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THE SECURITY COUNCIL'S FIRST FIFTY YEARS

*By Frederic L. Kirgis, Jr.**

I. THE FORMAL CHARTER, 1945 AND 1995

The provisions relating to the Security Council in the United Nations Charter of 1995 do not look much different from those in the Charter of 1945. Articles 23 and 27 were amended in 1965 to increase the membership of the Security Council from its original eleven to its present fifteen, with a corresponding change from seven to nine votes for the adoption of resolutions. No change was made in the five permanent members' veto power over substantive matters. Article 109 was amended in 1968 to increase from seven to nine the number of votes in the Security Council needed to complement a two-thirds vote in the General Assembly for the convening of a Charter review conference. Otherwise, c'est la même chose.[1]

Not exactly. The changes over the fifty-year span in the practice of the principal organs of the United Nations are striking, especially in the practice of the Security Council. Some would say that the changes go so far as to weaken the constitutional integrity of the organization.[2] Others are more sanguine, viewing most or all of the changes as normal, or at least as acceptable, steps in the development of the UN Charter as a living constitution. In any event, there is little doubt that the legal modalities of, and constraints upon, Security Council action today are not what they were thought to be in 1945.

II. THE ORIGINAL PLAN

The United Nations was conceived by the Soviet Union, the United Kingdom and the United States, with some input from China, at the Dumbarton Oaks Conference in 1944. The goal was primarily to create an organization that would serve as a mechanism for post–World War II international security.[3] The Dumbarton Oaks plan was refined by Stalin, Churchill and Roosevelt at Yalta in early 1945, and was molded into the Charter at San Francisco later that year.

The plan was not pure invention. Instead, the major powers drafting the UN Charter built on the practice of the League of Nations. They did so with an eye to strengthening the world body, so long as their own vital interests were protected by institutional safeguards. To enable the new organization to deal effectively with peace and security issues, they departed from the League's debilitating unanimity rule, substituting as a safeguard

* Of the Board of Editors.

[1] The only other Charter amendments did not affect the Security Council. Article 61 has been amended twice—in 1965 to increase the size of the Economic and Social Council from its original 18 to 27, and in 1973 to increase it to its present 54.

[2] For a forceful expression of this view, see YEHUDA Z. BLUM, ERODING THE UNITED NATIONS CHARTER (1993). Blum discusses not only the Security Council, but other organs as well. Some of the changes Blum criticizes are discussed later in this article.

[3] The focus was not solely on international security. See Leland M. Goodrich, *From League of Nations to United Nations*, 1 INT'L ORG. 3 (1947), discussing the influence of the Bruce Committee. That committee was appointed in May 1939 to examine the League's experience and to make recommendations. Its principal recommendation concerned the establishment of a Central Committee for Economic and Social Questions. Although the Bruce Committee's report came too late to be implemented by the League, it did influence the preparation of the UN Charter. *See* Jean Siotis, *The Institutions of the League of Nations*, *in* THE LEAGUE OF NATIONS IN RETROSPECT 19, 28 (UN Library and Graduate Inst. of Int'l Stud. symposium, 1983). *See also* Martin D. Dubin, *Toward the Bruce Report: The Economic and Social Programs of the League of Nations in the Avenol Era*, *in id.* at 42.

the veto power of the permanent members of the Security Council.[4] Having agreed that some sort of military staff would be needed if the Security Council were to play a credible role in maintaining or restoring peace and security, they created the Military Staff Committee—a step regarded as a great innovation.[5]

The major powers sought to strengthen the Council by eliminating the provision in the Covenant that allowed either party to a dispute to transfer the matter from the Council to the Assembly,[6] and they eliminated provisions in Article 15 of the Covenant that required members to refer "any dispute likely to lead to a rupture" to the League Council if it was not submitted to arbitration or judicial settlement.[7] The League Council, like the UN Security Council, was a political body not well suited to the role of mediator.

The founders also gave the Secretariat a vital role by inserting Article 99, which supplied the authority to bring to the attention of the Security Council any matter that in the Secretary-General's opinion might threaten international peace and security.

The veto was a sensitive matter then, as it is now. Even before the San Francisco Conference convened, it was quite clear that the veto would have to be included in the Charter if the major powers were expected to be parties to it. Consequently, the existence of the veto and the concept of permanent Security Council membership for the five major powers were not seriously challenged in San Francisco.[8] What was challenged was the extent of the permanent members' discretion to use the veto. The Soviet Union seemed to reverse an earlier stand and took the position that even a decision to discuss a dispute involving a permanent member should be subject to its veto. A fortiori, any resolution dealing with the dispute itself, or any enforcement action, would be subject to its veto. The United States, the United Kingdom and France joined the smaller states in opposing such an extreme use of the veto. The result was the compromise now embodied in Article 27(3): in decisions under chapter VI, but not under chapter VII, a party to a "dispute" shall abstain from voting.[9] This, of course, papered over the difficulty of determining what is and what is not a "dispute"—a difficulty that was to arise on several occasions in the practice of the Security Council.[10]

As the United Nations emerged from San Francisco, then, it was the inevitable product of political compromise among the major powers, with some genuflections in the direction of the smaller states. It had a trim Security Council that could presumably act effectively to settle disputes or take enforcement action when there was a threat to the peace, breach of the peace or act of aggression—provided that none of the five permanent members was directly involved in the matter. The assumption was that, as in the days of the League, many international disputes would be of little or no interest to the

[4] Article 5 of the League of Nations Covenant provided that, except for procedural matters, "decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting."

[5] *See* Brian Urquhart, *The UN and International Security after the Cold War, in* UNITED NATIONS, DIVIDED WORLD 81, 101 (Adam Roberts & Benedict Kingsbury eds., 2d ed. 1993). It did not take long for observers to realize that the Military Staff Committee might be ineffective. *See* CLYDE EAGLETON, INTERNATIONAL GOVERNMENT 453–54 (rev. ed. 1948).

[6] LEAGUE OF NATIONS COVENANT Art. 15(9). Goodrich, *supra* note 3, at 15, points out that only 3 of the 66 disputes that came before the League were transferred to the Assembly under this provision.

[7] Under Article 15(1) and (2) of the Covenant, any dispute between League members that was likely to lead to a rupture was to be submitted to the Council, with statements of the case. Under Article 15(4), if no settlement was reached, the Council was to publish a report with a statement of the facts—an implicit fact-finding authority—and with its recommendations to the parties. These provisions gave ample authority to the League Council to make quasi-judicial pronouncements, if it wished to do so. Eagleton, however, viewed the Council's Article 15 authority as that of a conciliator. *See* EAGLETON, *supra* note 5, at 278.

[8] *See* 1 EVAN LUARD, A HISTORY OF THE UNITED NATIONS 44 (1982).

[9] *See generally id.* at 29, 33–34, 45–48; RUTH B. RUSSELL & JEANNETTE E. MUTHER, A HISTORY OF THE UNITED NATIONS CHARTER 445–55, 531–33, 713–35 (1958).

[10] *See* p. 511 *infra*.

major powers.[11] They would wish to see such disputes resolved amicably, and would have no real incentive to veto dispute settlement measures that were acceptable to a Council majority.[12]

There was even the possibility that the Council could play a constructive role in settling disputes to which a permanent member was a party, if the dispute fell short of an actual threat to the peace. The duty of a party to a dispute to abstain from voting under chapter VI would prevent a permanent member from vetoing the Council's efforts to settle the matter. The Council could then (at least) recommend procedures for settling the dispute under Article 36. Facing such a recommendation, a recalcitrant permanent member might feel some pressure to settle the matter peacefully.

To deal with breaches of the peace and acts of aggression, the Security Council would have at its call armed forces and facilities, pursuant to Article 43 agreements with member states. The Chiefs of Staff of the permanent members would constitute a Military Staff Committee under Article 47, advising and assisting the Security Council on the military aspects of maintaining peace.

The Security Council thus would be a formidable body if all went as planned. So formidable, in fact, that several of the smaller powers represented at San Francisco worried about how to keep the Council in check if it began to run roughshod over their interests. Proposals were made to associate the General Assembly with the Security Council in taking enforcement action, and to give the Assembly the authority to pass judgment on the Council's actions. These proposals were unacceptable to the major powers and were rejected.[13] Some also proposed that the Charter's grant of powers to the Council be reviewed after a few years' experience. But when the Cold War essentially immobilized the Council, the worries dissipated.[14] They have returned in recent years.[15]

Meanwhile, at San Francisco the smaller powers obtained a degree of solace. The General Assembly would have some authority to participate in peace/security matters. It could discuss them under Article 10 and could make recommendations unless the Security Council was exercising its functions in the matter. If the Council was at work on the dispute or situation, Article 12 would prevent the Assembly from acting. Nor could the Assembly simply decide that the Council at some point was not exercising its functions and thus free itself from the Article 12 proscription.[16] Nevertheless, the Assembly could act, often by simple majority vote, on a variety of other matters without regard to what the Security Council or any other organ was doing. In fact, it could discuss and make recommendations on any matters within the scope of the Charter, subject to Article 12. Of course, Article 2(7) was included to preclude "intervention" in matters "essentially within the domestic jurisdiction of any state," with an exception for "enforcement measures" by the Security Council under chapter VII. The Charter did not define the quoted terms. Because of the exception, controversies over the meaning of "intervention" and "domestic jurisdiction" would primarily concern the General Assembly.

It was contemplated that the Secretariat—and especially the Secretary-General—would be a significant participant in the UN political process. The key Charter article, as mentioned above, was and still is Article 99. On its face, it seemed modest enough as drafted. It simply authorized the Secretary-General to bring to the attention of the

[11] *See* LUARD, *supra* note 8, at 87.

[12] Not all observers were so sanguine. *See* James L. Brierly, *The Covenant and the Charter*, 23 BRIT. Y.B. INT'L L. 83, 89–90 (1946).

[13] *See* RUSSELL & MUTHER, *supra* note 9, at 750–51.

[14] *See* Mohammed Bedjaoui, *Du Contrôle de légalité des actes du Conseil de Sécurité*, *in* NOUVEAUX ITINÉRAIRES EN DROIT: HOMMAGE À FRANÇOIS RIGAUX 69, 73–74 (1993).

[15] *See, e.g.*, Sean D. Murphy, *The Security Council, Legitimacy, and the Concept of Collective Security After the Cold War*, 32 COLUM. J. TRANSNAT'L L. 201, 252–69 (1994).

[16] *See* RUSSELL & MUTHER, *supra* note 9, at 760.

Security Council any matter he thought might threaten the maintenance of international peace and security. But it was recognized from the outset that it had far-reaching implications, going well beyond any power previously given to any comparable international official. In the hands of a dynamic Secretary-General, it would amount to a sweeping right of political initiative.[17]

The International Court of Justice, though designated a principal organ of the United Nations, was not given a prominent role in settling disputes that could—in the words of the League Covenant—lead to a rupture. It was essentially a continuation of the Permanent Court of International Justice.[18] The drafters of the Charter did insert a mild reminder in Article 36(3) that, as a general rule, the parties should refer legal disputes to the ICJ. But attempts at San Francisco to empower the Security Council to refer legal disputes directly to the Court were defeated.[19]

The drafters included a potentially significant provision for enforcing the Court's judgments. Article 94(2) gives the Security Council the only binding authority it has that is not explicitly tied in the Charter to the maintenance of international peace and security: the Council may, at the request of the prevailing party in the ICJ proceedings, decide upon measures to be taken to give effect to the judgment. It seems to have been understood, though, that the Council would not do so if the losing party's failure to comply with a judgment presented no threat to the peace.[20]

Hardly anyone thought of the Organization thus created as ideal. It reflected the art of the possible, circa 1945. It could be effective as a mechanism for keeping the peace, and for other purposes such as promoting social justice and economic advancement, only if and to the extent its members wished it to be. How strongly they held that wish remained to be seen.

III. THE SECURITY COUNCIL IN OPERATION: GENERIC ISSUES

Legal Scruples and the Security Council

In the earliest years of the United Nations, diplomats and scholars paid considerable attention to legal detail in assessing the permissible scope of Security Council authority. This is not surprising, since the Charter had been the subject of intensive negotiations and careful drafting at San Francisco. The first members of the Secretariat, and the states members of the Security Council in the early years, had the San Francisco proceedings clearly in mind. Practice would inevitably blur those recollections and would present unanticipated problems that could not always be solved simply by parsing the legal texts, but these developments would take a little time.[21]

The ICJ gave legalism an early boost when it advised that the Security Council and General Assembly had to stick to the criteria in Article 4 of the Charter for admission of new members to the United Nations. The Court said:

> The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its

[17] *See* Josef L. Kunz, *The Legal Position of the Secretary General of the United Nations*, 40 AJIL 786, 790–91 (1946).

[18] *See* Manley O. Hudson, *The Twenty-fourth Year of the World Court*, 40 AJIL 1 (1946) (presenting an article-by-article comparison of the new Statute with the old).

[19] *See* RUSSELL & MUTHER, *supra* note 9, at 661.

[20] *Id.* at 895–96.

[21] Professor Sohn has noted that it did not take long for the Security Council to abandon its practice of referring matters to a committee of legal experts. *See* Louis B. Sohn, *The UN System as Authoritative Interpreter of Its Law*, *in* 1 UNITED NATIONS LEGAL ORDER 169, 227 (Oscar Schachter & Christopher C. Joyner eds., 1995) [hereinafter UN LEGAL ORDER].

> powers or criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution.[22]

An early example of attention to legal detail in a highly charged political situation involved the Palestine Commission, which was supposed to administer Palestine in the interim between the withdrawal of the mandatory power, the United Kingdom, and the establishment of functioning Arab and Jewish states. The UN Secretariat issued a carefully drafted legal memorandum on the powers of the Palestine Commission and the Security Council.[23] The United States tried to make a sharp distinction between what it affirmed to be the Council's Charter authority to use force if necessary to remove a threat to international peace, even if the threat came from within Palestine, and the Council's lack of authority to enforce the partition plan for Palestine.[24]

Another early question within the Security Council concerned the double veto. Since the veto applies only to substantive matters, a determination that a particular matter was substantive or procedural could control the availability of a veto on that matter. Three times in the early years the Soviet Union vetoed a preliminary determination that a matter was procedural, claiming that the determination was itself substantive.[25] This initial veto enabled the Soviet Union to veto the main resolution.

The San Francisco Statement issued by the United States, the United Kingdom, the Soviet Union and China tended to support the double veto, at least when the question alleged to be procedural related to "any matters of great importance."[26] But in 1949 the General Assembly intervened with the adoption of Resolution 267 (III),[27] setting forth a list of categories it regarded as procedural. The Council has since respected the Assembly's categories.

An early issue that was not resolved by a parsing of the legal text concerned the effect of an abstention by a permanent member when a vote was taken on a substantive resolution. Article 27(3) calls for "the concurring votes of the permanent members" if a substantive resolution is to be adopted. The proviso in Article 27(3)—calling for abstention by a party to a dispute—seems to distinguish abstention from a "concurring vote." The proviso seems to have been regarded originally as identifying a narrow category of cases in which a permanent member's abstention would not stand in the way of a substantive decision.[28] The Security Council nevertheless has consistently adopted substantive resolutions on matters ranging far beyond the range of the proviso, despite abstentions by permanent members. The ICJ has treated this as a general practice of the organization, accepted by the members, and thus as an authoritative interpretation of the Charter.[29] In November 1975, the Legal Adviser of the U.S. Department of State characterized the practice as "an excellent example of how the language of the charter permits important evolutionary changes without requiring textual changes."[30]

[22] Admission of a State to the United Nations (Charter, Art. 4), 1948 ICJ REP. 57, 64 (Advisory Opinion of May 28).

[23] UN Doc. A/AC.21/13 (1948), *in* UN SCOR, 3d Sess., Supp. for Jan., Feb. & Mar. 1948, at 14.

[24] UN SCOR, 3d Sess., 253d mtg., at 265 (1948).

[25] *See* SYDNEY D. BAILEY, THE PROCEDURE OF THE SECURITY COUNCIL 214–23 (2d ed. 1988). The double vetoes related to the Spanish question in 1946, *id.* at 216; the Greek frontier question in 1947, *id.* at 218–19; and the Czechoslovak question in 1948, *id.* at 219–20.

[26] Doc. 852, III/1/37 (1), 11 U.N.C.I.O. DOCS. 710, 714 (1945).

[27] UN Doc. A/900, at 7 (1949).

[28] *See* U.S. DEP'T OF STATE, CONF. SER. NO. 71, REPORT TO THE PRESIDENT ON THE RESULTS OF THE SAN FRANCISCO CONFERENCE 71–77 (1945); [1945] 1 FOREIGN RELATIONS OF THE UNITED STATES 1258–60.

[29] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970), 1971 ICJ REP. 16, 22 (Advisory Opinion of June 21) [hereinafter Namibia].

[30] 74 DEP'T ST. BULL. 118, 119 (1976).

More controversial has been the disinclination of permanent members to abstain consistently when they have arguably—or even clearly—been parties to a dispute before the Council. The Article 27(3) proviso says that in decisions under chapter VI, "a party to a dispute shall abstain from voting." No such duty attaches if the matter is not a "dispute" but, rather, a "situation which might lead to international friction or give rise to a dispute"—another category covered by chapter VI.

In the early years of the United Nations, attempts were made to define "dispute," but no agreement among the permanent members was reached.[31] On some occasions during those years, members of the Council acknowledged that they were parties to a dispute and thus abstained from voting on the matter.[32] But practice has been inconsistent since at least the early 1950s.[33] Sometimes interested members, including permanent members, have voted on the ground that the matter was a "situation" rather than a "dispute"; sometimes on the ground that, although it may have been a dispute, they were not parties to it; and sometimes simply without any Council member's mentioning the issue at all. To make matters even less clear, the Council has adopted about 30 percent of its decisions by consensus (i.e., without a vote); consequently, there is a substantial body of indeterminate practice.[34]

Cot and Pellet raise the question whether the mandatory abstention rule of Article 27(3) has been abrogated, either by desuetude or by modifying custom.[35] Blum says no, because—with the exception of the insistence by France on the right to vote on a resolution concerning its dispute with the Comoros over the island of Mayotte in 1976—members have professed their acceptance in principle of the proviso. Thus, he says, the necessary *opinio juris* for a change in the rule is lacking.[36]

The ICJ has concluded that the proviso "requires for its application the prior determination by the Security Council that a dispute exists and that certain members of the Council are involved as parties to such a dispute."[37] This statement is a gloss on the Charter provision, which says nothing about any such preliminary determination. Nevertheless, the ICJ's conclusion reflects pragmatic and not entirely unprincipled considerations. It takes account of actual practice in the Council, without surrendering to apparent chaos—as it would have done if it had said that there is no ascertainable rule. It allows a straightforward Security Council determination, on a case-by-case basis, of the important dispute resolution issue left undefined at San Francisco.[38] Moreover, it reduces the likelihood that the Security Council will make decisions under chapter VI, only to have them ignored by a permanent member that has unwillingly abstained.[39]

Preliminary Determinations as Conditions Precedent to Security Council Action

Another early question that seems to have been resolved by Security Council practice was whether a preliminary determination under Article 34, that continuance of a dispute

[31] *See* BLUM, *supra* note 2, at 196–98.

[32] *Id.* at 204–05. Blum surveys Security Council practice extending beyond the early years, *id.* at 204–11.

[33] For discussion of several instances since 1946, see BAILEY, *supra* note 25, at 225–31.

[34] *See* LA CHARTE DES NATIONS UNIES 506–07 (Jean-Pierre Cot & Alain Pellet eds., 2d ed. 1991) [hereinafter Cot & Pellet].

[35] *Id.* at 505–06.

[36] *See* BLUM, *supra* note 2, at 211–15. As to the Mayotte matter, see FREDERIC L. KIRGIS, JR., INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING 196–202 (2d ed. 1993).

[37] Namibia, 1971 ICJ REP. at 23.

[38] *See* p. 507 *supra*.

[39] A caveat: If a preliminary determination that a dispute exists would be procedural (and thus immune from the veto), nine Council members could force the hand of a permanent member by adopting a resolution characterizing the matter as a dispute and could then make it very difficult for the permanent member to justify voting on the merits. This type of preliminary determination is not among the matters deemed procedural in GA Res. 267 (III), *supra* note 27. The question whether it would be procedural was raised in the Security Council in 1946, but was not resolved. *See* BLUM, *supra* note 2, at 201–02.

or situation "is likely to endanger the maintenance of international peace and security," is necessary before the Security Council makes a chapter VI recommendation. Clyde Eagleton argued in 1946 that, unless the Council actually made such a determination, it could not properly recommend procedures or terms of settlement under Article 36 or 37. He lamented the Council's failure even then to make these determinations, considering the practice to be in disregard of a limitation "put into the Charter to give some degree of protection to Members against arbitrary invasion of their rights."[40] Nevertheless, his view did not prevail.

The chapter VII counterpart to Article 34 is Article 39, which authorizes the Security Council to determine the existence of a threat to the peace, breach of the peace or act of aggression, and to make recommendations or decisions to maintain or restore international peace and security. One could read the Charter to require an Article 39 determination before the Council could make recommendations or decisions under chapter VII. But when the Security Council invoked Articles 25 and 49 in calling on states to carry out its decisions during the Congo peacekeeping efforts in 1960, it obviously regarded itself as acting under chapter VII despite having made no express determination under Article 39.[41] The ICJ later held that the Congo operation was not enforcement action, since it had not been directed (so the ICJ said) against any state.[42] Consequently, the precedent of eschewing any determination under Article 39 could be limited to chapter VII measures that do not amount to enforcement action.

When the Council has intended to take enforcement action, as it did for the first time against Southern Rhodesia in 1966, it has followed the practice of making actual determinations under Article 39. This practice by now amounts to an authoritative interpretation of chapter VII to the effect that an Article 39 determination must be made in advance of, or at the time of, enforcement action.[43] This requirement, like the one Eagleton thought should be found in Article 34, gives some protection against arbitrary action. The potential for arbitrariness under chapter VII, though, is not necessarily confined to enforcement action. It would be salutary if the practice were extended to all measures taken under chapter VII, whether or not they amount to enforcement action.

Until recently, such protection was rarely needed. The Cold War effectively prevented the Security Council from acting under chapter VII except to counteract apartheid and the vestiges of colonialism. Not everyone saw a cognizable threat to international peace in those situations—especially that of Southern Rhodesia when it unilaterally declared its independence in 1965.[44] The Council did not help its case when it failed adequately to assert that the large-scale human rights violations in those situations presented latent threats to the peace that could not confidently be predicted to remain within national boundaries. Such an argument could have cogently been made.[45]

When the end of the Cold War liberated the Security Council from its East-West impasse, it proceeded to make several Article 39 determinations and to act on them. It

[40] Clyde Eagleton, *The Jurisdiction of the Security Council over Disputes*, 40 AJIL 513, 528, 530 (1946).

[41] *See* E. M. Miller (Oscar Schachter), *Legal Aspects of the United Nations Action in the Congo*, 55 AJIL 1, 4 (1961). Schachter said that "Article 40 could appropriately be considered as the applicable provision." *Id.* at 5.

[42] Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), 1962 ICJ REP. 151, 177 (Advisory Opinion of July 20) [hereinafter Expenses].

[43] To the same effect, though without explicitly relying on Security Council practice, see Vera Gowlland-Debbas, *Security Council Enforcement Action and Issues of State Responsibility*, 43 INT'L & COMP. L.Q. 55, 61 (1994).

[44] *See, e.g., U.N. Sanctions against Rhodesia—Chrome: Hearings Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. 37–38 (1971) (statement of Dean Acheson); Charles G. Fenwick, *When Is There a Threat to the Peace?—Rhodesia*, 61 AJIL 753 (1967).

[45] *See* Thomas M. Franck, *Fairness in the International Legal and Institutional System*, 240 RECUEIL DES COURS 9, 202–04 (1993 III).

did so not only when the situation clearly called for such a determination, as in the case of Iraq's invasion of Kuwait in 1990, but also when the threat to international peace was far less apparent. In these cases, the Council was disinclined to explain what it saw as the threat to international peace.

For example, the resolution imposing a chapter VII arms embargo on Somalia in January 1992 recited the Council's concern that the situation constituted a threat to international peace and security, but supported that "finding" only with a vague reference to the consequences of the Somalian civil war on "stability and peace in the region."[46] The resolution was adopted after "consultations," but without public debate—and thus without any public effort to define the threat to regional stability.[47] There was little evidence that the strife between clans in Somalia, devastating though it was for the people of that country, actually posed a serious threat to stability in neighboring states, at least in the short term.

Somalia's representative at the United Nations welcomed the resolution and said that even coercive measures would not be interpreted as interference in Somalia's internal affairs.[48] This dispensation, of course, would not relieve the Council of the constitutional limitation on its authority under chapter VII: the requirement in Article 39 that it act to maintain or restore *international* peace and security.[49]

In December 1992, the Security Council again applied chapter VII to the situation in Somalia. After stressing the uniqueness of the situation there, it determined in Resolution 794 "that the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security."[50] The Council then invoked chapter VII to authorize the Secretary-General and member states "to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia."[51] This was in response to two reports from the Secretary-General indicating that extortion, blackmail and robbery were preventing the delivery of humanitarian relief to the suffering people of Somalia, and recommending that forceful UN action be taken to get the supplies through.[52] These reports outlined several attacks on personnel of the UN Operation in Somalia (UNOSOM) and pointed out that private aid agencies were forced to pay for "protection," but did not discuss how these incidents threatened international peace and security. The Council, in off-the-record consultations, supported the Secretary-General's view "that the time had come when it was necessary to move into chapter VII."[53] On the record, there was no Council debate; instead, representatives made statements before and after the preordained vote. Insofar as they dealt with whether there was a threat to international peace and security, they pointed to the anarchy in Somalia and the desperate need to end the suffering of the people.[54]

As Ruth Gordon has pointed out in connection with Resolution 794 on Somalia: "[W]ith this Resolution, a humanitarian crisis with no discernible cross-border effects, or at least none that involved military responses, triggered the most extreme measures

[46] SC Res. 733, UN SCOR, 47th Sess., Res. & Dec. at 55, UN Doc. S/INF/48 (1992).
[47] *See* UN Doc. S/PV.3039 (1992).
[48] *See* UN Doc. S/23507, at 1, 5 (1992).
[49] *See generally* Franck, *supra* note 45, at 202.
[50] SC Res. 794, UN SCOR, 47th Sess., Res. & Dec. at 63, UN Doc. S/INF/48 (1992).
[51] *Id.*
[52] UN Docs. S/24859 & S/24868 (1992).
[53] UN Doc. S/24868, at 1 (1992).
[54] UN Doc. S/PV.3145, at 14 (Ecuador), 19–20 (Cape Verde, mentioning also, but without elaboration, peril to the stability and security of the region), 29–31 (France), 34 (the United Kingdom), 38 (the United States), 46 (Morocco) (1992).

the Council can undertake."[55] It is surprising, to say the least, that the Security Council would not be explicit about the threat to international peace before taking such a step.

When the Security Council first imposed limited economic sanctions on Haiti in June 1993,[56] the discussion concerned the urgent need to relieve the humanitarian crisis within the country and to foster a return to democracy. There was scarcely any mention of a threat to international peace and security. Of the three sponsors of the resolution (France, the United States and Venezuela), only Venezuela mentioned any such threat. While tying it to the prospective flight of hundreds of thousands of Haitians to other countries, the Venezuelan representative gave no particulars regarding the threat to international peace such an exodus would cause.[57]

When the Council in July 1994 authorized member states to form a multinational force "to use all necessary means" to rid Haiti of its military dictatorship and to bring about the return of President Aristide and other legitimate authorities,[58] the arguments made in favor of the resolution stressed the need to strengthen democracy.[59] A few voices in the Council debate questioned whether there was an international threat.[60]

In September 1993, the Security Council prohibited the supply of arms and petroleum products to UNITA, the rebel force in the civil war in Angola.[61] Once again, there was sparse evidence of a threat to international peace and security, at least in the traditional sense. At stake was the continuation of the Angolan civil war, at a time when the various external sponsors of the factions had left the scene and very little, if any, actual fighting had spilled over into neighboring states.

Those arguing in the Security Council for the sanctions against UNITA stressed essentially the same goals as were expressed in the case of Haiti: support for the democratic process and the need to stem a humanitarian disaster.[62] Two speakers made very general references to international peace and security.[63] A few others were more specific: one referred to the plight of foreign citizens trapped in the Angolan conflict;[64] another mentioned the exodus of refugees to neighboring states;[65] and another voiced concern for the personnel of UN and other organizations engaged in humanitarian assistance.[66] But no one tried to show how these genuine sources of concern posed real threats to international peace.

The Article 39 question also came up recently in connection with international terrorism. In January 1992, the Security Council condemned the destruction of Pan American Flight 103 over Lockerbie, Scotland, and UTA Flight 772 over Niger. It also deplored the Libyan Government's failure to respond to requests by France, the United Kingdom and the United States to turn over the two Libyan suspects, and urged the Libyan Government to "provide a full and effective response to those requests so as to contribute to the elimination of international terrorism."[67] This resolution did not impose chapter VII sanctions, but it led two months later to one that did. In March 1992, the Council

[55] Ruth Gordon, *United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond*, 15 MICH. J. INT'L L. 519, 554 (1994); *see also id.* at 572–73.

[56] SC Res. 841, UN SCOR, 48th Sess., Res. &. Dec. at 119, UN Doc. S/INF/49 (1993), *reprinted in* 32 ILM 1206 (1993).

[57] *See* UN Doc. S/PV.3238, at 11–12 (1993). For further discussion of the UN involvement in Haiti, see Gordon, *supra* note 55, at 557–60, 573–74.

[58] SC Res. 940 (July 31, 1994), *reprinted in* 5 DEP'T ST. DISPATCH 555 (1994).

[59] UN Doc. S/1994/PV.3413 *passim* (1994).

[60] *Id.* at 4, 9–10 (concerns expressed by Mexico and Brazil).

[61] SC Res. 864, UN SCOR, *supra* note 56, at 59.

[62] *See* UN Doc. S/PV.3277, at 31–32, 41 (1993) (statements by Spain and the United Kingdom).

[63] *Id.* at 16, 48 (Egypt and Hungary).

[64] *Id.* at 22 (Portugal).

[65] *Id.* at 28 (China).

[66] *Id.* at 46 (Russia).

[67] SC Res. 731, UN SCOR, 47th Sess., Res. & Dec. at 51, 52, UN Doc. S/INF/48 (1992).

declared that it was "[*c*]*onvinced* that the suppression of acts of international terrorism, including those in which states are directly or indirectly involved, is essential for the maintenance of international peace and security." It went on to decide, under chapter VII, that the Libyan Government must provide the full and effective response urged in the previous resolution, and must commit itself definitively to cease all terrorist action and assistance to terrorist groups. Selective Article 41 sanctions were imposed.[68]

In the public Council debates surrounding these two resolutions, several speakers condemned acts of terrorism as threats to international peace.[69] The closest they came to an explanation of why the terrorist incidents of violence against the Pan Am and UTA aircraft were threats to international peace in the sense contemplated by Article 39 was the emphasis that some speakers—particularly the British representative—placed on the Libyan Government's involvement.[70] If support of terrorism is government policy, it is not hard to see the analogy to more traditional cross-boundary uses of deadly force by governments—the sort of thing Article 39 clearly was intended to address. On the other hand, if a government "supports" terrorism on isolated occasions by failing to pursue aggressively or turn over those suspected of a terrorist act, an Article 39 threat to international peace is not so clearly at hand.[71] Even if the government's failure to act amounts to a violation of international law, it would not necessarily constitute a threat to international peace and security.

Libya and its supporters argued at the time of the second resolution that the dispute being dealt with by the Council was essentially legal and should consequently be decided by the International Court of Justice.[72] By then, Libya had begun proceedings against the United States and the United Kingdom in the ICJ, asking the Court to declare that the respondent states had violated the Montreal Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation.[73] The Montreal Convention requires the state having custody of alleged offenders either to extradite them or to submit the case to its competent authorities for possible prosecution. Libya thus has argued that prosecution, not just extradition or some other form of turning over the suspects, is open to it under the Convention, and that the Security Council should have deferred to the ICJ on the extradition question.

Libya's argument is beside the point in the Security Council *if* the extradition question is simply part of a broader matter involving a threat to the peace, breach of the peace or act of aggression. The Security Council could then decide, no matter what the Montreal Convention may permit or even require, that extradition or something equivalent to it is necessary in order to keep the peace.[74] The Security Council could also decide—as it did in Resolution 748 when it directed Libya to commit itself to cease all terrorist activities—that something more than delivery of the suspects is needed to defuse the threat to the peace. But these Security Council measures are disturbing if the members make no serious attempt to demonstrate how and why the specific acts or policies of

[68] SC Res. 748, *id.* at 52.

[69] *See* UN Doc. S/PV.3033, at 47 (Canada), 79–80 (the United States), 82 (France), 87 (Russia), 91 (Hungary), 92 (Austria), 94 (India), 103–06 (the United Kingdom, stressing Libyan government involvement) (1992); UN Doc. S/PV.3063, at 67 (the United States), 68–69 (the United Kingdom) (1992).

[70] *See, e.g.*, UN Doc. S/PV.3033, at 103, 106 (1992).

[71] *See* Benedetto Conforti, *Le Pouvoir discrétionnaire du Conseil de Sécurité en matière de constatation d'une menace contre la paix, d'une rupture de la paix ou d'un acte d'agression, in* THE DEVELOPMENT OF THE ROLE OF THE SECURITY COUNCIL 51, 60 (René-Jean Dupuy ed., 1993) [hereinafter ROLE OF SECURITY COUNCIL].

[72] *See* UN Doc. S/PV.3063, at 6, 13–15, 18 (Libya), 32 (Mauritania), 39–40 (Uganda), 46 (Cape Verde), 52–53 (Zimbabwe), 58 (India) (1992).

[73] Sept. 23, 1971, 24 UST 564, 974 UNTS 177, *reprinted in* 10 ILM 1151 (1971).

[74] *See* UN CHARTER Arts. 24, 25, 103.

the "respondent" state constitute such a threat to international peace as to justify the use of chapter VII enforcement measures.[75]

Mere allegations that a particular government supports terrorism do not make the case. If the United States, for example, has evidence of Libyan state-supported terrorism, as it has claimed it does,[76] it could make the evidence available to the Security Council in a way that would protect intelligence sources. That the sharing of intelligence is feasible, at least in some cases, is shown by the U.S. willingness in 1993 to reveal spy satellite photographs of North Korean nuclear installations to the International Atomic Energy Agency's Board of Governors.[77]

Another surrender-of-suspects issue involving chapter VII looms on the horizon. In May 1993, the Security Council, acting under chapter VII, established the International Tribunal for the Former Yugoslavia[78] and adopted its Statute.[79] In November 1994, the Council, again acting under chapter VII, established the International Tribunal for Rwanda[80] and adopted its Statute.[81] Both Statutes require states to comply with any request or order issued by trial chambers to surrender or transfer an accused to the Tribunals.[82] When the Security Council adopted each Statute, it mandated the cooperation of all states with the Tribunal, "including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber" to surrender or transfer an accused.[83] The United States has warned that refusal to comply with such a request or order from the Yugoslavia Tribunal may subject the noncooperating state to sanctions.[84] Presumably, the same fate would await refusal to comply with a similar request from the Rwanda Tribunal. If chapter VII enforcement action is to be taken in these situations, findings will have to be made that noncompliance generally, or noncompliance in a particular case, is a threat to the peace. Any such finding should be given serious consideration and should be articulated rather than incanted almost as a ritual.

The point is not that the Security Council has turned from helpless inaction in the Cold War years, despite clear threats to international peace, to the reckless application of chapter VII in recent years, when there has been no threat to international peace. One does not long for a return to the Cold War impasse—a specter not entirely unreal—nor should one tie Article 39 forever (absent formal amendment) to the kinds of situations delegates had in mind in 1945 at San Francisco. Concerned observers need to allow the Council a great deal of leeway to apply and interpret the powers it has long had on paper. Once it asserts those powers, the Council itself is the best (in fact, the only) judge of what amounts to a threat to international peace for purposes of chapter VII.[85]

At the same time, if the Council is to be effective in the long run, it needs to demonstrate that it is using the powers judiciously. In this context, it needs to make, and to demonstrate that it is making, a genuine effort to determine what the threat to international peace actually is, and how serious it is. It may well be that such late-twentieth-

[75] *See generally* Franck, *supra* note 45, at 217–18.

[76] *See* Abraham D. Sofaer, *Terrorism and the Law*, 64 FOREIGN AFF. 901, 921 (1986).

[77] *See* WASH. POST, Apr. 27, 1993, at A1.

[78] Hereinafter "the Yugoslavia Tribunal."

[79] SC Res. 827, UN SCOR, *supra* note 56, at 29, *reprinted in* 32 ILM 1203 (1993), adopting the Statute of the Yugoslavia Tribunal as set forth in UN Doc. S/25704, annex (1993), *reprinted in* 32 ILM 1192 (1993).

[80] Hereinafter "the Rwanda Tribunal."

[81] Statute of the Rwanda Tribunal, SC Res. 955, annex (Nov. 8, 1994), *reprinted in* 33 ILM 1602 (1994).

[82] Statute of the Yugoslavia Tribunal, *supra* note 79, Art. 29(2)(e); Statute of the Rwanda Tribunal, *supra* note 81, Art. 28(2)(e).

[83] SC Res. 827, *supra* note 79, para. 4; SC Res. 955, *supra* note 81, para. 2.

[84] Madeleine K. Albright, *Agenda for Dignity*, 4 DEP'T ST. DISPATCH 803, 806 (1993). Ambassador Albright's reference to "sanctions" presumably was to chapter VII sanctions.

[85] *See* Oscar Schachter, *The UN Legal Order: An Overview*, *in* 1 UN LEGAL ORDER, *supra* note 21, at 1, 13–14.

century phenomena as the mobility of masses of people across international borders, the communications explosion and the attendant heightened concern for the suffering of people at the hands of their own governments, the diminishing significance of traditional international boundaries with the rise of nonstate nations and their claims for recognition, and the widespread availability of highly destructive weapons to nongovernmental actors, as well as to governments, lead unavoidably and quite properly to a much expanded definition of "threat to international peace" than could have been intended fifty years ago.[86]

Such an expanded definition should be regarded as legitimate even without a Charter amendment. Nevertheless, if we are concerned about the responsible use of power by a marginally representative international organ that at present is not subject to recall or judicial review, we should expect the Security Council to be conscious of how and why it is expanding the definition. It should also contemplate the limits to be applied to the broader definition. It should, in other words, make principled Article 39 determinations, publicly explicated, that do not set unlimited or unintended precedents.

In addition, the Security Council in a chapter VII situation should respect the principle of proportionality—or what might better be described as the principle of avoiding excessive disproportionality.[87] Strict proportionality cannot be expected in all cases, and may not even be appropriate in the context of enforcement action designed to halt aggressive behavior. At the same time, there is no call in the Charter for enforcement beyond what is actually necessary to thwart an actual threat to the peace or to end a breach of the peace.[88]

The representative of Zimbabwe was squarely on target in connection with the sanctions against Libya:

> [T]his 15-member Council acts on behalf of a total of 175 States Members of the United Nations. This means that 160 States have placed their security, and possibly their very survival, in the hands of the 15. This is a solemn and heavy responsibility that each and every member of the Council carries. It is therefore of crucial importance that every decision taken by the Security Council be able to withstand the careful scrutiny of the 160 Member States on whose behalf the Council is expected to act. This is only possible if the Council insists on being guided in its decisions and actions by the Charter and other international conventions. Any approach that

[86] For somewhat different enumerations of factors that might "internationalize" an internal conflict, see Oscar Schachter, *The United Nations and Internal Conflict*, *in* LAW AND CIVIL WAR IN THE MODERN WORLD 401, 409–15 (John Norton Moore ed., 1974); Paul C. Szasz, *Role of the United Nations in Internal Conflicts*, 13 GA. J. INT'L & COMP. L. 345, 347–51 (1983). *See also* Gordon, *supra* note 55, at 539–40, 544–45, 579.

[87] Bothe finds the principle of proportionality running through municipal and international public law. He concludes, "Il est donc possible de conclure que le principe de la proportionalité constitue en effet un principe général qui limite l'exercice de certains pouvoirs de l'autorité publique." Michael Bothe, *Les Limites des pouvoirs du Conseil de Sécurité*, *in* ROLE OF SECURITY COUNCIL, *supra* note 71, at 67, 78. In the sphere of interstate countermeasures, it has been recognized that the proportionality principle is applicable, but should not be applied strictly. *See* Case Concerning the Air Service Agreement of 27 March 1946 (U.S. v. Fr.), 18 R.I.A.A. 417, 54 ILR 304, 338 (1978). No less leeway, and perhaps somewhat greater leeway, should be given when the Security Council adopts countermeasures under chapter VII.

[88] The distinction is essentially between legitimate enforcement action and retribution. Article 24(2) of the Charter requires the Security Council to act in accordance with the purposes and principles of the United Nations. The first purpose mentioned in Article 1 is to maintain international peace and security. No mention is made of punishment or retribution to be imposed on a state or other entity that threatens or breaches the peace. Punishment of individuals responsible for breaches of the peace or acts of aggression might be said to contribute to restoration of peace and security, and therefore to be legitimate, but retribution that affects powerless individuals within the state or territory would seem to go beyond what would normally be needed. Article 41 sanctions imposed and maintained while an actual threat to the peace or breach of the peace is occurring often affect powerless individuals, but probably cannot be considered disproportionate so long as an effort is made to gauge them to the seriousness of the situation and the sanctions allow basic supplies such as food and medicine to go through. Economic sanctions are by their nature blunt instruments. They illustrate why the principle of proportionality is inevitably a principle of avoiding excessive disproportionality.

> assumes that international law is created by majority votes in the Security Council is bound to have far-reaching ramifications which could cause irreparable harm to the credibility and prestige of the Organization, with dire consequences for a stable and peaceful world order.[89]

If there were some form of effective judicial review of the Council's Article 39 determinations, these concerns might be alleviated. Indirect judicial review may be possible when the ICJ is asked to interpret or apply Security Council resolutions that one or more parties assert to be procedurally or substantively improper.[90] Moreover, some observers have found an embryo of direct judicial review in the ICJ's order denying Libya's request for provisional measures in the *Lockerbie* case.[91] But, as Professor Reisman has pointed out, it would not be easy for the Court to find judicially manageable standards to review the Security Council's exercise of chapter VII enforcement authority.[92] For the present, and presumably for the foreseeable future, it is up to the Council members themselves to keep a rein on Article 39 determinations.

Private vs. Public Sessions

The Council members could be aided in this endeavor by the "careful scrutiny of the Member States," to use the Zimbabwean formulation. But careful scrutiny is impeded or precluded if the Council's decisions are made off the record in the Council's closed consultation room, rather than after public deliberations in the Council's normal chamber.

The Council's Provisional Rules of Procedure say, "Unless it decides otherwise, the Security Council shall meet in public."[93] Originally, the Council did meet and make decisions in public except when it was considering the selection of a Secretary-General.[94] As recently as 1987, it could be said that the Council "normally meets in public."[95] Of course, until the end of the Cold War, some of what the Council did in public could be called posturing. In that context, public meetings could serve a purpose without getting in the way of attainable goals that might require off-the-record negotiations. When significant decisions were feasible in those years, the "abnormal" sometimes occurred: members in informal, off-the-record consultations hammered out resolutions that could be adopted publicly.[96]

Since the early 1990s, the Security Council has been faced with a volume of work not theretofore encountered. It began carrying out most of its work in its closed consultation room, meeting in public only to adopt resolutions already agreed upon (and to provide a forum for set speeches regarding the resolutions) or to give the Council's President a platform for statements reflecting understandings reached in private consultations.[97]

[89] UN Doc. S/PV.3063, at 54–55 (1992). At that time, there were 175 UN members.

[90] *Cf.* Vera Gowlland-Debbas, *The Relationship between the International Court of Justice and the Security Council in the Light of the* Lockerbie *Case*, 88 AJIL 643, 663–65 (1994). *See generally* Bedjaoui, *supra* note 14, at 88–110.

[91] Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. UK; Libya v. U.S.), Provisional Measures, 1992 ICJ REP. 3, 114 (Orders of Apr. 14). *See* Bothe, *supra* note 87, at 69, 80; Thomas M. Franck, *The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?*, 86 AJIL 519 (1992); Franck, *supra* note 45, at 218–21; Gowlland-Debbas, *supra* note 43, at 97; Geoffrey R. Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 HARV. INT'L L.J. 1, 22–28 (1993). Professor Watson's article is a thorough review and analysis of judicial review by the ICJ.

[92] W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AJIL 83, 93 (1993).

[93] Provisional Rules of Procedure of the Security Council, Rule 48, UN Doc. S/96/Rev.7 (1983).

[94] For the Council's practice in this regard, see Anthony Aust, *The Procedure and Practice of the Security Council Today*, *in* ROLE OF SECURITY COUNCIL, *supra* note 71, at 365, 366–67.

[95] BAILEY, *supra* note 25, at 41.

[96] *Id.* at 233.

[97] See the French aide-mémoire concerning the working methods of the Security Council, UN Doc. A/49/667–S/1994/1279, at 3 (1994). See also the reports of Security Council presidential statements, e.g., UN Doc. S/PV.3436, at 2 (1994).

Several of the chapter VII resolutions discussed above were negotiated and adopted in closed consultations among Council members, subject only to a formal show of hands and some speeches in a public session.[98] The Council has met in private for most of its deliberations regarding the breakup of the former Yugoslavia and the conflict in Bosnia-Hercegovina.[99] In these and other cases, closed consultations have been held not only by the Council members in the aggregate, but also by separate, smaller groups such as the five permanent members.[100]

It need not be so. France has proposed that Council sessions be open in two additional situations. The first would be when the Council begins to consider an important question. At that time the debate would be open to all UN members, subject to certain limitations imposed to keep the proceedings manageable. The second would involve public exchanges of views among Council members before matters are settled by detailed (private) negotiations.[101] This maturation of Council procedure is both modest and overdue.

Presidential Statements

In recent years, the Security Council has relied heavily on the practice of having its President issue statements reflecting the consensus reached in closed sessions by Council members. It is not, however, a new phenomenon. It began in 1948, on a modest scale.[102] Recently, it has become such a common practice that a new UN document symbol (S/PRST/—) was created for it.

To take a snapshot of only a limited time frame—autumn 1994—presidential statements were used for such diverse purposes as (1) to establish a procedure that would keep governments contributing peacekeeping troops better informed;[103] (2) to report the results of the Council's review of sanctions in force against a particular state;[104] (3) to report that the Council had considered taking certain action, but had deferred doing so;[105] (4) to express the Council's condemnation of recent unacceptable conduct;[106] (5) to warn parties not to engage in proscribed conduct in the future;[107] (6) to instruct the Secretary-General;[108] (7) to announce procedural decisions;[109] and (8) even to set forth quasi-judicial determinations by the Council about international law.[110]

[98] This was true, for example, of the resolutions on Somalia and Libya. *See* UN Docs. S/PV.3039, at 2, S/PV.3063, at 2, & S/PV.3145, at 3 (1992).

[99] *See* JAMES O. C. JONAH, DIFFERING STATE PERSPECTIVES ON THE UNITED NATIONS IN THE POST–COLD WAR WORLD 12 (ACUNS Rep. & Papers No. 4, 1993).

[100] *See id.* at 11; Reisman, *supra* note 92, at 85–86.

[101] *See* UN Doc. A/49/667–S/1994/1279, *supra* note 97, at 2, 5–6. The Council has taken a step in the right direction. *See* UN Doc. S/PRST/1994/81–S/PV.3483, at 28 (1994).

[102] *See* BAILEY, *supra* note 25, at 233.

[103] UN Doc. S/PRST/1994/62.

[104] UN Doc. S/PRST/1994/41 (Libya).

[105] UN Doc. S/PRST/1994/45 (measures against UNITA).

[106] UN Docs. S/PRST/1994/40 (specific terrorist acts), S/PRST/1994/44 (impediments to movement of UNPROFOR), S/PRST/1994/52 (offensive military action in Angola), & S/PRST/1994/57 (attack on UNPROFOR troops).

[107] UN Docs. S/PRST/1994/42 (warning Government of Rwanda against reprisals), S/PRST/1994/57 (warning Bosnian Serbs against retaliation and against interference with functioning of Sarajevo airport).

[108] UN Doc. S/PRST/1994/56 (views and recommendations to be submitted to the Council regarding provisional cease-fire in Tajikistan).

[109] UN Doc. S/PRST/1994/55 (suspension of Rule 18 to skip Rwanda's scheduled turn for presidency of the Council).

[110] UN Docs. S/PRST/1994/53 (detention and mistreatment of UNOMIL observers in Liberia "are in flagrant violation of international humanitarian law"), S/PRST/1994/59 (provisions of the Convention Relating to the Status of Refugees do not apply to persons fleeing from Rwanda to escape prosecution for breaches of international humanitarian law or for acts of genocide). Regarding quasi-judicial pronouncements by the Council, see p. 527 *infra*.

One astute observer has said that presidential statements of this sort "perform a kind of Greek Chorus role" for Security Council resolutions.[111] One wonders whether the chorus is appropriate for the many roles it now performs. It does not seem essential to the effective functioning of the Security Council that all of these decisions be taken in camera and then simply conveyed or reported by the President. This is especially so when it comes to making quasi-judicial determinations of a sort that might be thought to stretch or exceed the Council's proper authority even if done in public.

We shall examine the Council's practice of making quasi-judicial determinations later. First, we turn to its quasi-legislative authority.

IV. The Security Council in Operation: Issues Relating to Function

Quasi-Legislative Acts

From the outset, the Security Council has had quasi-legislative authority or, depending on one's definition, true legislative authority, when there is a threat to the peace, breach of the peace or act of aggression. The definition probably depends more on whether or not one thinks "true international legislation" is an oxymoron than on any meaningful distinction between quasi and actual legislation. Thus, the distinction will not be pursued here.

A widely accepted definition of legislative authority in the UN setting is this: "[L]egislative acts have three essential characteristics: they are unilateral in form, they create or modify some element of a legal norm, and the legal norm in question is general in nature, that is, directed to indeterminate addressees and capable of repeated application in time."[112]

UN Charter Articles 41 and 42, buttressed by Articles 25 and 48, clearly authorize the Security Council to take legislative action in the sense just mentioned. Thus, economic sanctions under Article 41 have been unilateral in form (adopted by the fifteen-member Security Council rather than by agreement of all UN members); they have created or modified legal norms (binding rules); and they have been general in nature (directed to all member states and sometimes even to nonmembers, although Article 48(1) permits them to be directed more selectively).

The Security Council has never acted explicitly under Article 42. Article 106 expressly contemplates that Article 43 agreements between member states and the United Nations will "enable [the Council] to begin the exercise of its responsibilities under Article 42." This demonstrates quite clearly the widely held understanding in 1945, carrying over into the early years of UN practice, that the use of force under Article 42 was dependent on the existence of Article 43 agreements.[113] Since no such agreements have ever been concluded, it is arguable that a condition precedent to the use of Article 42 has not been met.[114]

Article 47, also in chapter VII, calls for the establishment of a Military Staff Committee to advise and assist the Security Council on military questions relating to peace and

[111] Bhaskar Menon, *Security Council Statements in 1994: A New Genre,* INT'L DOCS. REV., No. 45–46, Dec. 31, 1994, at 4. Menon provides a summary of the presidential statements issued throughout 1994. *Id.* at 4–6.

[112] EDWARD YEMIN, LEGISLATIVE POWERS IN THE UNITED NATIONS AND SPECIALIZED AGENCIES 6 (1969).

[113] See the authorities cited in Oscar Schachter, *United Nations Law in the Gulf Conflict,* 85 AJIL 452, 464 nn. 33, 34 (1991). EAGLETON, *supra* note 5, at 450, noted that "the Security Council will actually have no jurisdiction" over a case of armed aggression until Article 43 agreements are concluded. HANS KELSEN, THE LAW OF THE UNITED NATIONS 756 (1950), said that "Article 106 evidently presupposes that the Security Council cannot take an enforcement action involving the use of armed force if not a sufficient number of special agreements referred to in Article 43 have been concluded."

[114] *See* Burns H. Weston, *Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy,* 85 AJIL 516, 519 (1991). Weston also expresses concern about the Security Council's disinclination to identify the specific source of its authority when it authorizes the use of armed force, as in the case of Resolution 678 (against Iraq). *Id.* at 518–22.

security. The Military Staff Committee was essentially a British idea at Dumbarton Oaks.[115] It was established in 1946, but it has never played a significant role in the exercise of the Security Council's responsibilities. Its most important function as contemplated by the Charter—the strategic direction of any armed forces placed at the disposal of the Security Council—obviously could not be carried out in the absence of Article 43 agreements or some comparable arrangements. Nevertheless, the exercise of its rather nebulous responsibility was not conditioned, at Dumbarton Oaks or thereafter, on the existence of Article 43 agreements.[116] It clearly is not so conditioned today.[117]

Article 42 does not itself tie Security Council armed action to Article 43 and does not necessarily depend on a strong Military Staff Committee.[118] Article 42 does contemplate that member states will take armed action deemed necessary by the Council. Thus, one could argue that when the Council has authorized the use of armed force under chapter VII without specifying which article it has relied on, the source of its authority is Article 42. The argument is a pragmatic one, treating the Charter as a constitution capable of growing to meet changing circumstances. By the same token, the Council's power to authorize the use of armed force under chapter VII may be seen as an implied power that is not literally tied to Article 42, but is consistent with the purpose of that article and emanates from the functional necessity to make the Council's enforcement authority effective.[119]

In some cases, the Council's authorization of the use of armed force may be seen as a stamp of approval on member states' claims to be entitled to act in self-defense under Article 51. This is one way to explain the Charter basis of Resolution 678, authorizing the use of "all necessary means" (armed force) against Iraq to drive it from Kuwait "and to restore international peace and security in the area."[120] It is also a plausible explanation for Resolution 83, the model for Resolution 678. In Resolution 83, adopted in 1950, the Security Council recommended that UN member states furnish such assistance to South Korea "as may be necessary to repel the armed attack [from North Korea] and to restore international peace and security in the area."[121] Both of these resolutions were interpreted to authorize carrying the conflict into the territory of the aggressor with a goal—restoring international peace and security—that sounds very much like an Article 41 or 42 goal. If Article 51 was indeed the source of the Council's authority, these resolutions marked a significant extension of the article's scope as understood by the framers of the Charter.[122]

[115] *See* ROBERT C. HILDERBRAND, DUMBARTON OAKS: THE ORIGINS OF THE UNITED NATIONS AND THE SEARCH FOR POSTWAR SECURITY 156 (1990).

[116] If Article 43 agreements had been successfully negotiated, the Military Staff Committee probably would have emerged as a significant participant in UN enforcement action. The United States was a vigorous proponent of Article 43 agreements, but the Soviet Union frustrated the effort because it saw the agreements as vehicles for stationing U.S. and other Western forces in forward positions that would threaten the USSR. *See* Frederic L. Kirgis, Jr., *The United States Commitment to the Norms of the United Nations and Its Related Agencies*, 1 TRANSNAT'L L. & CONTEMP. PROBS. 125, 130–31 (1991); Oscar Schachter, *Authorized Uses of Force by the United Nations and Regional Organizations*, *in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 65, 71–72 (Lori Fisler Damrosch & David J. Scheffer eds., 1991).

[117] *See, e.g.*, David J. Scheffer, *Commentary on Collective Security*, *in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER, *supra* note 116, at 100, 106.

[118] *See* Franck, *supra* note 45, at 286; Schachter, *supra* note 113, at 464.

[119] On implied UN powers dictated by functional necessity, see Reparation for injuries suffered in the service of the United Nations, 1949 ICJ REP. 174, 179, 182 (Advisory Opinion of Apr. 11). *See also* Expenses, 1962 ICJ REP. at 167 (expressing the Court's view that UN authorization of armed force in the Middle East and the then-Congo did not have to be based on Article 42).

[120] SC Res. 678, UN SCOR, 45th Sess., Res. & Dec. at 27–28, UN Doc. S/INF/46 (1990), *reprinted in* 29 ILM 1565 (1990). *See* Schachter, *supra* note 113, at 457–61 (making the case for Article 51 as the Charter source of Res. 678). *See also* Schachter, *supra* note 116, at 78–79. *But see* Murphy, *supra* note 15, at 226–29 (expressing reservations about the Article 51 explanation).

[121] SC Res. 83, UN SCOR, 5th Sess., Res. & Dec. at 5, UN Doc. S/INF/5/Rev.1 (1950). *See* Schachter, *supra* note 116, at 78.

[122] *See* Philippe Weckel, *Le Chapitre VII de la Charte et son application par le Conseil de Sécurité*, 37 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 165, 166–67 (1991); Cot & Pellet, *supra* note 34, at 774.

In the final analysis, it is probably immaterial whether the Council relies on a specific article in chapter VII or on its own implied powers when it authorizes the use of armed force to preserve or restore peace. Moreover, there is no need for the Council to specify which of these sources it relies on in the particular case, if the safeguards built into the Charter against immoderate or premature enforcement action through the use of armed force are met.

The safeguards are found in Articles 39 and 42. When the Security Council makes an Article 39 finding, it should take care to demonstrate that there is indeed a threat to the peace, breach of the peace or act of aggression. When it decides to use or to authorize the use of armed force, it should demonstrate (if it is not fully apparent) that nonlethal sanctions under Article 41 would be or already are inadequate (the precondition written into Article 42), whether or not the Council then literally acts under Article 42.[123] This practice would comport with the Dumbarton Oaks principle, adopted before there was an Article 42, that armed force should be the last resort.[124] The precondition for the use of armed force obviously should not be excused simply because the Council is unable to apply Article 42 as the framers of the Charter originally intended. On the other hand, the precondition should not be applied so strictly that the civilian population of the sanctioned state suffers more severe deprivations than would be likely if armed enforcement action were taken against military targets in that state.[125]

It is a separate issue whether the Security Council, having demonstrated that there is a threat to the peace, breach of the peace or act of aggression, may act quasi-legislatively under chapter VII to take or authorize action other than provisional measures (Article 40), sanctions under Article 41, or the use of armed force. Prominent recent examples are the Council's establishment of war crimes tribunals concerning the former Yugoslavia and Rwanda. The Council did so by adopting Statutes setting forth the criminal law, as well as basic elements of procedure, to be applied.[126] These Statutes are legislative in nature even though each Statute applies to only one existing situation: each is directed to indeterminate addressees (individuals) and may be applied repeatedly until all justiciable cases have been tried.

Formally, the Yugoslav and Rwanda Tribunals are subsidiary organs of the Council under Article 29 of the Charter, even though they were established as enforcement measures under chapter VII.[127] No legislative authority for statutes such as these is to be found in the Dumbarton Oaks or San Francisco plans. Nevertheless, it is not farfetched to find an implied power to create war crimes tribunals if the conditions for applying chapter VII are met and principles of fundamental adjudicatory fairness are followed.[128] In the cases of the former Yugoslavia and Rwanda, the Article 39 conditions were clearly met: in the former Yugoslavia because the conflict spilled over international boundaries once Slovenia, Croatia and Bosnia-Hercegovina achieved statehood; in Rwanda because large numbers of Rwandan armed forces and refugees swarmed into neighboring states, especially Zaire, and because the interethnic hostilities in Rwanda bore ominous implica-

[123] *Cf.* Schachter, *supra* note 116, at 67; Weston, *supra* note 114, at 520–21, 528–32.

[124] *See* HILDERBRAND, *supra* note 115, at 138.

[125] See the remarks of Michael Reisman in the panel entitled *The Costs and Benefits of Economic Sanctions: The Bottom Line,* 89 ASIL PROC. (forthcoming 1995).

[126] *See* Statute of the Yugoslavia Tribunal, *supra* note 79; Statute of the Rwanda Tribunal, *supra* note 81.

[127] See the Secretary-General's explanation of the basis for the Yugoslavia Tribunal, in UN Doc. S/25704, *supra* note 79, at 8. Article 29 was adopted without discussion at San Francisco. *See* RUSSELL & MUTHER, *supra* note 9, at 1068.

[128] It may not be necessary to rely on an implied power. Express authority might be found in Article 41. *See* ABA TASK FORCE, REPORT ON THE INTERNATIONAL TRIBUNAL TO ADJUDICATE WAR CRIMES COMMITTED IN THE FORMER YUGOSLAVIA 10–11 (Monroe Leigh, Chair, 1993) [hereinafter ABA REPORT]; Christopher C. Joyner, *Enforcing Human Rights Standards in the Former Yugoslavia: The Case for an International War Crimes Tribunal,* 22 DENV. J. INT'L L. & POL'Y 235, 257 (1994).

tions for the maintenance of stability between the same ethnic groups in Burundi. One could certainly argue that "justice" for war criminals in those conflicts would help—perhaps would even be necessary—to restore peace or to alleviate the continuing threat of future breaches of the peace.

Given these conditions, if the Security Council had done nothing more in the Statutes of these tribunals than to codify preexisting international criminal law and set out fair procedural standards for the conduct of trials and appeals, there would be little room for objection beyond the understandable, but rather legalistic, objection lodged by the Federal Republic of Yugoslavia (Serbia and Montenegro). The objection was that an independent tribunal could not properly be a subsidiary organ of a political body such as the Security Council.[129] To be sure, the framers of the Charter do not seem to have contemplated the use of Article 29 in this fashion.[130] Nevertheless, the objection seems legalistic because the Article 39 conditions were met, the Tribunal's decision makers are independent of political control,[131] and the adjudicative procedure appears to be essentially fair.[132]

The UN Secretary-General was sensitive to the codification point when he recommended the establishment of the Yugoslav War Crimes Tribunal. He said that the Council "would not be creating or purporting to 'legislate' [international humanitarian law]. Rather, the International Tribunal would have the task of applying existing international humanitarian law."[133] Since the Tribunal is a criminal court, when the Secretary-General said "existing international humanitarian law," presumably he meant existing international criminal law designed for humanitarian purposes: the provisions of the 1949 Geneva Conventions on grave breaches,[134] the laws or customs of war set out in the Regulations annexed to the 1907 Hague Convention (No. IV),[135] and the prohibition of genocide and of crimes against humanity, all of which are specified in the Statute.

The United States Government, though, does not read the Statute of the Yugoslavia Tribunal so narrowly. For example, Madeleine K. Albright, the U.S. Permanent Representative to the United Nations, has said that the United States considers interference by any of the Bosnian factions with the delivery of emergency food supplies as a violation of international humanitarian law that should fall within the Tribunal's jurisdiction.[136] Such conduct does not clearly amount to a grave breach of the Geneva Conventions or fall within the other generally accepted formulations of international criminal law applicable to armed conflicts.[137]

[129] *See* UN Doc. A/48/170–S/25801, at 3 (1993).

[130] Early uses of Article 29 fell into three categories: standing commissions or committees meeting at UN headquarters; commissions or committees dealing with particular political matters, meeting in the field; and ad hoc drafting and other committees not of a judicial character. *See* LELAND M. GOODRICH, EDVARD HAMBRO & ANNE PATRICIA SIMONS, CHARTER OF THE UNITED NATIONS 236 (3d rev. ed. 1969).

[131] As the Secretary-General noted, the Yugoslavia Tribunal "would not be subject to the authority or control of the Security Council with regard to the performance of its judicial functions." UN Doc. S/25704, *supra* note 79, at 8.

[132] *But see* ABA REPORT, *supra* note 128, *passim* (expressing some concerns about possible issues of fairness). *See also* Jose E. Alvarez, *The Once and Future Security Council*, WASH. Q., Spring 1995, at 5, 11.

[133] UN Doc. S/25704, *supra* note 79, at 8.

[134] *See especially* Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Art. 130, 6 UST 3316, 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 147, 6 UST 3516, 75 UNTS 287.

[135] Convention [No. IV] Respecting the Laws and Customs of War on Land, Annex, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

[136] *Reported in* WASH. POST, Jan. 17, 1994, at A19.

[137] *See* James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AJIL 639, 646–47 (1993). O'Brien also makes the point that the Tribunal could apply common Article 3 of the Geneva Conventions (on noninternational conflict) if necessary, even though there may be doubt whether that article would give rise to individual criminal responsibility in the absence of the Statute. *Id.* at 647.

The Statute of the Rwanda Tribunal contains an important substantive provision not found explicitly in the Statute of the Yugoslavia Tribunal. Article 4 of the Rwanda Statute gives the Tribunal the power to prosecute persons under common Article 3 of the Geneva Conventions and under Additional Protocol II to those Conventions.[138] Common Article 3 and Protocol II apply to noninternational armed conflicts. It is a stretch to say that they represent existing international criminal law.

Some of the procedural provisions in the Statutes of the Yugoslav and Rwanda Tribunals are also legislative in the sense that they establish new rules that could directly alter legal processes in UN member states. For example, both Statutes provide that the International Tribunal shall have primacy over national courts; both provide that no person shall be tried for serious violations of international humanitarian law for which he or she has already been tried by the International Tribunal.[139] These are directives to national governments.[140] Since the Statutes were both adopted under chapter VII, these directives would bind member states internationally in the absence of some authoritative pronouncement that the Security Council does not have the authority to legislate in this way. It seems that the Council does have the authority to do so, if it has the authority to establish war crimes tribunals at all. This conclusion follows from the proposition that the Council has implied powers necessary to make its basic authority effective.[141]

The directives to national courts in these Statutes have a counterpart in Security Council Resolution 687, the "mother of all resolutions" adopted under chapter VII at the end of the Persian Gulf conflict. One of its many provisions says, in effect, that all states must apply the *force majeure* defense to any claim by or through Iraq or anyone in Iraq in connection with any otherwise-valid transaction that was not carried out because of the Security Council's economic sanctions against Iraq.[142] A similar provision appears in Resolution 757, in connection with economic sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro).[143]

At first glance, it might seem questionable whether a directive of this sort is necessary to render the Security Council's chapter VII authority effective. Such directives were certainly not contemplated at Dumbarton Oaks or San Francisco. But a quite respectable argument can be made that authority to issue this sort of directive under chapter VII is "necessary" in the rather loose sense in which that term is used to support implied powers. First, such a directive is not supererogatory, even though compliance with a mandatory trade or investment embargo might seem to be the classic case for *force majeure*. If the embargo is not self-executing in the domestic law of a member state, and if the legislature has not enacted it into domestic law, the courts of that state might not recognize the *force majeure* defense in the absence of the directive.

Second, *force majeure* protection is important to business entities that have preexisting contracts or other arrangements that would be affected by Article 41 sanctions. These

[138] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 UNTS 609, *reprinted in* 16 ILM 1442 (1977). As noted by O'Brien, *supra* note 137, at 646, the Yugoslav War Crimes Tribunal might apply common Article 3 and Protocol II even though the Statute of that Tribunal does not expressly direct it to do so.

[139] Statute of the Yugoslavia Tribunal, *supra* note 79, Arts. 9(2), 10(1); Statute of the Rwanda Tribunal, *supra* note 81, Arts. 8(2), 9(1).

[140] The term "directive" is used advisedly here and in connection with the Security Council's *force majeure* pronouncement in Resolution 687, discussed in text at note 142 *infra*. The effect of these pronouncements on UN member states is similar to the effect on European Union states of formal directives issued by the institutions of the Union. *See* TREATY ON EUROPEAN UNION (Feb. 7, 1992) Art. 189.

[141] *See* text at note 119 *supra*.

[142] This is the effect of SC Res. 687, para. 29, UN SCOR, 46th Sess., Res. & Dec. at 11, 15, UN Doc. S/INF/47 (1991), *reprinted in* 30 ILM 847, 854 (1991).

[143] SC Res. 757, para. 9, UN SCOR, 47th Sess., Res. & Dec. at 13, 15, UN Doc. S/INF/48 (1992), *reprinted in* 31 ILM 1453, 1457 (1992).

entities, and governments that have stakes in their economic health, would have little incentive to observe chapter VII economic sanctions as applied to preexisting contracts and other preexisting commercial arrangements, if there were any significant risk that observance could render the entities liable in a domestic court for breach of contract or some other failure to act in the normal commercial manner. Since *force majeure* protection cannot be taken for granted under the domestic law of member states, it makes sense that the international body empowered to impose sanctions should also have the power to protect those who comply with them. Consequently, even though enabling the Security Council to legislate on *force majeure* in domestic courts may have been far from the minds of the delegates in San Francisco, it can be seen as an appropriate outgrowth of the authority they bestowed on the Council in Article 41.

Resolution 687 also contemplated, among many other things, the creation of a commission to evaluate losses suffered as a result of Iraq's invasion of Kuwait, and to resolve disputed claims as to Iraq's liability for those losses.[144] Relying again on the implied power under chapter VII to provide justice and resolve outstanding issues after a devastating armed conflict, the Council then created the UN Compensation Commission.[145] Like the Yugoslav and Rwanda Tribunals, it is formally a subsidiary organ of the Security Council under Article 29 of the Charter. Unlike those Tribunals, it has only one respondent: the Government of Iraq. But it contemplates the disposition of myriad claims against Iraq by myriad claimants. Although the UN Secretary-General has said that the "major part of this task is not of a judicial nature,"[146] the Commission has the authority to resolve disputed claims, determine which losses are compensable and assess damages in each case. Moreover, it has an appellate mechanism to review damage assessments. Thus it seems that basic procedural safeguards should apply.

In one important respect, however, the mechanism lacks essential procedural safeguards. The whole procedure is supervised by a Governing Council, which consists of the representatives of the Security Council's members at any given time, acting not as independent individuals, but in their governmental capacities.[147] The Governing Council establishes rules and interpretations for application by the commissioners (who do act in their personal capacities) and serves as the appellate body for the review of damage assessments. The legitimacy of this mechanism is thus open to question, not because it was unforeseen in 1945 or the Security Council lacked the implied power to create a compensation commission after an armed conflict, but because the Council hedged some basic principles of procedural fairness when it created a commission lacking independence from political influence.[148]

The Security Council took another unprecedented legislative step in connection with the Compensation Commission. It first imposed what could be called a chapter VII tax on Iraq's oil exports, to be used to compensate successful claimants. The "tax" amounted to 30 percent of the proceeds.[149] Iraq declined to export oil under the Council's imposed conditions. The Council then decided under chapter VII that states with control over frozen proceeds from Iraq's oil sales, paid for since August 6, 1990, must transfer the

[144] SC Res. 687, *supra* note 142, paras. 18, 19, 30 ILM at 852.

[145] SC Res. 692, UN SCOR, *supra* note 142, at 18.

[146] UN Doc. S/22559, at 8–9 (1991), *reprinted in* 30 ILM at 1706, 1709.

[147] *Id.* at 3, 30 ILM at 1706–07.

[148] For further explication of the points made in this paragraph, see Frederic L. Kirgis, Jr., *Claims Settlement and the United Nations Legal Structure, in* THE UNITED NATIONS COMPENSATION COMMISSION 103, 110–13 (13th Sokol Colloquium on Private International Law, Richard B. Lillich ed., 1995). *See also* Murphy, *supra* note 15, at 238–39 (noting that the Compensation Commission's credibility might be enhanced if Iraq were allowed to participate more significantly than has been the case).

[149] SC Res. 705 & 706, UN SCOR, *supra* note 142, at 21.

funds (within stated limits) to a UN-administered escrow account, with 30 percent to go toward compensating successful claimants.[150]

These measures can only be disturbing to anyone apprehensive about movement toward world government with the power to tax, or to anyone troubled by the expanding power of a fifteen-member Security Council dominated by one, or at most a few, states. Nevertheless, they probably can be justified under the Charter if the Compensation Commission to which they are ancillary is itself legally justifiable. To be effective, such a commission needs a way to "execute" its decisions against the property or income of the party held responsible—Iraq, in the case at hand, and perhaps other states in future cases. But this power to "tax" or "execute" is legally questionable, as well as ominous, if the mechanism for determining claims rests on questionable Charter authority or is perceived to be less than meticulously fair.

Chapter VII is not the only source of Security Council legislative or quasi-legislative authority, according to the International Court of Justice. In the *Namibia* Advisory Opinion, the Court found that Article 24 provided the legal basis for Security Council Resolution 276.[151] In paragraph 2 of that resolution, the Security Council declared that the continued presence of South Africa in Namibia was illegal and determined that all acts by the South African Government concerning Namibia were invalid. In its quasi-legislative part, the resolution called upon all states to refrain from any dealings with South Africa that were inconsistent with paragraph 2.[152] The Court held that this directive was binding on all member states under Article 25.[153]

There is support for the Court's view that the Security Council may bind member states by acting under its general Article 24 authority to maintain international peace and security. Some of the support goes all the way back to San Francisco. The Secretary-General referred to a discussion in Committee III/1 at San Francisco, when he made a statement to the Security Council in 1947. He said in part:

> [T]his discussion concerned a proposed amendment to limit the obligation of Members to accept decisions of the Council solely to those decisions made under the specific powers. In the discussion, all the delegations which spoke, including both proponents and opponents of this amendment, recognized that the authority of the Council was not restricted to such specific powers. It was recognized in this discussion that the responsibility to maintain peace and security carried with it a power to discharge this responsibility. This power, it was noted, was not unlimited, but subject to the purposes and principles of the United Nations.[154]

The Secretary-General overstated his case. The speakers in Committee III/1 did not all clearly recognize that the authority of the Council went beyond its enumerated powers, although the tenor of the discussion was consistent with that proposition.[155] More to the point is the fact that most Security Council members in 1947 seemed to share the opinion put forth by the Secretary-General.[156] There was no objection from the broader UN membership. This acquiescence is strong support for the Court's view. In addition, the Court's subsequent assertion regarding the Council's authority has itself received general acquiescence—even though some thought the Court erred in finding

[150] SC Res. 778, UN SCOR, *supra* note 143, at 72.

[151] Namibia, 1971 ICJ REP. at 52.

[152] SC Res. 276, UN SCOR, 25th Sess., Res. & Dec. at 1, 2, UN Doc. S/INF/25 (1970).

[153] Namibia, 1971 ICJ REP. at 52–53.

[154] UN SCOR, 2d Sess., 91st mtg. at 45 (1947).

[155] *See* Doc. 597, III/1/30, 11 U.N.C.I.O. DOCS. 393–95 (1945); *see also* KELSEN, *supra* note 113, at 284–85 n.6. The proposed amendment received a favorable vote of 14–13, but failed because it lacked the necessary two-thirds majority. 11 U.N.C.I.O. DOCS. at 395.

[156] *See* GOODRICH, HAMBRO & SIMONS, *supra* note 130, at 204–05. *See also* 2 REPERTORY OF UNITED NATIONS PRACTICE 19, UN Sales No. 1955.V.2 (Vol. II) (1955).

that the Council actually intended to bind states when it called on them, in Resolution 276, to refrain from certain dealings with South Africa.[157]

The Article 24 authority has malleable limits, defined only by the purposes and principles of the United Nations. If judicial review is still unavailable, the Security Council itself will be the judge of how far these purposes and principles may be stretched. That may be cause for concern, but it seems at present to be the law of the Charter.

Quasi-Judicial Determinations

It was recognized at San Francisco that the Security Council, like other UN organs, would interpret Charter provisions relating to its own functions. At the same time, it was understood that if an interpretation by the Council was not generally acceptable, it would be no more binding on members than a comparable interpretation by any other organ.[158] As Professor Sohn has noted, though, the converse is that a generally acceptable interpretation is binding.[159]

The Security Council was clearly empowered from the outset to make some other determinations that could be seen as quasi-judicial. Thus, it could expressly, or by necessary implication, brand a state as a potential or actual violator of international law. The obvious example is the Article 39 authority to determine the existence of a threat to the peace, breach of the peace or act of aggression. It was understood all along that this authority entitled the Council to make more than a nonjudgmental, factual determination: it included the authority to determine the aggressor, and to do so with binding effect on member states under Article 25.[160]

Examples that might more properly be considered quasi-judicial are found in chapter VI.[161] They constitute quasi-judicial activity even though the Security Council does not have authority to bind member states without their consent under chapter VI, and even though it does not have the mediation authority that the League of Nations Council had. A recommendation may have quasi-judicial character if it embodies determinations adjudicators normally make—findings of fact or conclusions of law, as applied to a concrete dispute or situation. It is the function that counts, rather than the formal legal effect of the decision.[162]

The Security Council has chapter VI quasi-judicial authority in Article 37(2) to recommend terms of settlement if the Council deems that continuation of a dispute is likely to endanger international peace and security. It was agreed at San Francisco that the Council's recommendation would not bind the parties.[163] Nonetheless, the Council's function would be quasi-judicial in the sense mentioned above: it could deal with the merits of an existing dispute and reach a conclusion that could take normative assertions into account and would have some normative consequences.

[157] *See* United Nations Resolutions and Declarations, 1975 U.S. DIGEST §4, at 88–90.

[158] *See* Doc. 750, IV/2/B/1, 13 U.N.C.I.O. DOCS. 831–32 (1945).

[159] *See* Sohn, *supra* note 21, at 174.

[160] *See, e.g.*, EAGLETON, *supra* note 5, at 450. RUSSELL & MUTHER, *supra* note 9, at 465–66, point out that at Dumbarton Oaks China raised the question who was to judge whether a state was using force aggressively or defensively. The consensus was that it was probably the Security Council.

[161] Vera Gowlland-Debbas has usefully distinguished peaceful settlement procedures (which in my view would include, but not be limited to, the Security Council's chapter VI functions) and institutionalized countermeasures (which are imposed under chapter VII, based on determinations under Article 39). *See* Gowlland-Debbas, *supra* note 43, at 73.

[162] That nonbinding decisions may be judicial in nature is shown by the authority of the ICJ to issue nonbinding advisory opinions. *See* UN CHARTER Art. 96; ICJ STATUTE Arts. 65–68. The League of Nations Council had a mediation function that clearly was quasi-judicial in the sense used above, even though it did not result in binding awards. *See* note 7 *supra*.

[163] *See* RUSSELL & MUTHER, *supra* note 9, at 663–64; GOODRICH, HAMBRO & SIMONS, *supra* note 130, at 284.

Although Article 37 could be read to give the Council jurisdiction in these cases only if both parties join in referring the dispute to it, this does not seem to have been the intention at San Francisco. It was understood that either party could submit the dispute to the Council.[164] Article 37, however, has rarely been asserted as a basis for the Council's jurisdiction, much less cited in its resolutions.[165]

Article 38 also gives the Security Council quasi-judicial authority. It empowers the Council to make recommendations to the parties to any dispute—not just those endangering international peace and security—if all the parties so request. The recommendations may be substantive as well as procedural. Although it was apparently intended originally that all parties to a dispute would have to join in a specific request to the Council under Article 38, the (sparse) practice has not been so strict. So long as all parties acquiesce somehow in the Council's involvement, a quasi-judicial determination could be made under Article 38. A determination under that article would not be binding unless the parties agreed in advance to be bound by it—which they could do.[166]

The Security Council has undertaken additional quasi-judicial functions, some more defensible than others. It performs a legitimate quasi-judicial function when it interprets its own resolutions. If it does so under chapter VII, the interpretation will be binding on member states. A recent example is Resolution 958, in which the Council interpreted a previous resolution that authorized member states to use air power to support UNPROFOR (the UN peacekeeping/humanitarian assistance mission) in and around designated safe areas in Bosnia and Hercegovina. Resolution 958 said that the authorization applied also to measures taken in Croatia.[167]

The ground for quasi-judicial determinations becomes less solid when the Council's pronouncements about violations of international law are not inherent in its Article 39 powers, are not requested by any parties to a dispute, and do not merely interpret previous Council resolutions.[168] Even in such cases, there is little reason to object when the Council simply states the obvious, as when it has said (for example) that genocide is a flagrant violation of international law.[169]

Sometimes the Council has made quasi-judicial determinations that reflect widely shared views in the international community regarding practices or policies of specified states. Thus, in 1970 the Council determined that the continued presence of South Africa in Namibia was illegal—a conclusion of law described by Judge Onyeama in the *Namibia* case as, "in effect, a judicial determination."[170] To give another example, the Council on several occasions has declared that the Fourth Geneva Convention of 1949 applies to the territories occupied by Israel since 1967 and that deportation of civilians from those territories contravenes Israel's obligations under the Convention.[171] The UN Secretary-General (Javier Pérez de Cuéllar) said that the Security Council resolutions on Israeli deportation of civilians, together with similar General Assembly resolutions, have established the *opinio juris* of the world community.[172]

If the Security Council merely purports to articulate a widely prevailing *opinio juris* when it pronounces itself on an international law issue related to international peace

[164] GOODRICH, HAMBRO & SIMONS, *supra* note 130, at 283.

[165] *Id.* at 285; Cot & Pellet, *supra* note 34, at 629.

[166] On the interpretation and effect of Article 38, see GOODRICH, HAMBRO & SIMONS, *supra* note 130, at 288–89.

[167] SC Res. 958 (Nov. 19, 1994).

[168] A fortiori, when the Council declares a violation of municipal law, as it did in SC Res. 169, para. 8, UN SCOR, 16th Sess., Res. & Dec. at 3, 5, UN Doc. S/INF/16/Rev.1 (1961) (declaring that secessionist activities against the Republic of the Congo violated its Loi fondamentale).

[169] *See* SC Res. 955, *supra* note 81, preamble (in the context of the situation in Rwanda).

[170] Namibia, 1971 ICJ REP. at 147 (Onyeama, J., sep. op.).

[171] *See, e.g.*, SC Res. 799, para. 2, UN SCOR, *supra* note 143, at 6.

[172] UN Doc. S/19443, at 9 (1988), *reprinted in* 27 ILM 1684, 1692 (1988).

and security, there is little reason to object other than to say that a fifteen-member UN body dominated by one or a few states is less well situated to reflect an *opinio juris* than is the plenary body—the General Assembly. It is not clear, though, that the Security Council regards its role as one of ascertaining and reflecting a broader international conviction when it makes seemingly quasi-judicial pronouncements. Instead, it usually seems to be making its own determination.[173] It gives this impression even when it purports simply to "affirm" or "reaffirm" a rule or principle of international law.

For example, in Resolution 687 the Council "reaffirmed" that Iraq "is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait."[174] The UN Compensation Commission, administering claims against Iraq, has treated this provision as the authoritative basic determination of Iraq's liability.[175] It is not simply a statement of an obvious international law principle as applied to Iraq. In particular, its causation standard—"direct" loss, damage or injury—does not coincide with the International Law Commission's provisionally adopted causation standard for state responsibility.[176]

In the same resolution, the Security Council "decided" that all statements made by Iraq since August 2, 1990, repudiating its foreign debt are null and void.[177] Presumably, since this decision was adopted under chapter VII, it was meant to be binding on all member states, including Iraq. It is open to question on several counts. First, the Council did not make clear which body of law it was referring to when it decided that Iraq's attempts to repudiate its foreign debt are null and void. It could be international law, though that seems a somewhat doubtful proposition. Government debt instruments are normally subject to municipal law, and although state responsibility may be incurred under international law if those debts are repudiated without a sufficient excuse,[178] that is not the same thing as saying that the attempt to repudiate them is null and void under international law. Thus, the Council presumably was not applying international law, or if it was, it was applying a principle of nullity that called for some justification. No justification was given.

Second, if the Council was saying that the repudiations were null and void under some state's municipal law, it was not only unclear, it was treading on very thin ice under Article 2(7) of the Charter. That article, restricting the United Nations from intervening in matters essentially within the domestic jurisdiction of any state, does not apply to enforcement measures under chapter VII, but not all chapter VII decisions are enforcement measures. This is the clear implication (though not the holding) of the *Expenses* case, where the Court regarded "enforcement action" as a measure directed against a state and designed to coerce it into peaceful conduct.[179] It is difficult to fit the decision on

[173] For several examples, see ELIHU LAUTERPACHT, ASPECTS OF THE ADMINISTRATION OF INTERNATIONAL JUSTICE 39–41 (1991).

[174] SC Res. 687, *supra* note 142, para. 16, 30 ILM at 852.

[175] *See, e.g.*, UN Doc. S/AC.26/1992/9, para. 2, *reprinted in* 31 ILM 1037, 1037 (1992) (stating that paragraph 16 of Resolution 687 is "[t]he basic premise underlying all of the findings concerning business losses").

[176] The International Law Commission rejected the "direct/indirect damage" dichotomy, and provisionally substituted as the test: "the presence of a clear and unbroken causal link between the unlawful act and the injury." Commentary to Draft Articles on State Responsibility, pt. 2, Art. 8, Report of the International Law Commission to the General Assembly, UN GAOR, 48th Sess., Supp. No. 10, at 172, UN Doc. A/48/10 (1993). For more on this point, see Kirgis, *supra* note 148, at 107–09.

[177] SC Res. 687, *supra* note 142, para. 17, 30 ILM at 852.

[178] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §712(2) (1987).

[179] *See* Expenses, 1962 ICJ REP. at 166, 177. *Cf.* Schachter, *supra* note 116, at 82 (noting that chapter VII was the basis for mandatory Security Council decisions affecting the Congo, even though they were not enforcement action).

Iraq's repudiation of its foreign debt into that mold. Since the decision was nevertheless intended to be binding, it would seem to be an "intervention" into a matter within the domestic jurisdiction of the state whose law would otherwise govern Iraq's attempt to repudiate its debt.

Perhaps the Council was not attempting to apply either international or municipal law but, rather, was simply rendering Iraq's debt repudiations null and void as a sanction under chapter VII. If so, other questions arise. First, this was a decision about legal status, not a "measure" to be taken to maintain or restore peace as contemplated in Articles 39, 41 and 42. Nor could it reasonably be said to be a provisional measure under Article 40. At most, the Council could have been saying that Iraq's repudiation of its foreign debt was itself a threat to the peace and thus had to be undone by applying chapter VII. But that is scarcely a plausible assertion, unless Iraq's repudiation of its foreign debt somehow contributed in a significant way to the breach of the peace or act of aggression—Iraq's invasion of Kuwait—that had justified a chapter VII response in the first place. It is difficult to find the connection.[180]

In Resolution 687, the Security Council even invoked chapter VII to impose a binding settlement of the boundary dispute between Iraq and Kuwait. The Council demanded that Iraq and Kuwait respect the inviolability of the international boundary between them as set out in their 1963 Agreed Minutes.[181] Iraq had contested the validity of the Agreed Minutes.[182] Iraq's grounds (essentially that its own constitutional procedures had not been followed) probably would have been insufficient to invalidate the 1963 agreement in the eyes of an impartial decision maker.[183] Nonetheless, the point is that there was a dispute over whether or not an agreed boundary existed. The Security Council's action was therefore more than a purely technical boundary delimitation.[184]

Although Iraq grudgingly consented to Resolution 687, it had little choice.[185] Thus, the boundary as recognized by the Council (and later approved by it after the UN-appointed Iraq-Kuwait Boundary Demarcation Commission demarcated the border) was indeed an imposed one.[186] The Security Council, hardly an impartial decision maker, effectively resolved the boundary dispute in favor of Kuwait.

The drawing of territorial boundaries is, of course, one of the most sensitive matters in international relations. Despite the depressingly familiar historical phenomenon of the establishment and changing of boundaries by the use of armed force, it is generally recognized today that the only legitimate means stem from agreement between the

[180] Arguably, by singling out Iraq's repudiation of its foreign debt and failing to respond when other governments have repudiated their debts—sometimes on a massive scale—the Council was acting inconsistently with the principle of sovereign equality of all members, found in Article 2(1). The ICJ said in the *Expenses* case that, "if an expenditure were made for a purpose which is not one of the purposes of the United Nations, it could not be considered an 'expense of the Organization'." 1962 ICJ REP. at 167. It would seem equally true that a Security Council decision made inconsistently with the principles of the United Nations could not be considered a "decision of the Security Council" under Article 25—*if* an authoritative decision maker determines that the decision is inconsistent with the principles of the United Nations. The authoritative decision maker cannot be each member government, deciding according to its own lights. Chaos would result, and the Security Council's effectiveness would be undermined.

[181] SC Res. 687, *supra* note 142, para. 2, 30 ILM at 849. *See* Agreed Minutes Between Kuwait and Iraq Regarding the Restoration of Friendly Relations, Recognition and Related Matters, Oct. 4, 1963, 485 UNTS 321, 326, *reprinted in* 30 ILM at 855.

[182] See Iraqi documents reprinted in 13 HOUS. J. INT'L L. 282, 284, & 286, 288 (1991).

[183] *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, Art. 46, 1155 UNTS 331, *reprinted in* 8 ILM 679, 697 (1969).

[184] As Professor Alvarez, *supra* note 132, at 7, has put it: "For the first time, the UN told a supposedly sovereign state what its borders are supposed to be . . . ." *But see* John F. Murphy, *Force and Arms, in* 1 UN LEGAL ORDER, *supra* note 21, at 247, 273–74.

[185] *See* UN Doc. S/22456, annex (1991).

[186] Franck, *supra* note 45, at 205, reaches the same conclusion. *See also* Alvarez, *supra* note 132, at 7; Gowlland-Debbas, *supra* note 43, at 83.

neighboring states. These agreements may set the boundaries or consent to an arbitral or other procedure that will result in setting them.

The negotiating history of the Charter is particularly clear on the Security Council's lack of authority to impose binding settlements upon the parties to international disputes. The United States was especially adamant on this point. At Dumbarton Oaks, the United States

> agreed that the Council should be limited to recommendations on settlement, but considered that it should be only the court of last resort after the parties to a dispute had failed to settle outside the organization. The Council should act, that is, primarily as a policeman in the settlement process rather than as a judge.[187]

Later, at San Francisco, the British delegation proposed that the Council be empowered to recommend terms of settlement to disputing parties. The U.S. delegation was less than enthusiastic. Nevertheless, "[t]he United States delegation finally decided to go along with the British proposals, but on the understanding that there was no intention of empowering the Council to impose settlement."[188] In addition, the United States delegation proposed amendments to the Dumbarton Oaks proposals to preclude any interpretation that would permit the imposition of settlement terms by the Council. The term "recommendations" was thus inserted into the provision that became Article 39, to show that any settlement terms adopted by the Council would be nonmandatory even though they were adopted under what became chapter VII.[189]

This negotiating history, buttressed by the absence of any Security Council practice to the contrary from 1945 until 1991, casts strong doubt on the propriety of the Council's imposition of the Kuwait-Iraq boundary upon Iraq. But that is not the whole of it. The Council also decided to guarantee the inviolability of the boundary and to take all necessary measures to that end.[190] This posture contrasts sharply with the position developed within the U.S. delegation as it prepared for the San Francisco Conference:

> Everyone [in the U.S. delegation] wanted to see boundaries drawn that were at once possible, permanent, and ideal; but under actual circumstances, the best that could be done was to seek to maintain the integrity and independence of states by regulating their behavior toward each other and by preventing change through aggression. Any attempt to guarantee boundaries in perpetuity, it was agreed, would itself produce war, and was therefore not the answer to the dilemma.[191]

The U.S. concern in 1945 does not necessarily mean that the Security Council could never lawfully guarantee a boundary. The Council might, for example, decide (no matter what the concern was in 1945) that the maintenance of international peace requires in a particular case that it guarantee a boundary mutually agreed upon by neighboring states. But when the guarantee is instead tied to a boundary imposed under chapter VII of the Charter, the efficacy of the exercise of power is as doubtful as its legal propriety.

The doubt could be lessened or perhaps even eliminated if there were widespread acquiescence in an asserted Council authority to impose a boundary and guarantee it. When Resolution 687 was adopted, several Council members seemed to acquiesce in the proposition that the Council may guarantee a boundary in order to prevent a threat to the peace, breach of the peace or act of aggression, no matter how unwise that might

[187] RUSSELL & MUTHER, *supra* note 9, at 458–59.

[188] *Id.* at 664. China and the Soviet Union went along as well. *Id.*

[189] *See id.* at 669–70; *see also* Goodrich, *supra* note 3, at 8. Article 39 authorizes the Security Council to "make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

[190] SC Res. 687, *supra* note 142, para. 4, 30 ILM at 850. The Council later reiterated its guarantee and its decision to take, as appropriate, "all necessary measures to that end." SC Res. 773, para. 4, UN SCOR, *supra* note 143, at 72.

[191] RUSSELL & MUTHER, *supra* note 9, at 604.

seem. But the idea that the Council could impose a boundary was quite unsettling to some Council members; they sought to interpret what was done in such a way as to limit or negate any precedent. Venezuela stressed the special circumstances following Iraq's invasion of Kuwait;[192] Ecuador abstained from voting, pointing out the "general view" that the relevant paragraphs of Resolution 687 "do not constitute a precedent that can be invoked in the future";[193] Japan noted the special circumstance that, when Iraq invaded Kuwait, "it illegally claimed that Kuwait was a part of Iraq";[194] and India interpreted the Council's action as simply recognizing a boundary that Iraq and Kuwait had already agreed to.[195] In light of these reactions, it cannot be said that the Council has established the authority to set international boundaries under chapter VII, even in the aftermath of naked aggression.[196]

When the Security Council makes quasi-judicial determinations that go beyond its inherent authority to find threats to the peace, breaches of the peace and acts of aggression, it not only risks going beyond its proper role as the guardian of international peace and security; it also risks going beyond the bounds of fairness to the states or other parties whose rights or obligations the Council is determining.[197] The Council has no rules of procedure for fair adjudicative hearings; nor could it reasonably be expected to adopt or follow any such rules. Even if it did adopt procedural rules and try to follow them, it would not likely be regarded as a fair or effective adjudicator. In its fifty years of practice, it has given reason for concern in this regard. It has sometimes—including recently—seemed quite unaware of, or unconcerned about, any limits that ought to apply to its quasi-judicial role.

Peacekeeping, Peacemaking and Peace Enforcement

According to the leading UN authority on peacekeeping, "The technique of peacekeeping is a distinctive innovation by the United Nations. The Charter does not mention it. It was discovered, like penicillin. We came across it, while looking for something else, during an investigation of the guerrilla fighting in northern Greece in 1947."[198] The newly discovered concept developed slowly and without serious controversy for several years, then became controversial in the Middle East and the Congo in the 1960s, then receded from the headlines again, only to take new forms and create new controversies as the fiftieth anniversary of its discovery approached.[199] One of the new forms, not foreseen at San Francisco or in the early years of peacekeeping practice, has

[192] *See* UN Doc. S/PV.3108, at 3 (1992).

[193] *Id.* at 3–4. Ecuador made a legal argument to the effect that Article 36 of the Charter does not grant the Security Council competence under chapter VII to pronounce itself on a territorial boundary. *Id.* at 3. Article 36 is in chapter VI, and does not affect the Council's chapter VII powers. Perhaps Ecuador meant that the Council was attempting to do under chapter VII what it could legitimately do only under chapter VI, and then only in nonbinding fashion.

[194] *Id.* at 6.

[195] *Id.* at 7.

[196] It does not seem viable to argue that Resolution 687 has no precedential value at all. Before it was adopted, six nonaligned members of the Security Council proposed an amendment to it that would have called the circumstances unique, requiring unprecedented actions "which do not set undue precedents." *See* INT'L DOCS. REV., No. 11, Apr. 8, 1991, at 4. The amendment was rejected, leaving open the possible future use of the resolution as a precedent. Whether it will be strictly limited to the facts that gave rise to it is an unresolved question.

[197] For elaboration of this point, see LAUTERPACHT, *supra* note 173, at 42–43.

[198] Brian Urquhart, *The United Nations, Collective Security, and International Peacekeeping*, *in* NEGOTIATING WORLD ORDER: THE ARTISANSHIP AND ARCHITECTURE OF GLOBAL DIPLOMACY 59, 62 (Alan K. Henrikson ed., 1986).

[199] As of mid-December 1994, 17 UN peacekeeping operations were in the field—9 of them traditional, the other 8 "multifunctional." This was up from 5 in January 1988—all of them traditional. The number of military personnel deployed increased from 9,570 in January 1988 to 73,393 in December 1994. *See* Boutros Boutros-Ghali, Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, UN Doc. A/50/60–S/1995/1, at 4 (1995).

been involvement in ongoing internal conflicts. The results do not augur well for the future. There is reason to suspect that peacekeeping will again recede from the headlines, reflecting a reaction in the United States and elsewhere to the expense, danger and perceived ineffectiveness of UN peacekeeping in its recent, most active phase.

Few important legal issues emerged when peacekeeping consisted only of observer missions and lightly armed forces monitoring cease-fires, operating in an essentially static mode with the consent of the parties involved. One significant political issue with legal overtones arose in this context when the United Arab Republic ordered the UN Emergency Force (UNEF) to leave Egyptian territory on the eve of the Six-Day War in 1967. Arguably, U Thant, then the Secretary-General, was not legally obligated to remove the force.[200] As a practical matter, though, he did not have much choice.[201]

Legal issues did arise over the General Assembly's assessments for the expenses of UNEF and the UN Operation in the Congo (ONUC), which France, the Soviet Union and some other states refused to pay. UNEF had been authorized by the General Assembly in 1956,[202] after the United Kingdom and France vetoed Security Council attempts to call for a cease-fire and withdrawal of forces during hostilities that erupted in the wake of Egypt's nationalization of the Suez Canal. ONUC was organized in 1960, when violence broke out in the Congo as soon as it became independent. Belgian troops intervened, and the Security Council authorized Secretary-General Dag Hammarskjöld to provide military assistance to the Congolese Government.[203] But ONUC was unable to maintain order. The Council, at the urging of Hammarskjöld, adopted a series of resolutions that plunged ONUC deeper into the Congo conflict, including the internal conflict over the breakaway province of Katanga. The Soviet Union became disenchanted with Hammarskjöld's handling of the situation and vetoed a proposed resolution that would have buttressed ONUC's authority.[204] The General Assembly then entered the fray under the Uniting for Peace Resolution.[205] The Security Council got back into the act in 1961, as the situation in the Congo continued to deteriorate.

The Soviet Union and France argued that only the Security Council could authorize or supervise peacekeeping activities, and that financing for peacekeeping could be arranged only by agreements under Article 43. In the *Expenses* case, the ICJ rejected these arguments. The Court noted that the Security Council's responsibility for the maintenance of international peace and security is primary, not exclusive. The General

[200] The aide-mémoire between Egypt and the United Nations on the presence and functioning of UNEP said that the United Nations reaffirmed "its willingness to maintain UNEF until its task is completed." UN Doc. A/3375, annex, UN GAOR, 11th Sess., 2 Annexes, Agenda Item 66, at 9 (1956). Dag Hammarskjöld, the Secretary-General in 1956, recorded his interpretation of the text. He said that if Egypt were to request withdrawal of UNEF, the General Assembly would take up the matter. "If [the General Assembly] found that the task was not completed and Egypt, all the same, maintained its stand and enforced the withdrawal, Egypt would break the agreement with the United Nations." Hammarskjöld Aide-Mémoire at 7 (Aug. 5, 1957), *reprinted in* 6 ILM 595, 601 (1967).

[201] *See* Thomas M. Franck, Nation Against Nation 89–91 (1985).

[202] GA Res. 1000 (ES–I), UN GAOR, 1st Emergency Special Sess., Supp. No. 1, at 2, UN Doc. A/3354 (1956).

[203] SC Res. 143, UN SCOR, 15th Sess., Res. & Dec. at 5, UN Doc. S/INF/15/Rev.1 (1960).

[204] *See* UN Doc. S/4523 (1960).

[205] GA Res. 377A, UN GAOR, 5th Sess., Supp. No. 20, at 10, UN Doc. A/1775 (1950). The General Assembly resolution that took over from the Security Council in the Congo situation was GA Res. 1474 (ES–IV), UN GAOR, 4th Emergency Special Sess., Supp. No. 1, at 1, UN Doc. A/4510 (1960). Eastern European governments challenged the constitutionality of the Uniting for Peace Resolution when it was adopted. See the arguments described in Miller (Schachter), *supra* note 41, at 21–22. Western commentators at the time generally found an adequate legal justification for it. *See, e.g.*, L. Cavaré, *Les Sanctions dans le cadre de l'O.N.U.*, 80 Recueil des Cours 191, 281–82 (1952 I); Francis Vallat, *The General Assembly and the Security Council of the United Nations*, 29 Brit. Y.B. Int'l L. 63, 96–100 (1952); Lester H. Woolsey, *The "Uniting for Peace" Resolution of the United Nations*, 45 AJIL 129, 133–35 (1951) (expressing some doubt about part C, on maintaining national armed units for the use of the General Assembly as well as of the Security Council).

Assembly, it said, is also concerned with such things. The Assembly does not have to defer to the Security Council under Article 11(2) of the Charter unless enforcement action is necessary. Since neither UNEF nor ONUC was authorized to take military action against any state, no enforcement action took place (even though, as was noted above,[206] the Council had acted under chapter VII in the case of the Congo). The absence of enforcement action also eliminated Article 43, which in any event could not be the sole source of financing for peacekeeping if the Security Council was to perform its primary function.[207]

The peacekeeping operation in the Congo bears a striking resemblance to some of the controversial peacekeeping operations of the 1990s. What began as a rather modest operation requested by the Congolese Government escalated into the largest UN military activity of the Organization's first forty-five years. In a chaotic internal situation involving the attempt by Katanga Province to secede with the help of foreign mercenaries, the United Nations muddled through. It began by trying to limit its use of force to self-defense, but eventually it had to take sides—including the use of force beyond the limits of self-defense—against the Katangese rebels.[208] In the meantime, a rift occurred between the United Nations and the central Government. The rift ended only after the Secretary-General reminded his hosts that the Security Council had acted with binding effect under chapter VII, and that the host state was as much bound by that as any other state.[209] ONUC troops were finally extricated from the area in 1964.[210]

Three decades later, in such places as Somalia and the former Yugoslavia, the seeds sown in the Congo sprouted. The fruit could only be described as pungent. In both of those places, elements of peacekeeping and enforcement action were combined. In each case, the Security Council adopted binding chapter VII measures directed against one of the parties to the armed conflict. In neither place did the measures have the desired effect.

In the case of Somalia, the Secretary-General was authorized "to take all necessary measures against all those responsible for the armed attacks" on personnel of UNOSOM II.[211] As a result, enmity between the United Nations and the Aidid faction increased, culminating in the loss of U.S. troops' lives and the eventual termination of the entire operation under conditions of continuing internal turmoil.

In the former Yugoslavia, the Security Council imposed an arms embargo on the entire area, but economic sanctions were directed specifically against the Federal Republic of Yugoslavia (Serbia and Montenegro) and later against the Bosnian Serbs.[212] A delayed effect apparently was to influence Serbia to control supplies of war matériel that had been directly crossing the Serbian-Bosnian border. Some supplies nevertheless seemed to enter Bosnia, perhaps by circuitous routes. The goal of maintaining a unified Bosnian state remained elusive.

[206] *See* text at note 41 *supra*.

[207] Expenses, 1962 ICJ REP. at 163–64, 166–67, 177.

[208] *See* Schachter, *supra* note 116, at 84–85.

[209] UN Doc. S/4775, UN SCOR, 16th Sess., Supp. for Jan., Feb. & Mar. 1961, at 261, 262–63, 269.

[210] For a full account of the ONUC experience, see GEORGES ABI-SAAB, THE UNITED NATIONS OPERATION IN THE CONGO 1960–1964 (1978).

[211] SC Res. 837, UN SCOR, *supra* note 56, at 83, "reaffirming" under chapter VII a none-too-clear authorization in a previous resolution. An investigation commissioned by the Secretary-General found convincing evidence that General Aidid and his faction were responsible. *See* UN Doc. S/26351, annex (1993).

[212] SC Res. 757, *supra* note 143; SC Res. 787, UN SCOR, *supra* note 143, at 29; SC Res. 820, *id.*, *supra* note 56, at 7; SC Res. 942 (Sept. 23, 1994). In addition, several Security Council resolutions authorized the use of armed force to protect UN safe areas in Bosnia. These resolutions were ostensibly directed against any party that violated the safety of the areas, but as a practical matter they were directed against the Bosnian Serbs and their supporters.

The peacekeeping operations in Somalia and the former Yugoslavia involved humanitarian efforts to supply and protect civilians, as well as the peace and security efforts described above. Other peacekeeping operations, too, have had a significant humanitarian component, conducted directly by the United Nations or by private and public agencies with UN protection. Many of these have been within single states where civil wars are raging. Not all of them have been with the consent of the government, if indeed there was a government. A legal purist would have trouble finding authority in the Charter for Security Council measures of this sort, but the international community has not objected to them on legal grounds.

Objections to these operations have been based instead on success/failure, or cost/benefit, grounds. The Secretary-General has acknowledged the great risk of failure that combined humanitarian and peacekeeping missions face when they operate without the consent of the parties, or behave in a way that seems to favor one side over another, or use force other than in self-defense.[213] Often the problem seems to be the Security Council's lack of a clear goal, consistently pursued. It may be questioned whether the Security Council could ever be expected to formulate a clear policy at the beginning and follow it over any substantial period of time. In any event, failure to do so does not, of itself, raise serious legal questions.

Despite the traumas of Somalia and Bosnia, the peacekeeping picture is not entirely bleak. To quote the Secretary-General:

> In the late 1980s a new kind of peace-keeping operation evolved. It was established after negotiations had succeeded, with the mandate of helping the parties implement the comprehensive settlement they had negotiated. Such operations have been deployed in Namibia, Angola, El Salvador, Cambodia and Mozambique. In most cases they have been conspicuously successful.[214]

The Secretary-General described the variety of functions involved:

> the supervision of cease-fires, the regroupment and demobilization of forces, their reintegration into civilian life and the destruction of their weapons; the design and implementation of de-mining programmes; the return of refugees and displaced persons; the provision of humanitarian assistance; the supervision of existing administrative structures; the establishment of new police forces; the verification of respect for human rights; the design and supervision of constitutional, judicial and electoral reforms; the observation, supervision and even organization and conduct of elections; and the coordination of support for economic rehabilitation and reconstruction.[215]

These functions have been performed with the consent of the parties. They are directed at the maintenance or restoration of peace and security, sometimes within a single state but usually with implications for the stability of the region involved. Consequently, they generally fit comfortably within the Security Council's Article 24 responsibility for the maintenance of international peace and security. Presumably because the Security Council has had greater success in this capacity than in its efforts to keep the peace or protect humanitarian activities by military means, governments have been quite supportive in principle. They have not always been as supportive when the time has come to pay.

Postconflict efforts to prevent resumed fighting have included coercive measures in the case of Iraq. The Security Council imposed quite intrusive disarmament requirements on Iraq after it was driven from Kuwait in 1991. These included supervised dismantling

[213] Boutros-Ghali, *supra* note 199, at 8–9.
[214] *Id.* at 6.
[215] *Id.*

of Iraq's nuclear weaponry capability and destruction of all of Iraq's chemical and biological weapons, as well as its ballistic missiles with a range greater than 150 kilometers.[216] An argument might be made that these measures were inconsistent with the sovereign equality principle of Article 2(1), since no other state has ever been subjected to such a disarmament mandate under chapter VII, but no other state since North Korea in 1950 has conducted a full-scale, World War II-style invasion of a neighboring state. Moreover, any disarmament measures imposed after a breach of the peace or act of aggression must be tailored to the situation at hand. About the only such measures that might run afoul of Article 2(1) would be any that are quite out of proportion both to the threat of renewed conflict and to disarmament measures imposed on other aggressors in similar circumstances.

A somewhat stronger argument could be made that one aspect of the disarmament regime imposed on Iraq encroaches on that country's rights under the Charter. Iraq has a continuing right of self-defense under Article 51, no matter how egregiously it has behaved in the past. Depriving it of nuclear, chemical and biological weapons would not prevent it from exercising that right. On the other hand, depriving it of the much more modest capability of using any ballistic missiles with a range greater than 150 kilometers would seem to tie its hands in a way that may be understandable (given the compactness of the volatile Middle East and Iraq's use of Scud missiles during the Persian Gulf conflict), but that could deprive it of legitimate means of self-defense. If the prohibition were limited to Scud missiles, or to any other missiles that would inherently threaten nonmilitary targets, or to missiles with a particularly destructive type of warhead, the self-defense argument would be attenuated. But the prohibition is not limited in any of these ways and thus does seem open to objection on Article 51 grounds.

Another postconflict peace enforcement measure against Iraq merits comment. At the urging of the United States, the Security Council persisted into 1995 with its refusal to alleviate in any significant way the economic sanctions it had imposed on Iraq shortly after Iraq invaded Kuwait.[217] The Secretary-General rather clearly had this situation in mind, though he did not mention Iraq, when he pointed out in 1995 that "the purpose of sanctions is to modify the behaviour of a party that is threatening international peace and security and not to punish or otherwise exact retribution."[218]

Without going so far as to say that economic sanctions could never lawfully be used under chapter VII as a deterrent to renewed aggression after past aggression has been stopped, one could argue that a new resolution justifying that purpose should be adopted instead of simply continuing in force economic sanctions originally designed to modify ongoing belligerent behavior. The same considerations that call for a conscious Security Council determination under Article 39 when enforcement action is originally taken also call for a conscious determination that a new, prophylactic rationale justifies keeping the sanctions in force under postconflict circumstances. The fact that economic sanctions fall heavily on persons within the sanctioned territory who often have little or no influence over their government's decisions makes it all the more imperative that the Security Council consciously weigh costs and benefits, with clear reference to the purpose at hand, before imposing or continuing the sanctions.

Peacekeeping experience has made it apparent that in some cases peacekeeping measures can and should be adopted before any conflict breaks out. In An Agenda for Peace, the Secretary-General endorsed (among other things) preventive diplomacy: confidence-

[216] SC Res. 687, *supra* note 142, paras. 8–13, 30 ILM at 850–52.

[217] On the use of the "reverse veto" to prevent the Security Council from terminating or altering an enforcement regime it has imposed, see David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AJIL 552, 577–88 (1993).

[218] Boutros-Ghali, *supra* note 199, at 16.

building measures, fact-finding, early warning, preventive deployment and demilitarized zones in conflict-prone areas.[219] Some of these methods were not new. Nevertheless, they were presented with renewed emphasis, and a new Department of Political Affairs was created to handle the old, as well as the new, functions. The Secretary-General has reported, though, that preventive efforts have often been blocked by individual states that are reluctant to accept UN help.[220] As he has noted, when the potential conflict is within a single state, Article 2(7) may impose a legal barrier to preventive diplomacy in the absence of consent or acquiescence by the government.[221] This would be so if the diplomacy amounts to "intervention," as clearly would be some of the measures the Secretary-General contemplated.

Preventive intervention, without consent, would have to contend with Article 2(7) even if the Security Council finds a threat to the peace under chapter VII, unless the Council takes "enforcement measures." Those, of course, are the only measures within the express exception to the prohibition against intervening in domestic jurisdiction. If "enforcement measures" are the same as "enforcement action"—i.e., forcible action directed against the state or other political entity—it is hard to imagine the Security Council authorizing preventive diplomacy that would qualify for the exception in Article 2(7).[222]

V. Conclusion

In a formal sense, the Security Council in 1995 is not strikingly different from the Security Council in 1945. It has increased in size from its original eleven members to its current fifteen, with the prospect of another increase in the foreseeable future to reflect the demands for a body more representative of the full UN membership.[223] Among the permanent members, the seat expressly allocated to the Republic of China has been occupied since 1971 by the People's Republic of China, and the seat allocated to the Soviet Union has been occupied since December 1991 by Russia. A few new permanent members may be added if and when the current debate over Security Council reform is resolved. At this writing, it is still too early to predict what the debate will lead to.

As a practical matter, the Council over the years has gotten over such procedural hurdles as the double veto and the apparent Charter requirement that all permanent members actually vote in favor of a resolution if it is to be adopted. Abstentions are treated as though they were "concurring votes" within the meaning of Article 27(3). This device enabled the Council to act, at least on occasion, during the Cold War; it continues to be an essential procedural device for the Council to be effective.

The most serious legal or quasi-legal issues surrounding the post–Cold War Security Council have so far been of the sort an observer during the Cold War would hardly have dreamt could reach center stage. They have had much more to do with the possible abuse of power than with abdication of it. The Council has invoked chapter VII when the threat to international peace was not self-evident, and has for the most part omitted any justification for finding such a threat. It has invoked chapter VII to authorize member

[219] UN Doc. A/47/277–S/24111, at 7–10 (1992), *reprinted in* 31 ILM 953, 960–63.

[220] Boutros-Ghali, *supra* note 199, at 7–8.

[221] *Id.* at 8.

[222] In Expenses, 1962 ICJ Rep. at 177, the ICJ equated "preventive or enforcement measures" with "enforcement action" for purposes of UN Charter Article 11(2).

[223] The push for a more representative Security Council is not new. It dates all the way back to 1945 at San Francisco. *See* Doc. 881, III/3/46, 12 U.N.C.I.O. Docs. 502, 503–04 (1945). *See also* Luard, *supra* note 8, at 50–51; Russell & Muther, *supra* note 9, at 443–44, 646–54.

states to use armed force to preserve or restore peace, without relying on Article 42 and without any Article 43 agreements in place.

On the quasi-legislative front, the Council has established war crimes tribunals and in connection with them has issued directives to member states to cooperate. It has created a compensation commission to determine claims against an aggressor state. It has empowered the tribunals and the commission to apply norms that do not necessarily reflect preexisting international law.

The Council has made quasi-judicial determinations that go well beyond those inherent in its express authority to determine threats to the peace, breaches of the peace and acts of aggression. It has also gone beyond its readily implied authority to interpret and apply relevant Charter provisions or to interpret its own resolutions. It has done so despite its own nonjudicial character, and without procedural safeguards.

Peacekeeping was invented by the Council early on. It has no express or even clearly implied basis in the Charter. Nevertheless, it has been widely accepted by the membership, at least in its traditional form—peace observation and the creation of buffer zones when fighting has ceased. But it has gone much further than that on some occasions, not always with felicitous results.

Some of the innovations are more troubling in a legal sense than others. Particularly disturbing are the Council's tendency to invoke chapter VII without demonstrating what the threat to international peace is; the recent instances of quasi legislation establishing norms for particular situations that go beyond what international law already required, without any recognition by the Council—or at least without any acknowledgment—that it was doing so; and the making of quasi-judicial pronouncements regarding the conduct of designated states or entities. The mingling of traditional peacekeeping with chapter VII sanctions is perhaps less legally troublesome if there is a demonstrated threat to international peace, but the mix has proved volatile and not necessarily effective.

This is not to say, of course, that the Security Council should remain in 1995 as it was thought to be in 1945. Nor is it to say that the Council should prepare a legal brief or even cite a specific Charter article every time it wants to act. It is to say, though, that legal considerations are more than marginally relevant. They should be taken into account (and be shown to have been taken into account) when the Council decides what measures, if any, to adopt in any given situation.

Innovation, including legal innovation, would by no means be precluded from such a scene. Without the development of new legal justifications for its acts, the Council would hardly have even the prospect of fulfilling its primary responsibility—the maintenance of international peace and security. If the Council had to await the signing of Article 43 agreements before authorizing the use of force against an aggressor, the world would be an even more dangerous place than it is. If the Council had no authority to act under Article 24 except as specifically designated in chapters VI, VII, VIII and XII, it would be a less effective body than it is. If the United Nations had not invented and then refined peacekeeping, the international community would surely be the worse for it, recent setbacks notwithstanding.

The Security Council has not been the exclusive UN organ involved in peacekeeping, but it has played a large role. The results in Central America and in such states as Mozambique, Namibia and perhaps Cambodia appear at this writing to have been peacekeeping successes. The results could, of course, unravel, but the fact remains that the United Nations, and the Security Council in particular, has been a constructive participant in the peacekeeping and peace-making processes in those places.

The balance sheet for the Security Council's first fifty years defies attempts to audit it with precision. That is as true of the essentially legal balance sheet as it is of the essentially political one. The Charter continues to evolve, and so does the Security Council—not

to the complete satisfaction of all legal or political observers, but it evolves inevitably nonetheless.

The next fifty years will surely witness a Security Council constituted somewhat differently from the Council of 1995, performing some functions we see dimly or not at all today. Its effectiveness in maintaining peace will depend on a variety of factors. One of them is the extent to which governments and other important actors on the international scene have confidence in the sensitivity of the Council (in other words, in the sensitivity of the members that effectively control the Council) to essentially legal considerations having to do with the use of power and authority. The legal considerations are not chiseled in stone; as they expand and contract within manageable limits, they should channel Security Council decisions along a path widely regarded as legitimate—provided that members pay serious attention to them. It is a path worth taking.