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Unilateral Action in the UN System

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Abstract

Realization of UN Charter values has required adaptation of its procedures in the face of Cold War politics and conflicts of national self-interest. Security Council machinery has never worked quite as planned. 'Recommendations' for the use of force have substituted when Article 43 agreements were not forthcoming and direct enforcement action was unavailable. 'Abstentions' by permanent members of the Council have been counted as 'concurrences' to allow decisions to go forward. In an era with an expanded account of human rights and human security, it should not surprise us that there is an impetus to permit effective action: in humanitarian emergencies through an expanded reading of Chapter VIII, with new latitude for regional action, and in meeting the dangers of weapons of mass destruction and terrorism through a broader account of Article 51 self-defence and unilateral enforcement of standing Council resolutions.

The United Nations Charter is, perhaps more than we care to acknowledge, a document of its time, built upon the Western alliance of World War II and the expectation that post-war action would be undertaken with unity by the anti-fascist powers. Its adaptation to the ideological schism of the Cold War, and to a post-Cold War period where national interests continue to diverge, has required focus on Charter goals as much as on formal procedures. Realization of the Charter's humane values has, at times, required the substitution of other actors and imperfect observance of the Charter's forms. The justification of procedural latitude has weighed more heavily on international lawyers than upon pragmatic political authorities. It may be time for the twain to meet.

In February 1945, returning from the Yalta Conference, US President Franklin Roosevelt sketched his plan for 'Four Policemen' to guarantee post-war security. Joint action by the United States, the Soviet Union, the United Kingdom, and China would guard against new threats to the peace, Roosevelt supposed, just as the wartime allies had acted to defeat fascism in Europe and Asia. The difficult question of structure for the global organization was settled by the Yalta voting formula that permitted

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enforcement action through a qualified majority of members on a post-war security council and the concurrence of the four wartime allies. The Yalta agreement, Roosevelt announced to the US Congress, ‘ought to spell the end of the system of unilateral action, the exclusive alliances, the spheres of influence, the balances of power, and all the other expedients that have been tried for centuries — and have always failed. We propose to substitute for all these, a universal organization in which all peace-loving Nations will finally have a chance to join’ as the ‘... beginning of a permanent structure of peace.’¹

In the midst of the Cold War, the discussions at Yalta were recalled in less charitable mien by those who believed the West was naive about Stalin’s ambitions. Churchill’s ‘percentages’ agreement with Stalin on relative influence in the individual countries of central Europe and the Balkans, together with the American decision not to advance on Berlin, Prague, or Vienna in the closing days of the war, foreshadowed post-war Soviet dominance east of the Oder-Niesse line. Roosevelt’s plans for joint action by the Four Policemen, with France as a fifth gendarme, were soon derailed by competition between the Soviet Union and the West over Greece and Turkey, the confrontation over Berlin, and the beginning of atomic rivalry. The United Nations Charter, for all of its durability, did not work as intended at the beginning, nor for most of its juridical career.

Collective security, to be sure, has remained a challenging alternative to the balance of power and local alliances. The lesson of World War I was that overly rigid alliance structures, such as the Triple Entente and Triple Alliance, with preset mobilization plans, could magnify a local dispute into a global war. The advent of World War II instructed that credible military capacity, as well as resolve, is necessary to stem aggression; compromise with aggressors may not be durable; and defensive alliances cannot always be cobbled together in time (witness the last hour attempt to save Poland). The competition of East and West throughout the Cold War has taught separate lessons about the limits of a universal scheme of collective security. Stability in Europe in the face of a Soviet threat depended on the strength of the Euro-Atlantic alliance and credible nuclear deterrence. The balance in the Pacific depended on a continuing American commitment to the defence of South Korea and Japan, and a moderation of the tension between Taiwan and China. The central architecture of stability was provided by defensive alliances, not by commitments of the UN Security Council.

To be sure, the NATO alliance was accommodated by the structure of the UN Charter,² and the defence of South Korea was advanced by the community voice of the United Nations (first in the Council, when the Soviet Union was absent,³ then in the

¹ Franklin Roosevelt, Message to Congress Regarding the Yalta Conference, March 1945, President’s Personal File 1820 (speech 1572), FDR Library, Hyde Park, New York, also in Department of State, *Bulletin*, 4 March 1945, vol. 12, at 321–326. See T. Hoopes and D. Brinkley, *FDR and the Creation of the United Nations* (1997) 172–179.

² See United Nations Charter, Art. 51.

³ SC Res. 83 (27 June 1950), SCOR, 5th Sess., 474th mtg, at 4, UN Doc. S/INF/5/Rev. 1 (1950).

General Assembly⁴). United Nations peacekeeping helped to buffer local situations that could have escalated between East and West, such as the Suez intervention in 1956⁵ and the Congo in 1961.⁶ UN forces separated the warring communities in Cyprus (avoiding an open rupture in the NATO alliance),⁷ and provided some measure of stability in Kashmir.⁸ And certainly the United Nations advanced the necessary process of decolonization, pushing reticent communities in Rhodesia, Namibia and South Africa to accommodate majority rule. The United Nations has continued its important work in creating norms of human rights and monitoring the proliferation of weapons of mass destruction. And no student of American foreign policy can overlook the importance of the United Nations as a bully pulpit — used to moderate the action of both camps, exposing Russian missiles in Cuba in 1962, and reminding the United States that interventionism in its own hemisphere might seem dated. Crucially, as well, the Security Council has provided a cloakroom for consultations among the Permanent Members, one of several useful venues to clarify intentions and communicate resolve.

Nonetheless, the United Nations was hardly the keystone of post-war strategic balance. When Permanent Members became Permanent Rivals, UN collective security machinery could not operate, except as a contact group to avoid misapprehension or to handle disputes that fell outside the orbit of East–West competition. The use of Chapter VII to authorize security measures and deterrence, much less the loan of troops to the United Nations under Article 43, was a dead letter when the conflicts at hand were surrogate contests between East and West.

In the post-Cold War period, Roosevelt's exuberance about the potential of collective security has been once again entertained. The Security Council decision to deploy UN observers to monitor the end of the Iran–Iraq war in 1987,⁹ the military alliance that countered Iraq's aggression against Kuwait,¹⁰ and the common interest in ending the Bosnian war,¹¹ seemed to signal a new capacity for action in the United Nations. But the disillusionment has been equally dramatic. It became clear that the Security Council, freed from ideological competition, is still prey to the algebraic rule of the lowest common denominator. The differences in national interest and political sympathy among Council members have meant that Council action comes late, lacks force, and focuses on 'neutral' humanitarian tasks that do not resolve a conflict. A lack of experience in robust security operations during most of its history (with the exception of Korea, the Congo, and Iraq, the first and last under US command), has disabled the United Nations from the necessary vigour of response in recent crises. The

⁴ GA Res. 376(V) (7 October 1950), GAOR, 5th Sess., Supp. No. 20, at 9, UN Doc. A/1775 (1950).

⁵ GA Res. 1001 (ES-I) (7 November 1956), GAOR, First Emergency Special Sess., Supp. No. 1, at 2, UN Doc. A/3354.

⁶ SC Res. 161 (21 February 1961), SCOR, 16th Sess., 942nd mtg, at 2, UN Doc. S/INF/16/Rev.1 (1961).

⁷ SC Res. 186 (4 March 1964), SCOR, 19th Sess., 1102nd mtg, at 2, UN Doc. S/INF/19/Rev.1 (1966).

⁸ SC Res. 91 (30 March 1951), SCOR, 6th Sess., 539th mtg, at 1, UN Doc. S/INF/6/Rev.1 (1965); SC Res. 210 (6 September 1965), SCOR, 20th Sess., 1238th mtg, at 14, UN Doc. S/INF/20/Rev.1 (1967).

⁹ SC Res. 598 (20 July 1987), SCOR, 43d Sess., 2750th mtg, at 5, UN Doc. S/INF/43 (1989).

¹⁰ SC Res. 678 (29 November 1990), SCOR, 45th Sess., 2963d mtg, at 27, UN Doc. S/INF/46 (1991).

¹¹ SC Res. 1031 (15 December 1995), UN Doc. S/RES/1031 (1995) (calling for the establishment of IFOR).

war of attrition in Bosnia from 1991 to 1995 reminded some of earlier trench warfare, and the United Nations' work in delivering humanitarian aid was an inadequate amelioration. The Serb attack on Srebrenica, and the execution of 7,000 disarmed Muslim men, exposed the helplessness of underequipped peacekeepers and the limits of UN operations when effective measures can be thwarted by each participating country. The casualties suffered in Somalia also showed that UN privileges and immunities will not protect peacekeepers against local retaliation. The inability of the United Nations to mount a force to intervene in Rwanda against the Hutu genocide showed the debilities of waiting for consensus (including, sometimes, US concurrence) before taking action. And the erosion of the UN coalition to dismantle Iraq's production of weapons of mass destruction has exposed the limited coincidence of national preferences. What the economists call a 'collective action' problem is unhappily apropos — no particular actor has any incentive to sacrifice his interests for the provision of a public good such as security, when someone else may undertake the task.

1 The Question of Unilateral Action

Lawyers are inclined to approach any question with immediate reference to the governing text, and in the case of the use of force, the limitations of the UN Charter are of obvious moment. The foundational principles of interpretation of a treaty text are widely agreed, whether or not the Vienna Convention on the Law of Treaties ever gains universal adherence.¹² But the interpretive principles deployed in the application of a constitutive text may also depend on the nature of the values and interests at stake — the teleology of an instrument as much as its literal form. This is not to deny a claim of objectivity in interpretation, but at a minimum, values and interests are likely to influence state practice, which in turn must inform the meaning given to a treaty undertaking.

Tolerance for unilateral action in the post-Cold War arena depends in part on a theory of security — what human goods are at stake, and whether forcible interference is necessary for their preservation. There are many other disincentives, besides the use of force, to deter provocative conduct, including loss of community reputation, loss of access to the private capital market, and the suspension of bilateral cooperation.¹³ Constructivists also posit that the enunciation of international norms may gradually transform an actor's own preferences, not just for the sake of preserving reputation but because the actor comes to embrace community goals as his own. And in situations where the use or threat of force appears unavoidable, the temptation to act unilaterally still must be tested by other concerns such as limiting

¹² Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, reprinted in 8 *ILM* (1969) 679 (entered into force 27 January 1980). The United States signed the Convention on 24 April 1970, but has never ratified it.

¹³ See e.g., A. Chayes and A. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995).

the escalation and domain of a conflict, guarding against partiality, and preserving the credibility of multilateral machinery.

But when push come to shove, waiting for unanimity may sometimes fail to protect other values at stake. Just as a domestic system of governance requiring the agreement of all communities will often fail to function (as we have seen in the attempt to reconstruct the domestic government of Bosnia and Herzegovina), so too a system of international action requiring full concurrence may prove inadequate. A passive system of security — favouring inaction over action — can avoid the danger of provocation of one superpower by another, but prove unable to meet other challenges truly threatening to international peace. Demanding multilateral authorization for action in all places and circumstances may limit the efficacy of multilateral and unilateral diplomacy, as well as good offices.¹⁴ And if we define human security in broader terms, as the January 1992 Security Council Heads of State Summit prescribed,¹⁵ then a system of inaction is all the more troublesome.

This castigation of collective machinery does not assume ill will on the part of any national actor. The foreign policy decisions of member countries are often limited by the demands of their domestic constituencies, certainly in democracies, and even autocratic governments and societies can be held captive by violent or destabilizing factions. National actors can be overawed by the size and ambitions of their regional neighbours, by the threat of retaliation, and by the inducements of commercial and political advantage.

Since Security Council machinery has never worked quite as anticipated, there are widely accepted conventions designed to increase its effectiveness and capacity for action. Article 43 agreements were not forthcoming in the Cold War,¹⁶ and even now, no country has offered to commit troops to the Council's automatic disposal, even for peacekeeping.¹⁷ Multilateral enforcement has instead been mounted by Security Council 'recommendations' or 'authorization' to member states undertaking coalition

¹⁴ The Secretary-General noted this harsh fact of life in the aftermath of his ultimately unsuccessful mission to Baghdad in 1998. 'You can do a lot with diplomacy', Mr Annan observed, 'but of course you can do a lot more with diplomacy backed up by firmness and force.' Iraqi TV, 23 February 1998, 7:57 a.m., GMT, rebroadcast on British Broadcasting Corporation, 24 February 1998. The same point is made bluntly in a poster published by the Newport News shipyard: the design of an aircraft carrier is underlined with the logos, '90,000 Tons of Diplomacy'.

¹⁵ Statement of the Security Council Meeting of Heads of State and Government, 31 January 1992.

¹⁶ But see United Nations Participation Act, Pub. L. No. 264, 59 Stat. 619 (1945) (codified at 22 USC 287–287(e)) (authorizing the United States to enter into an Article 43 agreement with the United Nations).

¹⁷ The standby arrangements inaugurated in the 1990s consist of offers of military units that may be available. But each member state has retained the right to decline a requested deployment, in light of other demands on its forces, the circumstances of the mission, or any other reason. See generally Supplement to the Agenda for Peace, UN Doc. A/50/60-S/1995/1 (1995), para. 43; Report of the Secretary-General on Stand-By Arrangements for Peacekeeping, UN Doc. S/1994/777 (10 June 1994); Report of the Special Committee on Peacekeeping Operations (Comprehensive review of the whole question of peacekeeping operations in all their aspects), UN Doc. A/54/87 (23 June 1999); Progress Report of the Secretary-General on Standby Arrangements for Peacekeeping, UN Doc. S/2000/194 (8 March 2000).

military action.¹⁸ The Charter text demands that nonprocedural decisions by the Security Council, including decisions under Chapter VII, should be supported by the affirmative vote of nine members ‘including the concurring votes of the permanent members’.¹⁹ This, too, has not been observed in practice. The permanent members have often abstained, permitting a decision to go forward, and the abstention has not counted as a veto.²⁰ Other fora for security recommendations to member states have also been tolerated, such as the General Assembly’s Uniting for Peace Resolution in the Korean conflict.²¹ Multilateralism has thus assumed forms unanticipated in 1945.

The limited capacity of the Security Council to respond robustly to identified threats to peace and security is also met in part by the UN Charter’s explicit protection of the right of self-defence in Article 51,²² permitting both individual and collective action to meet an armed attack. Even the Kellogg–Briand Pact,²³ renouncing the use of Clausewitzian war, was interpreted by the United States to preserve the right of self-defence and the right of each state to judge its necessary circumstances (a reading

¹⁸ See e.g., SC Res. 83 (27 June 1950), SCOR, 5th Sess., 474th mtg, at 4, UN Doc. S/INF/5/Rev.1 (1950); SC Res. 84 (7 July 1950), SCOR, 5th Sess., 476th mtg, at 5, UN Doc. S/INF/5/Rev.1 (1950); (*The Security Council, / Having determined that the armed attack upon the Republic of Korea . . . constitutes a breach of the peace, / Having recommended that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack . . . / Recommends that all Members providing military forces and other assistance . . . make such forces and other assistance available to a unified command under the United States of America.*). See also SC Res. 678 (29 November 1990), SCOR, 45th Sess., 2963d mtg, at 27, UN Doc. S/INF/46 (1991) (*The Security Council, / Acting under Chapter VII of the Charter, / Authorizes member states co-operating with the Government of Kuwait . . . to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions to restore international peace and security in the area.*).

¹⁹ UN Charter, Article 27(3).

²⁰ See S. D. Bailey and S. Daws, *The Procedure of the U.N. Security Council* (3d ed., 1998) 250–257. The practice began in 1946 with an abstention by the Soviet Union, to which other members did not object. See SC Res. 4 (29 April 1946), SCOR, 1st Sess., 39th mtg at 243; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion of 21 June 1971 (1971) *ICJ Reports* 22.

²¹ GA Res. 377(V) (3 November 1950), GAOR, 5th Sess., Supp. No. 20, at 10, UN Doc. A/1775 (1950) (*‘if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.’*)

²² Article 51 states: *‘Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.’*

²³ Treaty Providing for the Renunciation of War as an Instrument of National Policy, 27 August 1928, 46 Stat. 2343, TS No. 796, 94 LNTS 57.

not objected to by the other signatories).²⁴ But the reach of Article 51 has proven troublesome in several circumstances that fallible draftsmen did not anticipate.

First, the Article 51 text does not address the possible need for the unilateral use of force at an earlier stage. The inadequacy of waiting for an attack to be mounted is evident in the very framing of Article 39, allowing collective action to meet a 'threat to the peace' or an 'act of aggression'.²⁵ In circumstances where the Council is stymied, it requires a blinkered and sanguine positivism to conclude that no threat exists and that inaction is always preferable. The presumption of Article 106 must surely give us pause, even now — the Charter's assertion that until the Council has at its disposal a working system of enforcement with Article 43 troops at hand, responsibility for maintaining international peace and security must continue to rest upon the world war allies, with the far looser instruction to merely 'consult' with each other and other UN members 'with a view to such joint action . . . as may be necessary for the purpose of maintaining international peace and security'.²⁶

Weapons of mass destruction, and the possibility of remote delivery, make the problems of a Council monopoly even more telling. The acquisition of weapons of mass destruction is not per se illegal under international law, and even where a country has violated a treaty undertaking, the violation has not been deemed equivalent to an armed attack. Yet stability in a real world may depend on avoiding break-outs that also betoken hostile intent. The Cuban missile crisis can be interpreted in this light; the Soviet Union's deployment of offshore intermediate range missiles would have altered the strategic nuclear balance, as well as boosting Moscow's ability to intimidate states in the hemisphere and endangering crisis diplomacy by shortening delivery time. The creativity of international lawyers in justifying the American response as the execution of mere 'recommendations' by the OAS²⁷ does not change a realist's account of strategic self-defence. The 1962 crisis may not be the

²⁴ US Secretary of State Frank Kellogg argued that the pact's ban on war 'as an instrument of national policy' in no way limited the right of self-defence. 'There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defence.' Every nation 'alone is competent to decide whether circumstances require recourse to war in self-defence'. Note of 23 June 1928, quoted in D. W. Bowett, *Self-Defence in International Law* (1958) 133; see also Y. Dinstein, *War, Aggression, and Self-Defence* (1988) 81–82; J. T. Shotwell, *War as an Instrument of National Policy* (1929).

²⁵ Article 39 states: '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.'

²⁶ Article 106 states: 'Pending the coming into force of such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42, the parties to the Four-Nation Declaration, signed at Moscow, 30 October 1943, and France, shall, in accordance with the provisions of paragraph 5 of that Declaration, consult with one another and as occasion requires with other Members of the United Nations with a view to such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security.'

²⁷ The Legal Adviser of the Department of State at the time of the Cuban missile crisis, Professor Abram Chayes, concluded that the OAS-authorized quarantine was not 'enforcement action' under Article 53 of the UN Charter and so did not require prior UN Security Council authorization, because it was 'only recommendatory' to members of the OAS. See Department of State Memorandum: Legal Basis for the Quarantine of Cuba (23 October 1962), reprinted in A. Chayes, *The Cuban Missile Crisis* (1974) 141, 146. Professor Henkin later disputed such a latitudinarian reading of Chapter VIII, but suggested in the

last of its kind — the acquisition of weapons of mass destruction by governments that manifest hostile intent, as well as state tolerance for weapons acquisition by terrorist groups resident within their borders — is likely to goad even well-intentioned neighbours to seek security against misuse.

But the erosion of a classical account of Chapter VII comes from a different quarter as well — the expanded account of human security and human rights. The Somali famine and civil conflict among clans, the fratricidal wars in Bosnia and Kosovo, as well as the earlier conflicts in South Africa and Rhodesia, have been characterized by the Security Council as threats to international peace and security. This morally driven reading of Chapter VII has been buttressed by adventitious reference to refugee flows and regional stability, but it has a teleologic lesson even where these special circumstances are missing. The UN Charter is designed to preserve certain human goods, and the violence of civil conflict can threaten them as gravely as international conflict. The Council's duty to act in accordance with international law has an obverse effect, for Council action influences our perception of what the law is. A broadened interpretation of Chapter VII that marks civil conflicts as threats to international peace and security may justify a wider reading of Article 51 and Chapter VIII as well, embracing a right of 'collective self-defence' against a government's armed attacks on its own population and a strengthened right of regional action. The defence of a minority against ethnic slaughter in a civil conflict is surely of as much concern as the defence of a juridical state in international war, if humane values are the criterion. The authority of international human rights law challenges any characterization of this as intermeddling, even without Council action, for the scope of a country's 'domestic jurisdiction' under Article 2(7) is limited by these fundamental constraints on sovereignty.²⁸

A broadened notion of human security also helps to justify greater latitude in our account of the regional action permitted under Chapter VIII. Some observers have presumed that regional enforcement action must be authorized explicitly and in advance by the Council. But the text of Article 53 is not unambiguous,²⁹ and state practice has evolved in varying directions. Regional 'recommendations' have been claimed to be distinct from 'enforcement action' in the Cuban missile crisis and

alternative that the quarantine might not fall within the reach of Article 2(4) in the first place. 'The quarantine was surely a threat if not a use of force, but was it against the political independence or territorial integrity of Cuba? Of Russia? Or, alternatively, was it "in any other manner inconsistent with the purposes of the United Nations?"' Comment by Louis Henkin, in Chayes, *supra*, at 149, 152.

²⁸ Article 2(7) states: 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.'

²⁹ Article 53(1) states: 'The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state ...'

Dominican intervention.³⁰ Regional intervention to quell the fighting in the West African states of Liberia and Sierra Leone has been ratified by the Council after the operations were well underway, with no note of remonstrance or chastisement at the initial decision of ECOWAS to forge ahead.³¹ The argument that prior Council action is necessary may appear almost circular — based on the premise that a looser-jointed system is undesirable and could not have been intended by the San Francisco signatories.³² This originalist question may in any event be tabled by evolving practice.³³

Unilateral or regional action will gain greater comfort when it is bracketed by Council diagnoses of a crisis situation. Varying situations have obtained in the recent interventions in Rwanda, Liberia, Kosovo and Iraq. In Rwanda, the ongoing slaughter was denounced by the Security Council, even though no agreement could be obtained on the mustering of a peacekeeping force to replace the UNAMIR mission. The insertion of troops by France in Operation Turquoise was authorized in Resolution 929 as a temporary measure under Chapter VII until UNAMIR could be brought up to strength, allowing the establishment of a 'multinational operation . . . for humanitarian purposes'.³⁴ The locus of the protected safe zone was determined by French forces on their own authority, however, in the Cyangugu-Kiguye-Gilongoro triangle in southwestern Rwanda, with some later criticism that the intervention served to shield retreating Hutu genocidaires. In Liberia and Sierra Leone alike, the United Nations declined involvement at the time of ECOMOG's initial military intervention, but in subsequent Council resolutions — including decisions to impose arms embargoes and establish joint peacekeeping monitors — the ECOWAS operations

³⁰ See Chayes, *supra* note 27; S. A. Alexandrov, *Self-Defense against the Use of Force in International Law* (1996) 154–155, 242–247.

³¹ SC Res. 788 (19 November 1992), UN Doc. S/RES/788 (1992) (Liberia); SC Res. 1132 (8 October 1997), UN Doc. S/RES/1132 (1997) (Sierra Leone).

³² Compare B. Simma (ed.) *The Charter of the United Nations: A Commentary* at (1994) 722, at 734 (commentary on Article 53 by Georg Ress of Saarbrücken, stating that *ex post* authorization 'cannot be reconciled with the requirement of effective SC control over regional enforcement action. Such control is only generated by clear and prior authorization'); and Y. Dinstein, *War, Aggression and Self-Defence* (2nd ed., 1994) 286–87; with Murphy, 'Force and Arms', in O. Schachter and C. C. Joyner (eds), *United Nations Legal Order* vol. 1 (1995) 247, at 300 ('neither the political organs of the United Nations nor the International Court of Justice has issued authoritative statements regarding the scope of the authority of regional organizations or agencies to threaten or to use armed force to maintain international peace and security.') and D. Wippman, 'Enforcing the Peace: ECOWAS and the Liberian Civil War', in L. Damrosch (ed.), *Enforcing Restraint: Collective Intervention in Internal Conflicts* (1993) 157, 182 ('danger of discouraging regional interventions that genuinely merit, and eventually receive, Council approbation, but that would be rendered ineffective or unduly costly if forced to await prior authorization').

³³ As the Permanent Representative of Slovenia, Ambassador Danilo Türk, noted in the Security Council debate on the Kosovo intervention, 'the Council had chosen to remain silent at times when regional organizations sought to remove regional threats to peace and security, and some consistency in adhering to the Charter was required.' UN Press Release SC/6659, 26 March 1999. Ambassador Türk was recently appointed as Assistant-Secretary-General in the UN Department of Political Affairs.

³⁴ SC Res. 929 (22 June 1994), UN Doc. S/RES/929 (1994). See also UN Department of Public Information, United Nations Assistance Mission for Rwanda, September 1996, available at http://www.un.org/Depts/DPKO/Missions/unamir_b.htm

were noted with approval.³⁵ In Kosovo, the Council condemned Belgrade's indiscriminate attacks on ethnic Albanian communities as a threat to regional peace³⁶ and endorsed the Contact Group's attempt to negotiate substantial autonomy for the province,³⁷ also authorizing the use of force to protect OSCE 'verifiers' deployed to monitor the partial withdrawal of Serb police and military.³⁸ No resolution was presented to authorize the NATO air campaign against Yugoslavia following the failure of the Rambouillet negotiations (in the face of a probable Russian veto), but the Council overwhelmingly rejected Russia's draft resolution that would have condemned the NATO bombing.³⁹ After the campaign, the Security Council also acted under Chapter VII to authorize the deployment of an 'international military presence' to supervise Serb withdrawal from the province, an engagement hard to reconcile with any claim that the Council considered the NATO campaign to be *ultra vires* aggression.⁴⁰ The Kosovo intervention presents the curious picture of Council authorization before and aft, while dodging the NATO bullet.⁴¹

In the Iraq crisis of 1997–1998, when Saddam Hussein blocked UN inspections designed to find weapons of mass destruction, the Security Council refrained from finding that Iraq was in 'breach' of the ceasefire terms that ended the Gulf War.⁴² But the Council did declare that Iraq was in 'flagrant violation' of its ceasefire obligations.⁴³ The Council's President warned that 'serious consequences' would flow from Iraq's failure to allow the inspections⁴⁴ and condemned the regime's 'clear violation of the relevant resolutions'.⁴⁵ In an earlier episode of obstruction in 1993, the Council President categorized interference with the arms inspections as an 'unacceptable and *material breach* of the relevant provisions of resolution 687',⁴⁶ and in the earlier episode, the United States, France, and the United Kingdom conducted air raids on sites in southern Iraq. In 1997–1998, the United Kingdom and the United

³⁵ See The United Nations and the Situation in Liberia, UN Doc. DPI/1668, 52nd sess., at 35 (1997); and Levitt, 'Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone', 12 *Temple International & Comparative Law Journal* (1998) 333 at 347.

³⁶ SC Res. 1160 (31 March 1998), UN Doc. S/RES/1160 (1998); SC Res. 1199 (23 Sept. 1998), UN Doc. S/RES/1199 (1998); SC Res. 1203 (24 Oct. 1998), UN Doc. S/RES/1203 (1998).

³⁷ SC Res. 1160 (31 March 1998), UN Doc. S/RES/1160 (1998), paras 4, 5.

³⁸ SC Res. 1203 (24 Oct. 1998), UN Doc. S/RES/1203 (1998) ('[e]ndorses' NATO and OSCE agreements with Belgrade for the deployment of verifiers within Kosovo and 'affirms that in the event of an emergency, action may be needed to ensure their safety and freedom of movement') (emphasis omitted).

³⁹ See Belarus, India and Russian Federation: Draft Resolution, UN Doc. S/1999/328 (26 March 1999), reprinted in Security Council Rejects Demand for Cessation of Use of Force against Federal Republic of Yugoslavia, UN Press Release SC/6659 (26 March 1999).

⁴⁰ SC Res. 1244 (10 June 1999), UN Doc. S/RES/1244 (1999).

⁴¹ See generally Wedgwood, 'NATO's Campaign in Yugoslavia', 93 *AJIL* (1999) 828.

⁴² See SC Res. 687 (3 April 1991), UN Doc. S/RES/687 (1991).

⁴³ SC Res. 1134 (23 October 1997), UN Doc. S/RES/1134 (1997); accord SC Res. 1137 (12 Nov. 1997), UN Doc. S/RES/1137 (1997).

⁴⁴ Statement of the President of the Security Council, UN Doc. S/PRST/1997/49.

⁴⁵ Statement by the President of the Security Council, UN Doc. S/PRST/1997/56; accord Statement by the President of the Security Council, UN Doc. S/PRST/1998/1.

⁴⁶ Statement by the President of the Security Council, UN Doc. S/25081 (8 January 1993) (emphasis added) (concerning obstruction of UN flights into Iraqi territory).

States, with offers of support from a dozen other nations, again threatened air operations, finally conducting four days of raids in December 1998 after Iraq breached its renewed undertakings to the Secretary-General. This was an instance where the Council withheld the comfort of immediate authorization, but a claim of continued authority could be drawn from standing Council resolutions.⁴⁷

Perhaps the most difficult instance of unilateral action has been the United States air strikes in Sudan and Afghanistan, justified by Washington as necessary self-defence against terrorist action. The use of military force to protect nationals and to disrupt ongoing terrorist action is not generally disputed, and the dangerousness of the network of Osama bin Laden is widely accepted. The timing and targeting of the strikes was designed to avoid collateral damage to neighbouring civilian and diplomatic sites. The United States filed an Article 51 letter with the Security Council.⁴⁸ But the problem of striking at a terrorist organization *within* the territory of another state, much less overflying the borders of a third-party country, was further complicated by the dilemma of sensitive targeting information. The common international view is that the al Shifa pharmaceutical plant in Khartoum was erroneously selected, and this conclusion could not be effectively dislodged without drawing upon intelligence sources considered essential to the continuing effort to thwart bin Laden's terrorism.⁴⁹ The dilemma of adequate public justification, whether *ex ante* or *ex post*, is all too evident when an ongoing military effort depends upon closely held tactical information.

When a country or coalition is tempted to act without explicit Security Council authorization, the potential cost to Council authority must be prominently in mind. At a minimum, the underlying reasons for Council involvement should be part of the decision process. The need to avoid escalation of the conflict and to communicate the limited aim of the intervention, the virtue of consulting with other interested countries (where circumstances possibly allow), and the impartiality suggested by broadly based coalition action, are continuing goods. The unilateral course of action must also be urgent enough that the actor is willing to bear the political costs of castigation — for the maintenance of the credibility of multilateral machinery may depend, at times, on a public insistence that another course should have been chosen, even where it is conceded in private that there was no other choice.

⁴⁷ See generally, Wedgwood, 'The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq's Weapons of Mass Destruction', 92 *AJIL* (1998) 724. But see Lobel and Ratner, 'Bypassing the Security Council: Ambiguous Authorizations to Use Force, Ceasefires and the Iraqi Inspection Regime', 93 *AJIL* (1999) 124.

⁴⁸ Letter dated 20 August 1998 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/780 (1998).

⁴⁹ See generally Wedgwood, 'Responding to Terrorism: The Strikes against bin Laden', 24 *YJIL* (1999) 559.