# Collective Security After "Operation Allied Force"

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## I. Introduction

With the collapse of the communist regimes in eastern Europe and in the Soviet Union and the resulting end of the East-West conflict after 1989, the principal cause of the paralysis of the collective security sys-



*J.A. Frowein and R. Wolfrum (eds.), Max Planck Yearbook of United Nations Law,* 73–106.

tem of the United Nations disappeared, quickly and practically without bloodshed. Optimism concerning the effectiveness of the system as conceived in 1945 seemed therefore justified. However, these hopes have not yet come to real fruition, as was most emphatically demonstrated in the Kosovo crisis in 1999. In any event, enough time seems to have elapsed for attempting to evaluate the progress and shortcomings of the United Nations as a global security organization in the first decade of what many had hoped would be a new, more peaceful era. Such an assessment requires at least a quick glance at the performance of the United Nations during the Cold War period.

## II. The Basic Orientation of the United Nations

Against the backdrop of the horrors of World War II which had just ended, the victorious powers created a new international organization, the United Nations, which came into existence on 24 October 1945. The very first paragraph of the UN Charter spells out the determination of the peoples of the United Nations "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind". Among the purposes of the organization listed in Article 1 of its constituent treaty, the maintenance of international peace and security is therefore mentioned first. This goal is to be achieved by two means set forth in the same paragraph: "effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace ..." and the peaceful settlement of disputes as the preferable alternative.[1]

## III. The Concept of Collective Security

In contradistinction to collective self-defense, a system of collective security provides for joint sanctions by the other Member States against aggressors who also belong to the system.[2]

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1 For a recent discussion of this dimension, see H. Neuhold, "Das System friedlicher Streitbeilegung der Vereinten Nationen", in: F. Cede/L. Sucharipa-Behrmann (eds), *Die Vereinten Nationen. Recht und Praxis*, 1999, 57 et seq.

2 It is a half-way house between the traditional "primitive" self-help system and a world state in which central authorities hold a quasi-monopoly on

The functioning of collective security requires the fulfillment of a number of prerequisites that are not easily met.[3] At the military level, the system must have a sufficient deterrence potential at its disposal. As a result, potential aggressors ought to reckon with such crushing collective sanctions that they refrain from actually attacking other members, even those they can expect to defeat easily in a bilateral confrontation. In a global collective security organization, this precondition implies quasi-universality of membership, i.e., that as many states as possible, above all the great powers, belong to it. Among these major actors, a rough balance of power should prevail, so that no hegemon is in a position to impose its will on the other members.

With respect to the legal foundations of a system of collective security, a clear-cut prohibition of the individual, non-defensive use of force and an equally unambiguous obligation to take enforcement action in clearly defined situations, the *"casus securitatis communis"*, are required. Otherwise members could argue that they are resorting to force that is still permissible, although its results in fact endanger the security of another Member State. In the absence of a "watertight" duty to participate in collective sanctions, members may attempt to avoid the resulting costs by claiming that they are exempted from them or that a given situation is not one requiring enforcement action. Security is a public good; if somebody provides it, others benefit free of charge, hence the temptation to become a "free rider".[4]

These problems are more likely to arise in a decentralized system in which each Member State decides for itself whether an act of aggression

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armed force. The members of a system of collective security maintain national control over their armed forces; they agree, however, not to resort to these forces for offensive purposes but only to use them in order to promote and protect vital common values and interests in accordance with specific rules.

3 I.L. Claude, *Swords Into Plowshares*, 3rd edition, 1964; see also J. Delbrück, "Collective Security", *EPIL* I (1992), 646 et seq.; T. M. Menk, *Gewalt für den Frieden. Die Idee der kollektiven Sicherheit und die Pathognomie des Krieges im 20. Jahrhundert*, 1992; H. Neuhold, "Kooperative Sicherheit — kollektive Sicherheit — kollektive Verteidigung. Eine Bestandsaufnahme aus europäischer Sicht", *Österreichisches Jahrbuch für internationale Sicherheitspolitik* 1997 (1998), 79 et seq.; H. Freudenschuß, "Kollektive Sicherheit", in: Cede/Sucharipa-Behrmann, see note 1, 57 et seq.

4 J. Joffe, "Collective Security and the Future of Europe", *Survival* 34 (Spring 1992), 36 et seq.

has been committed and, consequently, that sanctions are called for. At the organizational level, centralized collective security is therefore preferable. An organ on which only a few members, including the major powers, are represented, ought to decide (a) whether armed aggression or another act prohibited under the system has been perpetrated, (b) against which member(s) (c) which type of enforcement action (military or non-military) (d) by which Member States (all or merely some of them) is to be taken. These decisions made by the body with limited membership must be binding on all states members of the system.

Genuine international solidarity is the critical political requirement for collective security. All members of a global system must regard world peace as indivisible: They must feel directly affected by any illegal resort to force, regardless of where and between which parties it occurs. Consequently, they have to be ready to take part in sanctions, even if this entails considerable costs for them, possibly even the loss of human lives in case of military action. The principle of anonymity means that states belonging to a system of collective security must have no *a priori* friends nor foes if the system has to be activated. They must be impartial in the sense that they are also willing to take enforcement action against another Member State, with which they traditionally have good and close relations, and assist another member, with which they are not on good terms, should the former attack the latter.

## IV. The United Nations System of Collective Security Before the End of the East-West-Conflict

In contradistinction to its *de facto* predecessor, the League of Nations, the United Nations fulfills these preconditions to a high, and for uninformed observers at times surprising, degree — unfortunately, with one decisive exception, which continues to stymie its system of collective security.

Practically all states of the world (except Switzerland and the special case of Taiwan) belong to the organization.

Article 2 para. 4 of the UN Charter outlaws the threat or use of force. Article 2 para. 5 and Article 25 oblige Member States to assist the organization in any action in accordance with its Charter, in particular to carry out the decisions of the Security Council. Thus the above-mentioned legal backdoors are closed.

In the centralized UN system, the Security Council, composed of only 15 out of presently 188 Member States, has been given the power to take the four decisions referred to above. Under Article 39 of the Charter, the collective security system may already be activated if the Council determines the existence of a mere threat to the peace; it does not have to wait for a conflict to escalate to a breach of the peace or act of aggression. In accordance with Arts 41 and 42, the Security Council may choose between measures not involving the use of armed force and military enforcement action. The Council also decides against which state(s) such sanctions are to be applied. Finally, under Article 48, it determines whether its decisions for the maintenance of international peace and security shall be carried out by all UN members or only some of them. As already pointed out, all these decisions of the UN sanctions body are binding on all members of the organization.

Whereas the UN system of collective security thus meets the objective criteria for its effective functioning, its main problem has always been the lack of the fourth prerequisite listed above, genuine international solidarity, above all among the five permanent members of the Security Council. The system is in fact built on the continuing cohesion of the main powers of the anti-Axis coalition in World War II. This coalition was, however, only held together by the need to join forces against otherwise too powerful enemies. Once this single shared objective, the defeat of the common adversaries, was attained, the fundamental conflicts between the Western powers and the Soviet Union, which had only been shelved temporarily but not solved, moved to the forefront again. The result came to be known as the Cold War. One of its consequences was the inability of the main antagonists of the East-West conflict, who were granted a privileged position in the Security Council as the five permanent members endowed with the "veto" power, to reach the necessary agreement for making collective security work.[5]

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[5] However, the realistic choice in 1945 was not between the imperfect system created by the UN Charter and a superior variant not burdened by the "veto", but rather between the actual system or no universal system of collective security at all. The right to obstruct non-procedural decisions of the Council single-handedly was the condition *sine qua non* posed by the Soviet Union for its consent to join the United Nations. Stalin had drawn the obvious lesson from his country's expulsion from the League of Nations after the Soviet attack on Finland in 1939. Whereas a "veto" in a narrow sense signifies the right to block a decision made by somebody else,

During the East-West conflict, the Security Council only managed to resort to Chapter VII enforcement action on three atypical occasions.

A tactical error committed by the Soviet Union enabled the Council to take decisions in the Korean crisis of 1950. In order to protest the non-recognition by most other United Nations members of the People's Republic of China's claim to represent China in the UN, the USSR boycotted the meetings of the Security Council at the time. This did not prevent the other Member States of the Council from adopting resolutions on the Korean issue, disregarding Article 27 para. 3 of the Charter; according to this provision, the concurring affirmative votes of the permanent members are required for decisions on non-procedural matters.

After North Korean forces had launched a large-scale invasion of South Korea across the demarcation line separating the two parts of the country on 25 June 1950, the Security Council declared the attack a threat to the peace and called for the immediate cessation of hostilities and the withdrawal of the North Korean forces across the 38th parallel on the same day.[6] Since this demand fell on deaf ears, the Council recommended that the UN members furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area on 27 June 1950.[7] Ten days later, the Security Council *recommended* that all Member States place their forces and other assistance under a unified U.S. command.[8] Moreover, it *authorized* this unified command to use the UN flag in the course of operations against North Korea.[9]

The subsequent attempt by the West, after the Soviet Union had returned to the Security Council, to "upgrade" the General Assembly, where Western Member States held a comfortable majority at the time, had little practical relevance.[10] According to the "Uniting for Peace

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objection by a permanent member of the Security Council prevents the taking of a decision alltogether.

6 In S/RES/82 (1950) of 25 June 1950.

7 In S/RES/83 (1950) of 27 June 1950.

8 In S/RES/84 (1950) of 7 July 1950; J.L. Kunz, "Legality of the Security Council Resolutions of June 25 and 27, 1950", *AJIL* 45 (1951), 137 et seq.

9 Italics added. The Security Council thus did not enact binding armed enforcement measures under Article 42 of the Charter, but merely enhanced the legitimacy of action taken by what today would be called a "coalition of the able and willing." See below, 84 et seq.

10 A few Emergency Special Sessions of the General Assembly provided for in the "Uniting for Peace Resolution" were held.

Resolution",[11] the Assembly was to step in if the Security Council was blocked due to the lack of unanimity of its permanent members. In any event, all the General Assembly could have done by virtue of this resolution was to merely recommend collective action by Member States, including resort to armed force in the event of a breach of the peace or act of aggression.

Furthermore, after the unilateral declaration of independence by a racist regime in the British colony Southern Rhodesia in 1965, the Security Council determined that the situation there constituted a threat to international peace and security. Therefore, the Council imposed compulsory — first limited and later on comprehensive — embargoes against Southern Rhodesia in 1966 and 1968, respectively.[12] The Security Council even called on Great Britain to use force, if necessary, to prevent the arrival at Beira (a port city in Mozambique) of vessels reasonably believed to be carrying oil destined for Southern Rhodesia.[13]

Acting again under Chapter VII of the Charter, the Security Council regarded the acquisition of war material by South Africa as a threat to the maintenance of international peace and security and consequently voted a mandatory embargo on arms and related material against this state in 1977.[14] Whereas North Korea and Southern Rhodesia were not members of the United Nations, the embargo against South Africa was

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11 A/RES/377 (V) of 3 November 1950. On the legality of this resolution, see H. Kelsen, *Recent Trends in the Law of the United Nations*, 1951, 953 et seq.; L.H. Woolsey, "The Uniting for Peace Resolution of the United Nations", *AJIL* 45 (1951), 129 et seq.; F.A. Vallat, "The General Assembly and the Security Council of the United Nations", *BYIL* 29 (1952), 63 et seq.; J. Andrassy, "Uniting for Peace", *AJIL* 50 (1956), 563 et seq.; E. Jiménez de Aréchaga, *Derecho Constitucional de las Naciones Unidas (Coméntario téorico-practico de la Carta)*, 1958, 197 et seq.; H. Neuhold, *Internationale Konflikte — verbotene und erlaubte Mittel ihrer Austragung*, 1977, 117 et seq.

12 In S/RES/217 (1965) of 20 November 1965; S/RES/221 (1966) of 9 April 1966; S/RES/232 (1966) of 16 December 1966 and S/RES/253 (1968) of 29 May 1968; J. L. Cefkin, "The Rhodesian Question at the United Nations", *International Organization* 22 (1968), 649 et seq.; L. C. Green, "Southern Rhodesian Independence", *AVR* 14 (1968/1970), 155 et seq.; M. S. McDougal and W. M. Reisman, "Rhodesia and the United Nations: The Lawfulness of International Concern", *AJIL* 62 (1968), 1 et seq.

13 In S/RES/221 (1966) of 9 April 1966.

14 In S/RES/418 (1977) of 4 November 1977.

the first enforcement measure adopted against a Member State of the organization.

What the two cases of non-military sanctions had in common was the fact that they were directed against apartheid regimes. Racial discrimination was unacceptable to all major camps in the post-World War II international system, the West, the "socialist" bloc and, of course, the "Third World". Southern Rhodesia and South Africa were the equivalents of today's "rogue states."[15] When it came to taking enforcement action against South Africa, however, the West was not ready to go beyond an arms embargo against an anti-communist state with which it had important economic relations.

In addition, the United Nations developed an activity that contributed to the maintenance or restoration of peace but was not provided for in the Charter.[16] However, these peace-keeping operations — at least their "first generation" variant — may even be considered the opposite of compulsory military sanctions under Article 42, since they essentially are cooperative and not collective security activities.[17] In fact, such missions are not meant to assist the victim(s) of armed attack against the aggressor(s). Instead, they are designed to help all conflicting parties involved to stabilize a precarious settlement on which they have previously agreed, usually a cease-fire. Whereas military enforcement action is inevitably characterized by extreme partiality in favor of the assisted victim of aggression, peace-keeping forces must observe strict objectivity. Moreover, mandatory military enforcement action is solely based on a decision by the Security Council; the consent of the states on which the Council calls for participation, let alone that of the target state(s) of the sanctions, is not needed. By contrast, a peace-keeping mission not only requires a mandate from the Security Council but also the agreement of all the parties to the dispute as well as of the states requested to take part in it. Furthermore, armed sanctions under Article 42 would consist in the use of massive non-defensive force, whereas peace-keepers — who, as a rule, are "underarmed" as compared with

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15 See below, 83.

16 It may be justified, however, by the "implied powers" theory or the functional interpretation of the UN Charter and later on, with sufficient practice and the development of *opinio juris*, on the basis of customary international law.

17 L. Sucharipa-Behrmann, "Die friedenserhaltenden Operationen der Vereinten Nationen", in: Cede/Sucharipa-Behrmann, see note 1, 85 et seq., and the literature cited there.

the conflicting parties — may only use their weapons in self-defense. Finally, if military collective security action is to be effective, the great powers would normally have to bear the brunt of the operation. In contrast, the permanent members of the Security Council were not supposed to participate in peace-keeping missions in order to better isolate the conflict at hand from the rivalries between the great powers.[18]

All in all, the record of the United Nations with regard to the accomplishment of its principal purpose, the maintenance of international peace and security, was disappointing in the era of the East-West conflict. As pointed out above, the main reason for the failure of collective security was, clearly, the fundamental disagreement between the Cold War blocs. This led to the frequent exercise of the "veto" by the permanent members of the Security Council, almost 300 times altogether.[19]

## V. The New Political Environment After the End of the East-West-Conflict

Recent progress achieved by the United Nations as a security institution as well as the organization's continuing deficiencies can only be fully understood against the backdrop of the changes that have occurred in international relations in the wake of the end of the East-West conflict; only those of particular relevance to the topic under discussion can be mentioned here.

At the structural level, the bipolar system has given way to a trend toward unipolarity. The United States remains the only superpower that clearly dominates in the military and economic fields as well as in the equally important realm of "soft power", setting trends in the media, fashion, entertainment and lifestyle in general.[20]

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18 This is not to say that all these rules where strictly complied with in all peace-keeping operations prior to the end of the East-West conflict. For instance, UNTEA (United Nations Temporary Executive Authority) in West Irian was charged with extensive non-military tasks; the Security Council authorized ONUC (*Opération des Nations Unies au Congo*) to resort to non-defensive force; Great Britain took part in UNFICYP (United Nations Peace-Keeping Force in Cyprus).

19 Freudenschuß, see note 3, 74.

20 R.N. Haass, "What to Do With American Primacy?, *Foreign Aff.* 78 (September/October 1999), 37 et seq.; S. Huntington, "The Lonely Superpow-

The new military situation is characterized by positive and negative developments. On the one hand, the specter of all-out nuclear war that could annihilate mankind as a whole has receded into the background. Headway has been made in the areas of nuclear and conventional disarmament through the conclusion of the START and CFE (Conventional Armed Forces in Europe) treaties and agreements. On the other hand, the two major nuclear powers, the United States and the Russian Federation, will still possess "overkill capabilities" even after the entry into force of the START Treaties. Moreover, the proliferation of weapons of mass destruction rightly causes growing concern.[21] Conventional disarmament has been limited to Europe. In addition, we have witnessed the return of conventional war as a "practicable" continuation of politics by other means, above all in Europe. Political leaders may again, as in the pre-nuclear age, resort to armed force without having to fear the almost automatic, lethal escalation of military hostilities across the nuclear threshold.

The end of the comprehensive and global East-West conflict between two irreconcilable ideological systems did facilitate subsequent cooperation between the parties involved. As a result, the common value platform of the international community has been enhanced beyond physical survival. More and more states are embracing pluralistic democracy, Western-type human rights, the rule of law and the principles of market economy.[22]

Yet growing ideological commonalties do not exclude further conflicts between states.[23] Nor do all states accept Western political values. On the contrary, one author even predicted that a "clash of civilizations" would become the principal conflict pattern after the Cold War.[24] Even though this development may not be a foregone conclusion, there

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er", *Foreign Aff.* 78 (March/April 1999), 35 et seq.; W.C. Wohlforth, "The Stability of a Unipolar World", *Survival* 24 ( Summer 1999), 5 et seq.

21 R.K. Betts, "The New Threat of Mass Destruction", *Foreign Aff.* 77 (January/February 1998), 26 et seq.

22 These shared basic community values are reflected in international law in the concepts of *jus cogens*, obligations *erga omnes* and international crimes as defined by the ILC. See below, 100.

23 This is particularly true of the great powers in their pursuit of the goals of traditional power politics. Relations among the permanent members of the Security Council have in fact cooled in recent years after the initial euphoria at the end of the Cold War.

24 S.P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, 1997.

is no denying that religious and political fundamentalists, with weapons of mass destruction more and more easily within their reach and their resort to "cyberwarfare" looming large, pose an increasingly serious threat.

To make matters worse, conflict potential abounds in today's world. Claims that communism and "socialist internationalism" had eliminated the root causes of intrastate and international conflicts have turned out ill-founded. Ethnic, religious and territorial disputes have broken out again with renewed vigor in eastern Europe; their origins frequently date back to past centuries. They are exacerbated by political instability and economic difficulties in the countries concerned. In Africa, a bloody prize has often to be paid for the application of the *uti possidetis* rule in the decolonization process, i.e., the acquisition of statehood within the former colonial boundaries that had frequently been drawn arbitrarily by the colonial powers. Ethnic/tribal violence has erupted within heterogeneous populations in young states that "inherited" such artificial borders.

Another disturbing development has been the growing number of "rogue states". Their governments brazenly disregard the very principles of the international legal order and are ready to face sanctions for the illegal resort to force against other states or for large-scale atrocities.[25] In "failed states", equally massive violations of basic human rights may occur because the central and local authorities have lost control over the country.[26]

As a result of the above-mentioned developments, internal conflicts often fought with almost boundless brutality[27]are replacing international disputes as the main security challenge.

Another factor relevant to the topic under discussion is the growing impact of public opinion, which is increasingly sensitive to human rights issues, on political decisions, at least in multi-party democracies. Public opinion is, in turn, shaped by the media, in particular television. Shocking pictures of atrocities or starving refugees lead to outcries for swift action. However, if the first casualties — even when professional soldiers are involved — are reported and the first body bags are shown,

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25 As pointed out above, such states are not a novel phenomenon, however. The apartheid regimes in South Africa and Southern Rhodesia already fell into this category. See above, 79 et seq.

26 D. Thürer/M. Herdegen/G. Hohloch, "Der Wegfall effektiver Staatsgewalt (The Failed State)", *DGVR* 34 (1996), 9 et seq.

27 As, for example, in the former Yugoslavia and Rwanda.

the public emphatically demands that a military operation be stopped immediately.[28] An actor that plays a more and more important role in this context is the NGO, in particular in the areas of human rights and the protection of the environment. Although the material resources of these organizations may be negligible, even the governments of great powers and mighty transnational corporations ignore NGOs like Amnesty International or Greenpeace at their peril.

## VI. Increased Security Council Activism in the Post-Cold War Era

### 1. Authorization of the Use of Armed Force by the Security Council

Although the East-West conflict characterized by diametrically opposed ideological and *Realpolitik* positions of the political camps involved has come to a close, military collective security continues to remain a dead letter in the UN context. The Security Council has failed to take any action by air, sea or land forces under the strategic direction of the Military Staff Committee composed of the Chiefs of Staff of the Council's permanent members as provided for in Arts 42 and 47 of the Charter, although the need for such measures has arisen on more than one occasion in the 1990s. No agreements between the Security Council and Member States under Article 43 have been entered into. These agreements on the armed forces, assistance and facilities to be made available by UN members are necessary to enable the Council to take military enforcement measures of its own. The conclusion of these agreements appears even less likely today than right after the 1989/90 political watershed because of the above-mentioned strains on great power relations.

The Council has resorted, however, to the then atypical Korean precedent of 1950 several times. Instead of taking action itself, it authorized Member State(s) able and willing to do so to use armed force in international as well as internal conflicts. The most spectacular example of such a "franchise operation" for the restoration of international

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[28] Especially in the United States, the loss of American human lives in military missions abroad is deemed unacceptable. Hence, superior technology, in particular bomber attacks and long-range missiles, is to assure victory, whereas ground forces should only be used as a means of last resort.

peace and security was furnished by Council Resolution 678 of 29 November 1990 in the Gulf conflict that was caused by the invasion of Kuwait by Iraqi forces in 1990. Acting under Chapter VII of the Charter, the Security Council authorized Member States cooperating with the government of Kuwait to use all necessary means to uphold and implement Resolution 660 of 2 August 1990 and all subsequent relevant resolutions and to restore international peace and security in the area. All (other) states were requested to provide appropriate support for what was named "Operation Desert Storm" under the leadership of the United States.[29] Other examples include the conflicts in the former Yugoslavia, Somalia, Haiti and Rwanda.[30]

## 2. Non-Military Sanctions

The Security Council has adopted non-military sanctions much more frequently than in the past. Such measures were applied against "rogue states", such as Iraq, Somalia, the Federal Republic of Yugoslavia (FRY), Haiti, Rwanda and Sierra Leone. The most recent recourse to such enforcement action at the time of writing was Security Council Resolution

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[29] Opinions are divided on the legal basis of this type of military action. Some authors regard it as the exercise of the right of collective self-defense under Article 51 of the Charter expressly restated by the Security Council. Others wonder why resort to this "inherent" right needs to be authorized. Instead, these writers refer to a functional interpretation of the Charter and point to its Article 48: Since, by virtue of this provision, the Security Council may determine that all or just some Member States shall carry out its decisions for the maintenance of international peace and security, it must *a maiore ad minus* also be deemed to have the lesser power of a mere authorization. K. Zemanek, "The Legal Foundations of the International System: General Course in Public International Law", *RDC* 266 (1997), 23 et seq., (299 et seq.), and the works quoted there.
For the purposes of the present discussion, there is no need to decide whether military operations conducted by a single state or a coalition that is able and willing to embark on them are an exercise in self-defense, "indirect collective security" or based by now on customary law. What counts is the fact that the legality of such forcible action is generally accepted.

[30] For a brief description of these and other operations, see Freudenschuß, see note 3, 79 et seq.; for a more detailed analysis, see A.F. Bauer, *Effektivität und Legitimität. Die Entwicklung der Friedenssicherung durch Zwang nach Kapitel VII der Charter der Vereinten Nationen unter besonderer Berücksichtigung der neueren Praxis des Sicherheitsrats*, 1996, 113 et seq.

1267 of 15 October 1999 against the Taliban in Afghanistan for their refusal to extradite Usama bin Laden who had been indicted for the bombings of the U.S. embassies in Nairobi and Dar es Salaam in 1998. The Council imposed a flight boycott on Taliban aircraft and froze Taliban financial assets.

The application of economic sanctions gives rise to a familiar dilemma.[31] On the one hand, the international community should not limit its response to major breaches of international law to verbal condemnations and then return to "business as usual" sooner or later. On the other hand, economic enforcement measures tend to hurt those whom they are meant to help, namely the population as a whole that usually has no say in the decision to violate their state's international legal obligations. If such sanctions are effective, they are likely to result in mass poverty, unemployment and declining health standards, especially among women and children and the old. By contrast, the political elites responsible for their country's illegal conduct hardly suffer at all, although they may resent travel restrictions or the freezing of their bank accounts abroad. Their domestic position might even be strengthened, because international pressure could make it easier for them to denounce political opponents as traitors. Moreover, non-military measures are frequently slow in producing their intended effects; more often than not, loopholes and possibilities of circumvention exist and are exploited, be it for political reasons or the financial profits involved.[32]

## 3. "Second-Generation" Peace-Keeping Operations

The post-Cold War era has witnessed the launching by the United Nations of so-called second-generation peace-keeping operations — missions with broader mandates and involving higher numbers of military as well as civilian personnel than traditional "first-generation" peace-

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31 M. Miyagawa, *Do Economic Sanctions Work?* 1994; J. Stremlau, *Sharpening International Sanctions: Towards a Stronger Role for the United Nations*, 1996; M. Doxey, *United Nations; Sanctions: Current Policy Issues*, 1997; H.K. Ress, *Das Handelsembargo*, 2000.

32 The above-mentioned cases of recent UN sanctions, in particular those adopted against Iraq and the FRY, furnish ample evidence of these problems. In addition, economic enforcement measures may also cause damage to the states that apply them.

keeping.[33] These forces were charged with military tasks beyond direct self-defense, such as keeping supply routes open, the enforcement of no-fly zones or the protection of "safe areas". In addition, they were entrusted with non-military, political-administrative responsibilities. These functions included assistance in the process of democratic "nation building", above all the organization and supervision of free and fair elections, the maintenance of law and order by police forces and far-reaching contributions to the administrative, legislative and judicial reorganization of a state. Moreover, such missions also provided humanitarian aid.

Second-generation peace-keeping operations were not always backed by the consent of all parties to the conflict. This handicap confronted them with a dilemma: If they wished to preserve their crucial credibility, they had to resort to non-defensive force, thereby losing their equally essential impartiality in the eyes of those against whom they took military action. Unlike in "classical" peace-keeping, the great powers also participated in this new type of mission.

The three major operations of this kind which took place on three different continents — UNPROFOR (United Nations Protection Force) in Europe, UNOSOM (United Nations Operation in Somalia)/ UNITAF (Unified Task Force) in Africa and UNTAC (United Nations Transitional Authority in Cambodia) in Asia[34] — have shown the weaknesses and limits of peace-keeping: the shortcomings of the UN infrastructure, the lack of personnel with adequate training for their specific tasks and the reluctance of Member States to provide the necessary funds. The most serious problem, however, were ambitious mandates conferred by the Security Council on peace-keeping forces that lacked the means to carry them out. The most dramatic illustration of the inability of underarmed peace-keepers to fulfill their assigned tasks was the failure of UNPROFOR to prevent the conquest of safe areas in Bosnia and the subsequent massacers by Serb forces there.[35]

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33 F.-E. Hufnagel, *UN-Friedensoperationen der zweiten Generation. Vom Puffer zur Neuen Treuhand*, 1996.

34 J. Mayall (ed.), *The new interventionism: United Nations experience in Cambodia, former Yugoslavia and Somalia*, 1996.

35 Another innovation was the preventive deployment of a peace-keeping force with the stationing of UNPREDEP (United Nations Preventive Deployment Force) in Macedonia (FYROM) by virtue of S/RES/795 (1992) of 11 December 1992. Such an operation may have a particular stabilizing effect by dissuading the conflicting parties from resorting to force and as a

## 4. "Enforcement by Consent"

The introduction of "enforcement by consent" remedied this deficiency. Such operations are different in principle[36] both from military measures in the context of collective security and peace-keeping missions. They are designed to assure compliance by conflicting parties with a settlement which these parties have reached, including its military terms. Sufficiently numerous and well-armed forces are deployed that should prevent, for instance, the breach of an armistice or the reintroduction of troops into areas from which they had to withdraw. Such operations are thus similar to effective military sanctions in that they can also successfully overcome armed resistance; they are different from such measures and resemble peace-keeping missions by being based on the specific consent of the parties to the conflict.

A case in point was IFOR (Implementation Force) which was established by Security Council Resolution 1031 of 15 December 1995 in the context of the peaceful solution to the conflict in and over Bosnia and Herzegovina brought about by the Dayton/Paris Peace Agreements of 1995. Determining that the situation in the region continued to constitute a threat to international peace and security and acting under Chapter VII of the UN Charter, the Council authorized the Member States acting through or in cooperation with NATO[37] to establish a multinational implementation force under unified command and control. Its task was to fulfill the role specified in Annex 1-A and Annex 2 of the Peace Agreement.[38] The first instrument dealt with the Military Aspects of the Peace Settlement (above all, the cessation of hostilities, the withdrawal of foreign forces from and the redeployment of forces in Bosnia and Herzegovina), the second with the Inter-Entity Boundary Line (in particular the delineation, marking, description and adjustment of the line[39] in which IFOR was to participate).[40] Resolution 1031 also

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special confidence–building measure. Sucharipa-Behrmann, see note 17, 90 et seq.

36 In practice, the lines between these different types of operations may be blurred.

37 The Atlantic Alliance was not mentioned by name but as "the organization referred to in Annex 1-A of the Peace Agreement". In general, Resolution 1031 can hardly be called a model of simple and elegant drafting.

38 Para. 14.

39 It may be recalled that the territory of the Republic of Bosnia and Herzegovina was divided between the Federation of Bosnia and Herzegovina (it-

authorized the Member States taking part in IFOR to take all necessary measures to effect the implementation of and to ensure compliance with Annex 1-A, stressed that the parties shall be subject to such enforcement action by IFOR as may be necessary to ensure implementation of that Annex and the protection of IFOR, and took note that the parties had consented to IFOR's taking such measures.[41] The Security Council also recognized even more explicitly that the parties had authorized IFOR to take such actions as required, including the use of necessary force, to ensure compliance with Annex 1-A.[42]

With some 60,000 troops and also equipped with heavy weapons, IFOR, which initially was to be deployed for just approximately one year,[43] had the necessary clout to deter the parties from violating the obligations they had undertaken. IFOR, which replaced the ill-fated UNPROFOR, was in term succeeded by SFOR (Stabilization Force), whose numerical strength was approximately half of IFOR's, for an indefinite period.[44]

## 5. "Humanitarian Intervention" by the Security Council

Another noteworthy extension of the Security Council's activities has been its growing involvement in internal crises that apparently do not entail the risk of leading sooner or later to an interstate armed conflict. The UN system of collective security as designed in 1945 right after the most horrible war that had ever afflicted mankind focused on peace un-

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self a Bosnian/Croat construct) and the Republika Srpska according to a 51/49 territorial ratio.

40 Texts in *ILM* 30 (1996), 91 et seq., and 111 et seq.

41 Para. 15.

42 Para. 5.

43 Para. 13.

44 Whereas the military part of the peace plan for Bosnia and Herzegovina has, on balance, been successfully implemented, some of the civilian aspects still leave a great deal to be desired. This is particularly true of the return to a multi-ethnic and multi-cultural society through the return of refugees and economic recovery. H. Riegler, *Einmal Dayton und zurück. Perspektiven einer Nachkriegsordnung im ehemaligen Jugoslawien*, 1999.

derstood as the absence of armed violence.[45] This orientation does not prevent the Council, however, from also taking action in domestic conflicts. For Article 2 para. 7 of the Charter exempts the application of enforcement measures under Chapter VII from the principle of non-intervention by the United Nations in matters which are essentially within the domestic jurisdiction of any state.

As was noted above, the typical conflict of the 1990s has been internal and not international. Moreover, the international community is more determined than previously to try stopping large-scale violations of human rights within states which the media regularly bring to its attention in shocking detail — not that action is taken, however, in each and every such case. The Security Council declared that massive violations of humanitarian law such as "ethnic cleansing" constituted threats to the peace, although the only actual or possible transboundary spill-over, if any such extension was to be feared at all, was the flow of refugees seeking shelter abroad and not the spread of armed hostilities to other, in particular neighboring, countries.[46] Examples include the humanitarian catastrophes in Bosnia, Somalia and Rwanda.[47] The Security Council did not always bother to mention explicitly its goal to maintain or restore international peace and security.

## 6. The International Criminal Tribunals for the Former Yugoslavia and Rwanda

The Security Council also ventured into uncharted legal territory by setting up, in 1993, the International Tribunal for the Prosecution of

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45 Defined as "negative peace" by "critical" peace research. J. Galtung, "Gewalt, Frieden und Friedensforschung", in: D. Senghaas (ed.), *Kritische Friedensforschung*, 1971, 55 et seq.

46 H. Gading, *Der Schutz grundlegender Menschenrechte durch militärische Maßnahmen des Sicherheitsrates — das Ende staatlicher Souveränität?* 1996.

47 This development was not a complete novelty, however. The Council had already set a precedent in the 1960s when it resorted to sanctions against Southern Rhodesia. By contrast, international ramifications were referred to in S/RES/418 of 4 November 1977 in which the Security Council imposed an arms embargo against South Africa. In the second preambular paragraph, the Council recognized that the military build-up by South Africa and its persistent acts of aggression against the neighboring states seriously disturbed the security of those states.

Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia[48] and, in 1994, the International Tribunal for Rwanda.[49] The establishment of these tribunals raised questions regarding the limits of the powers of the Security Council.[50] In particular, were these measures adequate to deal with the threat to international peace and security posed by the situation in those two countries? One may indeed wonder whether individual criminal responsibility for grave breaches of international humanitarian law was relevant to collective security as defined in this article. However, since no Member State of the UN officially objected that the Council had acted *ultra vires*, differences of opinion on this issue are primarily of academic interest. Yet it is worth noting that there were misgivings about an excessively powerful Security Council, whose permanent members would form a directorate governing the world.

## VII. Resort to Armed Force Without Authorization by the Security Council

On the one hand, the past decade has thus seen an increasingly active and dynamic Security Council that has engaged in new activities and areas in its efforts to cope with challenges to peace and security. This was made possible by a broader platform of common values and interests within the Council, above all among its permanent members. On the other hand, a negative trend — at least with respect to the UN system of collective security — must also be noted. If and when the Security Council could not agree to take or authorize action in a crisis situation, Western states took the law — or what they considered the law — into their own hands and used armed force against "rogue states" without an unambiguous mandate from the Council.

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48 S/RES/827 (1993) of 25 May 1993.

49 S/RES/955 (1994) of 8 November 1994.

50 E. David, "Le Tribunal international pénal pour l'ex-Yougoslavie", *RBDI* 25 (1992), 565 et seq.; A. Pellet, "Le Tribunal criminel international pour l'ex-Yougoslavie", *RGDIP* 98 (1994), 7 et seq; D. Shraga and R. Zacklin, "The International Tribunal for the Former Yugoslvavia", *EJIL* 5 (1994), 360 et seq.; Zemanek, see note 29, 204 et seq.; C. Greenwood, "The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia", *Max Planck UNYB* 2 (1998), 97 et seq.

## 1. Unilateral Western Enforcement of Humanitarian and Disarmament Obligations Against Iraq

The first case in point was provided by the establishment of no-fly zones in Iraq in 1991 and 1992.[51] They were designed to protect the Kurds in the north and the Shiites in the south of the country from attacks by the Iraqi air force. Compliance with this prohibition was verified by U.S., British and initially also by French military aircraft. When Iraq failed to respect the zones and its air-defense artillery fired at Western patrol planes, the latter opened fire in turn. By mid-August 1999, U.S. and British planes had launched more than 1,100 missiles against Iraqi targets, about two thirds of the sum total of these weapons used during the entire "Operation Allied Force" against Yugoslavia in 1999.[52]

The three Western powers failed to produce a consistent and detailed legal justification for enforcing the no-fly zones over Iraq, understandable and acceptable as their actions against a dictator slaughtering his own population may have been from a moral and political point of view. The legal basis most frequently invoked was Security Council Resolution 688 of 5 April 1991. In this resolution, however, the Council had condemned the repression of Iraqi civilians but had not granted any authorization to any state(s) to resort to armed force in general nor to set up no-fly zones in particular. Quite significantly, the Western powers argued that they were acting in support of Resolution 688, pursuant to Security Council resolutions or in accordance with the spirit of Resolution 688.[53] Other reasons they relied on included recourse to Security Council Resolution 678[54] which was said to permit action to enforce Resolution 688 as a "subsequent" resolution within the meaning of the former resolution. Moreover, Great Britain pointed to an extreme humanitarian need and an overwhelming humanitarian necessity that were supposed to legalize the resort to military force even in the absence of a UN resolution to this effect. The United States also referred to its containment policy against Iraq.

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51 P. Malanczuk, "The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War", *EJIL* 2 (1991), 114 et seq.

52 *International Herald Tribune* of 14/15 August 1999.

53 On the following, see N. Krisch, "Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council", *Max Planck UNYB* 3 (1999), 61 et seq., (75 et seq.), and the sources quoted there.

54 See above, 84 et seq.

The basic problem with these justifications is that *de lege lata* only two exceptions to the prohibition in Article 2 para. 4 of the UN Charter are recognized: Force may be used legally in the exercise of the right to individual or collective self-defense under Article 51 or pursuant to a decision or authorization by the Security Council within the framework of Chapters VII or VIII. Neither exception obtained in the case of the no-fly zones. The legality of "humanitarian intervention" without authorization by the Security Council has no sufficient foundation in existing international law.[55] The invocation of Resolution 678 is pointless because the subsequent resolutions mentioned therein are those following Resolution 660 and not Resolution 678 itself.[56]

It should also be noted that numerous states, including two permanent members of the Security Council, namely China and the Russian Federation, as well as the Non-Aligned Movement as a whole, objected to Western air attacks on Iraq.[57]

The United States and the United Kingdom nevertheless launched "Operation Desert Fox", also against Iraq, but this time because of the refusal of Saddam Hussein's regime to abide by its disarmament obligations, in late December 1998. The crisis was triggered by Iraq's objections to the inspection of some of its strategic sites by members of UNSCOM as required by Security Council Resolution 687 of 3 April 1991. A peaceful solution seemed to have been achieved in February 1998 through an agreement reached with Iraq by UN Secretary-General Kofi Annan backed up by US threats to resort to force. After further Iraqi tergiversations and American and British threats, the two Western powers eventually ordered air strikes on targets in Iraq on 16 December 1998 without involving the Security Council.

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55 See below, 99 et seq.

56 The key para. 2 of Resolution 678 reads as follows: "The Security Council ... Authorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area".

57 See para. 235 of the Final Document of the 12th Summit of the Non-Aligned Movement in Durban from 29 August to 3 September 1998: "The Heads of State or Government deplored the imposition and continued military enforcement of 'No-Fly Zones' on Iraq by individual countries without any authorisation from the UN Security Council or General Assembly (sic!)".

Apart from the failure of the raids to achieve their military and political goals,[58] the United States and the United Kingdom again skated on thin legal ice.[59] They argued that since Iraq had violated its disarmament-related obligations under Resolution 687 that had declared a cease-fire, the authorization to use force granted in Resolution 678 had revived. The United States and Great Britain also relied on Resolution 1154 of 2 March 1998 and Resolution 1205 of 5 November 1998, respectively. In the first resolution, the Council had announced the severest consequences if Iraq did not live up to its duties to permit verification by UNSCOM and the IAEA, whereas in the second it found that Iraq had flagrantly violated these obligations.

The principal difficulty with these justifications once again is the silence of those resolutions on any authorization of any Member State(s) to use force in order to make Iraq abide by its duties. On the contrary, in the final paragraph of Resolution 687 the Security Council decided to remain seized of the matter and "to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the region". In a similar vein, in Resolution 1154 the Council made it clear that it would remain concerned with the matter and ensure itself the implementation of the resolution. In Resolution 1205, it decided to remain actively seized of the matter.

It is one thing for the Security Council to determine the existence of one of the situations listed in Article 39 of the UN Charter; it is quite another thing to agree what, if any, forcible action to deal with the situation is to be taken by whom at which point in time. The debates in the Council that preceded the adoption of the three above-mentioned resolutions confirm this view.

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58 To reduce Iraq's capability to threaten neighboring countries and the world with weapons of mass destruction by imposing controls and to oust Saddam Hussein. After the departure of UNSCOM, UN inspectors have yet to return to Iraq. "Operation Desert Fox" apparently even strengthened Sadam Hussein's regime internally and weakened whatever opposition to it existed.

59 A "Legal" Assault: Experts Cite UN and U.S. Resolutions, *International Herald Tribune* of 18 December 1998. In favor of the legality of the operation 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.; against it 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.; Krisch, see note 53, 64 et seq.

It should also be borne in mind that the majority of the international community, led once more by China and Russia, opposed "Operation Desert Fox" as clearly illegal.

## 2. "Operation Allied Force": A Negative Turning Point for Collective Security?

### a. The Evolution of the Kosovo Crisis in 1998/99

The most spectacular and controversial resort by Western states to armed force considered by them as law enforcement against a "rogue state" without authorization by the Security Council was "Operation Allied Force" against the FRY in the spring of 1999. The regime of President Slobodan Milošević embarked on the systematic repression of the Albanian minority in the FRY; at the same time, these Albanians constituted the overwhelming — approximately 90 % — majority of the population in the Yugoslav Province of Kosovo whose autonomy Milošević had abolished in 1989. Little international attention was paid to the peaceful and passive resistance of the Kosovo Albanians under the leadership of Ibrahim Rugova. It was only when the Kosovo Liberation Army (KLA) launched its armed struggle, which was met by increased brutality on the Serb side, that the international community, in particular also the Security Council, became involved in the Kosovo conflict.

In its Resolution 1160 of 31 March 1998, the Security Council, acting under Chapter VII of the UN Charter, called upon the FRY and the leadership of the Kosovar Albanian community to achieve a political solution through a meaningful dialogue and imposed an arms embargo on the FRY, including Kosovo.[60] The Council also emphasized that failure to make constructive progress towards the peaceful resolution of the situation in Kosovo would lead to the consideration of additional measures.[61]

As armed hostilities nevertheless spread almost to the entire territory of Kosovo and the flow of refugees swelled dramatically from about 25,000 in the spring of 1998 to approximately 265,000 by mid-Septem-

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60 The ban included the arming and training for terrorist activities (para. 8 of Resolution 1160).

61 Para. 19 of Resolution 1160.

ber of the same year, NATO prepared for military action by conducting air maneuvers over neighboring Albania and Macedonia.[62]

On 23 September 1998, the Security Council voted Resolution 1199 in which it affirmed that the situation in Kosovo constituted a threat to peace and security in the region.[63] Acting under Chapter VII, the Council demanded the immediate cessation of hostilities and the withdrawal of Yugoslav security units used for civilian repression. It also decided, should the concrete measures demanded in this resolution and Resolution 1160 not be taken, to consider further action and additional measures to maintain or restore peace and stability in the region.[64]

Under the threat of NATO's Activation Order of 12 October that set the stage for air attacks by the alliance, U.S. Special Envoy Richard Holbrooke persuaded President Milošević, on the following day, to agree to end offensive operations and to reduce Yugoslav security forces in Kosovo. Compliance with these pledges was to be monitored by a NATO and an OSCE mission, respectively. The Security Council called for the full implementation of the FRY's commitments and endorsed the verification agreements in its Resolution 1203 of 24 October 1998.[65] As in the Iraqi crisis earlier on in February, it looked as if brinkmanship had succeeded and a military showdown had been averted at the very last moment. In both cases, however, hopes that agreements reached

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62 P. Jurekovič, "Die politische Dimension des Krieges im Kosovo und in der BR Jugoslawien: Konfliktentwicklung, politische Initiativen der Staatengemeinschaft, Auswirkungen auf das Umfeld", in: E. Reiter (ed.), *Der Krieg um das Kosovo 1998/99*, 1999, 39 et seq., (49).

63 Although the Kosovo conflict was essentially an internal Yugoslav issue, it did have international implications due to transborder refugee movements to Albania and Macedonia and KLA operations from there. The strong response to the Kosovo crisis by Western governments was guided in part by their reluctance to admit large numbers of Kosovar refugees to their own countries and concern over regional destabilization as a result of the inflow of refugees and fighters from Kosovo into these two economically weak and politically unstable neighboring countries.

64 Para. 16 of Resolution 1199. Quite significantly, the paragraphs in Resolutions 1160 and 1199 in which the Security Council refers to measures it may consider in the event of non-compliance are not mentioned by R. Wedgwood who is rather sympathetic to "Operation Allied Force." R. Wedgwood, "NATO's Campaign in Yugoslavia", *AJIL* 93 (1999), 828 et seq.

65 The Council again affirmed that the unresolved situation in Kosovo constituted a continuing threat to peace and security in the region.

under the threat of armed force were dashed, since both Saddam Hussein and Slobodan Milošević later on reneged on their commitments and decided to "call the bluff".

The initial withdrawal of part of the Serb forces in accordance with the Holbrooke-Milošević agreement permitted the KLA to strengthen its position and to extend its armed activities. This led to new Serb offensives which culminated in "Operation Horseshoe" directed not only against KLA fighters but also including the systematic expulsion of Kosovar civilians. In particular, news of a massacer of Kosovars by Serb forces in the village of Racak on 15 January 1999 shocked Western public opinion. Negotiations at Rambouillet and in Paris in February and March 1999 failed to bring about the FRY's consent to the peace plan submitted by the so-called Contact Group on Yugoslavia[66] that was eventually accepted by the delegation of the Kosovo Albanians. This time, a last-minute effort by Mr. Holbrooke to persuade President Milošević to give in fell on deaf ears. Thereupon NATO began its air attacks on the FRY on 24 March 1999, again without previously raising the matter in the Security Council. A draft resolution condemning the air raids tabled in the Council two days later obtained only three votes in favor (China, Namibia, Russia). "Operation Allied Force" ended on 10 June after the FRY had at last accepted a peace scheme that was based on the principles agreed on by the foreign ministers of the G-8[67] on 6 May at the Petersberg Center near Bonn.

In Resolution 1244 of 10 June 1999, the Security Council welcomed the acceptance by Yugoslavia of this plan and decided that it shall provide the foundation for a political solution to the Kosovo crisis. In particular, the Council decided on the deployment in Kosovo, under UN auspices, of "international civil and security presences, with appropriate equipment and personnel as required".[68] In other words, the Council authorized the establishment of KFOR (Kosovo Force), another "enforcement by consent" operation.[69]

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66 The major powers whose interests are particularly affected by the Balkan conflicts: France, Germany, Italy, the Russian Federation, the United Kingdom and the United States.

67 The seven major Western industrial powers Canada, France, Germany, Italy, Japan, United Kingdom and the United States, as well as the Russian Federation.

68 Para. 5.

69 It was charged, *inter alia*, with deterring hostilities, maintaining and where necessary enforcing a cease-fire, and ensuring the withdrawal and prevent-

"Operation Allied Force" epitomized the above-mentioned post-Cold War political realities: A "rogue state" that had already been involved in previous armed conflicts increasingly characterized by atrocities (Slovenia, Croatia, Bosnia and Herzegovina) was again committing massive violations of human rights, this time those of its own population. Extensive media, especially television, coverage of the growing humanitarian disaster in Kosovo mobilized Western public opinion. The governments of NATO states felt that they could not ignore demands to take effective action in order to enforce political values on whose universal validity the West insisted. The members of the Atlantic Alliance also believed that they could exploit their military superiority without having to worry about an escalation of the conflict as a result of other states, in particular major powers, providing military assistance, above all troops, to the FRY. Since it was a foregone conclusion that China and Russia would oppose an authorization of "Operation Allied Force", the Security Council was bypassed.

### b. The Legal Dimension

In the public debate on NATO air raids against the FRY, the legal aspects were again neglected.[70] The two key arguments advanced to jus-

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ing the return into Kosovo of Yugoslav forces, as well as demilitarizing the KLA and other armed Kosovo Albanian groups (para. 9 (a) and (b) of S/RES/1244).

70 By contrast, the issue of the legality of NATO air attacks on the FRY has given rise to extensive discussions among numerous international lawyers, whose opinions, at least in the West, are divided. See A. Cassese, "*Ex iniuria ius oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?", *EJIL* 10 (1999), 23 et seq.; J.I. Charney, "Anticipatory Humanitarian Intervention in Kosovo", *AJIL* 93 (1999), 834 et seq.; C.M. Chinkin, "Kosovo: A "Good" or "Bad" War?", ibid., 841 et seq.; J. Delbrück, "Effektivität des UN-Gewaltverbots. Bedarf es einer Modifikation der Reichweite des Art. 2 (4) UN-Charta?", *Die Friedens-Warte* 74 (1999), 139 et seq.; R.A. Falk, "Kosovo, World Order, and the Future of International Law", *AJIL* 93 (1999), 847 et seq.; P. Fischer, "Der gerechte Krieg im Kosovo", *Die Universität* (publication of the University of Vienna), June 1999, 15; T.M. Franck, "Lessons of Kosovo", *AJIL* 93 (1999), 857 et seq.; C. Guicherd, "International Law and the War in Kosovo", *Survival* 41 (1999), 19 et seq.; L. Henkin, "Kosovo and the Law of "Humanitarian Intervention", *AJIL* 93 (1999), 824 et seq.; P. Hilpold, "Auf der Suche nach Instrumenten zur Lösung des Kosovo-Konfliktes: Die trügerische Faszination von Sezession

tify "Operation Allied Force" were the enforcement of the above-mentioned Security Council resolutions threatening unspecified sanctions in case of non-compliance and the prevention of a humanitarian disaster, reviving the discussion about the lawfulness of the so-called humanitarian intervention.

Neither argument, however, is convincing. As pointed out above, the general application of Chapter VII by the Security Council and the determination of a threat to the peace by it[71] does not empower individual members to take what they regard as the necessary measures to deal with the situation; they are not allowed to act as substitutes for the Council if the latter does not agree on concrete enforcement action. This remains true although in Resolution 1203 the Security Council welcomed agreements concluded by the FRY under the threat of force by NATO. Nor does it make a legally relevant difference that in this last resolution preceding "Operation Allied Force" the Council did not mention the consideration of further action and additional measures as it had in Resolutions 1160 and 1199.[72]

The refusal of a clear majority of the Council members to condemn NATO's bombing campaign did not signify approval of "Operation Allied Force" by the Security Council, all the more so because two permanent members voted for the draft resolution that denounced the

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und humanitärer Intervention", in: J. Marko (ed.), *Gordischer Knoten Kosovo/a: Durchschlagen oder entwirren?*, 1999, 157 et seq.; K. Ipsen, "Der Kosovo-Einsatz - Illegal? Gerechtfertigt? Entschuldbar?", *Die Friedens-Warte* 74 (1999), 19 et seq.; H.F. Köck, "Legalität und Legitimität der Anwendung militärischer Gewalt. Betrachtungen zum Gewaltmonopol der Vereinten Nationen und seiner Grenzen", *Zeitschrift für öffentliches Recht* 54 (1999), 133 et seq.; Krisch, see note 53, 79 et seq.; H. Neuhold, "Die "Operation Allied Force" der NATO: rechtmäßige humanitäre Intervention oder politisch vertretbarer Rechtsbruch?", in: Reiter, see note 62, 193 et seq.; W.M. Reisman, "Kosovo's Antinomies", *AJIL* 93 (1999), 860 et seq.; A. Roberts, "NATO's Humanitarian War", *Survival* 41 (1999), 102 et seq.; C. Schreuer, "Is there a Legal Basis for the NATO Intervention in Kosovo?", *International Law FORUM du droit international* 1 (1999), 151 et seq.; B. Simma, "NATO, the UN and the Use of Force: Legal Aspects", *EJIL* 10 (1999), 1 et seq.; S. Stadlmeier, "Völkerrechtliche Aspekte des Kosovo-Konflikts", Österreichische Militärische Zeitschrift 37 (1999), 567 et seq.; C. Tomuschat, "Völkerrechtliche Aspekte des Kosovo-Konflikts", *Die Friedens-Warte* 74 (1999), 33 et seq.; Wedgwood, see note 64.

71 As in S/RES/1199 (1998) and S/RES/1203, see above, 96.

72 See above, 95. Moreover, the Council decided to remain seized of the matter not only in S/RES/1160 and S/RES/1199 but also S/RES/1203.

air raids. Moreover, the negative vote of some Member States of the Council was not due to their support for the operation but rather to the lop-sided wording of the draft that failed to mention the violation of Security Council resolutions by the FRY.[73]

Especially if one assumes that the Security Council may authorize the resort to force also implicitly and after the event, the question arises whether Resolution 1244 may have provided such an indirect and subsequent authorization. However, in this Resolution the Council merely welcomed the solution brought about by NATO's air strikes but did not pronounce on their legality on which opinions remained sharply divided.

The controversies about humanitarian intervention highlight one of the central dilemmas of international law: a conflict between two of its most important principles that have attained equal superior rank and both reflect fundamental values of the international community.[74] That the prohibition of the threat or use of force belongs to these basic rules is stating the obvious. In the age of weapons of mass destruction, a breach of this prohibition may even entail the annihilation of mankind as a whole. Another achievement of modern international law of similar importance is the respect for human rights and fundamental freedoms. States are not free any more to treat individuals, above all their own nationals, as they deem fit.[75] It is only appropriate that both principles are generally regarded as *jus cogens* and as having *erga omnes* effects and that they have been included by the ILC in the category of norms whose violation constitutes an international crime and entails special consequences for the perpetrator.[76]

However, which of the two principles is to prevail if resort to armed force not covered by the two exceptions to the prohibition of the use of force in Article 2 para. 4 of the UN Charter seems to be the only means to prevent a state from committing massive violations of basic human rights?

It seems morally and politically unacceptable that the international community should have to sit idly by while a ruthless dictator engages

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73 Krisch, see note 53, 84 et seq.

74 B. Simma, "From Bilateralism to Community Interest in International Law", *RDC* 250 (1994), 229 et seq.

75 Aliens enjoyed a minimum of rights also under traditional international law. R. Arnold, "Aliens", *EPIL* I (1992), 102 et seq.

76 For further details see H. Neuhold, "The Foreign-Policy 'Cost-Benefit Analysis' Revisited", *GYIL*, forthcoming, and the literature quoted there.

in the "ethnic cleansing" of part of his country's population. The legal dilemma could be solved if existing international law recognized the lawfulness of "humanitarian intervention", i.e., the use of force to protect the nationals of another state at least against large-scale atrocities by their own authorities.[77] It is submitted, however, that no such third exception to the ban on force exists.

Those who consider humanitarian intervention permissible *de lege lata* under very strict conditions cannot point to any treaty supporting their view. Nor can they prove sufficient practice and *opinio juris* to establish a foundation under customary international law. The few precedents in recent decades — like the military interference by India in East Pakistan in 1971, by Vietnam in Cambodia in 1978 and by Tanzania in Uganda 1979 — met with widespread protests and were, moreover, mainly justified as exercises of the right of self-defense. Humanitarian interventions by European great powers in the colonial period, for instance in Syria in 1860/61, are even less relevant to modern international law after the entry into force of the prohibition in Article 2 para. 4 of the Charter. Moreover, as recently as 1986, a document of the British Foreign and Commonwealth Office contested the legality of humanitarian intervention — Great Britain thus radically changed its mind after the end of the East-West conflict![78] Also in 1986, the ICJ rejected the

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77 On this issue in general, see U. Beyerlin, "Humanitarian Intervention", *EPIL* 3 (1982), 926 et seq.; W.D. Verwey, "Humanitarian Intervention and International Law", *NILR* 32 (1985), 357 et seq.; M. Bothe, "The Legitimacy of the Use of Force to Protect Peoples and Minorities", in: C. Brölmann/R. Lefeber/M. Zieck (eds), *Peoples and Minorities in International Law*, 1993, 290 et seq.; C. Greenwood, "Gibt es ein Recht auf humanitäre Intervention?", *EA* 48 (1993), 93 et seq.; P. Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force*, 1993; H.-J. Blanke, "Menschenrechte als völkerrechtlicher Interventionstitel", *AVR* 36 (1998), 257 et seq.; K. Doehring, *Völkerrecht. Ein Lehrbuch*, 1998, 431 et seq.; D. Kritsiotis, "Reappraising Policy Objections to Humanitarian Intervention", *Mich.J.Int'l L.* 19 (1998), 1005 et seq.; F. R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, 1998; F. Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, 1999; Danish Institute of International Affairs, *Humanitarian Intervention: Legal and Political Aspects*, 1999; K. Zemanek, "Hat die humanitäre Intervention Zukunft?", in: E. Reiter (ed.), Jahrbuch für internationale Sicherheitspolitik 2000 (2000), 183 et seq.

78 "But the overwhelming majority of contemporary legal opinion comes down against the existence of a right of humanitarian intervention, for three main reasons; first, the UN Charter and the corpus of modern inter-

use of force by the United States to ensure the respect for human rights in Nicaragua.[79]

It is also highly doubtful whether a right to humanitarian intervention will emerge in the future, even if very restrictive conditions are attached to it, such as its availability as a means of last resort, compliance with the principle of proportionality, its exercise by a group of states and not a single state and support for a concrete operation by a majority of the international community.[80] It should be borne in mind that "Operation Allied Force" was widely and vehemently criticized outside the Euro-Atlantic region — were it only because the human rights records of many states, including China and the Russian Federation, are not beyond reproach.

This writer believes that on balance priority should still be given to the ban on force and that "Operation Allied Force" was not in conformity with international law — yet morally tenable and politically inevitable.[81]

There may indeed be situations in which notions of justice are at odds with existing law. If one does not regard law as an end in itself and as a supreme value, one can live with such discrepancies if they remain sporadic. Moreover, to open the Pandora's box of declaring humanitar-

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national law do not seem to specifically incorporate such a right; secondly, state practice in the past two centuries, and especially since 1945, at best provides only a handful of genuine cases of humanitarian intervention, and, on most assessments, none at all; and finally, on prudential grounds, that the scope for abusing such a right argues strongly against its creation." Foreign and Commonwealth Office, Foreign Policy Document No. 148, *BYIL* 57 (1986), 614 et seq., (619).

79 "In any event, while the United States might form its own appraisal of the situation as to the respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect." ICJ Reports 1986, 14 et seq., (134).

80 Cassese, see note 70.

81 Other arguments in favor of the lawfulness of "Operation Allied Force", for instance on the basis of a general principle of law or an analogy extending the right of self-defense that Article 51 of the UN Charter grants to states to assistance to repressed peoples or minorities also lack a sufficient foundation *de lege lata*. Neuhold, see note 70, 201 et seq. Furthermore, since NATO does not want, for various reasons, the Kosovo Albanians to form a state of their own, it did not invoke the controversial right to provide military aid to them in the exercise of their right to self-determination as a people.

ian intervention legal may entail consequences that are undesirable from a political point of view. It increases the risk of similar action by other states in situations where those supporting the air raids in the Kosovo crisis may hardly welcome the resort to force.

## VIII. Conclusions

The post-Cold War record of the UN system of collective security and the Security Council as its central institution is thus rather mixed. On the one hand, the system has been activated much more frequently in the 1990s than in previous decades in the area of non-military sanctions. However, this type of enforcement action was slow to produce the intended results, if it was effective at all. The Security Council was innovative in the field of peace-keeping, although "second-generation" operations ran into difficulties because the means at their disposal did not match their ambitious mandates. Military enforcement measures taken by the Council itself still remain a dead letter. The Council has tried to remedy this deficiency by authorizing states able and willing to do so to resort to military force in order to maintain and restore peace. "Enforcement by consent" is an interesting new variant in this context. The Security Council has also developed an increasingly broad notion of threats to the peace. There even have been concerns about the transformation of the Council into a world government.

On the other hand, the system and the Council are in the throes of a double crisis. The legitimacy of the Security Council is increasingly contested.[82] The composition of this body, in particular the privileged position of its permanent members, endowed with the "veto" power, reflects the political realities of more than half a century ago and is widely criticized as out of tune with the needs of today's world. A reform of the Council appears rather unlikely, however, since all the permanent members would have to agree to any amendment or revision of the Charter[83] and do not seem ready to see their domination eroded.

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

83 Arts 108 and 109 of the Charter. W. Karl/B. Mützelburg, "On Article 108" and, "On Article 109", in: B. Simma et al. (eds), *The Charter of the United Nations: A Commentary*, 1995, 1163 et seq.; see also in this respect I. Winkelmann, "Bringing the Security Council into a New Era", *Max Planck UNYB* 1 (1997), 35 et seq.

The Council is also accused of applying a double standard in its practice of resorting to sanctions.

Moreover, Western air raids against Iraq and, above all, "Operation Allied Force" have dealt severe blows to the Security Council's authority. Efforts at justifying these armed attacks on the basis of previous Council resolutions without an additional, specific authorization were hardly convincing. The Security Council was ostentatiously bypassed in all three cases mentioned above. In the Kosovo crisis, it was eventually used to sanction a solution which the FRY accepted after President Milošević realized that his apparent strategy to wait for an early end to the bombings due to dissent within NATO and for Russian assistance had failed.

It is not yet clear whether NATO Member States will rely on "Operation Allied Force" as a precedent for similar action on behalf of Western values and/or interests in the future or whether it will remain an atypical episode. In particular, will the Atlantic Alliance consider the backing of military operations, above all its ill-defined "crisis response operations", by the Security Council, if not in advance, then at least afterwards, as essential or merely as desirable, but not indispensable? The ambiguous formulations concerning this issue in the new Strategic Concept adopted at the NATO summit in Washington on 23/24 April 1999 while "Operation Allied Force" was in progress[84] and conflicting statements by leading politicians and the chief administrative officer of the alliance at that meeting do not permit a definitive answer to this question.[85]

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84 See, in particular, point 15 of this Concept, which in part restates Article 24 of the UN Charter: "The United Nations Security Council has the *primary* responsibility for the maintenance of international peace and security and, as such, plays *a* crucial role in *contributing* to security and stability in the Euro-Atlantic area" (italics added). This wording may reopen the debate to which the "Uniting for Peace" resolution adopted by the UN General Assembly in 1950 , gave rise: Does the "primary" responsibility of the Council leave room for a "secondary" role, this time not for the General Assembly but for the Atlantic Alliance or individual Member States beyond individual or collective self-defense, if the Security Council fails to take the necessary action to cope with a threat to the peace? See above, 78 et seq.

85 French President Jacques Chirac regarded authorization by the Security Council as necessary, for German Federal Chancellor Gerhard Schröder it was needed "as a rule", whereas NATO Secretary-General Javier Solana denied this requirement. *Die Presse* of 26 April 1999.

In this context, it may also be pointed out that in the above-mentioned cases the use of military force was not totally independent of the Security Council. The Council had brought Chapter VII into play, had agreed on the existence of a threat to the peace and had also envisaged subsequent measures against the state responsible for the threat. Hence the Western powers did not "go all the way" in the direction of unilateral enforcement, since the direction had indeed been indicated by the sanctions organ of the UN. The Security Council also reappeared on the scene after "Operation Allied Force" had achieved its objectives and accepted the settlement agreed on by the parties. The damage to the Council's authority was thus limited to a certain extent; it remained severe enough, however, because of the challenge to the Council's monopoly on enforcement action under the UN Charter.

Another question mark concerns NATO's ambitions to act as a "global policeman". Whereas the Washington Strategic Concept focuses on security in the Euro-Atlantic area, reference is made to the need to also take account of the global context.[86]

This does not mean that the Security Council has been completely sidelined after the Kosovo crisis. As has already been mentioned, it adopted non-military sanctions against the Taliban later in 1999.[87] Moreover, it launched another "enforcement by consent operation" in East Timor to which the Indonesian government had eventually agreed.[88] The Council authorized the states participating in the operation to take all necessary measures to fulfill its mandate that included the restoration of peace and security in East Timor.[89] This multinational force was to be replaced as soon as possible by a UN peace-keeping operation.[90]

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86 Point 24 of the Strategic Concept.

87 See above, 85 et seq.

88 By then, pro-Indonesian militias, in addition to killing thousands, had expelled or deported about half of the East Timorese population of approximately 800,000, after an overwhelming majority of some 80 % had voted in favor of independence in a referendum on 30 August 1999.

89 Para. 3 of S/RES/1264 (1999) of 15 September 1999.

90 Para. 10 of S/RES/1264 (1999). The Security Council thereby clearly distinguished between these two types of operations. The peace-keeping force was established as the military component (with a strength of up to 8,950 troops and up to 200 military observers) of UNTAET (United Nations Transitional Administration in East Timor) by S/RES/1272 (1999) of 25 October 1999.

On balance, the system of collective security of the UN, despite some progress since the end of the Cold War, still leaves a great deal to be desired and has even suffered resounding setbacks in recent years. Conflicts continue to pit UN Member States, in particular also major powers, against one another. It must unfortunately be doubted whether the permanent members of the Security Council as the key actors will find it easier to act jointly in the near future. Russia is at present riding on the crest of anti-Western and nationalistic feelings in the wake of the Kosovo crisis and the armed conflict in Chechnya. China, still not a democracy by any stretch of the imagination, is looking for an independent great power role in world politics and is at odds with its Western counterparts over a number of issues. Even the Western states have reasons to worry about the state of transatlantic relations. It will therefore remain difficult to reach the necessary agreement within the Security Council in a concrete crisis on a common assessment of the situation and the measures that ought to be taken to deal with it. If the Council is paralyzed, it is difficult to predict whether Western powers will resist the temptation to go it alone — at least as long as their present superiority will last into the 21st century.