Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council*

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Interests of the international community have been the object of intense discussions among international lawyers, especially in recent years[1]. While the existence and membership of this community remains disputed[2], different categories of community interests have been suggested, such as human rights, the environment or peace in general. They are generally opposed to state interests, as states do not necessarily have a direct interest in pursuing such community values: they are not directly concerned and do not immediately profit from their enforcement. The modes of enforcement have likewise been subject to intense debate which has focused on institutional mechanisms, especially the Security Council, and unilateral action, such as reaction to the violation of *erga*

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* For comments and discussion, I am grateful to Cordula Dröge, Thilo Marauhn and Georg Nolte. I am particularly indebted to Petra Weiler for her help with documents. Errors and misunderstandings remain, of course, my own.

1 See already P.C. Jessup, *A Modern Law of Nations*, 1950, 2 et seq.; and, more recently, J.A. Frowein, "Das Staatengemeinschaftsinteresse — Probleme bei Formulierung und Durchsetzung", in: K. Hailbronner et al. (eds), *Staat und Völkerrechtsordnung — Festschrift für Karl Doehring*, 1989, 219 et seq.; B. Simma, "From Bilateralism to Community Interest in International Law", *RdC* 250 (1994), 217 et seq.; C. Tomuschat, "Obligations Arising for States without or against Their Will", *RdC* 241 (1993), 195 et seq., (237, 269, 300).

2 See R.-J. Dupuy, *La communauté internationale entre le mythe et l'histoire*, 1986; C. Tomuschat, "Die internationale Gemeinschaft", *AVR* 33 (1995), 1 et seq.; B. Simma and A. Paulus, "The 'International Community': Facing the Challenge of Globalization", *EJIL* 9 (1998), 266 et seq.

omnes norms. For quite some time, both approaches seemed to be integrated in the drafts of the ILC on state responsibility with respect to international crimes of state[3].

In 1998 and early 1999, state practice has taken up the question again, by a rise of unilateral military action of especially western states. Apart from the United States strikes on Afghanistan and Sudan in August 1998, which were claimed to be justified mainly by self-defense after terrorist attacks on United States embassies in Africa[4], military action has claimed to advance community interests: human rights in the cases of Kosovo and of the no-fly zones in Iraq, peace in the case of Iraqi disarmament. And acting states have, at least in part, relied on collective decisions to justify the use of force. I will call the common interest formulated in such decisions the collective will — as opposed to community values in general which, due to their subjective, decentralized determination, would be open to divergent views and would therefore remain less clear and forceful.

In this article I try to show that, despite different ways of justification in detail, the acting states in principle claimed a right to unilateral enforcement of that collective will. Most other states have rejected this general claim, but it reflects a perceived need to act when collective enforcement action is blocked in the Security Council, while purely unilateral action seems hardly justifiable any more. The emergence of such a new right would, however, seriously affect the system of collective security. And the way in which the claim has been advanced has led to widespread perceptions of hegemonic action without regard for the collective system. Although analysis shows nonetheless that the Security Council did matter, albeit to a limited degree, the prospects for collective security are rather sad.

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3 Cf. J.A. Frowein, "Reactions by not Directly Affected States to Breaches of Public International Law", *RdC* 248 (1994), 345 et seq.; A. de Hoogh, *Obligations Erga Omnes and International Crimes*, 1996, 137 et seq.; see also under I.

4 See *Keesing's Record of World Events* 44 (1998), 42434 et seq.; on the very negative reaction from many states, see, e.g., *Africa Research Bulletin* 1998, 13268; Final Document of the XIIth Summit of the Non-aligned Movement, 2–3 September 1998, Durban, South Africa, § 159.

I. The Enforcement of Community Interests

Three ways have been conceived for the enforcement of community interests: traditional Security Council action in less traditional fields, unilateral action of states, and a mixture of both in the work of the ILC. An understanding of the role of the Security Council as enforcement organ for the highest values of the international community departs to some degree from the original Charter concept. Set up for the maintenance of international peace and security, it was not conceived as a law enforcement agency, apart from its role in the enforcement of judgments of the ICJ[5]. But the Council itself often expressly relied on legal evaluations to justify its action which therefore came to be perceived more and more as law enforcement action, although the Council was not limited to that role[6]. In the 1990s, the Council then extended its competences considerably to internal situations and especially to humanitarian concerns[7]. And in 1992, the summit meeting of the Council indicated an extension of the range of action to humanitarian and environmental problems[8]. This task to enforce more and more community interests influenced the tendency to construe the UN Charter and its procedures as the constitution of the international community[9]. Despite this, enforcement action authorized by the Council possessed less collective elements than originally envisaged. For example the Gulf War in 1991

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5 H. Kelsen, *The Law of the United Nations*, 1950, 294.

6 V. Gowlland-Debbas, "Security Council Enforcement Action and Issues of State Responsibility", *ICLQ* 43 (1994), 55 et seq., (73); see also F.L. Kirgis, "The Security Council's First Fifty Years", *AJIL* 89 (1995), 506 et seq., (527 et seq.).

7 Cf. J.A. Frowein, "Article 39", in: B. Simma et al. (eds), *The Charter of the United Nations*, 1994, 605 et seq., (610 et seq.); F.R. Tesón, "Collective Humanitarian Intervention", *Mich.J.Int'l L.* 17 (1996), 323 et seq.; H. Gading, *Der Schutz grundlegender Menschenrechte durch militärische Maßnahmen des Sicherheitsrates — das Ende staatlicher Souveränität?*, 1996, 91 et seq.; M. Lailach, *Die Wahrung des Weltfriedens und der internationalen Sicherheit als Aufgabe des Sicherheitsrates der Vereinten Nationen*, 1998, 171 et seq.

8 Doc. S/23500 of 31 January 1992.

9 Cf. P.-M. Dupuy, "The Constitutional Dimension of the Charter of the United Nations Revisited", *Max Planck UNYB* 1 (1997), 1 et seq.; B. Fassbender, *UN Security Council Reform and the Right of Veto*, 1998, 19 et seq.

was not conducted under UN command, and later military action rarely was: measures often had a rather unilateral than collective character[10].

Unilateral action to further those common interests was likewise admitted, albeit with limitations. State practice seems to accept different forms of reaction to breaches of fundamental rules such as obligations *erga omnes*, including counter-measures[11]. But the conditions of the latters' exercise remain highly disputed[12], and general agreement apparently exists only on the exclusion of forcible counter-measures, with the exception of self-defense and, possibly, of humanitarian intervention[13]. On this last point, intense discussions continue, but, despite the overwhelming importance of human rights in the international legal order, large parts of doctrine reject a right to use force for their protection. Their view is based on the primacy of the Security Council and on the lack of decisive practice by states[14]. States indeed do not appear to have consistently claimed a right to humanitarian intervention, although this

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10 J. Quigley, "The 'Privatization' of Security Council Enforcement Action: a Threat to Multilateralism", *Mich.J.Int'l L.* 17 (1996), 249 et seq.; see also N.D. White and Ö. Ülgen, "The Security Council and the Decentralised Military Option: Constitutionality and Function", *NILR* 44 (1997), 378 et seq.; F. Böhmer, *Die Ermächtigung zu militärischer Gewaltanwendung durch den Sicherheitsrat*, 1997, 69 et seq.

11 Frowein, see note 3, 422; de Hoogh, see note 3, 212 et seq.; C. Annacker, "The Legal Régime of Erga Omnes Obligations in International Law", *Austrian J.Publ.Int. Law* 46 (1994), 131 et seq., (160).

12 De Hoogh, see note 3, 213; Annacker, see note 11, 159 et seq.

13 F.R. Tesón, *Humanitarian Intervention*, 2nd edition, 1997, 146 et seq.; and the authors cited ibid., 148, note 44. For a more cautious approach see C. Greenwood, "Is there a right of humanitarian intervention?", *The World Today*, February 1993, 34 et seq.; D. Kritsiotis, "Reappraising Policy Objections to Humanitarian Intervention", *Mich.J.Int'l L.* 19 (1998), 1005 et seq. For cautious acceptance of humanitarian intervention by regional agencies despite rejection of unilateral intervention, see C. Walter, "Security Council Control over Regional Action", *Max Planck UNYB* 1 (1997), 129 et seq., (162 et seq.).

14 Cf. A. Randelzhofer, "Article 2(4)", in: Simma, see note 7, 106 et seq., (123); S.D. Murphy, *Humanitarian Intervention*, 1996, 358 et seq.; M. Pape, *Humanitäre Intervention*, 1997, 87 et seq.; for an earlier account, cf. T.M. Franck and N.S. Rodley, "After Bangladesh: The Law of Humanitarian Intervention By Military Force", *AJIL* 67 (1973), 275 et seq.

would have been indispensable in order for such a right to emerge[15]. At least, humanitarian intervention is the only area where forcible action in favour of community interests is discussed at all.

The doctrinal debate on unilateral action had strong ties with the work of the ILC on state responsibility, especially on the concept of international crimes of states as violations of fundamental rules of the international community[16]. The ILC considered different ways of reaction to such crimes, including non-forcible counter-measures by not directly affected states, as well as institutional solutions. According to earlier proposals, every state should be entitled to react in the same way to crimes as the directly affected state to ordinary violations of international law, but counter-measures would have required a prior decision of the Security Council[17]. In 1995, Special Rapporteur Arangio-Ruiz went even further and suggested that reactions to international crimes should be subject to far-reaching institutional prerequisites: resolutions by the Security Council or the General Assembly and a decision by the ICJ. In the meantime, only interim measures should be lawful[18]. This combination of unilateral and collective action, however, was finally dropped by the ILC in favour of a purely unilateral solution[19]. Ac-

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15 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA), Judgment of 27 June 1986, *ICJ Reports* 1986, 14 et seq., (109). The Court seems to have rejected a right of unilateral humanitarian intervention in this judgment. I shall follow this view, being prevented from further elaboration in the framework of this article.

16 See in general J.H.H. Weiler et al. (eds), *International Crimes of State*, 1989.

17 Arts. 5 lit. (e) and 14 of Part Two of the draft articles proposed in 1984, see W. Riphagen, "Fifth report on the content, form and degrees of international responsibility", *ILCYB* 36 (1984), Vol. II/1, 1 et seq.; id., "Sixth report on the content, form and degrees of international responsibility; and 'Implementation' of international responsibility and the settlement of disputes", *ILCYB* 37 (1985), Vol. II/1, 3 et seq., (14); Frowein, see note 3, 412; Annacker, see note 11, 159.

18 Cf. Report of the International Law Commission on the work of its 47th session, GAOR 50th Sess., Suppl. No. 10 (Doc.A/50/10), 91 et seq.; and especially proposed arts 16 through 19, ibid., 94 et seq. See also G. Arangio-Ruiz, "Eighth report on state responsibility", Doc. A/CN.4/476 of 14 May 1996, 3 et seq., responding to criticism of his proposals of 1995.

19 Cf. Report of the International Law Commission on the work its 48th session, GAOR 51st Sess., Suppl. No. 10 (Doc.A/51/10), 121 et seq.; and especially arts 51 through 53 of the draft articles adopted in first reading, ibid., 146, and the commentary, ibid., 164 et seq.

cording to this, all states possess a right to resort to counter-measures against crimes of states as they do when directly affected by violations of international law, without any subordination to a collective system, except for procedures of dispute settlement. In later discussions, however, the dangers inherent in such unilateral measures to further community interests were again brought up[20]. Of course, with the exception of self-defense, counter-measures were not supposed to include forcible action.

Recent events in the cases of Kosovo and Iraq do not conform to this clear separation of unilateral and collective measures. Here, both are combined, even in the field of forcible action. States rely on Security Council authority in order to prove the common interest involved, and purely unilateral justifications are avoided even when possible.

II. The Use of Force against Iraq for Disarmament Reasons

The airstrikes against Iraq by the United States and the United Kingdom in December 1998 followed an escalation of the situation which had taken place since the beginning of the year[21]. In January, Iraq had

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20 Report of the International Law Commission on the work of its 50th session, GAOR 53rd Sess., Suppl. No. 10 (Doc.A/53/10), 144.

21 See the chronology in *Keesing's Record of World Events* 44 (1998), 42698; L. Balmond, P. Weckel and A.S. Millet, "Chronique des faits internationaux", *RGDIP* 103 (1999), 169 et seq., (203 et seq.); and see M. Torrelli, "Le nouveau défi irakien à la communauté internationale: la dialectique des volontés", *RGDIP* 102 (1998), 435 et seq.; J.A. Frowein, "Unilateral Interpretation of Security Council Resolutions — A Threat to Collective Security?", in: V. Götz et al. (eds), *Liber Amicorum Günther Jaenicke*, 1998, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Bd.135, 98 et seq.; R. Wedgwood, "The Enforcement of Security Council Resolution 687: The Threat of Force against Iraq's Weapons of Mass Destruction", *AJIL* 92 (1998), 724 et seq.; G. den Dekker and R.A. Wessel, "Military Enforcement of Arms Control in Iraq", *LJIL* 11 (1998), 497 et seq.; C. Tomuschat, "Using Force against Iraq", *Friedenswarte* 73 (1998), 75 et seq.; N.D. White, "The Legality of the Threat of Force Against Iraq", *Security Dialogue* 30 (1999), 75 et seq.; J. Lobel and M. Ratner, "Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime", *AJIL* 93 (1999), 124 et seq.

prohibited UNSCOM[22] from visiting certain strategic sites; the U.S. President reacted by a threat of force. After several weeks of rising tensions, the UN Secretary-General reached an agreement with Iraq on continued co-operation, which was endorsed by Security Council Resolution 1154 (1998)[23]. The Council also stressed that any further violation of disarmament obligations would have "severest consequences for Iraq".

Nevertheless, several other provocations by Iraq occurred during the year. In August, it again restricted access to certain sites, which was condemned by the Security Council in early September[24]. On 31 October, Iraq prohibited all inspections by UNSCOM. The Security Council again condemned this by Resolution 1205 (1998)[25] and demanded full compliance by Iraq, without immediate success. After further threats, the United States and the United Kingdom ordered airstrikes on 14 November, which were finally not carried out because Iraq, in a letter to the UN Secretary-General, accepted resumption of the inspections and, on demand by the United States and the United Kingdom, announced unconditional compliance[26]. Both states declared that any further provocation by Iraq would lead to attacks without any further warning or negotiation.

When, one month later, Iraq again restricted access of UNSCOM to specific sites and the head of UNSCOM delivered a highly critical report to the Security Council, the United States and the United Kingdom reacted immediately, even before the Security Council had held its debate on the issue. From 16 to 20 December, both states attacked Iraq more forcefully than any time since the Gulf War in 1991.

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22 UN Special Commission for Iraq for monitoring the Destruction and Surrender of Mass Destruction Weapons.

23 Memorandum of Understanding between the United Nations and the Republic of Iraq of 23 February 1998, Doc. S/1998/166 of 27 February 1998; S/RES/1154 (1998) of 2 March 1998.

24 S/RES/1194 (1998) of 9 September 1998.

25 S/RES/1205 (1998) of 5 November 1998.

26 Cf. *Keesing's Record of World Events* 44 (1998), 42646; UN press release SC/6596 of 15 November 1998; and Letters from the permanent representative of Iraq to the UN Secretary-General, Docs. S/1998/1078 and S/1998/1079 of 14 November 1998.

1. Claims and Reactions

While the claims to justify the threat of force in early 1998 varied considerably, the United States and the United Kingdom advanced a clearer basis in December, although differences remained. The United States based their action mainly on Security Council Resolution 678 (1990)[27] which had authorized the use of force to make Iraq comply with Resolution 660 (1990)[28] and subsequent resolutions. The latter term, it was argued, comprised also later decisions of the Council, such as Resolution 687 (1991)[29], which had mandated the cease-fire, but was conditioned by Iraqi compliance with its disarmament obligations. As Iraq had violated these obligations, the cease-fire was not valid any more, and the original authority was revived[30]. In this vein, the United States Under-Secretary of State declared:

> "(W)e believe the original use of force resolution from November 1990 – 678 – provided for the use of force to enforce Security Council resolutions. Those happen to include many of the sanctions resolutions, but also that the cease-fire resolution which succeeded it temporarily stopped the use of force only so far as Iraq kept its obligations under the cease-fire resolution"[31].

In addition to this, the United States referred to more recent resolutions. Resolution 1154 (1998) had threatened "severest consequences" for any violation of Iraq's disarmament obligations, and Resolution 1205 (1998) had determined that Iraq was in flagrant violation of them[32]. The same arguments were used by the United Kingdom in a slightly different manner. In some official documents, only Resolutions 1154 (1998) and 1205 (1998) were cited as justification[33], and these later resolutions also played a greater role in the statements of United Kingdom representatives, such as in the Security Council:

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27 S/RES/678 (1990) of 29 November 1990.

28 S/RES/660 (1990) of 2 August 1990.

29 S/RES/687 (1991) of 3 April 1991.

30 See the statement of the United States representative in the Security Council, Doc. S/PV.3955 of 16 December 1998, 9, and the US Department of State Press Briefing of 16 December 1998.

31 Department of State, Press Briefing, 22 December 1998.

32 Department of State, Press Briefing, 22 December 1998.

33 Cf. British Embassy to the United States, "Iraq: Key Messages".

> "There is a clear legal basis for military action in the resolutions adopted by the Security Council. Resolution 1154 made it clear that any violation by Iraq of its obligations to allow the Special Commission and the IAEA unrestricted access would have severest consequences. Resolution 1205 established that Iraq's decision of 31 October 1998 to cease cooperation with the Special Commission was a flagrant violation of Resolution 687, which laid down the conditions for the 1991 cease-fire. By that Resolution, therefore, the Council implicitly revived the authorisation to use force given in Resolution 678"[34].

While the military strikes were supported by several, mostly western states, the majority of the international community did not appreciate that its will was enforced in such a manner. The supporters, e.g. Japan, Australia, the Netherlands, Austria, Canada, and Germany[35], did not argue legally. They generally regretted military action but called it "inevitable", holding Iraq responsible for them. But some, such as Germany, expressed sorrow about its negative impact on the international system, especially the United Nations[36].

Reference to legal arguments was more common among the states opposing the strikes. Thus Russia declared:

> "The UN Security Council resolutions on Iraq do not provide any grounds for such actions. By use of force, the US and Great Britain have flagrantly violated the UN Charter and universally accepted principles of international law"[37].

Like several other states, Russia expressly regretted that the strikes were started at a time when the issue was under discussion in the Security Council and that Council members had not even been consulted. China condemned the military action with similarly clear words[38]. Opposition was expressed by several other states, such as Brazil, South Africa,

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34 Doc. S/PV.3955 of 16 December 1998, 7.

35 Cf. "Iraqi Raids Polarize International Opinion", *YahooNews/Reuters*, 17 December 1998.

36 Press release of the German Foreign Ministry, 18 December 1998.

37 Statement of the President of the Russian Federation, Press release of the Mission of the Russian Federation to the UN, 20 December 1998; see also Doc. S/PV.3955 of 16 December, 3 et seq.

38 Press release of the Foreign Ministry of China, 17 December 1998 ("The unilateral use of force ... without the authorization of the Security Council runs counter to the UN Charter and the principles of international law").

Costa Rica and Kenya[39]. The Secretary-General of the Arab League called the acts "aggressions", which was moderated by later statements of the foreign ministers of the League members[40]. The non-aligned movement, comprising 114 states, deplored "the ongoing military actions against Iraq by individual countries without any authorization from the Security Council in flagrant disregard of the United Nations Charter"[41].

Some states chose more ambiguous expressions of their criticism. Sweden, e.g., emphasized that the Council itself was to decide the course of action[42]. France, which regretted the military strikes and stressed that the role of the Security Council had to be fully restored in the future, accepted at least the legal justification[43]:

> "On ne peut pas dire que leur active soit dénuée de base légale. En effet, la résolution 1154, adoptée en mars 1998, prévoyait qu'une nouvelle violation par l'Iraq de ses engagements aurait 'les plus graves conséquences'. Sans doute, cette résolution n'est pas aussi détaillée que d'autres mais elle est analogue à celle sur le Kossovo qui a permis, sous la menace d'une action militaire, l'intervention de l'OSCE. ... La base légale de l'action américaine n'est pas parfaite, mais elle est comparable à celle qui fonde notre action au Kossovo"[44].

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39 For the position of Costa Rica, Brazil and Kenya see Doc.S/PV.3955 of 16 December 1998; for that of South Africa see the press release of its Department of Foreign Affairs, 17 December 1998. For other reactions, especially of African states, cf. *Africa Research Bulletin* 1998, 13381.

40 See A. Lyon, Arab League to Hold Weekend Meeting on Iraq, *Yahoo News/Reuters*, 17 December 1998; *Neue Zürcher Zeitung*, 25 January 1999, 1.

41 Press release of the Department of Foreign Affairs of South Africa of 18 December 1998.

42 Doc.S/PV.3955 of 16 December 1998, 11. But see also the statement of the Swedish Prime Minister of 17 December 1998, holding Iraq responsible for the events while regretting that action had been taken without Council decision.

43 A similar view was taken by Italy whose Prime Minister said that "the US idea of bombing is useless even if it surely has a legal base", cf. *Keesing's Record of World Events* 44 (1998), 42699.

44 Hearing of the French Foreign Minister before the Commission on Foreign Affairs of the Assemblée Nationale, 22 December 1998.

2. The Legal Basis of the Claims

The British-American attempt to justify the military action seems more than weak. Certainly, Resolution 678 (1990) "(a)uthorizes Member States ... to use all necessary means to uphold and implement Security Council resolution 660 (1990) and all subsequent relevant resolutions and to restore peace and security in the region". But this does only include the enforcement of previous resolutions concerning Iraq, not that of any resolution adopted after November 1990; this becomes clear already from the text of Resolution 678 (1990) which several times refers to the resolutions adopted between August and November 1990[45].

Moreover, the authorization did not remain valid after the adoption of Resolution 687 on 3 April 1991. Already, according to Resolution 686 (1991)[46], this authorization ended once Iraq complied with several conditions none of which went as far as the obligations imposed by Resolution 687 (1991)[47]. On the contrary, these conditions were designed to ensure the retreat of Iraq from the territory of Kuwait, the beginning of reparation of the damage and the safety of the allied troops from mines etc. In Resolution 687 (1991)[48], it became even more evident that the original authorization was restricted. It mandated a formal cease-fire and referred to the intention of the allied states to bring their military presence in Iraq to an end, as warranted in Resolution 686 (1991), thereby expressing the will to conclude the period of hostilities authorized by Resolution 678 (1990). This was all part of the final clause of the resolution which reads:

> "(The Security Council) decides to remain seized of the matter and to take such further steps as may be required for the implementation of this resolution and to secure peace and security in the region".

The responsibility for ensuring that Iraq complied with its obligations was assumed by the Council itself and not conferred to the member

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45 Cf. Dekker/Wessel, see note 21, 503.

46 Doc. S/RES/686 (1991) of 2 March 1991.

47 Cf. C. Gray, "After the Ceasefire: Iraq, the Security Council and the Use of Force", *BYIL* 65 (1994), 135 et seq., (138 et seq.).

48 On the obligations imposed by Resolution 687 (1991) on Iraq, see T. Marauhn, "The Implementation of Disarmament and Arms Control Obligations Imposed upon Iraq by the Security Council", *ZaöRV* 52 (1992), 781 et seq.; on doubts about the resolution's conformity to the UN Charter and its validity which cannot be discussed here see, e.g., B. Graefrath, "Iraqi Reparations and the Security Council", *ZaöRV* 55 (1995), 1 et seq.

states. This result is confirmed by the debates in the Council. China "believe(d) that on questions concerning the implementation of the resolution the Security Council should be responsible for handling these matters; and there should be no other interpretation"[49]. The same was expressed even more clearly by India:

> "As regards operative paragraph 4 of the draft resolution (concerning the boundary guarantee), it is India's understanding that it does not confer authority on any country to take a unilateral action under any of the previous resolutions of the Security Council. Rather, the sponsors have explained to us that in case of any threat or actual violation of the boundary in future the Security Council will meet to take, as appropriate, all necessary measures in accordance with the Charter"[50].

Both the resolution and the debates leading to its adoption therefore leave no doubt that action by single states to implement Security Council decisions was not authorized any more[51]. This invalidates also the argument that the cease-fire mandated by the resolution was conditional and became invalid once Iraq flagrantly violated its obligations under it[52]. This might have been the case had the Gulf war been a classical war between states. On the face it was: No United Nations troops, no United Nations command — an action of allied states. But these allied states relied on United Nations authority to fight this war. They could have acted in collective self-defense for Kuwait[53], but they chose to justify themselves publicly by reference to United Nations decisions[54].

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49 Doc. S/PV.2981 of 3 April 1991, 97.

50 Doc. S/PV.2981 of 3 April 1991, 78.

51 Cf. Frowein, see note 21, 107 et seq.; Gray, see note 47, 155; White, see note 21, 81.

52 See the statements cited above and Wedgwood, see note 21, 725 et seq.

53 The much debated question whether the legal basis of the Gulf war was self-defense or Chapter VII action must remain open here, see only O. Schachter, "United Nations Law in the Gulf Conflict", *AJIL* 85 (1991), 452 et seq., 458 et seq.; T.M. Franck and F. Patel, "UN Police Action in Lieu of War: 'The Old Order Changeth'", *AJIL* 85 (1991), 63 et seq. But it is clear that if Chapter VII allowed such a decentralized action, the action was placed under UN authority.

54 See, e.g., the statements of the United Kingdom, Doc. S/PV.2977 of 14 February 1991, 72 and 376 ("under the authority of that resolution", "... resolution 678 which is the basis on which the current action ... is taken."); and

And if they profited from the enhanced legitimacy of these decisions, they had to accept also that the United Nations decided on the further course of action — still subject to the veto power of the main actors. Coherency therefore demanded the acceptance of collective post-war solutions and also the acceptance that the cease-fire was not a classical one between states, but was embedded in the collective security system of the United Nations[55].

The conclusion that the authority of Resolution 678 (1990) was terminated by Resolution 687 (1991) has, however, been contested on the ground of events in January 1993, when the United States, the United Kingdom and France conducted air raids on sites in Southern Iraq[56]. It is true that this occurred only few days after the Security Council had condemned Iraq for violations of the demilitarized zone set up pursuant to Resolution 687 (1991)[57]. But these violations did not form the justification for the air raids. The strikes were designed to enforce the no-fly zone in southern Iraq, and the United States and the United Kingdom claimed to act in self-defense against Iraqi threats to attack coalition planes controlling the zone[58]. Rather incidentally, they warned Iraq that other forms of defiance of United Nations resolutions would not be tolerated either. Only the French claim and the positive reaction of Russia combined both aspects[59], and the UN Secretary-General alone assumed that the action had been taken solely as reaction to the violation of Resolution 687 (1991)[60]. Only with regard to a missile strike on 17–18 January 1993 against a nuclear weapons facility near Baghdad, did the United States claim to enforce Resolution 687 (1991)[61]. But the

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of the United States, ibid., 263 ("Coalition continues to act under the authority given to it by the Security Council").

55 Cf. Gray, see note 47, 142 et seq.; Tomuschat, see note 21, 79; see more generally on the relationship of traditional law on cease-fires and United Nations law, R. Baxter, "Armistices and Other Forms of Suspension of Hostilities", *RdC* 149 (1976), 353 et seq., (382 et seq.).

56 Wedgwood, see note 21, 727 et seq.

57 UN press release SC/5536 of 11 January 1993.

58 See the statement of the UK Prime Minister and the US press statement of 13 January 1993, reprinted in: M. Weller (ed.), *Iraq and Kuwait: The Hostilities and their Aftermath*, 1993, 738 et seq.

59 See the press statement of the French Foreign Ministry and the statement by the Russian Foreign Ministry of 14 January 1993, reprinted in: Weller, see note 58, 744 et seq.

60 See the statement of the UN Secretary-General of 14 January 1993, reprinted in: Weller, see note 58, 741 et seq.

United States claim to enforce Resolution 687 (1991)[61]. But the legality of this attack was questioned by France and Russia, as was the whole series of strikes by several states[62]. Due to this opposition and since two of the states conducting the strikes did not even claim to be acting with the purpose of enforcing Resolution 687 (1991), consistent state practice in favour of the legality of its enforcement may not be deduced from this incident.

The same holds true for the reactions of states in 1998. Those in December have already been described, and in February, March and November, the situation did not differ very much from this[63]. But remarkably, some states and officials seemed to justify means by ends, the threat of force by the achievement of a "diplomatic" solution. The most notable expression of this was given by the UN Secretary-General who, immediately after his return from Baghdad in February, said: "You can do a lot with diplomacy, but with diplomacy backed up by force you can get a lot more done"[64]. This, however, was no legal argument, and when force had been actually used in December, he declared this to be "a sad day for the United Nations"[65], leaving ambiguous the meaning of his words. Since his earlier words had not found broad support among states, legal conclusions may not be drawn from them.

Security Council Resolution 1154 (1998), endorsing the *Memorandum of Understanding* reached in February, did not provide authorization either[66]. While threatening "severest consequences" of Iraqi non-compliance, the Council decided to remain concerned with the matter itself in order to ensure the implementation of the resolution. This exclusion of unilateral enforcement was confirmed during the debate within the Council by statements of Russia, France and Costa Rica[67]. China expressed this most clearly by declaring that the resolution "will in no way mean that the Security Council is automatically authorising

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61 Cf. Gray, see note 47, 154.

62 Cf. Gray, see note 47, 154, 168.

63 Cf. Torelli, see note 21, 452 et seq.; Frowein, see note 21, 106 et seq., 110 et seq.; Dekker and Wessel, see note 21, 500.

64 UN press release SG/SM/6470 of 24 February 1998; cf. Wedgwood, see note 21, 727; Torrelli, see note 21, 442 et seq.

65 UN press release SG/SM/6841 of 16 December 1998.

66 Cf. Frowein, see note 21, 110 et seq.; Dekker and Wessels, see note 21, 509; Tomuschat, see note 21, 75 et seq.; White, see note 21, 83; but cf. Wedgwood, see note 21, 728.

67 Cf. Doc. S/PV.3858 of 2 March 1998, 5, 15, 18.

any state to use force against Iraq"[68]. Similar statements were made during the debate on Resolution 1205 (1998) in November, which established a "flagrant violation" of earlier resolutions by Iraq, but did not contain any indication of an authorization to use force. The United Kingdom and the United States, however, concluded that the resolutions left authority derived from previous resolutions untouched[69].

To sum up, neither the interpretation of Resolutions 678 (1990), 687 (1991), 1154 (1998) and 1205 (1998) nor state practice since 1991 give indications for United Nations authorization of the threat or use of force in order to enforce Iraq's post-war obligations. Other possible justifications, such as preventive self-defense, have not been advanced by the acting states[70]. Thus, the reliance on United Nations authority seems motivated by the desire to enhance the appearance of legitimacy despite obvious illegality.

III. The Use of Force against Iraq to enforce the No-fly Zones

Only few days after the massive airstrikes in December 1998, the United States and the United Kingdom took military action against Iraq in still another context. Beginning on 27 December 1998, they launched a series of attacks on Iraqi aircraft and air-defense sites after Iraq had attempted to hit coalition planes patrolling the no-fly zones in northern and southern Iraq[71]. Similar events had occurred in previous years, as Iraq did and still not does recognize the legality of the no-fly zones and therefore regards patrol flights as aggression.

The zones had been established in 1991 and 1992 after reports on increased repression against the Kurdish and Shiite population in the

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68 Doc. S/PV.3858 of 2 March 1998, 14.

69 Cf. UN press release SC/6591 of 5 November 1998; on similar statements outside the Council in March 1998, see *International Herald Tribune* of 12 March 1998, 1.

70 Cf. White, see note 21, 80. This claim would have been groundless either; cf. Tomuschat, see note 21, 76 et seq.

71 Cf. *Keesing's Record of World Events* 44 (1998), 42700; 45 (1999), 42754 et seq.

north and the south of the country[72]. They were designed to prevent the Iraqi government from effective military action against its own citizens, and Iraqi compliance was supervised by patrol flights of the United States, the United Kingdom, and France. First incidents occurred in December 1992, when Iraqi planes entered the southern zone. After further violations in the following weeks, the coalition started a series of missile attacks against Iraq on 13 January 1993. In September 1996, Iraqi government troops interfered with fighting between Kurdish factions in the North. The United States and the United Kingdom reacted with severe missile strikes and proclaimed the extension of the southern no-fly zone up to the 33rd parallel in order to reduce Iraq's military capability[73]. France did not participate in the supervision of the extended zone, and in early 1997, it also withdrew from the northern zone due to an alleged lack of humanitarian character. After the United States and the United Kingdom strikes in mid-December 1998, France provisionally terminated its participation in the remaining part of the southern zone, too.

1. The Claims and Reactions

In order to justify the use of force against Iraqi aircraft and sites in late 1998 and early 1999, the United States and the United Kingdom relied on self-defense: Their planes, legally patrolling the no-fly zones, had been the object of an attack by Iraqi aircraft and were thus entitled to defend themselves[74]. This, of course, presupposed the legality of the no-fly zones and of their supervision by coalition aircraft. The first and most frequently used justification for them referred to Security Council Resolution 688 (1991)[75] which had condemned the repression of the ci-

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72 See generally on these zones, P. Malanczuk, "The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War", *EJIL* 2 (1991), 114 et seq.; Murphy, see note 14, 165 et seq.; Pape, see note 14, 163 et seq.

73 Cf. N.D. White, "Commentary on the Protection of the Kurdish Safe-Haven: Operation Desert Strike", *Journal of Armed Conflict Law* 1 (1996), 197 et seq.; D. Wembou, "Considération Juridiques sur les récentes attaques américaines contre l'Iraq", *RADIC* 9 (1997), 72 et seq.; G.A. Symes, "Force Without Law: Seeking a Legal Justification for the September 1996 U.S. Military Intervention in Iraq", *Mich.J.Int'l L.* 19 (1998), 581 et seq.

74 Cf., e.g., UK Ministry of Defence, Press release 334/98 of 30 December 1998.

75 S/RES/688 (1991) of 5 April 1991.

vilian populations in many parts of Iraq, but had not contained an explicit authorization to establish no-fly zones or to use force to achieve this goal. This is reflected, for example, in this statement of the Defense Secretary of the United Kingdom:

> "(The no-fly zones) were set up *in support of* UN Security Council Resolution 688 to bring protection to the Kurds in the north and the Shia in the south, and as long as that humanitarian need remains, we will continue to enforce the no-fly zones"[76].

Similar arguments are used in most United States statements, as, e.g., in the declaration of the Department of Defense:

> "These no-fly zones that were set up *pursuant to* United Nations Security Council resolutions that were designed to prevent Saddam Hussein from using his forces to attack his own people, using his air forces to attack his own people and from using his air forces to threaten his neighbors"[77].

This corresponds to the common position adopted by the United States, the United Kingdom and France in 1992 when they set up the southern no-fly zone[78]. In other recent statements, however, US officials did not only rely on humanitarian grounds such as defined in resolution 688 (1991), but broadened the objective to the containment of Iraq and the reduction of its military capability[79]. While not explicitly referring to Resolution 687 (1991), these goals allude to the enforcement of the obligations imposed by this resolution.

Surprisingly, in 1998–1999, none of the other justifications for the no-fly zones which had been used in previous years[80] was advanced. Particularly in 1996, the United States had relied on arguments similar

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76 UK Ministry of Defence, Press release 334/98 of 30 December 1998; emphasis added.

77 US Department of Defense, News Briefing, 5 January 1999; emphasis added.

78 See the statement of 26 August 1992, reprinted in: Weller, see note 58, 725 ("... In view of these failures (of Iraq) to comply with UNSCR 688, the coalition has concluded that it must itself monitor Iraqi compliance with UNSCR 688 in the south. Coalition aircraft will therefore begin flying surveillance missions ... to monitor and report on the state of Iraqi compliance with the provisions of the resolution. In support of this monitoring effort a no-fly zone for all Iraqi ... aircraft ... will be established ...").

79 Cf. remarks by the US President, 28 December 1998 ("The no-fly zones have been and will remain an important part of our containment policy").

80 Cf. Murphy, see note 14, 187 et seq.

to those used to justify the strikes in mid-December 1998. They had claimed that the authorization given in Resolution 678 (1990) also comprised the enforcement of Resolution 688 (1991) as this was a "subsequent resolution" within the meaning of Resolution 678 (1990)[81]. The United Kingdom, while usually referring only to Resolution 688 (1991), relied, on separate occasions in 1992, on a unilateral right to use force in cases of extreme humanitarian need[82]. In 1999, this argument was raised again, but only after reference to Security Council authority[83]. A similar path was followed by France which usually referred at least to the "esprit" of Resolution 688 (1991), although it did not claim that the resolution itself contained an authorization for the action[84]. In 1998–1999, it evaded commenting directly on the legality of the British-American strikes, but did not resume its participation and expressed reservations on the continued use of force[85].

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81 Cf. US press release of 3 September 1996 ("We relied ... on authority for our no-fly zone on our interpretation of UNSCR 688, using the enforcement mechanism that was available in UNSCR 678. ...The UNSC required in UNSCR 688 that Saddam refrained from repressing minorities ..., because that type of repression represents a threat to international peace and stability in the region. UNSCR 678 authorizes all member states of the UN to conduct all necessary means to effectively protect international peace and security in the region").

82 See the interview with the UK Foreign Minister of 19 August 1992, reprinted in: Weller, see note 58, 723 ("We operate under international law. ...Not every action that a British Government or an American Government or a French Government takes has to be underwritten by a specific provision in a UN resolution provided we comply with international law. International law recognises extreme humanitarian need"); cf. also Murphy, see note 14, 188 et seq.

83 Cf. the statement of the UK representative in the Security Council, Doc. S/PV.3980 (Res. 1) of 22 February 1999, 17 ("(The no-fly zones) were established to help protect the civilian population in the north and south from repression by the Government of Iraq, in support of Security Council resolution 688 (1991). ...The no-fly zones are justified under international law by this continuing situation of overwhelming humanitarian necessity").

84 See the statement of the spokesman of the French Foreign Ministry of 2 September 1996 ("Provide Comfort se fonde dans son esprit sur la résolution 688, mais il n'y a pas de texte explicite des Nations Unies qui fixe cette zone d'exclusion. ...Il n'est pas illégal, ... mais ce n'est pas la légitimité du Conseil de Sécurité ..."); cf. also Murphy, see note 14, 189.

85 Cf. Statements of the spokesman of the Foreign Ministry of France, 29 December 1998; and especially those of 16 February 1999.

The reactions of other states to the strikes in 1998–1999 varied a lot, but stronger objections than in previous years could be recorded. China, in particular held "that the establishment of the no-fly zone in Iraq runs counter to the UN Charter and the norms governing international relations"[86]. In September 1998, the Non-aligned Movement had already formulated clear opposition to the zones, deploring:

> "the imposition and enforcement of 'No Fly Zones' on Iraq by individual countries without any authorisation from the UN Security Council or General Assembly"[87].

Likewise, Russia contended that the zones had nothing to do with Security Council resolutions and ran counter to fundamental principles of the Charter and international law[88] — a position consistently taken during previous years[89] with the exception of the years 1992–1993[90]. Similar, although less strong opposition came from the Arab League[91].

2. The Validity of the Claims

As in the other cases discussed, the main arguments of the acting states are weak. Certainly, Resolution 688 (1991) determines that the consequences of the repression of the Iraqi civilian population threaten international peace and security in the region, opening the door for collective enforcement measures. But the Council then only demanded that Iraq end this repression and allow access to humanitarian organizations. It

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86 Statement of the spokesman of the Foreign Ministry of China, 29 December 1998.

87 Final Document of the XIIth Summit of the Non-aligned Movement, 2–3 September 1998, Durban, South Africa, § 235.

88 Cf. Doc. S/PV.3980 (Res. 1) of 22 February 1999, 17.

89 See the statement in 1991 finding the zone to be in violation of the UN Charter, *Archiv der Gegenwart*, 24 April 1991, 35565; and the strong reactions to the incidents in 1996 when Russia warned the US not to assume the role of the Security Council which alone was competent to authorize the use of force, *Archiv der Gegenwart*, 4 September 1996, 41367.

90 In 1992, Russia supported the establishment of the no-fly zone in southern Iraq, see *Archiv der Gegenwart*, 27 August 1992, 37110. In January 1993, it supported the warning given to Iraq by the coalition not to continue the violation of the zones, see US press release of 7 January 1993, reprinted in: Weller, see note 58, 734.

91 Cf. *Keesing's Record of World Events* 45 (1999), 42755.

did not expressly cite Chapter VII of the Charter as a basis[92], and its text does not provide any indication that states should be authorized to enforce the demands. Most commentators see this result confirmed by the debates in the Council and the history of the resolution, especially by the Chinese opposition to any international action[93]. But with regard to the general use of the veto power by China, it is at least doubtful whether China would have vetoed enforcement measures in this case. It has instead been argued that western states did not seriously try to insert an authorization which would, in fact, have forced them to intervene[94]. At least, no intention to use force was expressed by them during the debates in the Council, and therefore no argument is available for an interpretation in favour of its authorization[95].

Later events do not warrant such a conclusion either. With respect to the incidents in 1992–1993 it has already been stated that the ways of justification varied considerably[96]. Some states supported the enforcement of the no-fly zones, others the enforcement of Resolution 687 (1991). No consistent practice for one or the other can therefore be observed, and, additionally, the attacks provoked negative reactions of third states. The strikes in 1996 met with even stronger opposition.

Likewise, the other justifications advanced in previous years cannot prove the legality of the action. The reference to Resolution 678 (1990) for the enforcement of Resolution 688 (1991) faces similar objections as above with respect to the enforcement of Resolution 687 (1991): the "subsequent resolutions" mentioned in Resolution 678 (1990) were those subsequent to Resolution 660 (1990), but not subsequent to Resolution 678 (1990) itself. Moreover, Resolution 688 (1991) does not deal with the situation between Kuwait and Iraq any more — how could then an authorization for states "co-operating with the Government of Kuwait" as given in Resolution 678 (1990) make sense? There

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92 This, however, would not have been indispensable for enforcement action, cf. Frowein, see note 7, 613.

93 Malanczuk, see note 72, 129; White, see note 73, 200; Pape, see note 14, 172.

94 H. Freudenschuß, "Article 39 of the UN Charter Revisited: Threats to the Peace and the Recent Practice of the UN Security Council", *Austrian J.Publ.Int. Law* 46 (1993), 1 et seq., (10).

95 Cf. Malanczuk, see note 72, 129; Murphy, see note 14, 184 et seq.; Frowein, see note 21, 105 et seq.; but see Tesón, see note 7, 347, who contends that the circumstances of the adoption of resolution 688 (1991) allow the conclusion that forcible measures were authorized.

96 See under, II. 2.

remains the aspect of unilateral humanitarian intervention which has never been raised by the United States, and never since 1992 by the United Kingdom. If, as has been argued above, no right to unilateral humanitarian intervention exists, it has not been created by this inconsistent and often opposed practice either[97]. Therefore, the attempt to justify the use of force fails.

IV. The Use of Force in the Case of Kosovo

Tension in the Yugoslavian province of Kosovo had grown since the death of Tito and especially since 1989, when autonomy rights were reduced and the use of the Albanian language was severely restricted[98]. Constant repression against the Albanian population in the following years led to some international protest, but only when the Albanians gave up their strictly peaceful strategy and started to oppose state authorities by force, the international community saw greater need for action – partly due to fears of new refugees. After negotiations and limited concessions by the Federal Republic of Yugoslavia, the Security Council, by Resolution 1160 (1998)[99], imposed an arms embargo and expressed support for a substantially greater degree of autonomy of Kosovo. The resolution was based on Chapter VII of the Charter, but, due to Russian opposition, did not determine the existence of a threat to the peace[100].

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97 Cf. Murphy, see note 14, 192 et seq., 364.

98 On the history of Kosovo and the development of the situation until 1997 see: N. Malcolm, *Kosovo*, 1998, especially 334 et seq. On the development in 1998-1999 see B. Simma, "NATO, the UN and the Use of Force: Legal Aspects", *EJIL* 10 (1999), forthcoming; A. Cassese," *Ex iniuria ius oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?", *EJIL* 10 (1999), forthcoming; L. Balmond, P. Weckel and A.-S. Millet, "Chronique des faits internationaux", *RGDIP* 102 (1998), 1060 et seq. and *Keesing's Record of World Events* 44 (1998), especially 42413, 42519 et seq., 42580 et seq.; 45 (1999), 42750 et seq.; M.Weller, "The Rambouillet Conference on Kosovo", *Int'l Aff.* 75 (1999), 211 et seq.

99 S/RES/1160 (1998) of 31 March 1998.

100 See UN press release SC/6496 of 31 March 1998; cf. G. Nolte, "Reflections on the Limits of the Security Council's Powers and on its Functions in the International Legal System", in: M. Byers (ed.), *The Role of Law in International Politics*, forthcoming.

The situation deteriorated further, and a need for more decisive action, possibly military strikes, was felt. In late summer, the widespread excessive use of force by Serbian security forces against the civilian population became evident[101]. States then pressed for a new resolution of the Security Council authorizing the use of force, which, however, was strongly opposed by Russia. On 23 September, the Security Council enacted Resolution 1199 (1998)[102], which determined that the situation constituted a threat to peace and security in the region, demanded a cease-fire and the start of a dialogue between Serbs and Albanians. Yugoslavia was obliged to cease action by its security forces, to withdraw them and to enable effective international monitoring. In the following days, NATO threatened to use force, and after reports on lacking compliance by Yugoslavia, the alliance increased pressure until agreement was reached with the Yugoslav leadership on further steps[103]. These included international monitoring and NATO verification flights, and were endorsed by Security Council Resolution 1203 (1998)[104].

After a massacre in January 1999, the international community again took up the matter[105]. The Contact Group for the former Yugoslavia established a framework agreement which the Security Council approved[106]. Negotiations on this basis began in France on 6 February 1999, accompanied by NATO threats to use force should one side not agree to the proposal. Talks finally failed in March due to Serbian opposition to the peace plan. The Serbian government then reinforced its attacks on the civilian population in Kosovo, and on 24 March, NATO began airstrikes against Yugoslavia to end the repression. On 29 April 1999, after weeks of ongoing military action, Yugoslavia instituted proceedings against ten NATO member states before the ICJ which re-

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101 Cf. the report of the UN Secretary-General, Doc. S/1998/834 and Add.1 of 4 September 1998.

102 S/RES/1199 (1998) of 23 September 1998.

103 Doc. S/1998/953, Annex, of 14 October 1998; cf. *Neue Zürcher Zeitung*, 3 October 1998, 3, and 8 October 1998, 2; on 13 October 1998, NATO had issued an "activation order" for air strikes, see Press statement of NATO Secretary General of 13 October 1998.

104 See Docs. S/1998/978 of 20 October 1998, and S/1998/991 of 23 October 1998; S/RES/1203 (1998) of 24 October 1998.

105 Cf. the condemnation of the massacre by the Security Council, Doc. S/PRST/1999/2 of 19 January 1999.

106 Doc. S/1999/96 of 29 January 1999; Doc. S/PRST/1999/5 of 29 January 1999.

jected the request for provisional measures by an Order of 2 June. Shortly thereafter, NATO, Russia and Yugoslavia reached agreement on principles for an end of the war. Yugoslavian forces started to withdraw, NATO halted its military action, and on 10 June 1999, the Security Council, by Resolution 1244 (1999), authorized the deployment of an international security presence and the establishment of a UN civil authority in Kosovo.

1. Claims and Reactions

Most claims advanced by the acting states remained rather on the political than the legal level, especially the declarations by NATO itself[107]. When legal arguments were used, they generally combined two aspects: the prevention of a humanitarian catastrophe, and the enforcement of Security Council Resolutions 1199 (1998) and 1203 (1998). In the Security Council, both the United States and the United Kingdom saw the action justified "to stop the violence and prevent an even greater humanitarian disaster" and "as an exceptional measure to prevent an overwhelming humanitarian catastrophe"[108], but mentioned collective decisions rather marginally. This corresponded to the United States position in 1998, which had argued that sufficient authority already existed without Council authorization, but had not mentioned where this authority came from[109]. In 1999, however, both the United States and the United Kingdom rejected the assumption of unilateral action. Thus, US Secretary of State Albright, while stressing the humanitarian objective, insisted that action was taken "within the framework" of Security Council decisions[110]. This was affirmed by the US representative before the ICJ who argued that

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107 Cf. NATO press release (1999) 041 of 24 March 1999; Press statement of NATO Secretary General of 23 March 1999.

108 Cf. Doc. S/PV.3988 of 24 March 1999, 5 and 12.

109 See, e.g., US Department of State Press Briefing of 1 October 1998.

110 Cf. US Secretary of State press conference, 25 March 1999 ("Acting under Chapter 7, the Security Council adopted three resolutions – 1160, 1199 and 1203 – imposing mandatory obligations on the FRY; and these obligations the FRY has flagrantly ignored. So NATO actions are being taken within this framework, and we continue to believe that NATO's actions are justified and necessary to stop the violence").

> "the actions of the Members of the NATO alliance find their justification in a number of factors. These include: (t)he humanitarian catastrophe ...; (t)he acute threat ... to the security of neighbouring States ...; (t)he serious violation of international humanitarian law and human rights obligations ...; and finally (t)he resolutions of the Security Council which have determined that the actions of the Federal Republic of Yugoslavia constitute a threat to peace and security in the region and pursuant to Chapter VII of the Charter, demanded a halt to such actions."[111]

Before the House of Commons, the British Secretary of Defence relied even more explicitly on Security Council authority:

> "The use of force in such circumstances can be justified as an exceptional measure in support of purposes laid down by the UN Security Council, but without the Council's express authorisation, when that is the only means to avert an immediate and overwhelming humanitarian catastrophe"[112].

Many other NATO members, on the contrary, had initially insisted on a clear and unambiguous Council authorization. Still in October 1998, France, Italy, Greece and Germany expressed reservations against unilateral action[113]. Only later on, they supported the British-American view that sufficient authority already existed, but placed specific emphasis on the Council resolutions already passed[114]. Finally, their positions were very similar to those of the United States and the United Kingdom. The German Foreign Minister declared before parliament that "(t)he threat of military action finally aims at enforcing the unanimous resolution of the Security Council"[115], but added in other state-

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111 International Court of Justice, CR 99/24 of 11 May 1999.

112 UK House of Commons Hansard, 25 March 1999, Col. 617; cf. the similar statement by the representative of the government in the House of Lords, UK House of Lords Hansard, 25 March 1999, Col. 1509.

113 Cf. *Keesing's Record of World Events* 44 (1998), 42580; *Le Monde*, 19 September 1998, 12; *Süddeutsche Zeitung*, 26 September 1998; *Neue Zürcher Zeitung*, 2 October 1998, 2; 8 October 1998, 2; 9 October 1998, 1; and *International Herald Tribune*, 1 October 1998, 12; 7 October 1998, 4.

114 Cf. *International Herald Tribune*, 12 October 1998, 1.

115 Deutscher Bundestag, Plenarprotokoll 13/248 of 16 October 1998 ("(D)ie Drohung mit einem militärischen Einsatz (zielt) schließlich auf die Verwirklichung der einstimmig gefaßten Sicherheitsratsresolution hin").

ments the aspect of humanitarian intervention[116]. Belgium, apart from the United States the only respondent party to address aspects of the merits before the ICJ in May 1999, held that "l'intervention armée trouve un fondement sans conteste dans les résolutions du Conseil de sécurité"; only later on did it refer to humanitarian intervention.[117] Similarly France seemed to rely exclusively on Council decisions. Thus, the spokeswoman of the French Foreign Ministry declared:

> "(L)'action de l'OTAN trouve sa légitimité dans l'autorité du Conseil de sécurité. Les résolutions du Conseil concernant la situation au Kosovo ... ont été prises en vertu du chapitre VII de la Charte des Nations unies, lequel traite des actions coercitives en cas de rupture de la paix. ... (Le recours à la force) répond à la violation par Belgrade de ses obligations internationales, telles qu'elles résultent des résolutions du Conseil de sécurité..."[118].

Support for the action by NATO came, e.g., from the EU, Japan, Australia, New Zealand, and Switzerland[119]. The UN Secretary-General, however, while acknowledging that force might sometimes be legitimate, expressed his concern that the Security Council had not been involved[120]. Strongest opposition was voiced from the outset by Russia whose President declared:

> "Only the Security Council can decide on what measures, including the use of force, should be taken to maintain or restore international

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116 Statement of 12 October 1998, *Frankfurter Allgemeine Zeitung*, 13 October 1998 ("Im Lichte des Unvermögens des Sicherheitsrates, seinem Gewaltmonopol bei dieser besonderen notstandsähnlichen Situation gerecht zu werden, fußt die Rechtsgrundlage angesichts der humanitären Krise im Kosovo auf Sinn und Logik der Sicherheitsratsresolutionen 1160 und 1199 in Verbindung mit dem Gesichtspunkt der humanitären Intervention und einem Mindeststandard in Europa für die Einhaltung der Menschenrechte...").

117 International Court of Justice, CR 99/15 of 10 May 1999 ("Ces précédents joints [d'une intervention humanitaire], couplés avec des résolutions du Conseil de sécurité et le rejet du projet de résolution russe ... tentent et accréditent certainement l'idée que nous sommes là en présence d'une intervention tout à fait licite."). While Belgium also defended the legality of purely unilateral humanitarian interventions, it did so without relying on it for the action in Kosovo.

118 Declaration of the spokeswoman of the Quai d'Orsay, 25 March 1999.

119 Cf. only *International Herald Tribune*, 26 March 1999.

120 UN press release SG/SM/6938 of 24 March 1999.

> peace and security. The Security Council did not take such decisions with regard to Yugoslavia. ... A dangerous precedent has been created regarding the policy of diktat and force, and the whole of the international rule of law has been threatened"[121].

In the Security Council session held immediately after the NATO strikes had begun, Russia refuted arguments based on humanitarian aspects, as did China, Namibia, and especially India:

> "The attacks ... are in clear violation of Article 53 of the Charter. ... (W)e have been told that the attacks are meant to prevent violations of human rights. Even if that were to be so, it does not justify unprovoked military aggression"[122].

Similar opposition was expressed by Belarus, Ukraine, Iran, Thailand, Indonesia and South Africa[123]. Also the Group of Rio, comprising 29 Latin-American and Caribbean states[124], regretted the recourse to force without observance of Articles 53 and 54 of the Charter[125]. This was all the more surprising as its members Brazil and Argentina did only very cautiously express their regret in the Security Council[126], and as they were among the states to oppose a draft resolution condemning the air strikes two days later[127]. This draft was sponsored by Russia, Belarus and India, but gathered only three votes in favour (Russia, China, Namibia) with twelve against. The rejection of this draft, however, did not necessarily imply support for the NATO strikes. Many Council members voting against it expressed concern that adoption of the draft could have been interpreted as an approval of the repressive action by Yugoslavia. The violation of previous Council resolutions by the repressive policy had not even been mentioned in the draft which was regarded as extremely one-sided, and was therefore opposed even by states which had taken a rather neutral or critical stand toward the

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121 Cf. Doc. S/PV.3988 of 24 March 1999, 3.

122 Doc. S/PV.3988 of 24 March 1999, 15 et seq.

123 Cf. *International Herald Tribune*, 26 March 1999; and the press release of the South African Department of Foreign Affairs of 25 March 1999.

124 Among them Argentina, Brazil, Mexico, Colombia, Chile, Peru and Venezuela; cf. http://www.worlddata.com/grupo_de_rio.

125 Press release of the Brazilian Foreign Ministry of 25 March 1999.

126 Cf. Doc. S/PV.3988 of 24 March 1999, 8, 10 et seq.

127 Cf. Doc. S/PV.3989 of 26 March 1999, and, as to the draft, Doc. S/1999/328 of 26 March 1999.

NATO strikes in the previous Council session[128]. In sum, opposition to the NATO strikes was strong, but not as unified as in the cases of Iraq.

2. The Validity of the Justifications

The recourse to Security Council resolutions as sole source of authority finds little support in their text or other means of interpretation[129]. Neither in Resolution 1160 (1998) nor in Resolution 1199 (1998) there is any passage authorizing force. In the latter resolution, the Council:

> "Decides, should the concrete measures demanded in this resolution and resolution 1160 (1998) not be taken, to consider further action and additional measures to maintain or restore peace and stability in the region".

This pointed to further decisions on enforcement measures by the Council, not by individual states. The sole reference to Chapter VII in the resolution does not, as was argued by France and also the United Kingdom, provide an authorization either, as an action under Chapter VII does not necessarily imply military action but can also take the form of recommendations or non-military enforcement measures[130]. The conclusion that the resolutions did not contain an authorization to use force is likewise warranted by the statements of Security Council members before their adoption. The Russian Federation declared in September that "(n)o use of force and no sanctions are being imposed by the Council at the present stage"[131]. China went even further in regarding the whole situation as an internal matter of the FRY, therefore rejected any Chapter VII action[132] and abstained from voting, as it had already done in March. In the March session, moreover, no mention of a possible use of force had been made at all. The Council resolutions could therefore not be interpreted as authorizing the use of force. The same holds true for the decisions and statements by which the Council endorsed the results of the ongoing threat of force in October 1998 and January 1999. Approval of the result does not imply approval of the

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128 E.g., Bahrain, Gambia, Malaysia and Gabon, and also Argentina and Brazil.

129 On questions of interpretation, see M.C. Wood, "The Interpretation of Security Council Resolutions", *Max Planck UNYB* 2 (1998), 73 et seq.

130 See Arts 39 to 41 of the Charter.

131 Doc. S/PV.3930 of 23 September 1998, 3.

132 Doc. S/PV.3930 of 23 September 1998, 3.

means — especially as Russia and China still opposed military action[133]. Even less can the rejection of a condemnation of the strikes on 26 March 1999 be regarded as an implicit authorization: apart from the fact that the rejection was not motivated by a wish to approve the strikes, the Charter requires a positive decision by the Council, not the absence of a negative one — otherwise the veto power of the permanent members would be pointless.

The basis for a right to unilateral action is far from clear, too. Since self-defense was neither relied on nor were its conditions fulfilled, only a right to humanitarian intervention could provide a basis. This, however, has not been consistently claimed as such by any of the acting states, although it was clearly relevant to the case. The United States and the United Kingdom referred to it, but finally only in combination with reliance on Security Council decisions. The case of Kosovo therefore does not provide an affirmation of such a right, which is, as has been said above, more than doubtful. Moreover, the opposition of several states would have prevented any such right from emerging.

The threat of force against the Federal Republic of Yugoslavia was therefore justified neither by Security Council resolutions nor by a right to unilateral humanitarian intervention. But none of this had really been claimed either: states had rather relied on a combination of Security Council authority and its unilateral enforcement, and partly also humanitarian intervention.

V. A Right to Unilateral Enforcement of the Collective Will?

Neither Security Council resolutions nor unilateral rights permitted the use of force in the instances discussed — one could conclude on the illegality of the action and stop legal analysis at this point. But this would miss an important aspect present in all three cases: a combination of both collective and unilateral elements. As all action was based on Security Council resolutions which did not authorize enforcement, it would have been justified if a right to their enforcement by unilateral measures existed. As will be shown, this right does not exist, but a claim to establish it was advanced. To accept this claim seems, however, not advisable.

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133 Cf. Simma, see note 98.

1. Unilateral Enforcement under United Nations Law

Article 2 para. 4 of the Charter prohibits the use of force "inconsistent with the Purposes of the United Nations", and it could be argued that unilateral enforcement of collective decisions would rather serve than impair these purposes and would therefore fall outside the scope of the prohibition. Such an interpretation would, however, contradict the context and history of the norm according to which the term "inconsistent with the Purposes" is not meant to restrict the prohibition, but to strengthen it[134]. One might then refer to the Preamble of the Charter which provides that "armed force shall not be used, save in the common interest", and this clause points rather to the goal than to the means and could be interpreted to justify reliance on unilateral measures if they serve this "common interest". But the UN system of collective security excludes this: it confers the right to take military action on behalf of the international community to the Security Council and limits unilateral action to self-defense.

It is up to the Council to determine any threat to the peace and decide if and which measures shall be taken to remove it. During the negotiations of the Charter, this was expressed by Committee I/1 reporting to Commission I that "(t)he use of force is left possible only in the common interest. As long as we have an Organization, the Organization only is competent to see the common interest and to use force in supporting it"[135]. And it was also reflected in the rejection of a French proposal to insert, instead of self-defense, a clause reserving the right of members to act "in the interest of peace, right and justice" if the Security Council failed to act[136]. The possibility of a blockade of the Council was thus foreseen, but no unilateral action beyond self-defense was admitted[137]. And unilateralism was excluded not only for the determina-

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134 Cf. Randelzhofer, see note 14, 117 et seq.; Y. Dinstein, *War, Aggression and Self-defence*, 2nd edition, 1994, 85 et seq.; see especially *UNCIO* Vol. VI, 335 and 304 ("It was pointed out that the phraseology of paragraph 4 might leave it open to a member state to use force in some manner consistent with the purposes of the Organization but without securing the assent of the Organization to use such force. It was felt, accordingly, that paragraph 4 should be reworded so as to provide that force should not be used by any member state except by direction of the world Organization").

135 *UNCIO* Vol. VI, 451.

136 Cf. R.B. Russell and J.E. Muther, *A History of the United Nations Charter*, 1958, 690.

137 Cf. Russell and Muther, see note 136, 698.

tion of the common interest, but also for the measures to achieve it. This finds expression in Articles 40 to 42 of the Charter which grant the Council wide discretion as to whether and what measures to take. Enforcement action, be it non-military or military, is not automatic, and general agreement existed during the negotiations of the Charter that the Council's freedom should not be restrained by the prescription of specific modes of reaction to threats to the peace[138]. Therefore, according to its original conception, the Charter prohibits unilateral enforcement of Council decisions or of the "common interest" in general.

Later events, such as the General Assembly's so called Uniting for Peace Resolution[139], have not modified this account. The resolution claimed the power of the Assembly to recommend collective measures in the case of failure of the Security Council, but did not purport to empower the Assembly to authorize measures which would otherwise be unlawful[140]. A change has not been brought about either by the Cold War blockade of the system of collective security which has been said to have "killed Article 2(4)"[141]. Even if this had been correct at the time[142], it would not be persuasive any more today as the system is now operating reasonably well in general[143]. Moreover, a single inaction by the Council may simply show a lack of support and constitute a decision not to act — as part of a system that is working as intended[144].

Another solution is not warranted either with respect to enforcement action of regional organizations[145] which, despite their special

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138 Cf. Russell and Muther, see note 136, 674, 678.

139 A/RES/377 (V) of 3 November 1950.

140 Cf. J. Andrassy, "Uniting for Peace", *AJIL* 50 (1956), 563 et seq., (572); Dinstein, see note 134, 302 et seq.; E. Stein and R.C. Morissey, "Uniting for Peace Resolution", *EPIL* 5 (1983), 379 et seq.

141 See T.M. Franck, "Who killed Article 2(4)? or: The Changing Norms Governing the Use of Force by States", *AJIL* 64 (1970), 809 et seq.

142 Which has been doubted, see L. Henkin, "The Reports of the Death of Article 2(4) are Greatly Exaggerated", *AJIL* 65 (1971), 544 et seq.

143 See also, today, T.M. Franck, *Fairness in International Law and Institutions*, 1995, 273 et seq.

144 See, *mutatis mutandis*, Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion of 3 March 1950, *ICJ Reports* 1950, 4 et seq., (7).

145 The prevailing view that NATO is to be regarded as a regional organization under Chapter VIII of the UN Charter is highly questionable as NATO's action is not directed toward its member states, but to the outside, cf. re-

status under Chapter VIII of the Charter, are not allowed to take military enforcement measures without authorization by the Security Council[146]. The only exception to this rule, self-defense, was explicitly introduced in order to make regional organizations not totally dependent on Council action, but further exceptions should be excluded. This does not, of course, hinder interpretations accepting implicit or even ex-post authorization under Article 53 which would not be sufficient under Article 42[147]. But without at least such Council authorization, the enforcement of common interests by regional organizations remains unlawful.

2. The Reliance on a Right to Unilateral Enforcement

In spite of this, the acting states advanced the claim to a right to unilateral enforcement in a quite consistent way. To state this may seem to contradict the analysis of the cases above. The attempts to justify the threats and strikes differed, as did the arguments for their rejection. But leaving aside all the details presented, the justifications of the acting states in all three cases are quite simple, and quite similar. They claim to enforce Security Council resolutions which themselves do not authorize their enforcement: Resolutions 1160 (1998) and 1199 (1998) in the case of Kosovo, Resolutions 687 (1991), 1154 (1998) and 1205 (1998) in the case of the strikes against Iraq in mid-December 1998, and Resolution 688 (1991) in the case of the no-fly zones. The legal dispute only concerned the question whether these resolutions contained an authorization or whether another resolution could provide authority to enforce them. Because both was clearly not the case, the claim underlying the very detailed legal justifications was that of unilateral enforcement.

Such an interpretation finds support in several explanations given for the different actions. The clearest expression is to be found in statements on the enforcement of the no-fly zones. As already indicated, they often did not explicitly specify where the enforcement authority flew from, but they recurred to formulae such as "in support of" or

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cently Simma, see note 98. But see also C. Walter, *Vereinte Nationen und Regionalorganisationen*, 1996, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Bd. 124, 27 et seq., (81), with detailed arguments in favour of such a characterization of NATO.

146 Article 53 para. 1 of the Charter.

147 Cf. Walter, see note 13, 176 et seq.

"pursuant to" Resolution 688 (1991). Even such a broad justification as the French one simply referring to the "esprit" of the resolution was advanced, and a common explanation of all the acting states based the action on the need to "monitor Iraqi compliance with UN Security Council resolution 688".

Equally in the case of Kosovo, this aspect played an important role, but more in Europe than in the United States. While the United States saw themselves free to act even without a resolution, France and Germany made strong efforts to achieve a solution in the Council. Resolution 1199 (1998), while clearly not authorizing any use of force, was welcomed as the expression of the will of the international community, and later justifications for the threat generally referred to this resolution: The United Kingdom explained NATO action as "support" of the resolution, France relied on the fact that by reference to Chapter VII the resolution had opened the way to the use of force, and the German government stated that the threat against Yugoslavia aimed "at enforcing the unanimous resolution of the Security Council".

In the Iraqi crisis in mid-December 1998, this more general tendency was to some degree hidden behind more detailed arguments. Nevertheless, it reappeared in many statements especially of the United Kingdom: some official documents relied simply on Resolutions 1154 (1998) and 1205 (1998) without any indication of an authorization within them. And the UK Prime Minister explained that the United Kingdom's "policy has always been to seek genuine Iraqi compliance with the demands of the Security Council"[148]. Even more generally he stated that "when it is right and when the will of the international community is at stake we will act to enforce it ..."[149]. This might be accounted for as a purely political statement, but it rather seems that the United Kingdom claims the right to enforce the will of the international community any time the international community is not able to enforce it itself. Accordingly France, while denying any action without Security Council involvement, accepted the British-American claims in analogy to its own position in the Kosovo case: the mere determination by the Council of Iraq's violation of earlier resolutions was recognized as a sufficient basis.

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148 UK House of Commons Hansard, 17 December 1998, Col. 1097.

149 Press conference of 20 December 1998.

3. The Difficult Future of Pure Unilateralism

These claims to a right to use force in order to ensure compliance with Security Council resolutions imply the rejection of a legal necessity to obtain clear authorization, but likewise that of a purely unilateral right to action. This is all the more surprising as reliance on traditional unilateral rights would have been possible, although as ill-founded as the claims advanced.

Thus, in the case of Iraqi disarmament, a case could have been made in favour of self-defense, especially because scholars had supported the view that the Gulf War 1990-1991 was conducted in self-defense[150]. The argument that the cease-fire had been violated could thus have led to the position that the right to self-defense revived — a more coherent way to look at it, even if finally barred by Resolution 687 (1991). But neither the United States nor the United Kingdom chose it at any time; they always relied in one way or the other on collective authorization. With regard to the no-fly zones and the situation in Kosovo, arguments could have been based on a unilateral right to humanitarian intervention, despite its weak legal ground. But, in the case of Kosovo, this approach was adopted only by the United Kingdom, and it was not upheld as a general line of justification. For northern Iraq, such arguments were advanced only in the beginning, but were not repeated in 1998–1999. France, known as rather supporting a unilateral right[151], rejected this view openly by stating that NATO had no right to authorize itself. And Germany did not dare to rely on a unilateral right without reference to the Security Council decision.

Of course, the United States initially did not share this view in the case of Kosovo, and, moreover, they declared several times that they had the right to act when they deemed it necessary. Nevertheless, their efforts to justify their own action relied on collective authority rather than on a purely unilateral right. And their European allies insisted on collective elements in unilateralism, even where traditional unilateral justifications would have been possible. Thus, a purely unilateral hu-

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150 Cf. E.V. Rostow, "Until What? Enforcement Action or Collective Self-Defense", *AJIL* 85 (1991), 506 et seq.; see also Schachter, see note 53, 457 et seq.

151 Cf. E. Spiry, "Interventions humanitaires et interventions d'humanité: la pratique française face au droit international", *RGDIP* 102 (1998), 407 et seq.

manitarian intervention seems even more difficult after the case of Kosovo than before.[152]

4. Unilateral Enforcement: Community Interests Enhanced or Threatened?

The claim to unilateral enforcement of the collective will has been rejected by many states, and especially Russia reacted directly to it by stating that "(n)o one is entitled to act independently on behalf of the United Nations and even less to assume the functions of a world policeman"[153]. Thus, state practice has not confirmed the deviation from Charter law. To state the existence of a right to unilateral enforcement of the collective will today, on the basis of a perceived "need" for action, would therefore presuppose some sort of natural law above the Charter. Moreover, prospects for future establishment of such a right are rather limited as Russia, China and the Non-aligned Countries will not modify their views towards new attempts by western states to enforce collective decisions by unilateral measures. But it might not be impossible that they would rely on the same right once it served their interests and that thereby the right would gain acceptance.

Such a development might appear tempting as it could help achieve common interests more easily than under the present system of the Charter. In the domestic debates on the possible use of force, especially in the case of Kosovo, the value of the Charter system and of the authority of the Security Council was recognized[154]. But this system was perceived to hinder the achievement of common interests: it prevented saving Kosovar Albanians from death and suffering, and it endangered peace as it did not allow for effective measures against Iraqi re-emergence. The challenge to the UN system therefore was, at least in part, based on values. The opposing values were less evident: the preservation of the system of collective security had a more general character and less influence on public opinion. But its worth for peace was not

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152 Cassese, see note 98, observes an evolving trend towards the acceptance of humanitarian intervention in the case of Kosovo. This view, however, is mistaken as Cassese ignores the strong opposition of a great number of states and the fact that the acting states did not consistently rely on such a right.

153 Doc. S/PV.3955 of 16 December 1998, 4.

154 See under, VI. 1.

totally negligible: once unilateral action is permitted, it might be used to further national interests far removed from the common good but under this pretext. Thus, the indeterminacy of possible exceptions to the prohibition on the use of force could lead to less or no compliance at all. The initial dilemma was therefore a classical one: the strict and formal rule would prevent achieving justice and peace in some cases, and the rule allowing for justice would be so indeterminate that order would be endangered and with it peace and the conditions for achieving justice[155].

This last concern, however, is more striking for purely unilateral action than for action to enforce collective decisions[156]. The unilateral enforcement of Security Council resolutions appears to make the achievement of justice and peace possible, but seems not to undermine the formal rule to such a degree as to open the way to any interpretation. While still permitting to use such a right as a pretext for the achievement of the most selfish interests, the claim presents a compromise between order, justice and peace which might seem preferable to other options. Moreover, the reliance on a collective decision could reduce the perception that some states enforce their particular understanding of common interests — the reproach of neo-imperialism could be rejected more easily. This latter point seems even more true if action is taken not by single states, but by multilateral regional organizations. Decision-making procedures within such organizations might further limit the possibilities of states to enforce their particular interests, and therefore reduce the danger that action is taken only under the pretext of enforcing the common good[157]. But while this appears conclusive for action of organizations toward their member states, it is doubtful for action toward third states which most often do not share the same values and interests. Then, instead of interests of single states, those of a group of states might be imposed which remain particular and possibly different from universal standards. But the dangers of abuse are, of course, reduced when reliance on (universal) collective decisions is combined with multilateral action.

Despite these positive aspects mentioned, the acceptance of unilateral enforcement would have very serious consequences for the future of international security. First, reliance on collective decisions would

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155 Cf. T.M. Franck, *The power of legitimacy among nations*, 1990, 67 et seq., who calls this the Sophist rule-Idiot rule paradox.

156 Cf. Wedgwood, see note 21, 726; on this concern in general, cf. Franck and Rodley, see note 14, 304 et seq.; Kritsiotis, see note 13, 1020 et seq.

157 Cf. Walter, see note 13, 170.

not be likely to end with Security Council resolutions under Chapter VII of the Charter. Instead, other Council resolutions or those of the General Assembly would be used, and maybe even decisions of the ICJ. But even if this did not occur, the emergence of a right to unilateral enforcement of Council resolutions is likely to block the system of collective security. If any determination of a threat to the peace incurred the possibility of unilateral military action, Council members would be much more cautious to make such a determination. Other measures under Chapter VII, such as provisional measures or sanctions, would not be taken any more if their adoption opened the way for unilateral military action. This risk could be avoided only by an express prohibition on the use of force in a given resolution. But due to the difficult negotiations within the Council, it is highly improbable that clear and express formulae in this respect could ever be agreed upon. The problem would then be simply transferred to another level: from the question of collective authorization of military action to the question of collective determination of a threat to the peace. The latter would be as difficult then as the former now[158]. The substantive values would not be achieved in a better way than before, and the resulting blockade of the system of collective security would probably lead to the next step: to the adoption of purely unilateral measures. A right to unilateral enforcement of Council decisions could therefore not create a stable situation; it would instead erode the collective system with the possible result of its breakdown.

Although at first sight a helpful invention, unilateral enforcement would not help achieve common interests in the long run — rather the opposite. It would leave open the central question of how to achieve common interests better, a question gaining importance the more considerations of justice play a role in the international sphere where interest in order has prevailed for quite some time. But how to define justice in the absence of natural law, if not by collective determination, remains unresolved.

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158 If it seems that such a determination can be more easily achieved, that is because it can still be interpreted in a way not to authorize military action. Thus, Russia accepted the determination in the cases of Kosovo and Iraq because it could domestically argue that it had not consented to enforcement. Once a right to unilateral enforcement is established, this way out would be barred, and the determination could not be achieved this easily any more.

VI. Is there still a Role for the Security Council?

During 1998, several incidents have raised doubts about the continued relevance of the Security Council and international law on the use of force. Beside the events discussed here, the most striking example were the United States strikes against Sudan and Afghanistan, allegedly in self-defense, but directed against general dangers without any consultation in the Council. Often reliance on the Security Council or international law was seen as a simple pretext. But at least in the cases of Kosovo and Iraq, the institutional framework of the United Nations was of some, albeit limited importance, especially for the European states involved. The overall perception of the events is, however, likely to lead to a much weaker role of the Council.

1. Unilateralism Disguised? The Council's Role in Recent Events

In the cases of Kosovo and Iraq, observers often had the impression that it looked good to rely on the United Nations, but that the Security Council did not really matter. In Kosovo, once a resolution clearly not containing any authorization to use force was obtained, states referred to it for their threats. The strikes against Iraq in mid-December were claimed to be justified by United Nations authority, but no effort to consult the members of the Security Council was made although it had been convened to discuss the situation in Iraq. Council authority might then seem as a pretext, and United States officials confirm this to some degree by stating that, while United Nations support was welcome, NATO may not be subordinated to any other international organization[159]. The high hopes for a new role of the United Nations and the Security Council in a "New World Order" have disappeared, and the system of collective security again seems to be a useful tool for the powerful. It serves as a legitimizer of the hegemonic power as long as possible; but when obstacles grow, it is given up without much concern. This would correspond to classical realist theories of international politics. Already in 1948, Hans Morgenthau, himself a disappointed lawyer, put it like this:

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[159] Cf. US Deputy Secretary of State S. Talbott, "The New Europe and the New NATO", Address to the German Society for Foreign Policy, 4 February 1999.

> "Governments ... are always anxious to shake off the restraining influence which international law might have upon their international policies, to use international law instead for the promotion of their national interests, and to evade legal obligations which might be harmful to them. They have used the imprecision of international law as a ready-made tool for furthering their ends. They have done so by advancing unsupported claims to legal rights and by distorting the meaning of generally recognized rules of international law"[160].

These words could have been written fifty years later, and they indeed still bear much plausibility, especially with regard to the policy of the United States. Beside the use of force already discussed, they deny immunity to such states that are "sponsors of terrorism" in the view of the United States government, they enact legislation openly aiming at the removal of a government, even by military aid to opposition groups, they "take treaties less seriously", they ignore the ICJ etc.[161] Since they are the sole remaining superpower, they face little risk of generalization of such practices, and therefore normative or legal considerations are almost irrelevant. Moreover, the United States are still able to muster significant support among western states for their exercise of hegemonic power, circumventing the Security Council when necessary. Likewise, European states hide typical national interests behind reliance on common interests: concerns with the humanitarian situation in Kosovo were initially triggered by the fear of a flood of refugees.

Nevertheless, this very pessimistic account alone would seem one-sided as recent events indicate that several of the acting states did not simply use Security Council authority as a welcome addition to their justification but that it played an important role in this respect. Action without any supporting decision by the Council appeared much more costly. This could already be observed in 1990–1991 when the coalition against Iraq several times sought Council authorization although its action would have been justified by self-defense[162]. In 1998, Council deci-

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160 H. Morgenthau, *Politics among Nations: The Struggle for Power and Peace*, 1949, 214.

161 See the amendment of the Foreign Sovereign Immunities Act of 1976 by the Antiterrorism and Effective Death Penalty Act of 1996, U.S.C. 28 § 1605(a)(7); Iraq Liberation Act of 1998, Public Law 105-338, Stat. 112, 3178; D.F. Vagts, "Taking Treaties Less Seriously", *AJIL* 92 (1998), 458 et seq.; "Agora: Breard", *AJIL* 92 (1998), 666 et seq.

162 This was the case for Resolution 665 (1990) with respect to the maritime blockade set up by the United States and the United Kingdom under col-

sions were similarly important for the legitimization strategies of the acting states. In the case of Kosovo, France insisted on a Council decision declaring Yugoslavia to be in breach of its obligations, and NATO returned to the Security Council for the establishment of a post-war order. In the case of Iraq, the United States and the United Kingdom worked hard to obtain support for resolutions condemning the Iraqi behaviour as a "flagrant violation" of its obligations. This does not mean that action would not have been taken had those resolutions not been agreed upon. But the lack of collective condemnation would have severely increased the costs of unilateral action, both internationally and nationally, and would have weakened support for the actions taken[163].

Domestic discussions, especially those of the parliaments in the acting states, confirm this result. While in the United States Congress almost no mention was made of international law or the Security Council[164], European parliaments often insisted on explanations as to why action was taken without specific authorization by the Security Council. In the United Kingdom, both in the House of Commons and in the House of Lords, the government was anxious to dissipate concerns about a lack of United Nations authority for military measures in Kosovo and Iraq[165]. Before the French *Assemblée Nationale*, the foreign minister repeatedly stressed the legal basis in Security Council Resolution 1199 (1998) for the threat against Yugoslavia, and with respect to

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lective self-defense and for Resolution 678 (1990). The military action authorized thereby could have been taken also in exercise of the right to self-defense, but international support seemed to be stronger when collective authorization was obtained. Cf. M. Weller, "The Kuwait Crisis: Some Legal Issues", *RADIC* 3 (1991), 1 et seq., (20 et seq.); Y. Dinstein, "The Legal Lessons of the Gulf War", *Austrian J.Publ.Int. Law* 48 (1995), 1 et seq., (14).

163 Cf. in general, I.L. Claude, "Collective Legitimization as a Political Function of the United Nations", *International Organization* 20 (1966), 367 et seq.

164 Legal arguments concerned constitutional issues, cf. US House of Representatives, Congressional Record, 105th Congress, 5 October 1998, H9350; 17 December 1998, H11722 et seq.; US Senate, Congressional Record, 105th Congress, 5 October 1998, S12488 et seq.; 106th Congress, 23 March 1999, S3110 et seq.

165 UK House of Commons Hansard, 19 October 1998, Col. 957 et seq.; 17 December 1998, Col. 1106 et seq.; 25 March 1999, Col. 536 et seq.; UK House of Lords Hansard, 12 October 1998, Col. 753; 17 December 1998, Col. 1534 et seq.; 25 March 1999, Col. 1476 et seq.

the British-American action against Iraq, the parliament strongly urged for the restoration of the Security Council's role[166]. The most intense debate about the role of the Council was held in the German *Bundestag* whose authorization had to be sought for military involvement in Kosovo. Much concern was expressed about the weakened role of the Council, and a significant number of deputies did not support the participation for lack of United Nations authority while openly acknowledging the humanitarian need[167]. While lacking Security Council authorization did not prevent those states from taking measures or supporting the strikes of others, it affected domestic political debates and thereby influenced the decision-making processes of the acting governments. Moreover, some of these governments had expressly committed themselves to strengthening the United Nations. In the United Kingdom and in Germany, general objectives of foreign policy were closely tied to multilateralism and in particular to the United Nations[168]. To some degree, the "monopoly of force" of the Security Council became part of the identity of these governments, making it more difficult to justify circumvention of the organ. This account fits into a broader constructivist approach to international relations which understands state preferences and identities as socially constructed and therefore open to normative factors[169]. Realist theories would have difficulties in explain-

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166 Assemblée Nationale, Comptes Rendus, 7 October 1998, 6040; 22 December 1998, 11007 et seq.

167 Deutscher Bundestag, Plenarprotokoll 13/248, 16 October 1998, 23127 et seq.; see also Plenarprotokoll 14/30, 25 March 1999, 2424 et seq.; 14/31, 26 March 1999, 2571 et seq.

168 Cf. the Constitution of the UK Labour Party, mentioned in UK House of Commons Hansard, 17 December 1998, Col. 1129 ("Labour is committed ... to the United Nations ... to secure peace, freedom, democracy"); the coalition agreement of the German Social Democratic Party and the Green Party of 20 October 1998, *Internationale Politik* 53 (1998), 67 et seq., (75) ("The government will work toward the preservation of the monopoly of force of the United Nations..."). Recent attempts by France to strengthen multilateralism do, however, not seem to be driven by long-term commitments, but rather by a desire to limit U.S. power, cf. *International Herald Tribune*, 3 February 1999, 1.

169 Cf. in general J.T. Checkel, "The Constructivist Turn in International Relations Theory" (Review Essay), *World Politics* 50 (1998), 324 et seq.; from a legal perspective, cf. A.C. Arend, "Do Legal Rules Matter? International Law and International Politics", *Va.J.Int'l L.* 38 (1998), 107 et seq., (125 et seq.); B. Kingsbury, "The Concept of Compliance as a Function of Competing Conceptions of International Law", *Mich.J.Int'l L.* 19 (1998), 345 et

ing this importance of norms as such. Moreover, the observations made with regard to debates in parliaments support tendencies which claim that compliance with international norms is favoured by domestic democratic institutions[170]. This seems plausible as public justification necessitates general arguments. Even if states did not comply in the cases discussed, parliamentary debates, at least in Europe, gave international law a place in the decision-making process.

Several specific factors, in contrast, favoured non-compliance with Charter rules. One was the indeterminacy of Security Council resolutions which permitted interpretation in various ways, in particular the very vague Resolution 678 (1990), and Resolution 1154 (1998) with its formula of "severe consequences" form striking examples[171]. Another factor was the perceived injustice of the legal rule in question which has already been discussed and which was strongest with regard to Kosovo[172].

Thus, in the cases of Iraq and Kosovo, international law and institutions did not play a decisive role, but their importance was not reduced to nothing: the reliance on Security Council authority reduced obstacles for domestic and international support and was part of a more general identity of European governments. Even in these "high politics", international law therefore did not simply represent an epiphenomenon[173].

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seq., (358 et seq.); on this approach in the study of international security, cf. P. Katzenstein (ed.), *The Culture of National Security: Norms and Identity in World Politics*, 1996; H. Müller, "The Internationalization of Principles, Norms, and Rules by Governments: The Case of Security Regimes", in: V. Rittberger (ed.), *Regime Theory and International Relations*, 1993, 361 et seq.

170 Cf. A. Hurrell, "International Society and the Study of Regimes: A Reflective Approach", in: Rittberger, see note 169, 49 et seq., (71); on the area of international security, cf. Müller, see note 169, 381.

171 Cf. Frowein, see note 21, 110 et seq.; Lobel and Ratner, see note 21, 137 et seq.; Tomuschat, see note 21, 80 et seq.; on the problem of indeterminacy in general, cf. Franck, see note 155, 50 et seq.

172 See the statements of several German deputies as to the reasons for their support of the use of force despite illegality, Plenarprotokoll 13/248, 16 October 1998, 23127 et seq.; see also Franck, see note 155, 208 et seq., who, although acknowledging the importance of the "justice" of a rule for compliance, dissociates it from issues of legitimacy.

173 On different ways to explain compliance with international norms, see H.H. Koh, "Why Do Nations Obey International Law?" (Review Essay),

Nevertheless, hopes for a "rule of law" in international security still seem greatly exaggerated.

2. Collective Security in the Future

In spite of these indications toward some, albeit limited importance of the Security Council, recent events leave the system of collective security severely damaged. The western action was widely perceived as hegemonic, and its attitude toward the Council as making use of it only when it pleases. This perception is continuously confirmed by statements of United States officials who reject any subordination of NATO to the United Nations and claim their own right to defend the own values and interests — rights that they probably would not concede to other states in the same way. Attempts to insert this into the new strategic concept of NATO have only in part failed: the concept leaves the relationship with the UN Security Council unclear, but extends the notion of security to areas such as human rights, thereby allowing for NATO action in these fields outside the area of the member states or even Europe[174]. This reduces incentives for co-operation within the Security Council and renders probable a rise of unilateralism — of unilateralism beyond the limits of any right to enforcement of collective decisions. Not the claim to such a new right itself is therefore the cause of the adverse impact, as general public international law is usually modified by partial violations of old rules. The problem is rather the manner of its invocation. Had it been possible to perceive it as a serious claim to a new, limited right, it would have succeeded or failed, but would not have severely damaged the system. But it is rather perceived as an expression of the freedom of western states to act when they deem it right — as an expression of their persuasion that they are "more faithful to the purposes as well as to the specific words of the United Nations than is the United Nations itself"[175].

Yale L.J. 106 (1997), 2599 et seq.; Arend, see note 169; Kingsbury, see note 169.

[174] See "The Alliance's Strategic Concept", approved on 23-24 April 1999, NATO press release NAC-S (99)65 of 24 April 1999; on the attempts of some states before the adoption cf. US Deputy Secretary of State Talbott, see note 159; on this, cf. Simma, see note 98.

[175] This justification was advanced by an editorialist of the *Washington Post*, cf. *International Herald Tribune*, 19–20 December 1998, 6.

This negative impact is not reduced either by attempts of the acting states to remain "close to legality" or by an "isolated character" of these events[176]. As I have tried to show, the events already form, especially on the background of statements of western officials, a coherent picture — even if unilateral action to further western values has not yet been explicitly formulated as a general option for NATO[177]. Moreover, the states did not claim to be acting outside the law on moral or political grounds in an isolated case, but they argued legally to justify their military interventions. Despite some statements that no precedents should be created[178], the cases discussed will be referred to in the future and will thereby serve to create new rules.

Prospects for collective security are therefore quite unhappy: insofar as reliance on Security Council decisions is seen as a simple pretext, it will be concluded that in any new situation where United Nations authority is not available at all, a new claim will arise which serves best the interest of the acting state. This may lead to further erosion of the authority of the Security Council which is already weak, especially due to its unequal composition and the perception of double standards[179]. Now, its appearance as a tool of the powerful is reinvigorated — not only as a tool of the states using force, but also of those permanent members blocking Council action for selfish interests. Any feeling of responsibility for a "common good" that may have existed among Council members is likely to disappear in favour of the pursuit of old-fashioned national interest[180]. When the persuasion of some to see the common interest and to enforce it is thus perceived as power policy, the

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176 With respect to the NATO threats in Kosovo, this is argued by Simma, see note 98.

177 See also B. Møller, "The Slippery Slope of Authority Eroded", *Security Dialogue* 30 (1999), 87 et seq., (88 et seq.); E.B. Eide, "Intervening Without the UN", *Security Dialogue* 30 (1999), 91 et seq.

178 Cf. the statement of the German Foreign Minister, Deutscher Bundestag, Plenarprotokoll 13/248, 16 October 1998, 23129.

179 Cf. only D.D. Caron, "The Legitimacy of the Collective Authority of the Security Council", *AJIL* 87 (1993), 552 et seq.

180 This phenomenon is not new — after dominating the Cold War, it persisted, e.g., in the protection of Israel by the United States or of Serbia by Russia. But it seems to return with greater force now, as with the Chinese use of the veto-power to punish Macedonia for its diplomatic contact with Taiwan, cf. Doc. S/PV.3982 of 25 February 1999.

common interest will, in the end, rather be damaged than served[181]. Then, single states will claim the right to define it for themselves, and the collective system will remain just one among many actors all determining the common good as they please. Whose "common interest" then prevails, will be rather a question of might than of right.

VII. Conclusions

While discussions on the enforcement of values of the international community usually focused on two distinct modes, the collective and the unilateral, the events in 1998 and early 1999 have shown a tendency towards a combination of both: the unilateral enforcement of collective decisions. In all these cases, the justifications were based on determinations of a common interest by the Security Council, although the Council had not authorized military action. A right to unilateral enforcement of the collective will, however, could not be established due to strong opposition by a great number of states. Because such a right finds no support in the Charter, and other ways of justification by the states were either not advanced or untenable, the actions were unlawful. But this claim reflects, in part, concerns about the legitimacy of the authority of a collective system which seems unable to enforce community interests, and the combination of unilateral and collective action removes some of the objections traditionally held against unilateral action. The emergence of a right to unilateral enforcement would nevertheless have very negative consequences, as it is likely to cause a blockade of the system of collective security.

Concerns about the legitimacy of the "old rule" may help understand why states ignored it. But non-compliance can, for the most part, be explained by the hegemonic pursuit of objectives of the acting states. The limited role of international law in international security, is once again confirmed. Nevertheless, these events show that action without the Security Council is, at least in Europe, regarded as very costly and therefore undesirable. Claims to purely unilateral action have been avoided, and even a unilateral right to humanitarian intervention has not been vigorously restated. The importance of the Security Council for the legitimization of action is reflected also in domestic discussions and

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[181] Nolte, see note 100, has recently emphasized this process with regard to the Holy Alliance and indicated parallels to the use of the Security Council by the great powers.

in general commitments forming part of the identity of several European governments.

The manner in which action has been taken, has, however, severely damaged the system of collective security. It has led to widespread perceptions that western states do not accept the authority of the Security Council, but that they pursue hegemonic objectives under the pretext of United Nations authority. Strong efforts to co-operate within the Council in the future are therefore unlikely, while unilateral definition of common interests will spread. The UN Charter's conception that "the Organization only is competent to see the common interest and to use force in supporting it" is therefore likely to remain a hope rather than become a reality.