAF forces did not wish to engage in this action, it might have been accomplished through use of a multinational commission established by the United Nations and expert in locating and destroying light and heavy weapons. Ultimately, the presence of those weapons made the environment in Somalia so hostile that political support eroded in many of the sending states for the presence of their military forces.

III. LEGITIMACY AND COLLECTIVE SECURITY

A. *The Question of Legitimacy*

Prior to considering ways for improving the various functions performed by the Security Council, it is important to assess whether the current process of decision-making by the Security Council is

165. See Letter dated 29 November 1992 from the Secretary-General to the President of the Security Council, U.N. SCOR, 47th Sess., U.N. Doc. S/24868 (1992); Letter dated 24 November 1992 from the Secretary-General to the President of the Security Council, U.N. SCOR, 47th Sess., U.N. Doc. S/24859 (1992).

appropriate for undertaking these functions. In the wake of the robust use of the Security Council's Chapter VII powers since the end of the Cold War, various states and commentators have questioned the "legitimacy" of the Security Council's process of decision.¹⁶⁶

Some critics have focused on the size or composition of the Security Council, arguing that it should be expanded in membership to reflect certain economic powers, such as Germany or Japan, or to provide more widespread regional representation.¹⁶⁷ Others focus on the existence of the "veto power," which immunizes the permanent members from enforcement action.¹⁶⁸ Still others lament the method of authorizing member states to engage in forcible action under Chapter VII through indeterminate resolutions imposing little or no restrictions, rather than using U.N. forces under the command and direction of the United Nations. Some favor greater involvement of other U.N. organs in the decision-making process, such as consultation with the General Assembly and judicial review by the International Court of Justice. Advocates of greater "transparency" call for open sessions of the Security Council prior to adoption of resolutions and other means for involving non-Security Council members, particularly those most affected by the underlying matter.

Some critics favor expansion of the Security Council and elimination of the veto power to help encourage more uniform action and participation in addressing threats to the peace, rather than just addressing those issues deemed important by Western powers. Particularly in the context of the Iraq-Kuwait crisis, there were charges that one power—the United States—had strong-armed other members of the Security Council into undertaking excessively

166. See, e.g., David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552, 562-66 (1993) (and sources cited therein).

167. Pursuant to Article 23 of the U.N. Charter, the Security Council consists of fifteen members, of which five are permanent (China, France, Russia, Great Britain, and the United States) and ten are elected by the General Assembly for terms of two years. U.N. CHARTER art. 23.

168. Pursuant to Article 27 of the U.N. Charter, each member of the Security Council has one vote, and decisions of the Security Council on other than procedural matters require an affirmative vote of nine members, including the "concurring votes" of the permanent members (an abstention by a permanent member counts as a "concurring vote"). U.N. CHARTER art. 27. This, in effect, allows the permanent members to "veto" a decision by casting a negative vote. Article 27 further provides that members who are party to a dispute must abstain for Security Council decisions taken under Chapter VI (pacific settlement of disputes by the Security Council) or under Article 52 of the U.N. Charter (pacific settlement of disputes by regional organizations), but not for enforcement actions taken by the Security Council under Chapter VII or through regional arrangements or agreements under Article 53 of the U.N. Charter. U.N. CHARTER art. 27, ¶ 3.

confrontational action. For instance, Professor Burns Weston argued that the United States failed to demonstrate "true respect for multilateral responsibility and accountability, *akin to what the San Francisco drafters had in mind . . .*"¹⁶⁹ Professor Weston further argued that by authorizing military action against Iraq, the Security Council itself was not true to the original intent of the Charter:

[T]he Security Council, though clearly mindful of its duty to suppress acts of aggression and other breaches of the peace, paid insufficient heed to the most overriding of UN Charter purposes and principles: the pacific settlement of international disputes and, failing that, a *genuinely collective assertion of authority and control* dedicated to the restoration of international peace and security.¹⁷⁰

Proposals of this type that can provide greater "legitimacy" to the decisions of the Security Council are not new, but they have now taken on added significance with the more active posture of the Security Council. The fear is that if a general consensus emerges that the decision-making process of the Security Council as currently structured is not "legitimate," then it may be harder to obtain the majority of votes necessary to reach decisions and harder to command respect for those decisions once reached.¹⁷¹ If this occurs, the Security Council could once again be crippled.

It is not always clear what states or commentators mean when they criticize the "legitimacy" of the Security Council's decision-making process. To avoid a subjective inquiry into the "fairness" or "justness" of the decision-making process, "legitimacy" might turn on whether the Security Council has acted in accordance with the technical rules governing that process, as set forth in the U.N. Charter and associated instruments. If so, the inquiry is really one into the legality or legal competence of the Security Council's actions. Chapter VII provides the Security Council with wide-ranging authority both in determining the existence of threats to the peace, breaches of the peace, or acts of aggression, and in deciding what measures, if any, should be taken to restore international peace and security. The membership of the Security Council and the process for making these decisions is clearly set forth in the Charter and in the

169. Burns H. Weston, *Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy*, 85 AM. J. INT'L L. 516, 535 (1991) (emphasis added) (footnotes omitted).

170. *Id.* at 518 (emphasis added) (footnotes omitted).

171. For conjectures of this type, see Caron, *supra* note 166, at 558.

Security Council's provisional rules of procedure. While there is little doubt that in its recent actions the Security Council has interpreted "threat to the peace" in a very expansive manner, the negotiating history of Chapter VII reveals that elasticity, not rigidity, was favored at San Francisco in establishing the conditions under which the Security Council should operate, as was the ability of the Security Council to self-judge its actions.¹⁷² Unlike the Security Council's decisions in response to North Korea's attack on South Korea in 1950—which were taken without the participation of the representative from the Soviet Union—the Security Council's actions in Iraq, Somalia, and Bosnia-Herzegovina raised no serious questions regarding the legal competence of the Security Council to act.

Yet, critics of the "legitimacy" of the Security Council's decision-making process look beyond whether the Security Council is merely acting in accordance with its legal competence. For Professor Thomas Franck, a forum is "acting legitimately" when "those it addresses perceive the forum itself as having come into being in accordance with right process."¹⁷³ For decisions of the Security Council to bear the imprimatur of legitimacy, Professor Franck argues that states must see the Security Council as acting in accordance with its legal mandate *and* with "general principles of

172. During the drafting of the Charter, it was agreed that each organ of the United Nations would be responsible itself for interpreting those parts of the U.N. Charter that apply to its particular functions. 13 U.N.C.I.O. Docs. 709-10 (1945). This approach was subsequently confirmed by the International Court of Justice in *Certain Expenses of the United Nations*, 1962 I.C.J. 151 (July 20) (advisory opinion). Some argue, however, that the International Court of Justice is inclined to review the acts of the Security Council in certain limited situations. See Geoffrey R. Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 HARV. INT'L L.J. 1 (1993). The International Court recently refused to stay a Security Council decision to impose economic sanctions on Libya in a suit brought against the United States and the United Kingdom alleging a treaty violation. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libya v. U.K.; Libya v. U.S.*), 1992 I.C.J. 3 (Apr. 14). Several of the judges, however, seemed to suggest that the Court could review the legality of a Security Council decision affecting the rights of States under the Charter. Even if the Court ventures into this area, however, the frequency with which it could address Security Council decisions would seem inadequate for addressing some of the concerns about the "legitimacy" of the Council's decision-making process, and completely inadequate for addressing other concerns (e.g., the lack of uniformity in addressing threats to the peace).

173. Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 725 (1988). In his *THE POWER OF LEGITIMACY AMONG NATIONS*, Professor Franck elaborates four "objective" elements of "legitimacy" as applied to both rules and rule-making institutions: determinacy, symbolic validation, coherence, and adherence. A rule or rule-making institution that embodies these four elements will "pull toward compliance" those states that it addresses because it is perceived as legitimate. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

fairness; that is, in a disinterested, principled fashion, and not simply to gratify some short-term self interest of a faction."¹⁷⁴ He specifically criticizes the veto power granted to the five permanent members as undermining the "principle of sovereign equality" of all U.N. members recognized by Article 2(1) of the U.N. Charter, which in turn is perceived by states as an affront to the integrity of the U.N. system.¹⁷⁵

Similarly, one might focus on the "political and social dynamic that accompanies allegations of illegitimacy."¹⁷⁶ That is, what circumstances bring about perceptions of improper conduct, and what steps are necessary to counter those perceptions? For Professor Caron, perceptions of illegitimacy of an institution can arise when there is a great discrepancy between the expectations generated by the promises of an international institution (which may be found in its preamble) and what the institution actually delivers; discrepancies may occur when the institution either is abusing its authority or is failing to exercise its authority.¹⁷⁷ With respect to the Security Council, Professor Caron identifies two sources for perceptions of illegitimacy: the dominance of the Security Council by a few states and the perception of unfairness surrounding the veto.¹⁷⁸

Thus, Security Council decisions might be said to lack legitimacy if the process by which they were rendered is perceived by the international community as not in accord with "general principles of

174. Franck, *Legitimacy in the International System*, *supra* note 173, at 725. Professor Franck's prolific efforts in this area aspire to an objective assessment of the status of international rules and rule-making institutions, without reliance on a moral or philosophical system of values. He specifically seeks to exclude any notion of "justice" as a factor in determining legitimacy. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS*, *supra* note 173, chap. 13. Ultimately, however, the whole notion of "fairness" seems to invite a value-laden analysis. See Jose E. Alvarez, *The Quest for Legitimacy: An Examination of the Power of Legitimacy Among Nations*, 24 N.Y.U. J. INT'L L. & POL. 199, 241-44 (1991).

175. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS*, *supra* note 173, at 176. Professor Weston purports to apply Franck's theory of legitimacy in criticizing U.S. and U.N. conduct in the war against Iraq, *supra* notes 169-70 and accompanying text.

176. Caron, *supra* note 166, at 557.

177. *Id.* at 559-61.

178. *Id.* at 566. Professor Caron concludes that typical proposals for reform — changing the veto, increasing Security Council membership, and increasing involvement of the General Assembly — as a practical matter would have only a modest effect in countering these perceptions. *Id.* at 575. His primary concern is with the open-ended nature of Security Council resolutions, in which once a Security Council authorization is granted to take certain action, any permanent member can veto efforts to withdraw that authorization (a problem he refers to as the "reverse veto"). Professor Caron suggests that this problem might be addressed through the use of modified voting clauses, whereby decisions to terminate an authorization would not be subject to a veto by the permanent members. *Id.* at 577-88.

fairness" or with the "promise" inherent in the establishment of the Security Council. Determining how states today perceive the Security Council's decision-making process, however, is difficult. Global community "perceptions" are not monolithic, and "perceptions" by states or blocs of states are not constant over time, nor across the spectrum of issues that the Security Council must face. A different approach would be to assess what *should* be the perceptions of states drawing on the lessons of history and likely future trends.

Since states that become members of the United Nations agree to the provisions of the Charter—including Article 25 by which they are bound to accept and carry out the Security Council's decisions—then it might be said that member states should *per se* perceive the Security Council's decision-making process as legitimate. Professor Franck himself acknowledges that at the time of the drafting of the Charter, the special privileges granted the permanent members might have been viewed as having a principled basis (or, using his terminology, to have "coherence").¹⁷⁹ Yet, as Professor Franck notes, many of the conditions and circumstances that led to the acceptance of this decision process in 1945, and its amendment in 1965,¹⁸⁰ are vastly different from those of today. The vanquished foes of the Second World War, Germany and Japan, have risen like the proverbial Phoenix to the status of economic superpowers. Germany, no longer occupied or partitioned, is reunited. The European states are integrating, albeit in a stumbling fashion, into a single political and economic entity. The states of the developing world have increased both in number and in their determination to advance claims for economic and social assistance. And most important, the seminal event of the second half of the twentieth century, the dissolution of the Soviet Union and its ideology, has laid to rest the bipolar antagonism that produced a still-born Security Council in the first place.

The question, then, becomes whether these changes warrant a different perception of the Security Council's decision-making process today. On one level, the perception that the Security Council's decisions since the end of the Cold War lack legitimacy seems misplaced. Although there are five permanent members, each with

179. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS*, *supra* note 173, at 176.

180. Articles 23 and 27 of the U.N. Charter Articles were amended by the General Assembly on December 17, 1963, and entered into force on August 31, 1965. The amendments enlarged the membership of the Security Council from eleven to fifteen, and provided that affirmative votes were to be made by nine members instead of seven. U.N. CHARTER art. 23 (amended 1965); U.N. CHARTER art. 27 (amended 1965).

an ability to block Security Council action, the "veto power" has rarely been wielded in the post-Cold War era. Further, there remains on the Security Council ten non-permanent members, drawn on a rotating basis so as to represent the various regions of the world, who are capable of blocking and influencing actions taken by the permanent members. A review of the votes taken in passing the Security Council resolutions relating to Iraq, Somalia and Yugoslavia from August 1990 to December 1993 reveals vote counts that are often unanimous or near-unanimous. The degree of unanimity on these votes suggests broad-based support among the Security Council members, not just the occurrence of some states imposing their will on others. While certain states applied diplomatic pressure to other states to join in these actions, this is consistent with the nature of the Security Council which, unlike a court, is supposed to operate in a political environment. Most major initiatives of the Security Council emerge from informal consultation among the permanent members, but these consultations must then widen to take account of the views of non-permanent members, and ultimately must take account of the intense scrutiny given by non-members, the media, and the public to the final decision rendered by the Security Council, and the associated public statements made by its members.

Yet on another level, the perception that Security Council decisions lack legitimacy resonates because it is not clear why some states should count more than others. On this level, it seems that the perception of illegitimacy largely reflects a tension that has characterized all efforts in this century to pursue an ideal system of collective security. The tension is between the aspiration for a truly collective security system—in which all states obligate themselves to defend each other against aggressors, in which sanctions automatically occur and are binding on all members, and in which all states are equally represented and equally subject to the possibility of sanctions—and the realization that such a system cannot be achieved and must be altered to reflect certain inescapable power differentials among states. To understand this debate, and its contemporary relevance, merits examining its origins.

B. Of Concerts, Covenants, and Charters

In an ideal system of collective security, the aggression by any state against another is to be resisted by the combined action of all other states.¹⁸¹ An ideal concept of collective security is a very

181. For works generally addressing the potential and practice of collective security in

expansive and inclusive one; when an act of aggression occurs, corrective action is to be taken regardless of who the aggressor is or who the victim is, and the system is to respond automatically and reliably. Under this ideal system, knowing that all states will participate in a diplomatic, economic, or military response deters potential aggressors, thus building a lasting peace.

This ideal system has never been created, let alone realized. Although Woodrow Wilson was a visionary in his desire to organize states in a global collective security arrangement,¹⁸² Wilson's initial preference was for a loosely defined structure that would evolve over the years and that was chiefly dependent not on legal obligations but on the "moral force of the public opinion of the world."¹⁸³ He ultimately championed an obligation by states to defend other states from aggression, but rejected greater certainty in enforcement, such as efforts to create an international force to defend other countries (e.g. France) on the grounds that he could not constitutionally subject U.S. forces to international control.¹⁸⁴

Thus, it is no surprise that the League of Nations Covenant did not create an ideal system of collective security. Article 10 did contain an obligation on the part of all members to "preserve" other members against territorial aggression, and Article 16 purported to apply sanctions automatically against any unlawful aggressor.¹⁸⁵ Yet Article 16 contained no provision by which the League could bind member states to take effective military action to protect the

this century, see generally ROLAND N. STROMBERG, *COLLECTIVE SECURITY AND AMERICAN FOREIGN POLICY: FROM THE LEAGUE OF NATIONS TO NATO* (1963); Robert Osgood, *Woodrow Wilson, Collective Security, and the Lessons of History*, 5 *CONFLUENCE* 341-54 (1957); INIS L. CLAUDE, JR., *POWER AND INTERNATIONAL RELATIONS* (1962); INIS L. CLAUDE, JR., *SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION* (4th ed. 1971); F.S. NORTHEGE, *THE LEAGUE OF NATIONS: ITS LIFE AND TIMES, 1920-46* (1986); GILBERT MURRAY, *FROM THE LEAGUE TO UNITED NATIONS* (1948).

182. In his famous address to the Congress on war aims and peace terms, President Wilson stated in the last point of his "Fourteen Points":

A general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike.

President Woodrow Wilson, Address to Congress (Jan. 8, 1918), in 2 HENRY STEELE COMMAGER, *DOCUMENTS OF AMERICAN HISTORY* 139 (9th ed. 1973).

183. AUGUST HECKSCHER, *WOODROW WILSON* 533, 535 (1991).

184. *Id.* at 534, 588-89.

185. The Covenant of the League of Nations entered into force on January 10, 1920). *LEAGUE OF NATIONS COVENANT*, June 28, 1919, art. 10, art. 16, ¶ 1, 225 *Consol. T.S.* 195-205, 1 *L.N.O.J.* 3.

covenants of the League.¹⁸⁶ Instead, the League's Council only had the authority to "recommend" forcible action, which placed the Council in such a weakened condition that it never proposed forcible sanctions, let alone enforced them. The aspiration for inclusiveness and fully collective decision-making resulted in rules permitting both the Assembly and the Council to participate in efforts to resolve disputes under Article 15,¹⁸⁷ but also resulted in giving every member a veto on such action by requiring that decisions be unanimous (with the exception of the members who were party to the dispute). The price paid for such unanimity was a need to accommodate the views of every member, regardless of their relative interests and their ability to thwart or frustrate League actions, thus precluding effective, timely responses. It was recognized that all nations could not be treated equally; special status of membership on the Council was granted to the "principal allied and associated powers" (originally intended to be France, Great Britain, Italy, Japan, and the United States, to which were later added Germany and the Soviet Union).

Yet the largely concurrent authority with the Assembly in matters regarding peace and security, the rule of unanimity, and the lack of effective powers, precluded the Council from becoming an effective organ. Concern with being forced to defend countries in future situations and with being prevented from protecting vital interests (e.g., as expressed by the United States in the Monroe Doctrine) led certain key powers, such as the United States and initially the Soviet Union, not to join the League, thereby eliminating an essential element of any system of collective security.

In the aftermath of World War II, the failings of the League were very much in the minds of the representatives at the 1944 major powers conference at Dumbarton Oaks and at the more general conference in San Francisco in 1945. As far as the major powers were concerned, however, the goal was not to rebuild the League in

186. Article 16 of the Covenant provided that if a state violated the provisions for the peaceful settlement of international disputes laid down in Articles 12, 13, and 15, then: (1) the lawbreaking state was deemed to have committed an act of war against all other members of the League; (2) the latter were obligated to isolate the lawbreaking state through a complete boycott; (3) the Council was obligated to recommend to the member states the military action they should take; and (4) the member states were to support each other in these measures. Not only did item (3) leave discretion to the member states on how to act, but interpretive resolutions by the Assembly of the League virtually eliminated the compulsory aspect of the other items as well. See LEAGUE OF NATIONS O.J. Spec. Supp. 6, at 24 (1921).

187. See LEAGUE OF NATIONS COVENANT, June 28, 1991, art. 15, ¶ 10, 225 Consol. T.S. 195-205, 1 L.N.O.J. 3.

a fashion that achieved an ideal system of collective security, but rather to take seriously the conditions necessary for enforcing peace. For Franklin Roosevelt, this did not mean a collective effort of all nations acting automatically whenever a breach of the peace occurred pursuant to a legal commitment by all states to defend each other. Rather, it meant the creation of a powerful executive committee capable of enforcing the peace in a binding manner when they chose to do so, consisting of the four main powers (the United States, Great Britain, the Soviet Union, and China).¹⁸⁸

The other major powers agreed that, while there would be a universality of membership in the organization as a whole, there should be a core group of permanent members responsible for maintaining the peace.¹⁸⁹ Originally envisioned as a small, and thereby efficient body, the Security Council came to be regarded by the major powers at Dumbarton Oaks as also needing non-permanent members to guarantee support for the organization among other nations.¹⁹⁰ While the major powers at Dumbarton Oaks could not agree on the exact voting procedure of the Security Council, a rule of unanimity of all permanent and non-permanent members was not favored by anyone; ultimately a formula proposed by Roosevelt at Yalta in February of 1945 was accepted by Stalin and Churchill, and became the basis for Article 27.¹⁹¹ The emphasis at Dumbarton Oaks on *collective security by major powers* was clearly manifested by the proposals that emerged: the inability of the General Assembly to take enforcement measures; the restriction of the rule of unanimity to the permanent members of the Security Council; and the right of those members to veto enforcement measures against themselves.¹⁹² This emphasis on the centrality of the major powers is also reflected in the desire not to create a permanent international force under U.N. command. Rather, military action by the United Nations would be through forces made up of national contingents, which would provide greater control to the major powers over U.N. deployments.¹⁹³

188. Roosevelt's "Four Policemen" idea dominated his plans for a post-war world structure. ROBERT C. HILDERBRAND, *DUMBARTON OAKS: THE ORIGINS OF THE UNITED NATIONS AND THE SEARCH FOR POSTWAR SECURITY* 16 (1990).

189. See EVAN LUARD, *A HISTORY OF THE UNITED NATIONS* 1, 6-8 (1982).

190. HILDERBRAND, *supra* note 188, at 128.

191. See Dwight E. Lee, *The Genesis of the Veto*, in *I INTERNATIONAL ORGANIZATION* 33, 33-42 (1947). For the provisions on Security Council voting, see the *Protocol of the Proceedings of the Crimea Conference*, reprinted in COMMAGER, *supra* note 182, at 488.

192. See Proposals for the Establishment of a General International Organization, Oct. 7, 1944, reprinted in DEP'T ST. BULL., Nov. 1944, at 368.

193. *Id.* at 372.

The composition and decisional process accorded the Security Council was not without opposition during the San Francisco conference. Various unsuccessful proposals were advanced to remove or to lessen the "veto power," to eliminate permanent member status, and to include provisions for changing permanent members. The sponsoring governments and France insisted that they were the most important guarantors of security, and that major-power unity was necessary if the Security Council was to discharge its duties.¹⁹⁴ Many states also wished to increase the Security Council's size to ensure better regional distribution; others noted that a second tier of states, because of their economic and military importance, deserved special consideration.¹⁹⁵ The compromise struck was that, in electing the non-permanent members, the General Assembly should pay special regard to the contribution of members "to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution."¹⁹⁶ Nevertheless, the essential process of decision making and the structure of the Security Council that were agreed upon by the major powers at Dumbarton Oaks and Yalta were also accepted at San Francisco.

In doing so, the United Nations founded itself on a concept of relating responsibility for the maintenance of peace and security to the self-interest of the major powers. Gone was the League's obligation by member states to preserve all other member states from external aggression. Gone was the League's concept of a system in which sanctions would be imposed automatically by all states on any state that violated the "resort to war" provisions, regardless of its military strength. Gone too was the principle of unanimity in which any member of the League, except parties to a dispute, could veto a decision. Such a system had proven inadequate in that it purported

194. See *Statement by the Delegations of the Four Sponsoring Governments on Voting Procedure in the Security Council*, Doc. 852, III/137(1), 11 U.N.C.I.O. Docs. 710-14 (1945). Paragraph nine reads:

In view of the primary responsibilities of the permanent members, they could not be expected, in the present condition of the world, to assume the obligation to act in so serious a matter as the maintenance of international peace and security in consequence of a decision in which they had not concurred. Therefore, if a majority voting in the Security Council is to be made possible, the only practicable method is to provide, in respect of non-procedural decisions, for unanimity of the permanent members plus the concurring votes of at least two of the non-permanent members.

195. See LELAND M. GOODRICH ET AL., *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 196-97 (3rd ed. 1969).

196. U.N. CHARTER art. 23, ¶ 1.

to impose responsibilities on states that in practice they were unwilling to undertake because of the serious consequences such responsibilities could have for them. Instead, there emerged a system in which responsibility for decisions involving the possible use of military forces were to be taken by a Security Council constituted so as to reflect the special interests and responsibilities of the principal contributors.

The pedigree of the Security Council lies less in the Council of the League of Nations than in the nineteenth century Concert of European Powers (Austria, Great Britain, France, Prussia, and Russia), which largely succeeded in preserving peace during its ninety years of existence.¹⁹⁷ The analogy is inexact in that the Concert of Europe was not an institution and there were no regular meetings of the great powers. The Concert was, however, essentially an assumption of responsibility by the military powers of the time to work together to maintain peace on the basis of the status quo. Regarding the Security Council as more akin to the Concert of Europe is objectionable in one sense; it reveals the United Nations in the area of security as being an organization of great powers in the clothes of an international organization. Yet as constructed at Dumbarton Oaks and confirmed at San Francisco, that is exactly what emerged, based on the experiences of the international community in its efforts to build a workable collective security organization. As Leland Goodrich commented:

The method of informal concert of great powers without formal participation of the smaller states had failed to prevent World War I and gave no greater promise of success at the end of World War II; yet, it was recognized that the concert was based on a valid principle. So the drafters of the Charter came to the conclusion that a form of organization that followed the general lines of the League system, but incorporated the concert principle that peace could only be maintained so long as the major powers had an interest and were willing to cooperate in maintaining it, had at least a chance of success.¹⁹⁸

197. The Concert of European Powers began with a short-lived attempt to form an international government, commonly called the Holy Alliance, based on three treaties signed in 1814-1815. That process evolved after 1830 into a number of conferences relating to problems that threatened the peace, which continued until the outbreak of World War I in 1914. The only major war which Europe experienced during that period was the Crimean War of 1854-56.

198. LELAND M. GOODRICH, *THE UNITED NATIONS IN A CHANGING WORLD* 21 (1974).

C. Collective Security After the Cold War

The debate today regarding the "legitimacy" of the Security Council decisional process is a reawakening of issues that were at the fore during the development of the Charter. Reforms calling for broader membership, elimination of the veto power, greater involvement by the General Assembly and non-Security Council members, and less arm-twisting by major powers can be seen as aspiring to the ideal form of collective security that was never embodied in the League of Nations or in the United Nations Charter. Under the ideal system, more nations would play a role in the determination of threats to international peace and security, and in decisions regarding how to respond to those threats, and no nation would unduly influence the process. Responses would be more consistent, not based on the particular concerns of just a few powerful states, and even potentially against the interests of those states. Only in this way could there be "fairness" in the decision-making process and a "genuinely collective" assertion of authority and control.

Yet, as was the case in 1945, it is not at all self-evident in today's world that "fair" and "genuinely collective" decision-making by the Security Council is a sensible approach for global conflict management. If critics of the current Security Council decision-making process are to sustain their case, they will need to do a much better job of establishing what the San Francisco drafters "had in mind" which is now purportedly being abused or unfulfilled. Likewise, they will have to do much better than to assert that "general principles of fairness" are being trampled; they must explain why aggrieved states are justified in asserting that those principles should govern the United Nations.¹⁹⁹ The enormous disparity in economic resources and military power among states is not fair, but the international community tacitly accepts these inequities and organizes itself to take account of them so as to obtain universal participation. Similarly, in criticizing the legitimacy of the Security Council decision-making process, it is not enough to point to a "principle of sovereign equality" as the basis for the organization of the United Nations. Such a principle is no more effective in arguing for elimination of the veto power (or for that matter the existence of permanent seats on the Security Council), than it is for elimination of

199. Professor Franck himself has acknowledged that the U.N. system is not predicated on "equal protection" or "even-handed fairness." Thomas M. Franck, *Of Gnats and Camels: Is There a Double Standard at the United Nations?*, 78 AM. J. INT'L L. 811, 833 (1984). ("There is no commitment to 'equal protection' in the UN order of things," nor are political considerations "necessarily subordinated to principles of fairness or equality.")

the Security Council as a whole (since, at any time, it accords greater weight to the views of a limited number of states), let alone elimination of other U.N. practices, such as the scale of assessments for the payment of dues. Finally, advocates of such principles must explain why it is both desirable and feasible for political organs such as the Security Council to be governed by universalist principles when "[n]either precision nor logic is a primary value for political bodies."²⁰⁰

An alternative means of assessing the "legitimacy" of the Security Council's decision-making process may be to test it against the particular functions the Security Council is performing, as set forth in Part II. In other words, rather than starting out with a premise that perceptions of the Security Council's decision-making process should be driven by certain principles, those perceptions could be derived from what the global community actually expects the Security Council to do under this approach. Criticisms of the legitimacy of the Security Council's decisions seem the strongest when made with respect to global community functions. In performing global community functions, the Security Council is reliant on the support of the global community for the success of those functions, whether it be the moral suasion of declarations, the coercive tactics of political or economic sanctions, or the global community monitoring function of a peacekeeping operation. Unless the Security Council's decisions in performing these functions are reflective of the views of the global community, they are unlikely to succeed.

Criticisms of the Security Council's decisional process seem weaker with respect to technical commission functions. Admittedly, the decision to establish such commissions is not one taken by the international community as a whole, and therefore may be tainted with the "illegitimacy" of the Security Council. Yet, so long as these commissions are composed of independent experts tasked to review impartially evidence submitted by both sides to a dispute, then the process would appear to be even-handed and reflective of the views of the international community, not that of just a limited group of states.

The most strident criticisms of the Security Council's decision-making process arise in the context of the major power functions, in which the Security Council relies upon the support and resources of

200. Schachter, *supra* note 2, at 9. Professor Schachter notes that "[i]ndeterminacies and inconsistencies have played a useful role in attaining important objectives" and "[w]e can hardly expect that they will disappear."

states capable of projecting military force to enforce the Security Council's decisions. It is certainly true that in exercising these functions, the Security Council does not engage in a wholly collective assertion of authority. The ultimate goal of the Security Council, however, is not a wholly collective assertion of authority, but rather to maintain international peace and security through prompt and effective action.²⁰¹ The enforcement of international peace and security—as seen in the situations of Iraq, Somalia, and Yugoslavia—concerns itself with complex issues: overt transnational aggression, covert transnational aggression, and internal conflict resulting in widespread human rights atrocities by a central government or warring factions. To maintain international peace and security in these situations requires a credible threat or use of power, particularly military power involving the large-scale deployment of ground forces, as a response to the threat or use of power by aggressive regimes. It also requires flexibility and creativity in designing these responses. The question, then, is how can this best be achieved.

The most realistic means of achieving a credible threat or use of power by the United Nations is through close cooperation among the major military powers of the world. Those powers must be convinced to leave aside the option of exercising unilateral action in favor of a collective process that forces them to take account of each other's interests. To do so, the major powers must be permitted to bring into the process those matters they consider vital to their own interests and to push for those matters to be addressed in a satisfactory manner. In doing so, each power is forced to take into account the concerns of the other major powers, thereby minimizing the likelihood of an escalation of conflict. On the other hand, each power will only be willing to participate in the process if it is capable of protecting its own vital interests from collective action and of avoiding the commitment of its military forces when it so chooses. For both reasons, the system should not aspire to treating all threats to the peace equally through automatic and reliable responses. Decisions must be taken through informal negotiations and the emergence of a consensus that takes account of the concerns of major powers both in proceeding with collective action and in preventing such action. Flexibility is gained by formulating sanctions pursuant to an ongoing process of balancing interests among these states.

Participation of other states in the process is desirable to ensure that the views of less powerful states are considered. The number of

201. U.N. CHARTER art. 24, ¶ 1.

states in the world today tops 180—more than three times the original membership of 51 states. The size of the Security Council has not proportionately kept pace with the expansion, although it should be noted that about half of the global population is represented by its governments on the Security Council. Expanding the Security Council by a few seats would probably not radically undercut its ability to function, yet widespread participation (including the ability of others to block action) makes political consensus more difficult to achieve and political cohesion more difficult to maintain. Faced with complex problems regarding whether aggression has occurred, and whether and how to respond, widespread participation jeopardizes the ability of the system to work at all.

The method of authorizing states to deploy military forces to respond to threats to peace and security well suits the concept of major powers acting by consensus. When such situations arise, one or more major powers will be the motivating force in securing Security Council authorization for the action, and should be expected to carry the primary burden through the use of its military forces. Imposition of this burden makes it more likely that enforcement action will only be taken when there is a real commitment by one or more major powers, which is an essential element to the success of the action.

For similar reasons, the process of providing fairly open-ended authorization to these national forces is appropriate. When necessary, the Security Council can agree to impose time limits on the scope of its authorization, as was done in Resolution 678 on Iraq, which authorized action only after a period of time elapsed. The Security Council can and should also make clear the essential goals of the enforcement action, such as the expulsion of an aggressor or the creation of an environment for humanitarian relief. Yet, in most circumstances, it is simply not feasible for the Security Council to attempt to impose extensive constraints on the actions of those states conducting the enforcement action, whether they be in the nature of imposing a "cut-off" date for the action or making tactical decisions (such as preventing the forces entering the territory of the aggressive state). Such constraints ultimately can be highly counterproductive to the conduct of the enforcement action: they can send the wrong signal to the aggressor state; they artificially seek to constrain complex situations; and they risk not being accepted by the major power(s) whose forces are on the line. The Security Council must take seriously any authorization for the use of force in light of the inevitably serious consequences that will result; at the same time, there must be a degree of faith and trust in the actions of the

enforcing states to adhere to the basic goals established by the Security Council.

If this assessment is correct, then it would argue for pursuing reforms of the Security Council decisional process that improve primarily the "legitimacy" of global community functions, the only area of Security Council activity in which these criticisms are strong. For instance, one might propose the expansion of the Security Council membership when it is undertaking global community functions. Alternatively, one might propose the creation of some form of advisory body representing a wider number of states to advise on global community functions. Finally, a greater link between the General Assembly and the Security Council might be developed when undertaking these functions. Yet while these different categories of functions may be broken down into analytical components, it is more difficult to pursue reforms addressed to only a particular category of functions. Indeed, while these functions are distinct, they are part of a continuum of activity performed by the Security Council to address threats to peace and security, in which declarations are followed by sanctions, then by military measures, and then by technical commissions. As such, creating differing decisional processes for these functions poses insurmountable problems.

Consequently, while some of the criticisms of the Security Council decisional process are valid for some of its functions, they seem misplaced for the most important functions performed by the Security Council, and as such should not lead to significant changes in that decisional process. As was understood by the framers of the Charter—and as is still true today—the most effective method of collective security is not the ideal system, but rather an attenuated system of collective security that emphasizes engaging the most militarily powerful states.²⁰² This is the system that has operated at the United Nations in the Iraq, Somalia, and Yugoslavia crises, and that for the most part has fostered creative mechanisms for maintaining international peace and security in situations where action pursuant to U.N. authority is possible. A major power (often the United States, which today has the premier ability to project military force) consults with other closely allied major powers (such as Great Britain and France) on a particular initiative. If agreement is reached, consultations are held with the other major powers (such as Russia

202. For an excellent discussion of an "attenuated" form of collective security based on the Concert of Europe as might be used in Europe today, see Charles A. Kupchan & Clifford A. Kupchan, *Concerts, Collective Security, and the Future of Europe*, 16 INT'L SECURITY 114 (1991).

and China) to develop a consensus approach. Sometimes, as has been the case with certain initiatives toward Yugoslavia,²⁰³ agreement cannot be reached among the major powers. If agreement is reached, the text of a proposed resolution is presented to the non-permanent members of the Security Council for their review. Usually about seven of these non-permanent members are "non-aligned" with the major powers, and consequently their views must be taken into account to obtain the ninth necessary vote to pass a resolution. Once done, most of these states join the consensus. States on the fringes of the non-aligned movement and hostile to any significant action by the major powers (e.g. Cuba, Yemen) cannot block the action. In this manner, as noted above, most resolutions pass by three or four votes more than is needed.

An example of this process is the Security Council decision of June 4, 1993, to protect the six "safe havens" in Bosnia-Herzegovina. To address the crisis, the United States initially proposed a plan for air strikes against Bosnian Serb positions in conjunction with lifting the arms embargo on the Bosnian Muslim government so that it could more effectively fight its opponents. European opposition to the plan resulted in the U.S. accepting a European plan to send additional, well-armed peacekeeping forces to Bosnia-Herzegovina to protect the six safe areas that had been declared by the Security Council for besieged Muslim civilians,²⁰⁴ with the United States contributing air power to protect the peacekeeping forces if attacked. The plan was announced at a meeting of foreign ministers of France, Britain, Spain, Russia, and the United States.²⁰⁵ While it was expected that the proposal would be approved by the Security Council without opposition, in fact considerable opposition developed among the non-permanent members on the basis that the plan essentially recognized Serb territorial gains in Bosnia-Herzegovina and potentially consigned the Muslims to living in "ghettos."²⁰⁶ The opposition led to changes in the resolution ultimately adopted designed to make clear that the

203. For instance, efforts to impose stricter economic sanctions on Serbia were reportedly blocked in the spring of 1993 by Russia, to avoid providing reactionary Russians (with close historical ties to Serbia) with political ammunition against reformist Russian President Boris Yeltsin. William Drozdiak & Peter Maass, *Western Anxiety Deepens Over Bosnian Crisis: Unappealing Options, Sense of Helplessness Frustrate U.S. Allied Leaders*, WASH. POST, Apr. 15, 1993, at A20.

204. S.C. Res. 824, U.N. SCOR, 48th Sess., 3208th mtg., U.N. Doc S/RES/824 (1993).

205. Elaine Sciolino, *Allies Announce Strategy to Curb Fighting in Bosnia; U.S. Offers Planes, Not Men*, N.Y. TIMES, May 23, 1993, at A1.

206. Julia Preston, *'Safe Haven' Proposal Under Siege at U.N.: Non-Aligned Group Assails Balkan Initiative*, WASH. POST, June 3, 1993, at A21.

plan was not an end in itself and that the ultimate solution would require Bosnian Serb relinquishment of territory.²⁰⁷ The resolution passed by a vote of 13-0, with Pakistan and Venezuela abstaining.

This process permits dynamic leadership by the major powers, while taking into account non-permanent member views in a manner that still permits action to occur. Reforms designed to improve the "legitimacy" of the Security Council—by increasing its size, eliminating the veto power, extending the veto power to all members of the Security Council, eliminating certain options such as authorizing the deployment of forces under the command of states, or precluding initiating leadership by the major powers—would undermine the vitality and effectiveness of this process.

One area of reform, however, should be carefully considered: altering the composition of the Security Council permanent membership. As a general matter, it should be clear from the foregoing discussion that it is in the interests of the global community for the permanent membership to reflect contemporary power realities, not those that prevailed in 1945. As such, it should allow for the continuous participation of those states whose military or economic capabilities either are necessary for the preservation of international peace and security or who are capable of thwarting Security Council actions. The difficulty arises in establishing the standard by which this power is to be assessed. In 1993, the Clinton Administration announced its support for expanding the Security Council to include Germany and Japan.²⁰⁸ Under any standard of power, Germany likely would place in the top five countries of the world, whether the standard is based on combat capability, gross national product, or some combination. Japan would also rank high, although its combat capability may not fall within the first rank. The use of their militaries in foreign operations, however, remains an emotional issue in both countries, and this must be taken into account in considering their willingness to assume the responsibilities expected of permanent members.²⁰⁹

207. S.C. Res. 836, U.N. SCOR, 48th Sess., 3228th mtg. ¶ 3, U.N. Doc. S/RES/836 (1993).

208. Julia Preston, *U.S. Seeks To Expand U.N. Security Council*, WASH. POST, Aug. 7, 1993, at A1. Germany's interest in a Security Council seat is attributed to a desire both to further its national interest and to symbolize its return to the status of a world power after its 1990 reunification. Rick Atkinson, *Bonn Presses for Lead U.N. Role*, WASH. POST, Sept. 27, 1993, at A14.

209. See, e.g., Marc Fisher, *New Debate Erupts on German Military*, WASH. POST, Apr. 16, 1993, at A21; Paul Blustein, *Japan: Is Cambodia Too Costly?*, WASH. POST, May 8, 1993, at A15.

Yet other nations may also have claims to status as powerful states, depending on the power characteristic emphasized. If gross national product is important,²¹⁰ Italy, Canada, Brazil, and India should be considered. If combat capability is important, South Korea, Israel, and Vietnam should be considered. If total number of men and women under arms is important, Turkey should be considered. If military expenditures is important, Saudi Arabia should be considered. If total population is important, India, Indonesia, Brazil, Nigeria, Bangladesh, Pakistan, and (before long) Iran should be considered. If land mass is important, Brazil, Australia, India, Argentina, Sudan, and Algeria rank in the top ten.²¹¹

None of these characteristics alone provides a satisfactory standard for assessing state power; rather some combination is necessary. One effort prior to the breakup of the Soviet Union and the reunification of Germany to rank the most powerful nations in the world, based on critical mass (population and territory), economic capability, military capability, and strategy and will, came up with the following list: 1. Soviet Union; 2. United States of America; 3. Brazil; 4. West Germany; 5. Japan; 6. Australia; 7. China; 8. France; 9. United Kingdom; 10. Canada.²¹²

Yet in addition to reflecting contemporary power realities, any reform of the composition of the permanent membership must also take account of contemporary political realities. For obvious reasons, adding Israel or South Africa, Pakistan or India, South Korea or Vietnam, would raise difficult, likely insurmountable political difficulties. Likewise, the addition of countries considered or perceived as part of the Western bloc—Canada, Germany, Italy, Japan, Australia, Turkey—would raise political difficulties for countries outside that bloc. Conversely, removing current permanent members such as France or the United Kingdom will encounter stiff resistance from those countries and their allies; their ability to veto amendments to the Charter and other means of reform would preclude their demotion absent tremendous diplomatic pressures by other states.

210. In light of the costs of the U.N.-sponsored military actions in Iraq, Somalia and Yugoslavia, there is little doubt that economic resources will be a primary issue for future military actions.

211. There are various sources for obtaining information on these characteristics for countries. For one source that seeks to rank countries on the basis of a wide variety of factors, see GEORGE THOMAS KURIAN, *THE NEW BOOK OF WORLD RANKINGS: FACTS ON FILE* (1991).

212. *Id.* at 47.

There also will be political pressure to augment the permanent membership to better reflect powerful states from certain regions of the world, such as South America (e.g. Brazil) and Africa (e.g. Egypt, Nigeria, Zaire, and South Africa depending on political developments in those countries). Individual states from those regions might be selected for permanent membership or some process might be developed for rotating a permanent seat among a few powerful states within each region. A move toward regional representation will result in pressure from non-European states for France, the United Kingdom, and Germany to accept permanent membership as represented by the European Community. This in turn may result in intra-regional pressures for membership by other organizations (e.g. the Organization of American States or the Organization of African Unity), rather than by individual states. While at first blush organizational representation on the Security Council would appear to be one way of keeping Security Council membership small yet with widespread participation, it must be remembered that these organizations must be *security* organizations, capable of speaking on behalf of their members in matters relating to security affairs. As such, organizations such as the European Community cannot serve as members of the Security Council (nor even the Western European Union) until such time as they are competent in this area to speak on behalf of their members.²¹³ Further, the practicalities of such organizations as members must be kept in mind; organization representatives need instructions from their membership, which can be a time-consuming process that inhibits expeditious Security Council action.

While status as a permanent member and the possession of the "veto power" are currently congruent, the two features need not go hand-in-hand. Indeed, if the permanent membership is expanded, it would be desirable not to extend the veto power to the new permanent members if they are willing to participate on a different basis, because the more members holding a veto power, the less effective the operation of the Security Council is likely to be. This would result in three tiers of membership: superpower states (permanent membership with the veto power); powerful states (permanent membership without the veto power); and all other states (non-perma-

213. Title V of the Treaty on European Union provides procedures for adoption of joint action in matters covered by a common foreign and security policy, but specifically carves out from this issues having defense implications. Treaty on European Union, Feb. 7, 1992, art. J.4, ¶ 3, Luxembourg: Office of Official Publications of the European Communities. Those issues are left to the Western European Union, which does not have authority to take decisions on behalf of its members regarding the deployment of military forces.

ment membership rotating among states without the veto power). An illustration of one approach to this would be as follows:

Permanent Membership with the Veto Power

1. China
2. France
3. Russia
4. United Kingdom
5. United States

Permanent Membership without the Veto Power

6. Brazil
7. Germany
8. India
9. Japan
10. Egypt
11. Nigeria

Non-Permanent Membership without the Veto Power

Ten states selected on a rotating basis by the General Assembly

Formally changing the composition of the Security Council would require amending the U.N. Charter, as was done in 1965 when the membership went from six to ten non-permanent members. Amendments of the U.N. Charter require adoption by two-thirds of the members of the General Assembly, and must be ratified by two-thirds of the members of the United Nations, including all of the Security Council permanent members.²¹⁴ Further, the entire process of debating, adopting, and particularly bringing into force any such amendment will prove to be a lengthy one. For this reason, it may be useful to consider more expeditious means of altering the composition of the Security Council.

For instance, states capable of projecting, and willing to project, military power in cooperation with the Security Council could enter into a U.N. Charter Article 43 agreement (discussed below) with the Security Council, and then participate in the informal and formal decision making processes of the Security Council on the basis of U.N. Charter Article 44.²¹⁵ Since Article 44 speaks to a situation

214. U.N. CHARTER art. 108.

215. Article 44 of the United Nations Charter provides that: When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfillment of the obligations assumed under Article 43, invite that Member, if the Member

where "the Security Council *has decided* to use force," a flexible interpretation would be necessary for a state to participate in all stages of the Security Council's deliberations regarding a particular crisis.

Alternatively, for states capable of projecting military power or providing financial resources, participation in the decision making processes of the Security Council might be based on U.N. Charter Article 31, which allows non-members to participate in the decisions of the Security Council without a vote if their interests are "specially affected;" those interests could include the likelihood of being called on to provide military or financial assistance.

In summary, criticisms regarding the legitimacy of the Security Council's decisional process have some validity with respect to functions of the Security Council that derive their moral support and effectiveness from the global community as a whole. They appear less valid for other functions of the Security Council. The founders of the U.N. Charter quite rightly were less interested in obtaining an ideal system of collective security than in "the practical problem of managing postwar relationships more systematically than alliance systems had done in the past."²¹⁶ Achievement of the essential goal of a collective security system requires that special status and special responsibilities be given to those countries who, upon the basis of their overall power, are capable of coercing behavior (which to be done credibly requires the projection of military force) or are capable of thwarting the actions of the system. Moreover, the experiences of the United Nations in Iraq and Somalia, and its relative failure in Bosnia-Herzegovina, indicate that at least one of the major powers must act as the primary motivating force, willing to deploy its own resources, for action to occur. Widespread participation of other states in the decision to apply power is an appropriate secondary goal; global support, particularly with respect to economic sanctions, is an important element. Yet this secondary goal cannot be used to undermine the need for an efficient organ capable of acting quickly to address threats to international peace and security as they arise. The reform most needed relates to the composition of the permanent members of the Security Council, although such reform entails difficulties in the standard applied for such membership, the politics

so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces. U.N. CHARTER art. 44.

216. Joseph P. Lorenz, *The Case for Collective Security*, in TWO VIEWS ON THE ISSUE OF COLLECTIVE SECURITY 19 (U.S. Institute of Peace, 1992).

of changing the status quo, and the speed with which such reform can be achieved.

IV. THE SEARCH FOR DETERRENCE

Part II of this Article described how, since the end of the Cold War, the Security Council has performed a wide array of functions to address threats to and breaches of the peace. The effectiveness of these functions has varied, as has the willingness of the Security Council to perform them in a timely fashion, if at all. Not surprisingly, the high expectations for a renaissance of conflict management by the Security Council have now been followed by disillusionment that the Security Council cannot resolve all of the world's conflicts.²¹⁷

A common element of the Security Council functions discussed in Part II is that they were performed after the commencement of aggression or civil warfare and represented efforts to "recapture" a preexisting status quo. While efforts to improve the use of these functions should be made, considerable attention should also be paid to the development of methods for deterring aggressive conduct before it occurs. As noted in the Secretary-General's "Agenda for Peace," the "most desirable and efficient employment of diplomacy is to ease tensions before they result in conflict—or, if conflict breaks out, to act swiftly to contain it and resolve its underlying causes."²¹⁸ Indeed, the dangers, costs, and domestic political obstacles to those states that act on behalf of the United Nations in Iraq, Somalia, and Yugoslavia were such that even if the actions taken by the Security Council are successful, they cannot be sustained for all the likely conflicts in the future.

If the analysis in Part III is correct—that criticism of the process of the Security Council's decisions is largely misplaced and that the Security Council was intended to and must function as a product of the inescapable power differentials among nations—then the development of additional tools for the Security Council should take into account the need for major power involvement. This Part explores four avenues for developing such action. The first, preventive diplomacy, emphasizes the gathering of information and the issuing

217. See, e.g., Julia Preston, *Vision of a More Aggressive U.N. Now Dims: Disappointments of 1993 Reveal the United Nations' Limits in the Post Cold-War World*, WASH. POST, Jan. 5, 1994, at A24; Hall, *supra* note 76.

218. *Agenda for Peace*, *supra* note 1, ¶ 23.

of warnings prior to or immediately upon the outbreak of a conflict. Major powers are particularly well-situated to provide the Security Council with information, to assist the Security Council in developing its own system of information gathering, and to back Security Council warnings with a credible use of force. Second, the much discussed yet never used prospect of Article 43 agreements provide opportunities for a closer association of major power capabilities with the Security Council, either through the deployment of forces under U.N. command, or a less ambitious relationship that creates the framework for such deployments without actual commitment. Third, regional security organizations that use major powers as linchpins can and should be more closely associated with the Security Council, thereby allowing each to draw on the other's strength. Finally, although difficult and controversial, efforts should be pursued by the Security Council to foster greater rule of law engagement. Major power involvement in such efforts will be essential in light of their economic and military relationships with countries lacking in democratic institutions and respect for human rights.

A. Preventive Diplomacy

The concept of preventive diplomacy recognizes that the best opportunity for preventing breaches of the peace arises in the early stages of a conflict. The Security Council is given primary responsibility for international peace and security in order to ensure "prompt and effective" action by the United Nations.²¹⁹ Yet conflicts cannot be prevented by the Security Council unless the threat of conflict is known in advance and the underlying causes are clearly understood.

Several factors weigh against the Security Council as an organ undertaking to obtain information prior to a conflict. First, for the most part, the members of the Security Council view it as a reactive organ, whose charge is to respond to existing breaches of the peace, usually on an interstate level; it is left to the Secretary-General to pursue measures of preventive diplomacy in advance of a conflict. Second, the tendency of the members of the Security Council is to be very conservative in the exercise of their powers, which results normally in action that only relates to clear, overt actions of renegade states or factions. Although Chapter VII trumps the prohibition of Charter Article 2(7) on interfering in matters which are essentially in the domestic jurisdiction of states, Chapter VI, relating to the investigation of situations that might lead to disputes, does not.

219. U.N. CHARTER art. 24, ¶ 1.

Consequently, the non-intervention principle in Charter Article 2(7) weighs against systematic efforts to obtain information that would reveal a likelihood of aggressive behavior by a state.

Despite these obstacles, a goal of the Security Council should be to utilize a comprehensive system for monitoring global trends relating to both international and internal conflicts. Precedent for such a system already exists at some of the U.N. specialized agencies for anticipating potential nuclear or environmental hazards, or predicting food shortages.²²⁰ In 1987, the Secretary-General established an Office for Research and the Collection of Information (ORCI) to gather information, conduct research, assess global trends and bring potential conflicts to the attention of the Secretary-General.²²¹ ORCI is a small unit in the political section of the offices of the Secretary-General; it is not integrated into other units of the Secretariat with responsibilities in the area of peace and security.²²² Further, ORCI is under-funded and under-staffed, and only provides reports to the Security Council through the Secretary-General on an *ad hoc* basis. One approach for developing a U.N. monitoring system to assist the Security Council would be to integrate ORCI fully with other relevant units and upgrade its resources and staff so that trends—military, economic, social, energy, environmental—having a bearing on international peace and security or on widespread human rights atrocities are regularly reported to the Security Council for its consideration. Alternatively, the Security Council itself is capable of establishing its own subsidiary bodies that could assist it in the performance of some of these information-gathering functions, either as a standing committee or as a committee addressing a particular functional or geographic problem.²²³

220. The International Atomic Energy Agency performs functions pursuant to the Convention on Early Notification of a Nuclear Accident (in particular through arrangements for the use of the World Meteorological Organization's Global Telecommunication System). The United Nations Environment Program operates a Global Environment Monitoring System. The Food and Agriculture Organization operates a Global Information and Early Warning System (providing current information on the world food situation and identifying countries threatened by food shortages).

221. See B.G. RAMCHARAN, *THE INTERNATIONAL LAW AND PRACTICE OF EARLY-WARNING AND PREVENTIVE DIPLOMACY: THE EMERGING GLOBAL WATCH* 44-67 (1991).

222. See ERSKINE CHILDERS & BRIAN URQUHART, *TOWARDS A MORE EFFECTIVE UNITED NATIONS* 20-23 (1992) (arguing in favor of a consolidated "Department of Political, Security and Peace Affairs," which would include ORCI).

223. U.N. CHARTER art. 29; Provisional Rules of Procedure, Rule 28. The Security Council has three standing committees of the whole: The Committee of Experts (which studies and advises the Council on rules of procedure and other technical matters); the Committee on the Admission of New Members; and the Committee on Council Meetings

Ideally, a well-functioning monitoring and assessment system would include investigation through U.N. observers and fact-finders, as well as highly skilled analysts. The Security Council has in the past dispatched members of the Security Council to ascertain the facts of a crisis situation and report back to the Security Council.²²⁴ For deterrence purposes, such missions should be used more aggressively *in advance* of a crisis. Further, a well-functioning monitoring and assessment system would cultivate receipt of information, perhaps even on a real-time basis, from space-based and other technical surveillance systems of states, particularly major powers that have committed extensive financial and technical resources to the creation of such systems. Obviously, states will not wish to disclose to the United Nations all of their intelligence capabilities, but the dramatic increases in international cooperation on security matters at the United Nations merits rethinking whether national interests are better served by a more systematic disclosure of appropriate information to the Security Council. The experience of states in pursuing confidence-building measures in the arms control area, including through the Conference on Security Cooperation in Europe (CSCE), could be very helpful in encouraging information disclosure. Finally, a well-functioning system would seek to harness the vast amounts of information uncovered by non-governmental organizations regarding the activities of states in matters that may lead to threats to the peace.

A comprehensive monitoring and assessment system should focus not just on international trends, but internal trends as well. The events in Iraq after its expulsion from Kuwait, and the situations in Somalia and Bosnia-Herzegovina, affirmed the increasing role of the international community in addressing affairs previously deemed subject solely to national prerogatives. Moreover, it is often the case that international conflict has its origins in developments that are internal, such as the ouster of a government or economic turmoil. As such, the Security Council is justified in pursuing measures to enhance its capabilities to understand and to address not just interstate conflicts, but intrastate conflicts as well.

A well-functioning system for providing information to the Security Council is only useful if the Security Council is prepared to

away from Headquarters. Other *ad hoc* committees have been established through the adoption of specific resolutions, such as the sanctions committees discussed in Part II(2)(a).

224. See, e.g., S.C. Res. 819, U.N. SCOR, 48th Sess., 3199th mtg. ¶ 12, U.N. Doc. S/RES/819 (1993); *Note by President of the Security Council*, U.N. SCOR, 48th Sess., U.N. Doc. S/25645 (1993) (dispatching a mission of six members to Bosnia-Herzegovina). The report of the mission appears as U.N. Doc. S/25700 (1993).

act on it. For a long time, the practice was only for Security Council members or non-member states to request Security Council consideration of a matter, which resulted in many threats to international peace (and even wars) never even being placed on its agenda. It also left unused other possibilities for the President of the Security Council to take initiatives to place matters on its agenda. Since the end of the Cold War, greater initiatives have been taken by the Secretary-General under Charter Article 99 to bring matters to the attention of the Security Council; this, and other possibilities, should be encouraged and perhaps linked to reporting from a monitoring and assessment system.

Once in receipt of information that suggests a potential threat to the peace and explains its causes, the Security Council might take action through a Security Council resolution (including dispatching a fact-finding mission or a special envoy), although as noted above the dynamics of caution might still tend toward inaction. Nevertheless, an effective early warning system would at least raise the issues before the Security Council and provide the possibility for measures short of passing a resolution. For instance, there could be issued a public or private communication from the President of the Security Council to the regime in the potentially threatening state. The Secretary-General plays the primary role in this area, but in some instances the President of the Security Council will be a more convincing messenger about what action the Security Council might take if a breach of the peace develops. In the event that the Security Council does not wish to be formally involved in such a communication, it could informally be agreed that one or more of the major powers should issue a statement or approach the regime. Major power involvement is essential to provide credible backing to the Security Council's position.

Would such actions deter an aggressor? It cannot be assumed that an aggressor can always be deterred. While much discussion occurred in the United States about the failure of U.S. Government officials to communicate unequivocally to Iraq the views of the United States regarding aggressive action toward Kuwait, some argue that even if those views were communicated, Iraq would not have been deterred.²²⁵ Most studies of deterrence, however, have focused

225. Janice G. Stein, *Deterrence and Compellence in the Gulf, 1990-91*, 17 INT'L SECURITY 147, 148 (1992). Stein suggests that Iraq's President, Saddam Hussein, was unstoppable because of the strategic judgment he made, late in 1989, that the United States was determined to undermine his regime through economic sabotage and covert action. Once he developed a strong image of an enemy

on the ability of a single country, such as the United States, to deter an aggressor, such as Iraq. If the Security Council were to pursue measures designed to deter an aggressor, the calculus might be quite different. Most countries in the world capable of undertaking aggression have some relationship with one of the major powers, if for no other reason than the supply of arms. If a consensus can be developed among the major powers, which is then communicated to the potential aggressor, the potential costs to the aggressor in following through with the aggression would seem considerably higher. Obviously, developing a consensus among the major powers is not always easy, as was witnessed in the response to the Yugoslav crisis. Yet a major power that has an historical relationship with a potential aggressor may wish to prevent the breach of the peace from ever occurring precisely to avoid being placed in the uncomfortable position of having to block measures at the Security Council after the aggression has occurred. If so, there will be an incentive for all the major powers to work together to help deter the breach before it occurs. It will still be the case that not all aggressors can be deterred all of the time, but increasing the likely costs of the aggression should have an effect at least on the margin, where the perceived benefits from the aggression are close to the perceived costs. Of course, a key element of such deterrence will be to maintain the credibility of the Security Council with respect to the warnings it issues. If governments are allowed to ignore warnings with impunity, then those warnings become meaningless, and perhaps even dangerous if they create a sense of action by the international community where in fact there is none.

Preventive diplomacy by the Security Council need not proceed on just a conflict-by-conflict basis; it should also involve actions that address cross-cutting issues in global conflict management. For instance, one of the principal horrors of modern warfare—for civilians and peacekeepers alike—and principal impediments to civil reconstruction is the widespread use of antipersonnel land mines.²²⁶

bent on his destruction, he was almost immune to any evidence that challenged the conclusion he had drawn. Under these conditions, neither deterrence nor reassurance before the invasion, nor compellence after the invasion stood much of a chance.

Other perceptive analysts have also concluded that deterring Iraq's invasion by taking U.S. action in late July or early August would have been more difficult than many commentators have suggested. See PAUL K. DAVIS & JOHN ARQUILLA, *DETECTING OR COERCING OPPONENTS IN CRISIS: LESSONS FROM THE WAR WITH SADDAM HUSSEIN* viii, 67-71 (1991).

226. See Boutros Boutros-Ghali, *The Land Mine Crisis, A Humanitarian Disaster*, 73:5 FOREIGN AFF. 8 (1994).

These indiscriminate weapons are inexpensive to acquire and easy to lay, but wreak tremendous damage and are expensive to remove. Whether there would be consensus among the Security Council members to issue a ban on the global production and export of such mines is not clear. To do so might take the Security Council down a path of legislating rules, which would make many states uneasy. Nevertheless, innovative long-term means of preventive diplomacy should be considered, and where possible, adopted.

B. Article 43 Agreements

With the increased possibilities for action by the Security Council has come increased attention to the possibility of placing standing military forces at the disposal of the Security Council for deployment under the command of the United Nations. Article 43 of the U.N. Charter contemplates the negotiation of agreements between member states and the Security Council for the contribution of "armed forces, assistance, and facilities, including rights of passage" whenever called upon by the Security Council. The agreements are to govern the "numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided." Under Article 47, a Military Staff Committee is to advise and assist the Security Council on the "employment and command of forces placed at its disposal," and is to be responsible for the "strategic direction" of those forces.

Although in the early years of the Charter era efforts were made to establish such agreements, political difficulties largely arising from Cold War distrust prevented this from occurring.²²⁷ Consequently, U.N. deployments of forces in the Charter era have occurred through two modalities: peacekeeping forces deployed under U.N. command at the consent of the host government(s); and U.N.-authorized actions by member states to engage in forcible military actions on an *ad hoc* basis. With the cooperative spirit pervading actions of the Security

227. In 1946, the Security Council tasked the Military Staff Committee with examining the issue of Article 43 agreements. The report of the Committee indicated disagreement on several key issues, such as the size and composition of the forces to be contributed, the location of the forces, and the conditions for their use and withdrawal. See U.N. SCOR, 2d Spec. Supp. 1 (1947), discussed in LELAND M. GOODRICH, *supra* note 198, at 113-14:

Generally speaking, the United States favored a large force with great striking power, flexibly composed, and so organized and located as to be readily available. The Soviet Union, on the other hand, saw no need of a large force, insisted that the principle of equality should govern contributions, and demanded clear definition of the conditions under which the force could be used.

Council in the post-Cold War era, the possibilities for Article 43 agreements should be pursued. As Secretary-General Boutros-Boutros Ghali has noted, "[u]nder the political circumstances that now exist for the first time since the Charter was adopted, the long-standing obstacles to the conclusion of such special agreements should no longer prevail."²²⁸ Some members of the U.S. Senate have spoken out in favor of, and held hearings on, the idea of an Article 43 agreement by which U.S. forces would be placed at the disposal of the United Nations,²²⁹ although as yet there is no general Congressional support in favor of such agreements. The President has the authority to negotiate Article 43 agreements with the Security Council which, once approved by the Congress, would permit the President at future times to make U.S. forces available to the Security Council in accordance with the agreements without further Congressional authorization.²³⁰

One misconception about Article 43 is that it contemplates the possibility of a "standing army" under the control of the Security Council. The concept of a standing force—particularly an air force—maintained directly under the Security Council's control was discussed and rejected at the Dumbarton Oaks Conference. The direction taken in Article 43 was not to create the possibility of a separate standing U.N. force, but rather to establish a mechanism whereby national forces would be made available to the Security Council at the time of a crisis pursuant to prior agreement.²³¹ Consequently, while the creation of such a standing force under the overall Chapter VII powers of the Security Council might be possible, it would not appear to be within the scope of Article 43.

An ambitious approach to the use of Article 43 agreements would be to seek commitments from a large number of states for the use of significant numbers of their national forces upon call of the Security Council. The advantages of such an approach would be to

228. *Agenda for Peace*, *supra* note 1, ¶ 43. The Secretary-General recommended that the Security Council initiate negotiations supported by the Military Staff Committee. *Id.*

229. See *Arming the United Nations Security Council — The Collective Security Participation Resolution: Hearing Before the Senate Foreign Relations Comm. on S.C. Res. 325*, 102d Cong., 2d Sess. 102-873 (1992) [hereinafter *Arming the United Nations*].

230. The President's authority to negotiate such agreements is inherent in the authority to make treaties, with the advice and consent of the Senate. U.S. CONST. art. II, § 2. Congressional support for such agreements was expressed in the 1945 U.N. Participation Act. U.N. Participation Act of 1945, 22 U.S.C. § 287-287(e) (1982).

231. Article 43 was the product of a U.S. compromise in the face of a strong desire of the Soviet Union to establish an international air corps maintained directly under the control of the Security Council. HILDERBRAND, *supra* note 188, at 146-49.

engage widespread support for U.N. deployments, to spread the costs of undertaking such deployments, to foster world community cooperation in matters of peace and security through periodic joint training and exercises, and to aspire to the fulfillment of the clear legal obligation under Article 43 of "all" members to enter into Article 43 agreements. Efforts to "go global" with large national contingents under Article 43 agreements, however, are bound to run into difficulties. Many states will be reluctant to commit large numbers of their forces in advance for political and economic reasons. The negotiation and conclusion of such agreements could be time-consuming. Coordination of large numbers of forces from many countries for the purpose of training and exercises, let alone actual combat, would be very difficult and expensive.

A less ambitious approach would be to seek commitments from a moderate number of states for use of a small number of their forces for a Rapid Deployment Force. For instance:

Some forty to fifty U.N. members in different parts of the world could enter into Article 43 agreements designating units of brigade strength (2,000 to 3,000 soldiers) that would be available for use by the Security Council as a Rapid Deployment Force to deal with threats to the peace and acts of aggression. These units, totalling 100,000 men would be prepared in advance of a crisis with common training, standardized or interoperable equipment, and joint exercises under a UN Commander. When a crisis occurred, those national contingents most suited for the purpose would be called up—which in most cases would be far less in number than 100,000.²³²

Such a force would be capable of defeating aggression or ending widespread human rights atrocities. An even smaller force might be created to serve simply as a presence or "trip wire" force along a border; the function of such a force would not be to defeat an aggressor, but rather to put an aggressive regime on notice that cross-border action would implicate armed conflict with the United Nations.²³³ These approaches are not mutually exclusive; different tiers of Article 43 agreements could be constructed such that they

232. Richard N. Gardner, *Collective Security and the 'New World Order': What Role for the United Nations?*, in TWO VIEWS ON THE ISSUE OF COLLECTIVE SECURITY, *supra* note 216, at 10.

233. See *Arming the United Nations*, *supra* note 229, at 60-61 (statement of Robert F. Turner, University of Virginia).

Yet most issues must be resolved in advance—establishing a multilateral U.N. force capable of deploying expeditiously should not be done if that force ultimately is not capable of being organized and operated as effectively and efficiently as would be done under national commands. If it is not so capable, support for it will quickly evaporate and its credibility in both deterring and responding to aggression will be undermined.

It would be unfortunate if the concerns regarding deployment of military forces under Article 43 agreements precluded pursuit of other possibilities for Article 43 agreements. Article 43 speaks not just of placing military forces on call, but of providing assistance and facilities as well, including rights of passage. Since one of the advantages often noted with Article 43 agreements is the ability to burden-share, it would seem reasonable to pursue agreements that allowed a standardized arrangement for states to provide funds to the United Nations for actions taken by the Security Council, even those in which nationally-commanded forces were authorized to act.²⁴⁰ An Article 43 burden-sharing agreement might be compulsory (which may assist some states under their domestic processes in the expeditious provision of funds) or, if that is not possible, might simply provide a mechanism for the orderly collection of funds. A standardized mechanism would seem preferable to an *ad hoc* approach, although *ad hoc* approaches can work both within and outside the U.N. system. For the Iraq crisis, the United States pursued the collection of funds from various countries which were deposited in a U.S. government account and from which appropriations were made by the U.S. Congress. In the case of funding for UNITAF in Somalia, an *ad hoc* trust fund was established by the Security Council and administered by the Secretary-General to receive funds for supporting military contingents provided by lesser developed countries. Whether states would be any more diligent about paying these funds than they are about their annual assessments is not clear; it will undoubtedly turn on how well the funds are used.

Another possibility would be to negotiate Article 43 agreements that provide ready access to airfields, ports, railroads, and roads for forces acting pursuant to authorization by the Security Council. In the case of Iraq, some countries experienced difficulties obtaining such support, even though the Security Council called on all states to

240. The failure of member states to pay their assessed contributions on time and in full is, of course, a major problem for the United Nations across the board. The mounting cost and complexity of actions conducted pursuant to decisions of the Security Council make resolving the financing problem all the more urgent.

provide assistance and support to states acting on behalf of Kuwait. In some instances, states asserted that their status as neutrals precluded the provision of assistance. Article 43 agreements could help avoid some of these difficulties.

A third possibility would be Article 43 agreements that provided for the provision to the United Nations of a revolving reserve of equipment (lethal or non-lethal) or other supplies (e.g., food) commonly used in U.N. operations, including humanitarian operations. The equipment and supplies could either be handed over to the United Nations for storage at a U.N. facility or be stockpiled in certain states, including the donor states. Precedent for stockpiling exists with many of the arrangements concluded by the major powers with their allies during the Cold War era. While many states were reluctant to enter into such arrangements with the major powers, they may be more willing to do so pursuant to an arrangement with the Security Council. The benefit for the host country, of course, lies in both the relationship with the Security Council and the presence of readily-available materials that could help maintain regional stability. If necessary, the Article 43 agreement could provide the host government with the ability to veto the use of the materials in the region if the host state believed doing so threatened its vital interests. At a minimum, the stockpiling of medical supplies and foodstuffs for use in humanitarian situations should pose minimal difficulty for the host state.

A final possibility would be Article 43 agreements that set down guidelines for the status of military personnel deployed under the authorization of the Security Council. Unless military forces are in fact detailed to the United Nations, the privileges and immunities accorded to U.N. officials do not attach. Article 43 agreements could provide for such privileges and immunities to all forces operating under the authorization of the Security Council, as well as other issues relating to the treatment and status of such forces in the host country, on issues as diverse as claims for damages, payment of duties and customs, and alcohol use.

These suggested possibilities may appear more cosmetic than the weightier proposals for deployment of forces under a U.N. command. It is submitted, however, that not only might these possibilities be easier to achieve, but that they might considerably advance the goal of deterrence. The existence of Article 43 agreements that address funding, rights of passage, prepositioning, and status of forces can themselves have a deterrent affect, for they flesh out, even if in a non-binding fashion, the possibilities for deployment of forces under Chapter VII of the Charter in defense of a country or region.

C. Regional Security Organizations

The least utilized and yet most promising avenue for enhancing the capabilities of the Security Council is the development of relationships between the Security Council and regional security organizations. Chapter VIII of the Charter acknowledges the usefulness of such organizations in the maintenance of international peace and security, and calls upon the Security Council to utilize them in appropriate circumstances for enforcement action under its authority.²⁴¹

In the aftermath of the Second World War, some international organizations, such as the North Atlantic Treaty Organization (NATO) and the Warsaw Pact, developed as alliance systems oriented toward defense from an external threat. The two superpowers served as the linchpins for the direction and stability of these organizations. The member states of these organizations never considered themselves "regional organizations" for purposes of Chapter VIII of the U.N. Charter. Nevertheless, as indicated in Part I, NATO has been very active in assisting the United Nations in measures for maintaining international peace and security. In principle, there is no reason why an agency primarily designed to assist in collective self-defense cannot in some instances engage in such measures.

Other international organizations, such as the Organization of American States, developed as continent-wide entities oriented toward peace and security of the continent and peaceful settlement of disputes that may arise among its members. The Charter of the OAS expressly states that "[w]ithin the United Nations, the Organization of American States is a regional agency."²⁴² By including all states in a region and focusing on conflict avoidance and resolution from within, regional organizations can be excellent fora for confidence building measures and rule of law engagement; the experience of the Conference on Security and Cooperation in Europe (CSCE) in fomenting democratic aspirations and human rights standards in Eastern Europe and the Soviet Union is instructive. The Security Council should encourage these organizations to pursue military exchanges among their members, to create risk reduction centers, and to exchange information regularly in areas that have the potential for generating conflicts.

241. U.N. CHARTER art. 53.

242. CHARTER OF THE ORGANIZATION OF AMERICAN STATES art. 1.

The Security Council should establish links with regional organizations so as to foster cooperation between the Security Council and those organizations. The enforcement of the no-fly zone over Bosnia-Herzegovina by NATO forces is an example of how such cooperation can work. More systematic linkage might include the conclusion of an agreement between the Security Council and the regional organization regarding information sharing, emergency consultation, periodic joint meetings, participation in Security Council meetings on issues related to the region, or placement of issues on the agenda of one entity by the other. The lack of systematic linkage might be resolved on an *ad hoc* basis as crises arise, but this will invariably lead to confusing, perhaps over-bureaucratic handling of a crisis. For instance, while the Security Council and NATO worked out a system for bombing Bosnian Serb targets, the requirement of prior authorization by U.N. commanders on the ground as well as U.N. officials in New York provided for a cumbersome requirement.²⁴³

Linkage of this type could provide benefits in deterring aggression or widespread human rights atrocities. Regional organizations are best equipped to sound an early warning system regarding the potential outbreak of external or internal conflict, and to provide information on its causes and possible solution. Regional organizations are best equipped to make use of the superior power of a state in the region, but on terms and conditions acceptable to less powerful states. Yet regional organizations are often weak in the diplomatic, economic, and military pressure they can bring to bear on a potential aggressor, either because of a lack of its own resources or because of the political difficulty in acting against a state that within the region is relatively powerful. A more symbiotic relationship with the Security Council could enhance the ability of a regional organization to bring pressure on the potential aggressor while at the same time

243. Barton Gellman & Trevor Rowe, *U.S. Agrees to U.N. Veto on Bombing*, WASH. POST, June 10, 1993, at A1. Of course, the mere existence of a system for conducting U.N.-authorized airstrikes, coupled with a concrete threat to use it, can have significant effects. For example, a NATO ultimatum to Bosnian Serb militia forces to withdraw their heavy artillery to 12 miles from the center of Sarajevo by February 21, 1994 or face airstrikes prompted those forces to withdraw their artillery (or hand them over to UNPROFOR). David B. Ottaway, *NATO Gives Serbs Airstrike Deadline*, WASH. POST, Feb. 10, 1994, at A1; John Kifner, *Serbs Agree to Give Up Sarajevo Guns*, N.Y. TIMES, Feb. 10, 1994, at A14. The first request for airstrikes from the U.N. to NATO was for the purpose of protecting UNPROFOR forces seeking to enter the Muslim town of Maglaj in northern Bosnia. The airstrike did not actually occur because the simple overflight by NATO warplanes silenced the targeted Serb artillery. Kurt Schork, *NATO Warplanes Protect U.N. Unit*, WASH. POST, March 14, 1994, at A13.

keeping on the front line the organization best equipped to resolve the problem.

D. Rule of Law Engagement

Another promising avenue for the Security Council to assist in deterring aggression and widespread human rights atrocities is to focus on "deterrence from within." By this is meant action designed to foster the creation and development of internal constraints on aggressive behavior.

Empirical evidence developed by political theorists indicates that liberal democratic states do not go to war with one another,²⁴⁴ and are less prone to engage in widespread human rights atrocities than their non-liberal counterparts (although deprivations do occur).²⁴⁵ Non-liberal states, characterized by high concentrations of power in regime elites, have a greater capacity for autonomous behavior in their economic and political action; they are not limited by democratic accountability, economic interdependence, and well-functioning judicial systems insulated from direct political influence.²⁴⁶ As such they are more capable of resorting to war externally and to widespread violations of human rights internally.

The defining aspect of the end of the Cold War was the unleashing of democratic forces and responsive governments where before there had been authoritarian regimes. As the Secretary-General noted in his "Agenda for Peace":

The form, scope and intensity of these processes differ from Latin America to Africa to Europe to Asia, but they are sufficiently similar to indicate a global phenomenon. Parallel to these political changes, many States are seeking more open forms of economic policy, creating a world-wide sense of dynamism and movement.²⁴⁷

244. See Michael W. Doyle, *Kant, Liberal Legacies and Foreign Affairs, Part 1*, 12 PHIL. & PUB. AFF. 205 (1983). Professor Doyle conducted a survey of all wars conducted in the past two centuries. See also Zeev Maoz & Nasrin Abdolali, *Regime Types and International Conflict 1816-1976*, 33 J. CONFLICT RESOL. 3 (1989); Steve Chan, *Mirror, Mirror on the Wall ... Are the Democratic States More Pacific?* 28 J. CONFLICT RESOL. 649 (1984).

245. R.J. RUMMEL, *DEATH BY GOVERNMENT* (1994).

246. For a discussion of the ramifications of this theory of liberal internationalism on understanding transnational law, see Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907 (1992); Anne-Marie Burley, *Toward an Age of Liberal Nations*, 33 HARV. INT'L L.J. 393 (1992); see also Richard N. Gardner, *The Comeback of Liberal Internationalism*, WASH. Q. 29 (Summer, 1990).

247. *Agenda for Peace*, supra note 1, ¶ 9.

To capitalize on these movements, members of the Security Council should consider initiatives that nurture democratic institutions and respect for human rights. Such initiatives could include general declarations regarding the relationship between rule of law institutions and the preservation of peace, declarations specific to a state or group of states on the same, greater coordination with other U.N. agencies with responsibilities for human rights to clarify and develop our understanding of the relationship between the rule of law and peace, and ultimately steps under Chapters VI or VII to promote the rule of law. Obviously in situations where there has been a breakdown in governmental authority, such as in Somalia, the Security Council can take steps to check violence and to assist in national reconciliation and the creation of a government predicated on the will of the people. Likewise, in Bosnia-Herzegovina, the Security Council encouraged the pursuit of a peace plan that would permit authentic representation of various factions in a single state, an effort that met with limited success. Yet even where there exists a central government fully in control of its territory, when that government is engaged in aggression or widespread human rights atrocities, the imposition of elections and election-monitoring on the basis of enforcement action under Chapter VII should be considered. The willingness to expel Iraq from Kuwait, and yet the reticence to alter the Iraqi structure of government, resulted in extensive suffering to Iraqi Kurds and Shiites, and required the expenditure of extensive U.N. resources in only partially successful efforts to demilitarize Iraq and promote regional stability. In some instances, the United Nations' involvement in the process of elections and election monitoring has been criticized as ineffective, but more often than not the criticism is that the Security Council is doing too little, not too much.²⁴⁸

There are problems with taking on such an approach. As a practical matter, those states on the Security Council that are not democratic or that have poor human rights records will resist such initiatives. The challenge then would be to find ways of engaging even non-democratic states in democratic initiatives that inure to their benefit. One approach would be to emphasize the importance of maintaining a world economy on the basis of liberal, democratic, and free-market concepts; even China today is pursuing a policy of export-led growth.²⁴⁹ For this reason, a special responsibility lies

248. See, e.g., Mary Kay Magistad, *U.N. Workers in Cambodia Give Ultimatum*, WASH. POST, Apr. 16, 1993, at A19 (elections conducted by U.N. peacekeeping force threatened by lack of protection for U.N. workers).

249. See Richard Rosecrance, *A New Concert of Powers*, 71 FOREIGN AFF. 64, 79-80

with those states with significant economic power, capable of providing incentives for developing states to adhere to the rule of law.

A further problem is that the Security Council, the United Nations as a whole, and international law generally are not constructed on the basis of differentiating among states on the basis of their internal governmental structures. Indeed, a fundamental tenet of international law and organization is the respect for the sovereign rights of states in their domestic affairs. The Charter itself precludes the United Nations from intervening in matters which are "essentially within the domestic jurisdiction" of states, absent enforcement measures taken under Chapter VII. Yet, as the global community becomes more sophisticated in its relationships, the concept of absolute and exclusive sovereignty has become increasingly tarnished; indeed, "its theory was never matched by reality."²⁵⁰ The interdependence of states economically and environmentally is readily apparent. Yet the massive flows of refugees that occurred from Iraq into Turkey and Iran, and from Somalia into its neighbors, also readily shows the interdependence of states in the practice of good internal governance.

V. CONCLUSION

The provisions of the U.N. Charter relating to international peace and security were drafted on the assumption that the permanent members of the Security Council would agree on effective courses of action when threats arose. For this reason, hopes for the effective functioning of the Security Council were dashed on the shoals of the Cold War. With the dissolution of the Soviet Union and the thaw in East-West relations, a renaissance of actions have occurred at the Security Council, which were dramatically seen during 1990-93 in relation to events in Iraq, Somalia, and Yugoslavia. Not only are the types of actions wide-ranging—from declarations, to economic sanctions, to military deployments, to war crimes, compensation, and boundary tribunals—but the reasons for these actions as well. Overt aggression, covert aggression and widespread human rights atrocities are all fair game for enforcement action under Chapter VII.

Not all of the Security Council's actions can be considered successful; indeed, in some instances, such as Bosnia-Herzegovina, little effective action was taken by the Security Council at all, despite

(1992).

250. *Agenda for Peace*, *supra* note 1, ¶ 17.

the existence of a brutal conflict in which one state surreptitiously provided military support against another. Nevertheless, this sea-change of activity is real and merits rethinking whether and how the functioning of the Security Council can be enhanced.

One area of review must be the process by which the Security Council reaches its decisions, and hence their "legitimacy." In creating the U.N. Charter, "major power" involvement in and influence on this decisional process was quite intentional, and has its origins not in some ideal form of collective security, but in the *realpolitik* of the Concert of Europe. As was recognized in 1945, the "concert-plus" formula of the Security Council has real benefits in seeking to engage the major powers in the maintenance of international peace and security by not threatening their own vital interests and not inhibiting expeditious action. Further, the method of authorizing the deployment of national forces on the basis of general goals (not detailed guidance) has proven effective given the limited resources and skills of the United Nations. Efforts to achieve greater involvement of states capable of providing significant military or economic support for Chapter VII enforcement actions should be explored, but more extensive reforms of the process do not at this stage seem warranted.

There is a significant area where the Security Council needs improvement, and that is in the deterrence of aggressors from pursuing either armed conflict or widespread human rights atrocities. The developments at the Security Council after the Cold War have largely focused on reactions to conflict once they occur, which is far more costly politically and financially than nipping such conflicts in the bud. Deterrence is an extremely difficult task; states are not good at predicting future behavior. Yet the Security Council would do well to pursue initiatives that would enhance its ability to deter aggressors. A highly capable early warning and analysis system should be developed as an integral part of the Security Council or through building on existing mechanisms within the office of the Secretary-General. Article 43 agreements should be pursued, to secure moderate commitments of military forces for rapid deployment or "trip wire" purposes if possible, but also for less ambitious tasks, such as financial support, prepositioning of supplies, access rights, or the status of forces rights for U.N.-authorized deployments. Regional organizations are significantly under-utilized and efforts should be made to see if there can be a trickle-down effect from the renaissance at the Security Council. Finally, and perhaps most contentiously, the Security Council (or at least its members) should pursue initiatives that foster the creation and development of rule of law institutions

within countries as a process of "deterrence from within." Initiatives of this type are the most likely to be considered as intruding upon "the sovereignty" of nations. Yet threats to international peace and security have their roots in internal structures, and if we are to take such threats seriously we must be willing to rethink our methods of addressing them.

The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again

LEILA SADAT WEXLER*

In 1946, the Nuremberg trials were held, marking the first time that the crime against humanity entered into the realm of positive international law. Twenty years later the French incorporated the crime against humanity into their domestic legal order through a statute making such crimes imprescriptible by their nature. Since then, the statute has been the basis of actions brought against various World War II war criminals, including Klaus Barbie and, most recently, Vichy collaborator Paul Touvier. The Touvier prosecution has not only generated tremendous interest in France, but provided a vehicle by which the French courts could, in a long series of decisions, elaborate upon the definition of crimes against humanity established at Nuremberg and in their own decisions in the Barbie case. This Article discusses and critiques the evolution of the French case law and its importance in keeping the Nuremberg legacy alive.

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