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## The "Privatization" of Security Council Enforcement Action: A Threat to Multilateralism

John Quigley  
*Ohio State University*

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# THE "PRIVATIZATION" OF SECURITY COUNCIL ENFORCEMENT ACTION: A THREAT TO MULTILATERALISM

*John Quigley\**

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## INTRODUCTION

In the post-Cold War period, the United Nations Security Council has emerged from a side show of international politics to center stage. It has acted to repel aggression, to promote humanitarian efforts, and to enforce democracy. This flowering of activity holds the potential for achieving concerted international action to remedy situations involving great human misery.

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\* Professor of Law, Ohio State University. LL.B., Harvard Law School (1966); M.A., Harvard University (1966); A.B., Harvard College (1962).

The Security Council, however, has faltered in the manner in which it has approached this activity. The concept of the United Nations Charter is that action to protect the peace should be multilateral. Only thereby can assurance be provided that collective force will be used only in pursuit of commonly held objectives of the international community.

The multilateral character of collective force used under United Nations auspices is, according to Chapter VII of the Charter, to involve decision making by the Security Council on the need to initiate force, operational control by the Security Council over military units in the field, and power in the Security Council to determine when to cease hostilities. The Security Council has, however, failed to follow this approach. Instead, the Council has resorted to a formula for military action that eschews multilateralism. This formula involves authorizing or calling upon member states generally to act with the Security Council's blessing but without its control. This approach represents the antithesis of the mechanism provided by the Charter.

By turning the use of force over to member states, the Security Council has relinquished its Charter defined role. To analogize to government policy in a domestic context, what the Security Council has done is to follow the trend toward privatization. Instead of carrying out military actions itself, the Council hires the work out to individual states, typically to states that have expressed an interest in doing so and which, as a consequence, may have private aims to pursue.

The Security Council's approach has its supporters, indeed a majority of the membership of the Security Council in the years since 1990. The argument in favor of "privatization" is that it provides a practical method of achieving international action where true collective force is politically or financially impossible. The choice, argue proponents, is not between Security Council control and no Security Council control, but between action or no action. This Article explores the Security Council's resort to the privatization of armed force, and its implications for the future of collective force under United Nations auspices.

## I. THE PRACTICE OF AUTHORIZING USE OF FORCE

The Security Council has employed the technique of authorizing member states to use military force to deal with the conflict situations that have drawn the Council's attention in the post-Cold War period. The first instance was in 1990 in a resolution aimed against Iraq following its invasion of Kuwait. The Council's resolution read:

The Security Council,

Recalling and reaffirming its Resolutions 660 (1990), 661 (1990), 662 (1990), 664 (1990), 666 (1990), 667 (1990) 669 (1990), 670 (1990), 674 (1990) and 677 (1990) [a series of resolutions finding Iraq at fault and imposing economic and diplomatic sanctions],

Noting that, despite all efforts by the United Nations, Iraq refuses to comply with its obligation to implement Resolution 660 (1990) and subsequent resolutions, in flagrant contempt of the Council,

Mindful of its duties and responsibilities under the Charter of the United Nations for the maintenance and preservation of international peace and security,

Determined to secure full compliance with its decisions,

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

1. Demands that Iraq comply fully with Resolution 660 (1990) and all subsequent relevant resolutions and decides, while maintaining all its decisions, to allow Iraq one final opportunity, as a pause of good will, to do so;

2. Authorizes member states cooperating with the Government of Kuwait, unless Iraq on or before Jan. 15, 1991, fully implements, as set forth in paragraph 1 above, the foregoing resolutions, to use all necessary means to uphold and implement the Security Council Resolution 660 and all subsequent relevant Resolutions and to restore international peace and security in the area;

3. Requests all states to provide appropriate support for the actions undertaken in pursuance of paragraph 2 of this resolution; and

4. Requests the states concerned to keep the Council regularly informed on the progress of actions undertaken pursuant to paragraphs 2 and 3 of this resolution;

5. Decides to remain seized of the matter.<sup>1</sup>

The United States, which drafted the resolution, had let it be known in advance that it would act on the authorization if it were granted.<sup>2</sup>

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1. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg. at 1-2, U.N. Doc. S/RES/678 (1990), *reprinted in* 29 I.L.M. 1565 (1990) (underlining omitted) [hereinafter Iraq Resolution]. The resolution was adopted by 12 votes (Canada, Colombia, Ethiopia, Finland, France, Ivory Coast, Malaysia, Romania, U.S.S.R., U.K., U.S.A., Zaire) to two (Cuba, Yemen), with one abstention (China). *Provisional Verbatim Record*, U.N. SCOR, 45th Sess., 2963d mtg. at 64-65, U.N. Doc. S/PV.2963 (1990) [hereinafter SCOR, 2963d mtg.].

2. See, e.g., *Letter dated 29 November 1992 from the Secretary-General Addressed to the President of the Security Council*, U.N. SCOR, 47th Sess., at 5, U.N. Doc. S/24868 (1992) (stating,

In 1992, the Security Council, finding a threat to the peace in Bosnia, and again stating that it was acting under Chapter VII, "call[ed] upon States to take nationally or through regional agencies or arrangements all measures necessary to facilitate in coordination with the United Nations the delivery by relevant United Nations humanitarian organizations and others of humanitarian assistance to Sarajevo and wherever needed in other parts of Bosnia and Herzegovina."<sup>3</sup> The resolution asked states that might act under it to "report to the Secretary-General on measures they are taking."<sup>4</sup> No states had volunteered to act at the time the resolution was adopted.

Later in 1992, the Security Council found a threat to the peace in a situation of internal disorder and severe privation in Somalia. In its resolution, the Council,

acting under Chapter VII of the Charter of the United Nations, authorize[d] the Secretary General and Member States cooperating to implement the offer referred to in paragraph 8 above [an offer by the United States to establish a military force] to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia.<sup>5</sup>

In 1993, the Security Council adopted another resolution on Bosnia that authorized member states to act, although the term "authorize" did not appear. It

[d]ecide[d] that . . . Member States, acting nationally or through regional organizations or arrangements, may take, under the

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I received a visit from Mr. Lawrence Eagleburger, the Acting Secretary of State of the United States of America, who informed me that if the Security Council were to decide to authorize Member States to use forceful means to ensure the delivery of relief supplies to the people of Somalia, the United States would be ready to take the lead in organizing and commanding such an operation, in which a number of other Member States would also participate.).

3. S.C. Res. 770, U.N. SCOR, 47th Sess., 3106th mtg. at 2, U.N. Doc. S/RES/770 (1992) [hereinafter Bosnia Resolution]. The resolution was adopted by 12 votes (Austria, Belgium, Cape Verde, Ecuador, France, Hungary, Japan, Morocco, Russia, U.K., U.S.A., Venezuela) to zero, with three abstentions (China, India, Zimbabwe). *Provisional Verbatim Record*, U.N. SCOR, 47th Sess., 3106th mtg. at 26, U.N. Doc. S/PV.3106 (1992) [hereinafter SCOR, 3106th mtg.].

4. Bosnia Resolution, *supra* note 3, at 2.

5. S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg. at 3, U.N. Doc. S/RES/794 (1992) [hereinafter Somalia Resolution]. The resolution was adopted by 15 votes (Austria, Belgium, Cape Verde, China, Ecuador, France, Hungary, India, Japan, Morocco, Russia, U.K., U.S.A., Venezuela, Zimbabwe) to zero. *Provisional Verbatim Record*, U.N. SCOR, 47th Sess., 3145th mtg. at 27-28, U.N. Doc. S/PV.3145 (1992) [hereinafter SCOR, 3145th mtg.].

authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR, all necessary measures, through the use of air power, in and around the safe areas in the Republic of Bosnia and Herzegovina, to support UNPROFOR

As before, no states had offered to act.

In 1994, the Security Council found a threat to the peace in Rwanda, where internal disorder was accompanied by the widespread killing of civilians. The Security Council authorized an operation to protect refugees and to secure delivery of aid supplies. The Council:

2. [w]elcome[d] also the offer by Member States (S/1994/34) to cooperate with the Secretary-General in order to achieve the objectives of the United Nations in Rwanda through the establishment of a temporary operation under national command and control aimed at contributing, in an impartial way, to the security and protection of displaced persons, refugees and civilians at risk in Rwanda, on the understanding that the costs of implementing the offer will be borne by the Member States concerned

3. [a]cting under Chapter VII of the Charter of the United Nations, authorize[d] the Member States cooperating with the Secretary-General to conduct the operations referred to in paragraph 2 above using all necessary means to achieve the humanitarian objectives set out in sub-paragraphs 4(a) and (b) of resolution 925 (1994).<sup>6</sup>

The offer mentioned in paragraph 2 was from France.<sup>8</sup> The referenced resolution 925 was an earlier Council resolution that established a military force to protect civilians called the United Nations Assistance Mission for Rwanda (UNAMIR). Resolution 925, in its sub-paragraphs 4(a)

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6. S.C. Res. 836, U.N. SCOR, 48th Sess., 3228th mtg. at 3, U.N. Doc. S/RES/836 (1993) [hereinafter Bosnia Safe Areas Resolution]. The resolution was adopted by 13 votes (Brazil, Cape Verde, China, Djibouti, France, Hungary, Japan, Morocco, New Zealand, Russia, Spain, U.K., U.S.A.) to zero, with 2 abstentions (Pakistan, Venezuela). *Provisional Verbatim Record*, 48th Sess., 3228th mtg. at 41, U.N. Doc. S/PV.3228 (1993).

7. S.C. Res. 929, U.N. SCOR, 49th Sess., 3392d mtg. at 2, U.N. Doc. S/RES/929 (1994) [hereinafter Rwanda Resolution]. The resolution was adopted by 10 votes (Argentina, Czech Republic, Djibouti, France, Oman, Russia, Rwanda, Spain, U.K., U.S.A.) to zero, with 5 abstentions (Brazil, China, New Zealand, Nigeria, Pakistan). *Provisional Verbatim Record*, U.N. SCOR, 49th Sess., 3392d mtg. at 5, U.N. Doc. S/PV.3392 (1994) [hereinafter SCOR, 3392d mtg.].

8. See *Letter dated 19 June 1994 from the Secretary-General Addressed to the President of the Security Council*, U.N. SCOR, 49th Sess., at 4, U.N. Doc. S/1994/728 (1994) (describing France's offer to head a multinational force in Rwanda "subject to Security Council authorization"). See also SCOR, 3392d mtg., *supra* note 7, at 5 (Mr. Mérimée, France, explaining "the French initiative" that led to the Rwanda resolution).

and 4(b), stated the objectives as being to "(a) [c]ontribute to the security and protection of displaced persons, refugees and civilians at risk in Rwanda, including through the establishment and maintenance, where feasible, of secure humanitarian areas; and (b) [p]rovide security and support for the distribution of relief supplies and humanitarian relief operations."<sup>9</sup>

Also in 1994, the Security Council found a threat to the peace in Haiti after a refusal to surrender power by a military group that had removed Haiti's elected president from office. The Council adopted a resolution which stated that it was "acting under Chapter VII of the Charter" which

authorize[d] Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti, and to establish and maintain a secure and stable environment that will permit implementation of the Governors Island Agreement . . . .<sup>10</sup>

Haiti's military rulers had agreed to relinquish power under the Governors Island Agreement.<sup>11</sup> The United States had indicated an intent to act with Security Council authorization.<sup>12</sup>

Thus, the Security Council, having once used the authorization technique in the Iraq resolution, has resorted to it in subsequent situations where it deemed appropriate the use of military force. Despite its now frequent use of the technique, the Security Council has not specified, other than by its general references to Chapter VII, how the technique conforms to its powers. Since the Council possesses powers as

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9. S.C. Res. 925, U.N. SCOR, 49th Sess., 3338th mtg. at 3, U.N. Doc. S/RES/925 (1994). UNAMIR was instructed to use force only in self-defense "against persons or groups who threaten protected sites and populations, United Nations and other humanitarian personnel or the means of delivery and distribution of humanitarian relief." *Id.*

10. S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg. at 2, U.N. Doc. S/RES/940 (1994) [hereinafter *Haiti Resolution*]. The resolution was adopted by 12 votes (Argentina, Czech Republic, Djibouti, France, New Zealand, Nigeria, Oman, Pakistan, Russia, Spain, U.K., U.S.A.) to zero, with 2 abstentions (Brazil and China). *Provisional Verbatim Record*, U.N. SCOR, 49th Sess., 3413th mtg. at 12, U.N. Doc. S/PV.3413 (1994) [hereinafter *SCOR*, 3413th mtg.].

11. See *SCOR*, 3413th mtg., *supra* note 10, at 12 (Governors Island Agreement, dated July 3, 1993, discussed by U.S. Ambassador Madeleine Albright and indicating that military rulers of Haiti had failed, despite the agreement, to relinquish power).

12. See *SCOR*, 3413th mtg., *supra* note 10, at 13 (Mrs. Albright, United States, stating, "the United States is prepared to organize and lead such a force").

granted by the U.N. Charter, it is there that one must look to assess the legality of the authorization technique.

## II. SECURITY COUNCIL'S POWERS IN PEACE MAINTENANCE

Article 24 of the U.N. Charter confers the power of peace maintenance on the Security Council: "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."<sup>13</sup> One analyst finds the authorization technique to be in violation of this provision:

By virtue of Article 24, the members of the United Nations have conferred the responsibility for maintenance of the peace on the Security Council and not on any other entity that the Council may imagine. All the procedural rules governing the exercise of this responsibility would be circumvented if there were such a power of delegation.<sup>14</sup>

The procedural rules to which the author refers are found in Chapter VII, which spells out the role of the Security Council in peace maintenance. There, Article 39 gives the Council the power and the obligation to act to maintain the peace: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."<sup>15</sup>

If the Council finds that one of the events mentioned in Article 39 has occurred, Article 41 gives the Council the option of instituting measures not involving military force:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.<sup>16</sup>

13. U.N. CHARTER art. 24, ¶ 1.

14. Michael Bothe, *Les limites des pouvoirs du Conseil de sécurité*, in PEACE-KEEPING AND PEACE-BUILDING: THE DEVELOPMENT OF THE ROLE OF THE SECURITY COUNCIL 67, 73 (René-Jean Dupuy ed., 1993) [hereinafter PEACE-KEEPING] (translation by the author).

15. U.N. CHARTER art. 39.

16. *Id.* art. 41.



Article 42 gives the Council a second option, namely, military force:

Should the Security Council decide that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.<sup>17</sup>

Thus, the Security Council is to determine that there is a problem (Article 39). It may then make recommendations to the parties (Article 39) or proceed to enforcement measures. The latter may involve economic or diplomatic measures (Article 41) or military action (Article 42). No mention is made in Chapter VII of an alternative route to military action undertaken by individual member states with the Security Council's authorization.

The Security Council was to have at its disposal troops designated by member states to be on the ready to maintain international peace, pursuant to agreements between the Council and individual member states.<sup>18</sup> The Council was to have a Military Staff Committee, composed of the chiefs of staff of the five permanent members, to coordinate the activities of these troops and to direct military operations.<sup>19</sup>

No troops, however, have been designated by member states,<sup>20</sup> and the Military Staff Committee has existed in name only. After Iraq's invasion of Kuwait, Soviet President Mikhail Gorbachev suggested that the Military Staff Committee be activated to manage any possible action of the Council.<sup>21</sup> Indeed, after the Security Council called for a trade embargo against Iraq, the United States conferred with the other permanent members of the Council to explore whether the Military Staff

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17. *Id.* art. 42.

18. *Id.* art. 43. See Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), 1962 I.C.J. 150, 298 (July 20) [hereinafter *Certain Expenses*] (Bustamante, J., dissenting) (stating that if the Council is unable to get troops from member states, it may nonetheless carry out an enforcement action by assembling the troops in whatever way it can).

19. U.N. CHARTER art. 47.

20. See *Report of the Secretary-General on an Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*, U.N. SCOR, 47th Sess., U.N. Doc. S/24111 (1992) (urging states to conclude such agreements with the Security Council).

21. Frank J. Priol, *Crisis Breathes Life into a Moribund U.N. Panel*, N.Y. TIMES, Sept. 6, 1990, at A20. The Committee met to discuss the Council's economic sanctions. Paul Lewis, *Security Council's Military Panel Reviews Naval Efforts to Enforce Trade Embargo*, N.Y. TIMES, Sept. 19, 1990, at A11. See Paul Lewis, *Soviet Announces Shift on U.N. Staff Demanded by U.S.*, N.Y. TIMES, June 4, 1988, at A1 (proposal by Gorbachev to revive Military Staff Committee).

Committee might coordinate blockade activities to enforce the embargo.<sup>22</sup> Nothing, however, came of these proposals.<sup>23</sup>

The Iraq resolution created no role for the Military Staff Committee.<sup>24</sup> Iraq cited the absence of a role for the Military Staff Committee to argue the illegality of the authorization technique as it was being applied against it. Iraq said that "only collective action under the command and control of the Security Council, in co-ordination with the Military Staff Committee, can lead to the use of force against any country, and no individual Member State may be authorized to lynch a particular country for any reason."<sup>25</sup>

A former United Nations under secretary-general lent credence to the Iraqi position when he criticized the Iraq resolution for omitting a role for the Military Staff Committee: "Articles 46 and 47 clearly imply that enforcement measures under chapter VII would be under the control of the Council and its Military Staff Committee. . . , but no such control was provided for [in the Iraq resolution]."<sup>26</sup>

Prior to the resolutions adopted by the Security Council in the 1990s, the only instance of a resolution leading to the use of force was in connection with the situation in Korea in 1950. The legal basis for the Council's action there was not clear. Article 42 refers to the Council "deciding" to take measures. In its resolution on Korea, however, the Council instead "recommended" that states take action. Specifically, the Council "recommend[ed] that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area."<sup>27</sup> Some commentators considered the Council's use of the word "recommend" instead of "decide" as indicating that the Council purported to act under Article 39 alone, bypassing Article 42.<sup>28</sup> On this

22. Margaret Tutwiler, *State Department Regular Briefing*, Aug. 14, 1990, available in LEXIS, News library, Script File.

23. See S.C. Res. 665, U.N. SCOR, 45th Sess., 2938th mtg. at 1-2, U.N. Doc. S/RES/665 (1990).

24. *U.S. Policy in the Persian Gulf: Hearings Before the Senate Comm. on Foreign Relations*, 101st Cong., 2d Sess. 107, 157 (1990) (Secretary of State James Baker stating that "if this were done you begin getting into questions of whether or not there should be a U.N. command of forces, whether or not the Military Staff Committee should give directions to the multinational force, and questions of that kind, which we do not think, under these circumstances, are things that we ought to invite").

25. SCOR, 2963d mtg., *supra* note 1, at 21 (Mr. Al-Anbari, Iraq).

26. Brian Urquhart, *Learning from the Gulf*, N.Y. REV. BOOKS, Mar. 7, 1991, at 34.

27. S.C. Res. 84, U.N. SCOR, 5th Sess., 474th mtg. at 5, U.N. Doc. S/INF/5/Rev.1 (1950).

28. LELAND M. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 315 (1969).

analysis, the Council construed "recommendations" in Article 39 as referring not only to recommendations to the parties to a dispute, but also to the United Nations membership to participate in military action.

It was on this basis that Hans Kelsen criticized the Security Council's Korea resolution as improper. Kelsen did not find in Article 39 a power to recommend what amounts to enforcement action:

[I]t is doubtful whether a recommendation of an enforcement action corresponds to the intention of those who framed the Charter . . . . If the Security Council, after having determined under Article 39 the existence of a threat to, or breach of, the peace, is of the opinion that enforcement measures are necessary to maintain or restore international peace, the Council must take these measures itself by acting under Article 41 or 42 . . . .<sup>29</sup>

The propriety of Kelsen's reading of the Charter is seen if Article 39 is read *in pari materiae* with Article 36, which also mentions recommendations. Article 36 is found in Chapter VI, which deals with interstate disputes not involving a threat to the peace, breach of the peace, or aggression. In dealing with such lesser disputes, the Council may, according to Article 36, "recommend appropriate procedures or methods of adjustment" to the parties involved. The "recommendation" mentioned in Article 39 is an analogue for the situation in which there is a threat to the peace, breach of the peace, or aggression. The Council devises a "recommendation" to the parties for a peaceful settlement of their conflict.<sup>30</sup>

The committee that drafted Article 39 explained that by "recommendations" it intended "to show that the action of the Council so far as it relates to the peaceful settlement of a dispute or to situations giving rise to a threat of war, a breach of the peace, or aggression, should be considered as governed by the provisions contained in Section A."<sup>31</sup> "Section A" became Chapter VI in the final text of the Charter. Chapter VI, as indicated, provides procedures for the Security Council to use in handling disputes that do not amount to a threat to the peace, breach of

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29. HANS KELSEN, *THE LAW OF THE UNITED NATIONS* 932 (1950). See also Erik Suy, *Peace-Keeping Operations*, in *HANDBOOK ON INTERNATIONAL ORGANIZATIONS* 379, 381 (René-Jean Dupuy ed., 1988) ("The Organization endeavoured in this case [Korea] to preserve its military enforcement capability by means which were not strictly in accordance with the explicit provisions for that purpose in the Charter. The highly sensitive issues raised by this venture caused this type of experiment not to be repeated, however.").

30. See Burns H. Weston, *Security Council Resolution 678 and Persian Gulf Decision-Making: Precarious Legitimacy*, 85 AM. J. INT'L L. 516, 521 (1991) (stating that Article 39 recommendations involve recommendations under chapter VI for peaceful resolution).

31. Doc. 943, III/5, 11 U.N.C.I.O. Docs. 51 (1945).

the peace, or aggression. Whether or not the Council makes recommendations to the parties when their situation amounts to a threat to the peace or breach of the peace or aggression, Chapter VI should apply. As used in Chapter VI, "recommendations" clearly means suggestions addressed to the parties, and this history of the text indicates that it has the same meaning in Chapter VII.

### III. REASONS WHY THE AUTHORIZATION TECHNIQUE HAS BEEN EMPLOYED

The authorization approach is the product of a history of unwillingness or the inability of the members of the United Nations to establish the kind of security apparatus contemplated by the U.N. Charter. The primary justification for the authorization technique from a policy standpoint is that it is a second-best, but still viable method of proceeding in a crisis situation, given that the Security Council has no functioning Military Staff Committee, and given that some states are unwilling to turn troops over to a United Nations command. The authorization approach is better than no action at all.

From a legal standpoint, the departure from the Charter, involved in the authorization technique, can be rationalized on the grounds that the Charter has been used by U.N. organs as a flexible document, rather than one that must be confined strictly to its wording. The General Assembly, for example, devised a procedure for organizing military operations that was arguably in violation of the Charter, in response to the difficulty of gaining Security Council action because of vetoes cast by a permanent member.<sup>32</sup> When some Security Council permanent members in voting on resolutions evidenced a desire to abstain, the Council deemed such resolutions to be adopted, even though the language of the Charter requires permanent members to cast an affirmative vote.<sup>33</sup> Even more significantly, the Council developed a practice of inserting military forces in what came to be called a peacekeeping capacity, with the consent of the host state, despite the fact that the Charter gives it no power to do so.<sup>34</sup>

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32. *Uniting for Peace*, G.A. Res. 377(v), U.N. GAOR, 5th Sess., Supp. No. 20 at 10, U.N. Doc. A/1775 (1950).

33. See, e.g., Advisory Opinion, *Competence of the General Assembly for the Admission of a State to the United Nations*, 1950 I.C.J. 3, 28 (Mar. 3) [hereinafter *Competence of General Assembly*] (Azevedo, J., dissenting). See also John Quigley, *The United States and the United Nations in the Persian Gulf War: New Order or Disorder?* 25 CORNELL J. INT'L L. 1, 28-32 (1992).

34. See generally ROSALYN HIGGINS, 4 UNITED NATIONS PEACEKEEPING 1946-79 (1981).

Opinions of some judges of the International Court of Justice have supported the prerogative of the principal U.N. organs to apply the Charter expansively. Judge Azevedo has written: "[T]he interpretation of the San Francisco instruments will always have to present a teleological character if they are to meet the requirements of world peace. . . . The Charter is a means and not an end."<sup>35</sup> Judge Alvarez has said: "[A]n institution, once established, acquires a life of its own, independent of the elements which have given birth to it, and it must develop, not in accordance with the views of those who created it, but in accordance with the requirements of international life."<sup>36</sup> Elsewhere Judge Alvarez has written: "[I]t is possible, by way of interpretation, to attribute to an institution rights which it does not possess according to the provisions by which it was created, provided that these rights are in harmony with the nature and objects of the said institution."<sup>37</sup> While most judges of the Court have not made such strong statements about flexibility in construing the Charter, the Court has not been overly demanding.

If one looks to Security Council action as precedent in assessing the authorization technique, one finds that the Council has not kept to the strict letter of the Charter — the Korea resolution being the prime example.<sup>38</sup> Viewed in light of this history of playing fast and loose with the Charter, the departure from Charter language involved in the authorization technique is less shocking.

The Council is a political, not a judicial body. In most war-and-peace situations, a member state seeking the adoption of a resolution may have to compromise to gain acceptance by the permanent members and by a sufficient number of non-permanent members, and this necessity may lead to departures from the Charter-mandated procedures. It may be unrealistic to expect the Council to abide by the Charter.

Moreover, it can be argued that legitimacy is less significant than success, and that if the two are at odds, the latter is to be preferred. The United Nations is criticized for failing to act in situations that call for peace enforcement. If the major powers are unwilling to have the Council take Article 42 action, and if the only route to action is via the authorization technique, then, according to this view, the United Nations

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35. *Competence of General Assembly*, *supra* note 33, at 23 (Azevedo, J., dissenting).

36. Advisory Opinion, *Conditions of Admission of a State to Membership in the United Nations*, 1948 I.C.J. 57, 68 (May 28) [hereinafter *Conditions of Admission*] (Alvarez, J., individual opinion).

37. *Competence of General Assembly*, *supra* note 33, at 18 (Alvarez, J., dissenting).

38. See *supra* text accompanying note 27.

should use the authorization technique; and if the action succeeds, the criticism over process should be lost in the praise of a successful outcome.<sup>39</sup>

Despite these considerations in its favor, the authorization technique comes at considerable cost to the integrity of the process of peace maintenance. It is the legal and practical hazards of the technique that must now be addressed.

#### IV. SECURITY COUNCIL OBLIGATION TO INITIATE MILITARY ACTION

One aspect of the procedures established by Chapter VII is that the Security Council, rather than individual member states, decides when to use military force.<sup>40</sup> This concept, indeed, was the innovation in the U.N. Charter over the Covenant of the League of Nations. In cases of aggression, the League's Covenant gave the League's Council only a power to recommend measures to member states. If the Council recommended a measure and a state acted on the recommendation, the decision was that of the state, not of the Council.<sup>41</sup>

The U.N. Charter deprived states of the power to determine unilaterally when to use force by transferring that power to the Security Council.<sup>42</sup> The authorization technique arguably turns the Charter system on its head, in effect reverting to the League of Nations approach.<sup>43</sup>

In the early history of the United Nations, the only Security Council action of an enforcement type, involving the dispatch of military units, was in Korea in 1950. There the Council delegated considerable authority to one state — the United States — but it decided itself that military

39. See Richard Falk, *The United Nations and the Rule of Law*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 611, 613 n.4 (1994) (author presenting, without endorsing, this view). See also David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552, 554 n.8 (1993) (stating that Council members appear more concerned about whether the Council can act than about whether it acts in conformity with the Charter); *id.* at 557-58 (raising the question whether the Security Council can withstand "occasional perceptions of illegitimacy" if it is generally effective in its work).

40. Louis Cavare, *Les sanctions dans le Pacte de la S.D.N. et dans la Charte des N.U.*, 54 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 647, 660 (1950).

41. *Id.* at 650. See LEAGUE OF NATIONS COVENANT art. 16, ¶ 2; GOODRICH ET AL., *supra* note 28, at 315.

42. Cavare, *supra* note 40, at 648. See GOODRICH ET AL., *supra* note 28, at 315.

43. SCOR, 2963d mtg., *supra* note 1, at 58 (Mr. Malmierca Peoli, Cuba, stating that the Iraq resolution "violates the Charter of the United Nations by authorizing some states to use military force in total disregard of the procedures established by the Charter").

action should be taken immediately. Furthermore, the Council itself created a command structure to function under the U.N. flag.<sup>44</sup>

Because of the Security Council's Charter-mandated role in deciding when force should be initiated, not all of the states that voted for the Iraq resolution, with its "authorization" language, were sure that the resolution constituted a final authorization to states. Malaysia, which as a Council member voted in favor of the Iraq resolution, said at the time of the vote that an additional resolution would be needed: "Any proposed use of force must be brought before the Council for its prior approval, in accordance with the specific provisions of Chapter VII of the Charter. We regret that this point is not clearly reflected in this resolution, a precedent that may not bode well for the future."<sup>45</sup> Malaysia based its interpretation on the view that under Chapter VII it is the Security Council alone that has the authority to initiate military force. There is considerable force in Malaysia's position that the Council ignored its responsibility by delegating so much power to member states. One analyst has written in this regard, that "coercive actions contemplated by Article 42 must be actions led under the effective direction of the Security Council and not actions undertaken by given states members on their own on the basis of their own decision, enjoying a kind of global blessing from the Security Council."<sup>46</sup>

The formulation that the Security Council has used in issuing authorizations makes it clear that the states are left to decide whether to take military action. Starting with the Iraq resolution, the Council has not mentioned military force as the action it was authorizing, but speaks rather of "all necessary means" or words to that effect.<sup>47</sup> This formulation leaves it to the member states to decide whether military force, or some measures short of it, might bring about the desired result.<sup>48</sup> Thus, the decision to use military force is being left to the member states; if they decide to use it, they would be doing so with the Security Council's approval.

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44. S.C. Res. 84, U.N. SCOR, 5th Sess., 474th mtg. at 5, U.N. Doc. S/INF/Rev.1 (1950).

45. SCOR, 2963d mtg., *supra* note 1, at 76 (statement of Mr. Al-Anbari, Iraq).

46. Bothe, *supra* note 14, at 74 (translation by author).

47. The only exception is the Bosnia Safe Areas Resolution, *supra* note 6, which mentions air power.

48. Council members understood "all necessary means" to include military action. SCOR, 2963d mtg., *supra* note 1, at 62 (Mr. Qian Qichen, China, stating that "all necessary means . . . in essence, permits the use of military action"); *id.* at 71 (Mr. Clark, Canada, stating that the "means" in the Iraq resolution "include the use of force"); *id.* at 81-82 (Mr. Hurd, U.K., referring to the resolution as "the military option"); *id.* at 103 (Mr. Baker, U.S.A., stating that the "[Iraq] resolution is very clear. The words authorize the use of force"). See also BOB WOODWARD, *THE COMMANDERS* 334 (1991) (reporting that the United States had wanted an explicit reference to military force, but that the U.S.S.R. objected, and the United States substituted "all necessary means").

It is doubtful, however, that the Security Council may, consistent with the Charter, leave a decision to take military action to the discretion of whichever member states are so inclined. Under Article 42, it will be recalled, the Security Council "may take such action . . . as may be necessary to maintain or restore international peace and security."<sup>49</sup> This language suggests that it is the Council that takes the action, with the Council bearing responsibility for the decision to initiate military action. The forces themselves, to be sure, are the forces of member states. Yet, under Article 42, it is the Council, not individual member states, that makes the decision to act.

#### V. UNCERTAINTY THAT ANY ACTION WILL ENSUE

One hazard of the authorization technique is that states may not act on it. If the Security Council decides that military action is required and "authorizes" member states to undertake it, the member states may determine that, for whatever reason, they will not act. Thus, even though the Council would have determined force to be necessary, force would not be undertaken.

This potential scenario flies in the face of the fact that the Security Council is supposed to act, under Chapter VII, if it finds a threat to the peace. Article 39 obliges the Council to counter a threat to the peace, stating that once the Council decides that the peace is jeopardized, it "shall make recommendations, or decide what measures shall be taken . . . ."<sup>50</sup> However, with the authorization technique, there is no assurance that any action will follow. In most of the instances of use of the authorization technique, at least one state was prepared in advance to act. Nonetheless, action still depended on the will of that state (or states), and there was no assurance that this state (or states) might not change its mind.

The Haiti episode revealed the possibility that the states contemplating intervention under the authorization may waver in their determination. For the United States, the primary state willing to intervene in Haiti, domestic political factors intruded, leaving in doubt for a time whether the United States would act. One reason for United States willingness to intervene in Haiti was the large numbers of Haitians sailing to the United States in small boats seeking asylum. After the Haiti resolution was adopted, that flow of refugees subsided, and in their

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49. U.N. CHARTER art. 42, ¶ 1.

50. U.N. CHARTER art. 39, ¶ 1.



place came large numbers of refugees from Cuba. This change in the refugee situation diminished domestic political support for intervention.<sup>51</sup>

Another factor which lessened the United States' determination was that the Rwanda crisis peaked at almost exactly the same time, and the uncertainty of success there gave the United States pause about attempting to use military force in Haiti.<sup>52</sup> In the final analysis the United States acted, but the uncertainty that reigned in the weeks following the Security Council's adoption of the resolution pointed out quite clearly the possibility that the authorization technique might lead nowhere.

## VI. SECURITY COUNCIL OBLIGATION TO CONTROL MILITARY ACTION

Another problematic aspect of the authorization technique is that the Security Council does not control military action, once underway.<sup>53</sup> According to the Charter, the Council must not only make the decision to act but must define military objectives and decide when to terminate hostilities.<sup>54</sup> As one author commented in criticizing the authorization technique in the Iraq resolution, "the UN had an obligation to control the definition of war goals, the means chosen to achieve them and to use its authority to impose a ceasefire."<sup>55</sup>

The Iraq resolution said only that states acting under it should keep the Council regularly informed on the progress of actions.<sup>56</sup> Yemen, a Security Council member at the time, objected that, "the Security Council will have no control over those forces, which will fly their own national flags. Furthermore, the command of those forces will have nothing to do with the United Nations, although their actions will have been authorized by the Security Council."<sup>57</sup> Malaysia, another Security

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51. Eric Schmitt, *U.S. Move on Haiti May Be Weeks Away*, N.Y. TIMES, Aug. 1, 1994, at A6.

52. *Id.* at A6 (quoting an unnamed senior military planner: "Wait and see what happens in Rwanda. . . . If that situation settles down in the next couple of weeks, the focus could turn back to Haiti.").

53. Weston, *supra* note 30, at 526-27 (saying that the lack of Security Council control under the Iraq resolution was "not what the UN founders and Charter drafters had in mind.").

54. Mary E. O'Connell, *Enforcing the Prohibition on the Use of Force: The U.N.'s Response to Iraq's Invasion of Kuwait*, 15 S. ILL. U. L.J. 453, 465 (1991) (stating, "[t]he Charter calls for the U.N. itself, not a small group of members, to do the countering").

55. Richard Falk, *Questioning the UN Mandate in the Gulf*, IFDA DOSSIER, Apr.-June 1991, at 81, 82. See also Falk, *supra* note 39, at 625 (stating, "[t]he mandate to wage war [against Iraq] delegated almost unlimited discretion to the American-led coalition"); Weston, *supra* note 30, at 518, 522 (criticizing the Iraq resolution for a lack of Security Council control).

56. Iraq Resolution, *supra* note 1, at 2.

57. SCOR, 2963d mtg., *supra* note 1, at 33 (Mr. Al-Ashtal, Yemen).

Council member at the time of the Iraq resolution, understood that the reporting requirement gave the Security Council little role in directing the military action. Its delegate said: "When the United Nations Security Council provides the authorization for countries to use force, these countries are fully accountable for their actions to the Council through a clear system of reporting and accountability, which is not adequately covered in resolution 678 (1990)."<sup>58</sup>

On the Bosnia resolution, Zimbabwe and India abstained because the resolution did not provide for Security Council control over the military action states might take.<sup>59</sup> India said:

So long as it is the Security Council which is authorizing a particular course of action, it should be with due respect to Charter provisions. It follows therefore, that, if use of force is to be authorized under chapter VII, the provisions of that Chapter should be respected.

It is the view of my delegation that, in the present instance, it would be highly advisable — indeed, imperative — that the operation, which could involve the use of force, should be and should always remain under the command and control of the United Nations.<sup>60</sup>

Zimbabwe explained, in a similar vein, that it was

of the view that any necessary measures taken or arrangements made to deal with this crisis have to be undertaken as a collective enforcement measure under the full control of and with full accountability to the United Nations through the Security Council, as provided for by the Charter of the United Nations.<sup>61</sup>

Zimbabwe was concerned about the possible consequences of an absence of Security Council control. It complained that the then draft Bosnia resolution

seeks to authorize unidentified States, individually or collectively, to take all measures necessary to facilitate the delivery of humanitarian assistance to Sarajevo and, wherever needed, in other parts of Bosnia and Herzegovina. In other words, the draft resolution seeks to empower any State which feels able and so inclined to use

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58. SCOR, 2963d mtg., *supra* note 1, at 76 (Mr. Abu Hassan, Malaysia).

59. Paul Lewis, *U.N. Council Votes to Support Force in Assisting Bosnia*, N.Y. TIMES, Aug. 14, 1992, at A1.

60. SCOR, 3106th mtg., *supra* note 3, at 12 (Mr. Gharekhan, India).

61. *Id.* at 16 (Mr. Mumbengegwi, Zimbabwe).

military force in any part of Bosnia and Herzegovina in the name of the United Nations but without any control from or accountability to the United Nations. What is even more disturbing to my delegation is the fact that it is left entirely to the individual States so intervening to define the scope of the said humanitarian operation. My delegation has serious difficulties in accepting a proposition that calls upon the Security Council to authorize unidentified States to use military force after which the Council is likely to assume the role of helpless spectator in a military operation it has so authorized.<sup>62</sup>

Zimbabwe was concerned in particular that if the action was taken by individual states, rather than by the Security Council, these states might be viewed as being partisan to one side or another. It spoke of

the danger that any individual State or indeed any group of States undertaking a humanitarian mission backed by military force would be seen by one or the other of the warring groups as having intervened to support the political objectives of its opponents. Such a perception would clearly intensify hostilities and lead to even more suffering for the innocent civilians than is currently being experienced.<sup>63</sup>

One danger in an absence of Security Council control is that the states taking action may exceed the level of force the Security Council authorized. The Iraq resolution, said Malaysia, anticipating this problem, "does not provide a blank cheque for excessive and indiscriminate use of force,"<sup>64</sup> and cautioned "against any action purportedly taken under this resolution that would lead to the virtual destruction of Iraq."<sup>65</sup>

In the later resolutions using the authorization technique, the Security Council involved the Secretary-General in an attempt to provide greater control. The Somalia, Rwanda, and Haiti resolutions were adopted on the basis of a report and recommendation of the Secretary-General; and the Secretary-General was to play a role in implementing the resolution.<sup>66</sup> This approach, though itself questionable for giving the

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62. *Id.* at 16-17.

63. *Id.* at 17.

64. SCOR, 2963d mtg., *supra* note 1, at 76-77 (Mr. Abu Hassan, Malaysia).

65. *Id.*

66. See *Letter dated 29 November 1992 from the Secretary-General Addressed to the President of the Security Council*, U.N. SCOR, 47th Sess., U.N. Doc. S/24868 (1992) (regarding Somalia); *Letter dated 19 June 1994 from the Secretary-General Addressed to the President of the Security Council*, U.N. SCOR, 47th Sess., U.N. Doc. S/1994/728 (1994) (regarding Rwanda); *Report of the Secretary-General on the United Nations Mission in Haiti*, U.N. SCOR, 47th Sess., U.N. Doc. S/1994/828 (1994) [hereinafter *Report on Haiti*] (regarding Haiti).

Secretary-General a role not directly contemplated by the Charter, constituted an improvement over the earlier approach in terms of control.

The Somalia operation was the only one of this series of actions in which the Security Council resolution gained a unanimous vote. The reason for the unanimity was that the resolution included control mechanisms.<sup>67</sup> Zimbabwe, which had abstained on the Bosnia resolution,<sup>68</sup> said that it supported the Somalia resolution because of its provisions aimed at maintaining United Nations control. It said that the resolution placed the Secretary-General of the United Nations at the controlling center of the operation.<sup>69</sup>

The Secretary-General was to consult with the participating states about their efforts<sup>70</sup> and to arrange for "the unified command and control of the forces involved."<sup>71</sup> An *ad hoc* commission of Security Council members was to report back to the Council on what the participating states were doing.<sup>72</sup> Both the Secretary-General and the participating states were to report to the Security Council "on a regular basis."<sup>73</sup>

Despite the inclusion of these mechanisms, several members of the Security Council supported the Somalia resolution only reluctantly. India

67. See, e.g., SCOR, 3145th mtg., *supra* note 5, at 32 (Mr. Hohenfellner, Austria, citing

the provisions regarding the Secretary-General's role in the use of all necessary means and in making the necessary arrangements for the unified command and control of the forces involved, and to the appointment of an *ad hoc* commission of the Council, the creation of a liaison staff, and improved reporting requirements,

and expressing the view that the Council had in this respect "come a long way" since the Iraq resolution); *id.* at 24 (Mr. Noterdaeme, Belgium, stating,

the draft resolution makes it quite clear that the operation in Somalia will be under the political control of the United Nations. The coordinating machinery to be set up between the States participating in the operation and the Secretary-General, and the decision-making powers granted to the Council concerning the duration of the operation, are, in my delegation's opinion, key elements in this draft resolution.).

68. See Bosnia Resolution, *supra* note 3.

69. SCOR, 3145th mtg., *supra* note 5, at 7-10 (Mr. Mumbengegwi, Zimbabwe, stating further,

Zimbabwe attaches a lot of importance to the idea that in any international enforcement action the United Nations must define the mandate; the United Nations must monitor and supervise its implementation; and the United Nations must determine when the mandate has been fulfilled. My delegation is happy that the draft resolution before us meets these very important requirements).

70. Somalia Resolution, *supra* note 5, at 3.

71. *Id.* at 4. This was done under the name UNITAF (Unified Task Force).

72. *Id.*

73. *Id.*

told the Council: "The present actions should not, however, set a precedent for the future. We would expect that, should situations arise in the future requiring action under Chapter VII, it would be carried out in full conformity with the Charter provisions . . . ." <sup>74</sup> Belgium, another Council member, expressed a similar preference: "Belgium would have preferred this to be a purely United Nations operation . . . ." <sup>75</sup> China said: "[I]n spite of the fact that the Secretary-General has been given some authorization, the draft resolution has taken the form of authorizing certain countries to take military actions, which may adversely affect the collective role of the United Nations. We hereby express our reservations on this." <sup>76</sup>

With the Rwanda operation, Nigeria expressed concern over a lack of Security Council control. Nigeria thought that the insertion of new forces should be carried out under the United Nations Assistance Mission for Rwanda (UNAMIR), already in place in Rwanda. <sup>77</sup>

With the Haiti operation, China abstained, listing, among other concerns, that "[t]he practice of the Council's authorizing certain Member States to use force is even more disconcerting because this would obviously create a dangerous precedent." <sup>78</sup> Pakistan, which, unlike China, voted in favor of the Haiti resolution, said that a U.N.-led operation would have been a "preferred course of action." <sup>79</sup> New Zealand, also voting in favor, expressed the same reservation: "New Zealand's preference has always been and will always be for collective security to be undertaken by the United Nations itself. That provides the assurance that small countries seek from the United Nations when Chapter VII is being invoked." <sup>80</sup>

The Secretary-General had told the Council that a U.N.-led operation in Haiti would be beyond the organization's financial capability. <sup>81</sup> Noting the Secretary-General's point that use of the authorization technique would skirt this financial problem, <sup>82</sup> New Zealand continued:

[U]nless absolutely exceptional circumstances exist, the United Nations itself should assume such responsibilities [for an opera-

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74. SCOR, 3145th mtg., *supra* note 5, at 51 (Mr. Gharekhan, India).

75. *Id.* at 24 (Mr. Noterdaeme, Belgium).

76. *Id.* at 17 (Mr. Li Daoyu, China).

77. SCOR, 3392d mtg., *supra* note 7, at 10.

78. SCOR, 3413th mtg., *supra* note 10, at 12 (Mr. Li Zhaoxing, China).

79. *Id.* at 26 (Mr. Marker, Pakistan).

80. *Id.* at 21 (Mr. Keating, New Zealand).

81. *Report on Haiti*, *supra* note 66, at 6.

82. *Id.* at 6.

tion]. In this regard, we have to record also that we do not agree with the Secretary-General's conclusion that this was not feasible in the case of Haiti. The resource and management difficulties that the United Nations faces are undeniable, but we believe they should be seen as challenges to be overcome, not as excuses for throwing in the towel and abrogating the responsibilities for international-dispute settlement under United Nations auspices which New Zealand and other Governments expect this Organization to fulfil.<sup>83</sup>

The Council can, of course, at any time adopt a new resolution to deal with a situation as it develops. However, this hands-off approach allows the Council to control the action only if it finds major problems. Moreover, such a new resolution would need a qualified majority (of eleven) required for all Security Council resolutions, including the concurring votes of all the permanent members.<sup>84</sup> If, as typically would be the case, one or more permanent members were participating in the action, and if those permanent members thought the action was being pursued appropriately, the Council would be unable to adopt the new resolution.

This possibility became reality with the implementation of the Iraq resolution. After serious bombing of Iraq, peace efforts pursued by various parties held the prospect that Iraq might withdraw from Kuwait obviating the need for further military action. Faced with pressure to desist, the United States and the United Kingdom reportedly threatened to veto any proposed draft resolution that would have revoked the authorization to use force against Iraq.<sup>85</sup>

## VII. COLLECTIVE SELF-DEFENSE AS A BASIS FOR THE AUTHORIZATION TECHNIQUE

When the authorization technique is used to counter an armed attack by one state against another, an argument has been made that the authorization technique is valid on the grounds that Article 42 is not implicated. In this situation, it is argued, use of the authorization technique can be based on another article in Chapter VII, namely, Article 51. Appearing as the final article in Chapter VII, Article 51 permits states to use force in defense of other states that have been attacked, under a concept called "collective self-defense," until the Security Council addresses the

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83. *Id.* at 22.

84. U.N. CHARTER art. 27, ¶ 3.

85. Caron, *supra* note 39, at 577.

matter.<sup>86</sup> This argument can be made in cases like that of Iraq's invasion of Kuwait, although it has no relevance to situations of an internal character, like that in Haiti.

As applied to cases of an external armed attack, the argument is that the other state or states have a right to act under Article 51, and the Security Council by "authorizing" them is doing nothing more than acknowledging their already existing right to act. As one analyst put the matter in connection with the Iraq situation, the Iraq resolution merely "served the political purpose of underlining the general support of the United Nations for the military measures" being taken by the states already aiding Kuwait.<sup>87</sup>

The difficulty with this approach is that Article 51 reads as an exception to the powers granted to the Security Council in Chapter VII. The purpose of Article 51 is to make it clear that until the Security Council deals with a matter, a state subjected to armed attack may defend itself — calling on other states, if necessary, for assistance. In addition, Article 51 ensures this right of defense for the situation in which the Security Council might not be able to act because of a veto by a permanent member.<sup>88</sup>

There is no indication, however, in the text or history of Article 51, that it was anticipated that the Security Council might refer to the rights of other states as a method of acting itself. The obligation laid on the Security Council in Article 39 is to deal with threats to the peace. It would not seem that the Security Council can discharge this obligation by allowing individual states to take action for the reasons already indicated — the Council would have no control over either the initiation of use of force or its subsequent course.

### VIII. SELF-INTEREST OF THE STATES THAT TAKE ACTION

A major risk of the authorization technique is that states with their own agendas may respond to the call to act. Typically, the Council has used authorization where it already has an offer from a particular state. Bosnia has been the only situation in which no state had indicated an intent to act. Where a particular state is proposing the action and indi-

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86. Although the term "collective self-defense" does not, strictly speaking, encompass defense of one state by another, the term as used in Article 51 has generally been construed to permit such. GOODRICH ET AL., *supra* note 28, at 348. See Weston, *supra* note 30, at 520; Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1639 (1984).

87. Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 460 (1991).

88. GOODRICH ET AL., *supra* note 28, at 345.

cates its intention to act on the Security Council's authorization, suspicion arises about its self-interest.

The target state, in any event, no matter how egregious its conduct, finds a ready argument against the propriety of the proposed action. When the Security Council adopted the Iraq resolution, Iraq claimed the United States proposed the resolution as a cover for its aggressive and imperialist policies in the region.<sup>89</sup> The charge was all the more compelling at the time because of the United States' predominance as the only remaining superpower. Impugning the resolution and the reasons for its adoption, Iraq said: "[T]he United States totally dominates the Security Council and its arbitrary and biased procedures."<sup>90</sup> Shortly after the vote on the Iraq resolution, the United States cut economic aid to Council member Yemen, in apparent retaliation for Yemen's negative vote on the resolution.<sup>91</sup> This action reinforced the impression that the United States was acting out of self-interest.<sup>92</sup>

In Rwanda, France had a history of involvement that cast doubt on its good faith in taking military action. France had backed the Hutu-led Rwandan government in its civil war against the Tutsi-led Rwanda Patriotic Front.<sup>93</sup> France was alleged to favor the Hutus because they used French as their second language, while the Tutsis used English.<sup>94</sup> France was criticized for failing to denounce major massacres of Tutsis

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89. SCOR, 2963d mtg., *supra* note 1, at 23 (Mr. Al-Anbari, Iraq). See also Falk, *supra* note 39, at 626 (stating that there was "created the impression that the Security Council lacked autonomy, and was appropriated by the United States to give a global community 'cover' to what was in essence a traditional exercise in great power diplomacy").

90. SCOR, 2963d mtg., *supra* note 1, at 23 (Mr. Al-Anbari, Iraq).

91. Judith Miller, *Kuwaiti Envoy Says Baker Vowed 'No Concessions' to Iraqis*, N.Y. TIMES, Dec. 5, 1990, at A22 (Kuwaiti ambassador to U.S. quoted as saying that Secretary Baker told him U.S. would cut aid to Yemen because of its vote). See Rick Atkinson & Barton Gellman, *Iraq Trying to Shelter Jets in Iran, U.S. Says*, WASH. POST, Jan. 29, 1991, at A1 (State Department informed Congress it would cut aid to Yemen from a planned \$22 million to under \$3 million; State Department did not deny published report that after the vote on the Iraq resolution a U.S. diplomat told Yemen Ambassador Al-Ashtal, "that will be the most expensive vote you will have cast").

92. 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, 141 (1991).

93. Philippe Leymarie, *Tardif "Réveil Humanitaire": Litigieuse intervention française au Rwanda*, LE MONDE DIPLOMATIQUE, July 1994, at 3 (questioning whether France was entering Rwanda with humanitarian intent, given the fact that it had armed and trained the government forces that were being accused of genocide against the civilian population of Rwanda).

94. Bill Bowring, *The "Droit et Devoir d'Ingerence": A Timely New Remedy for Africa?*, 7 AFRICAN J. INT'L & COMP. L. 493, 506 (1995); Peter Smerdon, *International Community Failed Dismally in Rwanda*, Reuters World Service, Sept. 29, 1994, available in LEXIS, News library, Wires File.



by Hutus.<sup>95</sup> French arms shipments to the Rwandan government continued as the massacres were underway.<sup>96</sup>

When the Rwanda resolution was adopted, the civil war still raged, and the Tutsi rebel force announced its objection to France's planned entry into Rwanda, vowing to attack French forces.<sup>97</sup> Of all states in the world, France was probably the worst choice for intervention, but it was France that was willing to act.

The difficulty of achieving easy success with military interventions has, ironically, served to confirm suspicions about self-interest on the part of intervening states. Among the major powers, the perceived failure of Security Council-authorized interventions reinforced the belief that a state should become involved militarily only if it has a direct interest in the state in question. According to a Reuters' diplomatic correspondent: "Analysts and diplomats say that problems with peace-keeping missions in Somalia and Bosnia have made the most powerful states — the United States, Russia, France and Britain — wary of involvement in missions where they do not have a clear stake."<sup>98</sup>

As a result of such concerns, the United States in 1994 published a statement on participation in United Nations peace operations that includes a requirement that the United States must have an interest in the situation before it contributes troops.<sup>99</sup> If this statement is followed, the United States, as a matter of formal policy, will intervene only if it has a direct interest — that is, an interest over and above that of preserving the peace in the region in question. This policy is at odds with the U.N. Charter concept that states are to contribute to international peace; the Charter takes the approach that it is in the interest of all states that the peace be preserved everywhere.

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95. *Id.* (reporting criticism by the organization Africa Rights).

96. *Id.* (quoting a statement from a report by the organization Africa Rights alleging that arms supplies acquired by the French Directorate for External Security arrived in Rwanda as late as the end of May 1994).

97. Keith B. Richburg & Jonathan C. Randal, *First French Soldiers Arrive on Mission to Help Rwanda*, WASH. POST, June 24, 1994, at A29. *See id.* (Neighboring Burundi and Tanzania denied France use of their territory as staging areas out of concern that France would play a partisan role in Rwanda). *See also* SCOR, 3392d mtg., *supra* note 7, at 3 (Mr. Sardenberg, Brazil, noting the Front's expressed opposition to the planned deployment). *But see Operation Turquoise: Two Months in Rwanda*, Agence France Presse, Aug. 19, 1994, available in LEXIS, News library, AFP File (indicating that as French troops were arriving Rwanda Patriotic Front said it would not attack so long as the troops confined themselves to humanitarian efforts).

98. Nicholas Doughty, *Haiti Shows Big Power Shift on U.N. Missions*, Reuters World Service, Sept. 19, 1994, available in LEXIS, News library, Wires File.

99. Executive Summary: The Clinton Administration's Policy on Reforming Multilateral Peace Operations, unclassified document, May 3, 1994. *See also* Tom Ashbrook, *Who Will Keep the Peace?*, BOSTON GLOBE, May 3, 1995, at 1 (summarizing Executive Summary).

If states intervene with Security Council backing in order to protect their own narrow interests, the Charter enterprise is in serious danger. Russia has been experiencing unrest on its periphery, in territories that were formerly part of the Soviet Union. The perception that states intervening under Security Council auspices were pursuing their own interests prompted Russia to assert a primary role for itself in potential interventions in conflicts in these territories.<sup>100</sup> This action troubled Western governments, as potentially leading to a sphere of influence for Russia, but their own actions elsewhere left them in a weak position to object.<sup>101</sup>

### IX. THE AUTHORIZATION TECHNIQUE AS AN ACT IN EXCESS OF POWER

The United Nations Charter is a treaty. If the authorization technique is beyond Charter-mandated powers for the Security Council, and if on the basis of the authorization technique action is taken against a member state, then that state's rights are violated. The Security Council, to be sure, is a political body, but the International Court of Justice (I.C.J.) has rejected the idea that the Council may lawfully act beyond its Charter powers. In a case over whether the Security Council must apply Charter criteria in deciding which new states to admit as members of 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 powers or criteria for its judgment."<sup>102</sup>

This approach prevails in particular with respect to the Security Council's powers concerning international peace. In another I.C.J. case, two judges addressed the question of whether the Security Council must abide by the Charter in exercising its power to determine whether a threat to the peace is present. They said that the Council's exercise of this power was subject to Charter limitations and to the Court's power to determine whether the Council had complied with the Charter.<sup>103</sup>

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100. Doughty, *supra* note 98.

101. *Id.*

102. *Conditions of Admission*, *supra* note 36, at 64. *But see id.* (Alvarez, J., individual opinion) (stating, "an institution, once established, acquires a life of its own, independent of the elements which have given birth to it, and it must develop, not in accordance with the views of those who created it, but in accordance with the requirements of international life").

103. *Legal Consequences for States of the Continuing Presence of South Africa in Namibia*, 1971 I.C.J. 16, 340 (Gros, J., dissenting) (stating, "[t]o assert that a matter may have a distant repercussion on the maintenance of peace is not enough to turn the Security Council into a world government."). *Id.* at 293 (Fitzmaurice, J., dissenting) (stating that the Security Council's powers, under Article 24, are limited to those mentioned in the Charter's chapters on Security Council powers).

One analyst of the Charter, commenting on the Security Council's expanded post-Cold War role in war-and-peace matters, notes that "the Charter creates a governance of limited enumerated powers,"<sup>104</sup> and that "[t]he United Nations is the creature of a treaty and, as such, it exercises authority legitimately only in so far as it deploys powers which the treaty parties have assigned to it."<sup>105</sup> Judge Bedjaoui of the I.C.J. has said that the Security Council may not impose a decision on a member state without observing the Charter. The United Nations, he writes, "must be deemed an international institution that may not impose its decisions in all domains on sovereign member states except in quite limited and well defined cases and with a strict interpretation as relates to maintenance of the peace."<sup>106</sup>

This proposition holds even if the action taken is in line with the general purposes of the United Nations. Judge Winiarski of the I.C.J. has written:

The fact that an organ of the United Nations is seeking to achieve one of those purposes [as set out in Article 1 of the Charter] does not suffice to render its action lawful. The Charter, a multilateral treaty which was the result of prolonged and laborious negotiations, carefully created organs and determined their competence and means of action.<sup>107</sup>

The fact that some member states who sit on the Security Council read the Charter to permit the authorization technique does not change the fact that a violation has occurred. A treaty cannot lawfully be re-interpreted by some of the parties to the detriment of another party.<sup>108</sup> As Judge Spender of the I.C.J. put the matter, the U.N. Charter

is a multilateral treaty. It cannot be altered at the will of the majority of the Member States, no matter how often that will is expressed or asserted against a protesting minority and no matter how large be the majority of Member States which assert its will in this manner or how small the minority.<sup>109</sup>

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104. Thomas M. Franck, *The Security Council and "Threats to the Peace": Some Remarks on Remarkable Recent Developments*, in *PEACE-KEEPING*, *supra* note 14, at 83.

105. *Id.*

106. Mohammed Bedjaoui, *Du contrôle de légalité des actes du Conseil de sécurité*, in *NOUVEAUX ITINÉRAIRES EN DROIT: HOMMAGE À FRANÇOIS RIGAUX* 69, 109 (translation by author).

107. *Certain Expenses*, *supra* note 18, at 230 (Winiarski, J., dissenting).

108. *Id.* at 196 (Spender, J., separate opinion).

109. *Id.*

To be sure, practice in applying a treaty subsequent to its entry into force can be used to establish the agreement of the parties regarding its interpretation.<sup>110</sup> But where, as here, the practice involves only the states that are members of the Security Council, the practice may not be sufficiently general to manifest the agreement of the parties. Judge Spender stated in this regard:

In practice, if the General Assembly (or any organ) exceeds its authority there is little that the protesting minority may do except to protest and reserve its rights whatever they may be. If, however, the authority purported to be exercised against the objection of any Member State is beyond power it remains so.<sup>111</sup>

Contrary to the prevailing view that the U.N. Charter created organs of limited powers, it has been asserted that the Charter should be regarded less as a treaty, and more like a constitution — namely, an instrument to be construed more with regard to current needs and realities than with the intent of the drafters. From a contextual standpoint, this line of analysis makes considerable sense because the charter is the constitution of an organization. However, international law as it has developed does not treat a treaty establishing an organization substantially different from any other treaty.<sup>112</sup> The Vienna Convention on the Law of Treaties makes no special provision for interpretation with regard to such treaties. It must therefore be deemed the expectation of the parties that the Charter be applied as written.

It has long been recognized that the Charter created an organization that might not be able to act in one or another situation involving a breach of peace. The most obvious instance is a case involving one of the Security Council's permanent members, where that member's power of veto could frustrate contemplated action against it.<sup>113</sup> Judge Winiarski said:

The intention of those who drafted [the U.N. Charter] was clearly to abandon the possibility of useful action rather than to sacrifice the balance of carefully established fields of competence, as can be seen, for example, in the case of the voting in the Security Council. It is only by such procedures, which were clearly defined, that

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110. Vienna Convention on the Law of Treaties, Jan. 27, 1980, art. 31(3)(b), 1155 U.N.T.S. 340.

111. *Certain Expenses*, *supra* note 18, at 196 (Spender, J., separate opinion).

112. See generally Edward Gordon, *The World Court and the Interpretation of Constitutive Treaties*, 59 AM. J. INT'L L. 794 (1965).

113. U.N. CHARTER art. 27.

the United Nations can seek to achieve its purposes. It may be that the United Nations is sometimes not in a position to undertake action which would be useful for the maintenance of international peace and security . . . but that is the way in which the Organization was conceived and brought into being.<sup>114</sup>

With the use of the authorization technique, the Charter is being amended in a *de facto* way. If the authorization technique were not available, states would be under greater pressure to agree to Security Council collective enforcement.

#### X. THE AUTHORIZATION TECHNIQUE AS A THREAT TO LEGITIMACY

As a result of exceeding its Charter powers, the Security Council undermines any action that may be taken. This aspect of the authorization technique was apparent in the case of Iraq, allowing Iraq to complain that the action against it was illegal. Iraq specified the authorization technique as unlawful. "Regrettably," it said, "the Council apparently thought that in this case the legal requirements were disposable niceties."<sup>115</sup>

Where a state has violated international norms and the Council is taking action against it, there is significant erosion of legitimacy when the Council acts in a fashion that violates the Charter. Such an approach gives the target state valid grounds for objecting to the action taken against it. Attention is deflected from that state's own Charter violation. A target state in such a situation can, like Iraq, depict itself as a victim of a cabal of states. Such an approach by a state like Iraq may garner sympathy with other states and may help it to justify itself before its own citizens.

Even beyond the reaction of a target state, the illegality of an action of the Security Council may have undesirable effects. The legitimacy of the actions of the Security Council rests, in the final analysis, on how they are accepted by the world community. It has been noted in this regard that

[a]s in a State where a constitution defines and legitimates the exercise of political power, so, too, at the United Nations the legitimacy of the exercise of power by the Security Council

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114. *Certain Expenses*, *supra* note 18, at 230 (Winiarski, J., dissenting).

115. SCOR, 2963d mtg., *supra* note 1, at 21 (Mr. Al-Anbari, Iraq).

depends upon the public perception that it is being exercised in accordance with the Charter's applicable defining rules and standards.<sup>116</sup>

Judge Bedjaoui made this same point:

This new world order and the Security Council which is to be its only worldly arm can gain credibility, authority, and effectiveness, only if there is a belief that they act not as institutions above the Charter and above international law, but as servants of the Charter and of international law.<sup>117</sup>

A number of states have persistently objected to use of the authorization technique, as reflected in critical comments made before the Council.<sup>118</sup> Yemen's ambassador, who represented Yemen during the Security Council debate on Iraq, said of the Iraq resolution, "it's just a blanket authorization, and is one of the most dangerous resolutions that the UN Security Council has adopted in its history."<sup>119</sup> As the Haiti resolution was adopted, Mexico objected that "a kind of *carte blanche* has been awarded to an undefined multinational force to act when it deems it to be appropriate. This seems to us an extremely dangerous practice in the field of international relations."<sup>120</sup>

If the Council exceeds its powers, it risks the loss of legitimacy. If the Council loses legitimacy, then not only will target states have good grounds to object to the actions taken against them, but governments may be reluctant to contribute troops to implement Council resolutions, and military personnel in units contributed by member states may be reluctant to risk their lives by participating.

## XI. A TEST OF THE LEGALITY OF THE AUTHORIZATION TECHNIQUE

A restrictive view of the authorization technique may prevent the Security Council from acting in some situations. At the same time, however, it may keep the Council from acting in situations in which action is not warranted. One critic of the authorization technique acknowledged the obvious retort that he was placing too tight an interpretation on the Security Council's power, but he deemed the restriction

116. Franck, *supra* note 104, at 85.

117. Bedjaoui, *supra* note 106, at 76 (translation by author).

118. See *supra* text accompanying notes 57-65.

119. "Eventually There Can Only Be an Arab Solution", MIDDLE EAST REP., Mar.-Apr. 1991, at 8, 9 (interview with Ambassador Abdallah Al-Ashtal).

120. SCOR, 3413th mtg., *supra* note 10, at 5 (Mr. Flores Olen, Mexico).

necessary to prevent actions whose purposes might not be clearly set by the Council: "Some will criticize the reasons we have just developed as too systematic and restrictive. But we believe that this precise and systematic approach is in reality necessary in order to prevent, or at least to try to prevent, unlimited use of poorly defined powers."<sup>121</sup>

The Charter provides a route whereby the legality of the authorization technique can be tested. The Charter gives the I.C.J. the power to issue advisory opinions at the request of the Security Council or General Assembly.<sup>122</sup> Either body could ask the Court for an advisory opinion on the authorization technique. This would allow the technique to be assessed outside the context of a crisis situation and by the body most qualified to determine the meaning of the Charter. Although an advisory opinion would not be binding, it would carry considerable moral weight.

The Council is unlikely to request such an advisory opinion, for it would gain little. It would risk having a cloud cast over a technique it finds useful. The General Assembly has less to lose by requesting such an opinion.

A restrictive view may also make manifest the need for action of the kind contemplated by the Charter. It could place pressure on states to act in the way Article 42 requires. Another possible solution would be to amend Chapter VII to permit authorization by the Security Council. Amendment is a difficult and time-consuming process, so much so that it may not be practicable. Indeed, it is because of the difficulty of amendment that the Security Council has resorted to practices that it deemed appropriate but which were questionable under the Charter.

Such an amendment, even if politically feasible, would not be wise. For the reasons indicated in this article, the Council is better advised to take action under Chapter VII only when it can direct the action itself. Unleashing individual states, even with Secretary-General involvement, is too risky an approach when one is considering sending a military force into a state.

## XII. RESULTS OF USE OF THE AUTHORIZATION TECHNIQUE

The Security Council has enjoyed mixed success in its "authorization" interventions, but the experience points to the hazards involved.<sup>123</sup> With Iraq, success was achieved in gaining Iraq's withdrawal from

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121. Bothe, *supra* note 14, at 74.

122. U.N. CHARTER art. 96.

123. See Falk, *supra* note 39, at 627 ("Subsequent developments in Somalia, Bosnia, Haiti, and Rwanda have confirmed the need for a more autonomous mechanism for collective security . . .").

Kuwait, but there was controversy over the manner in which this was accomplished. The United States directed military force not only against Iraqi forces in and around Kuwait; it also bombed central Iraq on the theory of destroying the infrastructure that allowed Iraq to fight.<sup>124</sup> A U.N. inspection team called this bombing "near apocalyptic" and said it reduced life in Iraq to a "pre-industrial stage."<sup>125</sup> The Secretary-General called it "disturbing" that "civilian casualties [in Iraq] are mounting and that damage to residential areas throughout Iraq has been widespread."<sup>126</sup>

During the hostilities directed against Iraq, the Secretary-General bemoaned the paucity of information the U.N. received from the participating states. "What we know about the war," he said, is

what we hear from the three members of the Security Council which are involved — Britain, France and the United States — which every two or three days report to the Council, after the actions have taken place. The Council, which has authorised all this, is informed only after the military actions have taken place. As I am not a military expert I cannot evaluate how necessary are the military actions taking place now.<sup>127</sup>

When the states acting under the resolution began land operations against Iraqi forces, the "Soviet foreign ministry expressed 'regret that a realistic chance for a peaceful outcome to the conflict and for the attainment of the aims stipulated in the UN Security Council resolutions, without further human casualties and material destruction, has been missed.'"<sup>128</sup> By this time, Iraq had agreed to withdraw from Kuwait, but

124. See Fred Kaplan, *General Credits Air Force with Iraqi Army's Defeat*, BOSTON GLOBE, Mar. 16, 1991, at A1.

125. *Excerpts from U.N. Report on Need for Humanitarian Assistance in Iraq*, N.Y. TIMES, Mar. 23, 1991, at A5. See also Paul Lewis, *UN Survey Calls Iraq's War Damage Near-Apocalyptic*, N.Y. TIMES, Mar. 22, 1991, at A1 (noting that the team found that the bombing affected major economic sites, such as sewage and water treatment facilities, and electrical generating plants); *Increased Activity in Northern Iraq*, 184 ICRC BULLETIN 1 (May 1991) (I.C.R.C. (Int'l Committee of the Red Cross) repairs on Baghdad water supply had restored system to 20% of former capacity by mid-April 1991). Physicians who inspected Iraq reported that all seven of Baghdad's water purification plants were non-functional, and that vibrations and shock waves from bombs cracked water and sewer mains throughout the city. As a result of the destruction of the electrical generating capacity of Baghdad, water could not be pumped through the distribution system. The Physicians for Human Rights found that the lack of electricity and water led to infantile diarrhea and other disease from untreated sewage and the drinking of unsanitary water. *Health Crisis in Baghdad*, 4 PHR RECORD 1 (Spring 1991).

126. Nikolai Maslov, *UN Chief Informs Security Council on Gulf Situation*, TASS, Feb. 9, 1991, available in LEXIS, News library, Tass File.

127. Leonard Doyle, *UN 'Has No Role in Running War'*, INDEPENDENT (London), Feb. 11, 1991, at 2 (interview with Pérez de Cuellar).

128. *Countdown to Iraq's Defeat*, MIDDLE EAST INT'L, Mar. 8, 1991, at 7.



not as rapidly as the states acting under the resolution thought appropriate. Thus, there was a serious issue as to whether the land operations conducted against Iraq were necessary. Had the Security Council been in control, these operations might have been avoided.

Under the Bosnia resolution, France, the U.K., Canada, and Spain sent several thousand troops in a grouping called United Nations Protection Force II (UNPROFOR II) to ensure the delivery of supplies,<sup>129</sup> but these troops enjoyed only limited success because of military opposition from Bosnian Serb militias.<sup>130</sup> In 1993, the United States and the North Atlantic Treaty Organization invoked the two Bosnia resolutions as a basis for air strikes around Sarajevo against Bosnian Serb emplacements, arguing that this invocation was appropriate because the air strikes were aimed at securing the delivery of shipments of food, fuel, and medicine.<sup>131</sup> The Secretary-General agreed that reliance on the Bosnia resolutions was proper,<sup>132</sup> but Russia objected that the air strikes were outside the authorization found in the Bosnia resolutions.<sup>133</sup> The Russian opposition was apparently based on the premise that the air strikes were aimed less at securing the delivery of humanitarian aid than at opening an arms supply route to Sarajevo for the Bosnian government.<sup>134</sup>

The invocation of the Bosnia resolution demonstrates the hazard of having a resolution in force over an extended period of time, so that it is invoked under factual circumstances differing from those in effect at the time the resolution was adopted. Reliance on a resolution in such circumstances is likely to be contested, as was done by Russia in the Bosnia case.

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129. So numbered to distinguish it from UNPROFOR, the United Nations humanitarian assistance operation established by S.C. Res. 743, U.N. SCOR, 47th Sess., 3055th mtg. at 1-3, U.N. Doc. S/RES/743 (1992).

130. James B. Steinberg, *International Involvement in the Yugoslavia Conflict*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 27, 44 (Lori F. Damrosch ed., 1993) [hereinafter ENFORCING RESTRAINT].

131. Peter Pringle, *Bosnia: US and UN Vie For Control of Air Strikes*, INDEPENDENT (London), Aug. 5, 1993, at 8; *Christopher Dismisses Unilateral U.S. Action in Bosnia*, Agence France Presse, Aug. 2, 1993, available in LEXIS, News Library, AFP File (quoting U.S. Secretary of State Warren Christopher).

132. *Bosnia: Boutros-Ghali Says U.N. Role in Air Strikes Vital*, Inter Press Service, Apr. 30, 1993, available in LEXIS, News Library, Wires File (quoting Secretary-General's interview on Public Broadcasting Service).

133. *Russia Opposes Use of Force in Bosnia Without UN Security Council Authorization*, BBC World Service, Aug. 3, 1993, available in LEXIS, News Library, Papers File.

134. See Branislav Andjelich, *In Bosnia, Air Strikes Alone Won't Do the Job; No Break in Arms Flow*, N.Y. TIMES, Aug. 18, 1993, at A18 (Letter to the Editor) (suggested theory that the recent Bosnian Serb capture of Mount Igman, near Sarajevo, had cut off an arms supply route theretofor used by Bosnian government for getting arms into Sarajevo).

In Somalia, the forces of the member states succeeded in distributing humanitarian aid but failed to bring political stability.<sup>135</sup> The United States quickly came into conflict with the Secretary-General; the United States was seeking a short stay with a subsequent takeover by U.N. troops.<sup>136</sup> In addition, the United States determined there was a need to defeat the forces loyal to Mohamed Farah Aidid.<sup>137</sup> Other states involved, notably Italy, viewed the United States' approach as inappropriate and specifically criticized a helicopter assault by the United States on an Aidid command center in Mogadishu, Somalia's capital city, that resulted in fifty civilian deaths. Italy called on the United Nations command to suspend combat operations in Mogadishu.<sup>138</sup> In response, the U.N. command asked Italy to replace the commander of Italy's contingent, but Italy refused, insisting, correctly, that it had the right to appoint the head of its contingent.<sup>139</sup> The open dissension in the ranks of the member states led to an early withdrawal of forces.

In Rwanda, within days after the French arrival, the Tutsi-led rebels consolidated their victory and took control of Rwanda. As a result of the rebel victory, the situation that France found in Rwanda differed from that existing at the time of the Security Council resolution. Those on the side of the overthrown government, rather than those on the rebel side, became the ones at risk. In addition, there arose a danger of reprisal against Hutus for actual or suspected involvement in the massacres that had occurred during the civil war.<sup>140</sup> France established a "safe zone" in southwest Rwanda,<sup>141</sup> and it was predominantly Hutus who sought refuge there.<sup>142</sup> As a result of being authorized by the Security Council

135. Somalia Resolution, *supra* note 5 (preamble indicates that Security Council was "determined" to facilitate a political settlement in Somalia, although no operative paragraph suggested that this should be accomplished). See generally Jeffrey Clark, *Debacle in Somalia: Failure of the Collective Response* in ENFORCING RESTRAINT, *supra* note 130, at 205.

136. See, e.g., *U.S. Forces to Hand Over Somalia Duty, Christopher Says*, Associated Press, Feb. 1, 1993, available in LEXIS, News library, Arcnws File (discussing tension between U.S. and Secretary-General over a transition to U.N. force).

137. Michael R. Gordon, *Europeans Plan Early Pullout From Somalia*, N.Y. TIMES, Oct. 13, 1993, at A10. See also *U.N. Urges U.S. Not to Abandon Its Peace Keeping Role*, National Public Radio broadcast, Oct. 30, 1993, available in LEXIS, News library, NPR File (interview with Secretary-General Boutros-Ghali detailing his differences with U.S. government).

138. *Italy's Somalia Commander 'Will Stay'*, Press Association Newsfile, July 16, 1993, available in LEXIS, News library, Wires File.

139. *Id.*

140. Robert M. Press, *Rwanda: A Future Without War?*, CHRISTIAN SCI. MONITOR, July 29, 1994, at 6 (indicating that new Tutsi-led government was concerned that Tutsis would take revenge on Hutus).

141. *Operation Turquoise: Two Months in Rwanda*, *supra* note 97.

142. *Warning on Rwanda Refugees*, FIN. TIMES, July 30, 1994, at 2 (estimating that 1.6 million Hutus took refuge in safe zone).

to act on its own, France alone decided how to accommodate to the new situation it found in Rwanda. Had the operation been under Security Council control, the Council would have made that determination. While the Council might well have made the same decision made by France, the changed circumstance nevertheless illustrates a hazard of the authorization technique.

In Haiti, the operation was conducted almost totally by the United States, just as in Rwanda it was almost totally conducted by France. The Haiti operation achieved the removal of the military group from office and the resumption of power by the elected president, and this with no actual military hostilities.<sup>143</sup> Thus, the Security Council achieved its main objective.

The generally negative experience with peace enforcement undertaken by authorization has, ironically, led not to a disinclination to use this technique, but rather has contributed to an attitude among Security Council members that authorization, rather than Security Council-led actions, is the better course for the future. According to one observer: "The United Nations has clearly been troubled by bad experiences in Bosnia and Somalia. . . . What we're seeing is that it will increasingly farm out missions to countries willing to act. The idea of a global will to deal with crises is not there."<sup>144</sup> If this view is accurate, the Security Council's use of the authorization technique is the model for the future, and the prospects for proper Security Council actions are slim.<sup>145</sup>

### CONCLUSION

It has often been said that there is nothing wrong with the United Nations but with its member states. This may be the problem reflected in the Security Council's adoption of the authorization technique. Member states, and particularly the major powers, have not been willing to subordinate their actions to the organization and have insisted on retaining the free hand that the authorization technique affords. These states have, in effect, blackmailed the United Nations into accepting authorization. Their implicit message to the organization has been that it either accept authorization or stand by idly in the face of threats to the peace. If the Security Council succumbs to such blackmail, perhaps the fault lies less with the Council itself than with the states that pressure it.

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143. *Carter Deal Saves Haiti from Invasion*, TIMES (London), Sept. 19, 1994, at 1.

144. Doughty, *supra* note 98 (quoting Trevor Findlay, expert on the United Nations at the Stockholm International Peace Research Institute).

145. Another serious contributing factor is finances, since with authorized actions the states themselves pay the bills. *Id.*

Secretary-General Boutros-Ghali, who has been at the center of several of the operations based on a Security Council authorization, finds it a less than optimal approach:

[N]either the Security Council nor the Secretary-General at present has the capacity to deploy, direct, command and control operations for [enforcement action], except perhaps on a very limited scale. I believe that it is desirable in the long term that the United Nations develop such a capacity, but it would be folly to attempt to do so at the present time when the Organization is resource starved and hard pressed to handle the less demanding peacemaking and peace-keeping responsibilities entrusted to it.<sup>146</sup>

Ironically, it was the end of the Cold War that has allowed the Security Council to play so freely with the Charter. During the Cold War, one superpower or the other would veto a resolution that gave such a free hand for military action under United Nations auspices. Since the end of the Cold War, however, the restraints imposed by the superpower confrontation have dissipated. The Western powers, enjoying predominance in the Security Council, are in a position to secure the adoption of resolutions giving themselves a free hand to use military force.

If the Security Council is to maintain its integrity as an institution, its members must work to reassert Council prerogatives. Unless this is done, there will be little viability in the concept of collective enforcement of the peace.

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146. *Supplement to An Agenda for Peace: Position paper of Secretary General Boutros-Ghali on the occasion of the fiftieth anniversary of the United Nations*, U.N. GAOR, 50th Sess., para. 77, U.N. Doc. A/50/60 (1995).