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Is the United Nations Security Council Still Relevant? And Was It Ever?

Erik Suy*

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Some time ago, I gladly accepted to deliver this Eberhard Deutsch Lecture. I accepted in the aftermath of President G.W. Bush's statement before the United Nations General Assembly on September 12, 2002.¹ This statement was followed by an exceptionally intense and long series of negotiations, ultimately leading to the stalemate in early March 2003 and, finally, to the beginning of the hostilities in Iraq.

These six months of multilateral diplomacy, mainly among the members of the United Nations Security Council, had to deal with one

* Professor emeritus of University of Leuven, Belgium. Ph.D. (law), University of Ghent; Ph. D. (political science), University of Geneva; Ph. D. (honorary), University of Montpellier. Professor Suy has had a long and distinguished career in public international law. His service includes from 1974-1987 as Under-Secretary-General of the United Nations, first in the capacity as the Legal Counsel at headquarters in New York, and from 1983 as Director-General of the United Nations Office in Geneva. He has served as an advisor to the governments of Belgium and Flanders, and as personal representative of the UN Secretary-General on various occasions including the Kurdish question in Iraq in 1991. Additionally, Professor Suy is the President of the Belgium Society of International Law, a founding member of the International Institute of Humanitarian Law in San Remo, and a member of the Appeals Board of the European Space Agency. He has also been counsel and advocate in several cases before the International Court of Justice.

1. President George W. Bush, Remarks by the President at the United Nations General Assembly (Sept. 12, 2002), *available at* <http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html>.

major question: Would the Council be able to handle this major crisis in the international relations? Would the Council eventually be in a similar position as in 1991, when it reacted unanimously against the flagrant violation by Iraq of the sovereignty and independence of Kuwait? And if the Council could not agree to the request for approving a military intervention, would this place the credibility the Security Council seemed to have acquired since the fall of the Berlin Wall and the end of the Cold War in 1989 in jeopardy? Could failing action by the Security Council, the multilateralism and the collective security system of the Charter of the United Nations be superseded by unilateral action, under the disguise of the doctrine of preventive or preemptive action?

These were the topical issues during the crucial months preceding the unilateral intervention by the United States and its allies of Iraq in March 2003. It is not my intention to express any detailed views on the legality of the military intervention against Iraq other than to say that I consider it to be a flagrant violation of the basic rules and principles of public international law and of the law of the United Nations. I rather will address the related question of whether this unilateral and illegal action affects the credibility of the United Nations and, in particular, of its Security Council. This necessarily implies a thorough examination of the position and the role of the Security Council in international relations and will have to start with an analysis of the original concept of the role of the Council as the guardian of the system of collective security.² This survey will then look into the ways and means invented by the international community to cope with some of the deficiencies of the system of collective security. This analysis will deal with peacekeeping operations, specifically the advantages and flaws of such operations.³ The end of the Cold War definitively affected the functioning of the Security Council because the permanent members of the Council suddenly discovered common goals to be reached through consensus. The use of veto nearly disappeared, and the decision making in the Council, through the adoption of *binding* resolutions based on chapter VII of the Charter, reflected a totally new approach towards handling the crisis in international relations. Peacekeeping underwent major changes, and the United Nations sought cooperation with regional organizations.⁴ In concluding these peregrinations, I will try to offer some suggestions

2. See discussion *infra* Part I.
3. See discussion *infra* Part II.
4. See discussion *infra* Part III.

concerning a possible remake of the Security Council and, if need be, of the United Nations System.⁵

However, before proceeding with these various topics, some statistics are necessary. During the time span of forty years, between October 1945, when the United Nations Charter entered into force, and the Security Council became operative, and August 1990, the Security Council adopted 660 resolutions.⁶ Only a few of these original resolutions were binding resolutions taken under chapter VII of the Charter which deals with “action” concerning a threat to the peace, a breach of the peace and acts of aggression. Consider, however, that from 1990 until the end of 2003, in a span of only thirteen years, the Security Council adopted nearly *nine hundred* resolutions dealing with questions of peace and security.⁷ The number of these resolutions in which the Council has stated that it is “*acting under Chapter VII of the Charter*” is nearly uncountable, and certainly in marked contrast with similar resolutions adopted from 1945 to 1990. From 1948 until 1978, the Security Council established thirteen peacekeeping operations.⁸ Then followed a period of ten years without peacekeeping operations. From 1988 until today, the Council established forty-four peacekeeping operations, twenty of which are in Africa.⁹ These figures are definitely food for thought.

I. THE SECURITY COUNCIL AS THE GUARDIAN OF THE SYSTEM OF COLLECTIVE SECURITY

When the founding fathers of the United Nations Charter met in Dumbarton Oaks and finally in San Francisco in 1945, they already had a pretty good idea of how the new world order after the Second World War would look. Franklin D. Roosevelt and Winston Churchill elaborated the basic principles of the new world order negotiations that started with the encounter in the Atlantic Ocean. The principal allied powers, the United States, the Soviet Union, Great Britain, China, and France, established a new directory for a new world order: the United Nations. The centerpiece of this United Nations Organization would be a *Security Council*.

5. See discussion *infra* Part IV.

6. For a complete listing of all Security Council Resolutions, see http://www.un.org/DOCS/SC/UNSC_resolutions.html (last visited Mar. 31, 2004).

7. See generally *id.*

8. See generally United Nations, *United Nations Peacekeeping in the Service of Peace*, at <http://www.un.org/Depts/dpko/dpko/home.shtml> (last visited Mar. 31, 2004).

9. See generally *id.*

When one reads today the provisions of the United Nations Charter, written during the period of euphoria at the end of the Second World War, one sees how naïve the politicians were to entrust the maintenance of international peace and security to an international council. It may be of use, therefore, to recall the basic tenets of this *System of Collective Security*. In doing so, and in light of my experience as both a practitioner and a scholar dealing with the law of the United Nations, I shall suggest some new and possibly useful insights, interpretations, and suggestions that could be useful in future attempts to adapt the United Nations' role in international affairs.

The U.N. Charter's key provisions on the *Functions and Powers* of the Security Council are laid down in articles 24 and 25.¹⁰ Article 26 may be considered as a curiosum.¹¹ Article 24 reads as follows:

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII and XII.
3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.¹²

Article 25, one of the shortest, but without doubt the most important provision of the Charter stipulates, "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."¹³

Without going into the details of a not always easy interpretation of these articles, one may, however, discover some elements of what modern legal jargon refers to as: *corporate governance*, *accountability*, and *transparency*. The Security Council can be compared with the Board of Directors of a Company. The Board acts on behalf of the General Assembly of the shareholders who, in our case, are the Members of the Organization. The Board shall act in accordance with the provisions of the Company's statute, and is accountable to the General Assembly. This aspect of accountability is rendered in a more precise way in article 15 of

10. U.N. CHARTER arts. 24-25.

11. *Id.* art. 26.

12. *Id.* art. 24.

13. *Id.* art. 25.

the UN Charter dealing with the Functions and Powers of the General Assembly. This article contains a precise description of the content of the Council's reports: "[T]hese reports shall include an account of the measures that the Security Council has decided upon or taken to maintain international peace and security."¹⁴

The element of *accountability* is hidden in the words "consider" (in article 15) and "for its consideration" (in article 24). In the French version of article 15, the General Assembly "*étudie*" (studies) those reports, whereas in article 25 the Security Council submits its reports "*pour examen*," which is somewhat stronger than *consideration*.¹⁵

The practice of the United Nations is that the General Assembly never examines or studies the reports of the Security Council. In the annual decisions of the General Assembly on the reports of the Security Council, one will find the traditional formula that the General Assembly "takes note of the Report of the Security Council."¹⁶ During the last decade, the relations between the two main organs has improved.

The primary role of the Security Council in implementing the mechanism of *collective security* is laid down in chapter VII of the Charter. Its meaningful title is "*Action with respect to threats of the peace, breaches of the peace, and acts of aggression*."¹⁷ According to the founding fathers of the UN Charter, the Security Council would be entrusted with the following tasks and functions:

1. Determining the existence of any of the events mentioned above;¹⁸
2. Deciding what measures not involving the use of armed force are to be employed (these are the so-called economic sanctions);¹⁹
3. Taking action by military forces as may be necessary to maintain or restore international peace and security.²⁰

Articles 43-47 address the question of how the Security Council could have military forces at its disposal. It is only worth mentioning a few salient points:

14. *Id.* art. 15.

15. *Id.* arts. 15, 24. The United Nations Website has the charter available in many languages. See <http://www.un.org>.

16. For an example of this see, U.N. GAOR, 58th Sess., 1st mtg. at 1, U.N. Doc. A/58/PV.1.

17. See U.N. CHARTER ch. VII.

18. *Id.* art. 39.

19. *Id.* art. 41.

20. *Id.* art. 42.

1. All Members of the UN undertake to make available to the Security Council, on its call and in accordance with special agreements armed forces;²¹
2. Even non Members of the UN could be invited to participate in this schema concerning the employment of contingents of that Member's armed forces;²²
3. Further details concerning the relations between the Security Council and the Members on military matters would be settled with the assistance of the Military Staff Committee;²³
4. A long article 47 deals with the mandate of the Military Staff Committee.²⁴

Until the end of the Cold War, chapter VII of the Charter, which originally was meant to be the tailpiece of the new world order, remained a dead letter.²⁵ The euphoric consensus as to the future of international relations in the form of this new world order appeared to be a false premise. The aggression of North Korea against South Korea in 1950 provoked a reaction by the Security Council along the lines of chapter VII. The United Nations established a military force, under the command of the United States, with participation from seventeen members states.²⁶ This was only possible due to the absence of the then

21. *Id.* art. 43.

22. *Id.* art. 44.

23. *Id.* arts. 45-56.

24. Article 47 requires a thorough reading to grasp the original idealistic concept of collective security. It reads:

1. There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.
2. The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any member of the United Nations not permanently represented on the Committees shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work.
3. The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council.
4. The Military Staff Committee, with the authorization of the Security Council and after consultation with the appropriate regional agencies, may establish regional sub-committees.

25. Historians note the end of the Cold War officially in 1990. *See generally* JOHN FOSTER DULLES AND THE DIPLOMACY OF THE COLD WAR (Richard H. Immerman ed., 1990).

26. U.N. SCOR 5th Sess., 476th mtg. at 5, U.N. Doc. S/1588.

Soviet Union at the deliberations of the Security Council.²⁷ We can only guess what the outcome of this conflict would have been if the Soviet Union had been present and exercised its veto. This blunder would never occur again by any of the permanent members in the Council. As a matter of fact, the Council will never start its meetings without all members being present. This episode touches the spot. The Security Council, because of the right to veto enshrined in article 27 of the Charter, would never be in a position to fulfill its mandate as the guardian of international peace and security in conflicts involving, directly or indirectly, one of the permanent members.²⁸ The exercise, by the permanent members, of the right to veto decisions of the Security Council has led to the paralysis of the Council in the exercise of its paramount mandate to maintain international peace and security. Hence, the need arose to elaborate new ways and means to keep the United Nations from breaking up. The United Nations developed two devices. During the Korean Crisis, the United States came up with the brilliant idea of transferring the responsibility for maintaining peace and security to the General Assembly. This happened in the form of the so-called *Uniting for Peace Resolution*, also known as the *Acheson Resolution*.²⁹ Although this resolution is still on the books, I wish to emphasize another major development: the introduction of *Peacekeeping Operations* as a substitute for “actions” under chapter VII.

II. PEACEKEEPING

The United Nations, in particular the Security Council, along with the Secretary-General, has invented and developed the concept of peacekeeping as a substitute for failing action under chapter VII. Peacekeeping can best be defined as field operations established by the Security Council, with the *consent* of the parties concerned, to help control and resolve conflicts between them, under *United Nations command and control*. This is done collectively at the expense of the Member States, and with military and other personnel and equipment voluntarily provided by them, acting *impartially* between the parties and *using force to the minimum extent necessary*.

The *traditional mandate* of a peacekeeping operation, either as a limited group of individual military observers, or as a larger operation of military contingents, was to man buffer zones and to observe a truce

27. *Id.* at 6 n.13.

28. U.N. CHARTER art. 27.

29. G.A. Res. 377, U.N. GAOR 5th Sess., Supp. No. 3, at 84, U.N. DOC. A/377 (1950).

between the fighting parties. Although it was expected that the positioning of this force would expedite a settlement of the dispute, it became clear that the traditional mandate was too static. Some of those operations of the first generation still exist as living fossils of a bygone era. This is certainly the case of UNTSO (*United Nations Truce Supervision Organization*), probably unknown to most.³⁰ The United Nations established it in 1948 after the first war between the young State of Israel and its Arab neighbors.³¹ This international observers team of approximately 150 officers is still operative as a support for two other UN peacekeeping operations in Lebanon (UNIFIL) and on the Golan Heights (UNDOF). Another example of a fossilized peacekeeping operation is UNMOGIP (*United Nations Military Observers Group India-Pakistan*). This small group of approximately forty-five high ranking officers is supposed to verify the observance of a ceasefire concluded between India and Pakistan in the region of Kashmir in 1949.³² There are many more examples of ongoing peacekeeping operations the full list of which can be found on the Web site of the United Nations.

The Security Council establishes these operations for a limited but renewable duration of normally six months.³³ Although the presence of these forces may sometimes be considered useful, they hardly contribute to the settlement of the dispute. This is the task of the parties involved, eventually with the assistance of a diplomatic representative of the United Nations Secretary-General. Member States of the United Nations and regional organizations may also become instrumental in sorting out political solutions. Recent developments concerning Cyprus and the Kashmir area between India and Pakistan are there to remind us that only the political will of the parties is instrumental in solving the conflict. The Security Council should take stock of these political developments with a view of evaluating the necessity of peacekeeping operations.

The Security Council also launched peacekeeping operations in situations of internal conflict. Rwanda, Somalia, Liberia, Sierra Leone, the Congo, and Ivory Coast are well known examples of such operations

30. For more information about UNTSO, see, <http://www.un.org/Depts/dpko/missions/untso/index.html> (last visited Apr. 3, 2004).

31. UNITED NATIONS, *Middle East-UNTSO-Mandate*, at <http://www.un.org/Depts/dpko/missions/untso/mandate.html> (last visited Apr. 3, 2004).

32. For more information about UNMOGIP, see <http://www.un.org/Depts/dpko/missions/unmogip/> (last visited Apr. 3, 2004).

33. A good example of peacekeeping operation with an original limited duration is the United Nations Peacekeeping Force in Cyprus. The United Nations originally created UNFICYP in 1964, yet it remains active and in force today. See <http://www.un.org/Depts/dpko.missions/unficyp/> (last visited Apr. 3, 2004).

on the African continent. But this touches upon at least two new aspects that do not correspond to the traditional definition and elements of peacekeeping. First of all, *there cannot be a peacekeeping operation where there is no peace*. This is the major flaw in the practice of peacekeeping during the last decade. Furthermore, United Nations military contingents sent into a country where heavy fighting occurs between various warlords and their factions, both of whom are trying to establish their supremacy over the country, are doomed to fail if the international forces lack the power to *enforce* the peace. Here we touch upon one of the basic tenets of peacekeeping, i.e., that the peacekeepers are only allowed to use armed force in the case of self-defense. But what is self-defense? According to the traditional concept of peacekeeping, the use of force in self-defense was limited to cases where one of the parties to the conflict used force which prevented the United Nations Force from exercising its mandate.

This definition of self-defense reflects the traditional thinking of the UN's Secretariat according to which the United Nations *is not at war* with any of the parties involved in either an international or an internal conflict. The use of armed force by the UN Peacekeepers is therefore limited to a most restricted interpretation of the right to self-defense. This interpretation was somewhat broadened in the light of the experiences in Rwanda, Somalia, and former Yugoslavia which all occurred in 1994. The countries contributing troops insisted upon a better protection of their contingents in areas of internal military conflict, and eventually convinced the Secretary-General and the members of the Security Council that the armament of the peacekeeping operations should be upgraded so as to enable the forces to defend themselves, and the humanitarian operations of international organizations, in a more convincing way as under the strict interpretation of self-defense. The Security Council allowed the Peacekeepers to "*use all necessary means*" for their protection and for the fulfillment of their mandate. The latter expression was first used in Resolution 678 containing the ultimatum for Iraq's withdrawal from Kuwait on the November 30, 1990.³⁴

Referring to this episode, then Secretary of State, James A. Baker, III, wrote in his book *The Politics of Diplomacy* that he had suggested the words: "all necessary means, including the use of force."³⁵ At the time he was afraid that the Soviets and the other allies might object to

34. S.C. Res. 678, U.N. SCOR 45th Sess., 2963rd mtg., at 28, U.N.DOC. S/RES/0678 (1990).

35. JAMES A. BAKER, III, *THE POLITICS OF DIPLOMACY: REVOLUTION, WAR AND PEACE 1989-1992* 305 (1995).

this specificity.³⁶ His legal advisor, Bob Kimmit, had concluded that the simple phrase “all necessary means” conferred sufficient authority to wage war.³⁷ Ever since, the Security Council has used this expression to authorize the use of robust and deterrent force by peacekeepers. These new *rules of engagement*, however, were not always successful in situations where the Peacekeeping Force met fierce resistance by an even more robust party. This was the case when an overwhelming Serbian force confronted UNPROFOR (United Nations Protection Force in Bosnia-Herzegovina), the organization in charge of implementing safe areas or demilitarized zones such as in and around Srebrenica. This, along with similar episodes in Rwanda and Somalia, led to a rethinking in the United Nations Secretariat of the future role of peacekeeping, and is the subject of the famous *Brahimi Report*, which we will not discuss here.³⁸ The UNPROFOR experience is perhaps even more important for the development of an entirely new relationship in the field of peacekeeping between the United Nations and regional international organizations.

III. THE SECURITY COUNCIL AFTER THE COLD WAR

The flagrant violation of the United Nations Charter provision on the nonuse of force by Iraq against Kuwait occurred precisely at a time when the Soviet Empire was imploding. The United States took advantage of this situation to use the utmost potential of the Security Council in order to obtain the green light to use force. This was done in Resolution 678 of the Council, although the United States and Kuwait could have had recourse to article 51 of the UN Charter to start operations in “self defense.”³⁹ In other cases, such as Somalia, Rwanda, Albania, Afghanistan, and Côte d’Ivoire, the Security Council authorized Member States to take action, individually, collectively, or with regional organizations.

Operation *Desert Storm* nearly fitted into chapter VII of the UN Charter, except that it was not a UN Operation. Then Secretary-General, Javier Perez de Cuellar, admitted that once the Security Council had given the green light for the operation, the United Nations stepped out of

36. *Id.*

37. *Id.*

38. The General Assembly of the United Nations issued the Brahimi Report in August 2000. *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects*, U.N. SCOR, 55th Sess., Item 87 of the Provisional Agenda, U.N. Doc. A/55/305-S/2000/809 (2000) [hereinafter *Brahimi Report*].

39. S.C. Res. 678, *supra* note 34.

the game, and instead it became an affair of the United States and their allies.⁴⁰ When the hostilities stopped, the Security Council was asked to draw its conclusions in the form of Resolution 687, which, in fact, was a ceasefire arrangement drafted by the United States.⁴¹

Shortly thereafter, the United Nations was confronted with the implosion of *Yugoslavia*. Initially, this was an internal affair until the various federated states proclaimed their independence and the United Nations admitted them as new members. Then the conflict continued as an international conflict. The Security Council established UNPROFOR as a peacekeeping force of the second generation, first in Croatia, and later on in Bosnia-Herzegovina. It was created to support the humanitarian mission of protecting the refugees and providing essential humanitarian relief to the victims of the ongoing conflict.⁴² The decisions of the Security Council imposing economic sanctions however, could not be implemented by UNPROFOR. It requested NATO to use its warships and aircraft for the implementation of the sanctions. Dick Leurdijk, the Director of Studies in the Netherlands Institute of International Relations "Clingendael," writing in 1994, drew the following sharp conclusion: "In accepting those requests, the Alliance, in fact, confirmed its political will to strengthen NATO's role as a projector of stability outside the Treaty area, as part of its newly defined missions."⁴³

This was only the prelude to a much closer cooperation in which NATO's role evolved from that of a subcontractor to a full replacement of UNPROFOR after the Dayton Agreements. On June 4, 1993, the Security Council, alarmed by the plight of the civilian population in the safe areas such as Sarajevo, Tuzla, Guražde, and Srebrenica, not only authorized UNPROFOR "to take the necessary measures, including the use of force, in reply to bombardments."⁴⁴ They also decided that

Member States, acting nationally or through regional organizations or arrangements, may take, under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR,

40. W. Michael Reisman, *Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions and Prospects*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 44 (Lori Fisler Damrosch & J. Scheffer eds., 1991).

41. See S.C. Res. 687, U.N. SCOR 46th Sess., 2981st mtg., U.N. DOC. S/RES/687 (1991).

42. See United Nations, *Former Yugoslavia United Nations Protection Force*, at http://www.un.org/Depts/dpko/dpko/co_mission/unfrofor.htm (last visited Apr. 3, 2004).

43. DICK LEURDIJK, *THE UNITED NATIONS AND NATO IN FORMER YUGOSLAVIA*, 1991-1996: LIMITS TO DIPLOMACY AND FORCE 12 (1996).

44. S.C. Res. 836, U.N. SCOR 48th Sess., 3228th mtg., U.N. DOC. S/RES/836 (1993).

all necessary measures, through the use of air power, in and around the safe areas . . . to support UNPROFOR, in the performance of its mandate.⁴⁵

This was a historical breakthrough for the role of the United Nations in maintaining international peace and security. Thus became evident not only the flaws in the Peacekeeping Operations, but also the shortcomings in the system of collective security as envisaged by the euphoric visionaries in 1945. In order to be efficient, the Security Council had to rely on those Member States and other entities willing to support the Council as its military arm. The initial relationship between UNPROFOR and NATO on practical issues has not been an easy one, and the *dual key practice* bears witness of it.

Close Air Support (CAS) implies nothing more than the appearance of NATO jets above the peacekeepers in order to deter "enemy" forces. This may perhaps be very efficient in some circumstances, but will not frighten otherwise well trained and equipped forces. This seemed to be the case in Bosnia where Serbian forces were not at all impressed by the roaring presence of F-16 fighters. *Air support*, therefore, was rather inefficient, whereupon the Secretary-General of the United Nations insisted on air *strikes*. On August 4, 1993, the North Atlantic Council approved the Operational Options for Air Strikes in Bosnia-Herzegovina.⁴⁶ The Council agreed with the position of the UN Secretary-General that the first use of air power in the theatre should come from the United Nations.⁴⁷ This led to a complicated set of procedures between all parties involved: the UN, NATO, and the Serbian Forces.

The military forces of NATO, put at the disposal of a weak UNPROFOR, proved to be of little help. The Serbian forces responded to the air strikes with taking hostages among the UN peacekeepers who were then chained at the gates of Serbian military targets and ammunition depots. Frustrated by these actions, as well as by the ridiculous *dual key* procedures, NATO abandoned all air support and air strikes. The United Kingdom and France then set up a Rapid Reaction Force as an integral part of the existing United Nations Peacekeeping Operation, UNPROFOR.⁴⁸ This Force soon, and with an overwhelming firepower, bombarded the Serbs, to the negotiating table in Dayton, Ohio, where all parties reached a comprehensive agreement. This agreement

45. *Id.* at 3.

46. Secretary-General, *Press Statement Following the Special meeting of the North Atlantic Council* (Aug. 2, 1993), at <http://www.nato.int/docu/comm/49-95/C930802a.htm>.

47. *See id.*

48. S.C. Res., U.N. SCOR 50th Sess., 3543rd mtg., U.N. DOC. S/RES/998 (1995).

was then converted into the Paris Peace Agreement of 14 December 1995.⁴⁹ To help insure compliance with that agreement, the Security Council, in its Resolution 1031 (1995) of 15 December 1995, authorized the deployment of a multinational NATO-led, sixty-thousand men strong Implementation Force (IFOR).⁵⁰ At the same time, the Security Council authorized Member States of the United Nations to “take all necessary measures” to effect the implementation of the Peace Agreement.⁵¹ In the final paragraphs of this resolution, the Security Council decided to terminate the mandate of the UNPROFOR on the same date of the transfer of authority to the IFOR.⁵²

In more than one respect, this is a remarkable development. First, the Rapid Reaction Force, a military operation by some NATO members, and although integrated in UNPROFOR, finishes the latter’s mandate. Second, the implementation of the Dayton/Paris Agreement, which would be a normal mandate of a United Nations peacekeeping operation, is entrusted to Member States of NATO. This changes the original mandate of this organization from a Defensive Alliance, into an organization also competent in “robust” peacekeeping. Third, NATO is not mentioned in this resolution, but is obliquely referred to as “the organization referred to in Annex 1-A of the Peace Agreement.”⁵³ We are thus witnessing a gradual and creeping involvement of NATO in the Balkans under the aegis of the United Nations. This involvement came into the open in 1999 with NATO’s military intervention in Kosovo, but this time, without any green light from the Security Council.⁵⁴ In Resolution 1244 of June 10, 1999, the Security Council adopted the general principles on the political solution to the Kosovo crisis, which the G-8 Foreign Ministers adopted on May 6, 1999.⁵⁵ In this Resolution, the Security Council “[d]ecides on the deployment in Kosovo, under United Nations auspices, of international civil and security presences,”⁵⁶ and “[a]uthorizes Member States and relevant international organizations to

49. The Dayton Peace Accords, Dec. 14, 1995, VII(1) DEP’T OF STATE DISPATCH SUPP., available at <http://www.state.gov/www.regions/eur/bosnia/bosagree.html>.

50. S.C. Res. 1031, U.N. SCOR 50th Sess., 3607th mtg., U.N. DOC. S/RES/4031 (1995).

51. *Id.* at 3, ¶ 16.

52. *Id.* at 5, ¶ 34.

53. *Id.* at 2, ¶ 12.

54. Erik Suy, *NATO’s Intervention in the Federal Republic of Yugoslavia*, 13 LEIDEN J. INT’L L. 193-205 (2000).

55. S.C. Res. 1244, U.N. SCOR 54th Sess., 4011 mtg., U.N. DOC. S/RES/1244 (1999); Statement by the Chairman on the conclusion of the meeting of the G8 Foreign Ministers on the Petersburg, May 6, 1999, at http://www.dfait-maeci.gc.ca/g8fimm-g8rmae/statement_petersburg.en.asp.

56. S.C. Res. 1244, *supra* note 55, at 2, ¶ 5.

establish the international security presence in Kosovo.”⁵⁷ Annex 2 of the G-8 document identifies NATO as the main participant in the international *security* presence under unified command and control.⁵⁸ KFOR was born, whereas the international *civil* presence was an exclusive United Nations operation (UNMIK) exercising a de facto protectorate over Kosovo.⁵⁹

In Somalia, a failing state, several warlords were fighting each other while the population starved. Heavy losses of human life and widespread material damage resulted from this internal conflict. Early in 1992, the Security Council expressed its *concern* “that the continuation of this situation constituted . . . a threat to international peace and security.”⁶⁰ The Council decided to establish an arms embargo, and called upon all parties involved in the conflict to facilitate the delivery of humanitarian goods by the United Nations, its specialized agencies, and other humanitarian organization. On April 24, 1992, the Council established a United Nations Operation in Somalia (UNOSOM) to monitor a ceasefire in Mogadishu between the fighting parties.⁶¹ By the end of July, however, nothing had changed. The Council, having once again urged all parties, “movements and factions,” to facilitate the efforts of the United Nations to provide urgent humanitarian assistance, threatened that “in the absence of such cooperation, the Security Council does not exclude other measures to deliver humanitarian assistance to Somalia.”⁶²

On December 3, 1992, that the Security Council made the *determination*, in accordance with article 39 of the Charter, “that the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, *constitutes a threat to international peace and security.*”⁶³ The Council then endorsed a recommendation by the Secretary-General “that action . . . should be taken in order to establish a secure environment for humanitarian relief operations in Somalia as soon

57. *Id.* at 2, ¶ 7.

58. Military Technical Agreement between the International Security Force (KFOR) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, June 9, 1999, Annex 2, *available at* <http://www.nato.int/kosovo/docu/a990609a.htm>.

59. KFOR is the Kosovo Force, a NATO-led international coalition which establishes and maintains peace and security in Kosovo. *See* KFOR Information, *at* <http://www.nato.int/kfor/kfor/about.htm> (last visited Apr. 3, 2004).

60. S.C. Res. 733, U.N. SCOR, 3039th mtg., U.N. DOC. S/RES/733 (1992).

61. S.C. Res. 751, U.N. SCOR, 3069th mtg., U.N. DOC. S/RES/751 (1992).

62. S.C. Res. 767, U.N. SCOR, 3088th mtg., U.N. DOC. S/RES/767 (1992).

63. S.C. Res. 794, U.N. SCOR, 3145th mtg., U.N. DOC. S/RES/794 (1992) (emphasis added).

as possible.”⁶⁴ Aware of the total lack of means by the Security Council or by UNOSOM to establish such an environment, the United States offered to establish such an operation which was subsequently authorized by the Council.⁶⁵ A *United Task Force* (UNITAF) was thus established and authorized to use force to ensure strict implementation of the arms embargo, and to protect the humanitarian relief operations. Within six months, UNITAF succeeded in securing the distribution of humanitarian aid. The United Nations, thereupon, decided to launch UNOSOM II, including American and other contingents, and have it operate again as a peacekeeping operation.⁶⁶ This operation was a total fiasco and, following horrendous massacres, was terminated after the withdrawal of the American and other contingents.

This episode of the Security Council’s handling of the situation in Somalia, can be compared with the failure of UNPROFOR in Bosnia-Herzegovina and of UNAMIR in Rwanda. An even more shameful episode occurred recently in the Democratic Republic of the Congo where neither the United Nations, nor Member States, were willing or able to prevent the death of *three million* innocent people during the years 1998-2002. In the United Nations, and prior to the massacres in the Congo, a Committee of Experts looked at the future of the peacekeeping operations. This resulted in the already mentioned *Brahimi Report*.⁶⁷ Furthermore, a special unit was set up in the United Nations Secretariat under the revealing title “*Lessons Learned*.”⁶⁸ So, time has come to draw some conclusions from this practice.

IV. PROSPECTIVE CONCLUSIONS

In some cases of both international and national armed conflicts, the establishment, by the Security Council, of a *traditional* peacekeeping operation, in accordance with the basic principles of consent by the parties, those of impartiality and not using force except in self-defense, may still be a workable and adequate solution when a truce, a cease-fire agreement, or even a peace treaty has been concluded.

In the course of the history, and responding to the requirements of each case, the Security Council has extended the mandate of peacekeeping operations also to cover such areas as: providing humanitarian relief; administering a territory; demining and disarmament;

64. *Id.* at 3, ¶ 7.

65. *Id.* at 3, ¶ 8.

66. S.C. Res. 814, U.N. SCOR, 3188th mtg., U.N. DOC. S/RES/814 (1993).

67. *See Brahimi Report*, *supra* note 38.

68. *Id.* at 39, ¶ 229.

preparing, organizing, and supervising elections; along with the training and organizing of police forces. These multifaceted tasks have a considerable effect on the composition of a peacekeeping organization, the nonmilitary component of which may sometimes prevail. These so-called operations of the second generation may, therefore, best be labeled as peace *operations* covering peace keeping, peace making, and peace building.

Whenever the Security Council authorizes peacekeepers to take “all necessary measures,” i.e., the use of force, some scholars used the expression “Peacekeeping operations of the third generation.”⁶⁹ This qualification, however, does not correspond to the realities. Peacekeepers, even with robust rules of engagement, never succeeded in implementing their mandate because the use of force by peacekeepers is a *contradictio in terminis*, and flies in the face of the basic principles of neutrality and impartiality.

In a few cases, the Security Council has called upon third parties (Member States and International Organizations) to support peacekeeping operations in providing military assistance. This has not always been very successful. In the cases of Somalia and UNPROFOR, the third parties were part of and operating with the peacekeeping operation. During the last phase of UNPROFOR, however, the Rapid Reaction Force, although operating with the UN force, displayed an overwhelming and irresistible force. During the developments in former Yugoslavia after the Dayton/Paris agreements, the lessons were learned, and the UN entrusted robust peacekeeping (IFOR, SFOR and KFOR) to an international organization.

Since the end of the Cold War, the practice of the Security Council has been increasingly towards authorizing States, directly, and without a reference to a peacekeeping operation, to use force in order to restore international peace and security.⁷⁰ This new trend indicates that the Security Council is aware that they have to explore new methods in order to uphold the credibility of the system of collective security, and the Council's role in it. Obviously, all new attempts and solutions require a consensus amongst the permanent members of the Council.

While the end of the Cold War did revive the hope of a full implementation of chapter VII of the United Nations Charter, this stake seemed too high. The ensuing overstretching of the Peacekeeping

69. See Mark Malan, *Peacekeeping in the New Millenium: Towards 'Fourth Generation' Peace Operations?*, 7 AFR. SEC. REV. 2 (1998).

70. Specific reference should be made to the Gulf War in 1991 and to the intervention in Somalia by UNITAF.

Operations—which received the Nobel Peace Prize in 1988—led to the awakening of the dormant chapter VIII of the Charter concerning Regional Arrangements. Article 53 is of particular interest for the further potentialities of the Security Council in using “such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.”⁷¹ What does practice reveal? There seems to be a clear distinction in the relationship between the Security Council and regional agencies in Africa, on the one hand, and between the Council and NATO, on the other hand.

During the internal conflict in Liberia and in Sierra Leone, the military components of both ECOWAS and the peacekeeping operations did work closely together on the basis of Security Council resolutions. It is too early to predict if this pattern of cooperation will continue under the reformed African Union, the structures of which emphasize a more substantive role in the field of peace enforcement and, hence, of military intervention on the African continent.⁷²

The relationship between the United Nations and NATO is developing in a totally new direction. One will recall that NATO, during the first half of the 1990s, was providing air support and air strikes to UNPROFOR as a subcontractor, as it were, of the United Nations. In 1995, members of NATO, through a highly robust military intervention, still on the side of UNPROFOR, put an end to the Balkan War.⁷³ The implementation of the peace arrangements was reserved for the Organization through IFOR and, later on, SFOR.

Early in 1999, NATO launched a major military attack against Serbia-Montenegro for the purpose of putting an end to the ethnic cleansing and other flagrant violations of human rights and international humanitarian law in Kosovo.⁷⁴ NATO abandoned the idea of requesting the authorization of the Security Council for this operation on the basis of two considerations. First, as the Russian Federation, and perhaps also other permanent members of the Security Council, were likely to use their veto power, it was felt that NATO should take action on its own.

71. U.N. CHARTER art. 53.

72. The African Union is an intergovernmental body of African States, modeled in the fashion of the European Union. It has replaced the preexisting organization of African Unity. For more information on the African Union, see <http://www.africa-union.org>.

73. See Dayton Peace Accords, *supra* note 49.

74. Statement by North Atlantic Council on Kosovo, NATO Press Release (99) 12, Jan. 30, 1999, available at <http://www.nato.int/docu/pr/1999/p99-012e.htm>.

There was, however, another and more important reason for not asking the Security Council's permission to launch the Kosovo operation. According to the official doctrine of NATO, this organization does not consider itself as a regional arrangement or a regional agency within the meaning of article 53 of the UN Charter. NATO feels that it does not need a "permission slip" if the fulfillment of its mandate is at stake, or if the interests of its Member States are in jeopardy.⁷⁵ NATO is present in Afghanistan and leads the International Security Assistance Force (ISAF) there. On January 21, 2004, Secretary of State Colin Powell emphasized NATO's role in Iraq in saying: "Of those 26 nations in the NATO alliance, 18 of them have troops in the Gulf, have troops in Iraq with us. So is that not NATO-involved or is it NATO-involved?"⁷⁶ The newly appointed Secretary-General of NATO confirmed this in nearly identical terms in a speech in the United States.⁷⁷

On April 12, 2003, less than a month after the war against Iraq, *Richard Perle* made a most unpleasant and naïve remark on the United Nations in an interview when "asked if the United States was doomed to follow a policy of preemption alone, Perle replied that it is necessary to restructure the United Nations . . . there was nothing in the UN Charter authorizing collective preemption."⁷⁸ This, then, brings up the question of the future of the United Nations.

Let it be clear, first of all, that any amendment of the Charter, redefining the purposes and principles of the Organization and modifying the mandate of the Security Council, belongs to utopia. The reason for this is very simple: the Charter defines that the existing permanent members have to agree to any amendment. The famous veto right applies, and none of the permanent members will ever be willing to give up this privileged position, even if one may think that it is anachronistic. Therefore, also the composition of the Council is not likely to change, although one may sympathize, in principle, with the idea of an increase in the permanent membership. It is very doubtful whether a future Security Council, with ten permanent members, all having a right to veto, will still be able to function. Let us, therefore, be

75. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, *available at* <http://www.nato.int/docu/basicxt/b510619aq.htm>.

76. Colin L. Powell, Interview with WPHT Radio (Jan. 21, 2004), *available at* <http://www.state.gov/secretary/rm/28292.htm>.

77. NATO Secretary-General Jaap de Hoop Scheffer, Speech at the National Defense University (Jan. 29, 2004).

78. Barry James, *A Strong Warning to Syria: Perle, A Pentagon Advisor, Sees More Preemption in the Future*, INT'L HERALD TRIB. (London), Apr. 12, 2003, at 2.

realistic, and look at the potential of the Organization, taking into account an evolving and de facto interpretation of the Charter.

The Security Council cannot play an effective and “relevant” role in the field of *peace enforcement*. This mandate will be left more and more to Member States, acting individually or collectively, either as a *coalition of the willing*, or in the framework of a regional organization. However, States and organizations, whenever possible and feasible, and as a fig leaf for legality, will continue to seek the authorization of the Security Council to use force.

The Security Council should stick to the tasks which it has proven to be good at, i.e., the peacekeeping operations of the first and second generation. In the case of Iraq, this would mean: preparing, organizing, and supervising the elections, along with providing all humanitarian assistance through the special funds and the Specialized Organizations. On February 2, 2004, the *New York Times* carried an article by Warren Hoge, its correspondent to the United Nations.⁷⁹ He refers to the electoral assistance as “the task that has gained the United Nations an international reputation as the most credible and trusted judge of elections.”⁸⁰

Let me conclude with another quotation which clearly indicates that the thinking of the United States Administration on the United Nations and the thinking of the Security Council is far from being uniform:

If the United Nations did not exist today, we would try to create it. It may not look the same, but an international forum like it makes sense both from a diplomatic standpoint, and from a national security standpoint. Working with the UN system helps us better leverage our political, financial, and military capabilities, so as to be ready to respond to any new challenges that arise.⁸¹

Whether this needs a rewriting of the Charter, or can be attained by its flexible interpretation and application, is at the core of an ongoing debate spanning more than two decades, and may very well last for another generation. In the meantime, and despite the barking of some dogs, the UN caravan steadily continues its journey. See the French proverb: “*les chiens aboient, mais la caravane passe*.”⁸²

79. Warren Hoge, *The Struggle for Iraq: The Experts, UN Election Team Seeks Order in Iraqi Chaos*, N.Y. TIMES, Feb. 2, 2004, 11.

80. *Id.*

81. Kim R. Holmes, *The U.S. Role in the United Nations*, Remarks Before the Defense Orientation Conference Association (Oct. 13, 2003), available at <http://www.state.gov/p/io/rls/rm/2003/26040.htm>.

82. The English translation of this proverb is “The dogs bark, but the caravan passes by.”