
The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance

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Abstract

The focus of this article is to examine, in the light of the evolution of UN peace maintenance, the justification and validity of non-Security Council authorized military interventions, such as that of NATO in Kosovo, based on claims to unilateral enforcement of UN resolutions and objectives. The function of resolutions of the Security Council authorizing military force is inter alia that of 'precluding wrongfulness'. The article examines justification of unauthorized unilateral action on the basis of implied authorizations, implied powers doctrine, legitimization ex post facto and emerging norms on humanitarian intervention, and concludes that in the absence of express Council authorization, this remains an act of usurpation of Council powers and a resort to force prohibited under international law. Ultimately, the debate does not revolve around a choice between protection of human rights on the one hand and state sovereignty on the other, but over the means utilized. Far from assuming a static view of the international legal system, the choice of collectively authorized over unilateral measures is an attempt to escape regression to unilateral decisions involving community interests. Moreover, the insistence on strengthening multilateral institutions, such as the UN, by addressing current concerns, far from representing a last-ditch nostalgic return to Wilsonian and liberal idealism stems from the need to protect the diversity of cultures and claims.

1 Introduction

The NATO air operations against the Federal Republic of Yugoslavia which began on 23 March 1999, galvanized international legal opinion and raised important issues of international public policy.

Professor Simma and Judge Cassese have exhaustively examined the arguments

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relating to the legality under international law of NATO's intervention,¹ and these will not be revisited here. They addressed two questions: (a) whether such action is presumed permissible under current international law, and both have agreed it is not, notwithstanding Cassese's view that 'from an *ethical* viewpoint resort to armed force was justified', and Simma's observation that it is only 'a thin red line (that) separates NATO's action on Kosovo from international legality'; (b) whether such action is in principle prohibited, but that one can point to an 'emerging doctrine in international law allowing the use of forcible countermeasures to impede a state from committing large-scale atrocities on its own territory, in circumstances where the Security Council is incapable of responding adequately to the crisis', as argued by Cassese.

I would like to assess the significance of the NATO-Kosovo military operation from the perspective of unilateral enforcement action (and by that I include regional action) taken within the framework of UN peace maintenance. The NATO operation has been expressly stated to have had as *one* of its proclaimed purposes the enforcement of Security Council resolutions and objectives, i.e. placed within a collective security framework, and in purported pursuit of community objectives.² In its objectives, therefore, it can be distinguished from those numerous unilateral actions — both military and non-military — which are likewise taken without the consent of the states against which they are directed, but which are carried out either in the express pursuit of national or foreign policy interests, or within a bilateral framework of self-help. At the same time, however, the NATO operation is problematic for the international lawyer in that it has been taken in the absence of express authorization

¹ See Simma, 'NATO, the UN and the Use of Force: Legal Aspects', and Cassese, 'Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?', 10 *EJIL* (1999) 1–22 and 23–31, respectively.

² The NATO position was summarized as follows by its Secretary-General Javier Solana on 9 October 1998: 'The relevant main points that have been raised in our discussion yesterday and today are as follows:

- The FRY has not yet complied with the urgent demands of the International Community, despite UNSC Resolution 1160 of 31 March 1998 followed by UNSC Resolution 1199 of 23 September 1998, both acting under Chapter VII of the UN Charter.
- The very stringent report of the Secretary-General of the United Nations pursuant to both resolutions warned *inter alia* of the danger of a humanitarian disaster in Kosovo.
- The continuation of a humanitarian catastrophe, because no concrete measures towards a peaceful solution of the crisis have been taken by the FRY.
- The fact that another UNSC Resolution containing a clear enforcement action with regard to Kosovo cannot be expected in the foreseeable future.
- The deterioration of the situation in Kosovo and its magnitude constitute a serious threat to peace and security in the region as explicitly referred to in the UNSC Resolution 1199.

On the basis of this discussion, I conclude that the Allies believe that in the particular circumstances with respect to the present crisis in Kosovo as described in UNSC Resolution 1199, there are legitimate grounds for the Alliance to threaten, and if necessary, to use force.' (Letter from Solana, addressed to the permanent representatives to the North Atlantic Council, dated 9 October 1998, quoted in Simma, *supra* note 1). See also Press Statement of Solana, repeating the threat of air strikes, if the 'requirements of the international community' and all relevant Security Council resolutions were not observed. NATO Press Release (99)12; see also (99)40 (<http://www.nato.int/docu/pr/1999/p99-040e.htm>). NATO's actions were stated also to be a response to Yugoslavia's failure to fulfil its obligations under Res. 1203, in which the Council 'endorsed and supported' the agreement reached between Belgrade, the OSCE and NATO, for the deployment of a Verification Mission within Kosovo and demanded that those agreements be implemented promptly.

by the Security Council, although implied authorization or *ex post facto* legitimization has been claimed.

The NATO operation is not an isolated case, although it may be so in its nature and magnitude. A number of cases illustrate the phenomenon of unauthorized unilateral enforcement of collective measures, such as the series of bombardments of Iraq to enforce a unilaterally proclaimed no-fly zone in southern Iraq, or to ensure compliance with Security Council resolutions (including those relating to disarmament); Operation Provide Comfort in northern Iraq; or again, the action led by a regional organization — ECOWAS — in Liberia. These actions were justified by being linked in to Security Council action under Chapter VII.

I will not refer in this context to the increasing resort to non-military countermeasures by states or groups of states in reaction to violations of *erga omnes* obligation, such as the economic sanctions applied by the European Union in response to human rights violations. However, in the context of unilateral enforcement of collective decisions, it is interesting to point out in passing that the United States D'Amato-Kennedy Act of 1996 imposing economic sanctions on foreign persons engaging in specified transactions with Iran and Libya, also constitutes a claim to enforce Security Council resolutions unilaterally (that is without specific authorization from the Security Council) as against third parties. One of the purposes of the Act is expressly stated to be, *inter alia*, that of seeking compliance by Libya with its obligations under Security Council Resolutions 731, 748 and 883.³ These measures may, in the light of each case, arguably constitute a violation of the principle of non-intervention, and raise issues of extraterritoriality or infringement of the rights of third parties.

A fortiori, those interventions involving military force cannot be justified within the context of the current rules on state responsibility under which armed reprisals have been clearly prohibited; moreover, they neither correspond to the requirements of a state of necessity as outlined in the ILC Draft Articles on State Responsibility, nor lend themselves to extended claims of self-defence. Finally, they cannot be reconciled with the classical doctrine of humanitarian intervention, in which military intervention by third states had as its purpose the protection of the nationals of a state from widespread violations of human rights.⁴ This basis for intervention was elaborated in a specific context, i.e. in the notable absence of both human rights law and an all-out prohibition of the threat or use of force. In the face of a visible absence of consensus, moreover, it is doubtful whether it can be maintained that this doctrine *in its classic form* survived the adoption of the Charter. Nor can all the above-mentioned military operations be justified on that basis, either in terms of their nature, legal basis, or

³ United States: Iran and Libya Sanctions Act of 1996, 35 *ILM* (1996) 1273 at s. 3.

⁴ For an exposition of the classical doctrine see e.g. Rougier, 'La théorie de l'intervention d'humanité', 17 *RGDIP* (1910) 468–526. See also for a survey, S.D. Murphy, *Humanitarian Intervention. The United Nations in an Evolving World Order* (1996).

expressed objectives, which have been closely linked to Security Council resolutions.⁵ In short, any analysis of their legality under existing general international law can only lead to the evident conclusion that they contravene the Charter's prohibition of the threat or use of force in international relations under Article 2(4) or, in the case of regional action, Article 53(1) which prohibits enforcement action 'taken under regional arrangements or by regional agencies without the authorization of the Security Council ...'

The focus of my enquiry is, rather, to examine the legality of such interventions on the basis of their claims to unilateral enforcement of UN resolutions and objectives within the framework of the collective security regime that is being forged in the recent practice of the Security Council under Chapter VII of the Charter. This practice has become increasingly central to issues of international responsibility and more particularly to enforcement of international community norms.⁶ While it is clear that the development of such UN mechanisms can only lie outside an eventual treaty on state responsibility, the relationship between collective security and state responsibility remains to be explored.

2 The Link between State Responsibility and Collective Security

On the one hand, at least in the recent practice of the Council (as opposed to the text of the Charter or the intention of its founders) the extensive and discretionary powers granted to an elitist, political United Nations organ whose primary responsibility is the maintenance of a political conception of international ordering — i.e. the maintenance of international peace and security — have come to play an important role within an emerging regime relating to collective responses to violations of norms considered of fundamental importance to the international community, when these are signalled out as constituting threats to or breaches of international peace and security.⁷

Numerous Security Council resolutions adopted under Chapter VII contain all the legal elements familiar to state responsibility taken in the sense of encompassing *all* the legal consequences of internationally wrongful acts of states. Determinations under Article 39 have been linked to alleged breaches of fundamental norms of international law, the violation becoming therefore a constituent element of the threat to, or breach of, the peace. The ensuing consequences — measures adopted under Article 41, or Article 42-type measures — have resulted in the temporary

⁵ Certain of these interventions, such as that in northern Iraq and the NATO operation have been justified both in terms of a duty to intervene under international law and an implied basis in Security Council resolutions. There is little coherency in these arguments. See Murphy, *ibid.*, at 187–192.

⁶ See for example reports of Roberto Ago, *YBILC* (1976), Vol. II, Parts 1 and 2 and Gaetano Arangio-Ruiz, A/CN.4/469 and 476 as to the rightness of considering measures under Chapter VII as forms of international responsibility.

⁷ See Gowlland-Debbas, 'The Functions of the United Nations Security Council in the International Legal System', in M. Byers (ed.), *The Role of Law in International Politics* (2000) 305–341.

suspension of the subjective rights of targeted states. Council resolutions have also called for the cessation of the acts in question, guarantees of non-repetition and even reparations (in the case of Iraq). Moreover, where implementing states are concerned, Council resolutions have served to exonerate them from performance of treaty obligations as well as from customary international law — in short, this can be viewed within the context of circumstances precluding wrongfulness.

In respect of the conflict in Kosovo, for example, Council concern was not only triggered by the instability created in the region and the threat of intervention by neighbouring states — a major security concern — but also included considerations relating to violations of fundamental principles of international law (see Resolutions 1160, 1199 and 1203 (1998)). While the Council has consistently stressed respect for the territorial integrity and sovereignty of the Federal Republic of Yugoslavia, far from regarding the internal crisis as falling within that state's domestic jurisdiction, it has expressed grave concern in respect of Yugoslavia's 'excessive and indiscriminate use of force', as well as condemned acts of violence by all parties as well as 'terrorism in pursuit of political goals'. It has also emphasized the 'increasing violations of human rights and of international humanitarian law, and . . . the need to ensure that the rights of all inhabitants of Kosovo are respected', as well as reaffirmed the right to return of refugees and displaced persons and 'the responsibility of the Federal Republic of Yugoslavia for creating the conditions which allow them to do so' (Resolution 1199). In sum, the Council has underlined respect for minority rights and outlined the means for ensuring this in the future, including 'an enhanced status for Kosovo, [with] a substantially greater degree of autonomy'.

The concept of international peace and security therefore appears to have acquired a meaning that extends far beyond that of traditional collective security (envisaged as an all-out collective response to armed attack), to one in which ethnic cleansing, genocide and other gross violations of human rights, as well as grave breaches of humanitarian law, including those encompassed within a state's own borders, are considered component parts of the security fabric.

Both the law of collective security — at least in practice — and the law of state responsibility (in respect of Article 19 of the draft Articles) have therefore been evolving towards concern with the legal consequences of violations of fundamental community norms, although it is obvious that the mechanisms should not be confused and the distinction between the two preserved. On the one hand, the ILC draft Articles, while seriously circumscribing unilateral reactions in general and prohibiting armed reprisals, have included not only a *duty* of all states to react to their violations, but also a (less fettered) right or *faculté* on the part of even indirectly injured states to react *uti singuli*. On the other hand, Chapter VII mechanisms provide centralized responses which create a 'vertical' relationship between implementing states and the organization, as well as regulating resort to military force.

The resort to military action, such as that led by NATO, can be examined within this evolving collective security framework, raising such questions as to whether we are or should be moving towards the institutional enforcement of international community norms; the limits within which the implementation of UN collective machinery can be

delegated or contracted out to individual actors; whether, in the face of the inadequacy or paralysis of such mechanisms, there is room for non-collectively authorized unilateral action for the execution of *collective decisions*, and the extent to which such unauthorized unilateral measures can constitute precedents which impact on the evolution of the United Nations Charter.

These issues are currently creating a profound unease among international lawyers,⁸ in particular in regard to such systemic questions as who creates, and by what process, fundamental community norms and who is entitled to enforce them and by what means. But also to return to the Cassese/Simma debate, they raise the question of the relationship between the international legal system and other systems — ethics for one, but also the exact location of that ‘thin red line’ that constitutes the interaction between law and politics.

3 The Legal Function of Security Council Resolutions Authorizing Military Force

Before examining *unauthorized* unilateral action, however, it is necessary to begin by examining the functions actually performed by those numerous Security Council resolutions adopted under Chapter VII of the Charter which have served as authorizations to states to resort unilaterally to coercive measures. These resolutions, which have become part of the regular practice of the Council, can be characterized as shown below.

They authorize expressly or implicitly, the use of military force, including air power, directed to the achievement of specific objectives. The purpose may be a limited one: enforcement at sea of an economic embargo decreed by the Security Council — although this may require exercise of police powers rather than military action (the cases of Rhodesia, Iraq, Haiti, Federal Republic of Yugoslavia); defence of peacekeeping forces (Bosnia, Kosovo); achievement of humanitarian objectives, such as the protection of UN so-called ‘safe’ areas and/or the provision of a secure environment for humanitarian relief operations (Somalia, Bosnia); or achievement of political objectives, such as reinstatement of a democratically elected regime (Haiti), or implementation of political or peace agreements (Bosnia, Haiti, Kosovo). But all-out military force has also been authorized by the Security Council in the cases of Korea and Iraq — Resolution 678 (1990), for example, had as its objective the use of all necessary means to uphold and implement Security Council resolutions and to restore international peace and security in the area. It should be added that Resolution 1264 (1999), adopted under Chapter VII, which authorized the establishment of a multinational force in East Timor to fulfil the objectives, *inter alia*, of restoration of peace and security in East Timor and facilitation of humanitarian assistance operations, was made pursuant to the request of the government of Indonesia.

They are directed expressly or by implication to a variety of addressees: the

⁸ See e.g. Condorelli, ‘A propos de l’attaque américaine contre l’Irak du 26 juin 1993: Lettre d’un professeur désemparé aux lecteurs du JEDI’, 5 *EJIL* (1994) 134–144.

resolution may be addressed to one state acting alone or called on to form a multinational force under its command and control (the United Kingdom (Rhodesia), United States (Somalia and Haiti), France (Rwanda), Australia (East Timor));⁹ a coalition of states (Iraq);¹⁰ as well as more generally, all member states (and even ‘all states’) acting nationally or through regional arrangements (Bosnia, Haiti).¹¹ Finally, Resolution 1244 on Kosovo adopted subsequent to the NATO intervention, ‘authorizes Member states and relevant international organizations to establish the international security presence in Kosovo . . . with all necessary means to fulfil its responsibilities’. (I exclude from this analysis authorizations directed to UN organs — such as peacekeeping forces, or the Secretary-General.)

They define in varying terms the modalities of the operation. Some of the resolutions specify a temporal limitation, e.g. the Rwanda operation is limited to two months, while in other cases it is left up to the Security Council to determine when the objectives are reached and the multinational force terminated (Haiti, East Timor). There is some form of accountability, e.g. a reporting requirement to facilitate monitoring (Somalia, Iraq), or a request for coordination of action with the Military Staff Committee (Resolution 665), or the Secretary General, for purposes of a unified command and control (Somalia, Bosnia, in the case of dual UN/NATO command).

⁹ See Res. 221 (1966) on Southern Rhodesia; Res. 794 (1992) on Somalia; Res. 940 (1994) on Haiti; Res. 929 (1994) on Rwanda; Res. 1264 (1999) on East Timor. For example, Res. 794 on Somalia welcomes ‘the offer by a Member State . . . concerning the establishment of an operation to create such a secure environment . . .’ and ‘authorizes the Secretary-General and Member States co-operating to implement the offer . . . to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia’. Res. 940 authorizes ‘Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership . . . 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 . . .’. Res. 929 authorizes member states cooperating with the Secretary-General to use ‘all necessary means to achieve . . . humanitarian objectives’ in Rwanda — in fact welcoming France’s offer to head a multinational force.

¹⁰ Res. 665 (1990) on Iraq calling upon ‘those Member States cooperating with the Government of Kuwait which are deploying maritime forces to the area’, authorizes enforcement at sea of the embargo; Res. 678 (1990) on Iraq ‘authorizes Member States cooperating with the Government of Kuwait . . . to use all necessary means to uphold and implement’ resolutions of the Security Council.

¹¹ On Bosnia, see Res. 770 (1992) which, ‘call(s) upon states to take nationally or through regional agencies or arrangements all measures necessary to facilitate in coordination with the United Nations’ the delivery of humanitarian aid; Res. 787 (1992) calling upon all states, acting nationally or through regional agencies or arrangements, to ‘use such measures commensurate with the specific circumstances as may be necessary under the authority of the Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations’ in implementation of economic sanctions; Res. 816 and 836 (1993) deciding that ‘Member States, acting nationally or through regional organizations or arrangements, may take, under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR, all necessary measures’ to ensure compliance with the ban on flights and to protect the safe areas in Bosnia, respectively, which served as the basis for NATO air strikes. See also Res. 1031 (1995) on enforcement of compliance with the Dayton Peace Agreement. On Haiti: Res. 875 (1993) and 917 (1994) which calls upon ‘Member States cooperating with the legitimate Government of Haiti, acting nationally or through regional agencies or arrangements . . .’

It is a truism to state that such authorizations have emerged out of necessity, in the absence of a military force at the Council's disposal, and on the basis of the implied powers doctrine,¹² although it will be recalled that the Charter expressly provides for some form of contracting out in Article 53(1): 'The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority.'

These resolutions essentially perform two functions: (1) in the context of Charter law, they constitute delegations of the Council's enforcement powers under Chapter VII; (2) in the context of international law, and in particular that of state responsibility, they act as a 'circumstance precluding wrongfulness', authorizing action which would otherwise be unlawful under international law.

A Authorizations as Delegation of Powers

Such authorizations, which harness unilateral action by effectively 'privatizing' or 'contracting out' the functions of the Security Council, have been seen in legal terms as a delegation under the Charter of the discretionary enforcement powers of the Security Council.¹³ The action authorized is therefore plainly to be conducted within the overall objective of 'restoration of international peace and security' which has included, in recent practice, enforcement of community norms. Moreover, the resolutions are based on a prior determination under Article 39 of a threat to or breach of the peace.¹⁴ Unlike the situation existing under the League of Nations, this power was vested from the start in the Security Council and remains a collective determination — it is neither up to individual member states nor a regional organization to determine when international peace and security has been threatened or when such a situation has ceased to exist, and this has been consistently recognized in Council practice. This is not to say that certain ambiguities have not arisen, as for example that, in Resolution 678, over the relationship between collective security and self-defence, but it is clear that the reference to 'restoration of international peace and security' places the action squarely within the responsibility and powers of the Security Council. In short, the insertion of unilateral action within the Charter means

¹² The ICJ stated in the *Expenses* case: 'It cannot be said that the Charter has left the Security Council impotent in the face of an emergency situation when agreements under Article 43 have not been concluded.' ICJ Reports (1962) 167.

¹³ See H.G. Schermers and N.M. Blokker, *International Institutional Law: Unity within Diversity*, (3rd rev. ed., 1995) 224–231; and, for a very lucid analysis of the general legal framework governing the process of delegation, D. Sarooshi, *The United Nations and the Development of Collective Security. The Delegation by the UN Security Council of its Chapter VII Powers* (1999).

¹⁴ In Res. 1160 (1998) on Kosovo, the Council purports to act under Chapter VII, but does so in the absence of a preliminary finding of a threat to international peace and security, contrary to an established and consistent practice beginning with the case of Southern Rhodesia. However, the subsequent Res. 1199 (1998) makes that finding.

that the Council continues to bear major responsibility for it, although that does not exclude an eventual form of joint accountability.¹⁵

There was from the start (the question was debated as early as Hans Kelsen's famous analysis of the Korean crisis) considerable controversy over such authorizations and their ambiguous legal basis, in the absence of an express provision in the Charter, and apart from broad references in the resolutions to Chapter VII.¹⁶ However, there is by now a sufficient and consistent practice to make these objections moot.

Nevertheless, resolutions authorizing 'the use of all necessary means' (which undoubtedly refers to the use of military force), imply a wide margin of discretion on the part of those called on to implement them, e.g. in determining when the circumstances calling for a use of force have arisen. Moreover, in practice the limited forms of accountability introduced into the resolutions have proved inadequate and the Security Council has in a number of cases lost control over the military action underway, particularly in situations where forces fly their own flags and ensure their own command, or in the case of UN/NATO dual command.¹⁷ It is understandable, therefore, that member states have treated such a delegation of the Council's powers to individual actors with extreme caution and that they have made numerous efforts to circumscribe Council authorizations, consistently insisting that the Council retain a degree of authority and control over such operations and avoid providing 'a blank cheque for excessive and indiscriminate use of force'.¹⁸

There has been insistence, for example, that such authorization must be express.¹⁹ The Council is also considered to have retained at all times the right to revoke such a

¹⁵ On the articulation between member state responsibility and the responsibility of the organization, see P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (1998) 426 et seq.

¹⁶ Despite references to the Military Staff Committee in Res. 665 and to the authority of the Council in some resolutions such as 665 and 787, it has been concluded that they are not based on Article 42 (See Zacklin, 'Les Nations Unies et la crise du Golfe', in B. Stern (ed.), *Les aspects juridiques de la crise et de la guerre du Golfe* (1991) 57–76, at 66–68).

¹⁷ On a critical approach to such authorizations and suggestions for improvement, see Quigley, "'The Privatization" of Security Council Enforcement Action: A Threat to Multilateralism', 17 *Michigan Journal of International Law* (1996) 249–283; Weston, 'Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy', 85 *AJIL* (1991) 516–535, at 526–527; Lobel and Ratner, 'Bypassing the Security Council: Ambiguous Authorizations to Use Force, Ceasefires and the Iraqi Inspection Regime', 93 *AJIL* (1999) 124–154; and Murphy, *supra* note 4.

¹⁸ Malaysia in SCOR, 2963rd mtg, at 76–77. 'When the UN 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). It must be underlined that this resolution does not provide a blank cheque for excessive and indiscriminate use of force. The Council has certainly not authorized actions outside the context of its Resolutions 660, 662 and 664.' Yemen referred to Res. 678 as a 'classic example of authority without accountability'. (SCOR 2963rd mtg, at 33. See also Cuba, at 58).

¹⁹ This is in accordance with the general institutional law governing delegation of powers. See the case of *Meroni*, in which the EC Court, referring to a delegation of powers by one of the organs of the European Community, considered that a 'delegation of powers cannot be presumed and even when empowered to delegate its powers the delegating authority must take an express decision transferring them' (Case 9/56 [1958] ECR 133 and 151–52). Schermers and Blokker, *supra* note 13, at 224–231 and Sarooshi, *supra* note 13, at 8–9.

delegation. Reluctance to vote on certain resolutions has been stated to be the result of their lack of adequate reporting and accountability requirements.²⁰ Zimbabwe stated that it ‘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’.²¹ This concern that all such operations be UN led and that they avoid setting dangerous precedents has indeed been shared by a wide spectrum of states and expressed on numerous occasions. New Zealand stated that its preference, ‘unless absolutely exceptional circumstances exist’, ‘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.’ The same opinion was expressed by Belgium.²²

In the light of the difficulties of constituting a UN force, this has become standard practice in the United Nations. But the concerns expressed by member states over such delegation by the Security Council of its responsibilities under Chapter VII, and the ambiguous and open-textured nature of the resolutions, underline that *even where authorized by the Council* such delegations of power require placing serious checks on unilateral action. It is generally agreed, moreover, that the Council does not have an unfettered right under the Charter to dispose of its powers.

B Authorizations as Precluding Wrongfulness

The second function of such resolutions is to serve as an authorization to take specified action that would otherwise be unlawful under international law. They have resulted in temporarily suspending the (non-imperative) rules of customary international law as well as conventional obligations. The extent to which the Security Council can legitimize such action should here be viewed from the perspective of the relationship between the Charter as treaty and constituent instrument, on the one hand, and general international law on the other, for it is clear that the Charter forms part of the corpus of international law. States parties to a multilateral treaty are of course entitled to derogate from the general (though not peremptory) rules of customary international law, at least in so far as their *inter se* relations are concerned. But in addition, the constitutional nature of the Charter means that the general rules relating to the application of successive treaties do not operate in particular situations — this is the effect of Article 103 of the Charter which ensures that Charter obligations (and this includes secondary obligations derived from Security Council resolutions) prevail over conventional obligations.

It is clear that member states have sought authorizations from the Security Council where they have deemed their actions contrary to international law. In the absence of

²⁰ India and Zimbabwe in the case of Bosnia (SCOR, 3106th mtg. at 12 and 16–17, respectively); China in the case of Haiti (SCOR, 3413rd mtg. at 12) etc. See discussion in Quigley, *supra* note 17, at 264–269.

²¹ SCOR 3145th mtg. at 7–10.

²² Netherlands in the case of Haiti (SCOR 3413th mtg. at 21–22); Belgium in the case of Somalia (SCOR, 3145th mtg. at 24).

such authorization, the naval interdictions called for in the cases of Rhodesia, Iraq, Yugoslavia and Haiti, which imply, and in the case of Rhodesia explicitly refer to, the use of a limited amount of (police) force, for the purpose of interception, forcible search, and eventual arrest, of third-party ships on the high seas, would normally have contravened member states' international law obligations both in time of peace and in time of war.²³ That only a specific Security Council authorization would serve to absolve states undertaking such action was also underlined in the various debates. The measures referred to in the so-called 'Beira' Resolution 221, were characterized by Arthur Goldberg, then US Security Council representative, as 'one of the gravest and most far-reaching proposals that has been made to this Council . . . we are asked . . . to put our sanction upon what will be a rule of international law — that when this Council acts vessels on the high seas can be arrested and detained in the interest of the international law which we will be making here today . . .', while Lord Caradon, the UK representative, stated: 'Without the authority of the Security Council . . . our government has to face defiance of the United Nations with its hands tied.' The UK had requested the adoption of a specific resolution by the Security Council 'so that it should not risk acting in breach of the law of nations . . .'.²⁴ Similar authorizations were sought in the form of Resolutions 665 and 678.

The fact that the resolutions are not governed by Article 25 of the UN Charter (the Council 'recommends', 'calls upon', 'authorizes' . . .), has raised the question as to whether they can override, on the basis of Article 103, member states' international conventional obligations, or serve as a derogation from customary international law. It has been pointed out that 'the concept of a recommendation having the effect of rendering an otherwise unlawful act lawful is not free from objection'.²⁵ However, United Nations practice corroborates the view that this is no longer a controversial issue. Such Security Council authorizations hence serve as 'circumstances precluding wrongfulness' and have their importance in the framework of state responsibility. They were addressed in passing by the International Law Commission, in the framework of discussions relating to the issue of countermeasures and sanctions: 'sanctions applied in conformity with the provisions of the Charter would certainly not be wrongful in the legal system of the United Nations, even though they might conflict with other treaty obligations incumbent upon the state applying them . . . (even) where the taking of such measures is merely recommended'.²⁶

²³ See V. Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law* (1990) at 408–413, and by the same author, 'Comment', in H.H.G. Post (ed.), in *International Economic Law and Armed Conflict* (1994) 168–171.

²⁴ See statements by Lord Caradon (UK) and US Ambassador Goldberg, in SCOR, 1276th mtg, paras 21, 68–69, respectively.

²⁵ Fawcett, 'Security Council Resolutions on Southern Rhodesia', 41 *BYIL* (1965–66) 103–121, at 121.

²⁶ *YBILC* (1979), Vol. II, Part 1, pp. 43–44 and Vol. II, Part 2, p. 119. See also *YBILC* (1979), Vol. I, p. 57 and the Collective Measures Committee established under the Uniting for Peace Resolution GA Res. 377 (V), which stated that 'in the event of a decision or *recommendation* of the United Nations to undertake collective measures . . . states should not be subjected to legal liabilities under treaties or other international agreements as a consequence of carrying out United Nations collective measures' (GAOR (VI), suppl. 13).

Despite the ambiguities raised above, authorizations embedded in Security Council resolutions have therefore served a very important function, placing the military action within the framework of the Charter and hence within the limits of the Charter's purposes and principles, as well as ensuring that states would not thereby incur international responsibility.

4 The Legality of Unilateral Action with No Council Authorization

A series of arguments, however, has been used to justify unilateral actions in the absence of express authorization by the Security Council.

A *Implied Authorizations*

The first argument acknowledges the importance of seeking authorization for the use of military force, but considers that implicit authorization can be unilaterally deduced from the open-ended nature of certain resolutions or from their wording. In the case of the intervention in northern Iraq, Resolution 688 (1991) was used as justification, both alone and in combination with Resolution 678, for the various actions that were taken — the establishment of no-fly zones, safe havens and the forcible delivery of humanitarian relief — despite the fact that the resolution had only called on Iraq to allow access by international humanitarian organizations and on states to contribute to such humanitarian relief efforts.²⁷

Resolution 1154 endorsing the memorandum of understanding reached in February 1998 between Iraq and the UN, concerning inspection of specific Iraqi installations, stated that 'any violation would have "severest consequences for Iraq"; the Council further decided 'in accordance with its responsibility under the Charter, to remain actively seized of the matter, in order to ensure implementation of this resolution, and to secure peace and security in the area'. This was claimed to have provided a green light to attack Iraq if it did not live up to the agreement. Furthermore, in December 1998, the United States justified its air strikes against Iraq on the basis that they were acting under the authority provided by the similarly worded Resolution 687, and, underlying that, Resolution 678.²⁸

Similar arguments were initially made by NATO members to justify the threat or use of force against the Federal Republic of Yugoslavia, on the basis of the wording of Resolution 1199 in which the Council declared that it was 'alarmed at the impending humanitarian catastrophe ...' (with reference in particular to the mass exodus of people from Kosovo), and that 'should the concrete measures demanded in this resolution and Resolution 1160 (1998) not be taken, to consider further action and

²⁷ See Murphy, *supra* note 4, at 171–172, 184–191. Similar arguments were used in respect of the intervention in southern Iraq.

²⁸ See Press Release SC/6626, 12 January 1999.

additional measures to maintain or restore peace and security in the area'. Yet, Russia had explicitly stated that it had voted for the resolution because no measure of force was being introduced at this stage.

Such efforts to link unilateral interventions into Security Council resolutions, rather than rely solely on general international law or more particularly, on a purported right of humanitarian intervention, shows the clear awareness on the part of states leading these operations of the need to seek Council authorization. NATO countries had also initially taken the position that NATO did require Security Council authorization for such action.²⁹

While there was little condemnation in the Council or in the General Assembly of the interventions in either northern or southern Iraq, it has been stated that this 'was most likely not based on a perception that states have a unilateral right to intervene for humanitarian purposes. Rather, it was based on a perception that authority to intervene for these purposes emanated in some fashion from Security Council authorization'.³⁰

However, commentators are in agreement that such wording as that used in Resolution 687 clearly reserves to the Council alone the right to determine when and what further measures should be taken and cannot be seen as substituting for an authorization clearly addressed directly to member states.³¹ Moreover, it has been seen that neither delegation of the Council's powers nor authorization of acts normally unlawful under international law can lightly be made. It is clear that the Security Council and hence its members remain bound by conventional or customary international law until such time as an express derogation has been made.

B Implied Powers Doctrine

In relation to the NATO air strikes, it has been argued that in the face of the paralysis of the Security Council, and on the grounds that the Council has a primary but not exclusive responsibility for the maintenance of international peace and security, regional arrangements have a residual responsibility to fill the gap on the basis of an extended interpretation of Chapters VII and VIII.

As the Netherlands stated in the Council's debates on 24 March at the start of the NATO bombardments: 'It goes without saying that a country — or an alliance — which is compelled to take up arms to avert such a humanitarian catastrophe would always prefer to be able to base its action on a specific Security Council resolution. The Secretary-General is right when he observes in his press statement that the Council

²⁹ See Lobel and Ratner, *supra* note 17, at 125 on the US position, and 123.

³⁰ Murphy, *supra* note 4, at 195.

³¹ See further Frowein, 'Unilateral Interpretation of Security Council Resolutions — a Threat to Collective Security?', in V. Götz, P. Selmer and R. Wolfrum (eds), *Liber amicorum Günther Jaenicke* (1999) 97–112, at 107, who states that unilateral interpretations of Security Council resolutions cannot be upheld in the face of the clear wording and the context in which the resolution was adopted. See statements (quoted in Frowein, at 111), by China, Costa Rica, France, and Russia in S/PV.3858, at 5, 14, 15 and 18, respectively. France declared: 'It is the Security Council that must evaluate the behaviour of a country, if necessary to determine any possible violations, and to take the appropriate decisions.'

should be involved in any decision to resort to the use of force. If, however, due to one or two permanent members' rigid interpretation of the concept of domestic jurisdiction, such a resolution is not attainable, we cannot sit back and simply let the humanitarian catastrophe occur . . . there are times when the use of force may be legitimate in the pursuit of peace.³²

This argumentation, which echoes past debates over the legality of the Uniting for Peace Resolution (Resolution 377 (1950)) is, in my view, inapplicable in this context for a number of reasons. First, Uniting for Peace was intended to operate only in the face of the paralysis of the Security Council. As Russia pointed out, however, no attempt was made to seek Council authorization immediately before the launch of NATO's military operation — no draft resolution was put before it and hence no veto can be said to have paralysed its actions. Secondly, the justification behind Uniting for Peace related to the assumption by the General Assembly of implied powers which could be deduced from the broad powers already bestowed on it under Article 10 of the Charter; it consisted in the transfer of responsibility from one principal UN organ to another, and one, moreover, representative of the totality of member states. In the event, no attempt was made to obtain General Assembly legitimization. Thirdly, the application of the doctrine of implied powers on which these arguments rest, is not unlimited — a power cannot be implied if it goes against an express prohibition in the Charter, such as the ones embedded in Article 2(4) or in Article 53(1).

This is certainly not to argue for a static approach to Charter interpretation. The doctrine of implied powers, which is based on the view that the purposes set forth in Article 1 of the Charter can be used to justify the exercise of power not expressly authorized, rejects the principle that treaties should be construed restrictively. It is however to underline the *raison d'être* of that doctrine, which up to now has been utilized to promote a teleological and evolutionary approach to the Charter for the purpose of expanding the collective competence of the United Nations in the face of restrictive assertions of sovereignty by member states. Such a doctrine commonly perceived as a progressive tool for adapting the Charter to changing circumstances, is not intended to be used for a reactionary purpose, i.e. reversion to a sovereign unfettered right on the part of one or several states to usurp Council powers.

C *Legitimization ex post facto*

It has also been argued that *a posteriori* legitimization of unilateral action by means of a Security Council resolution serves to remove any taint of illegality even in the absence of prior authorization.

In Resolution 1244 (1999) the Council decides on the deployment in Kosovo under United Nations auspices and in close coordination with it, of international civil and security presences having a clearly defined mandate. The authorization in paragraph 7 to 'Member States and relevant international organizations' to establish the international security presence in Kosovo and to endow it with 'all necessary means to

³² S/PV 3988, at 8. See also statement by Slovenia in S/PV 3989, at 4.

fulfil its responsibility' is closely circumscribed and the responsibilities clearly defined under paragraph 9. There are also clear reporting requirements.

But the resolution also incorporates, in its annexes, the General Principles on the Political Solution of the Kosovo crisis agreed upon by the foreign ministers of the Group of Seven and Russia in Bonn on 6 May 1999 and accepted by the Federal Republic of Yugoslavia, as well as refers to them in the preamble and paragraphs 1 and 2, as the basis for a political solution to the Kosovo crisis. A link is also made in the annexes between acceptance of these principles, the Rambouillet accords and NATO's suspension of military activity.

This is not the first time that it has been argued that a Council resolution has endorsed *ex post facto* a non-authorized unilateral action. Five months after the intervention in Liberia had begun, a Presidential statement of the Security Council commended the efforts made by ECOWAS and Resolution 788, adopted subsequently, 'commended ECOWAS for its efforts to restore peace, security and stability' in that country.

However, to begin with, it is not a foregone conclusion that these resolutions do indeed legitimize the action taken. It is not clear, for example, whether the Security Council was endorsing ECOWAS's diplomatic efforts or military intervention.³³ In the same way, the Council's clear reaffirmation of the principle of territorial integrity in Resolution 1244 brings us back to the prohibition laid down in Article 2(4) of the Charter and can with difficulty be seen as a waiver either under this Article or *a fortiori* under Article 53 of the Charter.

Nor do the Council debates surrounding the adoption of the resolution give any indication that it was to be seen as an endorsement of the NATO military operation. A number of states welcomed the resumption by the Council of 'its legitimate role in the Kosovo crisis', the enhancement of 'the Council's credibility' and renewed 'international confidence in a rules-based collective security system'.³⁴ China abstained rather than voted against the resolution only on the basis that it reaffirmed 'the purposes and principles of the UN Charter, the primary responsibility of the Council and the commitment of all member states to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia',³⁵ while Brazil warned: 'independent of the moral considerations invoked in these actions, with which we fully identified — problematic precedents have been set in the resort to military force without Security Council authorization. These have neither contributed to a policy on the Council's authority nor improved the humanitarian situation.'³⁶

It can therefore be argued that the Council, by means of Resolution 1244, simply makes its own the principles contained in an agreement concluded outside its framework, without any attempt at legitimization of the threat and use of force behind it. It should also be mentioned that some of these principles echo what the Council was

³³ See Murphy, *supra* note 4, at 345.

³⁴ S/PV 40011, Slovenia, France, at 11, Canada, at 13, Malaysia, at 15, Gabon and Gambia, at 19–20.

³⁵ *Ibid.*, at 9.

³⁶ *Ibid.*, at 17.

advocating in its previous resolutions, such as an end to the violence and repression in Kosovo and the safe and free return of all refugees and displaced persons, and that the Council had been following closely the negotiations on a political settlement of the situation in Kosovo by the members of the Contact Group.³⁷

On the other hand, if Resolution 1244 was indeed intended to endorse an agreement obtained through the threat or use of force contrary to Article 52 of the 1969 Vienna Convention on the Law of Treaties, or to legitimize action contrary to a norm of *jus cogens*, then this would raise serious questions in regard to the Council's responsibility arising from such action.

D Consolidation of Emerging Norms

It has finally been argued that precedents created by the lack of condemnation in the Council, as reflected in the rejection of the text sponsored by the Russian Federation, Belarus and India,³⁸ can contribute to the consolidation of emerging norms, in particular those relating to humanitarian intervention, which in effect modify the Charter's provisions.

While the practice of the political organs of the United Nations has undoubtedly legal significance, and has been taken into account on numerous occasions by the International Court of Justice, the question remains as to how it is to be assessed. While only three states voted in favour of the draft resolution — China, Namibia and the Russian Federation — with 12 states against, interventions by the states represented on or invited to the Council at its 23 and 24 March sessions make it difficult to reach any conclusion on the significance of this rejection. For while some states declared that the NATO action was intended to prevent a humanitarian catastrophe resulting from the Serbian attack on Kosovar Albanians, others such as Malaysia, Namibia, Gabon, China, Russia and India condemned the unilateral resort to force.³⁹ Malaysia stated:

If the use of force is at all necessary, it should be a recourse of last resort, to be sanctioned by the Security Council . . . We regret that in the absence of Council action on this issue it has been necessary for action to be taken outside of the Council . . .⁴⁰

India put the question in this way:

‘Those who continue to attack the Federal Republic of Yugoslavia profess to do so on behalf of

³⁷ See in particular the Presidential Statement of 19 January 1999 (S/PRST/1999/5), in which the Council, *inter alia*, expressed the intention to be informed by members of the Contact Group about the progress reached and awaited such a report.

³⁸ UN Doc. S/1999/328, 26 March 1999. The rejected draft resolution would have had the Security Council affirm that the unilateral use of military force by NATO against the Federal Republic of Yugoslavia without Security Council authorization, ‘constitutes a flagrant violation of the United Nations Charter, in particular Articles 2(4), 24 and 53’, and determine that it ‘constitutes a threat to international peace and security’. Acting under Chapters VII and VIII of the Charter, the Council would have demanded ‘an immediate cessation of the use of force . . . and urgent resumption of negotiations’.

³⁹ S/PV 3988 and 3989.

⁴⁰ S/PV 3988, at 9–10.

the international community and on pressing humanitarian grounds. They say that they are acting in the name of humanity. Very few members of the international community have spoken in this debate, but even among those who have, NATO would have noted that China, Russia and India have all opposed the violence that it has unleashed. The international community can hardly be said to have endorsed their actions when already representatives of half of humanity have said that they do not agree with what they have done.⁴¹

Others were visibly and understandably reluctant to vote for the resolution more because it could be seen as condoning the gross violations of human rights by the Federal Republic of Yugoslavia. The Netherlands stated: ‘the Nato action, in which we are participating, follows directly from Resolution 1203 (1998), in conjunction with the flagrant non-compliance on the part of the Federal Republic of Yugoslavia. Given its complex background, we cannot allow it to be described as unilateral use of force. If the Security Council should now demand an immediate cessation of the Nato action, it would once again — and once again at the initiative of Russia — give the wrong signal to President Milosevic.’⁴²

Assessing the practice of the political organs — determining whose voices count in assessing that practice and how to construe the silences or inaction of the Council — is therefore a difficult task. But this also raises the question of the role of the Security Council in the development of international law. Generally speaking, the Council’s resolutions are not legislative in the sense of applying outside the framework of particular cases of restoration of international peace and security. Moreover, they cannot — by analogy with General Assembly resolutions — be said to reflect either *opinio juris*, nor the generality of the requisite state practice. It is undeniable on the one hand that the cumulative actions of the Security Council under Chapter VII, in instituting collective responses to situations involving breaches of community norms, have had an impact on the shaping of an international public policy and that core norms of human rights, humanitarian law and international criminal law have been affected and strengthened through the impetus thus provided. It is less clear, however, how in the absence of all the components of the international community, and to begin with, the clear opposition of two permanent members of the Security Council, *jus cogens* norms such as the prohibition of the use of force — except where expressly authorized by the Charter — can be modified.

5 Concluding Reflections

Within a traditional bilateral framework, reactions to violations of international law involving subjective interests have taken decentralized and unpredictable forms; within this context, the main problem of unilateral measures has been perceived as the need to constrain and condition such measures. This led as we know to certain developments in public international law — resulting in part from the gradual

⁴¹ S/PV 3989, at 16.

⁴² *Ibid.*, at 4.

institutionalization of international society — in particular, outlawry of unilateral resort to military force short of self-defence, the circumscribing and conditioning of non-forcible reprisals or countermeasures, the monopolization of force within a collective security system and the institutionalization of non-military sanctions within the international organization.

The issue of unilateral enforcement has now resurfaced, this time within the framework of the concept of community interests, which reflects the paradoxical process of both fragmentation and unity of the international system. This has also had consequences in the international legal system. On the one hand, while armed reprisals have been prohibited, unilateral countermeasures short of military force are increasingly accepted as reactions to violations of *erga omnes* obligations, as evidenced by the retention of countermeasures in Part 2 of the draft Articles on state responsibility as one of the reactions to international crimes, or the 1989 resolution of the Institut de Droit International adopted in Compostella. On the other hand, with regard to unilateral resort to *military* force, it has been seen that two sets of claims are currently being made: the one concerns resort to unilateral military action for the purpose of enforcing *collective* decisions taken in the field of international peace and security, the purported justification of which is based on the inadequacy or paralysis of centralized mechanisms; the second is military action in the name of humanitarian intervention in emergency situations in which populations face genocide or other gross violations of human rights. While these two sets of claims are seldom so clear cut and are often intertwined, they must be viewed separately for purposes of legal analysis.

In regard to the first claim, it has been seen that those Security Council resolutions authorizing the use of military force have a dual function — they serve to delegate the Council's powers and competences, and they preclude wrongfulness. While there is a need to regulate and condition such authorizations as well as to circumscribe the powers of the Security Council and determine the allocation of responsibility, this evolution appears to have become an accepted alternative to the lack of means at the disposal of the Council. Resort to unilateral action in the absence of express Council authorization, however, remains an act of usurpation of Council powers and a resort to force which is prohibited under international law.

The second claim relates to the ongoing debate over the validity of humanitarian intervention. This debate, however, wrongly pits the imperatives of human rights against those of state sovereignty. For even the recent evolution of international law has shown that it is not paradoxical to continue to insist on the inadmissibility of intervention and the principle of territorial integrity while promoting the protection of the human person. Both of these developments have been considered as forming important parts of the fabric of the international legal order; the one forms part of the 'protectionist' norms safeguarding the rights of weaker states and shielding their populations, the other part of the content of 'ethical norms'.

This is illustrated by the fact that while in the relations between states the principle of non-intervention and respect for territorial integrity continues to be insisted upon and strengthened, Article 2(7) of the Charter which delimits the relations between the

United Nations and its member states has on the contrary been seriously and consistently eroded most notably in the field of human rights, thus leading to the expansion of international jurisdiction within a multilateral context. Moreover, the Security Council is not bound by Article 2(7) and hence not inhibited by state sovereignty when acting under Chapter VII; its practice has clearly confirmed that the Council has not balked at linking violations of human rights with maintenance of international peace and security, even in situations which traditionally fell within the reserved domain and in the absence of cross-border effects — beginning with the case of Southern Rhodesia. Nor has it been prevented, provided the requisite consensus can be found, from authorizing unilateral military action in such circumstances.

In short, the debate has been wrongly stated as a choice between protection of human rights on the one hand and state sovereignty on the other — it is really a debate over the means not the ends, for remedial action can encompass a number of reactions to human rights violations.

This has been confirmed in the jurisprudence of the International Court of Justice. The Court has juxtaposed on a number of occasions the bilateralist structure of international law with the notion of ‘common’, ‘collective’ or ‘general’ interest.⁴³ It has stated that states may well have an *erga omnes* right and even an obligation to act in a matter affecting the interests of the international community.⁴⁴ It has nevertheless considered that the means were not unlimited and rejected the United States’ invocation of Nicaragua’s human rights record to justify its armed intervention: ‘the protection of human rights — a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the contras.’⁴⁵

To return to Kosovo, the acts of which the Federal Republic of Yugoslavia was accused undoubtedly constituted gross violations of a whole range of human rights and may well have been tantamount to genocide. In consequence, international law has never more clearly provided a platform for action by the international community as a whole. But a military operation taken in response which has laid itself open to accusations of bombardment of towns, attacks against civilian targets and ‘collateral damage’ which included the deaths of columns of Kosovar refugees in flight, bombardment of petroleum refineries, chemical factories, and cultural monuments,

⁴³ *International Status of South West Africa*, ICJ Reports (1950); *Reservations to the Genocide Convention Case*, ICJ Reports (1951); *Barcelona Traction*, ICJ Reports (1970).

⁴⁴ In *Nicaragua*, the ICJ held that there was an obligation on the United States under common Article I of the Geneva Conventions, not only to ‘respect’ the Conventions, but even ‘to ensure respect’ for them ‘in all circumstances’, thus confirming the responsibility of third parties and the international community as a whole faced with violations of humanitarian law (*Nicaragua*, ICJ Reports (1986) at 114). In *Namibia*, the ICJ underlined the obligation of third states to react to certain breaches, in this case to recognize the illegality and invalidity of South Africa’s continued presence in Namibia (*Namibia Opinion*, ICJ Reports (1971) at 55–56).

⁴⁵ *Nicaragua*, ICJ Reports (1986) at 127, 134–135.

and the use of weapons with the potential to damage health and environment,⁴⁶ surely cannot be considered the best way of promoting the ethical and rule-of-law platform on which the response was said to be grounded, and it runs the risk of eroding that very platform. Moreover, in policy terms the operation has proven to have had unforeseen consequences on the ground.⁴⁷

To conclude on the question of unilateral action without Council authorization, I have argued that it is hard to justify such action on the basis of either Charter or general international law. Is this to assume a rigid and static view of the international legal system? Should one not appeal to extra-systemic considerations? Should one like Judge Cassese consider that the rule of law should break on the rocks of human compassion? Or, alternatively, argue that the profound changes in the international power configuration, and the emergence of a single superpower, resulting in a move towards unbridled unilateralism and general disdain for multilateral institutions, should automatically alter the premises of international law?

The question raised here is the extent of the autonomy of the international legal system and its relationship to ethics and politics. Should ethical considerations prevail *as such* over international law, or the legal system absorb *unaltered* changes in political power in the name of effectiveness? This addresses doctrinal debates relating to the function and operations of the international legal system. In a ‘pure theory of law’ approach, the legal system is regarded as a unity that is self-generating and self-regulating and ethical or political considerations are not the concern of the international jurist — this is considered to be the guarantee of the law’s autonomy shielding it from its ambient environment, at least until such time as the *grundnorm* is replaced by extra-systemic forces. At the other extreme, however, lie ‘open systems’ views in which the international legal system is open-ended, empirically and sociologically based, concerned with adapting the law to social change. It has been said that the former view is more likely to remain unchallenged at a time of great social stability, while the latter is more likely to find its *raison d’être* when there is

⁴⁶ See Yugoslavia’s Applications instituting Proceedings filed in the Registry of the Court on 29 April 1999 in the case of *Legality of Use of Force* (Provisional Measures) and oral pleadings by Yugoslavia, Public Sitings of 10 and 12 May 1999.

⁴⁷ See the declaration of the Netherlands in S/PV 4000, at 4: ‘All collateral damage is regrettable, and it is a deeply disturbing thought that air strikes in which my country participates have led to loss of life among innocent civilians. It is equally disturbing to realize that Belgrade’s ethnic cleansing of Kosovo, which was already well under way by 23 March, has enormously accelerated and intensified since our air strikes began. Yet we do not waiver in our conviction that we had no choice but to launch these air strikes . . .’. See also Russia, S/PV.4011, at 7. Another pernicious development is the distortion of the principle of proportionality which underlie such actions. Michael Reisman wrote in connection with the June 1993 raid on Baghdad by the United States, that it represented ‘one more claim to revise this part of the law of armed conflict by inserting a new corollary: the initiating state should use the most discriminating weapon that exposes its forces to the lowest probability of casualty. Note that in this claim, the relationship between attacker and collateral damage to civilians in the target state is perforce zero-sum. The greater margin of safety for the initiating forces translates into greater peripheral damage to civilians in the target’. Reisman, ‘The Raid on Baghdad: Some Reflections on its Lawfulness and Implications’, 5 *EJIL* (1994) at 130–131.

growing divergence between social mores and legal institutions.⁴⁸ Yet, did not Kelsen's insistence on the strict autonomy of the law take place in reaction to the brutal transformations of the social order of his time, and in some way constitute an attempt to save the law from destruction through its instrumentalization for political purposes?⁴⁹

But views of the legal system do not only offer a choice between vacuous form on the one hand and amorphous content, on the other; oscillating between 'the rigidity of metal and the decomposition of smoke'.⁵⁰ It has been held, for example, that the boundaries of law, the way in which the legal system distinguishes itself from other social phenomena, can be maintained on the basis of the autopoietic paradox of combining 'normative closure and cognitive openness', a compromise between the 'demand for continuous adjustment of law to social development while maintaining the regenerative capacity of normativity'.⁵¹

But the process of adjustment between law and politics is a complex one, for the international legal system does not transform any reality into law; it preserves some detachment from its external environment, transforming external 'noise' into order meaningful to itself.⁵² The legal system lays down its own conditions to regulate the relationship between fact and law, ingesting only that part of social reality that it considers relevant, determining which legally relevant facts are to be attributed legal consequences, and at times refusing to give effect to certain facts. Hence, it provides its own means of validation, bestowing legally normative quality on its elements through its sources or rules of recognition, and sanctioning violations of its binding norms on the basis of a binary code: legal/illegal. But it also determines substance, in addition to form, regulating not only the formal validity of the rule (Dworkin's pedigree test), but also its substantive validity based on empirical, teleological and axiological criteria (notions of effectiveness or legitimacy, finalities, essential values), incorporated as underlying or implicit rules of the system.⁵³ These are by no means static or absolute, but evolve over time; however, it is the legal process that again determines the mechanisms for change.

⁴⁸ See M. van Kerchove and F. Ost, *Le système juridique entre ordre et désordre* (1988) at 131.

⁴⁹ Kelsen, *General Theory of Law and State* (trans. Wedberg, 1945) at xvii. However, Kelsen was at the same time well aware of the dilemma created by his postulate of the complete separation of jurisprudence from politics: "This is especially true in our time, which indeed "is out of joint" when the foundations of social life have been shaken to the depths by two World Wars. The ideal of an objective science of law and state, free from all political ideologies, has a better chance for recognition in a period of social equilibrium. It seems, therefore, that a pure theory of law is untimely today."

⁵⁰ See H. Atlan, *Entre le cristal et la fumée* (1979) 5, quoted in Ost, 'Between Order and Disorder: The Game of Law', in G. Teubner (ed.), *Autopoietic Law: A New Approach to Law and Society* (1988) 36–50 at 81.

⁵¹ See Niklas Luhmann, 'The Unity of the Legal System', in *Autopoietic Law*, *supra* note 50, 12–35 at 20–21. One of the most challenging theses of autopoietic theory, according to Teubner, is that '[T]he more the legal system gains in operational closure and autonomy, the more it gains in openness toward social facts, political demands, social science theories and human needs'. 'Introduction', in *ibid.*, at 2.

⁵² See G. Teubner: "The legal system is forced by the uproar outside, by the "noise" of the economic actors, to vary its internal "order" until relative quiet returns . . .', quoted in 'On the Supposed Closure of Normative Systems', in *Autopoietic Law*, *supra* note 50, at 55–56.

⁵³ See Ost, in *Autopoietic Law*, *supra* note 50, at 91–92.

Law, in short, imposes on social reality its own ‘map of misreading’.⁵⁴ It has the paradoxical position of being both open because without society it is nothing, but it is also closed, because society — and with it its teleology and value content — is reinterpreted or ‘misread’ in a legal context according to a specifically legal matrix. The selection and transformation of political decisions or ethical considerations by the legal system into legally significant elements subjected to legal treatment, means that these ultimately escape the ambit of the processes from which they have come. This counters simplistic assertions that for example manifestations of power in the political arena are transported unmodified into the legal system, thus serving to weaken its autonomy.⁵⁵

The forging of an international public policy is the international legal system’s response to the move towards globalization of international society and to its current requirements for security, justice, a minimal ethical core, as well as for sheer survival. The concept of international community has been developed as a fictitious legal construct which may not necessarily correspond to the social reality of the coexistence of heterogeneous states, but which has been considered necessary for the creation and recognition of such community norms. The logic therefore of strengthening centralized institutional mechanisms as a framework for the enforcement of community norms does not come from the application of inappropriate domestic analogies, but from the need in a heterogeneous world to avoid unilateral decisions regarding community interests. As far back as 1910, Rougier, in elaborating the doctrine of *l’intervention d’humanité*, had eloquently stated: ‘les intérêts collectifs doivent faire l’objet de délibérations collectives. Le droit d’agir contre un gouvernement inhumain appartient proprement à la Société des nations, gardienne du droit humain, que les actes tyranniques lèsent dans ses prérogatives essentielles . . . Un Etat isolé, fût-il le plus civilisé du monde, ne saurait parler avec autorité en son nom ni en celui de l’humanité.’⁵⁶ Moreover, while the international system also opposes universalizing tendencies with a trend towards fragmentation, it can be said, paradoxically, that the universal can also serve to protect the particular, for the insistence on strong multilateral institutions is not to discount the need to assert local and cultural particularities.

The United Nations is once more under scrutiny. It is of course not the first time that its demise has been predicted.⁵⁷ But there are two very different sources of critique. The source of current disillusionment of Western (particularly American) writers with multilateralism is a parochial one — situated in a reaction to a very particular historical (Wilsonian) and ideological (liberalism) framework. The current disillusionment of Third World states, which once perceived the United Nations as a unique platform for the airing of different claims and voices, as well as for protection of

⁵⁴ See De Sousa Santos, ‘Law: A Map of Misreading. Toward a Postmodern Conception of Law’, 14 *Journal of Law and Society* (1987) 279 at 281–282.

⁵⁵ For a discussion in the light of the actions of the Security Council, see Gowlland-Debbas, *supra* note 7.

⁵⁶ Rougier, *supra* note 4, at 501.

⁵⁷ A New York Times headline in 1946 had proclaimed: ‘Is UNO going to break on the rocks of Iran?’, the first dispute before the Security Council.

sovereignty from encroachment by powerful states, springs from a very different source, from what is perceived as the hijacking of the institution for unilateralist, and by that I include regional, claims.

There is of course an undoubted and urgent need to review United Nations mechanisms — to limit collective action within the Security Council so that states do not escape constraints on unilateral action by hiding behind the corporate veil, to provide for some form of accountability, to ensure a more equitable representation within that body, and above all to have the General Assembly reassert its residual role in the field of international peace and security. Protection and enforcement of community interests should be sought by seeking to address these problems, rather than by assertions of unchecked unilateralism. Moreover, the United Nations continues to be the only existing forum that can accommodate and protect the diversity of cultures and claims. For in order to have a meaningful debate on the issue of the role and limits of unilateralism in international law, one must seek to transcend the current *hvis clos* of a 'US-European' conversation.