

Between Unilateralism and Collective Security: Authorizations of the Use of Force by the UN Security Council

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I. Introduction

Whole libraries have already been written on various aspects of Security Council action since the Iraqi invasion of Kuwait on 2 August 1990, on the unprecedented decisions during this conflict and its aftermath, followed by a much more cautious approach to the Yugoslav crisis and a curious response to the Somalia emergency. Assessments, of course, differed widely. They have ranged from believers in a New World Order to critics of Western imperialism under multilateral cover or neo-colonialism in humanitarian disguise, from idealists to realists, from those who regarded the action in the Gulf as a one-time aberration to those who saw the dawning of a new era. In a way, the Security Council has proven all these extreme schools of thought wrong.

In this paper I do not intend to intervene in this debate again directly.¹ Instead I shall attempt to retrace the road taken by the Security Council since Resolution 665, giving – to the extent possible – some background of the genesis of all 19 texts which contain authorizations of the use of force – but with variations upon the theme.

Following these case studies, some of their legal aspects, and in particular the Charter basis for these resolutions, will be explored. Finally, through an examination of both the legal and the political aspects of authorizations of the use of force by the UN Security Council, I elaborate on my long-held view that, by and large, such authorizations are the most we can expect under present circumstances from the

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1 Freudenschuß, 'The Changing Role of the UN Security Council: Trends and Perspectives', in W. Kühne (ed.), *Blauhelme in einer turbulenten Welt* (1993) 151.

Security Council. Explaining why I believe Chapter VII is destined to remain, in its stricter sense, dead letter requires taking a close look at the premises on which it is based.

II. Case Studies

A. Iraq

1. Resolution 665

This often overlooked resolution adopted (13:0 votes, Cuba and Yemen abstaining) on 25 August 1990 is the one with which it all began. Its operative paragraph (op. para.) 1 reads as follows:

[The Security Council] *Calls upon* those Member States co-operating with the Government of Kuwait which are deploying maritime forces to the area to use such *measures commensurate* to the specific circumstances *as may be necessary* under the authority of the Security Council *to halt* all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and *to ensure* strict implementation of the provisions related to such shipping laid down in Resolution 661 (1990).

The same day, the US initiated a full naval blockade of Iraq.

It is noteworthy that this resolution was *not* adopted under Chapter VII nor did it mention Article 51 of the UN Charter, although it did recall Resolutions 660 and 661 which contained both. How and why did this resolution, which was heralded as 'the most striking example of Soviet-American cooperation' and as 'the first time in the UN's 45-year history that such sweeping military authority had been conferred without a UN flag or command'² come about?

In his explanation of vote on Resolution 662 adopted on 9 August, the UK representative mentioned that his Government had agreed to contribute forces to a multinational effort for the collective defence in accordance with Article 51:

The presence of British forces, particularly naval forces, in the area will be of added advantage in the context of securing the effective implementation of Resolution 661... We see the close *monitoring* of maritime traffic as a key element in making the embargo effective.³

The US representative referred more vaguely to the increase of US presence in the area which 'is entirely defensive in purpose, to help protect Saudi Arabia, and is taken under Article 51 and indeed in consistency with Article 41 and Resolution

2 Sciolino, 'Putting Teeth in an Embargo: How US Convinced the UN', *New York Times*, 30 August 1990.

3 UN document S/PV 2934 of 9 August 1990, 18.

661'.⁴ The representative of the Soviet Union cautioned, however, that it was 'against reliance on force and against unilateral decisions' and that 'the wisest way to act in conflict situations is to make collective efforts and to make full use of the machinery of the UN' and declared himself prepared to undertake consultations immediately in the Security Council's Military Staff Committee.⁵ At the end of a routine fortnightly meeting of this Committee held the next day, the Soviet delegate merely distributed copies of this statement and asked his colleagues to reflect on it.

The same day, the US Secretary of State was reported to have declared it 'the view of some of us that we have the legal authority necessary to institute such an embargo or *blockade*, provided that the request comes from the legitimate Government of Kuwait'. The same report stated, however, that Canada, China and seven other members of the Security Council shared the British view that Resolution 661 only allowed the monitoring of ship movements and that a new resolution was required for which the time was not yet ripe. It concluded that the potential split over timing and procedure threatened the unity of the Council and presented the danger that US warships could unilaterally start stopping, searching and forcibly turning back tankers before the rest of the world community judged such military action necessary or justified.⁶

Two days later, on 12 August, Secretary Baker announced that the US had decided to go it alone with an *interdiction* of Iraqi commerce at sea, based primarily on a Kuwaiti request pursuant to Article 51 but also aimed at ensuring compliance with Resolution 661.

The UN Secretary-General (Secretary-General) declared to the media on 13 August that he understood that the word 'blockade' was not the right one: 'Only the UN, through its Security Council resolutions, can really decide about a blockade. That's why I think we have to avoid the word blockade'.

In informal Security Council consultations held the same day at the request of Cuba, only the US and – now – the UK based the 'interdiction' on Article 51. France declared that it would limit itself to monitoring and hinted at the necessity of adopting a resolution pursuant to Article 42 for imposing a blockade. This was echoed by Canada which suggested 'that these are uncharted waters, that there are no precedents, so why not play it as the framers of the Charter had envisioned it'.⁷

Sensing its isolation, the US began to consult the other Permanent Members in Washington on 14 August, seemingly intent on putting the naval forces under some kind of UN mandate or auspices. The Soviets reacted by repeating their suggestion made as early as 6 August⁸ to reactivate the Security Council's Military Staff Committee in order to get a say in any military action. The US, eager to entice the

4 Ibid., 7.

5 Ibid., 12.

6 Lewis, 'Security Council's Rare Unity May Be Threatened Over US Warships in the Gulf', *New York Times*, 11 August 1990.

7 Quoted by Sciolino *supra* note 2.

8 See M. Beschloss, St. Talbott, *At the Highest Levels* (1993) 250.

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Soviet Union into cooperating (and thereby discarding a long-held reluctance to allow a Soviet role in the region) agreed to review what role this moribund Committee could play but wanted to limit it to the exchange of information on monitoring and enforcing the embargo and the coordination of the activities of the various national fleets patrolling the Gulf⁹ rather than creating anything resembling a joint command. During a second round of consultations among the five Permanent Members (P5) held on 16 August in New York, the Soviet Union hinted at being prepared to accept a mere informal exchange of information.

When an Iraqi tanker steaming toward Yemen refused to reverse course on 19 August, the US convened consultations of the P5 and presented a first draft resolution which contained neither a reference to measures under Article 42, to Article 47 (the Military Staff Committee) nor even to Chapter VII as a whole but would have *authorized*, in its op. para. 3, 'to use such minimum force as may be necessary to prevent maritime trade in breach of the embargo'. It would have further even *recommended* in para. 1

that Member States should take all necessary action in accordance with the Charter (i.e. under Article 51) including *use of such air, sea or land forces* as may be necessary to ensure complete compliance (with Resolution 660-664).

The Soviet Union reacted cautiously¹⁰ and proposed to soften the text and to include a reference to the Military Staff Committee. The Chinese claimed that they had not yet received instructions.

In the evening of 20 August, the US demanded informal consultations of all members of the Security Council since the Iraqi tanker seemed poised to dock at Aden the following morning. It presented a watered-down version of its first draft resolution which omitted the earlier explicit reference to the use of air, sea or land forces but still contained an authorization 'to use such minimum force as may be necessary', now however limited to ensure compliance only with Resolution 661. It furthermore included a reference to a coordination role of the Military Staff Committee 'as appropriate'. Before these informal consultations were eventually held in the early hours of 21 August, the US further softened its draft by limiting it to the use of necessary minimum force 'under the authority of the Security Council' and only to ensure enforcement of measures 'related to maritime shipping laid down in Resolution 661'. In addition, a reporting requirement was added. However, after Yemen declared during the informals that it would not permit the tanker to unload its cargo, the wind was out of the American sails.

Consultations among the P5 were resumed on 22 August and continued on 23 August with the Soviets still playing for more time. On 24 August, the US met with

9 Cf. Lewis, 'US Seeks to Revive Panel That Enforces UN Decrees', *New York Times*, 15 August 1990.

10 See M. Beschloss, St. Talbott, *supra* note 8, at 252-256 for a background on the Soviet (gaining time for bilateral contacts with Iraq) and American (test case for cooperation with the Soviets) motives for the manoeuvring in the Security Council.

Cuba, Yemen, Columbia and Malaysia (which subsequently became known as the 'Gang of Four') and explained that the draft did not mention Article 42 since it was only meant to improve implementation of sanctions imposed under Article 41. The non-aligned Members (NAM) nonetheless prepared a draft which would have mandated the 'active involvement of the Secretary-General' and 'accountability to the Security Council'.

After bilateral American interventions in capitals, the NAM desisted from tabling their draft when the Security Council finally met on 25 August to adopt Resolution 665. Upon insistence by the Soviet Union¹¹ supported by China, the US agreed to two further modifications: The 'use of minimum force' was substituted by 'measures commensurate to the specific circumstances' and other States were invited to cooperate to ensure compliance 'with maximum use of political and diplomatic measures'. However, the differences of opinion papered over in the text resurfaced in the explanations of vote when the US spoke of the 'use of minimum force only as necessary', the Soviet Union urged 'prudence and caution and not to permit reliance on forcible methods' and China stated that the wording 'does not contain the concept of using force'.¹² In a statement by the Soviet Foreign Minister dated the same day, he emphasized the unprecedented nature of cooperation with the US, called the unity demonstrated by the P5 a 'historical and unprecedented phenomenon' and interpreted Resolution 665 as consolidating the Council's control over measures to implement the sanctions and providing for a co-ordinating role for the Military Staff Committee.¹³

Neither of the last two interpretations proved to be borne out by the actual developments. The unprecedented US-Soviet cooperation, however, was further intensified: as early as the Helsinki Summit held on 9 September 1990, President Bush agreed that both should co-sponsor an International Conference on the Middle East once the present crisis was over while publicly continuing to deny any linkage for months to come.¹⁴

2. Resolution 678

At the end of October – after the Council had adopted several more resolutions (to no avail) – there were first signs of an emerging consensus between the US and the Soviet Union that the next step in the Security Council would have to be to put the coalition forces under some kind of UN umbrella without, however, creating a UN command. A few days later, on 29 October, a P5 meeting was held in New York

11 See also Sciolino *supra* note 2. Greenwood, 'New World Order or Old? The Invasion of Kuwait and the Rule of Law', 55 *MLR* (1992) 153, 162 however gives the credit for this deletion only to China. I can only rely on hear-say in this matter because Austria was not yet on the Council, but given the usual passivity of China in the drafting process, the 'Soviet theory' is more plausible.

12 S/PV. 2938 of 25 August 1990, 54-55.

13 S/21650, Annex.

14 M. Beschloss, St. Talbott, *supra* note 8, at 262.

with the participation of high-ranking officers, including the Soviet Deputy Chief of Staff. According to what transpired about this meeting – which was to remain a one-off (non-)event – only information was exchanged and no operative issues were discussed. It was thus interpreted as a face-saving gesture for the benefit of the Soviets.

Other sources place the beginning of contacts between the US and the Soviet Union regarding another resolution a bit later. During his visit to Moscow on 8 November, Secretary of State Baker made the case for a use-of-force resolution, basing his appeal on Gorbachev's own 1988 speech on the future role of the UN in world affairs. Gorbachev then allegedly suggested not one but two resolutions. The first, to be adopted in late November, would authorize the use of force after a six-week period of grace to give diplomacy one last chance. The second would give the actual go-ahead. Baker offered as a compromise to build a time period into a single resolution before it would become operative.¹⁵

In a report published the same day, a senior State Department official was quoted as saying that '*legally* our position and the position shared by others is that Article 51 provides a sufficient basis under international law for further action' but that a resolution authorizing some specific military action '*would provide a firmer political basis*' as had Resolution 665 authorizing interdiction of Iraq-related shipping.¹⁶

Thus the train had been set in motion toward what was to become, on 29 November, Resolution 678. But it was a most unusual journey for a draft resolution because it was negotiated almost exclusively in capitals and not in the Security Council itself. By the time Baker met Shevardnaze again – on 18 November in Paris – the US claimed to have the required nine votes for a resolution to pass (US, UK, France, Canada, Finland, Ethiopia, Romania, Ivory Coast and Zaire) as well as Chinese assurances not to block it in case the Soviets went along. The Soviet Union however, still stalled.¹⁷ After Shevardnaze suggested substituting a less menacing-sounding phrase for 'use of force', Baker came up with five different euphemisms and finally proposed 'all necessary means'. The same evening Gorbachev agreed, provided that the resolution would be 'two-tiered', i.e. authorizing all necessary means but also containing a 'pause of goodwill', and that the Soviet approach would not be made public until one last trip of the Iraqi Foreign Minister to Moscow. Bush consented but suggested that the deadline be no later than New Year's Day.¹⁸

15 M. Beschloss, St. Talbot, *supra* note 8, at 282.

16 Friedman, 'Allies Tell Baker Use of Force Needs UN Backing', *New York Times*, 8 November 1990.

17 Rosenthal, 'Bush Fails to Gain Soviet Agreement on Gulf Force Use', *New York Times*, 20 November 1990.

18 M. Beschloss, St. Talbot, *supra* note 8, at 284-287. See also Friedman, 'How US Won Support to Use Mideast Forces', *New York Times*, 2 December 1990, who reported that the US Administration decided after a meeting with Congressional leaders on 14 November that a resolution was needed not only to keep the international coalition together but also to bring

On 24 November, the US felt confident enough to shift the action back to New York where it handed a draft to the other Permanent Members. This text contained a 1 January deadline, an authorization to use all necessary means to uphold and implement previous resolutions and 'to restore international peace and security in the area', a request 'to keep the Council regularly informed on the progress of actions' and was to be adopted under Chapter VII.

The text finally given to the non-permanent Members on 26 November included the earlier Soviet suggestions: 'a pause of goodwill' and, albeit still in brackets, an alternative deadline of 15 January 1991.

This, without brackets, was to be the final version adopted under Chapter VII at a Security Council meeting held on the level of Foreign Ministers with 12:2 (Cuba, Yemen) votes and 1 abstention (China) on 29 November.¹⁹ Its op. para. 2 reads as follows:

[The Security Council] *Authorizes* Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in para. 1 above, the foregoing resolutions, *to use all necessary means* to uphold and implement Resolution 660 (1990) and all subsequent relevant resolutions and to restore peace and security in the area.

Resolution 678 was and is noteworthy for how it came about, for what it contained, for the way it was applied – and for what it omitted: any mention of Article 42 or of a role for the Military Staff Committee and any reference (such as the one in Resolution 665) to actions 'under the authority of the Security Council' except a scant request 'to keep the Council regularly informed'.

This point was picked up by a number of non-aligned speakers in the debate on Resolution 678.²⁰ Yemen in particular called it 'authority without accountability', Cuba and Iraq declared the authorization illegal because the Charter only allowed the use of force pursuant to Articles 41, 51 or 106. Several also warned of a double standard and tried to establish a linkage with the Palestinian issue. China stated that the wording 'to use all necessary means' permits the use of military action which was the reason why it had 'difficulty voting in favour'. The US declared that 'today's resolution is very clear. But the purpose ... is to bring about a peaceful resolution of this problem'. The P4 (P5 minus China) announced, in almost identical words, that there would now be a pause in the Council's efforts without prejudice to the rights under (Article 51 of) the Charter should foreign nationals held in Iraq come to harm.

Congress along. The approach via capitals was chosen because the US felt that some Security Council delegates acted as if they were 'out of control' of their political masters.

19 The sticks and carrots-approach used by the US toward China and some NAM was known early on (see sources in note 18). It was only later interpreted by some as something approaching duress: Cf. Weston, 'Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy', 85 *AJIL* (1991) 516, 523-525.

20 Cf. S/PV. 2963 of 29 November 1990, *passim*.

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Amazingly, only Yemen seemed to refer to the sweeping authority granted by the authorization to 'restore international peace and security in the area'²¹ when it called the resolution 'so broad and vague that it is not limited to the purpose of enforcing implementation of the ten [previous] resolutions'. The rest, of course, is history.

3. Resolution 686

After the *de facto* cessation of hostilities, the Members of the Security Council decided in informal consultations on 28 February 1991 to entrust the outgoing and incoming Presidents of the Security Council (Zimbabwe and Austria respectively) with intensive bilateral consultations about the terms of a resolution on the formal cessation of hostilities which began the same day.²² The US handed out a first draft to the other Permanent Members which, in op. para. 4, would have *affirmed* the right of the coalition to 'resume offensive combat operations if Iraq does not comply with all demands' in that text. This would have gone beyond the already broad authorization contained in Resolution 678.

After laborious consultations among the P5 during the day, the US presented a revised draft to all Council Members in the evening of 1 March. Preambular paragraph (pr. para.) G of this text underlined 'the importance of Iraq taking the necessary measures which would permit a definitive end to the hostilities', listed a number of demands of Iraq and '*recognized* that during the period required for Iraq to comply [with these demands], the provisions of para. 2 of Resolution 678 (1990) remain valid' (op. para. 4).

This change was interpreted as confining the coalition to the terms of the original authority granted under Resolution 678, i.e. implementation of all relevant previous resolutions and restoration of peace and security in the area and seems to have again been proposed by the Soviet Union.

The resolution was adopted under Chapter VII on 2 March with 11:1 (Cuba) votes and 3 abstentions (China, India and Yemen). Op. para. 4 was criticized as 'absolutely excessive' by Yemen and as a relinquishment of the obligations of the Security Council by Cuba.²³

21 Incidentally a legal opinion rendered by the Deputy Legal Counsel of the Secretary-General (S/AC.25/1991/Note/15 of 26 February 1991) held that the expression 'the area' (as contained in Resolution 665) is neither defined in geographical terms nor is by itself a term which conveys a specific geographical connotation and that it was therefore necessary to have recourse to the context and the object and purpose of the text.

22 Since the outgoing President declared that for reasons of expediency he would take no active part in these consultations, Austria became, in all but in name, President of the Council one day earlier than usual.

23 S/PV. 2978 of 2 March 1991, 27 and 32 respectively.

4. Resolution 687

On 20 March 1991, the US – without previous consultations – distributed a draft resolution in the capitals of the Members of the Security Council which contained a guarantee of the international boundary between Iraq and Kuwait and of the allocation of islands and would have *authorized* the coalition States ‘to use all necessary means towards that end’ (op. para. 5). During consultations among the P5, this authorization was criticized as going too far.

In a text dated 22 March, this formulation had become op. para. 4 and was put in brackets. In its version of 23 March, the alternative ‘taking as appropriate all necessary measures to that end in accordance with the Charter and relevant Resolution’ was included. On 27 March, op. para. 4 read

Decides to guarantee the inviolability of the ... international boundary and to take as appropriate all necessary measures to that end in accordance with the Charter.

Instead of granting an explicit authorization, the Security Council now merely decided to take later action, i.e. to make a political commitment. This was also the formulation used in the draft finally handed to the non-permanent Members on 28 March. On 1 April, Cuba suggested referring to the international boundary freely determined in negotiations between both countries whereas India proposed the deletion of the whole paragraph which became a generally agreed position of the non-aligned Members on 2 April but was not accepted by the US.

Resolution 687 and op. para. 4 in its version of 27 March were adopted under Chapter VII on 3 April with 12:1 (Cuba) votes and 2 (Ecuador, Yemen) abstentions. The resolution also declared that, upon official notification by Iraq to the Secretary-General and to the Security Council of its acceptance of the provisions above, a formal *cease-fire* was to be effective (op. para. 33) but *decided to take such further steps as may be required* for the implementation of this resolution and to secure peace and security in the area (op. para. 34).²⁴

This was picked up in the debate only by Yemen who deplored that the state of war would continue until the coalition decided upon a definitive end of hostilities in accordance with Resolution 686 which might take years because it was related to the peace and security in the region and the guarantee of the boundary. The foreign forces would also get legitimacy for their continued presence in the Gulf. India expressed its understanding that op. para. 4 did not confer authority to take unilateral action under any previous resolution. It also reported assurances by the sponsors of this text that it (only) meant the Security Council would meet again in

24 After a US attack against Iraqi missile launchers below the 32nd parallel on 13 January 1993, the UN Secretary-General declared that ‘the forces that have carried out this raid have received a mandate from the Security Council, according to Resolution 678, and the cause of the raid was the violation by Iraq of Resolution 687 concerning the ceasefire’: See Freudenschuß, ‘Article 39 of the UN Charter Revisited: Threats to the Peace and the Recent Practice of the UN Security Council’, 46 *AJIL* (1993) 1, 9.

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the event of any threat to a violation of the boundary. Austria stated that future authorizations by the Security Council to use force might contain more fine print on how to apply and command that force and suggested discussing possible lessons from the Gulf crisis with regard to UN enforcement arrangements.²⁵

5. Resolution 773

Adopted (not under Chapter VII) on 26 August 1992 with 14 votes and 1 abstention (Ecuador), this resolution *underlined* the guarantee of the boundary and the *decision to take as appropriate all necessary measures* to that end in accordance with the Charter (op. para. 4).

6. Resolution 833

Adopted again under Chapter VII on 27 May 1993 after publication of the final report of the Boundary Demarcation Commission, it reminded Iraq of its obligations under Resolution 687 and other relevant resolutions and of its acceptance of them 'which forms the basis of the cease-fire' (pr. para. E) and then *underlined and reaffirmed* both the guarantee of the boundary and the *decision to take as appropriate all necessary measures* to that end (op. para. 6).

B. Former Yugoslavia

1. Resolution 770

Adopted under Chapter VII on 13 August 1992 with 12 votes and 3 abstentions (China, India, Zimbabwe), the text after

recognizing that the situation in Bosnia and Herzegovina constitutes a threat to international peace and security and that the provision of humanitarian assistance in Bosnia and Herzegovina is an important element in the Council's effort to restore international peace and security in the area,

called upon States

to take nationally or through regional agencies or arrangements *all measures necessary* to facilitate in coordination with the UN the delivery by relevant UN humanitarian organizations and others of humanitarian assistance to Sarajevo and wherever needed in other parts of Bosnia and Herzegovina (op. para.2).

Exactly one month earlier, during informal consultations of the Security Council, the US had already – albeit only rhetorically – raised the question of whether, in the

25 S/PV. 2981 of 3 April 1991, 46, 78 and 121 respectively.

light of the attitude of the Serb side, the provision of humanitarian assistance in Bosnia and Herzegovina remained feasible without the use of force.

However, after Austria had informally circulated a draft resolution on 14 July which would (only) have contained a decision by the Security Council to consider further steps that may be necessary to ensure compliance in case the Secretary-General would have reported within 48 hours on non-compliance with the demands of the Security Council,²⁶ the US backtracked. They argued that such a resolution would create expectations which – because of their military implications – they could, at least at present, not fulfil.

On 6 August it transpired that the US had begun consultations with the United Kingdom and France on a text to

call upon States, in cooperation with the Government of Bosnia and Herzegovina, to take all necessary measures to establish the conditions necessary for and to facilitate the delivery of humanitarian assistance to Bosnia and Herzegovina.

Informed by the US of their initiative, the Secretary-General voiced no opposition but indicated that he would in such a case propose to withdraw the United Nations Protection Force (UNPROFOR) from Bosnia and Herzegovina. France, however, preferred not only to leave UNPROFOR in place but to strengthen it, both quantitatively and qualitatively, and let it protect deliveries of humanitarian assistance. The United Kingdom, while closer to the French than to the American position, nonetheless attempted to bridge the gap by proposing to strengthen UNPROFOR while at the same time calling on States for supporting measures including the threat of further action by the Security Council.

After several days of intensive consultations, the P3 (US, UK and France) agreed on a draft on 10 August which reflected essentially the original US proposal insofar as it called on all States 'to take all measures necessary'. As concessions, the US agreed to delete the above-mentioned references to the cooperation with the Government of Bosnia and Herzegovina and to the creation of the conditions for the delivery of humanitarian assistance. They further agreed to call on all parties to the conflict to cease all military activity (thus refraining from singling out the Serb side) and to include a coordination requirement with the UN (with UNPROFOR remaining in place) as well as a reporting requirement to the Secretary-General (but not to the Security Council; presumably to avoid a repetition of the debate following the scant reporting called out pursuant to Resolution 678). The US did not, however, agree to the French proposal to extend 'the taking of all measures necessary' to the demand also contained in the text that unimpeded access be granted to the International Committee of the Red Cross (ICRC) to all camps and prisons.

26 Riedler, 'Österreich will UN-Ultimatum an Serbien', *Die Presse*, 15 July 1992. See also Ramet, 'War in the Balkans', 71 *Foreign Affairs* (1992) 79, 95 on the lack of support for the Austrian initiative.

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In informal consultations of the Council on 11 August, India proposed to put these measures 'under the control and supervision of the UN' while the P3 stressed the differences between this text and Resolution 678, in particular the underlying humanitarian motivation and the lack of intent to use force on a wider scale if it became at all necessary. Subsequently, the sponsors agreed to drop the reference to 'all States'.

In their explanations of vote on Resolution 770, India stated that the use of force would have to be under the command and control of the UN in order to conform to Chapter VII of the Charter; Zimbabwe added that the Security Council had relegated itself to the role of a helpless spectator while China called op. para. 2 a blank cheque which could lead to a loss of control of the situation with the reputation of the UN suffering as a result. They and a number of other Members also expressed concern for the safety of UNPROFOR.²⁷

As it turned out, however, none of this came to pass. Due to the continuing concerns of the Secretary-General, UNPROFOR, the UNHCR, the United Kingdom and France, the American position began to shift again, 'facilitated' by the fact that the US was not prepared to deploy ground forces anyway.

After lengthy consultations it was decided to enlarge the mandate of UNPROFOR after all. In his report to the Security Council of 10 September 1992,²⁸ the Secretary-General proposed that UNPROFOR should provide protection, at UNHCR's request, to deliveries of humanitarian assistance where and when UNHCR considers such protection necessary. The additional military personnel – provided at no cost to the UN – would be under UNPROFOR's command and would follow normal peace-keeping rules of engagement, i.e. be authorized to use force [only] in self-defence. The Secretary-General noted, however, 'that, in this context, self-defence is deemed to include situations in which armed persons attempt by force to prevent UN troops from carrying out their mandate'. In addition, the Secretary-General proposed to use the new resources also to protect convoys of detainees if the ICRC so requested.

A draft resolution dated 11 September contained the authorization 'in implementation of para. 2 of Resolution 770' to enlarge UNPROFOR's mandate accordingly (op. para. 2). Despite resistance by the UK and France, the US succeeded in including the further authorization of the Secretary-General 'to accept such financial or other assistance provided by Member States as he deems appropriate to assist in performing the [additional] functions' (op. para. 3). This was designed to allow the US to provide logistical and other support without requiring it to put its personnel under UN command.

During informal consultations on 14 September, the US proposed to adopt the text under Chapter VII but was opposed strongly by China, India and Zimbabwe. France succeeded in softening op. para. 3 by replacing the authorization of the

²⁷ S/PV.3106 of 13 August 1992.

²⁸ S/24540 of 10 September 1992.

Secretary-General with 'Urges Member States ... to provide the Secretary-General with ... assistance'. The text was finally adopted the same day with 12:0 votes and 3 abstentions (China, India, Zimbabwe) as Resolution 776. Resolution 770 – and the authorization contained therein – thus remained on the books but became, in fact, dead letter.

2. Resolution 787

After violations of the sanctions had become more and more apparent, the P4 and Belgium circulated a draft resolution on tightening the sanctions on 11 November 1992. This text also contained a US proposal *to call upon States*, under Chapter VII,

to use such measures commensurate with the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward shipping in order to inspect and verify their cargoes and to ensure strict implementation of the provisions of Resolution 713 and 757 (op. para. 12).

It further *reaffirmed* the responsibility of riparian States to take the same measures (op. para. 13) and requested States to consult with the Secretary-General regarding actions taken to facilitate the monitoring (op. para. 14). The latter provision was later changed (as proposed by India) to read 'to coordinate with the Secretary-General *inter alia* on the submission of reports to the Security Council regarding actions...'

This text was adopted on 16 November with 13:0 votes and 2 abstentions (China, Zimbabwe) as Resolution 787.

3. Resolution 816

During informal consultations of the Council on 10 September 1992, France (supported only by Austria) had already proposed declaring a 'no-fly zone' in Bosnia and Herzegovina, based on an agreement reached in the Working Group on Confidence and Security-Building and Verification Measures of the International Conference on the Former Yugoslavia (ICFY) of 10 September. In light of British reticence, Resolution 776 only contained a pr. para. F in which 'the importance of air measures, such as the ban on military flights to which all parties committed themselves' was stressed.

In late September, France presented a first draft resolution to its allies by which the Security Council, 'acting pursuant to the provisions of Resolution 770 aiming at insuring the safety of humanitarian distribution in Bosnia and Herzegovina' would decide 'to establish a flight interdiction for military aircrafts'. The US argued during talks on 29 September that any comparison with the 'no-fly zone' in Iraq should be avoided since in the present case there were no means available for enforcing it. The UK and Belgium referred to ongoing work of the UN Secretariat on the stationing of observers at military airfields. The Security Council could, once this report became

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available, simply welcome the cessation of military flights agreed to by the parties as a confidence-building measure.

However, after yet another surprising turn-around in Washington (with the White House overruling both State Department and Pentagon), the US informed its allies on 2 October that it was now seeking a resolution under Chapter VII to ban all military flights in Bosnia and Herzegovina and *to authorize States to enforce this ban by all necessary means*. The UK reacted negatively, pointing out the potentially detrimental impact of such a move on the safety of UNPROFOR and doubting its feasibility.

On 7 October, France presented a compromise draft resolution to declare a ban on military flights, to mandate UNPROFOR to monitor its implementation and to *threaten* to consider urgently the further measures necessary to enforce this ban in case of violations. The UK at first objected to any reference to enforcement but later relented under American pressure.

On 8 October, the Secretary-General informed the President of the Security Council that in view of the urgency felt by many Member States, he concurred with the advice of his Special Representative, Cyrus Vance, not to object to the adoption of such a resolution. He added, however, that the proposed ban and the modalities of its monitoring did not yet enjoy the consent of all the parties to the conflict and that he continued therefore to be concerned about the implications for the security of UNPROFOR.

On 9 October 1992, the Security Council – ‘acting pursuant to the provisions of Resolution 770 aimed at ensuring the safety of the delivery of humanitarian assistance in Bosnia and Herzegovina’ (but not quoting Chapter VII explicitly) – adopted the French draft as Resolution 781 with 14:0 votes and 1 abstention (China). The US declared in its explanation of vote that this resolution ‘binds the Council to further action’ in case of violations and that the US would then ‘move to seek adoption by the Council of a further resolution *mandating enforcement* of a no-fly zone over Bosnia and Herzegovina’.²⁹ Yet despite numerous reports of such violations,³⁰ six months would elapse before the Security Council – apart from reaffirming both the ban and the threat and endorsing the modalities for monitoring the ban by UNPROFOR with Resolution 786 on 10 November 1992 – took action.

In early December 1992, negotiations between the P4 on the enforcement of the ban on military flights were resumed.

A French text dated 15 December contained an authorization, subject to a grace-period of 1-2 weeks, for Member States to take all necessary measures to enforce the ban. This draft still contained in its op. para. 1 a number of square brackets,

²⁹ S/PV. 3122 of 9 October 1992, 9.

³⁰ Cf. f.i. S/24675 of 16 October; S/24750 of 2 November, S/24767 of 5 November, S/24840 of 24 November, S/24870 of 30 November, S/24900 of 7 December, etc. In a Presidential Statement of 9 December – S/24932 – the Security Council only strongly condemned *inter alia* violations of this ban.

indicating thereby the differences of opinion between the EC-Security Council Members and the US on the role of the Secretary-General (ranging from 'consultation of' through 'coordination with' to 'under the authority of the Secretary-General') and on the extent of the authorized measures (only against violating aircraft or also against military airfields and other aircraft on the ground). Russia took a restrictive line on the extent of the measures and wanted to delay any Council action until the elections in Serbia scheduled for 20 December lest the prospects of Prime Minister Panic were further damaged. In a text dated 17 December, a new op. para. 1 was added, declaring a complete ban on all flights but allowing for authorizations of non-military flights. The numerous differences of opinion on what had by now become op. para. 3 remained.

By 22 December, the number of reported violations of the ban had reached 350, but these differences of opinion had – if anything – become even more pronounced: The UK now favoured a one-month-long grace period; France insisted on putting the operation under UN command; the US continued to hold 'minimalist' views on these questions but wanted the authorization to also cover attacks against targets on the ground and outside Bosnia and Herzegovina as long as there was a connection with violations of the ban. The Secretary-General refused to take a clear position except to refer to the serious misgivings expressed by the Co-Chairmen of the ICFY, the Force Commander of UNPROFOR and UNHCR as well as troop-contributing countries like Canada, Norway and India.

More than anything else, the question of command and control over the operation had become the main bone of contention between the Western countries. France tried to justify its insistence on UN command by arguing that this would show its essentially peace-keeping (as opposed to peace-enforcing) character and humanitarian purpose. Since all preparations were, however, based on NATO resources and infrastructures, the French position was derided as an attempt to cover up the otherwise clearly preponderant role of NATO.³¹

By 30 December, a 'rapprochement' between the diverging positions was discernible. The same day, however, the Secretary-General addressed a letter to the President of the Security Council in which he blamed the media's focus on the plight of the civilian population in Bosnia and Herzegovina for 'obscuring subtle signs of progress in the peace process' which compelled him to express his 'grave concern at the growing momentum for stronger military measures'. He further expressed his 'sincere conviction that we must slow this momentum' and declared that, should the Security Council decide to adopt a resolution enforcing the ban, 'it would be helpful if its implementation could be delayed for a reasonable period of time'.

31 NATO's role became formalized later: see f.i. the letter of the Secretary-General to the President of the Security Council reporting on the arrangements to ensure compliance with the ban, S/25567 of 10 April 1993.

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On 18 January 1993, an agreement among the P3 along the following lines seemed finally to be in the offing: The US accepted a grace period of 30 days, the UK all necessary measures 'proportionate to the specific circumstances and the nature of the flights' (violating the ban) and France an authorization of States to take such measures 'under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR'. Russia, however, insisted that the field of application of this authorization was too wide and needed to be restricted to the airspace of Bosnia and Herzegovina.

The question at that time was whether this was just another Russian attempt to play for more time (a vote in the Bosnian Serb Parliament on the latest peace plan was due shortly) or whether it was a sign of a generally hardening Russian position. In any event, a new Administration had taken over in Washington in the meantime. On 11 February, the new US Secretary of State was quoted as saying that the options of using air power or arming the Bosnian Muslims were considered during the formal three-week policy review but were rejected because of concern that British, French and Canadian peace-keeping troops in Bosnia and Herzegovina might be gravely endangered.³²

This was not the end of the matter. By mid-March, consultations were again under way. On 22 March, there was agreement on a 15-day grace period. Russia had gained the inclusion of a requirement to coordinate also on the rules of engagement but then surprisingly again stalled on the adoption of the text by proposing to include an endorsement of the latest peace proposals by the Security Council, to tie the entry into force of the authorization to a report on the failure (or success) of the peace negotiations and to refer also to the idea of stationing observers along the borders of Serbia and Bosnia and Herzegovina. On 23 March, the grace period was shortened to 7 days but the starting date of the implementation (another 7 days thereafter) was also made subject to close coordination with the Secretary-General and UNPROFOR. On 24 March, Russia requested a 7-day delay of any further consideration of the draft. In the light of the situation prevailing in Moscow at the time, the Western countries agreed.

On 31 March 1993, Resolution 816 was finally adopted under Chapter VII with 14:0 votes and 1 abstention (China). Russia had gained the restriction of the authorization to measures in the airspace of Bosnia and Herzegovina. Op. para. 4 now reads:

Authorizes Member States, seven days after the adoption of this resolution ... to take, under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR, all necessary measures in the airspace of the Republic of Bosnia and Herzegovina, in the event of further violations, to ensure compliance with the ban on flights ..., and proportionate to the specific circumstances and the nature of the flights.

32 *New York Times*, 11 February 1993.

4. Resolution 836

After the siege of the Muslim town of Srebrenica and when the shelling of its civilian population by the Bosnian Serbs had reached alarming proportions, the Security Council – in Resolution 819 adopted unanimously on 16 April 1993 – *demande* *inter alia* that this town be treated ‘as a safe area’ and requested the Secretary-General to increase the presence of UNPROFOR there.

On 17 April, the NAM informally circulated a draft resolution under Chapter VII which would have condemned the assault against Srebrenica and

authorized Member States, pursuant to Article 51, to provide all necessary assistance to the Government of Bosnia and Herzegovina to enable it to resist and defend the territory of the Republic of Bosnia and Herzegovina against Serbian attacks (op. para.4).

This was designed to allow arms deliveries without explicitly revoking the arms embargo imposed with Resolution 713.

In Resolution 824, adopted unanimously on 6 May, the Security Council *declared* that Sarajevo, Srebrenica and four other towns ‘should be treated as safe areas’ and authorized the dispatch of 50 additional military observers.

In a Memorandum circulated on 14 May, the NAM stated that the collective security system had failed to redress this tragic situation, that – in spite of its establishment under Chapter VII – UNPROFOR’s functions had been narrowly interpreted and limited to the provision of humanitarian assistance based on the consent of the aggressors and proposed to

authorize Member States to undertake all necessary measures, including military air strikes, with a view to ensuring the safety and security of the UN personnel and the population under its protection if attacked.

In the ‘French Memorandum relative to safe areas’ of the same day, France proposed the appointment by the Secretary-General

of a political authority able to control actions undertaken and the establishment of a command organization capable of ensuring in particular coordination between ground and air forces ... [which] would moreover be in line with preparations for the transition towards the eventual implementation of the Vance-Owen peace plan.

This was again intended to counteract the primordial role assigned to NATO in carrying out such a mission.³³

By 18 May, the NAM had drafted a text *authorizing* States to use all necessary measures, including military air strikes, to ensure the implementation of a number of proposed additional tasks of UNPROFOR including the withdrawal of all heavy

33 Cf. *International Herald Tribune*, 11 May 1993, which – under the headline ‘NATO must hold Bosnia command, alliance chief says’ – quoted NATO Secretary-General Wörner as insisting on NATO exercising unity of command.

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weapons, the occupation of key points, the establishment of safe corridors, the protection of the population and the deterrence of further aggression.

As attacks against the 'safe areas' continued (and media attention focused on this issue), the P4 and Spain informally circulated a draft resolution on 27 May to extend, under Chapter VII, UNPROFOR's mandate

in order to enable it, in the safe areas referred to in Resolution 824, to deter attacks, to monitor the ceasefire, to promote the withdrawal of military or paramilitary units other than those of the Government of Bosnia and Herzegovina, and to occupy some key points on the ground, in addition to participating in the delivery of humanitarian relief (op. para. 2),

to authorize

UNPROFOR, in carrying out the mandate defined in para. 2 above, acting in self-defence, to take the necessary measures, *including the use of force*, in reply to bombardments of the safe areas by any of the parties or to armed incursion into them or in the event of any deliberate obstruction in or around those areas to the freedom of movement of UNPROFOR or of protected humanitarian convoys (op. para. 5)

and to

decide that ... Member States ... may take, under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR, *all necessary measures, through the use of air power*, in and around the safe areas ..., to support UNPROFOR... (op. para. 6).

Despite an unexpected (and negative) working paper circulated by the Secretary-General among Council Members on 28 May on the feasibility of establishing truly 'safe areas', the sponsors tabled their essentially unchanged draft on 1 June.

On 4 June, the Security Council – acting under Chapter VII – adopted this text (op. paras. 2 and 6 had become op. paras. 5, 9 and 10 respectively) with 13:0 votes and 2 abstentions (Pakistan and Venezuela for whom it did not go far enough) as Resolution 836.

In his report to the Security Council on the modalities for implementation of Resolution 836 of 14 June, the Secretary-General stressed the need for a credible air-strike capability provided by Member States in order to protect UNPROFOR. He reported that his request to NATO to prepare plans for provision of the necessary air support capacity, in close coordination with him and his Special Representative had been replied to by way of a letter of 11 June confirming NATO's willingness to offer

protective air power in case of attack against UNPROFOR in the performance of its overall mandate, *if it so requests*.³⁴

34 S/25939 of 14 June 1993, para 4.

The Secretary-General then went on to propose the additional deployment of some 7,600 UNPROFOR personnel.

In Resolution 844 of 18 June 1993, the Security Council approved this report and authorized the proposed enlargement of UNPROFOR.

A draft resolution formally submitted by the NAM on 24 June 1993³⁵ contained, under Chapter VII, the exemption of the Government of Bosnia and Herzegovina from the arms embargo and an *authorization* of Member States

to take all necessary measures, including air strikes against the heavy weapons and in support of the Government of Bosnia and Herzegovina.

After the latter provision was deleted,³⁶ the US voted for the text on 29 June. Owing to the abstention of the nine other Council Members, it was not adopted.

After several weeks of preparations, NATO completed its operational planning on the use of ground-attack aircraft to protect UNPROFOR pursuant to Resolution 836 in mid-July 1993. Air strikes were said to be conditional upon an request by the UN forces on the ground accompanied by forward air controllers.³⁷ At the end of July, it was however reported that the UN Secretary-General, while asking for a delay of this operation because these controllers were allegedly not all in place yet, wanted to hold back its launching lest it would further harden the position of the Bosnian Serbs and encourage the Muslims to take a more intransigent attitude at the forthcoming round of peace talks in Geneva.³⁸

In a letter dated 30 July 1993 to the Secretary-General, US Secretary of State Christopher referred to the apparent intent of the Serbs to strangle Sarajevo and informed him that the US would ask its NATO allies to agree to use air power in full coordination with the UN 'against Bosnian Serb targets *at times and places of NATO's own choosing ... consistent with the authority already provided by Resolutions 770 and 836*' if Serb forces continued their efforts to strangle Sarajevo or other areas in Bosnia and Herzegovina. In a more detailed non-paper handed over by the US, it was stated that 'as with the enforcement of the no-fly zone, there would not need to be a *specific* authorization from UN headquarters' but that there would be full coordination with UNPROFOR, including 'advance notice of planned strikes and sufficient time to take precautionary action'. It is noteworthy that there was no reference in this letter to the right of collective self-defence and that the proposed action was to be based solely on resolutions.

In his reply dated 2 August, the Secretary-General stated – while not objecting to the proposed extension of the use of airpower to prevent the fall of Sarajevo – that

35 S/25997 of 24 June 1993.

36 S/25997 of 28 June 1993.

37 Cf. Fitchett, 'NATO Will Use Jets in Bosnia to Protect UN's Peace Troops', *International Herald Tribune*, 15 July 1993.

38 UN Chief asks delay in air support, *International Herald Tribune*, 25-26 July 1993.

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the purpose of the use of air power ... is to promote the fulfilment of objectives approved by the Security Council... It follows that the general authority granted in Resolution 770 in this respect must be interpreted in the context of the modalities established pursuant to Resolutions 816 and 836. For this as well as pragmatic reasons, I have consistently taken the position that the *first* use of air power in the theatre should be *initiated by the Secretary-General*... In approving the report of the Secretary-General of 14 June 1993 in its Resolution 844, the Security Council has endorsed this approach... It is therefore my understanding that the decision to use air power in Bosnia and Herzegovina pursuant to UN resolutions *must continue to rest with the Secretary-General*... You may recall that action by NATO to enforce the no-fly zone was subject to specific authorization by the Force Commander of UNPROFOR.

This set the stage for a rather stormy session of the NATO Council on 4 August where Canada (together with the UK, Belgium and France, one of the larger troop-contributors to UNPROFOR) in particular stressed the need for UN control over events while the US seemed prepared to concede such a UN role only in cases where aircraft were called upon to protect UNPROFOR but not with regard to other uses against Bosnian Serb targets.³⁹ A number of others observed that the US proposal would turn the whole UN operation from neutral peace-keeping to peace-enforcement, requiring a new NATO approach and new plans.

In the course of the next few days, the US – under strong pressure from its allies – first conceded that the choice of targets for air strikes must be approved by both NATO and the UN⁴⁰ and ultimately agreed that the first such attack required approval by the Secretary-General.⁴¹

It is almost ironic that the Secretary-General requested a few weeks later the extension of ‘*close air support*’ to the (whole) territory of Croatia⁴² to enhance the security of UNPROFOR there.

5. Resolution 871

A first draft resolution by the EC-Security Council Members of 27 September would have *authorized* UNPROFOR, in carrying out its mandate in the Republic of Croatia, acting in self-defence, to take the necessary measures, *including the use of force*, to ensure *its* security and its freedom of movement (op. para. 8) and would have *decided* that Member States may take, under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR, *all necessary measures* for the extension of close air support to UNPROFOR... (op. para. 9).

After the US and Russia objected to the latter provision, Resolution 871 adopted unanimously on 4 October 1993 contained only a decision ‘to continue to review

39 Gellman, Rowe, ‘NATO Sees UN “Flak” on Campaign in Bosnia’, *International Herald Tribune*, 5 August 1993.

40 Jehl, ‘US Cedes to UN an Air Strike Veto’, *New York Times*, 7 August 1993.

41 Holmes, ‘US Allows a Veto for Boutros-Ghali’, *New York Times*, 8 August 1993.

42 S/26468 of 30 September and S/26470 of 20 September 1993, para. 16.

urgently the extension of close air support to UNPROFOR' in Croatia (op. para. 10) but, under Chapter VII, *authorized UNPROFOR* in the above-mentioned sense *to use force*.

6. Resolution 908

On 7 October, France again submitted a draft resolution regarding the extension of close air support. In informal consultations of the Council held on 8 October, the US declared that it required more time for reflection. Privately, US representatives referred to the debate raging in Washington on US involvement in Somalia which rendered any initiative relating to the use of military force by the US in the former Yugoslavia 'untimely'.

And so it continued until 31 March 1994, when the Security Council decided that Member States may take all necessary measures to extend close air support to the territory of the Republic of Croatia, in defence of UNPROFOR personnel in the performance of its mandate as recommended by the Secretary-General two weeks earlier (Resolution 908).

C. Somalia

1. Resolution 794

The rather curious response of the Security Council to the Somalia emergency cannot be fully appreciated without taking into account the pressure exercised by the Secretary-General – who spurred the Council into action by drawing unfavourable parallels to Security Council involvement in the Yugoslav conflict⁴³ – and, even more importantly, the unprecedented exposure given to this humanitarian disaster by the media, especially in the US.⁴⁴

By November 1992, it had become clear that the UN was unable to reach its – initially limited – humanitarian objectives through UNOSOM I, the traditional peace-keeping operation authorized by the Security Council earlier in the year but only partially deployed since agreement by all faction leaders had been impossible to achieve.⁴⁵ The Secretary-General at first only hinted at 'the possibility that it may become necessary to review the basic premises of the UN effort'⁴⁶ but then, during informal consultations of the Security Council held two days later after he had additional contacts with the US, suggested the use of force.

43 See S/24333 of 21 July 1992 and Freudenschuß, *supra* note 1, at 69.

44 Cf. f.i. Goodman, 'Re Somalia: How Much Did TV Shape Policy?', *New York Times*, 8 December 1992; Kennan, 'Into Somalia: A Dreadful Error of American Foreign Policy', *International Herald Tribune*, 1 October 1993.

45 Cf. Makinda, 'Somalia: From Humanitarian Intervention to Military Offensive?', *The World Today* (October 1993) 184, 185.

46 S/24859 of 27 November 1992 containing a letter by the Secretary-General dated 24 November.

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After the US offered troops but insisted on commanding them itself,⁴⁷ the Secretary-General presented five options to the Security Council:

- 1) continuation of UNOSOM I;
- 2) withdrawal of its military elements;
- 3) limited show of force by UNOSOM in Mogadishu;
- 4) country-wide enforcement action by a group of Member States authorized by the Security Council (with a number of measures designed to enhance the Council's role in following events);
- 5) enforcement operation carried out under UN command and control (adding, however, that the UN did not at present have this capability).

He concluded that there was no alternative but to resort to the enforcement provisions of Chapter VII but that the objectives should be precisely defined and limited in time in order to prepare for a return to peace-keeping and post conflict peace-building.⁴⁸

A first US draft resolution given only to the other Permanent Members and the Secretary-General early on 1 December was labelled 'option 4^{1/2}': It would have called on States to take all necessary measures to establish a secure environment for humanitarian relief operations under their unified command while UNOSOM would have continued to fulfill its mandate with its commander serving as deputy to the Unified Force Commander. After objections raised by the Secretary-General to such a hybrid construction, the US – still on 1 December – circulated a second draft which contained only an authorization for States 'to use all necessary means' under their own command and control after consultations with the Secretary-General and with appropriate coordination mechanisms. Provisions relating to the appointment of an ad hoc commission of the Security Council to monitor events and to create a small liaison staff of the Secretary-General at Field Headquarters were put in brackets, i.e. only tentatively included.

During informal Security Council consultations on 1 December, the Secretary-General added that he was not proposing a 'classic' Chapter VII-enforcement operation but rather a *new type of international police action to carry out humanitarian assistance*. The US, UK, Japan and Hungary spoke in favour of option 4; Russia in general terms for an operation under UN auspices. France, Belgium, Morocco and Austria favoured option 5 but – in light of the operational difficulties mentioned by the Secretary-General – were also prepared to accept option 4. China declared its preference for option 1, could also support option 5 but could not agree to option 4.

The third version of the draft dated 2 December (prepared by the US together with the UK, France and Russia) now provided for *unified* command and control arrangements of the forces involved (i.e. including UNOSOM) to be made by the

47 See Lewis, 'UN Weighs Terms by US for Sending Somalia Force', *New York Times*, 28 November 1992.

48 S/24868 of 30 November 1992.

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States concerned and the Secretary-General (op. para. 11), for appropriate mechanisms for coordination between the UN and (national) military forces (op. para. 12), the appointment of an ad hoc commission of the Council to report (no longer to monitor) on the implementation (op. para. 14) and the attachment of a small liaison staff to Field Headquarters (op. para. 15). The core provision remained op. para. 9, authorizing Member States, in consultation with the Secretary-General, to 'use all necessary means to establish ... a secure environment for humanitarian relief operations'. The operations and further deployment of UNOSOM were put at the discretion of the Secretary-General (op. para. 6). The NAM, in an attempt to minimize the value of this Security Council decision as a precedent, focused on stressing the unique character of the situation in Somalia and proposed to authorize the Secretary-General, instead of Member States, thus returning to option 5.

As – at least on paper – an important (but in practice only cosmetic) concession to the NAM, the sponsors agreed on 3 December to *authorize*, acting under Chapter VII,

the Secretary-General and Member States ... to use all necessary means to establish ... a secure environment for humanitarian relief operations (op. para. 10).

This version was adopted unanimously the same day as Resolution 794. Op. para. 12 authorized

the Secretary-General and the Member States concerned to make the necessary arrangements for the unified command and control of the forces involved, which will reflect the offer referred to in para. 8 above.⁴⁹

The other provisions relating to coordination between these States and the Secretary-General and to reporting to the Security Council remained unchanged. Op. paras. 18 and 19 underlined the US intent 'to get out again quickly': The Secretary-General was requested to report within 15 days on the attainment of the objective and submit a plan to ensure that UNOSOM would be able to fulfill its mandate upon the withdrawal of the unified command.

In its explanation of vote, the US underlined the essentially peaceful character of the operation which would only last as long as necessary and was a step toward a strategy for a 'post cold war world order' as a reaction to humanitarian needs, peace-keeping and the strengthening of the UN. The US would cooperate with other States on a case-by-case basis. Privately, US representatives pointed to the rather generally worded objective which deliberately did not specify any measures such as disarmament to reach that objective.

China – which had for the first time cast a positive vote for an enforcement resolution – and the NAM all stressed the stronger role given to the Secretary-

⁴⁹ Op. para. 8 referred indirectly to the US offer. This roundabout way was chosen because of France's objections against explicitly appointing an American Force Commander.

General and the Security Council in carrying out the operation.⁵⁰ On 9 December 1992, the first elements of the Unified Task Force (UNITAF), spearheaded by US Marines, waded ashore.

2. Resolution 814

Directly following the adoption of Resolution 794, however, the Secretary-General began to press for disarmament of the factions and to ask the US to stay as long as that took.⁵¹ In his report to the Security Council of 19 December pursuant to Resolution 794, the Secretary-General was quite explicit about his differences of opinion with the US. In addition to continuing to insist on effective disarmament, he reported that the time had not yet come to start work on a transition to a new UNOSOM whose mandate, level of armament and rules of engagement should – according to the US – be little different from UNITAF. He added that such an operation would be analogous to his preferred earlier fifth option but would present the daunting prospect of the first peace-enforcement operation to be carried out under UN command. Before recommending a venture into such uncharted territory, the feasibility of such an operation, the availability of a sufficient number of troops (to replace the US) and, above all, progress in the political process had to be achieved. In conclusion, he warned that the

international community faces a long haul in helping the people of Somalia to put their country on its feet again, [...] hasty decisions at the very beginning of this process could have far-reaching and nefarious consequences [...] it would be a tragedy if the premature departure, or remodelling of UNITAF were to plunge Somalia back into anarchy.⁵²

A first discussion during informal consultations on 23 December was inconclusive: While France, Ecuador and Zimbabwe were in favour of complete disarmament, Cape Verde called it counter-productive to the development of a pluralistic society in Somalia. In the course of the following weeks, only a number of disarmament forays were carried out on a limited scale with only 40% of the country's territory under UNITAF's control.

In his report of 3 March 1993,⁵³ submitted after the growing impatience of the US who wanted to withdraw its fighting units, the Secretary-General concluded that despite important progress, a 'secure environment' had not yet been established. The mandate of UNOSOM II would therefore have to include enforcement action and would be the first operation of its kind. Its deployment would *not* be subject to the agreement of any local faction leaders. Its mandate would include *forcible*,

50 S/PV. 3145 of 3 December 1992. See generally Sorel, 'La Somalia et les Nations Unies', XXXVIII *AFDI* (1992) 61, 76.

51 See Lewis, 'UN Says Somalis Must Disarm Before Peace', *New York Times*, 6 December 1992; Sciolino, 'UN Wants Somalia Disarmed Before US Leaves', *New York Times*, 11 December 1992.

52 S/24992 of 19 December 1992.

53 S/25354 of 3 March 1993.

continuous and irreversible disarmament of all factions and the prevention of any resumption of violence and, if necessary, taking appropriate action against any faction that violates the cessation of hostilities. The Force Commander would assume operational responsibility while the US would provide logistical and other support, including a tactical quick reaction force.

During informal consultations on 10 March, only China voiced concern about a Chapter VII PKO and the planned delegation of authority to the Force Commander which could lead to the Security Council losing control over the operation.

Resolution 814, adopted on 26 March 1993, followed the Secretary-General's proposals: acting under Chapter VII, the Security Council *decided* to expand the mandate of UNOSOM in accordance with the recommendations contained in paragraphs 56-88 of his above-mentioned report of 3 March.

3. Resolution 837

After attacks launched by General Aidid's forces against UNOSOM II on 5 June 1993, which resulted in heavy casualties, the Security Council unanimously adopted Resolution 837 the following day. Acting under Chapter VII, it

reaffirmed that the Secretary-General is authorized under Resolution 814 *to take all necessary measures* against all those responsible for the armed attacks referred to above, including against those responsible for publicly inciting such attacks, *to establish the effective authority of UNOSOM II* throughout Somalia, including to secure the investigation of their action and their *arrest and detention for prosecution, trial and punishment*' (op. para. 5).

This formulation is somewhat misleading because Resolution 814, as we have seen, did not contain such a specific authorization of the Secretary-General.

During informal consultations on 14 June, the Secretary-General reported on actions undertaken by UNOSOM in pursuance of Resolution 837, notably the beginning of

the first phase of a program to disarm Mogadishu ... in a series of carefully-planned precision air and ground military actions ... and the neutralization of Radio Mogadishu.

In a further interim report on 18 June, Council Members were informed during informal consultations of further air and ground attacks as well as searches, about casualties suffered by UNOSOM II and the instructions issued by the Special Representative of the Secretary-General (an American Admiral) to arrest General Aidid. In a statement by the President of the Security Council to the media, on the same day, the Members of the Council reiterated their support to the efforts carried out by the Secretary-General, his Special Representative and UNOSOM forces.

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In his formal report to the Council of 17 August 1993,⁵⁴ the Secretary-General stated that he was

conscious of the feeling in some quarters that UNOSOM is deviating from its primary task of ensuring the safe distribution of humanitarian assistance, rehabilitation and reconstruction of Somalia ... however, the international community has known from the beginning that effective disarmament of all the factions and warlords is *conditio sine qua non* for other aspects of UNOSOM's mandate...

Referring to serious problems encountered earlier on with the Italian contingent, the Secretary-General stressed that the increased risk of casualties in Chapter VII-operations can only be minimized if there is effective unity of command and control.

Yet, while the search for General Aidid continued, opposition to this confrontational approach grew stronger,⁵⁵ especially after additional casualties among UNOSOM personnel and the capture of an American soldier by troops loyal to Aidid. Slowly, the US Administration changed course, beginning to advocate the isolation of Aidid rather than his capture and requesting to withdraw its combat troops from patrols to ships offshore.⁵⁶

As the public debate on the future course of action intensified, so did mutual recriminations. The Secretary-General insisted that Resolution 837 obliged him to pursue Aidid, that any restriction on the use of the US Quick Reaction Force would undermine UNOSOM's ability to disarm all factions and that the quick withdrawal of forces and the surrender of Mogadishu to Aidid would represent a humbling of the UN. Commenting on the concept of an 'African solution', the Secretary-General stated that his 'knowledge of the personalities involved does not inspire optimism about the feasibility'.⁵⁷

In informal consultations on 8 October, the US presented its new strategy: a considerable increase in the strength of troops under US command, coupled with a deadline for complete withdrawal by 31 March 1994 and more emphasis on efforts aimed at a political solution, including the appointment of a Special Emissary and a call on 'African leaders to help us find an African solution to an African problem'. While the Secretary-General held on to his view that UNOSOM's mandate comprised disarmament and the task to bring those responsible for attacks on UN

54 S/26317 of 17 August 1993.

55 See f.i. Farer, 'Talk to Aidid, Don't Demonize Him', *International Herald Tribune*, 17 September 1993; Pfaff, 'Somalia: Get American Commanders and Troops Out of There', *International Herald Tribune*, 20 September 1993. On the effects of the falling side of the 'CNN curve' – images not of needs but of costs – see Goshko, Gellman, 'Idea of a Potent UN Army Receives a Mixed Response', *Washington Post*, 29 October 1993.

56 Cf. Sciolino, 'US Changes Strategy Over Somali Warlord' and 'Clinton Seeks to Remove US Troops from the Somali Front Lines', *International Herald Tribune*, 29 and 30 September 1993 respectively.

57 Sciolino, 'UN Chief Pans New US Strategy in Somalia', *International Herald Tribune*, 2-3 October 1993. See also Meisler, 'UN Chief Sees Clinton Need to Scapegoat Him', *Los Angeles Times*, 12 October 1993.

personnel to justice, a large number of Council Members supported the new US approach.

Assessments on who was to blame differed. Some saw the heart of the problem as the vendetta between the Secretary-General and Aidid,⁵⁸ some blamed the American Special Representative of the Secretary-General, Admiral Howe, and his supporters in Washington.⁵⁹ Another view was that

it is hard to judge whether the escalating goals in Somalia were due to a flawed command structure, an activist Secretary-General or the mishaps of transition in Washington. But the hard lesson of Somalia is that UN peacekeepers cannot be arbiters of civil wars and US Rangers should not be used as a posse to bring foreign adversaries before non-existent courts.⁶⁰

On 16 November, the Security Council unanimously adopted Resolution 885 proposed by the US, setting up a Commission of Inquiry, in further implementation of Resolution 837, to investigate armed attacks on UNOSOM II personnel and requesting the Secretary-General, pending completion of these investigations, to suspend arrest operations.

4. Resolution 886

In his report to the Security Council of 12 November 1993,⁶¹ the Secretary-General continued to stress the need for disarmament of all factions but added that this long-term goal could only be reached with the active participation of the majority of the Somali people and presented three options:

- 1) leaving the mandate and military capability of UNOSOM unchanged (recommended option);
- 2) returning to traditional peace-keeping; or
- 3) limiting the mandate to keeping the airports and ports open for the delivery of humanitarian assistance.

On 18 November, the Security Council followed the Secretary-General's recommendation by unanimously renewing, under Chapter VII, the mandate of UNOSOM II until 31 May 1994 while at the same time

recalling that the highest priority of UNOSOM II continues to be to support the efforts of the Somali people [themselves] in promoting the process of national reconciliation and the establishment of democratic institutions (pr. para. G)

58 'Bring Them Home Now', *International Herald Tribune*, 9-10 October 1993.

59 Gordon, Cushman, 'Record Contradicts Clinton on Somalia', *International Herald Tribune*, 19 October 1993.

60 'Standing Down in Somalia', *International Herald Tribune*, 25 October 1993. See also Crawford, 'Lessons of a Year in Somalia', *Financial Times*, 9 December 1993.

61 S/26738 of 12 November 1993.

and deciding to undertake a 'fundamental review' of the mandate by 1 February 1994. This meant – if only on paper – that the previous authorization contained in Resolution 837 continued to be in force until Resolution 897, adopted unanimously on 4 February 1994, when the Security Council limited the mandate of UNOSOM II to more traditional tasks.

Prior to the adoption of this text, France tried to address the relationship between US troops and UNOSOM. Since the US only agreed to take note of the relevant paragraph of the Secretary-General's report, the French explanation of vote⁶² regretted that this issue – important for the transparency and coherence of this and other UN operations – had not been clarified.

D. Haiti

1. Resolution 875

After a number of setbacks in the process of re-establishing the legitimate government in Haiti in which the UN had been involved⁶³ – continued obstruction of the arrival of the UN Mission in Haiti (UNMIH), breach of the Governors Island Agreement to reinstate the legitimate Government and the assassination of the Minister of Justice – the US announced on 15 October 1993 the dispatch of six warships to interdict maritime traffic with Haiti. The same day, President Aristide requested the Security Council⁶⁴ to call on Member States to take the necessary measures to strengthen the provisions of Resolution 873 (by which the Security Council had terminated the suspension of the arms and oil embargo imposed with Resolution 841).

Still on 15 October, the US, France, Canada and Venezuela circulated a draft which – without much hesitation or discussion – was to become Resolution 875, unanimously adopted by the Security Council under Chapter VII the following day. Its op. para. 1 was modelled after Resolution 665 and reads as follows:

Calls upon Member States, acting nationally or through regional agencies or arrangements, cooperating with the legitimate Government of Haiti, to use *such measures commensurate with the specific circumstances as may be necessary* under the authority of the Security Council to ensure strict implementation of the provisions of Resolution 841 and 873 relating to the supply of petroleum or petroleum products or arms and related material of all types, and in particular to halt inward maritime shipping as necessary in order to inspect and verify their cargoes and destinations.

62 S/PV. 3317 of 18 November 1993, 19-20.

63 For a brief survey see Daudet, 'L'ONU et l'OEA en Haiti et le droit international', XXXVIII *AFDI* (1992) 89, 91.

64 S/26587 of 15 October 1993.

2. Resolution 940

As additional sanctions imposed by the Security Council in the ensuing months had not produced the results postulated in Resolution 917 of 6 May 1994, namely the creation of a proper environment for the deployment of UNMIH and the departure of the three military leaders, the Secretary-General presented three options to the Security Council in mid-July 1994.⁶⁵

- Expansion of UNMIH with a revised mandate under Chapter VII. However, since the Secretary-General did not expect it to be possible to obtain the required personnel and equipment from enough Member States 'to conform with the established principle that no single Member State (i.e. the USA) should contribute more than about one third of a force', he did not recommend this option.
- Authorization of a group of Member States under Chapter VII to establish a stable and secure environment throughout Haiti in order to facilitate the restoration of the legitimate authorities (phase one) and to 'modernize' and professionalize the armed forces and the police (phase two).
- Authorization of a group of Member States, under Chapter VII, to carry out phase one, and of UNMIH, under Chapter VI, of phase two.

The Secretary-General furthermore proposed to the Security Council, if it decided to choose either the second or the third option, to also approve the establishment of a small group of UN observers to verify the manner in which the authorized States carried out their mandate.

The Security Council chose the third option. On 31 July 1994, it adopted Resolution 940 with 12 votes and 2 abstentions (China and Brazil; Rwanda did not participate in the meeting) and, acting under Chapter VII,

authorized Member States to form a multilateral 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 ..., the prompt return to the legitimately elected president and the restoration of the legitimate authorities of the Government of Haiti, and to establish and maintain a secure and stable environment that will permit the implementation of the Governors Island Agreement...

The Security Council also approved the Secretary-General's proposal to send international monitors of the operations of the multilateral force – the hitherto furthest-reaching decision of this kind.

Resolution 940 was controversial from the outset. In addition to China and Brazil, a number of Latin American States voiced their concerns during the debate in the Council.⁶⁶ Public and media reaction was largely unfavourable.⁶⁷ Apart from

⁶⁵ S/1994/828 of 15 July 1994.

⁶⁶ S/PV. 3413 of 31 July 1994.

⁶⁷ Cf. for example the editorials 'A UN License to Invade Haiti', *New York Times*, 2 August 1994; 'Haiti isn't UN Business', *The Guardian*, 2 August 1994; Kirkpatrick, 'Imposing Democracy: Could US Stop With Haiti?', *International Herald Tribune*, 10-11 September 1994.

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partisan American politics, the reasons for criticism ranged from 'recklessly stretching the boundaries of what constitutes a threat to international peace and security under Chapter VII of the UN Charter', the lack of a sufficiently strong US national interest to risk American lives, the impossibility of imposing democracy by military force to 'falling into the unhealthy habit of licensing great-power spheres of influence'.

E. Rwanda: Resolution 929

At the end of April 1994, the Secretary-General reported to the Security Council that the situation in Rwanda had deteriorated to the point where it was necessary to consider action by the Security Council or to authorize Member States to do so in order to contribute to the restoration of law and order, to end the massacres of defenceless civilians and to promote a cease-fire.⁶⁸

Although the Security Council quickly reversed its decision taken only one month earlier to reduce the strength of United Nations Assistance Mission in Rwanda (UNAMIR) and expanded its mandate by Resolution 918 of 17 May 1994 to contribute to the security and protection of civilians at risk as well as to provide security and support for humanitarian relief operations, the Secretary-General felt it necessary to report back to the Council in mid-June that he had been unable to find sufficient personnel and equipment for UNAMIR's expanded mandate and to suggest to the Security Council to consider the offer of France to undertake a French-commanded multinational operation under Chapter VII to assure the protection of displaced persons and civilians, following the precedent of the US-led UNITAF in Somalia.⁶⁹

On 22 June 1994, the Council adopted Resolution 929 with 10 votes and 5 abstentions (New Zealand, China, Brazil, Pakistan and Nigeria). Acting under Chapter VII, it *authorized* the Member States cooperating with the Secretary-General to conduct an operation limited to a period of two months under national command and control aimed at contributing, in an impartial way, to the security and protection of displaced persons, refugees and civilians at risk, using *all necessary means* to achieve these humanitarian objectives. The notions of impartiality, temporary character and humanitarian goals were added during brief but intensive consultations whereas the authorization was limited to States and not, as originally proposed by France, also extended to the Secretary-General (as in the case of Resolution 794).

As the high number of abstentions in the Security Council shows, there was a distinct lack of enthusiasm, caused by doubts about the true motives of France on

68 S/1994/728 of 20 June 1994.

69 S/1994/728 of 20 June 1994. Cf. also the French letter to the Secretary-General, S/1994/734 of 21 June 1994, stating that 'in the spirit of Resolution 794, the Governments of France and Senegal would like, as a legal framework for their intervention, a resolution under Chapter VII...'

the one hand and by concerns about a further foray of the Security Council into the internal affairs of a State on the other.⁷⁰

III. Conclusions

Having examined – in an admittedly rather tedious fashion – the 19 cases in which the Security Council has, one way or another, granted legal and/or political authority for military enforcement action, I come to the conclusion that a new instrument has been created out of the need to fill the gap between the invocation of an inapplicable or inopportune right to collective self-defence and the unwanted application of the system of collective security.

The extent of the use of this new instrument was at first – in the context of the Gulf conflict – limited to the traditional field of application of force, i.e. against an actual or potential aggressor. Later, it was extended, along with the expansion of ‘threats to the peace’ as the basis for Security Council involvement,⁷¹ to apply also in humanitarian emergencies (Bosnia and Herzegovina, Somalia), to enforce the implementation of sanctions aimed at reversing aggression (Former Yugoslavia), to restore a legitimate government (Haiti), to protect UN peacekeeping forces (UNPROFOR) or to ‘avenge’ attacks on them (UNOSOM II).

Hand in hand with the rather unexpected increase in the number of such authorizations granted by the Security Council went a significant decline in their actual use. It is safe to say that after the overwhelming use made of this instrument in the Gulf, only the authority granted first to UNITAF and then to UNOSOM II in Somalia were ever applied in practice. The reasons for this will be discussed below.

Both the development of this new instrument of the Security Council and its actual (non-)application show, yet again, the impossibility of separating international law from politics, the ‘political contingency’ of this law and the need for its dynamic understanding.⁷²

A. Legal Aspects

By way of introduction, it is interesting to note that academic discussion of the legal aspects of such authorizations is almost exclusively confined to the earlier texts dealing with the Gulf whereas the latter examples which are more numerous and in some respects even more interesting have, if at all, received only scant attention. One explanation for this may lie in simple ‘attention fatigue’, which – like the more

70 Jenkins, ‘Leave Rwanda Alone’, *The Times* of 20 July 1994. More positively Lewis, ‘France Dares to Face the Humanitarian Challenge in Rwanda’, *International Herald Tribune* of 30 June 1994.

71 See Freudenschuß, *supra* note 24, *passim*; *id.*, *Beschlüsse des Sicherheitsrates der VN nach Kapitel VII: Anspruch und Wirklichkeit* (1995, in print), *passim*.

72 See Simma, ‘Editorial’, 3 *EJIL* (1992) No. 2, 215, 217.

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serious ailment 'compassion fatigue' – stems from too much exposure to a problem. Another might be that such authorizations have almost become routine. However, in the wake of the recent crisis in UN operations related to these authorizations, they and their implications deserve attention.

1. Diversity Versus Clarity or: Do Words Still Matter?

A look at the 19 Resolutions under discussion here reveals complete inconsistency. The Security Council calls on States (Resolutions 665, 770, 787, 886), authorizes them (Resolutions 678, 816, 929, 940), authorizes States and the Secretary-General (Resolution 794), a PKO (836, 871), reaffirms the Secretary-General's authorization (Resolution 837), approves a mandate of a PKO comprising the use of force (Resolution 814) and renews it (Resolution 886), recognizes that the provisions of a previous authorizing resolution remain valid (Resolution 686), reaffirms the responsibility of some States (Resolution 787), decides that States may take all necessary measures (Resolution 908), decides itself to take all necessary measures (Resolution 687), underlines (Resolution 773) or underlines and reaffirms that decision (Resolution 833). Two of these resolutions were not even adopted under Chapter VII (Resolutions 665, 773); three do not contain any determination of a threat to or breach of the peace (Resolutions 665, 687, 908).

This careless if not haphazard practice leads me to conclude that recent Council action has rendered many distinctions (such as the one between decisions and recommendations of the Security Council under Chapter VII) academic. I do not recall a single discussion during the drafting of these texts about possible different legal meanings of the various terms employed. While one could argue that all delegates involved were completely ignorant of even the cruder points of traditional doctrine, the same could not plausibly be said of the Legal Advisers who, in the capitals of Council Members, were supposedly reviewing these drafts. Short of alleging indolence in addition to ignorance, the only sensible conclusion is that the *opinio iuris* now is that (at least such) words do not really matter.

2. Theories on the Legal Basis for Resolutions Authorizing the Use of Force

Many commentators have attempted to fit the earlier resolutions (particularly Resolution 678 but also Resolutions 665 and 687) into the Procrustean bed of the Charter. Most have, however, since given up. Space does not permit, and the purpose of this study does not demand, a detailed discussion of these attempts. A few remarks are nonetheless useful for understanding my reasoning set out further below.

(a) Article 39

Since the Security Council, after Resolution 660 where it acted under Article 39, only referred to Chapter VII as such and not to any specific article, it could be argued that the Council was making recommendations for the restoration of international peace and security.⁷³ However it has been argued that

if the Security Council could lawfully recommend under Article 39 that States take military action against an aggressor, this would defeat the Charter concept that the Council must either utilize or rule out economic and diplomatic sanctions first.⁷⁴

Besides, if Article 39 was chosen as the legal basis the resulting action would be enforcement action which is – at least – doubtful.

(b) Article 42 et seq.

Some argue that there are indications that the Security Council intended to rely on these articles but differ on whether control by the UN over the forces employed would be required.⁷⁵ The phrase, 'under the authority of the Security Council' employed in Resolution 665 and some later texts does not, as the *travaux préparatoires* show, mean control by the Security Council but was rather intended as a political face-saving gesture for some NAM and China. Similarly, the reference to the Military Staff Committee in Resolution 665 and its absence in later texts is not difficult to understand⁷⁶ if one recalls the historical context. As we have seen, it was a price paid on paper to get the Soviet Union on board for Resolution 665. By the time Resolution 678 was discussed, this was no longer an issue.

In the absence of UN control (with the exception of the mandates conferred on UNPROFOR with Resolutions 836 and 871 and to UNOSOM in Resolutions 814 and 837), the lack of agreements under Article 43 and in the light of the clear intentions of the drafters, I am led to conclude that the actions undertaken cannot be subsumed under the enforcement provisions of Article 42 et seq.

The above-mentioned mandates of UNPROFOR and UNOSOM represent, however, a departure from the practice followed earlier in the Gulf (and later in Haiti). Unless one requires the fulfilment of all Chapter VII-provisions including the conclusion of Article 43 agreements and the activation of the Military Staff Committee before speaking of UN enforcement action,⁷⁷ these were the first authorizations of this kind. However, in light of the experience with UNOSOM II,

73 Greenwood, *supra* note 11, at 168.

74 Quigley, 'The US and the UN in the Persian Gulf War: New Order or Disorder?', 25 *Cornell International Law Journal* 1 (1992) 1, 35.

75 Greenwood, *supra* note 11, at 168; Klein, 'Völkerrechtliche Aspekte des Golfkonflikts 1990/91', 29 *Archiv des Völkerrechts* (1991) 421, 428-429; Fink, 'Der Konflikt zwischen dem Irak und Kuwait und die internationale Friedensordnung', 29 *Archiv des Völkerrechts* (1991) 452, 473.

76 As Boustany, 'La guerre du Golfe et le système d'intervention armée de l'ONU', XXVIII *Annuaire canadien de droit international* (1990) 379, 396 would have it.

77 Weston, *supra* note 19, at 519.

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they may also be the last for quite some time. Moreover, UN control of UNOSOM II existed largely only on paper.

(c) Article 48

The hypothesis that the decisions of the Security Council could be based on Article 48⁷⁸ has not received widespread support. One counter-argument was that measures were not 'required' of States but only 'authorized'. Furthermore, it is arguable that Article 48 cannot be regarded as free-standing but rather forms part and parcel of the enforcement provisions in Chapter VII.

(d) Article 51

Taking the right to collective self-defence as the basis⁷⁹ would solve the question of UN control over actions. There would, however, still be the issue of the proportionality of the response to the original unlawful act. The mandate in Resolution 678 'to restore peace and security in the area' can be – and has been – interpreted as transcending the proportionality-requirement of self-defence to include also 'marching toward Baghdad', deposing Saddam Hussein or protecting the Kurds.⁸⁰

Furthermore, the Article 51 theory can neither explain op. para. 3 of Resolution 678 (or similar provisions in other resolutions) which requested other States to assist the coalition⁸¹ since there is no duty of collective self-defence nor can it be stretched to include the measures undertaken in Somalia, Haiti and by UNPROFOR because either there was no aggression giving rise to request for assistance or the entity authorized was not a State but the Secretary-General or a peace-keeping operation (PKO).

78 Lister, 'Thoughts on the Use of Military Force in the Gulf Crisis', *Bunche Institute of the UN Occasional Paper* No. VII (June 1991) 7; Delbrück, 'Wirksameres Völkerrecht oder neues 'Weltinnenrecht'? Perspektiven der Völkerrechtsentwicklung in einem sich wandelnden internationalen System', in W. Kühne, *supra* note 1, at 101.

79 E. Rostow, 'Until What? Enforcement Action or Collective Self-defence', 85 *AJIL* (1991) 506; Klein, *supra* note 68, at 431; Schachter, 'UN Law in the Gulf Conflict', 85 *AJIL* (1991) 452; Weckel, 'Le Chapitre VII de la Charte et son application par le Conseil de Sécurité', XXXVII *AFDI* (1991) 165, 189; O. Schachter, *International Law in Theory and Practice* (1991) 403 however considers the authorization by Resolution 678 compatible with both collective self-defence under Art. 51 and 'action' under Art. 42.

80 Klein, *supra* note 75, at 431; Raic, 'The Gulf Crisis and the UN', 4 *Leiden Journal of International Law* (1991) 119, 132. More generally Greig, 'Self-defence and the Security Council: What Does Art. 51 Require?', 40 *ICLQ* (1991) 366.

81 See Heinz, Philipp, Wolfrum, 'Zweiter Golfkrieg: Anwendungsfall von Kapitel VII der UN-Charta', 4 *Vereinigte Nationen* (1991) 121, 126.

3. *Dissenting Opinions on the Legality of Authorizations*

A small group of dissenters – the ‘Charter fundamentalists’ – disputed the legality of Council action in the Gulf per se. They questioned the competence of the Security Council to farm out its tasks to a group of States ‘like a fast food-franchise’⁸² and demanded a clear decision under Article 42 for the measures to become legal.⁸³

4. *The Third Way: From Political Expediency to Customary Practice?* –

It can be argued that the Charter, ‘far from being a rigid set of rules to be adhered to blindly, gives the Security Council the freedom and discretion to apply Chapter VII in an manner deemed appropriate to a given situation’.⁸⁴ Like PKOs, such authorizations cannot be found in the letter of the Charter. But they responded to a need and, by substituting unilateral violence (often under the guise of self-proclaimed self-defence) with multilaterally authorized enforcement, can be regarded as being in conformity with the Charter’s spirit.⁸⁵

Initially, only a handful of observers maintained that the Security Council had found a third way between sticking to the letter of the Charter and drifting into illegality:

The system has evolved a viable alternative, within the terms of the Charter, that permits the Council to authorize States to join in a police force *ad hoc*, instance by instance.⁸⁶

Thus, the ‘common law’ approach, for which the most important guide is practice, has gained the upper hand over the Charter fundamentalists. Faced with the impossibility of fitting the authorizations during the Gulf conflict into a neatly numbered pigeon-hole in the Charter, it became the predominant view that the Security Council had created a new instrument and model for the future.⁸⁷

82 Rotter, ‘Waffenruhe bewahrte die Wiener Regierung vor einer Peinlichkeit’, *Salzburger Nachrichten*, 4 March 1991; Djena Wembou, ‘Réflexion sur la validité et la portée de la résolution 678 du Conseil de Sécurité’, 46/4 *Revue juridique et politique* (1992) 438, 449.

83 Quigley, *supra* note 67, at 23; Rotter, ‘Gewalt nur zur Durchsetzung des UN-Embargos zulässig’, *Salzburger Nachrichten*, 27 August 1990. Cf. also M. Bothe, *Demokratie und Recht* (1991) 2, 7, 9-10.

84 Sabec, ‘The Security Council Comes of Age: An Analysis of the International Legal Response to the Iraqi Invasion of Kuwait’, 21/1 *Georgia Journal of International and Comparative Law* (1991) 63, 100.

85 See Scheffer, ‘Use of Force After the Cold War: Panama, Iraq and the New World Order’, in L. Henkin *et al.* (eds), *Right v. Might. International Law and the Use of Force* (1991) 129.

86 Franck, Patel, ‘UN Police Action in Lieu of War: “The Old Order Changeth”’, 85 *AJIL* (1991) 63, 74; Weston, *supra* note 19, at 522; Freudenschuß, ‘The Impact of the Gulf Conflict on the UN and the Security Council: Developments and Perspectives’, in W. Danspeckgruber, Ch. Tripp (eds), *The Kuwait Crisis, Second Liechtenstein Colloquium on European and International Affairs*, 17 May 1991 (1994, in print).

87 Simma, ‘Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations Erga Omnes?’, in J. Delbrück (ed.), *The Future of International Law Enforcement. New Scenarios-New Law?* (1993) 125, 138-139; Greenwood,

As subsequent events have shown, the Security Council has not limited such authorizations to cases of armed attacks but has granted them also in response to attacks on PKOs and to humanitarian emergencies. As their use – on paper – became more frequent and their field of application grew larger, their implementation – in practice – became both more controlled and less forceful. The reasons for this development will now be addressed.

B. Political Aspects

The early case-studies suggested the emergence of a system in which the Security Council authorizes military actions which are then placed under the effective control of a State or a group of States. The Security Council thus provided 'international political cover'⁸⁸ or political authority which was desirable for reasons of both domestic and international politics. There are a number of reasons for and advantages – as well as objections – to such an arrangement.

1. *The Issue of Command of and Control over the Forces Employed*

As we have seen, the question of whether or not to authorize the use of force has, after Resolution 678, become less important and less controversial than the question of command and control over the forces employed. On paper, 'international' control has increased since the almost unchecked authority granted in Resolution 678. In practice, however, the degree of control wrested from the US by the Secretary-General with regard to operations in the former Yugoslavia has only been 'negative' in the sense that, with the help of States who had peace-keeping forces on the ground, the Secretary-General managed to make the actual use of force contingent upon his prior approval. In Somalia, the decision rested nominally with the commanders of the UN operation and the Secretary-General but was in fact largely taken by Americans. UNOSOM can thus hardly be seen as a case in which the US accepted to operate under UN command.⁸⁹

It seems only natural that States jealously guard their decision-making power out of concern for risking the lives of their troops in operations distant from home in possibly controversial interventions. Then there is the issue of the adequacy of the UN's existing machinery for controlling military operations that require considerable logistical back-up, intelligence-gathering capabilities and close coordination between fighting units who may be from different countries. These things are much more likely to be achieved through pre-existing national armed forces, alliances and military relationships than within the structures of a UN

supra note 11, at 178; Brunner, 'Militärische Maßnahmen nach Kapitel VII UN-Charta', 1 *Neue Zeitschrift für Wehrrecht* (1992) 1, 10, 14.

88 Freedman, 'The Gulf War and the New World Order', 33 *Survival* (1991) 195, 197.

89 See Meisler, 'Activist UN Leader on the Firing Line', *Los Angeles Times*, 9 November 1993; Berdal, 'Whither UN Peacekeeping?', 281 *Adelphi Paper* (October 1993) 74.

command.⁹⁰ The muddle experienced in Somalia in this regard is a case in point but is only one aspect of the problems inherent in 'third generation' PKOs.⁹¹

Within the span of a few months, the US went from extolling the virtues of multilateralism to retreating to define its limits. After preparing a Presidential Directive for placing US troops under UN command in the summer of 1993, it is now predicted that this idea would be revived 'as soon as it snows in Mogadishu'.⁹²

2. Legitimacy Versus Leadership

The 'pseudo-multilateralism' of acting through the Security Council in the Gulf conflict was quickly recognized and indeed unmasked as giving unilateral decisions a multilateral sheen.⁹³ Decisions of the Security Council that reflected the interest of the West – or which at least seemed to at the time – were presented to the world as reflecting the desires of the international community:

The very phrase 'world community' has become the euphemistic collective noun (replacing the 'Free World') to give global legitimacy to actions reflecting the interests of the US and other Western powers.⁹⁴

However, the initial criticism of the way in which the Security Council was used by the US in the Gulf and later by the West in the Yugoslav conflict – the double-standard argument of Iraq yes, Israel no, Yugoslavia yes, Somalia no – became much more muted if not inaudible (apart from the expression of concern about neo-imperialism in humanitarian disguise) following the Council's involvement in Somalia.

What remained on the table were proposals to increase the acceptability of Council decisions by enhancing its 'representativity' and other measures. Without re-entering this debate,⁹⁵ now of much less urgency, it should be noted that the General Assembly recently decided in Resolution 48/27, 'bearing in mind the need to continue to enhance the efficiency of the Security Council', to set up a working group to consider, *inter alia*, the question of an increase in Security Council membership. The working group is not expected to reach an agreement in the near future.⁹⁶

Experience shows that the mobilization of political will and public support only works when one power takes – and maintains – the lead. A comparison between the

90 Roberts, 'The UN and International Security', 35 *Survival* (1993) 3, 15-19.

91 These issues are discussed in Freudenschuß, 'Drei Generationen von Friedensoperationen der VN; Stand und Ausblick', *Österreichisches Jahrbuch für Internationale Politik 1993* (Wien 1994) 44.

92 Atkinson, 'Guns Ready, US Forces Prepare to quit Somalia', *International Herald Tribune*, 9 December 1993.

93 Krauthammer, 'The Unipolar Moment', 70 *Foreign Affairs* (1990/91) 25.

94 Huntington, 'The Clash of Civilizations?', 72 *Foreign Affairs* (1993) 22, 39. Also Arnold, 'Wie reformfähig ist die UNO?', 4-5 *International* (1993) 37, 39.

95 For a recent summary see Freudenschuß, *supra* note 24, at 35-37.

96 Sucharipa-Behrmann, 'The Enlargement of the UN Security Council', 47 *AJIL* (1994) 1.

international responses to the Gulf and the Yugoslav conflicts is quite illustrative.⁹⁷ So too is the case of Somalia where the US was unable or unwilling to stay the course.

The Secretary-General, on the other hand, neither can nor should provide such leadership. His – possibly existing – aspirations notwithstanding, he is not the head of a World Government. If leadership today is to be exercised under democratic constraints, the absence of constitutional checks and balances – comparable to, let us say, the influence of Congress on US foreign policy – on a headstrong Secretary-General once authorized to carry out military operations could prove quite detrimental. There are no provisions for impeachment nor could a mandate given by the Security Council be revoked if a Permanent Member allied with the Secretary-General on a particular issue used its veto power.

The anticipated absence of strong leadership by the US or others⁹⁸ – because of past lessons, a more narrowly defined national interest in issues before the Security Council, domestic constraints etc. – will probably lead to a more measured approach to granting authorizations through the Security Council. Authorizations without implementation soon become meaningless and devalue, over time, an instrument originally designed to inspire fear in trespassers and to provide political cover for actions: if no actions are taken, no cover is necessary.

3. Authorizations as Placebos

However, while authorizations without any meaningful follow-up may inspire only boredom and a sense of déjà-vu in some, they may in other instances still serve a useful purpose for others: multilateral gridlock avoids unwanted involvement.⁹⁹

The lengthy search for obliquely worded international authorizations by the Security Council can also be used as an excuse or even a pretext for national inaction – which, for whatever reason, may be the desired outcome and can consequently be explained as a necessary sacrifice on the altar of international cooperation and consensus-building.

4. Authorizations as Political Cover

As we have seen with respect to Resolutions 665 and 678, involvement of the Security Council was useful, if not instrumental, in getting the Soviet Union on board. The Council thus served as an instrument for the management and coordination of national policies. It has been suggested that the international

97 See also Bertram, Cavazza, 'Needed Soon: New American Leadership Plus a New Europe', *International Herald Tribune*, 21 October 1992.

98 As shown above, apart from the US only France has successfully initiated Security Council authorizations for the use of force.

99 See Adelman, 'Multilateral Gridlock', *The Washington Times*, 29 September 1993.

imprimatur given to American intentions provided additional glue to a rather disparate coalition as well as an important stimulus for Congressional approval.

Later on, the changing nature of conflicts and crises – ethnic strife and violent nationalism, humanitarian emergencies and challenges to constitutional government – made the involvement of the Security Council instrumental in securing the acquiescence, if not the assent, of China and those NAM who continue to espouse (or pay at least lip-service to) the principle of non-interference in internal affairs.

For a while, it seemed that turning to the Security Council for an authorization to use force had become a foreign policy reflex, an almost Pavlovian reaction. The ease with which most of those authorizations were attained certainly also helped.

Yet, what may have been the zenith of the use of such authorizations might well also prove to be its nadir: Somalia may well have shown the limits, if not the inappropriateness, of the use of this new instrument in cases where there is no clear and compelling national interest involved or where other, non-violent forms of international engagement are available and advisable. Thus the Security Council, after long having been vegetarian, had become carnivorous, but may again go on a diet.

5. The Myth of Collective Security

While the objective criteria – universality and a legal framework – for a system of collective security have existed for quite some time now, its subjective elements such as consistent international solidarity, consensus on what is wrong, preparedness to cede executive authority to the UN, readiness ‘to bear any burden and pay any price’ for the consequences of collective decisions – have always been lacking and are likely to continue to be so. As long as the much quoted ‘international community’ remains an elusive phenomenon, true collective security will remain an elusive chimera as well.¹⁰⁰ In addition it can be argued that collective security as a state-centric concept is not really applicable to most of the new challenges in any case since they are either not amenable to primarily military solutions¹⁰¹ or are issues of ‘justice’ rather than of ‘stability’.¹⁰²

A dispassionate analysis of the actions of the Security Council to date reveals, therefore, apparent successes and inherent shortcomings. Barring a drastic deterioration in the international political climate, the chances are that the Council will remain a coordinating mechanism for – more narrowly defined – national

100 Cf. already Schaefer, ‘Die Rolle der VN im Rahmen der Friedenssicherung’, in G. Doeker, H. Volger (eds), *Die Wiederentdeckung der VN* (1990) 155, 157; Statz, ‘Nachkriegszeit: Vereinte Nationen zwischen ziviler und militärischer Weltordnung’, 4 *Vereinte Nationen* (1991) 129, 130-131; see also Roberts, *supra* note 90, at 27 and Neuhold, ‘Die Grundregeln der zwischenstaatlichen Beziehungen’, 2 *Österreichisches Handbuch des Völkerrechts* (1991) Rz 1601-1603.

101 Nye, ‘What New World Order?’, 71 *Foreign Affairs* (1992) 83, 90.

102 On Somalia, see Preston, ‘US, UN Differ on Long-term Goal in Somalia’, *Washington Post*, 30 September 1993; generally Arend, ‘The UN and the New World Order’, 81 *Georgetown Law Journal* (1993) 491, 520-524.

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interests and policies and, once a common denominator on an issue has been found, the provider of international political cover,

handing down blessings and curses on particular parties and courses of action which, like those of ancient Delphi and the medieval papacy, have power: they affect morale, for good or ill.¹⁰³

Put differently, the question 'Who lost collective security?' is not appropriate. There was no real 'window of opportunity' to realize a general system of true collective security through the Security Council as there seemed to be in the (wishful) thinking of some after the Gulf conflict:

International politics will continue as always with its mixture of peace and war, stability and instability, prosperity and poverty. Of course we live in a new world, but it is still a world of nation-states¹⁰⁴

– with their self-perceived and self-defined interests.

¹⁰³ O'Brien, 'Winning Votes in Sarajevo', *The Times*, 11 August 1992.

¹⁰⁴ Zakaria, 'Cure by Cavalry Charge is Rarely a Wise Prescription', *International Herald Tribune*, 27 September 1993. See also Kissinger, 'Foreign Policy is About the National Interest', *International Herald Tribune*, 25 October 1993. For a more optimistic, evolutionary view cf. Delbrück, *supra* note 78, *passim*.