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INGER ÖSTERDAHL

THREAT TO THE PEACE

THE INTERPRETATION BY THE SECURITY COUNCIL OF ARTICLE 39 OF THE UN CHARTER

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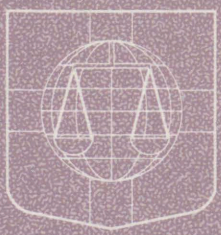

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Threat to the Peace

The interpretation by the Security Council of Article 39 of the UN Charter

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Abbreviations

AJICL	African Journal of International and Comparative Law
AJIL	American Journal of International Law
Dec.	Decision
Doc.	Document
ECOMOG	Economic Community of West African States Cease-fire Monitoring Group
ECOWAS	Economic Community of West African States
EJIL	European Journal of International Law
FNLA	National Front of Liberation of Angola
GA	General Assembly
HRQ	Human Rights Quarterly
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
IFOR	Peace Implementation Force
ILC	International Law Commission
IS	International Security
MICIVIH	International Civilian Mission in Haiti
MISAB	Inter-African Mission to Monitor the Implementation of the Bangui Agreements
MPLA	Popular Movement for the Liberation of Angola
NATO	North Atlantic Treaty Organization
No.	number
OAS	Organization of American States
OAU	Organization of African Unity
Op.	Operative
p	page
Para.	Paragraph
Pre.	Preambular
Res.	Resolution
RGDIP	Revue Générale de Droit International Public
SC	Security Council
Sipri	Stockholm International Peace Research Institute

SFOR	Stabilization Force
UK	United Kingdom
UN	United Nations
UNAMIR	United Nations Mission in Rwanda
UNHCR	United Nations High Commissioner for Refugees
UNITA	National Union for the Total Independence of Angola
UNITAF	Unified Task Force
UNMIH	United Nations Mission in Haiti
UNOMIL	United Nations Observer Mission in Liberia
UNOSOM	United Nations Operation in Somalia
UNPREDEP	United Nations Preventive Deployment Force
UNPROFOR	United Nations Protection Force
UNTS	United Nations Treaty Series
US	United States of America
ZaöRV	Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht

1. Introduction

The way in which the United Nations (UN) Security Council has interpreted the notion of "threat to the peace" in Article 39 of the UN Charter has been the object of intense debate since the beginning of the 1990s. The debate was triggered by the increased activity of the Security Council after the end of the Cold War. The activity on the part of the Security Council seemed to be combined with a tendency on its part to interpret extensively the idea of a "threat to the peace". Many different situations not necessarily entailing a threat to the peace according to the ordinary sense of the term were seen by the Security Council as constituting such a threat.

Considering the almost limitless powers of the Security Council under Chapter VII of the UN Charter and bearing in mind that the determination of a situation as a threat to the peace is the key to these powers, this tendency on the part of the Council to expand the meaning of threat to the peace in Article 39 has been regarded as potentially threatening by many countries and observers, particularly by countries belonging to the Third World. On the other hand, those countries and observers who support the recent activities of the Security Council have tended to emphasize the very fact that the Security Council is finally acting at all and claim that the SC is at last fulfilling its mission under the Charter.

However, after a hectic period in the early 1990s, when there was over-optimism concerning the presumed capabilities of the Security Council and the UN, the level of activity of the Security Council had again declined by the middle of the decade. This decline in the number of actions decided upon by the Security Council corresponds in time with the rather dispirited and uncertain international mood which has succeeded the generally optimistic outlook on the development of international relations once the Cold War was over.

Now, in the late 1990s the international scene seems to give evidence of yet another reshuffled set of circumstances in contrast to what the world looked like in the immediate post-Cold War era, but this time the result of the reshuffle is more complex than it seemed to be then. The rising optimism of the early 1990s soon waned, expectations were less in

evidence. By the mid- 1990s international developments suddenly seemed more uncertain, less obvious and less predictable than was imagined immediately after the fall of the Berlin Wall with its ensuing global wave of liberalization and democratization.

The shift in the global political climate corresponds quite well with the shift in the degree of activity within the Security Council. Between 1988 and 1994 the Security Council adopted more resolutions than ever before, the big upsurge beginning in August 1990 with the case of Iraq and Kuwait.[1] Thereafter there was a marked decrease in the number of resolutions adopted[2] and few decisions on collective enforcement measures under Chapter VII of the UN Charter have been taken since. It is not the permanent Cold War deadlock which has reappeared in the Security Council, but rather something resembling a transitionary standstill which, it would seem, will either prevail or could trigger yet another period of upsurge in Security Council activities. This present standstill in Security Council activity is obviously not due to superpower rivalry since there is currently only one superpower.

What is more serious, however, is that the current standstill in Security Council activity may be due to the fact that the sole remaining superpower, the United States, is simply acting unilaterally and is no longer using the collective machinery of the Security Council, not even in order to lend an air of international legitimacy or decency to what is in reality a unilateral policy.

Whether the other permanent members of the Security Council agree or not to the plans of the United States, if the United States decides to act unilaterally the Security Council will not be convened at all. The likelihood of this scenario is greatest of course in the cases where one or several permanent members cannot be brought to agree with the United States. However, if the United States, or some other superpower, becomes sufficiently dominant, the point is that the Security Council will in any case stand to lose a great deal of credibility and legitimacy. Regardless of whether such a dominant superpower acts unilaterally or

[1] Cf. UN Secretary-General, Boutros, Boutros-Ghali, *Building Peace and Development*, 1994, Report on the Work of the Organization from the 48th to the 49th Session of the General Assembly (UN General Assembly document (doc.) number (no.) A/49/1 of 28 February 1995), pp 12–15.

[2] Cf. UN Secretary-General, Boutros, Boutros-Ghali, *Confronting New Challenges*, 1995, Report on the Work of the Organization from the 49th to the 50th Session of the General Assembly (UN General Assembly doc. no. A/50/1 of 22 August 1995), pp 16–22; and UN Secretary-General, Boutros, Boutros-Ghali, *The 50th Anniversary, 1996, Annual Report on the Work of the Organization*, from the 50th to the 51st Session of the General Assembly (UN General Assembly doc. no. A/51/1 of 22 August 1996), pp 13–20.

through the Security Council the only option open to the Security Council will be to act as a function of the superpower. In other words, if the superpower acts unilaterally the Security Council will be inactive (because any countermeasures will be vetoed by the superpower) and if the superpower acts within the Security Council the Security Council will fall in with the wishes of the superpower.

What should be considered the normal level of activity of the Security Council, however, is as yet an open question. It seems as if most observers considered the high level of activity of the Security Council immediately after the post-1989 thaw as the normal one and one common observation was that the Security Council had finally started working as had been originally planned.[3]

According to this view then, the Cold War paralysis that gripped the Security Council would have been regarded as abnormal. Only time and practice will tell what the normal or average level of activity of the Security Council actually is. It may be that the Cold War period was normal in this sense, whereas the post-Cold War period which has just ended was in fact abnormal. Perhaps the Security Council was not even originally intended to take much action,[4] and was perhaps only set up to appear to be active and efficient, since in reality everyone could foresee and even appreciate the deadlock in the Security Council caused by the right of veto combined with the rivalry between the then two superpowers.[5]

[3] Cf. Koskenniemi, Martti, "The Place of Law in Collective Security", *Michigan Journal of International* Law, vol. 17, 1996, (pp 455–490) p 460; Higgins, Rosalyn, *Problems and Process. International Law and How We Use It*, 1994, p 184.

[4] Evan Luard seems to be of the opinion, however, that the subsequent lack of action on the part of the Security Council was not something which was brought about deliberately by the drafters of the Charter but depended on a number of defects in the UN system which were inadequately perceived at the time (Luard, Evan, *A History of the United Nations*, Vol. 1: The Years of Western Domination, 1945–1955, pp 87–90).

[5] Not thinking of the veto but of the inclusion of the "'inherent' right of individual or collective self-defence" in the UN Charter (Article 51) until the Security Council has taken measures necessary to maintain international peace and security, and of the possibility provided for in Article 53(1) of enforcement action being taken under regional arrangements or by regional agencies against "enemy states" or measures being taken in regional arrangements directed against a renewal of aggressive policy on the part of any such state (until, it may be noted, such time as the UN may, at the request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state), Evan Luard comments: "It is arguable that these changes brought a significant alternation in the emphasis of the Charter taken as a whole. Instead of a system in which the Security Council was the only body responsible for dealing with breaches of the peace all over the world (even if it might authorise action on its behalf by a regional organisation), it might now become a system in which breaches of the peace were met in the first place by action taken by individual states or groups of states, while only at some subsequent stage would the Security Council be called on to take action if necessary. In other words, it made

Even so, according to the original conception the Security Council can hardly have been expected to take action on humanitarian grounds, i.e. to regard human rights crimes as a threat to the peace. Nor can it reasonably be assumed that the drafters of the UN Charter would have expected the Security Council to take military enforcement action in the forms it has recently undertaken, i.e. by authorizing individual Member States to take military action. According to the original conception under Article 43 of the UN Charter there were to be standing military forces at the disposal of and under the control of the Security Council whenever the Security Council decided on military enforcement measures. No such UN forces, however, have ever been established. And, in line with what was said above concerning Security Council action on the whole and for the same reasons, one may wonder if the realization of the original plans for standing military forces at the disposal of the Security Council was ever seriously envisaged at all.

The form for military action which has become the most common recently is the authorization by the Security Council of military action undertaken primarily by one country, supported to a larger or lesser extent by a number of other countries. This action is led and controlled by the initiating country; so far the United States, France and Italy respectively have acted as such, and the role of the Security Council is in practice reduced to legitimizing the military action and, having done that, to step aside.[6] The countries who have led the military action have been important regional powers acting within their respective "spheres of influence", a fact which, among other circumstances, have caused considerable controversy concerning this mode of action.[7]

Compared with the original ideas about the way in which the Security Council would act militarily – on its own and pursuant to the conclusion of agreements under Article 43 of the UN Charter – the recent practice of collectively authorizing what in reality amounts to unilateral action at

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it substantially less likely that the new UN enforcement machine would ever come into use, and more likely that conflict situations would be dealt with in the traditional way, as for hundreds of years before" (Luard, ibid., p 54). And to this pessimistic observation one has to add the right of veto of the permanent members of the Security Council, which made and still makes it even less likely that the UN enforcement machine will come into use.

[6] Cf. Freudenschuss, Helmut, "Between Unilateralism and Collective Security: Authorizations of the Use of Force by the UN Security Council", *European Journal of International Law (EJIL)*, vol. 5, 1994, pp 492–531; Quigley, John, "The 'Privatization' of Security Council Enforcement Action: A Threat to Multilateralism", *Michigan Journal of International Law*, vol. 17, no. 2, 1996, pp 249–283.

[7] Concerning the resurgence of the idea of spheres of influence (which it should be added has no legal validity) see Moreau-Desfarges, Philippe, "Vers le retour des zones d'influence?", *Défense nationale*, vol. 51, 1995, pp 75–80.

least results in some kind of action. Lacking standing UN forces the alternative would be no action at all. This may have in fact been the original conception of the role of the Security Council; even if decisions were possible despite the right of veto in the Security Council, at least military action would be impossible because of the foreseeable lack of standing forces at the disposal of the Security Council. In any case the original conception of the role of the Security Council in maintaining international peace and security is not solely determinative of how the Charter should be construed today.[8]

Turning from the real to the desired level of activity of the Security Council, the rising and declining degree of activity on the part of the Security Council is not something necessarily good and bad respectively. A rising degree of activity on the part of the Council may coincide and has coincided with a wide interpretation by the Council of its powers under the Charter; for instance, its interpretation of what constitutes a "threat to the peace" in Article 39, which is focussed on here.

Every country may appreciate that the Cold War deadlock in the Security Council has loosened up and that the Security Council is able to act according to the mandate it has been given under the Charter. Every country may also appreciate that a lot of resolutions have been adopted recently by the Security Council as a sign of the disappearance of the deadlock. The issue becomes more complicated, however, if the adoption of the resolutions and the possible ensuing collective measures decided upon by the Council are based on a far-reaching interpretation by the Security Council of its powers under Chapter VII of the Charter. That may be too high a price to pay for Security Council activity according to some countries who would prefer a restrictive interpretation of Chapter VII even if it leads to less activity in the Council.

There is also the question touched upon above of how the Security Council should take action if it manages to reach a determination of the existence of a "threat to the peace" which adds to the overall complexity of the picture. The prospect of unilateral military action authorized by the Security Council may be frightening enough for some countries to make them prefer no action at all.

The possible benefits and drawbacks involved in the different ways of construing Articles 39 et seq. in Chapter VII of the UN Charter, and in the different degrees of activity on the part of the Security Council which ensue, will be discussed in detail later in this study. Some possible reasons

[8] For a comprehensive account of different methods of interpreting the UN Charter, see the chapter entitled "The Interpretation of the Charter" in *The Charter of the United Nations*, Simma, Bruno (ed.), 1994, pp 25–44.

behind the increase and decrease in Security Council activity will also be discussed. At this stage suffice it to say that the number of Security Council resolutions adopted rose in the early 1990s and then fell a couple of years later.

The curve showing the degree of activity of the Security Council in terms of resolutions adopted, or at least the rising part of it, happened to correspond with a similar upsurge globally in the interest in human rights and democracy. The connection is natural in that the upsurge in activity of the Security Council came about largely as a result of the democratization of the former Soviet Union and the ensuing halt in the use of the veto by the latter. But the next step taken by the Security Council was to start defining crimes against human rights and lack of democracy as a "threat to the peace" under Article 39 of the UN Charter, and this was followed by a decision by the Security Council to take collective enforcement measures designed to protect human rights and democracy in certain countries where human rights and democracy were seriously threatened. Many of the resolutions adopted by the Security Council under Chapter VII during the first years of the 1990s were actually concerned with specific issues of serious human rights violations and other forms of serious human suffering.

It may be that the curve is going downward globally also as regards the interest in human rights and democracy, and this may reflect the extent of the real commitment of political leaders to human rights, if it ever existed.Also on the external official level, however, it seemed that interest in human rights and democracy had weakened by the mid-1990s.[9] There is no necessary correlation between a possible decreasing

[9] However, according to the annual surveys of the state of freedom in the world carried out by the organization Freedom House in New York there is no marked negative trend. In *Freedom in the World* 1995/96 there is a chart showing how many countries were rated Free, Partly Free, and Not Free respectively from 1986 to 1996. In 1986 the number of countries rated Free was 56, Partly Free were also 56 countries, and 55 were rated Not Free. In 1996 the number of countries rated Free was 76, Partly Free were 62 countries, and 53 were rated Not Free (Karatnycky, Adrian, "The Comparative Survey of Freedom 1995–1996. Democracy and Despotism: Bipolarism Renewed?", in *Freedom in the World* 1995/96, (pp 3–13) p 8 ("The Global Trend")). On the other hand, as far as the part of the world's population is concerned, the percentage of people living in Free countries has sunk from its top level ever of 39.23 % in 1991 to 19.55 % in 1996 (ibid., p 4). This, it should be added, occurred at the same time as the number of formal democracies was continually growing (ibid., pp 4–5). In 1993, there was a dramatic rise in the number of countries rated Not Free by Freedom House, from 38 to 55. This corresponded primarily to a corresponding drop in the number of Partly Free countries. It was African countries above all that descended from Partly Free to Not Free (Karatnycky, Adrian, "The Comparative Survey of Freedom 1993–1994: Freedom in Retreat", in *Freedom in the World* 1993/94, (pp 3–9) p 4).

interest in human rights and the decreasing number of Security Council resolutions. It may be argued, however, that when the interest in human rights was strong the Security Council was also prepared to act for their enforcement, and that this was evidenced by the great number of resolutions adopted on this subject in the early 1990s. Accordingly, it may also be argued that the decline in the number of resolutions with the purpose of protecting human rights adopted by the Security Council evidences a similarly declining interest in human rights and their effective protection.

It may also be argued, however, that neither the rise, nor in particular the fall, in the number of resolutions adopted by the Security Council on the subject of human rights is correlated to any possible rise or fall in the global concern for human rights, but that the activities of the Security Council can and should be explained by completely different factors. Irrespective of the correct explanation, the issue of human rights and democracy was markedly present on the international agenda at the same time as the Security Council took an unprecedented number of resolutions which in their turn were mainly concerned with the protection of human rights. International interest in the issue of human rights and democracy seems to have weakened at the same time as the number of resolutions adopted by the Security Council declined – either temporarily or for a long time to come. On the face of it these phenomena seem at least to have something to do with each other.

This uncertain period in time, following on the unprecedented activity of the Security Council in the post-Cold War years and before a new definite period has set in (in contrast to the diffuse one of the mid- and late-1990s), offers a good opportunity for an evaluation of the resolutions adopted in the early 1990s by the Security Council under Chapter VII, in order to see in what way the Security Council has construed the Charter, and also in what way the construction of the Charter by the Security Council may have affected the import of the rules laid down therein.

As far as the activities of the Security Council are concerned the current period may be characterized as the calm after the storm – more precisely Operation Desert Storm in Iraq, with everything that happened in its wake in the Security Council – or as the calm before the storm if there is to be a renewed upsurge in Security Council activity.

The fact that at the moment fewer resolutions are adopted by the Security Council, and in particular fewer resolutions determining the existence of a "threat to the peace" and laying down different kinds of collective enforcement measures, does not necessarily mean that nothing is being done by the Security Council. The Security Council may, for instance, adopt resolutions also under Chapter VI in order to try to settle conflicts peacefully before going on to use the more intrusive methods

available to it under Chapter VII. The downward trend in the number of resolutions adopted under Chapter VII has not, however, been compensated by a corresponding upward trend in resolutions under Chapter VI. Neither have any larger peace-keeping operations under Chapter VI been launched since 1994 (nor under Chapter VII). The current intermission in the activities of the Security Council seems to manifest itself all along the line. It remains to be seen whether the pause will be temporary or prolonged. In any case the time would be right for consideration of what was achieved during the years before there was a pause.

In the analysis of the recent activities of the Security Council it is important not to get carried away by the international mood which currently reigns. In the early 1990s it was too easy to be overly optimistic about the capacity and capability of the Security Council to counter threats to and breaches of the peace, and by the middle and end of the 1990s it is too easy to become overly pessimistic. À propos of the difficulty of evolving a long-run perspective on global transformations and on the roles the UN can play in them James Rosenau writes "[w]e are inclined either to locate our empirical assessments in our value preferences or to attach significance to the latest trend and allow our judgments to fluctuate with shifts in the course of events".[10]

The risk is equally big, of course, for international lawyers as it is for observers of international relations coming from other fields. Since lawyers are normative by definition the risk of personal values influencing the observations made at a certain point in time may be even bigger in the field of international law than in other fields of social science.As far as lawyers are concerned the observations made mostly concern the content of the law at that particular point in time. Although no-one is perfect, being aware of the risk may help to check one's impulses stemming from value judgments and so ensure an analysis that is as impartial and lasting as possible.

The rest of this study is divided into four parts. Section 2 will deal with different legal issues emanating from the recent wide interpretation on the part of the Security Council of the concept of "threat to the peace". It will deal with the notion of "threat to the peace" as such in Article 39, with the mandate of the Security Council under Chapter VII of the UN Charter, with the means by which the Security Council has enforced its decisions under Chapter VII, and with Article 2(7) of the Charter and the limits of domestic jurisdiction. The discussion will focus on questions rather than answers; it will point out problems rather than try to present solutions.

[10] Rosenau, James, *The United Nations in a Turbulent World*, 1992, p 9.

In section 3 the cases in which the Security Council has determined the existence of a threat to the peace and in which it has usually decided on collective enforcement measures since the end of the Cold War will be examined through the legal framework drawn up in part one. The principal empirical basis for the discussion will be the resolutions adopted by the Security Council. Some general conclusions relating to past experiences and, more adventurously, to the future will be drawn in sections 4 and 5 respectively. The study is essentially legal but will take political arguments and realities into consideration as far as practicable.

2. Issues

2.1 The notion of "threat to the peace" in Article 39 of the UN Charter

2.1.1 International or domestic threat?

The Security Council shall, according to Article 39 of the UN Charter, determine the existence of any threat to the peace, breach of the peace or act of aggression. At the time of the drafting of the UN Charter what were considered to constitute "threats to the peace" were arguably military threats to international peace.[1] These were conflicts of the kind the world had come to know and to fear the most when the UN Charter was drafted, and from the formal point of view the notion of a threat to international peace was well suited to the idea of international law as dealing solely with international relations and not with intranational ones, such as civil strife and the treatment by a government of its own subjects, for example.[2]

Both the preconditions present when the UN Charter was drafted have since changed. Certainly the world still fears international armed conflict especially since the advent of nuclear weapons, but since World War II the most common kind of armed conflict by far has been the civil war, not the international war.[3] As concerns the nature of the "threat" itself

[1] Cf. Kelsen, Hans, *The Law of the United Nations*, 2nd impression, 1951, p 930; cf., however, also Goodrich, Leland M.; Hambro, Edvard; and Simons, Anne Patricia, who show that the issue was disputed from the very beginning, *Charter of the United Nations*, 3rd ed., 1969, p 296.

[2] For a discussion of the corresponding inter-/intranational dichotomy in international relations theory, see, for example, Brown, Chris, *International Relations Theory. New Normative Approaches*, 1992.

[3] According to the *Sipri Yearbook* 1997, 27 internal major armed conflicts were going on in 24 countries around the world in 1996 (Part I. "Security and conflicts, 1996", Chapter 1. "Major armed conflicts", Margareta Sollenberg and Peter Wallensteen, pp 17–30). There was only one interstate conflict, between India and Pakistan. "Major armed conflict" is defined

the general understanding of what constitutes a threat to the peace has undergone radical transformation. Today it has become almost trivial to point out that not only military but also social, political, economic, humanitarian, ecological and other non-military factors may constitute threats to the peace, domestic or international.[4] At the official level the climax so far of the qualitative expansion of the notion of "threat" to the peace was reached at the first meeting of the Security Council at the level of Heads of State and Government in January 1992.[5]

From the formal point of view the idea that "threat to the peace", and also international law in general, relate solely to interstate relations has also undergone radical changes since the time the UN Charter was drafted. Through its practice the Security Council has shown that it takes into consideration as a "threat to the peace" also a situation which emanates from within one country only and which does not really threaten anything more than the domestic peace of one country.

It is true, however, that in most cases the situations which, even though essentially internal, are serious enough to deserve the label "threat to the peace" in the view of the Security Council, will sooner or later constitute a threat also to neighbouring countries and will thereby become a threat to international peace in the true sense of the term. If nothing else, serious humanitarian crises will surely generate flows of refugees to neighbouring countries.

In Africa, primarily but not exclusively, the fact that the domestic *conflicts* are often ethnically based, together with the fact that the same people often live on either side of official boundaries separating states, easily contribute to making domestic conflicts indirectly international. If a

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as "prolonged combat between the military forces of two or more governments, or of one government and at least one organized armed group, and incurring the battle-related deaths of at least 1,000 people for the duration of the conflict" (ibid., p 17).

[4] Cf., for instance, *World Security. Challenges for a New Century*, Eds. Michael T. Klare and Daniel C. Thomas, 1994.

[5] "The absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to international peace and security", in UN Security Council Doc. S/23500 of 31 January 1992, Note by the President of the Security Council, p 3. See also *An Agenda for Peace, Preventive diplomacy, peacemaking and peace-keeping, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992*, General Assembly A/47/277, Security Council S/24111, 17 June 1992; and *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, UN General Assembly A/50/60, Security Council S/1995/1, 3 January 1995.

group on one side of the border is subject to persecution or repression by the authorities the relatives of the persecuted people on the other side of the border will perhaps become involved in order to assist their persecuted kin in defending themselves, thereby making the conflict international "from below". A persecuted people in one state may be the people in power in a neighbouring state, so that a domestic conflict may also become international "from above" if the authorities of the latter country decide to intervene in the former to protect their kin.[6]

The origins of the domestic disturbances so far labelled "threats to the peace" have always been serious violations of fundamental human rights either by the authorities or by independent militias.[7]

The fact that the Security Council has started dealing with domestic threats to domestic peace and security, primarily, corresponds with a similar development in international law in the post-World War II era. Having been an instrument for regulating solely interstate relations international law has moved in the direction of dealing also with relations between governors and governed within states. International law is still mainly concerned with interstate relations, but it has expanded its field of application and encroaches more and more on the domain of formerly exclusive domestic jurisdiction. This is due mainly to the rapid development of a large body of human rights law which cuts through the traditional dividing line between international and domestic affairs and international and domestic law.

The latest development in that field, which is also related to the wave of democratization which swept over the world in the wake of the fall of the Berlin Wall, is that, as some assert, liberal democracy is becoming or has become a norm of international law.[8] This, however, is a very controversial assertion to make.

[6] This was illustrated *inter alia* by the events in October–November 1996 in Zaïre where the Rwandan government intervened militarily to support its Tutsi kin led by Laurent Kabila who were rebelling against President Mobutu Sese Seko (see *Keesing's Record of World Events*, 1996, pp 41302; 41350 (hereinafter: *Keesing's*)).

[7] The man-made character of the crises is well captured by the term "unnatural humanitarian emergencies" used by Tom J. Farer in "Intervention in Unnatural Humanitarian Emergencies: Lessons of the First Phase", *Human Rights Quarterly (HRQ)*, vol. 18, 1996, pp 1–22.

[8] Cf., for instance, the discussion by Crawford, James, "Democracy and International Law", *British Year Book of International Law*, 1993, pp 113–133; Farer, Tom J., "The United States as Guarantor of Democracy in the Caribbean Basin: Is There a Legal Way?", *HRQ*, vol. 10, 1988, pp 157–176; Farer, Tom J., "Collectively Defending Democracy in a World of Sovereign States: The Western Hemisphere's Prospect", *HRQ*, vol. 15, 1993, pp 716–750; Fox, Gregory H., "The Right to Political Participation in International

The trends described above, real as well as legal, find their expression in the way the Security Council has recently interpreted the notion of "threat to the peace" in Article 39 and are manifested more tangibly in a series of resolutions adopted by the Security Council under Chapter VII of the UN Charter since 1990. We will come back to these resolutions in section 3.

2.1.2 A wide interpretation – advantages and drawbacks

It is one thing to observe that the Security Council interprets "threat to the peace" extensively and quite another to evaluate whether this is a good or a bad development. It is not the purpose of this study to settle that issue, far from it, but it is worth making some preliminary remarks here concerning the possible advantages and drawbacks associated with a broad construction of "threat to the peace" by the Security Council.

One obvious advantage provided by a broad and flexible construction of "threat to the peace" is that it allows the Security Council to act more often than it would otherwise, and that Article 39 can in this way be adapted to the changing times and changing problems of international concern. However, when coupled with a consensus or at least a lack of apparent rivalry among the permanent members of the Security Council this advantage of a broad conception of "threat to the peace" may in fact become a disadvantage. Since the powers of the Security Council are in principle limitless a combination of a broad notion of "threat to the peace", to which no further criteria are attached, with a lack of exercise

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Law", *Yale Journal of International Law*, vol. 17, 1992, pp 539–607; Fox, Gregory H. and Nolte, Georg, "Intolerant Democracies", *Harvard International Law Journal*, vol. 36, 1995, pp 1–70; Franck, Thomas M., "The Emerging Right to Democratic Governance", *American Journal of International Law (AJIL)*, vol. 86, 1992, pp 46–91; *Law and Force in the New International Order*, Ed. by Lori Fisler Damrosch and David J. Scheffer, 1991, chapter 13 "The United Nations and Illegitimate Regimes", pp 143–158, by Igor I. Lukashuk, and chapter 14 "Intervention Against Illegitimate Regimes", pp 159–176, by Thomas M. Franck; Okafor, Obiora Chinedu, "The Concept of Legitimate Governance in the Contemporary International Legal System", *Netherlands International Law Review*, vol. 44, 1997, pp 33–60; Reisman, W. Michael, "Sovereignty and Human Rights in Contemporary International Law", *AJIL*, vol. 84, 1990, pp 866–876; Reisman, W. Michael, "Humanitarian Intervention and Fledgling Democracies", *Fordham International Law Journal*, vol. 18, 1995, pp 794–805; Scheffer, David J., "Toward a Modern Doctrine of Humanitarian Intervention", *University of Toledo Law Review*, vol. 23, Winter 1992, (pp 253–293) pp 275–280.

of the veto on the part of the permanent members, obviously runs the risk of opening the door to abuse and *détournement de pouvoir*.[9]

For the sake of completeness it should be added that for formal or substantive reasons, or both, all observers certainly do not consider that a broad and flexible construction of "threat to the peace" invariably constitutes an advantage.[10]

A further advantage provided by a broad notion of "threat to the peace" today could be that it allows the United States to act through the Security Council instead of unilaterally. At some point there must of course be a limit to the flexibility of the notion of "threat to the peace", but it could be argued that for the present it is preferable that the United States at least follows the procedures of the Security Council in carrying through its essentially unilateral decisions, compared with a situation in which the United States leaves the Security Council completely behind. The same would apply to any other state which became the sole global superpower.

In the wake of the Lockerbie case (Libya vs. the United Kingdom and Libya vs. the United States)[11] and the case of Bosnia and Herzegovina vs. Federal Republic of Yugoslavia (Serbia and Montenegro),[12] both still pending before the International Court of Justice (ICJ), a discussion arose concerning whether or not the ICJ could and should judicially

[9] For an insightful analysis of the limits of the power of the Security Council, see Gill, T.D., "Legal and some political limitations on the power of the UN Security Council to exercise its enforcement powers under Chapter VII of the Charter", *Netherlands Yearbook of International Law*, 1995, pp 30–138; see also the more critical analysis of Bothe, Michael, "Les limites des pouvoirs du Conseil de sécurité", in *Peace-Keeping and Peace-Building, The Development of the Role of the Security Council*, Hague Academy of International Law, ed. by René-Jean Dupuy, 1993 (Colloque Dupuy, 21–23 July 1992), pp 67–81 (hereinafter: *Colloque Dupuy*).

[10] Cf., for example, Koskenniemi, Martti, "The Police in the Temple. Order, Justice and the UN: A Dialectical View", *EJIL*, vol. 6, 1995, pp 325–348; Blum, Yehuda Z., *Eroding the United Nations Charter*, 1993 (although not having treated the interpretation of Article 39 specifically opposing any and all alteration of the UN Charter through practice); Bothe, ibid.

[11] Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Request for the indication of provisional measures, Order of 14 April 1992, *ICJ Reports*, 1992, p 3; and Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Request for the indication of provisional measures, Order of 14 April 1992, *ICJ Reports*, 1992, p 114.

[12] Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures *(Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Request for the indication of provisional measures, Order of 8 April 1993, *ICJ Reports* 1993, p 3.

review the decisions of the Security Council and thereby exercise some kind of check on the power of the Security Council.[13]

Any comparison of the UN system with a national constitutional system of checks and balances is necessarily limited but it would even so be the underlying idea of a system in which the ICJ reviews the decisions of the Security Council. The question whether the ICJ *mutatis mutandis* could perform the function of a constitutional court is still an open one, to say the least. Since the decline in Security Council activity towards the mid- and late-1990s the discussion has lost some of its acute significance, but, on the other hand, this would provide an ideal opportunity for reflection and choices of strategy on the part of the UN General Assembly and the Security Council with a view to a potential new upsurge of Security Council activity in the future.

2.2 The competence of the Security Council

2.2.1 The mandate of the Security Council

The mandate of the Security Council is laid down in Article 24, Chapters VI on the peaceful settlement of disputes and in Chapter VII on action with respect to threats to the peace, breaches of the peace, and acts of aggression. Chapter VIII on regional arrangements and Chapter XII on the international trusteeship system are of less immediate interest in a discussion of the notion of "threat to the peace", but they are far from irrelevant. Regional arrangements for managing international peace and

[13] Concerning these issues through the Lockerbie case, see Akande, Dapo, "The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations", *International and Comparative Law Quarterly (ICLQ)*, vol. 46, 1997, pp 309–343; Alvarez, José E., "Judging the Security Council", *AJIL*, vol. 90, 1996, pp 1–39; Beveridge, Fiona, "The Lockerbie Affair", *ICLQ*, 1992, pp 907–920; Franck, Thomas, "The 'Powers of Appreciation': Who is the Ultimate Guardian of UN Legality?", *AJIL*, vol. 86, 1992, pp 519–523; Gill, op. cit. note 9, pp 116–126; Gowland-Debbas, Vera, "The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case", *AJIL*, vol. 88, 1994, pp 643–677; Graefrath. Bernhard, "Leave to the Court What Belongs to the Court – The Libyan Case", *EJIL*, vol. 4, 1993, pp 184–205; MacDonald, R. St. J., "Changing Relations between the International Court of Justice and the Security Council of the United Nations", *The Canadian Yearbook of International Law*, 1993, pp 3–32; Reisman, Michael W., "The Constitutional Crisis in the United Nations", *AJIL*, vol. 87, 1993, pp 83–100.

security have been at the top of the international agenda ever since the *Agenda for Peace* was drawn up by the UN Secretary-General in 1992.[14]

Chapter XII on the trusteeship system for the time being is largely irrelevant, but not completely. Considering the widespread disintegration of states primarily in Africa[15] a recolonization of some of these countries under the *aegis* of the Security Council is not as far-fetched a thought as it might at first seem, especially in view of the fact that the disintegrating states generate a large part of the current threats to the peace.[16]

According to Article 24(1) the Security Council has the primary responsibility for the maintenance of international peace and security. In discharging its duties the Security Council, according to Article 24(2), shall act in accordance with the purposes and principles of the UN. These are the only express limits to the power of the Security Council under the Charter. The purposes and principles of the UN are laid down in Article 1. For a discussion of "threat to the peace" in Article 39, paragraph 1 of Article 1 is most relevant. Paragraph 1 of Article 1 states that a primary aim of the UN is to maintain international peace and security and to that end take 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 (referring implicitly to Chapter VII) and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace (referring implicitly to Chapter VI).

Paragraph 2 of Article 1 talks of respect for the principle of equal rights and self-determination of peoples and paragraph 3 talks of promoting and encouraging respect for human rights and fundamental freedoms. All this is also relevant to a discussion of "threat to the peace" in its extended post-Cold War version, especially if the concept of equal rights and self-determination of peoples is interpreted in its internal version, i.e. to relate to the equal rights of peoples within one state and the internal

[14] Cf. above, note 5

[15] Cf. above, section 1 note 9 concerning the fact that during the year 1993 a lot of African states changed from Partly Free to Not Free, according to the terminology of Freedom House. That civil and political rights are not protected may have to do, among other things, with the crumbling of the state apparatus (assuming that the state was previously protecting human rights).

[16] Cf. Buzan, Barry, *People, States and Fear*, 2nd ed., 1991, pp 96–111 on "weak" (and "strong") states". Cf. Sir Brian Urquhart on the revival of the idea of "trusteeship" under the UN Charter in "The United Nations: Meeting the Challenges of the Post-Cold War World", remarks by Brian Urquhart, *The American Society of International Law, Proceedings of the 87th Annual Meeting*, Washington D.C., 1993, (pp 284–289) pp 288–289.

self-determination of peoples.[17] The idea of internal self-determination roughly corresponds to a (liberal) democratic system of government. As we will see in section 3 of this study the Security Council has determined the existence of a "threat to the peace" and has acted under Chapter VII in situations characterized by serious human rights violations, violations of the equal rights of peoples – more precisely the equal right to exist[18] – and violations of the right to internal self-determination.[19] The traditional domain of action of the Security Council, however, has been considered to lie within paragraph 1 of Article 1.

As concerns the substantive mandate of the Security Council under Chapter VII there are principally Article 39 under which the Security Council may determine, among other things, the existence of a "threat to the peace", and Articles 41 and 42 on non-military (economic, diplomatic and political) and military enforcement measures. Concluding Chapter VII, Article 51, on the right of self-defence of the Member States in relation to the role of the Security Council as ultimate guardian of international peace and security, is an important element in the collective security system of the UN Charter as a whole, but will not be discussed in detail in this study.

2.2.2 The protection of peace versus human rights

As to the question of the relative importance of the goal of maintaining or restoring international peace and security (Article 1(1)) and the goal of encouraging respect for human rights (Article 1(3)) respectively, to the extent that the two can be separated, there is no doubt that the former was considered to be superior to the latter when the Charter was drafted.[20] This concerns the UN as a whole, as well as the function of the Security Council more specifically. Everything seems to indicate that the balance has swung towards human rights, though it is difficult to say how far.

[17] Cf. Kiss, Alexandre, "The Peoples' Right to Self-Determination", *Human Rights Law Journal*, vol. 7, 1986, pp 165–175; Rosas, Allan, "Internal Self-Determination", in *Modern Law of Self-determination*, ed. by Christian Tomuschat, 1993, pp 225–252.

[18] Tellingly and somewhat ironically, considering the numerous violent and bloody ethnic clashes taking place in Africa, the African Charter on Human and Peoples' Rights, of 1986, is the only international human rights treaty which expressly lays down all peoples' right to exist (Article 20(1) "All peoples shall have right to existence ...")

[19] On the Security Council and human rights in general, see Bailey, Sydney D., *The UN Security Council and Human Rights*, 1994.

[20] Cf. Goodrich, Leland M; Hambro, Edvard; and Simons, Anne Patricia, op. cit. note 1, pp 25–26; Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, *ICJ Reports* 1962, p 151, Separate opinion of Judge Fitzmaurice, pp 213–215.

Supporting the argument in favour of the growing prominence of human rights Article 55 of the Charter is also brought forward in addition to Article 1(3). Article 55 states that the UN shall promote, *inter alia*, international economic and social progress and universal observance of human rights and fundamental freedoms.

Contrary to the view that human rights are gaining ground relative to the maintenance of peace and security under the UN Charter it has been argued, in the context of humanitarian intervention by individual countries, that giving priority to the protection of human rights logically implies that any other purpose of the UN mentioned in Article 1 could similarly be given priority and be used as a justification for military intervention. For instance, why should a state not be able to invoke the fact that another state is not fulfilling its duty of co-operation in solving international problems of an economic, social or cultural character (also in Article 1(3) of the Charter) in order to use force against the latter?[21]

The Security Council is not bound by the same prohibition on the use of force as individual states are so this argument, which also takes the prohibition of the use of force in Article 2(4) into consideration, is not directly applicable to the mandate of the Security Council, but it can be applied, and refuted, *mutatis mutandis*. Although the mandate of the Security Council in determining the existence of a "threat to the peace" under Article 39 is basically limitless according to a formal but at the same time realistic method of interpretation, there are many who criticize the Security Council for overstepping its mandate when it decides on military, or non-military, enforcement measures for the protection of human rights.

The same author who made the above argument, however, which was supposed to support the conclusion that the prohibition on the unilateral use of force is absolute under the UN Charter save where there is an express exception, executes a volte-face when it comes to the Security Council and writes that the Security Council may determine, for instance, that violations of human rights in a particular country constitute a threat to the peace, and could take military action to terminate such violations.[22]

In the context of a discussion concerning threats to the peace there may have been sound reasons why the Security Council should on occasion have elevated human rights to a position equal to international peace and security and have authorized Member States to take enforcement

[21] Akehurst, Michael, "Humanitarian Intervention", *Intervention in World Politics*, ed. by Hedley Bull, 1984, (pp 95–115) pp 105–106.
[22] Ibid., p 106.

action. However, the present author is of the opinion that this line of reasoning should not lead to any other purpose of the UN being likewise invoked in support of a determination by the Security Council of the existence of a threat to the peace. If one of the many different purposes enumerated in Article 1 of the UN Charter should gain ground, through the practice for instance of the Security Council, it is not logically necessary at all that all the others should follow. Similarly, it is not necessary to apply such a formal, or rather formalistic, method of interpretation to the Charter so that the outcome is that action for any purpose is permitted as long as it is the Security Council who is acting.

If through state practice, or through the practice of the Security Council, it turns out that the international community does value the respect for and protection of human rights higher than, for instance, international co-operation in economic, social, cultural or humanitarian matters there is nothing to stop general international law or the UN Charter from developing in this direction.

With respect to the Security Council it could very well be argued that the Council may determine that grave violations of human rights constitute a threat to the peace under Article 39 of the UN Charter, but that this extension of the notion of threat to the peace does not have to have the spill-over effect of turning practically any social phenomenon into a potential threat to the peace. This is, however, what some observers seem to fear.

Similarly, it could be argued, at least in theory, that placing respect for human rights on the same level as the maintenance of international peace in the hierarchy of values in UN Charter law and thereby possibly opening the door for unilateral military intervention to protect human rights in other countries, does not necessarily imply that the importance of all or some other honorable values is increased to a corresponding degree.

All the international, global and regional, human rights instruments worked out since the creation of the UN, the widespread ratification of these instruments and the practice of the various agencies instituted to control the observance of the instruments and to receive complaints from victims of human rights violations, rather support the argument that human rights in particular have by now gained a markedly higher status than some of the other purposes enumerated in the UN Charter and now enjoy a status equal to the maintenance of international peace and security. From this point of view grave violations of human rights would therefore deserve to be labelled a threat to the peace. It is almost easier to argue this way than to maintain that the hierarchy of values in the Charter

remains the same as it was in 1945 and that the interpretation of threat to the peace should remain unaffected by post-World War II developments in the field of human rights.

2.2.3 Forms of action available to the Security Council

Within the competence of the Security Council is also included the capacity to take binding decisions on behalf of the Member States. Article 24(1) of the UN Charter referred to earlier states that the Member States confer on the Security Council primary responsibility for the maintenance of international peace and security, "and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf".

When it comes to forms of action available to the Security Council it may take non-military enforcement measures under Article 41, for example the interruption of economic or other relations with the offending country or countries. The Security Council may also take military enforcement measures under Article 42. Sometimes the Security Council takes decisions which are not enforced in the traditional sense of the term but which nevertheless have important consequences. For instance, through two recent decisions the Security Council has created ad hoc tribunals for the prosecution of war criminals from the former Yugoslavia and Rwanda.[23] These decisions have not been combined with any conventional enforcement measures (but in principle they could be if states do not cooperate with the tribunals).

Once the Security Council has made a determination under Article 39 that a situation constitutes a threat to the peace the door is automatically opened to enforcement measures of a non-military or military kind.[24] That is why the interpretation of the notion of threat to the peace is so central. Not every determination of the existence of a threat to the peace, however, is in practice followed by a decision on enforcement measures. Also, not every decision, even if taken, is actually carried out.

[23] Security Council (SC) resolution (res.) 827 of 25 May 1993 and res. 955 of 8 November 1994 respectively.

[24] Although some argue differently. Mary Ellen O'Connell, for example, is of the opinion that there are situations in which a determination of a "threat to the peace" allows for the taking of enforcement measures and situations in which it does not: "Some states, including the United States, have at times maintained that the Council can determine threats to peace under Article 39 even if they are noninternational. *That may be*, but it also seems clear that the Council *cannot order action* unless it finds a threat to *international* peace" ("Continuing Limits on UN Intervention in Civil War", *Indiana Law Journal*, vol. 67, 1992, (pp 903–913), p 910).

Recently, as a result of the increased activity of the Security Council, there has been a discussion concerning the effects and effectiveness of different kinds of sanctions.[25] Usually economic sanctions are discussed on the one hand and military sanctions on the other. In the case of economic sanctions the most common objection has been that they are not effective enough, but recently objections have been raised because of the suffering they cause among the civilian population.[26] Economic sanctions do not hit the right target, so to say, which usually is the official authorities of the country concerned, but hit the innocent population instead. This has led some observers to advocate the use of military sanctions rather than economic sanctions, arguing that the latter cause relatively less suffering than the former.[27] Right or wrong this stands in complete contrast to the way the use of sanctions has been gauged heretofore. Any discussion on the effects of sanctions in reality, however, will not be elaborated here.

The fact that the Member States of the UN *confer* on the organization primary responsibility for the maintenance of international peace and security, and that the members agree that the Security Council acts *on their behalf,* implies that the decisions of the Security Council are binding on the Member States. As to the forms of action that the Security Council may take this also seems to mean that when it comes to military

[25] Cf. the reform proposal by the current UN Secretary-General, Kofi Annan, *Renewing the United Nations: A Programme for Reform*, 1997 (UN General Assembly doc. no. A/51/950 of 14 July 1997), para. 108: "In recent years, the Security Council has called, with increasing frequency, for economic sanctions as an enforcement tool under Chapter VII. —Consideration needs to be given, however, to making these sanctions more effective in achieving the goal of modifying the behaviour of those targeted, while limiting the collateral damages. There is also a need to address the broader humanitarian and economic effects of sanctions, as well as objective criteria in their application, and for their termination." The issue was taken up also by Kofi Annan's predecessor Boutros, Boutros-Ghali in *Supplement to an Agenda for Peace*, op. cit. note 5, paras. 66–76.

[26] Cf. among others Damrosch, Lori Fisler, "Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs", *AJIL*, vol. 83, 1989, pp 1–50; Joyner, Christopher C. "Collective Sanctions as Peaceful Coercion: Lessons from the United Nations Experience", *Australian Year Book of International Law*, vol. 16, 1995, pp 241–270; Koskenniemi, 1995, op. cit. note 10, pp 345–346 (concerning the absence of Security Council routines for looking after the effects and the observance of the resolutions on economic sanctions); Lopez, George A. and Cortright, David, "The Sanctions Era: An Alternative to Military Intervention", *Fletcher Forum of World Affairs*, vol. 19, 1995, pp 65–85 (concerning how to make economic sanctions effective); the discussion at the 89th Annual Meeting of the American Society of International Law under the title "The Costs and Benefits of Economic Sanctions: The Bottom Line", *American Society of International Law, Proceedings of the 89th Annual Meeting*, 1995, pp 337–362.

[27] Cf. Reisman, 1995, op. cit. note 8 pp 802–803.

action it is on the Security Council and only on the Security Council that the Member States have conferred the power of acting on their behalf. Some authors use this interpretation of Article 24(1) to criticize the Security Council for having started authorizing single countries to undertake military action on behalf of the Security Council and ultimately on behalf of the rest of the Member States, who have not conferred the power to act on their behalf on any agency other than the Security Council itself.[28] According to this argument the Security Council lacks the capacity to delegate powers to single states.

Article 48(1) of the Charter seems to support such an interpretation when it states that "[t]he action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by *some of them,* as the Security Council may determine (emphasis added)".[29] Perhaps states will anyway become less and less willing to intervene militarily at the request of the Security Council so that the problem of authorizations, if one looks at it as a problem, will solve itself automatically.[30] If not, we can only hope that the Security Council in future makes use of authorizations in forms which more effectively than at present take into consideration the right of the other UN members to control the military enforcement action.

2.3 Domestic jurisdiction and international law

2.3.1 Article 2(7) and Article 39

Article 2(7) of the UN Charter is not directly relevant to a study of the notion of a threat to the peace, but it is indirectly relevant and a few words deserve to be said about it here. The article states that nothing contained in the Charter shall authorize the UN to intervene in matters which

[28] Bothe, op. cit. (note 9), pp 73–74; Koskenniemi, 1995, op. cit. (note 10) even if not calling in question as such the power of the Security Council to authorize states to take military action, criticizes the forms in which this has taken place, p 346.

[29] Bothe argues, however, that Article 48 does not constitute an independent basis of competence of the Security Council, but refers only to action taken within the strict limits of Article 41 or 42 (ibid., p 73).

[30] Cf. the "Mogadishu syndrome" (referred to by Falk, Richard, "The Compexities of Humanitarian Intervention: A New World Order Challenge", *Michigan Journal of International Law*, vol. 17, 1996, (pp 491–513) p 505).

are essentially the domestic jurisdiction of any state. According to Article 2(7) the application of enforcement measures under Chapter VII is not included in the prohibition of interference in domestic affairs,[31] nor is a determination of the existence of a threat to the peace as such under Article 39, since it is by way of that article that enforcement measures are ultimately undertaken. The question is rather whether there are any limits to the freedom of the Security Council to decide what situations constitute a threat to the peace and according to what criteria these limits should be drawn.

If a strictly formal view is applied, there are no limits to the freedom of the Security Council in deciding what constitutes a threat to the peace and the discussion can end there. If one ventures one step further, however, the question of the limits to the notion of threat to the peace under Article 39 becomes indirectly related to the question of exclusive domestic jurisdiction under Article 2(7). The question is whether a formal or a substantive interpretation should be applied to Article 2(7) and 39 respectively.[32] Depending on how formal a view one adopts to the interpretation of "threat to the peace" the issue of the relationship between Article 39 and Article 2(7) will be either one of strict law or one of legitimacy, to the extent that the two can be separated.

If the formal view is applied, a determination of the existence of a threat to the peace and the possibly ensuing enforcement measures will always be legal, given that certain fundamental rules of international law are respected.[33] Any discussion of the matter beyond that point becomes one of the legitimacy (only) of the determination made and measures taken. Of course, even according to a formal interpretation of the Charter a measure may be legal but still illegitimate.

If on the other hand one applies a less formal interpretation of Article 39 in combination with Article 2(7) one may argue that there must be some built-in or implicit substantive legal limitations to the freedom of judgment of the Security Council in determining what constitutes a threat to the peace, and also on its freedom to take enforcement measures, despite what appears to be the *carte blanche* of Article 2(7). Then the issue becomes one of law since the determination by the Security Council of the existence of a threat to the peace and the ensuing enforcement measures will not only be illegitimate but also illegal if the substantive limitations

[31] "[B]ut this principle [of exclusive domestic jurisdiction] shall not prejudice the application of enforcement measures under Chapter VII."

[32] Cf. also the argument of Koskenniemi, 1995, op. cit. note 10 p 341 et seq.

[33] Cf. Gill, op. cit. note 9, pp 116–126.

are transgressed. Obviously the issues of legality and legitimacy are intimately related to each other but can be separated.[34]

The point where the notion of a threat to the peace meets the prohibition of interference in the domestic jurisdiction of states is in the cases where the Security Council determines that what are arguably essentially domestic phenomena constitute a threat to the peace. This is a development which gained momentum in the early 1990s and which largely contributed to making the activities of the Security Council controversial. Of course one can argue formally here also and say that what the Security Council determines to constitute a threat to the peace is by definition not or no longer within the exclusive domestic jurisdiction of any one sovereign state.[35]

Again it is also possible to argue that there must be some substantial limits or criteria according to which the line should be drawn between international and national jurisdiction.[36] There is no doubt that the domain of exclusive domestic jurisdiction has diminished dramatically relative to international jurisdiction since the creation of the UN, and that this is due in large part to the development of a substantial body of international human rights law. The question is exactly how much the domain of exclusive domestic jurisdiction has diminished and where precisely the limits should be drawn today. The next, and no less important, question in the context of a discussion of the notion of a threat to the peace in Article 39 of the Charter, is what conclusions can be drawn from the retreating limits of exclusive domestic jurisdiction as to the legality or legitimacy of the taking by the Security Council of primarily military enforcement measures. That is, given that what in the ordinary sense of the term seems to be an internal affair, but which according to a determination by the Security Council constitutes a threat to the peace, does

[34] Although some would argue that at a certain stage in international legal argument they cannot (cf., for instance, Koskenniemi, Martti, *From Apology to Utopia*, 1989; and "The Politics of International Law" by the same author in *EJIL*, vol. 1, 1990, pp 4–32.

[35] Fernando R. Tesón would call this the "legalist" view of domestic jurisdiction ("Collective Humanitarian Intervention", *Michigan Journal of International Law,* vol. 17, 1996, (pp 323–371), p 328: "Whether a matter falls within the state's *domaine reservé* ... is ... a relative matter which depends on the state of international law at any given time in history.")

[36] The most extreme variant of this argument would be what Fernando R. Tesón calls the "essentialist" view of domestic jurisdiction: "According to this view, the concept of domestic jurisdiction does not depend on the development of international law, because it is not relative but fixed, at least as long as we continue to live in a world of sovereign states. The essential attributes of the sovereign state require that certain matters be left to the state´s own sovereign judgment. There are, therefore, matters that fall *essentially* within the domestic jurisdiction of states – just as the language of Article 2(7) suggests" (Tesón, ibid., p 327).

the Security Council have the right to decide on economic or military enforcement measures in order to bring about changes within the country concerned?

2.3.2 Human rights and democracy – internal or international affairs?

Matters which according to the normally accepted understanding of the term seems to be an internal affair may not constitute a internal affair in the legal sense of the term, i.e. an affair outside the reach of other countries or international organizations. Violations of human rights, for instance, are no longer considered to constitute an internal affair.[37] Except for a very formal analysis there is no necessary link between this statement, however, and conceding to the Security Council the right to declare violations of human rights a threat to the peace. Neither is there any necessary analytical link between stating that human rights are no longer within the exclusive domestic jurisdiction of states and granting the Security Council the right to take enforcement measures to secure the observance of the human rights law.

In section 3 we will see in what way the Security Council has handled the issue of human rights violations recently, both as a threat to the peace and as grounds for enforcement action, and what conclusions can be drawn from this practice as to the interpretation of Article 39.

It should be added that irrespective of the fact that human rights are no longer considered to lie within the exclusive domestic jurisdiction of states, and ignoring how far the Security Council may go in protecting them through declaring them a threat to the peace and then perhaps taking enforcement action, some states and observers are of the opinion that the Security Council should not deal with human rights or humanitarian issues at all.[38] According to this view, human rights and humanitarian issues are outside the competence of the Security Council *ratione materiae,* and should be dealt with solely by the General Assembly.

Related to the issue of the growing importance of human rights is the issue of liberal democracy as a possibly existing or emerging rule of general international law.[39] On the one hand this is an easy case to make: The realization of human rights as they are formulated in different international treaties almost presupposes the existence of democracy. On the

[37] Cf. Higgins, op. cit. section 1 note 3, p 254.

[38] This is the argument of Koskenniemi, 1995, op. cit. note 10. For arguments by states see further below section 4.2 note 19.

[39] Cf. above, note 8.

other hand it is a difficult case to make: The right of every state to freely choose its system of government is traditionally a deeply embedded element of sovereignty.[40] The latter does not mean, however, that this state of the law could not change. The Security Council has taken enforcement measures under the threat to the peace formula in Article 39 in order to protect democracy, which is the reason why the question whether democracy is or is not part of international law is mentioned here.[41] The steps taken by the Security Council in favour of democracy will be examined in detail in section 3.

Some authors claim that the rule in Article 21 of the Universal Declaration of Human Rights of 1948 stating that "[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures"[42] has become a rule of customary international law.[43] This rule also seems to give expression to the lowest common denominator as to the meaning of the term "democracy" in an international context.

The binding equivalent of Article 21 of the Universal Declaration of Human Rights, Article 25 of the International Covenant on Civil and Political Rights of 1966 states the right of every citizen "[t]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors".[44]

[40] "Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State" (General Assembly Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, res. 2625 (XXV) of 24 October 1970, as part of the third principle "The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter").The ICJ confirms this in the case of Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, *ICJ Reports* 1986, p 14, paras. 205, 258, 263–64.

[41] The Security Council is also involved in the supervision of elections in different countries which is a topic, however, which will not be dealt with further here (cf. Richarte, Marie-Pierre, "L'ONU et l'impératif de démocratisation", *Le Trimestre du Monde*, 4e trimestre 1995, pp 125–153).

[42] UN General Assembly res. 217A (III) of 10 December 1948, Article 21(3); see also the General Assembly resolutions adopted every year since 1988 at least until 1995 entitled "Enhancing the effectiveness of the principle of periodic and genuine elections", from 1994 onwards with the slightly extended title "Strengthening the role of the United Nations in enhancing the effectiveness of periodic and genuine elections and the promotion of democratization".

[43] Cf., for instance, Fox, op. cit. note 8, passim; Reisman, 1995, op. cit. note 8, p 795, and 1990 op. cit. note 8, p 869.

[44] Article 25(b); 999 *UNTS* 171.

It could just as well be argued that the latter article has become a rule of customary international law. The International Covenant on Civil and Political Rights as a treaty already binds 140 states. What is missing from Article 25 of the International Covenant, however, is the significant statement that "[t]he will of the people shall be the basis of the authority of government" in Article 21(3) of the Universal Declaration, which is only implicit, but it still *is* implicit, in Article 25(b) of the International Covenant. Also the fact that a majority of the UN Member States as from 1993 are for the first time in history at least formally democratic (democratic in the liberal sense as opposed to "peoples' democracies") would also seem to support the argument that democracy has become a rule of customary international law.[45] The question whether liberal democracy is or is not a rule of general international law, however, will be left open here.

The same kind of step-by-step analysis as the one concerning human rights could be made concerning the relevance of democracy for the Security Council and for the discussion of Article 39. First of all, is the system of government an internal affair in the legal sense, i.e. does it belong to the domestic jurisdiction of states? Considering the content of the already mentioned human rights instruments, and other regional ones, this could only be maintained with some difficulty. The next question to arise is whether a lack of democracy constitutes a threat to the peace and, in this context, whether as a next step the Security Council may take economic or military enforcement measures to install or restore democracy in a particular state.

If democracy as a system of government becomes an established rule of international law, though it is more of an emerging rule at present, it becomes a violation of international law not to have a democratic system of government. This does not necessarily mean that a lack of democracy also constitutes a threat to the peace under Article 39. Whether the Security Council will take upon itself the task of enforcing democracy on a large scale in any case remains to be seen.

[45] McColm, Bruce R., "The Comparative Survey of Freedom 1992–1993: Our Crowded Hour", in *Freedom in the World* 1992/93, (pp 3–5) p 4 (of the 186 countries monitored by Freedom House in 1993, 99 were formal democracies). According to the latest survey, there are currently 117 democracies in the world of whom 76 are rated Free, 40 are rated Partly Free and 1 (Bosnia) is rated Not Free (Karatnycky, 1995/96, op. cit. section 1 note 9, p 5.

2.4 The international and the intranational in international law and international relations theory

From a more theoretical point of view the dichotomy between domestic and international jurisdiction in international law corresponds to the discussion within the field of international relations of the importance of domestic versus interstate factors in determining the international behaviour of states.[46] Issues such as the system of government and the respect for human rights also cut through the traditional dividing lines between international and national politics.

One of many theorists of international relations puts his views in terms which fit in well with the corresponding discussion in international law, although the latter is normative in the sense that it expressly purports to find the answer to how things should be, not necessarily to how they are. Perhaps one could say that the lawyer is prescriptive whereas the international relations theorist is descriptive. Through the law-creating practice of states these two aspects sometimes coincide. Fred Halliday writes that, according to his view, "[t]he most fundamental issue of all" in current theorizing about international relations "... is that of the formation of an international society, not in the sense of a club of states with common rules, but of a community of political units united by economic and other

[46] For a discussion see, for example, Buzan, op. cit. note 16, chapter 2 "National Security and the Nature of the State" pp 57–111, and chapter 4 "Security and the International Political System" pp 146–185; Ramsbotham, Oliver and Woodehouse, Tom, *Humanitarian Intervention in Contemporary Conflict. A Reconceptualization*, 1996, part I "The Classical Debate: Forcible Self-Help by States to Protect Human Rights", pp 3–66; Zürn, Michael, "Bringing the Second Image (Back) In. About the Domestic Sources of Regime Formation", in *Regime Theory and International Relations*, ed. by Volker Rittberger, 1993, pp 282–311; *International Relations Theory Today*, ed. by Ken Booth and Steve Smith, 1995. On the relative significance of domestic and interstate factors in the Third World context, see Ayoob, Mohammed, *The Third World Security Predicament. State Making, Regional Conflict, and the International System*, 1995, in particular chapter 2 "State Making and Third World Security", pp 21–45. For a dialogue on the issue of the relationship between the disciplines of international law and international relations generally, see Slaughter, Anne Marie Burley, "International Law and International relations Theory: A Dual Agenda", *AJIL* vol. 87, 1993 pp 205–239; and Scott, Shirley, "Building Bridges with Political Science?: A Response from the Other Shore", *The Australian Year Book of International Law*, 1995, pp 271–284; *International Rules. Approaches from International Law and International Relations*, ed. by Robert J. Beck, Anthony Clark Arend, and Robert D. Vander Lugt, 1996.

ransnational ties, and characterized by a broad sharing of political and social values."[47]

Halliday also writes that "[t]he issue of homogeneity, i.e. the need for societies to share common internal norms, has been inadequately studied in international relations".[48] Halliday argues that this issue "underlies the whole history of the international system, and explains why deviations from internal norms are so threatening to international relations."[49] In line with Halliday's view, if liberal democracy, for instance, becomes the international norm for how societies should be organized internally, then states will react to deviations from this norm and try to suppress them. This thesis is easily translated into international law terminology through a substitution of "should react" for "will react". Halliday refers to Edmond Burke who, in 1852, propagated the following thesis: "that social and political peace within one state requires that others conform to broadly the same norms; that states are inevitably affected by changes in their neighbours, even if the latter do not challenge them internationally; and that status quo powers have an obligation to suppress deviations in the international norm to prevent instability from spreading."[50] Halliday writes, finally, that "[i]nternational rivalry therefore acts as a homogenizing force, so that the growth of governmental structures, or of political forms, has, over a period of decades, a convergent character."[51]

The way Fred Halliday analyzes international relations bears a striking resemblance to how an international lawyer could analyze international relations, provided that he or she sympathizes with the idea that international law does set norms for how states should be organized internally, something which is far from true for all lawyers. All international lawyers do not think that the law has reached a point in its development where the thesis can be sustained that international law decides which domestic political systems are legal and which are not; in fact few lawyers do. Some would even deny that the law is developing in that direction, saying that there are no signs in the actual practice of the majority of the world's states to support such a conclusion. In contrast to this there are, as we have seen, a good many lawyers who argue that the law is

[47] Halliday, Fred, "The End of the Cold War and International Relations: Some Analytic and Theoretical Conclusions", in *International Relations Theory Today*, ed. by Ken Booth and Steve Smith, 1995, (pp 38–61) p 59.
[48] Ibid., p. 49.
[49] Ibid.
[50] Ibid., p 50. The work referred to of Edmond Burke is "Letters on a regicide peace", in *The Works and Correspondence of Edmund Burke*, vol. 5, London: Francis and John Rivington, 1852.
[51] Ibid.

indeed, or at least is probably, developing in the direction of setting binding norms for the internal political organization of states, but that this rule has not yet become a settled rule of international law.[52]

However,if a lawyer states that the domestic organization of states is a matter of international relevance this would be a normative statement, as we noted above, which may or may not correspond to the actual state of things, whereas if a political scientist made the same statement this statement would rather be of an empirical character or at least purport to be a theoretical hypothesis capable of being empirically investigated. The picture becomes blurred when one considers that international lawyers, too, sometimes base their conclusions, albeit normative, on empirical facts, in particular when the practice of states in respect of a certain matter is at issue. Since international law to a certain extent is a function of the actual behaviour of states lawyers, too, may have to investigate reality empirically.

The difference between a lawyer and a political or social scientist, however, in the way this author understands the matter, is that the lawyer seldom or never makes the same systematic empirical investigation of the real world as the political or social scientist does. The empirical reality serves as the backdrop to the normative argumentation, but is never the principal focus of the lawyer's analysis. One could say that any empirical investigation that the lawyer performs is merely incidental to the legal analysis; unless one counts case law as empirical material. It should be added that certain ideas about the actual state of things probably affects the individual lawyer's analysis of what international law says on a particular issue, whether or not he or she undertakes any empirical investigation of state practice or any other empirical investigation of the real world at all to substantiate the legal analysis.

Also, since the study of international law as well as law in general is normative in essence, perhaps the international lawyer even more easily than social and political scientists runs the risk of letting his or her preconceived notions of what the law should say guide the analysis of what the law actually says. This would correspond to the social scientist letting preconceived notions of how things are or of how things should be guide the empirical investigation of how things actually are, and perhaps even letting the preconceived notions prevail if there is a discrepancy between the results of the empirical investigation and the preconceived notions.

Trying to avoid these scientific pitfalls we will see in sections 3 and 4 what conclusions may be drawn as to the status of human rights and

[52] Cf. Crawford, op. cit. note 8; Franck 1992 op. cit. note 8.

democracy in international law from the recent practice of the Security Council under Chapter VII of the UN Charter.

Another point, not so much of principle as of reality, on which international relations theory and international law mesh, and which is essential for the study today of the notion of "threat to the peace" in the UN Charter, is the recent and abundant appearance on the international scene of disintegrating states. The disintegrating states tend in themselves to generate threats to international peace in the region surrounding them, and, as far as states in eastern Europe and central Asia are concerned, even peace on a global scale since in these cases, though not perhaps to the same degree in Africa, the interests of big and super powers are involved. Most disintegrating states or potentially disintegrating states so far have been located in Africa, but similar tendencies are also visible in eastern Europe and central Asia.

From a legal point of view the disintegrating state also brings to the fore the issue of under what circumstances foreign military intervention may be allowed under public international law; for the purposes of this study attention will be focussed on the circumstances under which humanitarian intervention may be permitted.

The prohibition of intervention and the prohibition of the use of military force are intimately linked to the concept of state sovereignty, which in its turn presumes a state apparatus and a government of some kind. If a state disintegrates into anarchy several of the presumptions underlying the idea of sovereignty and the prohibition of intervention are overthrown and the question arises whether military intervention in those situations is not *prima facie* legal. At any rate all the usual legal arguments against intervention are no longer applicable.

From the perspective of international relations theory the issue of the disintegrating states again brings to the fore the question of whether states in general should be regarded as "black boxes" (i.e.impenetrable entities) on the international scene or whether the internal situation of states is relevant to the study of their international behaviour. The reasoning of some authors on strong versus weak states and on the destabilizing repercussions the weak states may have on their neighbouring countries seems to fit very well with what we see today in Africa, for instance. Included in the question of whether the internal situation of states affects their international behaviour is the question of whether the choice of political system plays a role for the international behaviour of states. It would seem as if the strong states most often tend to be democratic whereas the weak states are most often under authoritarian rule.

To this author it seems clear that the behaviour of states in the international system is conditioned also by the circumstances reigning within

the states and not only by factors proper to the international system. This author thus agrees with those who do not consider it useful to regard states as "black boxes" in their international relations. As international relations become more and more dense and there are more and more transnational relations between other actors than the state representatives it would seem more and more difficult to maintain the "black box" perspective on international relations. Another question is what internal factors affect the international behaviour of states and in what way and to what extent they affect the states' international behaviour. Perhaps it should be added that this study does not attempt to answer those questions.

The analytical approach to the study of international relations of those international relations theorists who regard the internal qualities of states as relevant to the functioning of the international system and the approach adopted by those international lawyers who regard international law as laying down rules for how governments should treat their own subjects (human rights), and even for how the government itself should be organized (democracy), thus seem to be closely related. In international law the proposition that respect for human rights is an issue of international and not only national concern, and the proposition that states have taken on international obligations in this respect, if nothing else through their ratification of international conventions on human rights, is hardly a controversial proposition anymore. What is more controversial, as has already been stated, is the proposition that international law also restricts the freedom of states as far as their internal political organization is concerned.

One of the similarities between the two approaches would seem to be the fact that they do consider also internal national factors and do not only concentrate on truly *inter*national factors in the sense of *inter*state interactions. Also in international law we find the equivalent of "black box" thinkers also who are of the opinion that international law deals with nothing but, and should deal with nothing but interstate relations and who regard the internal organization and behaviour of a state as solely of the state's own concern out of reach of international law.

Those international lawyers and international theorists who look at the internal affairs of states apparently presume that the internal characteristics of states ultimately affect the issues of war and peace in the international context, i.e. that if states present certain internal qualities the chances of international peace are higher than they would otherwise be and vice versa. Of course, the international relations scholars would approach the issue from an empirical perspective whereas the approach of the international lawyer would be inherently normative. Fundamentally though the two approaches seem to be trying to grapple with the

same problems starting from a similar conception of reality, but using different analytical tools. The approach of this study is a legal one, but the legal approach will be complemented by arguments found in the literature on international relations generally when this can contribute to a better explanation of the issues being studied.

Whether one perceives of international law from a "black box" or a "transparent box" perspective may affect one's views of the concept of a threat to the peace in Article 39 of the UN Charter. If one conceives of international law as reaching into the internal lives of states one may relatively easily choose a broad construction of the notion of a threat to the peace. If, on the other hand, one conceives of international law as stopping at national borders and relating only to strictly interstate affairs then one would rather choose a narrow construction of a threat to the peace. The range of phenomena which may legally or legitimately constitute threats to the peace under Article 39 of the UN Charter could be broader or narrower depending on what position the observer takes on the "transparent box"- "black box" scale. If one considers that international law does not reach inside states, one would probably not consider crimes against human rights or a lack of democracy as constituting threats to the peace from the legal point of view.

However, even if one takes a broad view of the reach of international law and of the conception of threat to the peace, another step in the argumentative link is necessary before one arrives at the conclusion that the use of non-military or military enforcement measures is permitted, or is not permitted, in order to counter threats to the peace in the form, for instance, of crimes against human rights or a lack of democracy. One may argue that all forms of threats to the peace under the Charter may legally lead to the taking of enforcement measures, or one may argue that only threats to the peace in a narrow sense – military and international – may legally provide a basis for enforcement action.[53] Under the UN Charter it seems clear, according to this author, that a determination of the existence of a threat to the peace in whatever form under Article 39 may legally lead to a decision on the part of the Security Council to use military force to eliminate the threat to the peace.

It is of great importance then to elucidate, firstly, if the Security Council interprets the notion of threat to the peace broadly or narrowly, secondly, on what occasions actually the Security Council decides to determine that a particular situation constitutes a threat to the peace, and,

[53] Cf. above note 24.

thirdly, whether the Security Council decides to follow up its determination of the existence of a threat to the peace with a decision on enforcement measures.

In the following we will see what position the UN Security Council has taken on the construction of threat to the peace under Article 39 and on the link between such a determination and the use of enforcement measures to do away with the threat to the peace. In reality, another step which may have to be taken is the one from words to action in the sense that even if the Security Council determines the existence of a threat to the peace and goes on to decide on military enforcement measures, it does not necessarily follow that the latter decision will actually be carried out, for instance because the international community is unwilling to contribute the necessary troops, or because the perceived threat to the peace no longer exists or has become less acute.

As stated earlier this author tends to sympathize with those international relations theorists who consider that the inside of states is important for their international behaviour. This author also tends to sympathize with those international lawyers who take the view that international law nowadays reaches inside states and regulates *inter alia* the way in which a government treats its own subjects and perhaps even sets limits to what political systems are acceptable from the legal point of view. The point of this study, however, is to examine the way in which the UN Security Council looks upon these issues and to draw conclusions from its recent practice. Hopefully, the views of the author will not predetermine the results of this analysis.

3. Cases

3.1 Congo, Southern Rhodesia, South Africa

It is a commonplace proposition today to state that according to the practice of the Security Council a threat to the peace under Article 39 of the UN Charter is not necessarily restricted to a military threat by one state against another. The understanding of what constitutes a threat to the peace has been considerably widened.[1]

This wide interpretation of the notion of a "threat to the peace" was not unknown before, but it came into full bloom in the early 1990s with the end of the Cold War and the ensuing end of the deadlock in the Security Council due to the loosening tension between the Soviet Union and the US. One reason why the extensive interpretation of the concept of a threat to the peace had such a great impact at that time was simply that the Security Council was suddenly able to take decisions at all and so make determinations of the existence of threats to the peace.

As early as in the 1960s, however, the Security Council had determined that the civil war in the Congo (later Zaire and recently renamed the Democratic Republic of Congo)[2] and the racist regime Southern Rhodesia (Zimbabwe)[3] constituted threats to international peace and in the

[1] Cf. above, section 2.1.1 note 5.

[2] UN SC res. of 21 February 1961 contained in doc. S/4741, pre. paras. 2 and 3: "*Having learnt with deep regret* the announcement of the killing of the Congolese leaders, Mr. Patrice Lumumba, Mr. Maurice Mpolo and Mr. Joseph Okito, *Deeply concerned* at the grave repercussions of these crimes and the danger of widespread civil war and bloodshed in the Congo and the threat to international peace and security". In op. para. 1 the Security Council "Urges that the United Nations take immediately all appropriate measures to prevent the occurrence of civil war in the Congo, including arrangements for cease-fires, the halting of all military operations, the prevention of clashes, and the use of force, if necessary, in the last resort".

[3] UN SC res. 216 of 12 November 1965; SC res. 217 of 20 November 1965 and SC res. 253 of 29 May 1968. In the operative part of res. 216 the Security Council "2. *Decides to call upon* all States not to recognize this illegal racist minority régime in Southern Rhodesia and to refrain from rendering any assistance to this illegal régime". In the operative part of res. 217 the Security Council "1. *Determines* that the situation resulting from the proclamation of independence by the illegal authorities in Southern Rhodesia is extremely

1970s the Security Council, more indirectly, determined that the racial discrimination and the system of *apartheid* in South Africa constituted a threat to the peace.[4] This broad construction of a "threat to the peace" was supported at that time by the developing countries.[5]

The relevance of these early cases to the series of determinations of threats to the peace by the Security Council in the beginning of the 1990s, however, is limited. The resolutions were taken in the context of decolonization which may have affected both the readiness of the developing countries to accept them and the ability of the big and super powers from both sides to agree in these cases.

Also, since the world was under the spell of the Cold War there was no risk that the broad construction of threat to the peace would spread and be applied to an unforeseen number of other situations as well since such

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grave ... and that its continuance in time constitutes a threat to international peace and security" and "8. *Calls upon* all States to refrain from any action which would assist and encourage the illegal régime and, in particular, to desist from providing it with arms, equipment and military material, and to do their utmost in order to break all economic relations with Southern Rhodesia, including an embargo on oil and petroleum products". The arms and oil embargo was extended into comprehensive economic sanctions by res. 253 (1968). On the case of Southern Rhodesia see also Gowlland-Debbas, Vera, *Collective responses to illegal acts in international law: United Nations action in the question of Southern Rhodesia*, 1990; cf. also Higgins, 1994, op. cit. section 1 note 3, p 255.

[4] UN SC res. 417 of 31 October 1977 and res. 418 of 4 November 1977. In res. 417 the Security Council in the last pre. para states that it is "[m]indful of its responsibilities under the Charter of the United Nations for the maintenance of international peace and security and in the operative part "1. *Strongly condemns* the South African racist régime for its resort to massive violence and repression against the black people, who constitute the great majority of the country, as well as all other opponents of *apartheid*" and, *inter alia*, "3. *Demands* that the racist régime of South Africa: ... (f) Abolish the policy of bantustanization, abandon the policy of *apartheid* and ensure majority rule based on justice and equality". In res. 418 the Security Council condemns *apartheid* and racial discrimination in the preamble and in the operative part, "[a]cting ... under Chapter VII of the Charter of the United Nations, 1. *Determines*, having regard to the policies and acts of the South African Government, that the acquisition by South Africa of arms and related *matériel* constitutes a threat to the maintenance of international security". The Security Council then in op. para. 2 decided on an arms embargo against South Africa. Concerning the early cases of the Congo, Southern Rhodesia and South Africa, see also Franck, Thomas, "The Security Council and 'Threats to the Peace': Some Remarks on Remarkable Recent Developments", in *Colloque Dupuy*, (pp 83–121) pp 91–97.

[5] Cf. *La Charte des Nations Unies*, ed. by Jean-Pierre Cot and Alain Pellet, 1985, p 655; Farer, Tom, "A Paradigm of Legitimate Intervention", in *Enforcing Restraint. Collective Intervention in Internal Conflicts*, ed. by Lori Fisler Damrosch, 1993, p 321; Goodrich, Hambro, Simons, op. cit. section 2.1.1 note 1, pp 296–297; White, N.D. *The United Nations and the Maintenance of International Peace and Security*, 1990, pp 43–44. In the early cases the Security Council took the kind of circumstances into account which would probably today be regarded by many Third World countries as belonging to the internal affairs of states.

an application would soon be vetoed by either of the superpowers. When the Congolese, the Southern Rhodesian and the South African resolutions were adopted by the Security Council the world and its relationships of power looked so different from today. Those resolutions were such isolated and exceptional events that it is proper to talk of a fundamentally new trend in the decision-making of the Security Council and in its interpretation of a "threat to the peace" by the beginning of the 1990s.

3.2 The Kurds and Shiites in Iraq

So, considering the line of cases dealt with by the Security Council in the 1990s, what kind of situations have been determined to constitute a "threat to the peace" according to the Security Council?

In the case of the Kurds and Shiite muslims in Iraq in 1991, the repression of the civilian population resulting in a massive transfrontier flow of refugees was considered to threaten international peace and security in the region.[6] It is not entirely clear from the text of the Security Council resolution, and perhaps this is intentional, whether the repression of civilians in itself was considered to constitute a threat to the peace or whether the link to the cross-border flows of refugees was a necessary constituent element before a situation of that kind could be declared a threat to the peace by the Security Council.[7] It is possible to argue both ways. The flow of refugees constituted the most immediate threat to international peace and security in the region, but without the repression of the civilians there would not have been any flow of refugees, so it could be argued that being the cause of the flow of refugees the repression in itself constituted a threat to international peace.

[6] UN SC res. 688 of 5 April 1991, pre. para. 3 and op. para. 1. On the Iraqi Kurdish case in general see further Malanczuk, Peter, "The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War", *EJIL*, vol. 2, 1991, pp 114–132; Adelman, Howard, "Humanitarian Intervention: The Case of the Kurds", *International Journal of Refugee Law*, vol. 4, 1992, pp 4–38; Alston, Philip, "The Security Council and Human Rights: Lessons to be Learned from the Iraq–Kuwait Crisis and its Aftermath", *The Australian Year Book of International Law*, 1992, pp 107–176; Freedman, Lawrence and Boren, David, "'Safe havens' for Kurds in post-war Iraq", in *To Loose the Bands of Wickedness*, ed. by Nigel S. Rodley, 1992, pp 43–92.

[7] On refugee flows as threats to international security generally cf. Dowty, Alan and Loescher, Gil, "Refugee Flows as Grounds for International Action", *International Security (IS)*, vol. 21, 1996, pp 43–71. See also Posen, Barry R., "Military Responses to Refugee Disasters", *IS*, vol. 21, 1996 pp 72–111.

An indication that the repression itself was indeed considered a threat to the peace or at least that the Security Council takes the repression or maltreatment of civilians in itself seriously irrespective of any potential international repercussions, is the fact that the Security Council claims to be "[d]eeply disturbed by the magnitude of the human suffering involved" in the Kurdish and Shiite case.[8] This particular formulation, as we will see below, is used in many of the resolutions involving situations posing different kinds of threats to the peace adopted by the Security Council subsequent to the ground-breaking resolution in the Kurdish and Shiite case.

Chapter VII of the UN Charter was not explicitly referred to in the resolution on the Iraqi Kurds and Shiites, but the language used is basically the same as that which the Security Council uses in resolutions where it also does explicitly refer to Chapter VII. Under Article 39 of the Charter the Security Council shall determine the existence *inter alia* of any threat to the peace and shall make recommendations or decide what measures shall be taken to maintain or restore international peace and security.

The Security Council does state that the repression and its consequences in the form of flows of refugees do "threaten international peace and security in the region" and for the purposes of finding out what kinds of situations constitute a threat to the peace in the eyes of the Security Council that statement is enough, irrespective of whether it is explicitly attributed by the Council to Chapter VII of the Charter or not.[9] The Security Council then demands that in order to remove the threat to international peace and security Iraq immediately end the repression of the Iraqi civilians.[10]

No enforcement measures were recommended or decided upon by the Security Council as a follow-up to its determination that the repression of

[8] UN SC res. 688, above note 6, pre. para. 4.

[9] Considering that res. 688 was the first "post-Cold War" Security Council res. where the Security Council took a stand on the persecution of civilians as a threat to the peace it is not all that surprising that mentioning Chapter VII of the UN Charter explicitly in the res. was too controversial to be accepted by all the members of the Security Council, China in particular (According to the then Swedish ambassador to the UN and later Under-Secretary-General for Humanitarian Affairs, Mr Jan Eliasson, who participated in the Security Council debate preceding the adoption of res. 688, this was an unconditional demand on the part of China who otherwise would have vetoed the res. (Lecture given by Mr Eliasson at Uppsala University, Uppsala, Sweden, 18 April 1994)); see also Franck, in *Colloque Dupuy*, p 103. The then UN Under-Secretary-General for Legal Affairs, Carl-August Fleischhauer, insists that res. 688 was *not* adopted under Chapter VII of the UN Charter ("The Year of International Law in Review, Remarks by Carl-August Fleischhauer", in *The American Society of International Law, Proceedings of the 86th Annual Meeting*, Washington, D.C., April 1–4, 1992, (pp 586–590), p 588).

[10] UN SC res. 688, above note 6, op. para. 2.

Iraqi civilians and its consequences threatened international peace and security in the region.[11]

3.3 The former Yugoslavia

In the former Yugoslavia in 1991 the then civil war between Croatia, who wanted to break loose from the Socialist Federal Republic of Yugoslavia, and the Serb dominated central Yugoslavian authorities was considered by the Security Council to constitute a threat to international peace and security.[12] An arms embargo was decided upon under Chapter VII of the UN Charter covering the whole of the country "for the purposes of establishing peace and stability in Yugoslavia".[13] This "general and complete embargo on all deliveries of weapons and military equipment" covering the whole territory of the former Yugoslavia remained in force until the end of the war.[14]

When Bosnia-Herzegovina had become an independent state in March/April 1992 fighting broke out between the Bosnian, the Croat and the Serb communities within Bosnia with outside support *inter alia* from the (Serb dominated) Yugoslav People's Army and the Croatian Army.[15] "[T]he situation in Bosnia-Herzegovina and in other parts of the former Socialist Federal Republic of Yugoslavia" was determined to constitute a threat to international peace and security by the Security Council.[16] Comprehensive economic sanctions were imposed on Serbia and Montenegro under Chapter VII of the UN Charter.

Since Bosnia-Herzegovina by then had become an independent state and since there was military interference from the outside, the Bosnian

[11] An agreement including a Memorandum of Understanding was concluded between Iraq and the UN on 18 April (1991) (enclosed in SC doc. S/22513, 22 April 1991) according to which Iraq agreed "to cooperate with the United Nations to have a humanitarian presence in Iraq, wherever such presence may be needed, and to facilitate it through the adoption of all necessary measures. This shall be ensured through the establishment of United Nations sub-offices and Humanitarian Centres (UNHUCs), in agreement and cooperation with the Government of Iraq" (Article 4 of the Memorandum). It could be argued that the Memorandum of Understanding legitimized the preceding military intervention by the allied forces who established the safe zone the control of which lightly armed UN guards took over through the agreement with Iraq.

[12] UN SC res. 713 of 25 September 1991, pre. paras. 3 and 4. On the initial UN involvement in the former Yugoslavia, see Weller, Marc, "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia", *AJIL*, vol. 86, 1992, pp 569–607.

[13] Ibid., op. para. 6.

[14] The embargo was lifted, gradually, by UN SC res. 1021 of 22 November 1995.

[15] Cf. UN SC res. 752 of 15 May 1992.

[16] UN SC res. 757 of 30 May 1992, pre. para. 17.

case was a more clear-cut case of a threat to the peace along traditional lines (one state against another state) than the Croatian and Iraqi civilian cases mentioned earlier. It can be noted, however, that rather than being a "threat" to the peace, the situation in Bosnia-Herzegovina constituted a "breach" of the peace according to Article 39 of the UN Charter.[17] Since an aggressor, Serbia and Montenegro, was also indirectly pointed out through the imposition of economic sanctions it is all the more evident that the "threat" to the peace was in reality a "breach" of the peace, primarily by Serbia and Montenegro (the Croatian Army was also mentioned in the Security Council resolution but no sanctions were adopted against Croatia).

As far as enforcement measures are concerned, later on in 1992 the Security Council called upon states to take nationally or through regional agencies or arrangements "all measures necessary" to facilitate the delivery of humanitarian assistance to Bosnia-Herzegovina.[18] The formulation "all measures necessary" includes the use of military measures.[19] This was the first time that the Security Council authorized the use of military means in order to enforce humanitarian undertakings. The efforts to ensure the safety of the delivery of humanitarian assistance in Bosnia-Herzegovina were strengthened by a ban first on military flights and then on all flights, except those authorized by the United Nations Protection Force (UNPROFOR), in the airspace of Bosnia-Herzegovina.[20] Among the reasons cited by the Security Council for introducing the ban was its determination to ensure the safety of humanitarian flights to Bosnia and Herzegovina.[21] The ban on flights over Bosnia-Herzegovina was strengthened

[17] Also, as pointed out by Peter H. Kooijmans, the Security Council in the overwhelming majority of cases only determines the existence of a "threat" to the peace *after* fighting has broken out. Kooijmans advocates that the Security Council should determine the existence of a "threat" to the peace *before* fighting has broken out, which seems perfectly logical, and that the Security Council should order the deployment of troops as a conservatory measure before "the crisis becomes really explosive" ("The enlargement of the concept of 'threat to the peace'", in *Colloque Dupuy* (pp 111–121), pp 119–120). This seems fully in line with the wording of Article 39 *in fine*: "... measures ... to *maintain* ... international peace and security (emphasis added)". A preventive deployment which has in fact taken place is the one in 1992, which is still in force, of peace-keeping troops, The UN Preventive Deployment Force (UNPREDEP) in the former Yugoslav Republic of Macedonia (UN SC res. 795 of 11 December 1992).

[18] UN SC res. 770 of 13 August 1992, op. para. 2.

[19] It was used in SC res. 678 of 29 November 1990 in which the Member States co-operating with the Government of Kuwait were authorized to use "all necessary means" to repel the Iraqi occupation of Kuwait (op. para. 2).

[20] UN SC res. 781 of 9 October 1992 and res. 816 of 31 March 1993.

[21] UN SC res. 781, ibid., pre. para. 2.

when the Member States, acting nationally or through regional organizations or arrangements, were authorized to take "all necessary measures in the airspace of the Republic of Bosnia and Herzegovina, in the event of further violations to ensure compliance with the ban".[22]

Later on the Security Council authorized the Member States to use air power in and around the so called "safe areas" established in Bosnia in order to support the UNPROFOR in the performance of its mandate (to keep the peace in the "safe areas" and to protect the deliveries of humanitarian aid there).[23] Importantly, as in case of the ban on flights above, the Member States were authorized to act nationally or through regional organizations or arrangements. In practice this meant a mandate for the North Atlantic Treaty Organization (NATO) to intervene in the conflict. The mandate was not, however, taken advantage of on a larger scale until more than two years later when NATO forces eventually attacked the Bosnian Serbs and forced them to surrender.[24]

The earlier mandate to take "all measures necessary" to facilitate the delivery of humanitarian assistance was also granted to Member States acting nationally or through regional organizations,[25] but none of the Member States or any regional organization took any action of importance under this particular mandate. Neither was the mandate given to the Member States to shoot down aircraft in the airspace of Bosnia-Herzegovina[26] taken advantage of to any great extent.[27]

[22] UN SC res. 816 of 31 March 1993, op. para. 4. The "close air support" was later extended to the territory of the Republic of Croatia by UN SC res. 908 of 31 March 1994, op. para. 8.

[23] UN SC res. 836 of 4 June 1993, op. para. 10; reaffirmed in res. 844 of 18 June 1993, op. para. 4. This authorization was also later extended to cover measures taken in the Republic of Croatia, by UN SC res. 958 of 19 November 1994.

[24] On the relationship between the UN and NATO in the conflict in the former Yugoslavia see Leurdijk, Dick A., *The United Nations and NATO in Former Yugoslavia*, 1991–1996. See also Lightburn, David, "NATO and its New Role", in *After Rwanda. The Coordination of United Nations Humanitarian Assistance*, Ed. by Jim Whitman and David Pocock, 1996, pp 86–97.

[25] UN SC res. 770, above note 18.

[26] UN SC res. 816, above note 22.

[27] According to *The United Nations and the Situation in the Former Yugoslavia*, UN Department of Public Information, Reference paper, Revision 4, p 14: "Since the establishment of the 'no-fly zone' in the airspace of Bosnia and Herzegovina through 30 April 1995, the total number of flights asssessed as apparent violations of the ban had been 4,847. The most serious incident took place on 28 February 1994, when NATO fighters, acting in accordance with the established procedure, shot down four of six jets in the airspace of Bosnia and Herzegovina which had defied the international ban on military flights and ignored two warnings by the NATO fighters."

Within the framework of Security Council action in the former Yugoslavia the Council also found that crimes against international humanitarian law constitute a threat to international peace.[28] In order to reach this conclusion the Security Council refers back to its first resolution in the case of the former Yugoslavia and "all subsequent relevant resolutions"[29] and expresses "its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of 'ethnic cleansing', including for the acquisition and the holding of territory".[30] All in all, according to the Security Council, this situation continued to constitute a threat to international peace and security.[31]

It can again be noted, but will not be further discussed here, that the Security Council talks of crimes against humanitarian law as constituting a "threat" to the peace, although the war in Bosnia-Herzegovina alone had already been going on for over a year by the time the resolution was adopted.

This was the first time in its history that the Security Council determined that crimes against humanitarian law constitute a threat to international peace, and it was in this context that the Security Council established the ad hoc International Tribunal for the Former Yugoslavia in order for the perpetrators of the crimes to be brought to justice.[32] The Tribunal was created, in the words of the Security Council, in order "to put an end to [the crimes against international humanitarian law] and to

[28] UN SC res. 827 of 25 May 1993.

[29] Ibid., pre. para. 1.

[30] Ibid, pre. para. 3.

[31] Ibid., pre. para. 4.

[32] The full name of the Tribunal is The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. Its statute is contained in SC doc. S/25704 of 3 May 1993, "Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993)". On the ad hoc Tribunal in general see Bassiouni, Cherif M. and Manikas, Peter, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, 1996; Goldstone, Richard J., "The International Tribunal for the Former Yugoslavia: A Case study in Security Council Action", *Duke Journal of Comparative and International Law*, vol. 6, 1995, (pp 5–10); see also Akhavan, Payam, "The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond", *HRQ*, vol. 18, 1996, pp 259–285; Jones, John R.W.D., "The Implications of the Peace Agreement for the International Criminal Tribunal for the former Yugoslavia", *EJIL*, vol. 7, pp 226–244; Pellet, Alain, "Le Tribunal criminel international pour l'ex-Yougoslavie – Poudre aux yeux ou avancée décisive?", *Revue générale de droit international public (RGDIP)*, vol. 98, 1994, pp 7–60.

take effective measures to bring to justice the persons who are responsible for them"[33] and because the Security Council was "[c]onvinced that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Concil of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace".[34]

The decision by the Security Council to create a war crimes tribunal by a resolution adopted under Chapter VII of the UN Charter and thereby, at least theoretically, force every state to cooperate with the Tribunal was a unique decision. It should be compared with the efforts on the part of the UN to create a permanent international criminal court based on a treaty where every state voluntarily decides whether it wishes to ratify the treaty and thereby participate in the workings and be bound by the statute of the court.[35]

The creation of the ad hoc Tribunal was unique also as a form of enforcement measure taken by the Security Council in order to put pressure on the party at whom the resolution is directed to cooperate in restoring international peace and security. Among the kinds of non-military enforcement measures mentioned in Article 41 of the UN Charter we find the interruption of economic relations, interruption of communications or the severance of diplomatic relations. The list in Article 41 is not exhaustive, but usually the non-military enforcement measures decided upon by the Security Council take one or more of the forms mentioned in the article. The creation of an ad hoc War Crimes Tribunal is a definite novelty as far as forms of enforcement measures are concerned.

The explicit determination by the Security Council that crimes against humanitarian law constitute a threat to international peace and security in the first place also shows that the Security Council is widening its interpretation of the concept of threat to the peace and that the Council is

[33] UN SC res. 827, above note 28, pre. para. 5.

[34] Ibid., pre. para. 6.

[35] Cf. the draft statute for a permanent International Criminal Court in Report of the International Law Commission on the work of its forty-sixth session, 2 May–22 July 1994, UN General Assembly, official records, forty-ninth session, supplement no. 10 (A/49/10), pp 29–161; and the draft Code of Crimes Against the Peace and Security of Mankind in Report of the ILC on the work of its forty-eighth session, 6 May–26 July 1996, UN General Assembly, official records, fifty-first session, supplement no. 10 (A/51/10), pp 9–120. See generally Ambos, Kai, "Establishing an International Criminal Court and an International Criminal Code. Observations from an International Criminal Law Viewpoint", *EJIL*, vol. 7 1994, pp 519–544; Murphy, John F., "International Crimes", in *United Nations Legal Order*, ed. by Oscar Schachter and Christopher C. Joyner, vol. 2, 1995, pp 993–1023.

becoming more involved in humanitarian or human rights matters than before. It is clear that the Security Council considers these matters to lie within its mandate under Chapter VII of the Charter.

The International Tribunal for the Former Yugoslavia continues to function also after the conclusion of the Dayton Peace Agreement.[36] The NATO-led multinational implementation force IFOR (Peace Implementation Force), later transformed into the SFOR (Stabilization Force) which succeeded the UNPROFOR in the former Yugoslavia, in principle has the mandate to use military force if necessary in order to make all parties involved comply with their obligations toward the International Tribunal.[37]

The economic sanctions earlier imposed first against Serbia and Montenegro and later against the Bosnian Serbs, but suspended when the Peace Agreement was concluded, may also be reimposed if "the Federal Republic of Yugoslavia or the Bosnian Serb authorities are failing significantly to meet their obligations under the Peace Agreement" including their obligations toward the International Tribunal.[38]

3.4 Somalia

In the case of Somalia a civil war and its consequences were again considered by the Security Council to constitute a threat to the peace.[39] The Security Council stated at the beginning of 1992 that it was "[g]ravely alarmed at the rapid deterioration of the situation in Somalia and the

[36] For the agreement see General Framework Agreement for Peace in Bosnia and Herzegovina, 14 December 1995, 35 *International Legal Materials (ILM)* 89 (1996).

[37] UN SC res. 1031 of 15 December 1995, op. para. 5; see also Annex 1A to the Peace Agreement, "Military Aspects of the Peace Settlement", 14 December 1995, 35 *ILM* 91 (1996), in particular Article VI: Deployment of the Implementation Force.

[38] UN SC res. 1022 of 22 November 1995, op. paras. 1 and 3. See also Jones, op. cit. note 32; Szasz, Paul C., "The Protection of Human Rights Through the Dayton/Paris Peace Agreement on Bosnia", Current Developments, *AJIL*, vol. 90, 1996, pp 301–316.

[39] On the conflict in Somalia in general see Clarke, Walter and Herbst, Jeffrey, "Somalia and the Future of Humanitarian Intervention", *Foreign Affairs*, vol. 75, 1996, pp 70–85; Farer, Tom J., "Intervention in Unnatural Humanitarian Emergencies: Lessons of the First Phase", *HRQ*, vol. 18, 1996, pp 1–22; Hirsch, John L. and Oakley, Robert B., *Somalia and Operation Restore Hope*, 1995; Hutchinson, Mark R., "Restoring Hope: U.N. Security Council Resolutions for Somalia and an Expanded Doctrine of Humanitarian Intervention", *Harvard International Law Review*, vol. 34, 1993, pp 624–640; *Learning from Somalia: The Lessons of Armed Humanitarian Intervention*, ed. by Walter Clarke and Jeffrey Herbst, 1997; Makinda, Samuel M., *Seeking Peace From Chaos: Humanitarian Intervention in Somalia*, 1993; Sommer, John G., *Hope Restored? Humanitarian Aid in Somalia 1990–1994*, Refugee Policy Group, Center for Policy Analysis and Research on Refugee Issues, Washington D.C., 1994.

heavy loss of human life and widespread material damage resulting from the conflict in the country and aware of its consequences on the stability and peace in the region".[40] The Security Council was concerned that the continuation of this situation would constitute a threat to international peace and security.[41] The precise way in which the situation in Somalia constituted a threat to the security in the remaining countries in the region was not specified. Large transfrontier flows of refugees were not mentioned by the Security Council in the case of Somalia, in contrast for instance to the case of Iraq mentioned earlier, as a possible way of justifying why a basically internal conflict constituted a threat to international peace. An arms embargo was decided upon under Chapter VII of the Charter for the purposes of establishing peace and stability in Somalia.[42]

In a couple of subsequent resolutions the Security Council declared itself "[d]eeply disturbed by the magnitude of the human suffering caused by the conflict"[43] and "gravely alarmed by the deterioration of the humanitarian situation in Somalia".[44] The Security Council emphasized the need for quick delivery of humanitarian assistance in the country, by international, regional and non-governmental organizations.[45]

As the situation only deteriorated, despite the imposition of an arms embargo, the Security Council by the end of 1992 found itself compelled once again, but in stronger words than earlier, to determine that the situation in Somalia constituted a threat to international peace and security. The Security Council determined that "the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security".[46]

The Security Council seemed to look exclusively at the conflict and its humanitarian consequences within Somalia and seemed to regard this situation as a serious enough threat to international peace and security in and of itself. Alternatively the Security Council may have regarded the situation in Somalia as being of such a serious nature that the Security

[40] UN SC res. 733 of 23 January 1992, pre. para. 3.
[41] Ibid., pre. para. 4.
[42] Ibid., op. para. 5.
[43] UN SC res. 746 of 17 March 1992, pre. para. 6; res. 751 of 24 April 1992, pre. para. 6; res. 767 of 27 July 1992, pre. para. 7; and res. 775 of 28 August 1992, pre. para. 6.
[44] Res. 767, ibid., pre. para. 8; res. 775, ibid., pre. para. 7; and res. 794 of 3 December 1992, pre. para. 4.
[45] Res. 751, pre. para. 8; res. 767, pre. para. 8; res. 775, pre. para. 7; and res. 794 of 3 December 1992, pre. para. 4.
[46] UN SC res. 794, ibid., pre. para. 3.

Council had to be able to react to it in some way, irrespective of whether the situation really constituted a threat to international peace and security or not.

In order to alleviate human suffering in Somalia the Security Council decided to authorize those Member States who wanted to participate to "use all necessary means" to establish a secure environment for humanitarian relief operations in Somalia.[47] This was the first in a row of cases in which the Security Council has authorized individual Member States, acting more or less independently of the UN, to use military means to enforce the decisions of the Security Council.[48] A US-led multinational force intervened in Somalia shortly after the authorization to intervene had been adopted by the Security Council.[49]

Somalia was also if not the very first then at least among the first in a series of cases where the Security Council has acted trying to counter the recent phenomenon of disintegrating states in Africa.[50] Some of these cases have come before the Security Council, but far from all.

[47] Ibid., op. para. 10. The actual term "authorization" was used in the res. (but in present tense, "authorizes"). On res. 794, cf. Djiena Wembou, Michel-Cyr, "Validité et portée de la résolution 794 (1992) du Conseil de sécurité", *African Journal of International and Comparative Law (AJICL)*, vol. 5, 1993, pp 340–354.

[48] Cf. Quigley, op. cit. section 1 note 6; cf. also Bothe, op. cit. section 2.1.2 note 9, pp 67–81; Freudenschuss, Helmut, "Between Unilateralism and Collective Security: Authorizations of the Use of Force by the UN Security Council", *EJIL*, vol. 5, 1994, pp 492–531.

[49] On the intricate relationship between UN and US policy in Somalia, see Clarke, Walter and Herbst, Jeffrey, op. cit. note 38. For a partly contrary, less critical analysis of the initial role of the US, see Bolton, John R. (former Assistant Secretary of State for International Organizations under President Bush), "Wrong turn in Somalia", *Foreign Affairs*, vol. 73, 1994, pp 56–66; see also Clark, Jeffrey, "Debacle in Somalia", *Foreign Affairs*, vol. 72, 1993, pp 109–123.

[50] On this phenomenon, cf., for instance, van Eijk, Ryan, "The United Nations and the Reconstruction of Collapsed States in Africa", *AJICL*, vol. 9, 1997, pp 573–599; *Conflicts in Africa. An Analysis of Crises and Crisis Prevention Measures*, Report of the Commission on African Regions in Crisis, King Baudouin Foundation, Médecins Sans Frontières, 1997; Herbst, Jeffrey, "Responding to State Failure in Africa", *IS*, vol. 21, 1996/97, pp 120–144; cf. also Mutharika, Peter A., "The Role of the United Nations Security Council in African Peace Management: Some Proposals", *Michigan Journal of International Law*, vol. 17, Winter 1996, pp 537–562. Not realizing perhaps what a revolutionary thought this would be for the international legal system, an international relations theoretician/theorist has argued with respect to the fact that some states are too weak to fit the Westphalian model of a system of states based on autonomy and territoriality that it should be explicitly recognized that "principles [presumably including normative principles, i.e. international law] ought to vary with the capacity and behavior of states" (Krasner, Stephen D., "Compromising Westphalia", *IS*, vol. 20, 1995/96, (pp 115–151) p 151. This "would not only make normative discourse more consistent with empirical reality, it would also contribute to the more imaginative construction of institutional forms ... that could create a more stable and peaceful international system" (ibid.).

In the case of Somalia the Security Council was particularly ambitious. The Security Council set out to "restore peace, stability and law and order with a view to facilitating the process of a political settlement under the auspices of the United Nations, aimed at national reconciliation in Somalia".[51] This turned out to be too difficult a task to achieve and so the efforts to rebuild Somalia sanctioned by the Security Council were interrupted in the spring of 1995.

From the outset one of the premises of the Security Council action had been that "the people of Somalia bear ultimate reponsibility for national reconciliation and the reconstruction of their own country".[52] In the end it seems as if this is what has indeed happened, i.e. the Somalians have had to try to solve their own problems themselves.

Within the framework of the Security Council's trying to come to grips with the situation in Somalia the Council went as far as authorizing the Secretary-General of the UN to secure the arrest and detention for prosecution, trial and punishment of the war lords responsible for the armed attacks on the UN peace-keeping troops in Somalia (the United Nations Operation in Somalia, UNOSOM).[53] The UNOSOM was supposed to take over the peace-making/peace-keeping in Somalia after the initial intervention by the multinational force (the Unified Task Force, UNITAF).[54]

The authorization to arrest and detain is mentioned here to illustrate that the Security Council not only seems to interpret the concept of threat to the peace broadly but that it also seems to interpret broadly the range of different kinds of enforcement measures it may take or authorize.The authorization to arrest certain particularly aggressive Somalian war lords was in reality intended for the arrest of one particular leader, General Aydid who led the United Somali Congress, against whom the UN efforts in Somalia were concentrated at the time.

An order for the arrest of General Aydid was indeed issued by the Security Council according to certain sources but this author has never

[51] UN SC res. 794, above note 44, pre. para. 14. It can be noted that in a later res. the Security Council reiterated its demand that all Somali parties cease and desist from all breaches of international humanitarian law and reaffirmed that "those responsible for such acts be held individually accountable" (UN SC res. 814 of 26 March 1993, part B, op. para. 13). This looks like a hint that an international tribunal would be created to deal with the crimes committed against international humanitarian law also in the case of Somalia, but no ad hoc tribunal for Somalia was ever established.

[52] Ibid., pre. para. 15.

[53] UN SC res. 837 of 6 June 1993, op. para. 5. Res. 837 refers back to UN SC res. 814, above note 51.

[54] Cf. above note 49.

been able to find any official documentation originating from the Security Council to prove this.[55] As the hunt for General Aydid turned out unsuccessful the Security Council later the same year requested the Secretary-General to suspend arrest actions against those individuals who might be implicated but were not currently detained.[56] The Secretary-General was also requested to make appropriate provision to deal with the situation of those already detained,[57] but to the knowledge of this author none of those suspected of having participated in the armed attacks against the UNOSOM have been brought to trial, at least not under the aegis of the UN.

3.5 Liberia

Liberia is another case involving a disintegrating African state ravaged by civil war.[58] Around the same time as the Security Council determined that the conflict in Somalia constituted a threat to international peace, the Security Council determined that the "deterioration of the situation in Liberia constitutes a threat to international peace and security, particularly in West Africa as a whole".[59] Neither in the case of the conflict in Liberia did the Security Council point to any concrete circumstances which would turn the Liberian civil war into a threat to international peace and security even within West Africa. It seems again as if the civil war in itself was motive enough for the Security Council to determine that the Liberian civil war constituted a threat to international peace. An arms embargo was instituted for the purposes of establishing peace and stability in Liberia.[60]

There was outside military involvement in Liberia on the part of regional peace-keeping troops organized within the Economic Community of West African States (ECOWAS), the troops were called the Economic

[55] UN SC decision (dec.) of 17 June 1993, *Keesing's*, 1993, p 39499.

[56] UN SC res. 885 of 16 November 1993, op. para. 8.

[57] Ibid.

[58] On the conflict in Liberia see among others, Nolte, Georg, "Restoring Peace by Regional Action: International Legal Aspects of the Liberian Conflict", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)*, vol. 53, 1993, pp 603–637; Howe, Herbert, "Lessons of Liberia – ECOMOG and Regional Peacekeeping", *IS*, vol. 21., 1996/97, pp 145–176; Oteng Kufuor, Kofi, "The Legality of the Intervention in the Liberian Civil War by the Economic Community of West African States", *AJICL*, vol. 5, 1993, pp 525–560; Mindua, Antoine-Didier, "Intervention armée de la CEDEAO au Libéria: Illégalité ou avancée juridique?", *AJICL*, vol. 7, 1995, pp 257–283.

[59] UN SC res. 788 of 19 November 1992, pre. para. 5.

[60] Ibid., op. para. 8.

Community of West African States Cease-fire Monitoring Group (ECOMOG, later institutionalized under the name of the Military Observer Group of the Economic Community of West African States) and were headed by Nigeria. These troops were never authorized to intervene by the Security Council, but the Security Council seemed to endorse the intervention *post factum* by "[commending] ECOWAS for its efforts to restore peace, security and stability in Liberia".[61] Later on, a United Nations Observer Mission in Liberia (UNOMIL) was created to cooperate with the ECOMOG and monitor the implementation of a peace agreement concluded in July 1993 and to assist in the coordination of humanitarian assistance activities.[62]

Since then there have been other peace agreements of which the last one was concluded in Abuja, Nigeria in August 1996.[63] Under this agreement general elections were held in Liberia in July 1997.

3.6 Angola

Angola is yet another example of an African state which has been ravaged by civil war for a long time, ever since its independence in 1975. The Security Council in 1993 determined that "as a result of UNITA's (National Union for the Total Independence of Angola) military action, the situation in Angola constitutes a threat to international peace and security".[64] UNITA was fighting in a civil war against the government forces, the MPLA (Popular Movement for the Liberation of Angola), later the Angolan Armed Forces.UNITA refused to implement the peace negotiation process under the aegis of the UN, which they had agreed to enter into, and instead of respecting the results of the democratic elections

[61] Ibid., op. para. 1. The (peaceful) efforts of the ECOWAS to bring back democracy and constitutional order to Sierra Leone in 1997 were likewise supported by the UN Security Council (SC res. 1132 of 8 October 1997, op. para. 3). An arms and petroleum embargo was decided upon under Chapter VII and ECOWAS was authorized under Chapter VIII of the UN Charter to ensure its strict implementation (SC res. 1132, ibid., op. paras. 6 and 8 respectively).

[62] UN SC res. 866 of 22 September 1993. In the case of the Central African Republic in 1997 after the foreign troops had already arrived the Security Council also approved the continued activities of the Inter-African Mission to Monitor the Implementation of the Bangui Agreements (MISAB) and, furthermore, authorized the Mission under Chapter VII of the UN charter to ensure the security and freedom of movement of their personnel (SC res. 1125 of 6 August 1997, op. paras 2 and 3).

[63] The 14th attempt to end the civil war, according to *Keesing's*, 1996, p 41354.

[64] UN SC res. 864 of 15 September 1993, part B, pre. para. 4.

which had been held in 1992 (which UNITA lost) UNITA continued its military campaign.[65]

Formerly all sides in the civil war (MPLA, FNLA (National Front of Liberation of Angola), and UNITA) had been supported from the outside – UNITA most notably by South Africa[66] and Zaire and the MPLA forces by the Soviet Union, the countries of Eastern Europe and Cuba, (FNLA was supported by Zaire, the US, Romania North Korea, and China but disappeared as a fighting party in 1975) – but by the time the Security Council determined that the situation in Angola constituted a threat to international peace and security in 1993 most of the foreign involvement in the fighting had probably ended.[67]

The Security Council again does not specify what it is exactly in the Angolan situation which turns it into a threat to international peace. The Council does express "grave concern at the continuing deterioration of the political and military situation" and notes "the further deterioration of an already grave humanitarian situation".[68] It seems as if it was the civil war and the human suffering it caused that made the Security Council determine that the Angolan situation constituted a threat to international peace primarily in order for the Council to be able to do something about it and to put pressure on UNITA. The Angolan case is thus another example of a case where the Security Council has applied a broad interpretation to "threat to the peace".

The determination that the situation in Angola constituted a threat to international peace was followed by a decision by the Security Council on an arms and petroleum embargo against UNITA under Chapter VII of the UN Charter.[69] The sanctions against UNITA were tightened up in August 1997.[70]

[65] Cf. ibid., part A, op. para. 6.

[66] In 1985 the UN Security Council adopted res. 567 of 20 June, condemning South Africa for "its recent act of aggression against the territory of Angola" (op. para. 1); the condemnation of the Security Council was reiterated in res. 602 of 25 November 1987 and in res. 606 of 23 December 1987.

[67] Keith Sommerville, in 1990, wrote that the civil war in Angola had been "the most extensive war in Africa since the end of the Nigerian conflict and the most serious example of foreign military intervention since the end of the colonial era" (*Foreign Military Intervention in Africa*, 1990, p 95). The support by Zaire (now The Democratic Republic of Congo) for UNITA ended with the fall of the late President Mobutu Sese Seko in 1997.

[68] UN SC res. 864, pre. para. 3 (preamble to the res. as a whole).

[69] Ibid., part B, op. para. 19.

[70] UN SC res. 1127 of 28 August 1997.

3.7 Rwanda

Another African example of a disintegrating state where the Security Council has become involved is the case of Rwanda in 1994.[71] The genocide by the Hutus of the Tutsis broke out at the beginning of April 1994. In June the Security Council determined that "the magnitude of the humanitarian crisis in Rwanda constitutes a threat to peace and security in the region".[72] The Security Council also claimed to be "deeply concerned by the continuation of systematic and widespread killings of the civilian population in Rwanda".[73] Before that the Security Council had condemned several times the large-scale and systematic killings of civilians going on in Rwanda, without taking any further step and determining that the killings constituted a threat to the regional peace and security.[74] In the earlier resolutions reference was made to the "significant increase" in or "massive exodus" of refugees to neighbouring countries.[75]

While referring back to its previous resolutions on the situation in Rwanda, the Security Council again did not specify, in the context of determining that the crisis in Rwanda constituted a threat to peace and security, exactly what it was in the incontestably true humanitarian crisis that constituted a threat to international peace and security in the region. In the case of Rwanda, however, it was clear that there was indeed a massive flow of refugees to the neighbouring countries, primarily to Zaire (now The Democratic Republic of Congo), which may have a destabilizing effect on regional peace.[76] Also the fact that ethnic groups live on

[71] For a background to the crisis in Rwanda in 1994, see, for instance, Reyntjens, Filip, *L'Afrique des Grands Lacs en Crise: Rwanda, Burundi: 1988–1994*, 1994; see also O'Halloran, Patrick J., *Humanitarian Intervention and the Genocide in Rwanda*, 1995. For an overview of the activities of the peace-keeping UN Assistance Mission in Rwanda (UNAMIR) from its beginning in October 1993 to its end in March 1996, see Mubiala, Mutoy, "La mission des Nations Unies pour l'assistance au Rwanda (1993–1996)", *AJICL*, vol. 8, 1996, pp 393–402.

[72] UN SC res. 929 of 22 June 1994, pre. para. 10.

[73] Ibid., pre. para. 8.

[74] UN SC res. 912 of 21 April 1994, pre. para. 9; res. 918 of 17 May 1994, pre. para. 5; and res. 925 of 8 June 1994, pre. para. 7.

[75] UN SC res. 912, ibid., pre. para. 9; and res. 925, ibid., pre. para. 11 respectively.

[76] At the end of July, the number of refugees created by war and massacres was estimated at approximately 2,500,000 (mostly Hutus) of which 1,700,000 had fled to Zaire (Human Rights Questions: Human Rights Situations and Reports of Special Rapporteurs and Representatives, Situation of human rights in Rwanda, Note by the Secretary-General, General Assembly A/49/508, Security Council S/1994/1157, 13 October 1994, Annex II, Report on the situation of human rights in Rwanda prepared by the Special Rapporteur of the Commission on Human Rights in accordance with Commission res. S-3/1 and Economic and Social Council decision 1994/223, para. 16). According to the UN High Commissioner for Refugees (UNHCR), in October 1994 there were about 1,500,000 Rwandan

both sides of national borders in this area may have contributed to make the Rwandan conflict a threat to regional peace. There had, for example, been conflicts between Hutus and Tutsis in Burundi similar to the ones in Rwanda which may have caused realistic fears that the civil war in Rwanda would spread to Burundi.[77]

Even though the text of the resolution suggests that it was the humanitarian aspects of the Rwandan crisis which prompted the Security Council to declare the crisis a threat to regional peace, the fact that there were actually international linkages of the Rwandan crisis should have been relatively uncontroversial, compared with some of the other situations determined to constitute threats to international peace by the Security Council.

The determination by the Council that the civil war in Rwanda constituted a threat to peace and security in the region was followed by an authorization on the part of the Security Council of the Member States who wanted to cooperate in this operation to "use all necessary means", i.e. to undertake a military intervention, in order to protect displaced persons, refugees and civilians at risk in Rwanda, including the establishment of secure humanitarian areas, and to provide security for humanitarian relief operations.[78] The ensuing military intervention was headed by France.

The genocidal dimensions of the Rwandan case were expressly recognized by the Security Council some time after the killings had begun. In the resolution most closely preceding the one in which the Security Council determined that the situation in Rwanda constituted a threat to regional peace,[79] the Council notes the reports indicating that acts of genocide have occurred in Rwanda and recalls that genocide constitutes a crime punishable under international law.[80]

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refugees in neighbouring countries of whom 1,150,000 were found in Zaire (Situation of human rights in Rwanda, Note by the Secretary-General, Addendum, General Assembly, A/49/508/Add. 1, Security Council, S/1994/1157/Add. 1, 14 November 1994, Annex, Third report on the situation of human rights in Rwanda submitted by Mr. René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of res. S-3/1 of 25 May 1994, para. 49).

[77] On Burundi see further below section 3.9.

[78] UN SC res. 929, above note 72, op. paras. 2 and 3; the latter para. referring back to UN SC res. 925, above note 74, op. paras. 4 a) and b) spelling out the mandate of the unsuccessful UN peace-keeping troops in Rwanda, the United Nations Assistance Mission in Rwanda (UNAMIR). On safe humanitarian areas see further Mindua, Antoine, "De la légalité de la 'Zone de sécurité française au Rwanda", *AJICL*, vol. 6, 1994, pp 643–652; Torrelli, Maurice, "Les zones de sécurité", *RGDIP*, vol. 99, 1995, pp 787–848.

[79] The Security Council made this determination in res. 929, above note 72.

[80] UN SC res. 925, above note 74, pre. para. 6. The Council refers, also in the preamble, to a report by the Secretary-General dated 31 May 1994 (S/1994/640).

Later on, as in the case of the former Yugoslavia, the Security Council decided to establish an ad hoc Tribunal to deal with suspected perpetrators of the crime of genocide or of crimes against international humanitarian law.[81] This Tribunal was likewise established under Chapter VII of the UN Charter. In the resolution establishing the Tribunal, the Security Council expresses its "grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda" and determines that "this situation continues to constitute a threat to international peace and security".[82] It is not entirely clear what "this situation" refers to, but it seems to refer most directly to the large-scale killings which had been going on within Rwanda (as opposed to the whole Rwandan situation including the flow of refugees to other countries). In other words, the large-scale killings of civilians within Rwanda constituted in the eyes of the Security Council a threat to international peace.

When the resolution on the Tribunal was adopted in November 1994, however, the large-scale killings of civilians within Rwanda had more or less ceased, so consequently there were no killings which would threaten the peace in the region going on any longer. The Security Council does say, however, that it is "determined to put an end to such crimes", which must mean that in the view of the Security Council the genocidal killings were still going on in Rwanda at the time when the ad hoc Tribunal was established. Though it could mean that the Security Council is determined generally to put an end to genocide and crimes against international humanitarian law, whenever and wherever they occur, in which case exactly when the actual killings in Rwanda took place or ended becomes less important.

[81] UN SC res. 955 of 8 November 1994. The full name of the tribunal is the "International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states, between 1 January 1994 and 31 December 1994" (res. 955, ibid., Annex, Statute of the International Tribunal for Rwanda). On the ad hoc Tribunal for Rwanda, see Akhavan, Payam, "The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment", Current developments, *AJIL*, vol. 90, 1996, pp 501–510; Meier Wang, Mariann, "The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact", *Columbia Human Rights Law Review*, vol. 27, 1995, pp 177–226; Mubiala, Mutoy, "Le Tribunal international pour le Rwanda: Vraie ou fausse copie du Tribunal pénal international pour l'ex-Yougoslavie?", *RGDIP*, vol. 99, 1995, pp 929–954; Shraga, Daphna and Zacklin, Ralph, "The International Criminal Tribunal For Rwanda", *EJIL*, vol. 7, 1996, pp 501–518.

[82] UN SC res. 955, ibid., pre. paras. 4 and 5.

The Security Council points out in the same resolution, however, that the prosecution in Rwanda of persons responsible for serious violations of international humanitarian law would contribute not only to stopping the killings and thereby to the restoration of peace, but also to the process of national reconciliation and thus to the maintenance of peace.[83]

As an enforcement measure the establishment of the Rwandan ad hoc Tribunal is almost as exceptional as the establishment of the ad hoc Tribunal for the former Yugoslavia, except that a precedent had been set with the creation of the latter. Thus the Rwandan ad hoc Tribunal is not quite as exceptional as its Yugoslavian predecessor, although the creation of the Rwandan Tribunal, too, is the result of a wide interpretation of the mandate of the Security Council under the Charter. The creation of these two ad hoc Tribunals may imply that the Security Council has begun a new line of practice and that it will be prepared to create similar tribunals also in other areas of conflict. It is possible, however, that the experiences from the two existing ad hoc Tribunals will make the Security Council more reluctant to create ad hoc war crimes tribunals in the future.

In the case of the ad hoc Tribunal for the former Yugoslavia it can be noted that it was created while the war was still going on as a means, presumably, (even if inefficient) among others to stop the war which itself constituted the most immediate threat to international peace in the region. In Rwanda the civil war had ended once the ad hoc Tribunal was established.

When justifying the creation of the ad hoc Tribunal for Rwanda the Security Council obviously is applying Article 39 which talks of what measures the Council may take "to maintain or restore international security". In Article 39 the order between the two is "maintain or restore" whereas in the Council resolution the order is "the restoration and maintenance" of peace. It seems in Article 39 as if the idea was that the enforcement measures taken by the Security Council would either maintain peace, in the event of threats to the peace, or restore peace, in the event of breaches of the peace or acts of aggression.

In the resolution on the ad hoc Tribunal for Rwanda, however, it seems as if the Security Council thinks in terms of first restoring and then

[83] UN SC res. 955, ibid., pre. para. 7: "Convinced that ... the prosecution ... would contribute to the process of national reconciliation and to the restoration and maintenance of peace,". It can be noted that the Security Council in pre. para. 9 "[Stresses] also the need for international cooperation to strengthen the courts and judicial system of Rwanda". This is of course primarily in order to enable Rwanda to prosecute some of the suspected humanitarian law criminals itself, but apart from that immediate concern the emphasis more generally by the Security Council on the importance of the national judicial system for the maintenance of peace is encouraging from a lawyer's perspective.

maintaining the restored peace.[84] Since the Council theretofore had only talked about the situation in Rwanda being a "threat" to the peace, it is somewhat inconsistent to talk about the "restoration" of peace if the 'peace" referred to really is the international peace and security in the region mentioned earlier in the same resolution, and in the resolution authorizing Member States to intervene militarily in Rwanda.[85] If the conflict in Rwanda was only a "threat" to the peace in the region, the peace by definition was not breached and thus need not be "restored".

If, on the other hand, the "peace" which was supposed to be restored was the peace within Rwanda, the reasoning by the Security Council is entirely logical, but then it is the national peace in Rwanda which is at issue and not the international peace which the Security Council nevertheless purports to be protecting in its resolutions. The Security Council seems to be concerned with "restoring" the peace under Article 39 in an entirely civil war and thereby to be applying Article 39 directly to a civil war irrespective of any international linkages that this civil war may have (which it happened to have in the case of Rwanda in the form of flows of refugees). Of course, it can be argued also that the "maintenance" of peace mentioned as well by the Security Council in the resolution on the ad hoc Tribunal refers to the international peace in the region and that by "restoring" the peace within Rwanda, the peace in the region is "maintained".

Through the creation of the ad hoc Tribunal for Rwanda the Security Council seems to interpret also the term "peace" broadly in the sense that 'peace" is more than the absence of war. "Peace" presupposes national reconciliation and that the persons responsible for serious violations of international humanitarian law are brought to justice.

Apart from the fact that it is noteworthy that the Security Council engages under Chapter VII first in restoring the peace and then in maintaining the peace in the wake of what was basically a civil war, it is noteworthy, too, especially perhaps for a lawyer, that bringing persons suspected of violations of international humanitarian law to justice is considered to be a form of peace-keeping measure.

According to the resolution on the ad hoc Tribunal bringing these persons to justice will contribute to the process of national reconciliation and to the maintenance of peace. If this maxim is taken seriously it would mean that the alleged conflict between peace and justice, which is sometimes discussed in the context of peace agreements versus the respect for human rights where the respect for human rights are said to be

[84] UN SC res. 955, above note 81.
[85] UN SC res. 929, above note 72.

sacrificed for the benefit of peace, does not exist.[86] Instead peace would be dependent on justice being carried out faithfully and on serious human rights and humanitarian law criminals not being blessed with impunity as a reward for their willingness to conclude a peace agreement.

Unfortunately, neither of the two ad hoc Tribunals seems to work very efficiently, especially not the one for Rwanda, and part of the explanation for this is allegedly that the Security Council, or the international community on the whole, is not putting enough pressure on those who are not cooperating with the Tribunals to make them cooperate, i.e. by forcing them, for instance, to hand over suspected criminals, and also that the international community does not provide the Tribunals with adequate resources to make them work properly.[87] If these allegations are true it would indicate that the Security Council itself does not believe, nor does the International Community at large, that bringing the criminals before justice is all that important for the peace process in either country. In the case of Rwanda the official denunciation of the ad hoc Tribunal by the Tutsi government contributes to the malfunctioning of the Tribunal (which is based in Arusha, Tanzania).[88]

[86] In *HRQ* in 1996 an anonymous author argues the other way round and claims that peace was sacrificed for human rights in the case of the former Yugoslavia ("Human Rights in Peace Negotiations", *HRQ*, vol. 18, 1996, pp 249–258). Had it not been for "the moralists" the war would have ended in early 1993, the anonymous author claims, and much suffering and many lives would have been saved: "The pursuit of criminals is one thing. Making peace is another. ... The quest for justice for yesterday's victims of atrocities should not be pursued in such a manner that it makes today's living the dead of tomorrow" (ibid., p 258). When it established the ad hoc Tribunal for the former Yugoslavia, the Security Council stated that the prosecution of humanitarian law criminals would contribute to the restoration and maintenance of peace cf. above note 28.

[87] In the case of the former Yugoslavia it seems as if the SFOR in Bosnia-Herzegovina is intensifying its efforts to apprehend suspected war criminals; in July 1997 it took dramatic action which resulted in one suspect being arrested and one killed. In December two more suspects were apprehended. According to an internal UN investigation into the handling of the International Criminal Tribunal for Rwanda, published on 12 February 1996, "not a single administrative area [of the court] functioned effectively" and the investigation spoke of "mismanagement in almost all areas of the tribunal, and frequent violations of UN rules and regulations" (cited after *Keesing's,* 1997, p 41477; Financing of The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994, Report of the Secretary-General on the Activities of the Office of Internal Oversight Services, UN General Assembly doc. no. A/51/789, 6 February 1997, Plus Annex).

[88] The Rwandan government, who at the time was represented on the Security Council, voted against res. 955, above note 81 on the ad hoc Tribunal for several reasons: because, according to the Rwandan delegate, of the Tribunal's temporal jurisdiction, i.e. only the year of 1994, which did not cover the long period of planning the genocide including the

To conclude the discussion on the establishment of the ad hoc Tribunal and the interpretation of the term threat to the peace by the Security Council under Article 39 of the UN Charter in the case of Rwanda, it can be said that the killing of civilians on a genocidal scale in itself seems to be considered as a threat to the peace by the Security Council rather independently of whether there also exists a real threat to international peace, and that it also seems as if the Security Council is of the opinion that not bringing the persons responsible for such killings to justice constitutes a continuing threat to the peace even if the actual killings have stopped.

3.8 Haiti

In the case of Haiti in 1993 the Security Council determined that the continuation of the situation in which the democratically elected legitimate government of President, of 1991, Jean-Bertrand Aristide was not reinstated and in which Haitians were fleeing to neighbouring countries constituted a threat to international peace and security in the region.[89] The persistence of this situation, according to the Council, "contributes to a climate of fear of persecution and economic dislocation which could increase the number of Haitians seeking refuge in neighbouring Member

execution of "pilot projects" all of which had been carried out since 1990; because of the lack of resources given to the Tribunal; because certain countries (i.e., for instance, France with its close relations with the previous Hutu government and the murdered former Rwandan President Juvénal Habyarimana) who had taken an active part in the civil war would be in a position to propose judges; because the convicted criminals would be imprisoned outside of Rwanda and the same countries who had taken part in the civil war and who had supported the former Hutu regime would be in the position to determine the fate of the detainees imprisoned abroad; because the Tribunal should only try the crime of genocide and thereby prioritize its meagre human and financial resources whereas, according to its statute, the Tribunal was going to try a lot of other crimes as well, in addition to genocide, and there was also no order of priority established in which the crimes should be tried; because the Tribunal would not be entitled to pronounce death sentences; and because the seat of the Tribunal would not be in Rwanda (UN SC, official records, forty-ninth year, S/PV. 3453, 8 November 1994, pp 13–16). The majority of the suspected genocide criminals are tried by Rwandan national courts. According to *Keesing's*, 1995, p 40634, 47,000 people were being kept in prison in Rwanda accused of genocide. According to *Keesing's* also "[The Rwandan government] acknowledeged that the courts had neither the personnel nor the financial resources to deal with the huge numbers of people accused of genocide" (ibid.). According to Amnesty International Report 1996, 62,000 people were awaiting trial accused of having participated in the genocide (p 307 in the Swedish language version of *Amnesty International Report 1996, Amnesty International Årsrapport 1996*). According to *Keesing's* in 1997, 90,000 people were awaiting trial in Rwandan prisons in connection with genocide (p 41431).

[89] UN SC res. 841 of 16 June 1993, pre. paras. 9–11 and 14.

States", and the Council is "convinced that a reversal of this situaiton is needed to prevent its negative repercussions on the region."[90]

The Security Council then, under Chapter VII of the Charter, decided upon an embargo on the supply of arms or petroleum products to Haiti and it required the Member States to freeze any Haitian funds abroad "of the Government of Haiti or of the de facto authorities in Haiti" to make sure that they were not made available to the Haitian de facto authorities.[91] The Security Council stated that it would review the measures against Haiti when the de facto authorities had signed and begun implementing in good faith an agreement to reinstate the legitimate government.[92]

Here the Security Council takes enforcement measures against a state in order to ensure that the results of democratic presidential elections are respected and that the de facto authorities which have come to power by force step down. The situation is basically an internal Haitian one, but the flow of refugees contributes to internationalizing it and making it possible to describe it as at least a potential threat to international peace and security. The Security Council somewhat vaguely states that the "mass displacements of population" are "becoming or aggravating threats to international peace and security" and that the persistence of this situation "could increase the number of Haitians seeking refuge in neighbouring Member States".[93] In the eyes of the Security Council the lack of respect for the democratic election results seems to be the cause of the refugee flow and if the legitimate government is reinstated the threat to international peace and security in the region in the form of flows of refugees will disappear. Fundamentally, however, it would seem as if the Security Council is of the opinion that the illegitimate de facto authorities in Haiti themselves constitute a threat to international peace and security.

Before the Security Council became involved with the situation in Haiti, the Organization of American States (OAS) had adopted recommendatory economic sanctions against Haiti and demanded President Aristide's return to power.[94] The reaction of the OAS to the military coup

[90] Ibid., pre. para. 11.

[91] Ibid., op. para. 8. Cf. also SC res. 1132, above section 3.5 note 61.

[92] Ibid., op. para. 16.

[93] Ibid., pre. paras. 9 and 11 respectively. Cf. Helton, Arthur C., "The United States Government Program of Intercepting and Forcibly Returning Haitian Boat People to Haiti: Policy Implications and Prospects", *New York Law School Journal of Human Rights*, vol. 10, 1993, pp 325–349.

[94] OAS Permanent Council res. 567 of 30 September 1991; Meeting of Ministers of Foreign Affairs, res. 1/91 of 3 October 1991.

in Haiti is particularly interesting since it marks a turn in the traditional OAS policy of non-interference if proof is given by a new government – legitimate or not – that it has gained control over its internal affairs.[95]

After the adoption of mandatory economic sanctions by the Security Council, and thanks to the joint efforts of the Secretary-General of the UN and of the OAS respectively with a view to reaching a political solution to the crisis in Haiti, the elected Haitian President Aristide and the *de facto* leader General Raoul Cédras signed the so-called Governors Island Agreement, of 3 July 1993, laying down the conditions for a peaceful transition to democratic rule in Haiti and the return to Haiti of President Aristide, who had fled the country after the military coup.[96] The terms of the Governors Island Agreement were spelt out in greater detail in the New York Pact of 16 July 1993 worked out at the UN Headquarters.[97] None of the agreements were respected by the military regime in Haiti.

In May 1994 the Security Council reaffirmed that "the goal of the international community remains the restoration of democracy in Haiti and the prompt return of the legitimately elected President" under the framework of the Governors Island and the New York Pact.[98] The Security Council further condemns "the numerous instances of extra-judicial killings, arbitrary arrests, illegal detentions, abductions, rape and enforced disappearances, the continued denial of freedom of expression, and the impunity with which armed civilians have been able to operate and continue operating".[99] This confirms the impression that the Security Council is more concerned with the internal political situation in Haiti than with any international repercussions of the Haitian situation.

[95] For an analysis of the prospects of a move away from non-interference on the part of the OAS, taking as a point of departure the "Santiago Commitment to Democracy and the Renewal of the Inter-American System" adopted by the OAS General Assembly on 4 June 991, see Schnably, Stephen, "The Santiago Commitment as a Call to Democracy in the United States: Evaluating the OAS role in Haiti, Peru, and Guatemala", *The University of Miami Inter-American Law Review*, vol. 25, 1994, pp 393–587; see also Farer, Tom J., "Collectively Defending Democracy in a World of Sovereign States: The Western Hemisphere's Prospect", *HRQ*, vol. 15, 1993, pp 716–750. One does not need to go so far as Fernando Tesón and state that the traditional criterion of effectiveness for a government's international legitimacy is "indefensible" in order to question its validity today (Tesón, 996, op. cit. section 2.3.1 note 35, p 332.

[96] The Governors Island Agreement is contained in SC doc. S/26063, 12 July 1993, "The situation of democracy and human rights in Haiti: report of the Secretary-General". Security Council support for the efforts of the UN and the OAS Secretaries-General is expressed in SC res. 841, above note 89, see in particular pre. para. 6 and op. paras. 15–16.

[97] The New York Pact is contained in SC doc. S/26297, 13 August 1993, "Report of the Secretary-General".

[98] UN SC res. 917 of 6 May 1994, pre. para. 8.

[99] Ibid., pre. para. 11.

The Security Council reaffirmed its determination that "the situation created by the failure of the military authorities in Haiti to fulfil their obligations under the Governors Island Agreement and to comply with relevant Security Council resolutions constitutes a threat to peace and security in the region".[100] At this stage the Council does not mention the flow of refugees but concentrates solely on the national dimensions of the Haitian situation when it determines that this situation constitutes a threat to the peace. In what way exactly the situation in Haiti threatens the peace in the region is not specified. It can be noted that according to the Security Council it is the *failure* of the military authorities *to fulful their obligations* under the Governors Island Agreement and their *failure to comply* with the relevant Security Council resolutions which constitutes the threat to the peace. Since their obligations both under the Agreement and under the Security Council resolutions are to restore democracy, it can be said that indirectly, but fundamentally, it is the lack of democracy which constitutes the threat to the peace.

Another circumstance among the ones which threaten regional peace, according to the Security Council, is the fact that the UN peace-keeping mission in Haiti, the United Nations Mission in Haiti (UNMIH), was hindered from carrying out its mandate[101] (to train and monitor the Haitian police and to provide military training and carry out works of military construction[102]). Since the peace-keeping personnel were not Haitian the refusal of the *de facto* authorities to cooperate with the UNMIH immediately gave the political conflict in Haiti an international dimension. If carried to extremes, however, this kind of logic could lead to the Security Council first deciding on a peace-keeping mission and then if the target country refuses to cooperate, deciding that its refusal constitutes a threat to the peace. It can be noted that the UNMIH had not been decided upon under Chapter VII of the Charter and that its presence in Haiti was thereby in principle dependent on it being accepted by the local authorities.[103]

[100] Ibid., pre. para. 13.

[101] UN SC res. 917, pre. para. 12. The Security Council later in this context also referred to the expulsion of the staff of the OAS/UN International Civilian Mission in Haiti (MICIVIH) (UN SC res. 940 of 31 July 1994, pre. para. 5). Concerning this mission see O'Neill, William G., "Recent Developments: Human Rights Monitoring vs. Political Expediency: The Experience of the OAS/UN Mission in Haiti", *Harvard Human Rights Journal*, vol. 8, 1995, pp 101–128.

[102] UN SC res. 867 of 23 September 1993.

[103] Since the UN continuously regarded the regime of the democratically elected president as the legitimate authorities in Haiti, it could be argued that the legitimate authorities had expressed the necessary consent even if the *de facto* authorities refused to accept the presence of the peace-keeping mission. In the end the UNMIH (II) was placed under a Chapter VII mandate (UN SC res. 940 of 31 July 1994). (The UNOSOM (II) in Somalia (res. 814, above

After having reaffirmed that the situation in Haiti threatened the peace, the Security Council under Chapter VII of the Charter decided on comprehensive economic sanctions against Haiti, i.e. it broadened the sanctions adopted one year earlier.[104]

In July 1994 the Security Council went one step further. The Council again determined that "the situation in Haiti continues to constitute a threat to peace and security in the region".[105] Among the circumstances cited before this determination were some of those already cited in earlier resolutions leading up to the same conclusion. "[T]he desperate plight of Haitian refugees" is mentioned along with "the further deterioration of the humanitarian situation in Haiti, in particular the continuing escalation by the illegal de facto regime of systematic violations of civil liberties".[106] The Security Council reiterates "its commitment for the international community to assist and support the economic, social and institutional development of Haiti" and reaffirms that "the goal of the international community remains the restoration of democracy in Haiti and the prompt return of the legitimately elected President".[107]

None of the circumstances cited is directly tied to the determination in the last preambular paragraph that the situation constitutes a threat to the peace and security in the region, but it must be presumed that all the circumstances taken together constituted such a threat in the view of the Security Council.

The strong engagement of the Council in the internal political situation of Haiti can again be noted. Also in Somalia the Security Council in time engaged in the reconstruction of the internal institutional structure of the country (albeit unsuccessfully), but the lack of democracy and the lack of respect for civil liberties was not cited among the reasons why the situation in Somalia was considered a threat to international peace and security.[108]

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note 51) had also got a chapter VII mandate whereas this was not the case with the UNAMIR (II) in Rwanda (UN SC res. 918 of 17 May 1994; res. 925 of 8 June 1994) nor was it the case with the UNPROFOR in the former Yugoslavia (originally established by UN SC res. 743 of 21 February 1992).

[104] UN SC res. 917, above note 98. The earlier sanctions were adopted by res. 841, above note 89. Interestingly, the prohibition on trade with Haiti did not apply to trade in "information materials, including books and other publications, needed for the free flow of information" (UN SC res. 917, above note 98, op. para. 8.

[105] UN SC res. 940 of 31 July 1994, pre. para. 10.

[106] Ibid., pre. para. 4.

[107] Ibid., pre. paras. 6 and 7 respectively.

[108] Cf. res. 814, above note 51; res. 865 of 22 September 1993; and res. 897 of 4 February 1994.

In July 1994 the determination by the Security Council that the situation in Haiti constituted a threat to international peace was followed by a decision to authorize the Member States to form a multinational force and to use "all necessary means" to "facilitate the departure from Haiti of the military leadership", to ensure "the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti" and to establish a secure and stable environment generally in which different measures to democratize Haiti could be carried out.[109] The multinational force was headed by the US.[110] Because the military regime in Haiti stepped back voluntarily at the last minute the intervention was peaceful.[111]

3.9 Burundi

Burundi, like Rwanda, is plagued by civil conflict between the two ethnic groups the Tutsis and Hutus. In July 1996 there was a military coup in Burundi in which the Hutu-Tutsi coalition government was overthrown by the Tutsi-dominated army. The portfolios in the new government were divided evenly between Hutus and Tutsis.[112] In August the same year the Security Council found that the situation in Burundi constituted a threat to international peace: The Council expressed its deep concerns at "the continued deterioration in the security and humanitarian

[109] UN SC res. 940, above note 105, op. para. 4. For a discussion of the handling by the OAS and the UN of the crisis in Haiti until and including res. 940, see Coicaud, Jean-Marc, "La communauté internationale et la reprise du processus démocratique", *Le Trimestre du Monde*, 1er trimestre, 1995, pp 93–128; see also Bar-Yaacov, Nomi, "Haïti: la lutte pour les droits de l'homme dans un conflit entre l'État et la Nation", *Le Trimestre du Monde*, 1er trimestre, 1995, pp 135–159. The emphasis by the Security Council on human rights and democracy in Haiti leads Richard B. Lillich to characterize the UN authorized intervention in Haiti as "the purest form of humanitarian intervention to date" ("The Role of the UN Security Council in Protecting Human Rights in Crisis Situations: UN Humanitarian Intervention in the Post-Cold War World", *Tulane Journal of International and Comparative Law*, vol. 3, 1994, (pp 1–17), p 9).

[110] Cf. "Agora: The 1994 U.S. (sic!) Action in Haiti", *AJIL*, vol. 89, 1995, pp 58–87.

[111] The voluntary withdrawal of the military government was preceded by negotiations with the US which resulted in an agreement implying among other things that the Haitian military leaders would not be held accountable for their human rights crimes in return for peacefully relinquishing control of the government. This deal is criticized by Jeffry A. Williams and John N. Petrie in "The Carter Mission to Haiti: Unintended Consequences for Human Rights Law", *Fletcher Forum of World Affairs*, 1995, vol. 19, pp 95–114. Cf. also above note 86, concerning the discussion of a possible conflict between peace and human rights in the context of the ad hoc Tribunals for the former Yugoslavia and Rwanda.

[112] *Keesing's*, 1996, p 41214.

situation in Burundi that has been characterized in the last years by killings, massacres, torture and arbitrary detention, and at the *threat that this poses to the peace and security of the Great Lakes Region as a whole*" (emphasis added).[113]

After having characterized the humanitarian situation in Burundi as a threat to the regional peace and security, the Security Council "[condemns] the overthrow of the legitimate government and constitutional order in Burundi" and "[condemns] also all those parties and factions which resort to force and violence to advance their political objectives".[114] The Security Council also decided that if negotiations between all of Burundi's political parties and factions, inside and outside the country, were not initiated then the Security Council would "consider the imposition of measures under the Charter of the United Nations" in order to ensure compliance with the demand that such negotiations begin.[115] Chapter VII is not mentioned in the context where the Security Council talks of measures under the UN Charter, but what the Council seems to have in mind are economic sanctions under Article 41.

Among the measures that the Security Council would consider was a ban on the sale or supply or arms and related *matériel* to the regime in Burundi.[116] The imposition of an embargo on the supply of arms seems to have become a common preliminary step in the Security Council's dealing with civil war situations and situations involving a serious humanitarian crisis. In the case of Burundi, however, the Security Council never decided upon an arms embargo. Concerning the serious violations of international humanitarian law taking place in Burundi, the Security Council meaningly recalled that "all persons who commit or authorize the commission of such violations are individually responsible and should be held accountable" and the Council reaffirms "the need to put an end to impunity for such acts and the climate that fosters them".[117] There has been no arrangement like the ad hoc Tribunal for Rwanda, however, in the case of Burundi.

The Security Council hints at the possibility of a humanitarian intervention of some sort in Burundi when it encourages the Secretary-General and the Member States to continue to facilitate contingency planning "for an international presence and other initiatives to support and help

[113] UN SC res. 1072 of 30 August 1996, pre. para. 4.
[114] Ibid., part A, op. para. 1.
[115] Ibid., part A, op. para. 6 and part B, op. para. 11.
[116] Ibid., part B, op. para. 11.
[117] UN SC res. 1072, above note 113, pre. para. 7.

consolidate a cessation of hostilities, as well as to make a rapid humanitarian response in the event of widespread violence or a serious deterioration in the humanitarian situation in Burundi".[118]

Among the circumstances making the situation in Burundi a threat to the peace in the region, no expressly or directly international ones are cited by the Security Council.[119] Refugees flowing from Burundi to the neighbouring countries are not talked of at all in the resolution for instance. Foreign involvement in the conflict in Burundi is not mentioned either except when the Security Council demands that negotiations should begin involving Burundi's political parties and factions, *whether inside or outside the country,* implying that some Burundian groups operate from foreign territories.[120]

The Security Council is basically focussing on the internal political and humanitarian situation within Burundi and seems to say that the violent and unstable political and humanitarian situation in Burundi constitutes in itself a threat to the peace and security in the region. As in the case of Rwanda, however, there are evident international links since the conflict between Tutsis and Hutus in Burundi corresponds to a similar conflict in Rwanda. Since there is a national border in the middle leaving members of the same ethnic group on either side, there is a tangible risk that a conflict between the ethnic groups on one side of the border will spread also to the other side and thereby make the conflict international.

Considering the general political instability in the countries in the Great Lakes Region it could perhaps also be argued that a military coup in one country, or the serious deterioration of the humanitarian situation there, may have repercussions in the other countries even if the conflict, for instance in Burundi, is a purely internal one and there are no tangible elements present which would turn the internal conflict into an international threat to the peace.

3.10 Zaire (now the Democratic Republic of Congo)

Zaire is yet another example of a disintegrating African state. At the end of 1996 the Security Council determined that "the magnitude of the present humanitarian crisis in eastern Zaire constitutes a threat to peace

[118] Ibid., op. para. 12.

[119] According to *Keesing's*, 1996, p 41214, citing a statement issued by Amnesty International on August 6 (1996), "[M]ore than 6,000 [Hutu] civilians were reported to have been killed by the largely Tutsi army since the coup".

[120] Cf. UN SC res. 1072, above note 113, part A, op. para. 6.

and security in the region.[121] Among the circumstances making the situation a threat to regional peace the Security Council cites the large-scale movements of refugees and internally displaced persons.[122] The refugees in question were the 1,000,000 Hutu refugees from Rwanda who had stayed in Zaire since the spring and summer of 1994 when they had fled what they feared would be the revenge on the part of the advancing Tutsi FPR (Rwandan Patriotic Front) forces in Rwanda.[123] The Security Council underlined the necessity of adopting measures in order to enable the return in the region of humanitarian agencies and to secure the prompt and safe delivery of humanitarian assistance to those in need.[124] The Council also underlined, as crucial elements for the stability of the region, the urgent need for the orderly and voluntary repatriation and resettlement of refugees and return of internally displaced persons.[125]

The main concern of the Security Council seems to be humanitarian, but considering the large number of Rwandan Hutu refugees still remaining in Zaire there were obvious international aspects to the situation in eastern Zaire which could reasonably turn the humanitarian crisis into a threat to regional peace and security.

Less than a week after its first resolution on the humanitarian crisis in Zaire the Security Council again determined that the situation in eastern Zaire constituted a threat to international peace and security.[126] The Security Council talks generally about the deteriorating situation in the Great Lakes region and recognizes that the situation in eastern Zaire demands an urgent response by the international community.[127]

The Security Council then goes on to authorize under Chapter VII of the Charter the Member States to establish for humanitarian purposes a temporary multinational force "to facilitate the immediate return of humanitarian organizations and the effective delivery by civilian relief organizations of humanitarian aid to alleviate the immediate suffering of displaced persons, refugees and civilians at risk in eastern Zaire" and to facilitate the voluntary repatriation of refugees as well as the voluntary

[121] UN SC res. 1078 of 9 November 1996, pre. para. 19.

[122] Ibid., pre. para. 4. The internally displaced persons were the hundreds of thousands of Banyamulenge, ethnic Tutsis, living in eastern Zaire, who were fleeing the fighting between the Banyamulenge and the Zairean Armed Forces (FAZ) (*Keesing's*, 1996, p 41302).

[123] Cf. above note 76.

[124] UN SC res. 1078, above note 121, pre. para. 6.

[125] Ibid., pre. para. 14.

[126] UN SC res. 1080 of 15 November 1996.

[127] Ibid., pre. paras. 2 and 11 respectively.

return of displaced persons.[128] The Member States were authorized to use "all necessary means" to achieve these humanitarian objectives.[129] The multinational force was supposed to be led by Canada.[130] This time the multinational force, however, was never formed, mainly because the Hutu refugees in Zaire by their own efforts had started returning to Rwanda in large numbers. In the end, therefore, there was no need for a multinational force.[131]

3.11 Albania

When civil strife broke out in Albania in March 1997 the international community was again reminded of the fact that states are disintegrating not only in Africa. Without further motivation the Security Council determined that "the present situation of crisis in Albania constitutes a threat to peace and security in the region".[132] Considering that Albania borders on the former Yugoslavia which has been, and still is, an area characterized by violence and instability and that ethnic Albanians live also in Serbia and Montenegro, in the province of Kosovo, and in the former Yugoslavian Republic of Macedonia, it is not unreasonable to consider that an internal conflict in Albania constitutes a threat to peace and security in the region. The Security Council does not in any way, however, specify more concretely in what way the Albanian crisis threatened the regional peace.

The determination by the Security Council that the crisis in Albania constituted a threat to the peace was followed by an authorization on the part of the Security Council of a multinational protection force established by certain Member States, and led by Italy, to conduct an "operation" in Albania "to facilitate the safe and prompt delivery of humanitarian assistance, and to help create a secure environment for the missions of international organizations in Albania, including those providing humanitarian assistance".[133]

[128] Ibid., op. para. 3.

[129] Ibid., op. para. 5.

[130] Ibid., op. para. 4. See SC doc. S/1996/941, 14 November 1996, Annex, Letter dated 14 November 1996 from the Permanent Representative of Canada to the United Nations addressed to the Secretary-General.

[131] Cf. above note 122. The Security Council endorsed a peace plan for eastern Zaire (which evidently did not work out) by res. 1097 of 18 February 1997.

[132] UN SC res. 1101 of 28 March 1997, pre. para. 10.

[133] Ibid., op. paras. 2 and 4.

Chapter VII of the UN Charter is *not* cited directly in connection with the authorization of the Member States to conduct the humanitarian operation. In a somewhat strange turn of phrase at the end of the same operative paragraph of the same resolution the Security Council "*acting under Chapter VII* (emphasis added) of the Charter of the United Nations, *further authorizes* these Member States to ensure the security and freedom of movement of the personnel of the said multinational protection force".[134]

This must reasonably be interpreted to mean that the multinational protection force is allowed to defend itself in addition to protecting the deliveries of humanitarian assistance including the aid workers delivering the assistance. Otherwise it must mean that some other troops are allowed to protect the protection force; in any case the Member States are somehow authorized to use military force to carry out the humanitarian operation.

3.12 Libya and Sudan

The cases of Libya and Sudan distinguish themselves from the other cases discussed heretofore in that the resolutions adopted in these cases by the Security Council have not been motivated by the humanitarian situation, by the great suffering of the population or by the lack of respect for human rights or democracy in the respective countries. Both cases have to do with the refusal of the states to extradite suspected terrorists. They are included here in order to illustrate both the breadth of the Security Council's construction of the notion of a threat to the peace and the breadth of the measures that the Security Council is prepared to enforce in order to eliminate the threats to the peace, as the Security Council perceives them.

In relation to Libya, firstly, the Security Council stated that international terrorism, in the Libyan case primarily the destruction of an aircraft over the Scottish village of Lockerbie in 1988,[135] constitutes a threat to international peace and security.[136] The opinion that international terrorism constitutes a threat to the peace is not controversial. The Security

[134] Ibid., op. para. 4.

[135] A French aircraft was also destroyed over Niger in 1989 which Libya is also suspected of lying behind, but this aspect of the Libyan case has not been paid as much attention to as the destruction of the American aircraft over Lockerbie in Scotland. Perhaps this is because France has not been pressing the issue against Libya as hard as the US and the UK have.

[136] UN SC res. 731 of 21 January 1992, pre. para. 3.

Council states further that investigations implicate officials of the Libyan Government in the destruction of the aircraft and requests Libya, implicitly, to extradite the suspected terrorists.[137]

This demand gave rise to a complaint on the part of Libya to the ICJ against the US and the UK under the Montreal Convention of 1971 on the safety of civil aviation.[138] The Montreal Convention regulates *inter alia* the handling of cases involving suspected terrorists according to the rule that a state on whose territory the suspects are found should either prosecute them or extradite them (*aut dedere aut judicare*, Article 7). Disputes concerning the Montreal Convention may according to Article 14 of the Convention be referred to the ICJ.

When Libya refused to comply with the resolution, the Security Council determined that the continued failure by the Libyan Government to respond to the request to extradite the suspected terrorists constituted a threat to international peace and security.[139] The Security Council decided under Chapter VII of the UN Charter that Libya must comply with the request contained in the earlier resolution and the Council also decided upon economic, or non-military, sanctions against Libya in order to make it comply with the request to extradite the suspected terrorists.[140] The Security Council also decided that the Libyan government must commit itself definitively to cease all forms of terrorist action and all assistance to terrorist groups.[141]

[137] Ibid., pre. para. 7 and op. para. 3.

[138] The full name of the convention is the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done at Montreal on 23 September 1971 (974 UNTS 177). Cf. the ICJ's Order of 14 April 1992 concerning provisional measures, Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, (Libyan Arab Jamahiriya v. UK), *ICJ Reports* 1992, p 3; (Libyan Arab Jamahiriya v. US) *ICJ Reports* 1992, p 114. The case is still pending before the ICJ. The Libyan case has also given rise to a lively debate in the legal doctrine on the limits of the mandate of the Security Council and on the constitutional relationship between the Security Council and the ICJ; cf. above section 2.1.2 note 13 Cf. also concerning the possibilities of judicial review by the ICJ of the decisions of the Security Council, the case of Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276(1970), Advisory Opinion of 21 June 1971, *ICJ Reports*, p 16, paras. 87–116.

[139] UN SC res. 748 of 31 March 1992, op. para. 8.

[140] Ibid., op. paras. 1 and 3. The sanctions include among other things the interruption of aircraft communications with Libya, including the prevention of the operation of all Libyan Arab Airline offices, prohibition of the supply of aircraft or aircraft components to Libya, prohibition of the provision of arms and related material including technical advice, assistance or training, reduction of the staff at Libyan diplomatic missions and consular posts (ibid., op. paras. 4–6).

[141] Ibid., op. para. 2.

Of several crucial points in the Libyan case, one is the relationship between the decision of the Security Council under Chapter VII of the UN Charter and the rule of customary international law that no state is under the obligation to extradite its own citizens. Another issue is the fact that the Security Council takes on a judicial role and decides what is in reality a dispute under the Montreal Convention, which should be decided in accordance with the procedures laid down therein.[142] In addition, Libya is presumed to be guilty of state sponsored terrorism without a trial.

A fourth issue is whether the ICJ will actually find that the decision of the Security Council is invalid on the ground that the Security Council acted outside its mandate when it took the decision forcing Libya to extradite the suspected Libyan terrorists (which Libya has not complied with).[143] Concerning the notion of threat to the peace the Libyan case also raises the issue of whether the failure to comply with the demand to extradite the suspected terrorists four years after the actual terrorist attack really constitutes a threat to the peace.[144]

The Sudanese case, secondly, involves terrorists suspected of having tried to assassinate the president of Egypt Hosni Mubarak in Ethiopia in 1995. The Security Council states in general terms that "the suppression of acts of international terrorism, including those in which States are involved, [i.e. in this case presumably the Sudan] is an essential element for the maintenance of international peace and security".[145] The Security Council refers to similar requests formerly having been put forward by the Organization of African Unity (OAU) and on the basis of the 1964 Extradition Treaty between Ethiopia and the Sudan calls upon the government of Sudan to extradite to Ethiopia for prosecution the three suspects sheltering in the Sudan, and to desist from engaging in activities of assisting, supporting and facilitating terrorist activities and from giving shelter and sanctuaries to terrorist elements.[146]

[142] Cf., however, Conforti, Benedetto, "Le pouvoir discrétionnaire du Conseil de sécurité en matière d'une rupture de la paix ou d'un acte d'agression", in *Colloque Dupuy*, (pp 51–60), p 60 who argues that this is an irrelevant point of view, what is relevant is whether the refusal to extradite constituted a threat to the peace or not.

[143] The decision on provisional measures, above section 2.1.2 note 11, rather suggests that it will not.

[144] Cf. Conforti, op. cit. note 142, p 60.

[145] UN SC res. 1044 of 31 January 1996, pre. para. 5.

[146] Ibid., op. para. 4 a) and b). For details about the Ethiopian allegations and the Sudanese denial of all involvement in the assassination attempt, see Security Council doc. S/1996/10, 9 January 1996, letter dated 9 January 1996 from the Permanent Representative of Ethiopia to the United Nations addressed to the President of the Security Council plus Annexes I–III; and S/1996/22 of 11 January 1996, Letter dated 11 January 1996 from the Permanent

When Sudan did not comply with these requests the Security Council determined that the non-compliance by the Sudan constituted a threat to international peace and security.[147] Then the Security Council, in the same way as it proceeded in the case of Libya, made the same requests once again, but this time explicitly acting under Chapter VII of the UN Charter, and decided on some rather mild non-military enforcement measures against the Sudan to be in force until it complies with the requests.[148] Later on the Security Council once again found that the Sudan had not complied with the requests to extradite the three suspected terrorists and to desist from supporting terrorist activities and so the Security Council renewed its determination that the non-compliance by the Sudan with these requests constituted a threat to international peace and security.[149] The Security Council also tightened up the sanctions somewhat against Sudan.[150]

The Sudanese case raise more or less the same issues as the Libyan case mentioned above. In the Sudanese case the OAU had been engaged in trying to make the Sudan extradite the suspected terrorists before the Security Council became involved, which may render more legitimacy, if not legality, to the Security Council involvement in this affair in comparison with its involvement in the Libyan case. The Security Council takes on the same quasi-judicial role in both matters. However, if the suspected terrorists are not Sudanese nationals the conflict between the demand to extradite and the rule of customary international law that no state is obliged to extradite its own nationals does not arise. It is not clear from the Security Council documents whether the suspected terrorists are Sudanese citizens or not.

The question of whether the failure to comply with the demand of the Security Council to extradite the suspects constitutes a threat to the peace remains the same and, in particular, whether this failure continues to constitute a threat to the peace a long time after the actual terrorist event has

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Representative of the Sudan to the United Nations addressed to the President of the Security Council plus Annex; and S/1996/25, 12 January 1996, Letter dated 12 January 1996 from the Permanent Representative of the Sudan to the United Nations addressed to the President of the Security Council plus Annex.

[147] UN SC res. 1054 of 26 April 1996, pre. para. 11.

[148] Ibid., pre. para. 12; op. paras. 1 and 3. The enforcement measures include the reduction of the staff at Sudanese diplomatic missions and consular posts and the restriction of the entry into or transit through their territory of members or officials of the Sudanese government and members of the Sudanese armed forces.

[149] UN SC res. 1070 of 16 August 1996, pre. paras. 9 and 11.

[150] Ibid., op. para. 3. The interruption of aircraft communications with Sudan was added to the enforcement measures already in force.

taken place (not so long in the case of Sudan).[151] One argument in favour of the failure to extradite remaining a threat to the peace long after the event is that a state that fails to extradite shall not be able to profit from its own failure and with the passing of time be released from its obligation to extradite or from the international shame it deserves for failing to abide by international law and/or decency because too much time has passed since the terrorist attack took place. On the other hand, whether the failure constitutes a threat to the peace or not early on or later in the affair, the question of whether the Security Council is the right forum to solve such disputes is fundamentally relevant from the very beginning.

In both the Libyan and Sudanese cases an argument of a more formal character against the failure to extradite constituting a threat to the peace on the whole is the way the existence of a threat to the peace in the respective cases is motivated. In both cases the Security Council first adopted non-binding resolutions putting forward the requests to extradite. Then in both cases the Security Council adopted binding resolutions under Chapter VII, putting forward the same requests but now basing them on the failure of the respective target states to comply with the formerly adopted non-binding resolutions. According to the Security Council this failure constitutes in itself a threat to the peace according to the Security Council.[152]

If the important element is that the state at which the resolution is directed has failed to comply with an earlier non-binding resolution then the Security Council may in principle take any non-binding resolution and then determine the existence of a threat to the peace under Article 39 of the Charter if the target state does not comply, and thereby make it possible to take enforcement measures under Chapter VII against the non-complying state.[153] This would seem a somewhat too easy, but perhaps and hopefully a rather hypothetical way for the Security Council to "create" threats to the peace when it wants – non-militarily or militarily – to force certain countries to comply with certain demands.

[151] Of course, one could employ a circular argument and maintain that any action or non-action which irritates a permanent member, in particular, of the Security Council constitutes a potential threat to international peace just because a member of the Security Council is irritated and the Security Council may act precisely because of this irritation.

[152] UN SC res. 748, above note 139, pre. para. 8; and UN SC res. 1054, above note 147, pre. para. 11 and res. 1070, above note 149, pre. para. 12.

[153] Cf. Higgins, 1994, op. cit. section 1 note 3, pp 257–259.

3.13 Analytic summary of cases

With the exception of the Iraqi armed attack on Kuwait in 1990 which constituted a clear breach of the peace under Article 39 of the UN Charter (if not an act of aggression),[154] and which is therefore not dealt with in this study, none of the situations which have since been deemed to constitute threats to the peace by the Security Council have involved one state threatening or attacking another state, i.e. a scenario in line with the traditional conception of what constitutes a threat to or breach of international peace and security.

The case of Bosnia-Herzegovina bordered on the traditional conception in the sense that once Bosnia-Herzegovina had become an independent state, in 1992, it was the object of armed attacks if not directly carried out by foreign states then at least heavily supported by foreign states. The Security Council half-admitted this when it demanded that units of the Yugoslav People's Army and elements of the Croatian Army must cease interfering and withdraw from Bosnia-Herzegovina.[155] The Security Council also almost singled out an aggressor when it introduced comprehensive economic sanctions against Serbia and Montenegro.[156] But this is the only case which could perhaps be said to fit the traditional conception of an *inter*national threat to or breach of the peace although it was not treated as such by the Security Council. Also, the conflict in the former Yugoslavia differs from the traditional international conflict in that it started as a civil war within the Socialist Federal Republic of Yugoslavia and later turned into an international conflict.

This civil war was considered by the Security Council to constitute a threat to the peace and security in the region. In all the other cases as well where the Security Council has determined the existence of a threat to the peace the situation has been one of, if not outright civil war, at least one of violent civil unrest. In the case of the Kurds and the Shiite muslims in Iraq the repression of the civilians took place within the larger framework of the war between Iraq and the UN authorized forces cooperating to oust Iraq from Kuwait, so the situation was not one of a purely civil war. The repression of the Iraqi civilians constituted a separate enough aspect of the conflict, however, in order for it to be considered a threat to the peace in its own right, which is also the way the Security Council regarded it.

[154] UN SC res. 660 of 2 August 1990, pre. para. 3, talks of "a breach of international peace and security".
[155] UN SC res. 752, above note 15, op. paras. 3 and 4.
[156] UN SC res. 757, above note 16, op. paras. 3–9.

The Security Council has seldom spelt out specifically which aspects of the situations it has considered to constitute threats to the peace have been the elements actually threatening international peace and security. On more than one occasion it would seem that the civil conflicts in question have not in fact threatened international peace. The Security Council usually enumerates a number of circumstances in separate preambular paragraphs and then ends by postulating that the situation constitutes a threat to peace and security in the region.

In addition to the fact that all the situations have been civil war situations, and thereby atypical if compared with a traditional idea of threats to international peace and security, the Security Council has mentioned as background factors some other atypical circumstances that presumably motivated it to consider that the situations have constituted threats to international peace.

These circumstances most often include serious human suffering in the form, for instance, of repression, starvation or mass killings, serious breaches of international humanitarian law, which have led to the creation of two ad hoc Tribunals to deal with these crimes among others, flows of refugees to neighbouring countries or of displaced persons within the country where the civil war is going on and also a lack of respect for civil liberties and a lack of democracy. Of these circumstances, only a large flow of refugees can be said to contain within it a truly international component in the sense that something is moving from one country to another, and may indeed cause regional instability, whereas the other circumstances are largely internal. Still the Security Council is of the opinion that they constitute threats to the peace under Article 39 of the UN Charter.

In one case, in Albania in 1997, the Security Council did not mention any circumstances at all except for "hostilities and acts of violence" and a "deteriorating situation" in Albania which would make the Albanian civil conflict a threat to international peace and security.[157] Perhaps, in the view of the Security Council, the fact that Albania borders on the inherently unstable former Yugoslavia makes it obvious that a civil war in Albania also constitutes a threat to peace and security in the region.

Two other particular atypical cases of determinations by the Security Council of the existence of threats to the peace have also been included in the study. In these cases the Security Council has considered as threats to the peace the refusal on the part of states presumed to be involved in terrorist activities abroad (Libya and Sudan) to extradite suspected terrorists

[157] UN SC res. 1101, above note 132, pre. paras. 6 and 5 respectively.

for prosecution. These are obviously situations with strong international connections and in that sense they are not as foreign to the traditional notion of threats or breaches of international peace as are the civil war situations. They still diverge from the ordinary pattern of what in the view of the Security Council constitutes a threat to the peace and are included also in order to illustrate the breadth of enforcements measures or breadth of purposes for the realization of which the Security Council is prepared to decide on enforcement measures under Chapter VII of the Charter.

Concerning the kind of enforcement measures that the Security Council has been prepared to take it can be noted first of all that in some of the cases where the Council has determined the existence of a threat to the peace it has not taken any enforcement measures at all to eliminate the threat. This was the case with respect to the repression of the Kurds and Shiite muslims in Iraq and with respect to the civil unrest and humanitarian suffering in Burundi and Zaire.

In most cases, however, the Security Council has followed up its determinations of the existence of a threat to the peace with decisions on enforcement measures – non-military or military – of varying degrees of severity. In many of the cases the Security Council has begun by instituting an embargo on the sales of arms to the country in question or to a particular warring party (the UNITA in Angola for instance). In some cases, and after some show of disrespect for the decision of the Security Council on the part of the authorities in the country concerned the arms embargo has been expanded into a set of more comprehensive economic sanctions.

The Security Council has several times made use of military enforcement measures, though the use of military enforcement measures has been preceded by the use of non-military enforcement measures in every case except one (Albania). The authorization of military enforcement measures in the case of the Central African Republic, which has not been studied in detail here, were not preceded by non-military measures either.

What is remarkable, in addition to the very fact that the Security Council has made frequent use of military enforcement measures at all, is that the Council has decided on military enforcement measures through a new procedure which seems to have become established practice in the Council. In all the cases the Security Council has acted by authorizing willing Member States to carry out the military intervention or operation in question. The authorization is always granted on condition that the Member States cooperate with the UN and that they report to the Security Council, but the impression one gets is nevertheless that in

practice the Member States act rather independently of the UN.[158] In practice, one country, or organization, has taken the lead in these operations. In the case of Bosnia-Herzegovina the Member States *acting nationally or through regional organizations* were authorized to take the military enforcement measures in question (in order to assist the UNPROFOR in delivering humanitarian assistance,[159] in upholding the respect of the ban on flights in the airspace above Bosnia-Herzegovina[160] and in protecting the "safe zones" established in Bosnia-Herzegovina[161]). In practice, this meant that the NATO took the lead in the military enforcement operations in Bosnia-Herzegovina.

In Somalia and in Haiti, the US led the military interventions (in Haiti the military regime stepped back voluntarily in the end, so the intervention became a peaceful one). In Rwanda France led the intervention and in Albania it was Italy who took the lead. In the case of Zaire Canada had offered to establish a multinational force and had offered to take the lead in organizing and commanding a multinational force, but the plans for a multinational force in this case were never realized.

In two of the cases, in the former Yugoslavia and Rwanda, the Security Council also took the unusual – either ground-breaking or exceptional – enforcement measure under Chapter VII of the Charter of establishing ad hoc Tribunals for the prosecution of those having committed *inter alia* serious violations of international humanitarian law and genocide (or "ethnic cleansing" as it was termed in the former Yugoslavia).[162]

[158] Bothe, op. cit. section 2.1.2 note 10, pp 73–74, argues that the Security Council may not legally delegate its powers to take enforcement measures under Chapter VII of the UN Charter, but this is in fact what has happened. According to Yoram Dinstein (who is not, however, discussing the cases of authorization directly but is comparing the powers of the General Assembly and the Security Council respectively) "... a Security Council decision ... (by dint of Articles 42 and 51) can legitimize an otherwise unlawful use of force" (Dinstein, Yoram, *War, Aggression and Self-Defence*, 1994, p 303) which seems to support the view that the Security Council may authorize also individual Member States to use force. Koskenniemi, 1995, op. cit. section 2.1.2 note 10, writes that the Security Council has never required States that have been authorized to use force ("take necessary measures") under Chapter VII to report on those measures to the Council (or to members at large), but this statement seems to be incorrect because the authorized States according to the text of the resolutions have indeed been required to report on their measures to the Council.

[159] UN SC res. 770, above note 18.

[160] UN SC res. 781, above note 20; and 816, above note 22.

[161] UN SC res. 836, above note 23; and 844, above note 23.

[162] Even if exceptional as a form of enforcement measure under Chapter VII the ad hoc Tribunals may have been ground-breaking in the sense that they provided a new impetus for the elaboration within the UN of a statute that could result in the setting up eventually of a permanent international criminal court (cf. above note 35).

The line of argument in the case of the war crimes tribunals seems to have been that the violations of international humanitarian law constituted a threat to the peace and that by bringing the perpetrators of the crimes to justice the commission of these crimes would cease and the threat to the peace would thus be eliminated.[163] Prosecuting the humanitarian law criminals would also facilitate the process of national conciliation and thereby the maintenance of peace after the end of the civil war, according to the Security Council in the case of Rwanda.[164] In the case of the former Yugoslavia the ad hoc Tribunal was established during the on-going war but in the case of Rwanda it was established after the fighting had ended.

The actual creation of the ad hoc Tribunals was an unusual enforcement measure, but also the fact that the Security Council determined that any serious violations of humanitarian law constitute a threat to the peace was a novelty in the Council's practice. This determination is in line with the general widening of the Security Council's interpretation of the notion of threat to the peace in Article 39 and the increased involvement on the part of the Security Council in situations involving serious violations of human rights and humanitarian law.

[163] See UN SC res. 827 of 25 May 1993, pre. paras. 3–7.
[164] UN SC res. 955, above note 81.

4. The issues through the cases

4.1 What is a threat to the peace?

The widened interpretation on the part of the Security Council of the notion of threat to the peace in Article 39 of the UN Charter gives rise to a number of reflections, some of a more legal some of a more political character. In all international law, but in particular in the case of discussions of the Security Council and Article 39, it is difficult to keep the aspects of law and politics separated from each other.[1] An obvious conclusion is that situations which have not formerly typically been regarded as threats to the international peace and security lately have been determined as such by the Security Council.

In most situations the Security Council has involved itself in civil war situations which have been combined with serious human suffering in different forms. Since the Security Council was deadlocked due to the Cold War between the US and the Soviet Union until the end of the 1980s hardly any situations were characterized as threats to the peace at all during that time, so the fact that the mere number of such determinations rose at the beginning of the 1990s is not that remarkable in itself.

Since the Security Council furthermore hardly made any determinations of the existence of any threats to the peace according to Article 39 during this time it is difficult to ascertain what kind of situations the Council would have regarded as constituting threats to the peace.[2] It is, nevertheless, presumed here that the Security Council would have regarded as threats to the peace primarily direct military threats on the part of one state against another state.

So it would seem as if the Security Council has begun a new line of practice with respect of the interpretation of Article 39 implying that civil wars, serious human rights crimes, lack of democracy and serious violations of international humanitarian law, among other things, do

[1] According to Koskenniemi, 1989, op.cit. section 2.3.1 note 34, they are inseparable in international legal argument.

[2] The cases of Congo, Southern Rhodesia and South Africa being exceptions to this rule (cf. above section 3.1).

constitute real threats to international peace and security and give rise to a "threat to the peace" under Article 39. This, in its turn, gives rise to a right on the part of the Security Council to decide on enforcement measures under Articles 41 and 42 in order to remove the threat to the peace, i.e. to force the offending party or parties to stop committing the usually violent and brutal acts they are committing.

Empirically, it is virtually impossible to give a general answer to the question of what kinds of situations, apart of course from obvious direct military threats or attacks, really do threaten international peace and security. Consequently, there will be no systematic empirical evaluation in this study of the Security Council's determinations of the existence of a threat to the peace in order to see whether the Council made a correct assessment of the situations it treated in this way. This study is concerned with the way the Security Council has *interpreted* the notion of threat to the peace in Article 39, not with the empirical issue of whether the situations actually did constitute a threat to international peace.

To ascertain whether the Security Council makes the correct assessments of what situations constitute a threat to the peace one would also have to investigate cases where the Security Council has not intervened, in order to see whether each situation developed into an international conflict or not. Both in the cases where the Council acts and in the cases where it does not it should be remembered also that what should be evaluated is whether there was a *threat* to the peace, i.e. it would not be necessary for an international armed conflict actually to break out in order to find out whether or not there was or had been a threat.

In all the situations around the world similar to the few situations recently considered by the Security Council to constitute threats to the peace, it is impossible to say whether or not, in the short run or in the long run, they really do constitute threats to international peace and security. Serious crimes against human rights are committed in many countries every day, civil wars are going on in many places around the world[3] and many more countries than Haiti are characterized by a lack of democracy.[4]

Where the correlation of a democratic system of governance and international peace is concerned the prevailing opinion has been that the more democracies there are in the world the fewer wars there will be,[5] though

[3] Cf. above section 2.1.1 note 3.

[4] Cf.also the case of Sierra Leone, above section 3.5 note 61. According to the 1995/96 survey by Freedom House, of 191 countries in the world 74 are not formally democratic (while 117 are) (Karatnycky, 1995/96, op. cit. section 1 note 9 pp 4–5).

[5] See, for instance, Russett, Bruce, *Grasping the Democratic Peace*, 1993.

even this opinion has been called into question.[6] No-one knows in the long run whether democracy leads to more peace, although intuitively this seems to be a credible proposition. There are, of course, other reasons to prefer democracy in favour of some form of totalitarianism but from the point of view of the notion of a threat to the peace the important thing is whether the lack of democracy constitutes a threat to the peace or whether the existence of democracy is a guarantee for peace.

In the cases where the Security Council has not determined the existence of a threat to the peace, even though there have been such possible indirect threats that could have motivated such a determination, one could claim that the Security Council misjudged the facts and made an incorrect evaluation of whether the situation constituted a threat to the peace. But the reason why the Security Council did not consider a situation as serious was almost certainly based on completely different premises, and one important reason why certain serious situations are not dealt with by the Security Council under Chapter VII is the existence of the veto.

If one of the permanent members has any particular reason not to want a particular situation to be determined to constitute a threat to the peace it will use its right of veto to block a decision, irrespective of the empirical facts available, unless perhaps it is authorized to lead a military intervention into the country in question. Irrespective of whether a situation constitutes a real threat to the peace or not other reasons why a particular situation is not dealt with may be a lack of interest or political will on the part of one or more permanent members or a lack of economic resources.

Although the concept of a threat to the peace in Article 39 is inherently political it can at least be discussed, and potentially even empirically investigated through large-scale historical analyses of which kinds of situations lead to or may lead to international armed conflict, i.e. whether a certain situation in reality seems to be of a kind which could escalate into an international war. It is presumed here that "threat to the peace" in Article 39 means a threat to international peace, otherwise it is obvious

[6] Cf. Thompson, William R., "Democracy and peace: putting the cart before the horse?", *International Organization*, vol. 50, 1996, pp 141–174; Layne, Christopher, "Kant or Cant: The Myth of the Democratic Peace", *IS*, vol. 19, 1994, pp 5–49; Sprio, David E., "The Insignificance of the Liberal Peace", *IS*, vol. 19, 1994, pp 50–86; Farber, Henry S. and Gowa, Joanne, "Polities and Peace", *IS*, vol. 20, 1995, pp 123–146; Oren Ido, "The Subjectivity of the 'Democratic' Peace", *IS*, vol. 20, 1995, pp 147–184; Mansfield, Edward D. and Snyder, Jack, "Democratization and the Danger of War", *IS*, vol. 20, 1995, pp 5–38, take a position in between the two poles and argue that "[i]n the long run, the enlargement of the zone of stable democracy will probably enhance the prospects for peace. But in the short run, there is a lot of work to be done to minimize the dangers of turbulent transition [to democracy]" (p 38).

that ongoing civil wars are already in themselves threats to or rather breaches of *national* peace.

Another relevant aspect is in what way "peace" itself is defined; whether it is defined narrowly, as the absence of war, or broadly, as not only the absence of war but also as the presence of certain positive social, economic, humanitarian and ecological circumstances.[7] If peace is broadly defined a threat to the peace could well include very many different phenomena and an empirical analysis of what constitutes a threat to the peace in the broad sense would have to become correspondingly more comprehensive and complex. It would become unwieldy.

In the instances where the Security Council has determined the existence of a threat to the peace, for instance the case of the civil war in Somalia, the crimes against humanitarian law in Yugoslavia, the lack of democracy in Haiti, the breach by the UNITA of the peace accord in Angola, and the refusal of Libya and Sudan to extradite suspected terrorists, do not seem to have threatened international peace and security. On the other hand, perhaps they did, or still do. Considering the numerous serious humanitarian and other crisis situations around the world, the chances are quite high that once the Security Council does decide to determine the existence of a threat to the peace it is a serious enough situation to deserve the epithet "threat to the peace". It is easier to point to instances of threats to the peace where the Security Council could have intervened but did not, than to point to instances where its decision to deal with a certain in an internationally peace-threatening reality situation was completely without any foundation.

Some cases seem more likely than others to constitute threats to the peace and this is where an empirical discussion of the Security Council's assessments has to stop until there are reliable investigations of what really does constitute a threat to the peace. So far the Council has never determined the existence of a threat to the peace in a situation completely devoid of any kind of potential threat to the peace, though it has, on the other hand, omitted to act in situations which seemed to contain a lot of ingredients that did potentially threaten international peace.

Basically then, this study deals not with whether the Security Council takes the empirically correct decisions but with the way the Security Council interprets "threat to the peace" in Article 39 and what circumstances it brings forward to substantiate its determinations of the existence of a threat to the peace.

[7] Cf., for instance, UN SC doc. S/23500 of 31 January 1992, "Note by the President of the Security Council", above section 2.1.1 note 5, p 3.

From a technical point of view it can be noted that the Council hardly ever cites any specific articles explicitly, either when it determines that a situation constitutes a threat to the peace or when it decides on enforcement measures. Usually the Security Council determines in the preamble of the respective resolutions that a certain situation constitutes a threat to the peace without citing the UN Charter at all.[8] In all the cases studied here, except in the case of the Kurds and Shiites in Iraq and in the case of Burundi, the Security Council has always combined a prior determination of the existence of a threat to the peace with a decision on some form of enforcement measures. In the case of Zaire there was a decision but the enforcement measures were never carried out.

When it takes decisions on enforcement measures the Security Council usually only refers to "Chapter VII of the United Nations Charter". This is the case when the Security Council decides on non-military enforcement measures as well as when it decides on military enforcement measures. It is easy to understand why the Council does not cite any particular article when it decides on military enforcement measures since it is impossible, under the present circumstances, literally to apply Article 42, which deals with enforcement measures involving the use of armed force, since the UN forces presumed to carry out the enforcement measures are lacking. In the case of non-military enforcement measures it is more difficult to see why the Security Council only refers to "Chapter VII" since Article 41 easily covers the non-military enforcement measures taken by the Council, except perhaps the creation of ad hoc war crimes tribunals in the cases of the former Yugoslavia and Rwanda. The wording of Article 41 is very open-ended ("what measures not involving the use of armed force") so in principle any measure not involving the use of armed force may be decided upon by the Security Council to give effect to its decisions. There is a list of examples of such measures in Article 41, but the list is not exhaustive.

It is really the power of the Security Council to take binding decisions on enforcement measures, involving or not involving the use of armed force, which makes the way the Council interprets "threat to the peace"

[8] UN SC res. 660, above section 3.13 note 154, is an exception to this rule (cf. above section 3.13 note 154). This was the first of many resolutions adopted in the wake of the Iraqi invasion of Kuwait and in it the Security Council refers explicitly to Articles 39 and 40 of the UN Charter. True, the Council does this, not in the context directly of determining the existence of a breach of the peace, as it were, which it does in the preamble without any direct reference to the UN Charter, but in the context of calling upon the parties to comply with provisional measures under Article 40. In any case it is only in exceptional cases that the Security Council cites specific articles at all in the Charter in the context of a decision or recommendations of any kind.

in the UN Charter such a crucial issue.[9] The enforcement measures, provided that they are loyally carried out by all the Member States, make it harder for the target state or for the target party to a civil war to ignore a Security Council resolution, compared with the situation where a resolution or a rule of international law in general is not followed up by enforcement measures. For the sake of clarity the discussion here will nevertheless start with the way the Security Council interprets the concept of threat to the peace *per se,* while the issue of the enforcement measures it takes will be discussed later on in section 4.7.

The new practice, or perhaps just "the practice" considering the former dearth of determinations of the existence of threats to the peace on the part of the Security Council, may imply an amendment of the UN Charter, although not by the formal amendment procedure, but through practice. [10] It could perhaps be more correct to say that the Security Council has through its practice achieved a legally authoritative interpretation of the concept of threat to the peace in the UN Charter.

In the Vienna Convention on the Law of Treaties of 1969[11] it is stated in Article 31(3)(b) that "[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" shall be taken into account among other things when interpreting an international agreement, like for instance the UN Charter. The Vienna Convention according to its Article 5 is applicable also to treaties which are the constituent instrument of an international organization.[12]

The circumstances surrounding the interpretation of Chapter VII of the UN Charter by the Security Council are somewhat special in that the

[9] Koskenniemi, 1995, op. cit. section 2.1.2 note 10, p 341 who is critical of the Security Council's recent activities comments on the Council's preparedness to support its wide interpretation of the notion of threat to the peace with enforcement measures writes that: "The depth of the crisis is not so much related to the Council's enlarged jurisdiction *ratione materiae*: had it merely started to deal with a larger number of situations, including the internal conflicts and problems of social, economic, or humanitarian character to which it referred in its summit declaration of January 1992, few would have been concerned. The affair's seriousness is occasioned by the Council's willingness to use its exceptionally 'hard' powers of enforcement, binding resolutions, economic sanctions and military force for 'soft' purposes of international justice".

[10] Yehuda Blum, op. cit. section 2.1.2 note 10 argues forcefully against the view that the UN Charter can be changed at all through practice; Jost Delbrück, commenting on res. 688 (the "Kurdish resolution"), above section 3.2 note 6, argues the other way, "A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations", *Indiana Law Journal*, vol. 67, 1992, pp 887–901; and so does Frederic L. Kirgis Jr., "The Security Council 's First Fifty Years", *AJIL*, vol. 89, 1995, (506–539) p 517.

[11] 1155 *UNTS* 331.

[12] The legal relevance of subsequent practice reduces the possibility of *ultra vires* action of the UN, as is noted in *The Charter of the UN*, ibid.

Council may take decisions even though all states represented on the Council do not agree. Also, it is only the fifteen members of the Council who may take decisions under Chapter VII and thereby interpret this part of the UN Charter, thus excluding all the other members of the UN when a particular decision is taken. This decision is binding irrespective of the opinion of the dissenting members of the Council and the rest of the members of the General Assembly. Since all members of the UN have agreed to this particular system of decision-making and have agreed to being bound by the decisions of the Security Council it can be argued, however, that Article 31(3)(b) is applicable also to decisions by the Security Council.

4.2 The limits of the mandate of the Security Council

Apart from the Security Council itself, the only other agency which may have the opportunity to interpret the UN Charter, and also, at least theoretically, to evaluate the way the Security Council has interpreted the notion of threat to the peace, is the ICJ. Until the ICJ is afforded such an opportunity in practice, however, the Security Council basically interprets Article 39 as it wants and there is a strong presumption in favour of the legality of the Security Council's own interpretations. All the more so since the wording of the Charter more often than not is very vague and offers the organs acting under the Charter including the Security Council a wide range of possible interpretations to choose from.

The wording of Article 39, for instance, leaves much room for action and does not in any way define or limit the scope of the terms included in it. The only legal limit really on the freedom of interpretation and of action in particular of the Security Council seems to be that it is bound by the peremptory norms of international law – the *jus cogens.*[13] It is stated in Article 103 that in the event of a conflict between the obligations of the Member States under the UN Charter and any other international

[3] Conforti argues that it is *"[le] sentiment de la plus grande partie des Etats et de leurs peuples"* i.e. the feeling common to the majority of states and peoples, concerning what constitutes a threat to the peace which sets the outer limits of the mandate of the Security Council, but how this is related to the norms of *jus cogens* Conforti does not say (Conforti, op. cit. section 3.12 note 142). Presumably he does not calculate with the possibility that the feeling of the majority of states and peoples would contradict the peremptory norms of international law. A summary of peremptory norms in present-day international law is presented by Lauri Hannikainen in *Peremptory Norms (Jus Cogens) in International Law*, 1988, on pp 717–723.

agreement, their obligations under the Charter shall prevail. This includes conflicts between the UN Charter and customary international law, except for *jus cogens* rules.

It means that obligations under the UN Charter enjoy a position superior to the rest of the body of international law within which there is basically no normative hierarchy. (The superiority of the UN Charter obligations is of course based on a treaty and may be removed by an amendment or by the termination of the treaty.) The UN Charter law, however, is hierarchically subordinate to the peremptory norms of international law. This in its turn means that the Member States may lawfully abstain from following Security Council decisions on enforcement measures, even though the Security Council decisions are nominally binding, if these decisions conflict with *jus cogens*. Indeed it would be illegal to actually carry out such decisions. The likelihood, however, that the Security Council would adopt decisions which conflict with norms of *jus cogens* is very slight.

In the event it takes military enforcement measures, or in the more likely event that Member States or a regional organization takes military enforcement measures after having been so authorized by the Security Council, the UN and/or the Member States forces are, in addition to the rules of *jus cogens*, also bound by the laws of warfare.[14] In contrast to the very slight likelihood, according to the view of this author, that the Security Council will decide on enforcement measures which conflict with norms of *jus cogens,* the likelihood that UN forces (which have never so far come into existence), or national forces authorized by the UN, will act in breach of the laws of warfare or international humanitarian law is unfortunately considerably higher. In fact this has happened already,

[14] Cf. Gill, op. cit. section 2.12 note 9, pp 79–84, including further references. Gill writes that humanitarian law and human rights law forms part of the core values and principles of the UN organization, referred to in Chapters I and IX of the Charter (p 82). "The law of war ... together with certain other fundamental legal principles, including the non-derogable principles of human rights law, serve as a legal 'least common denominator' in time of armed conflict and is binding upon both the UN as an Organization and upon the Member States" (p 82). It can be noted that according to Hannikainen's reliable analysis, cf. above note 14, the basic laws of warfare also make up part of the rules of *jus cogens* (the prohibition of the use of nuclear weapons on a widespread or substantial scale; the obligation to respect medical personnel and units in international armed conflict; the inviolability of *parlementaires* and peace negotiators; the prohibition of treacherous methods of warfare; the basic obligation to respect prisoners of war and other members of armed forces who are *hors de combat*; the basic obligation to respect and protect civilians; the prohibition of causing widespread, long-term and severe damage to the natural environment; the prohibition and limitation of the use of particularly harmful weapons; the prohibition of wanton devastation).

most notably in the case of the UN authorized intervention in Somalia, beginning in 1993, where Belgian, Canadian and Italian soldiers have been found guilty of humanitarian law crimes against civilians.

Further supporting the presumption of freedom of interpretation and action of the Security Council is the design of its role under the UN Charter, where it has broad powers to do what it considers necessary, as quickly as it considers necessary, to maintain or restore international peace and security, and where few or no explicit limits are laid down to its freedom of action.

There may be a decision of the ICJ in the future which will touch upon the question of whether the Security Council has overstepped the limits of its mandate, in the cases of *Libya vs. the UK* and *Libya vs. the US*.[15] The complaint is not directed at the UN Security Council as such but among other issues more directly related to the obligations of Libya and the UK and the US respectively under the Montreal Convention on the safety of civil aviation, it may indirectly come to deal with the issue of whether it was right of the Security Council at the request of the US and the UK to order Libya to extradite its own nationals.[16] Generally, however, it is unlikely that the ICJ will have the opportunity to pronounce on the legality of the measures of the Security Council.[17]

Of course, the Security Council or the General Assembly might decide to use their right to request the ICJ to give an advisory opinion on *any legal question* in Article 96(a) of the UN Charter, though this is unlikely. The conclusion remains that, in almost all instances, no matter how the Security Council interprets the UN Charter, its interpretation will be legal under international law. It is thus much easier to argue in favour of the legality of the actions of the Security Council's action than against.

Returning to the interpretation of the Security Council of the concept of a threat to the peace more precisely under Article 39, it can be said that the Council through its practice has established that this concept can be interpreted very widely, and this is really one of the few relatively certain legal conclusions of substance that can be drawn from the activity of the Security Council in the immediate post-Cold War era. On the level of

[5] Cf. above section 2.1.2 note 11.

[6] Cf. above section 3.12 note 138.

[7] The case of Legal consequences for states of the continued presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council resolution 267(1970), above section 3.12 note 138, concerned, *inter alia*, the extent, or limits, of the mandate of the Security Council under Article 24 of the UN Charter (para. 109–110). In the case of Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), above section 2.2.2 note 20, the ICJ tried the issue of the limits of the mandate under Article 11(2) of the UN General Assembly in the area of international peace and security.

determining the existence of a threat to the peace, the Security Council has taken situations into account involving matters which, it may be argued, if not remaining within the domestic jurisdiction of states properly speaking, at least remain outside (or should remain outside) the reach of the Security Council. Examples of this would be the determination by the Security Council that violations of civil liberties and the lack of a democratic regime constitute a threat to the peace under Article 39.[18] Many Third World countries would argue this way.[19]

"[S]ystematic violations of civil liberties" were cited among the circumstances leading up to the determination that the situation in Haiti continued to constitute a threat to the peace which in its turn preceded the Security Council's decision to authorize the Member States to intervene by force to remove the military government in place.[20] "[T]he continued denial of freedom of expression" was referred to, among other things, in the preamble of an earlier resolution involving the adoption of comprehensive economic sanctions against Haiti.[21] The lack of democracy was never referred to explicitly by the Security Council, but the fact that "the legitimate Government ... has not been reinstated" (after having been ousted by a military *coup d'état*) and the fact that "the goal of the international community remains the restoration of democracy in Haiti" were likewise among the circumstances cited before the Security Council

[18] Cf. section 2.1.1 note 8.

[19] China argued this way in the case of Haiti, for instance, with respect of res. 841 of 16 June 1993 (UN SC, S/PV. 3238, 16 June 1993, pp 19–21); Yemen, Zimbabwe, Cuba, China and India argued this way in the case of res. 688 of 5 April 1991 concerning the Kurds and Shiite muslims in Iraq (UN SC, S/PV. 2982, 5 April 1991). In the latter case enforcement measures were not contemplated; even condemning the repression was considered moving too far into the internal affairs of Iraq by the above-mentioned states. According to the Report of the UN Secretary-General on the work of the organization in 1994, there was some concern among the members of the UN General Assembly at the tendency in the Council to deal with issues, such as humanitarian questions and human rights, that were regarded as falling outside the purview of the Security Council and which should be handled by other competent organs of the UN (United Nations Secretary-General, Boutros, Boutros-Ghali, *Building Peace and Development*, op. cit. section 1 note 1, p 14). Cf. further China's, not always consistent, argument in case of sanctions against UNITA in Angola (UN SC, S/PV. 3814, 28 August 1977, p 21. UN SC, S/PV. 3277, 15 September 1993, p 28); in case of the multinational intervention in Albania (UN SC, S/PV. 3758, 28 March 1997, p 3); and in the case of the, never realized, multinational intervention in Zaire (UN SC, S/PV. 3713, 15 November 1996, p 13). According to Mats Berdal, India is the champion *par préférence* among the Third World countries in the efforts to guard the principle of non-intervention in the internal affairs of states ("Somalie, Bosnie, Rwanda ... Fallait-il que l'ONU intervienne?", *Le Temps Stratégique*, juin 1995, pp 59–63, 66–67).

[20] Cf. above section 3.8 note 105.

[21] Cf. above section 3.8 note 98.

came to the conclusion in the respective resolutions that the situation in Haiti constituted a threat to the peace.[22]

In analogy with the way the ICJ argued in the Nicaragua case à propos of the United States military and paramilitary activities in Nicaragua in order, according to the United States, *inter alia* to enforce the international human rights undertakings of Nicaragua, it could be argued also with respect to the Security Council that there are alternative established institutional machineries for dealing with the implementation of human rights undertakings other than through enforcement measures under the UN.[23] In the case of the Security Council's involvement in the protection of human rights and democracy, in Haiti and elsewhere, it could be argued that these issues should be dealt with in other ways than through a determination by the Security Council that violations of human rights and the lack of democracy constitute a threat to the peace under Article 39 of the UN Charter, which may be followed up by a decision on enforcement measures, non-military or military.

Another argument which could be used alternatively, in analogy with the way the ICJ argued in the Nicaragua case, is the argument that at least armed force may not under any circumstances be used in other countries in order to stop violations of human rights there.[24] According to this argument it could be held that even if the Security Council would be justified in determining that the violations of human rights in Haiti constituted a threat to the peace, the Council would not be allowed to decide on military enforcement measures in order to remove the threat to the peace. The Security Council would, however, be allowed to decide on non-military enforcement measures.[25]

Examples of ways of dealing with the Haitian disrespect for human rights and lack of democracy other than through the Security Council's determination of the existence of a threat to the peace would be to launch an (individual) complaint before the Inter-American Commission on Human Rights concerning breaches on the part of Haiti of the American

[22] Cf. above section 3.8 note 89 and notes 98 and 105 respectively.

[23] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), above section 2.3.2 note 40, para. 267.

[24] Ibid., para. 268, see also paras. 206–209. Commenting on the Nicaragua judgment and noting with approval the ICJ's stand on the use of military force to protect human rights the author adds, however, that "if one reads what the Court says about human rights in the light of its central argument (i.e. that they cannot be invoked to justify armed intervention), one finds that the Court tends to confirm its recognition that human rights principles *are* part of general international law." (Rodley, Nigel S., "Human Rights and Humanitarian Intervention: The Case Law of the World Court", *ICLQ*, vol. 38, 1989, (pp 321–333), p. 328).

[25] Cf. the argument of O'Connell above section 2.2.3 note 24.

Convention on Human Rights,[26] or for someone, perhaps another state or a non-governmental organization, to try to place the issue on the agenda of the UN Commission on Human Rights according to the so called "1503 procedure".[27]

The violations of different kinds of human rights going on in Haiti would be easy to attribute to different articles in the human rights treaties. The lack of democracy would be more difficult to attack directly since a right to democracy is not explicitly spelled out in the treaties. The lack of democracy, however, could most certainly be attacked indirectly by reverting to Article 23(b) on genuine periodic elections in the American Convention on Human Rights, or to the corresponding Article 25(b) in the International Covenant on Civil and Political Rights.[28] In terms of general international law it could be argued that the lack of democracy could also be attacked by reverting to Article 21(3) in the Universal Declaration of 1948 stating that the will of the people shall be the basis of authority of government.[29] Also, in particular in the American Convention, the basic value of liberal democracy shines through implicitly and sometimes explicitly in several places in the Convention.[30]

One could also imagine the UN General Assembly as a possible forum for condemning the military regime in Haiti and for putting political pressure on the *de facto* authorities to resign. Also, similar pressure could be and in fact had been put on the Haitian military regime through the

[26] Haiti is a party to the Convention, but has not accepted state complaints under Article 45 of the Convention, nor has it accepted the jurisdiction of the Inter-American Court under Article 62 (9 *ILM* 673 (1970)). Making either an individual or a state complaint against Haiti before the Human Rights Committee under the International Covenant on Civil and Political Rights (above section 2.3.2 note 44) would be futile since, although Haiti is a party to the Covenant, it has neither recognized the possibility of state complaints under Article 41 nor has it ratified the Optional Protocol opening the way to individual complaints (999 *UNTS* 302).

[27] Named after UN Economic and Social Council res. 1503 (XLVIII), 27 May 1970, instituting procedures to enable the Commission on Human Rights and the Subcommission on Prevention of Discrimination and Protection of Minorities to deal with communications relating to violations of human rights and fundamental freedoms in private meetings. There is also the possibility of using the public but comparatively less forthright "1235 procedure" named after UN Economic and Social Council res. 1235 (XLII), 6 June 1967, Question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories.

[28] Cf. above note 27 and section 2.3.2 note 44.

[29] Cf. above section 2.3.2 note 42.

[30] In Article 29 "Restrictions Regarding Interpretation", it is stated in subparagraph c. that "[No provision of this Convention shall be interpreted as:] precluding other rights or guarantees that are inherent in the human personality or derived from *representative democracy as a form of government* (emphasis added)".

political organs of the OAS who had also recommended its members to impose a trade embargo on Haiti.[31]

Obviously all the ways of dealing with the Haitian situation just mentioned risk being ineffective, and in the case of Haiti certain had already proved to be ineffective, in the face of an unrepentant counterpart. That the counterpart is unwilling, for instance, to resign or change its policies can moreover almost be taken for granted in this kind of situation. Not even the specific human rights implementation machineries linked to the international global or regional human rights agreements include sanctions, with the possible exception of shame, in order to make states follow their decisions. Without sanctions international law in all its forms risks not being implemented by recalcitrant international actors.

Non-military enforcement measures such as economic sanctions can be an effective means of making states or others implement, for instance, their international human rights undertakings. The use of military enforcement measures or the threat of military enforcement measures being used, as in the case of Haiti, is probably the most effective means of making states and other international actors implement their international undertakings. Not even military enforcement measures are necessarily effective, however, especially not in the long run.

Disregarding the issue of efficiency, given that one argues that the issue of the violation of human rights and the lack of democracy are issues which remain outside the scope of what the Security Council should deal with on the whole, then one would argue that even by determining that a situation like the Haitian one constitutes a threat to the peace the Security Council has overstepped its mandate under the UN Charter. If one argues that the Security Council may lawfully determine that such a situation constitutes a threat to the peace, but that it may only take non-military enforcement measures in order to remove the threat, one would argue that the handling by the Security Council of the Haitian situation remained lawful up to the moment the Council decided to authorize the Member States to take military enforcement measures.

The legal answer, in the view of this author, is that the Security Council's determination that a situation like the Haitian one constituted a threat to the peace, or that any of the other situations discussed in section 3 were determined as such, was lawful and that the decisions to take non-military and military enforcement measures in order to remove the threat to the peace were lawful in principle. This is because the Security Council has been granted such extensive powers through the UN Charter and because there are almost no legal limits, either in principle or in practice,

[31] Cf. above section 3.8 note 94.

to the competence of the Security Council, either as regards the interpretation of the articles of the UN Charter under which it acts, or as regards the decisions it may take, or as regards its freedom to take enforcement measures of different kinds to give effect to its decisions under the Charter.

Put in simple terms, the Security Council may basically decide or do anything it wishes and it will still remain within the limits of the legal framework for its action. The actions of the Security Council can be criticized, but they are difficult to criticize from a legal perspective. Criticism will have to be launched from a perspective of legitimacy rather, or from a purely political, policy or any other extra-legal perspective.[32]

Also, from the perspective of UN Charter law it must be remembered that Article 2(7) suspends any and all prohibitions on intervention by the UN in the internal affairs of states once the Security Council has decided on enforcement measures. Thus, from a formal point of view, even if an issue clearly belongs to the domestic jurisdiction of a state, the Security Council has the right to intervene provided this takes place through a decision on enforcement measures. Put in another way, there are no matters essentially the domestic jurisdiction of any state once the Security Council has decided on enforcement measures. The discussion above as to whether the Security Council is justified in intervening in matters perhaps belonging to the internal affairs of states was an attempt to go a little further and deeper than to stop short in front of Article 2(7). If one stops at Article 2(7) the only legal limits on the action of the Security Council are the norms of *jus cogens* including the laws of warfare mentioned earlier.[33]

At the stage where the Security Council determines that a situation constitutes a threat to the peace one could argue that the delimitation between internal affairs – in which the UN may not intervene – and international affairs still applies. Article 2(7) talks only of "the application of *enforcement measures* under Chapter VII (emphasis added)" and at the stage of determining that a situation constitutes a threat to the peace, the Security Council has not yet entered into the stage of decision-making on enforcement measures. Usually the determination of the existence of a threat to the peace is combined with a decision on enforcement measures of some kind.

It happens that a determination of the existence of a threat to the peace is decided on alone (as in the case of the Kurds and Shiites in Iraq and the case of Burundi). In the latter cases it could hypothetically be argued in

[32] For the argument that the perceived legitimacy of the rules makes states abide by international law, cf. Franck, Thomas, *The Power of Legitimacy Among Nations*, 1990.
[33] Cf. above note 13 and 14.

substance that by finding a threat to the peace the Security Council illegally intervened in the internal affairs of the states in question. It would be easier, however, to argue the other way and say that all decisions taken under Chapter VII are covered by the exception to the rule of non-intervention in Article 2(7), not only the ones on enforcement measures proper.[34] It is difficult to see why a determination of the existence of a threat to the peace alone, but not the same determination combined with a decision on enforcement measure, should constitute an illegal interference in the internal affairs of the state concerned. Perhaps the reason why a determination of the existence of a threat to the peace is not mentioned in Article 2(7) is that such a determination would not under any circumstances constitute an illegal intervention in the internal affairs of states.[35]

The legal conclusions drawn with respect to the extreme liberty of action of the Security Council are only applicable to decisions taken by the Security Council, however, and not to similar action undertaken by individual countries (unless they have been so authorized by the UN). This is because of the way the UN Charter is drafted and the collective security system is set up, a treaty adhered to by practically all the states in the world and thereby setting a universal standard, and on a deeper level because collective action for the promotion of international security was considered superior to individual self-help action by the initiators of the UN Charter (as well as the initiators of the League of Nations Charter before them). What the Security Council does and what individual countries do should be kept separate, at least when the discussion is of a primarily legal character.

4.3 Potential domination by permanent member(s)

A problem arises because of the fact that a few members of the Security Council – the permanent members – dominate Security Council action; though, it should be added, that the permanent members would dominate was fully in line with the original design of the UN Charter system.[36] Of

[34] Cf. White, op. cit. section 3.1 note 5, p 51.

[35] Cf. Kelsen, op. cit. section 2.1.1 note 1, p 788.

[36] The permanent members dominate action in the Security Council *inter alia* because of their right of veto. Ruth B. Russell describes "the need to reconcile two irreconcilable facts" à propos of the veto: "Politically, it had seemed to the government experts, it would in all likelihood be impossible to obtain either (1) great-power ratification of any system permitting the Security Council to take decisions against the wishes of any of them; or (2) the adherence of the smaller states to a system that gave them no rights while the permanent members of the Council had an absolute veto" (Russell, *A History of the United Nations*

course, this becomes a problem if the permanent members of the Security Council use their position within the Council for their own purposes to carry through measures which would be illegal if they were undertaken outside the framework of the Security Council. The existence of the veto on the part of every permanent member makes sure during times when the permanent members do not agree that enforcement measures are seldom undertaken; in fact the veto ensures that no action is taken at all by the Security Council in times of general disagreement between the permanent members.[37] This was the situation more or less before the end of the 1980s.

With the development of international relations since the fall of the Berlin Wall in 1989 the permanent members, and particularly the United States and Russia, are no longer in permanent disagreement, which means first of all that the Security Council can act and secondly that it also risks being misused by the permanent members in their own interest. It is often claimed by observers today that in fact only one member, the United States, dominates the Security Council, which makes the problem more acute than if there had at least been a balance between the permanent five.[38] The problem of principle would of course be the same irrespective of what particular country dominated the Council.

Charter, 1958, p 725). Russell continues: "The compromise as finally worked out had, therefore, partially met both the demand of the great powers to guarantee that decisions of the Council would not be taken against their wishes and the demand of the other states to respect the principle that parties to a dispute [dealt with under Chapter VI] would not sit in judgment on themselves" (ibid.). It can be noted that what looked like a compromise turned out to be a complete victory for the permanent members of the Security Council since the rule that a party to a dispute under Chapter VI shall abstain from voting through subsequent practice has become obsolete.

[37] Cf. Higgins, 1994, op. cit. section 1 note 3, p 262, where she states: "... [T]he veto is an integral part of what was provided for in the Charter: the Permanent Members were certainly intended to have this power to control the use of force by the Security Council."; Goodrich, L., Hambro E., and Simons, Anne Patricia, write that the idea that any decision relating to enforcement action should require the concurring votes of the permanent members was generally accepted as justifiable or at least realistic at the 1945 San Francisco conference (leading up to the adoption of the final version of the UN Charter) (Goodrich, Hambro, Simons, op. cit. section 2.1.1 note 1, p 220).

[38] Cf., for instance, Reisman, 1993, op. cit. section 2.1.1 note 13, pp 83–100; Caron, David, "The Legitimacy of the Collective Authority of the Security Council", *AJIL*, vol. 87, 1993, pp 552–588. Some, however, argue the opposite: "There is something of a myth concerning the dominant role of the five permanent members. Reports of the domination of the Council by the P5, the P3 or the United States (the "P1") are greatly exaggerated." (Wood, Michael C., (Legal Counsellor, Foreign and Commonwealth Office, Great Britain), "Security Council Working Methods and Procedure: Recent Developments", *ICLQ*, vol. 45, 1996, (pp 150–161), p 153.

But, given the present state of affairs, in what way is the situation to be regarded if the United States uses the Security Council in order to make legal actions that the United States wants to take but which would otherwise be illegal?

From the legal point of view again it is difficult to attack Security Council action even when it is the result of a form of *détournement du pouvoir* on the part of one or other of its permanent members, i.e. where the Security Council is used by a member for purposes other than those of the UN. What is even more difficult to attack, of course, is Security Council action not constituting a *détournement du pouvoir* properly speaking, but merely being the result of the will of one Member State who can carry through its will because of its dominating position in the Council – a position which is ultimately due to its power position in the world generally.

Because there are almost no limits in substance to the competence of the Security Council and because the purposes of the UN are very vaguely formulated, an allegation of *détournement du pouvoir* would be difficult to prove. This is because so many different kinds of situations may be determined to constitute, for instance, threats to the peace, and also because there is room for so many different kinds of enforcement measures within both the competence of the Security Council and ultimately within the purposes of the UN. This makes it easy to remain technically within the framework of legality regardless almost of whatever decisions are taken, even if there also happen to be other reasons why a certain measure is decided upon than the maintenance of international peace and security. This would indeed be the case even if the reasons why a certain measure is undertaken were to be completely other than what the UN Charter prescribes, as long as the measures at first sight seem to be applicable under Chapter VII of the UN Charter.

The fact that the Security Council is dominated by only one member is not an argument with any real legal weight. The system of permanent members in the Security Council was designed to reflect the real power relationships in the world in 1945 and this still seems to be what it does today, with the exception of some economically powerful states not being present among the permanent members. From other points of view than the legal one, however, the current domination of the Security Council by the United States may have devastating consequences for the legitimacy of its action and for the respect granted its decisions by the rest of the members of the UN, and by those who may have voted against a certain decision in the Council itself.

The current problem, however, does not seem to be that the United States is using the Security Council for its own purposes so much as the United States not using the Council at all. The Security Council seems

thereby again to be moving back onto the fringes of international politics and away from its place at the centre of the international peace and security scene which it occupied for a few years at the beginning of the 1990s. The way the UN engagement abruptly ended for the benefit of NATO in the former Yugoslavia after the conclusion of the Dayton peace accords in November 1995 lends strong support, if not precisely to the hypothesis that the US does not act within the Security Council any longer, then at least to the hypothesis that the Security Council, and the UN, are again becoming marginalized as actors on the international scene with respect to the issues of peace and security.

Another issue arising in the case of the former Yugoslavia which does not strictly belong to a discussion of how the Security Council has interpreted the concept of threat to the peace, but belongs to a discussion of the legitimacy of Security Council action and of the possible marginalization of the Security Council on the international scene, is the way it implicitly accepted and legitimized the Bosnian Serb conquest by force of the "safe zones" of Zepa and Srebrenica in July 1995. According to the present author, the lack of action on the part of the Security Council to protect these two "safe zones", struck the most serious blow of all to the credibility and legitimacy of the Council. It is all the more serious since the Security Council also implicitly legitimized the breach of one of the most fundamental rules of international law, namely, the prohibition of the acquisition of territory by the use of force. This rule had been reiterated in many of the SC resolutions adopted during the crisis in the former Yugoslavia starting with the very first resolution.[39]

Another point which can be made concerning the alleged and probably also real domination by the United States of the Security Council is that under no circumstances can the United States decide an issue on its own. However dominant – the United States is always dependent on the other permanent members at least not voting against its proposals and it is similarly dependent on some of the other members actually voting in favour of its proposals. Some of the small countries among the non-permanent members can be easy to put pressure on economically or by other means and it is also possible to reward countries economically or otherwise if they support certain proposals.[40]

[39] UN SC res. 713 of 25 September 1991 states in pre. para. 8: "*Recalling* the relevant principles enshrined in the Charter of the United Nations and, in this context, noting the Declaration of 3 September 1991 of the States participating in the Conference on Security and Cooperation in Europe that no territorial gains or changes within Yugoslavia brought about by violence are acceptable".

[40] Cf. Weston, Bruce, "Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy", *AJIL*, vol. 85, 1991, pp 516–535.

But the United States is equally dependent on the permanent members who should not be as prone as some of the other members to yield to pressure or be tempted by rewards. If, for instance, China or Russia or why not France, who also belong to the states sometimes opposing the international plans and actions of the United States, choose to go along with or at least not actively oppose the wishes of the United States in the Security Council, it is not evident that it is only the United States who is to blame, if anyone. Also, the United States is not only dependent on the votes of enough members of the Security Council; after all, where military enforcement measures are contemplated the United States is highly dependent also on economic and logistic support from other members of the Security Council, as well as on other members of the UN, in order to carry through a military operation.[41]

The same goes for other states who may take the lead in military operations authorized by the Security Council, as the practice has developed (so far only France and Italy have lead such operations in addition to the United States). The degree of dependency on other countries is likely to vary according to the location of the target country and the size of the operation. If any state is to be blamed in the context of a particular measure undertaken under the *aegis* of the Security Council, the criticism should cover all those who have contributed economically or otherwise and not only the state who may have been most active in pushing the question through in the Security Council itself.

4.4 Arbitrary or coherent interpretation of "threat to the peace"?

The impression one gets from studying the way the Security Council has interpreted "threat to the peace" is that its interpretation is rather arbitrary. The criteria which makes a particular situation a threat to the peace in the eyes of the Council seem fluid, especially if one takes into account also all the situations in which the Council did not intervene, in any sense

[41] In the case of Iraq and Kuwait, for instance, on 15 January 1991, the international coalition included approximately 680,000 troops, of which some 410,000 were from the United States (*The United Nations and the Iraq-Kuwait Conflict 1990–1996*, UN Department of Public Information, 1996, p 24). In the case of the UN authorized intervention in Somalia in 1992/1993, the Unified Task Force in Somalia (UNITAF) at its peak consisted of 37,000 troops, of which 28,000 were American and 9,000 came from other countries (*The United Nations and Somalia 1992–1996*, UN Department of Public Information 1996, p 34).

of the term, not even with a condemnation or some form of appeal to the target actors, while at the same time it did intervene in some situations.

As we saw in section 3 the Security Council does not specify why a certain situation, however serious it may be in terms of human suffering, is considered to have such international links that it is to be considered as a threat to *international* peace and security, which seems to be a prerequisite for Security Council action under Chapter VII of the Charter. It may be that the Council is of the opinion that a really serious situation does not have to constitute a threat to international peace to be a "threat to the peace" under Article 39 and so permit the Security Council to act. This would be a remarkable development through practice of the purport of Article 39 and this may be what the Security Council has wanted to achieve.[42] In that case one would wish that the Council at some point was more explicit about its new practice. It may be that there are reasons why the Council considers a certain situation a threat to international peace but does not always manage to explain this clearly in the resolution. The most likely answer, however, is that the Council acts fairly arbitrarily and chooses first what situations it wants to take into consideration under Chapter VII and then thinks of the reasons to invoke in order to make the resolution fit with the criteria of the UN Charter.

There are some common denominators as to substance in the situations which the Council has decided to characterize as threats to the peace. All the cases concern situations characterized by internal armed conflicts and serious human suffering, though there are two exceptions to this, namely, the cases of Libya and Sudan. True, a brutal civil war is going on in Sudan as well but this is not what motivated the Security Council to adopt its resolution in the Sudanese case. True also, the destruction of the American and French aircraft caused several hundred deaths but "human suffering" as such was not the reason why the Security Council adopted the resolutions in the Libyan and Sudanese cases. In both cases the issue was international state sponsored terrorism. This, on the other hand, makes the international link more obvious than in several of the other cases where the Security Council has argued on the basis of serious human suffering. Another common denominator in the situations dealt with is that no permanent member has had any interest in shielding the target countries in question. Had that been the case the permanent member involved would have vetoed any attempts at resolutions.

[42] Cf. Österdahl, Inger, "By all means, intervene! The Security Council and the Use of Force Under Chapter VII of the UN Charter in Iraq (to protect the Kurds), in Bosnia, Somalia, Rwanda and Haiti", *Nordic Journal of International Law*, vol. 66, 1997, pp 241–271.

A further common denominator is that all except two of the events determined to constitute a threat to the peace took place in the Third World. The exceptions were the former Yugoslavia and Albania (although Albania is perhaps better characterized as a Third World country, too). This is not a coincidence but can be explained *inter alia* by the fact that most civil wars, serious humanitarian situations and large refugee flows are found in the Third World, and by the way the Security Council is composed (even if China sometimes takes on the role of protecting the interests of the Third World countries). It would be enormously more difficult to determine that a situation in a First World country constituted a threat to the peace even if that actually was the case, and it would be impossible to do so as far as the permanent members are concerned. It would also be practically impossible to determine that a situation close to the borders of any of the permanent members constituted a threat to the peace unless the permanent member concerned was allowed to take the lead in forming policy and any contemplated enforcement action, as in the case of Haiti which is situated within the United States "sphere of interest". The importance of the former factors is strengthened by the fact that it is the First World countries, with the help perhaps of some of the former Soviet bloc countries and some Arab states, who can afford to undertake transcontinental military enforcement measures at all.

It is not illegal on the part of the Security Council to be arbitrary, but if it becomes apparent that its choice of situations in which to intervene is arbitrary, both in the sense that some situations are intervened in but not others presenting the same characteristics, and that the situations in which the Council does intervene are very different from one another and the Council does not convincingly or consistently show in its resolutions why it intervenes in these situations, or precisely what makes these situations worthy of Security Council consideration, then the decisions and possible follow-up action of the Security Council risk losing a large measure of legitimacy. The fact that the Council has been passive for a number of years after having been relatively active during the first years of the 1990s, whereas there still exist a lot of situations which would merit consideration by the Security Council if the broad criteria applied during the active years were applied now, too, also adds to the impression of arbitrariness and increases the risk that the Security Council's decisions, when they come, lose legitimacy.

The hypothesis could be launched that the main thread in the recent practice of the Security Council is the protection of human rights and of the respect for humanitarian law, and that the main emphasis has been moved there instead of being on the maintenance of international peace and security. This may be because the Security Council is of the opinion

that violations of human rights constitute a threat to the peace or because the Security Council thinks that the protection of human rights is important enough in itself for the Council to become engaged. Whether this concern for human rights will be consistent in the Security Council and remain the main thread in its practice is uncertain, and the chances are that it will not. Even if human rights does remain a big concern, the likelihood is that this concern will not be voiced as frequently as during the first years of the 1990s.

A kind of support in the UN Charter for a partial or complete reorientation of the focus of the Security Council in favour of the protection of human rights and in favour of a broad construction of the notion of threat to the peace for the benefit precisely of human rights, in contrast to other purposes, is the fact that the protection of human rights is mentioned in Article 1 among the purposes and principles of the UN and the issue of human rights is further elaborated somewhat in Article 55 of the Charter.[43] This lends some Charter support to Security Council engagement in the area of human rights. Perhaps it could be argued, although that argument will not be pursued further here, that the broad construction of "threat to the peace", of what kind of situations the Security Council may determine as threats to the peace and of what kind of measures the Security Council may take in order to remove the perceived threat to the peace, is justified as far as situations involving serious violations of human rights are concerned. According to this argument, however, the broad construction would not be justified in other circumstances. If this argument was applied one would arrive at some limits, although still wide and relatively vague, for the freedom of action of the Security Council. It is unlikely, however, that the members of the Security Council would accept any restriction on their freedom of decision or action.

Concerning the argument of inconsistency in the practice of the Security Council, sometimes also called the Council applying "double standards" when it evaluates state behaviour and other situations,[44] it could be argued in the Security Council's defence, at least from a legal point of view, that a decision to determine that a certain behaviour or situation constitutes a threat to the peace in one case does not become less legal because another similar situation is not determined to constitute such a

[43] Michael Akehurst argues against the raising of the relative value of human rights in the UN Charter as we saw earlier (above section 2.2.2 note 21); Tom J. Farer invokes a number of circumstances to support the view that human rights only had "a tenuous place among the concerns of the founding members" ("Human Rights in Law's Empire: The Jurisprudence War", Editorial comment, *AJIL*, vol. 85, 1991, (pp 117–127), p 120).

[44] Cf. Roberts, Adam, "The Road to Hell ... A Critique of Humanitarian Intervention", *Harvard International Review*, Fall 1993, (pp 10–13, 63), p 12.

threat because of the use of the veto, or for other reasons. Also, a certain intervention, non-military or military, in a particular case on the part of the Security Council does not become better or worse depending on whether the Council has intervened in similar situations before or after the intervention in question. Put simply, saving people or removing a threat to the peace in one case is not wrong because no decision was taken to save people or remove the threat to the peace in another case. Another thing is that the Security Council's actions have has often been unsuccessful in practice. Also, as already stated, from the point of view of legitimacy and the degree of respect that the Security Council can command from the states of the world, too much inconsistency on the part of the Council is most certainly destructive.

Another aspect of the degree of extensiveness of the interpretation of the Security Council of the concept of threat to the peace is that, although a wide interpretation may cause criticism *inter alia* because it is inconsistently or arbitrarily applied and thereby risks decreasing the legitimacy of the decisions overall of the Security Council in the eyes of the states of the world, a restrictive interpretation of the concept leading to few instances of its application may also lead to criticism. Even if consistently applied, a narrow interpretation which makes the Security Council unable to take care of situations involving great human suffering, for instance, and which shock a majority of the states in the world may also erode the legitimacy of the Security Council. Then it may be argued that the Security Council is interpreting the UN Charter in a rigid and old-fashioned way and that the Council is not addressing today's problems, and that because of this it is becoming marginalized or irrelevant on the international scene.

So, whether the Security Council interprets the concept of threat to the peace extensively or narrowly it risks being criticized for eroding the legitimacy of its decisions. It is important to note that either way the Security Council is acting correctly from a strictly legal point of view since its mandate according to the UN Charter is so flexible. The problem of whether an extensive or restrictive interpretation of "threat to the peace" *per se* should be preferred will not be solved here. The point of bringing up the issue was to show that whichever way the Council acts there will be cause for criticism, even if the Security Council in principle stays within the limits of its mandate in both cases.

Still, if the legitimacy of the Security Council is to be the overriding interest consistency might after all be what would benefit the Security Council most in the long run. Conversely, inconsistency on the part of

the Council risks being what prejudices the legitimacy of the Council most, even if the activities include some actions which were considered laudable by the community of states.

This means that whichever approach is chosen, whether it is a narrow or a broad interpretation of Article 39, as long as it is consistently applied the Security Council would probably or would at least stand the chance of gaining the respect of most Member States.[45] The easiest way for the Security Council to stay consistent for the Security Council would be to stick to a narrow interpretation of Article 39 (although in that case the non-activity of the Security Council would on some occasions come into conflict with other values such as the protection of human rights, which as already argued would probably also be the cause of criticism).

From a practical viewpoint it would also be easiest to stick to a narrow interpretation of the concept of threat to the peace.[46] The Security Council will have great difficulty in carrying out its decisions if it applies a broad construction to "threat to the peace" in Article 39. This is because a broad construction would simply lead to too many situations for the Security Council to handle. If the Security Council takes decisions but does not succeed in carrying them through it may also lose a large measure of legitimacy. This can be the result if the Security Council tries to undertake enforcement measures which do not turn out successfully or if the Security Council does not decide on or take any enforcement measures at all because of a lack of resources, but is content with merely deploring the behaviour of different states or other international actors.

Incidentally, one reason why the Security Council's activity in authorizing military enforcement measures has declined, and a reason why individual member states are less willing than some years ago to undertake military interventions under the *aegis* of the Security Council, is no doubt, in addition to the costs involved, that several of the interventions undertaken for humanitarian reasons are considered to have been largely

[45] Frederic L. Kirgis Jr., after having criticized the Security Council for not explaining what precisely it sees as threats to the peace in the situations which it determines to constitute such threats, seems to make the same point: "... if the Council is to be effective in the long run, it needs to demonstrate that it is using the powers judiciously. In this context, it needs to make, and to demonstrate that it is making, a genuine effort to determine what the threat to international peace actually is, and how serious it is." Either it applies a narrow or expanded definition of "threat to the peace", Kirgis argues, "[i]t should ... make principled Article 39 determinations, publicly explicated, that do not set unlimited or unintended precedents." (op. cit. note 10, pp 516, 517).

[46] Koskenniemi, 1995, op. cit. section 2.1.2 note 10, p 346, talks of the "*nonchalance*" of the Security Council as concerns the practical implementation of its decision.

unsuccessful and that the Member States do not want to risk being unsuccessful again.[47]

There is another aspect worth noting about the practical aspects of the interpretation of "threat to the peace" as far as giving effect to the decisions is concerned. Apart from the veto among the permanent members, primarily the economic, but also the political costs of carrying out enforcement measures, especially those involving the use of armed force, are the only existing counterbalance to the mandate and the powers of the Security Council. This is because the mandate is so wide and the possibilities of judicial review and other forms of outside control are so limited. On the other hand, the costs it involves probably constitute a rather efficient limiting factor on the activities of the Security Council.[48]

The costs also contribute to marginalizing the Third World countries because, as noted earlier, most Third World states can hardly afford to carry out military enforcement measures. The costs aspect is also relevant to the powers of the Security Council in the sense that it is important that the economically rich countries agree on what measures the Security

[47] Two cases in which past experiences probably made the Member States unwilling to intervene militarily again were the cases of Burundi (1996) (where the use of force was never contemplated) and Zaire (1996/97) (where the use of force was authorized, but never carried out). One way out of the dilemma, most notably in Africa, of the existence, on the one hand, of many situations presenting potential threats to the peace and the reluctance, on the other hand, of the Western states to intervene militarily, is to try to make the African states themselves take care of the interventions, with different forms of support from the West. This was done with the support of France in the case of the Central African Republic in 1997. The states sending troops were all francophone (Burkina Faso, Chad, Gabon, Mali, Senegal and Togo). Discussions have been going on for some time concerning the creation of a pan-African peace-keeping force which would undertake any necessary interventions in African crises and conflicts (cf. Österdahl, Inger, "La France dans l'Afrique de l'après-guerre froide. Interventions et Justifications", Scandinavian Institute of African Studies, *Document de recherche 2,* 1997, p 80). The OAU has established a Mechanism for Conflict Prevention, Management and Resolution, which is supposed to take a larger and larger part of the responsibility for the settlement of the African conflicts (OAU, Declaration of the Assembly of Heads of State and Government on the Establishment, within the OAU, of a Mechanism for Conflict Prevention, Management and Resolution, Cairo, Egypt, June 1993; see also OAU, Resolving Conflicts in Africa – Implementation Options, OAU Information Services Publication – Series (II) 1993). The Mechanism is not yet truly operational. The Council of Ministers of the European Union (EU) has adopted a Common Position supporting the OAU Mechanism (Common Position of 2 June 1997 defined by the Council on the basis of Article J.2 of the Treaty on European Union, concerning conflict prevention and resolution in Africa, *Official Journal*, no. L 153, 11 June 1997, p 1).

[48] Higgins, 1994, op. cit. (section 1 note 3), p 257 aptly writes that "It is clear that opening the door to military intervention for humanitarian purposes around the world will place an unbearable burden on the UN enforcement mehanisms, whether through direct UN action or through UN-authorized action."

Council should take in order for the Security Council – or the authorized Member States – to afford the measures in question; this was to a certain extent a factor built into the right of veto. Today, however, as opposed to when the UN Charter was adopted, there are also economic great powers such as Germany and Japan outside the Security Council.

4.5 The Security Council as law enforcer

Concerning the fact that in several of the cases studied in section 3 the Security Council has taken it upon itself to enforce international humanitarian law – particularly in the case of the former Yugoslavia and Rwanda where ad hoc Tribunals to prosecute war criminals were set up – and that in the case of Libya and Sudan the Security Council enforced international agreements concerning the safety of civil aviation and the extradition of criminals, it can be noted that the Council acts within the UN system both as an executive organ and as a judicial organ. This is a problematic aspect of the Security Council's extensive interpretation of the concept of threat to the peace and of its extensive use of its powers to take enforcement measures.

On the one hand, it could be argued that it is a good thing if international law is enforced: This is often what is lacking in the field of international law. The problem with the Security Council as law enforcer in the case of a dispute (and all cases coming before the Council will by definition be contentious, at least among the parties involved) is that its procedure obviously is not that of a court. When it interprets international law the Security Council is a political organ applying other yardsticks than a judicial organ would apply.[49]

In the Security Council, furthermore, there is no contradictory procedure with two or more parties presenting their respective arguments and pieces of evidence and with a third disinterested party deciding the case. The Security Council procedure under Chapter VII is more "inquisitorial" in character, i.e. judge and prosecutor being identical, than a procedure before an international judicial institution would be. Presumably in order to remedy this situation, concerned parties "may", according to Article 31 of the UN Charter, and "shall", according to Article 32, if they are party to a dispute under consideration by the Security Council, be invited to participate, without vote, in the discussion relating to the dispute in the Council.

[49] Cf. among others Higgins, Rosalyn, "The Place of International Law in the Settlement of Disputes by the Security Council", *AJIL*, vol. 64, 1970, pp 1–18.

Even more important is the fact that members of the Council may very well decide cases in which they are themselves parties both under Chapters VI and VII. The more the Security Council is dominated and used by the permanent members for their own interests, the more serious the problem of the quasi-judicial activities of the Security Council becomes.

If the Security Council restricts itself to establishing independent judicial organs, such as the ad hoc Tribunals, this problem is not as pronounced as it is when the Security Council itself is resolving legal disputes.[50] In the case of the creation of judicial organs other problems emerge, however, concerning, for instance, the efficiency of these organs and the amount of resources they are provided with.[51] If they are not provided with adequate resources one may get the impression that the Security Council after all is not taking the violations of humanitarian law, for instance, and the prosecution of the suspected criminals as seriously as the original establishment of the Tribunals suggested.

The Security Council certainly has the powers under Chapter VII of the UN Charter to do what it has done in the form of different quasi-judicial activities. If the Security Council considers it necessary to enforce a certain international agreement in a particular way, or to act quasi-judicially in some other matter subject of dispute in order to remove a threat to the peace under Article 39, the presumption is very strong, as pointed out earlier, that the Council is acting within the limits of its mandate under the Charter.

From the perspective of legal certainty, evidently, and from the perspective of the respect for and the status of international law in the long run, it may be detrimental if the Security Council acts not only as an executive power but also as a judicial one. It may be detrimental also for the legitimacy of the Security Council, in particular if it is obvious that one or a couple of members are trying to use the Council for their own purposes, thus making the action seem respectable by claiming that the Council is in fact only enforcing international law.

[50] Cf., however, the objection by the Rwandan (Tutsi) government concerning the ad hoc Tribunal for Rwanda that the same countries who, according to the Rwandan government, had been actively involved in the civil war (i.e. primarily France who is also a permanent member of the Security Council) would be able to nominate judges who would sit on the Tribunal) (above section 3.7 note 88). Rwanda is thus calling the impartiality of the Tribunal into question as an extension of the alleged lack of impartiality on the part of some member/s of the Security Council.

[51] Cf. above section 3.7 note 87 concerning the critical internal UN report on the Tribunal for Rwanda.

4.6 The consequences of Security Council practice for the position of human rights and democracy in international law

Looking finally at the effects that the recent widened interpretation by the Security Council of the notion of threat to the peace, with its strong humanitarian bias, may have had on the respect for human rights as a rule of general international law, and the effect it may have had on the right to democracy as a rule of international law and, at the same time, considering the impact of the practice of the Security Council on the issue of domestic jurisdiction and international law in these two areas, the following tentative conclusions can be drawn.

As noted above, from a formal point of view the legal prerequisites of the decisions and actions of the Security Council are so different from those of individual states or other international actors that it is difficult to draw conclusions from the practice of the Security Council and transfer these conclusions to international law in general. In principle this is because when the Security Council determines that a certain situation constitutes a threat to the peace, in recent practice often one characterized by serious violations of human rights and humanitarian law, the Council has an almost unlimited freedom of judgment. Then, after having determined that the situation constitutes a threat to the peace, the Security Council has almost unlimited freedom to decide not only what measures should be taken in order to remove the threat to the peace but also what economic, military or other measures should be taken in order to enforce its decisions. Thus the position of the Security Council is obviously not comparable to that of a state.

As stated earlier, the only legal limits on the freedom of decision and of action of the Security Council are the (very few and fundamental) rules of *jus cogens*. Therefore, once the Security Council makes a decision or takes action under Chapter VII of the UN Charter with respect to a particular issue its decisions and actions are to a large extent lifted up and away from the ordinary field of international law and into another sphere with much fewer limits on its behaviour than would have been the case if it had been an ordinary state, for instance. It should be noted that this arrangement in itself is wholly in line with international law since the role of the Security Council has been agreed upon in an international treaty which has been widely adhered to by the states of the world. The freedom of states to agree on what they want in international law is also only limited by the *jus cogens*.

The fact that the Security Council may do practically anything it likes in order to protect human rights or to promote the respect for international humanitarian law does not, however, mean that this practice can be translated into rules or guidelines also for ordinary state behaviour, or that this practice necessarily affects the content of international customary law in the respective fields.

Apart from this formal viewpoint and starting with the issue of human rights, the practice of the Security Council certainly supported the general increase in the interest in human rights and the prominence of the issue on the agenda in different international fora, which could be particularly noted around the time of the fall of the Berlin Wall. Whether human rights really started being respected to a higher degree in practice around the world in the wake of the fall of the Berlin Wall is uncertain,[52] but it is not unlikely, since in Eastern Europe not least the former Soviet bloc countries were liberalized and some of these countries seem definitely to have taken a democratic way. The liberalization in Eastern Europe and in other parts of the Soviet empire caused similar liberalizations in other parts of the world, especially in Africa, but except for South Africa, the development there towards democracy seems more precarious.[53] Even so, as more and more states become liberal democracies this is likely to mean something positive as far as increased respect for human rights is concerned.[54]

The practice of the Security Council at the beginning of the 1990s seemed to lend support to the view that at last human rights issues were

[52] Cf. above section 1 note 9.

[53] Freedom House reports in its latest survey from 1995/96 concerning Central and Eastern Europe and the Former Soviet Union that "... there are 9 Free countries (representing 20 percent of the region's population of 414,7 million). There were 13 states rated Partly Free and inhabited by 63 percent of the region's population. And there were seven states rated Not Free in which 17 percent of the region's population live. None of the countries in the Commonwealth of Independent States was rated Free. ... The balance sheet of formal democracy was somewhat more encouraging in this post-communist expanse. Of the region's 27 states, 19 were formal democracies, in which 80 percent of the region's population lived" (Karatnycky, 1995/96, op. cit. section 1 note 9, p 11).

[54] In the words of Adrian Karatnycky commenting on the annual global survey by Freedom House of the protection of human rights, "... while democracies expand the range of freedoms enjoyed by citizens, they do not effectively protect all basic human rights, political rights and civil liberties characteristic of fully free societies. Thus, in recent years, while democracy has made progress around the world and while many states have successfully built cohesion and consensus on the basis of democratic choice, democracy does not always achieve or guarantee the kind of social, economic, ethnic and political stability that secures a state's Free status. ... Nevertheless, the correlation between democracy and freedom remains: two-thirds of democracies are Free, and all Free societies are democracies" (Karatnycky, "The Comparative Survey of Freedom 1993–1994: Freedom in Retreat", in *Freedom in the World* 1993/94, (pp 3–9), p 6).

being taken seriously and that the Security Council was even prepared to use force in order to make states and others respect human rights. In that sense the practice of the Security Council strengthened the general trend towards increased respect for human rights and contributed to strengthening the position of human rights within international law (although as argued above the practice of the Security Council cannot be directly translated into law-creating custom except as far as the very powers of the Security Council itself under the UN Charter are concerned). The fact, for instance, that the Security Council authorized military interventions in order to protect human rights or to enforce respect for international humanitarian law cannot be taken as a pretext for claiming that human rights now rank higher among the rules of international law than, for instance, the rule prohibiting the use of armed force, i.e. that individual states would henceforth be allowed to undertake humanitarian interventions (even if one could argue that this should be the case[55]).

As far as the domestic jurisdiction argument is concerned, the field of human rights clearly belongs to the area of general international law and not to the field of exclusive domestic jurisdiction. The action of the Security Council at the beginning of the 1990s has contributed to strengthening this legal fact. As far as its own actions are concerned the Security Council has, through its practice, established that it may even use military force in order to protect human rights, which although applying only to action taken by the Council itself is a significant legal development.

The actions of the Security Council may also have affected the minds and ideas of people, and most importantly, the ideas of state representatives in the UN and leaders of states and other high public officials around the world, and may have encouraged them to regard human rights as a more important issue generally. This may have an effect on the international *opinio juris* as far as the status of human rights in international law is concerned.[56]

The importance in the long run for the status of human rights in international law of the intensified involvement of the Security Council in these issues in the early 1990s is, however, far from certain. It is an open question whether the involvement of the Security Council in human

[55] Cf. the argument of Tesón, Fernando R., *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd ed., 1997.

[56] Cf Koskenniemi, 1996, op. cit. section 1 note 3, pp 481–482 concerning the possible emergence of a new international "public morality".

rights issues will be permanent since the arbitrariness which characterizes the practice of the Council also makes it hard to evaluate its devotion to the issue of human rights.

If it turns out that the short period during which the Security Council was prepared, not only to condemn violations of human rights or determine that they constituted a threat to the peace, but even to take the consequences in practice and decide on enforcement measures in order to protect human rights, was just a temporary exception to the rule of non-action in the face of such situations, then one can conclude that the legal effect of the upsurge of Security Council interest in the status of human rights was insignificant, as far as the status of these rights in international law is concerned. Today it would seem that this is the most likely scenario.

If, on the other hand, after a period of inaction in the middle of the 1990s, the Security Council again puts the issue of human rights high on its agenda the impact of its involvement may be important for the status of human rights in the long run. The mere knowledge that there is a binding and, if the need arises, necessary military enforcement mechanism as far as respect for human rights is concerned may make states more willing to implement the protection of human rights (i.e. in most cases to realize their international legal undertakings since most states are bound by one or other of the international or regional human rights treaties) and may possibly affect also their ideas on the relative importance of human rights within the system of international law. The role of the Security Council would be primarily preventive in the sense that the mere knowledge that the Security Council may act would prevent states from committing (too serious) crimes against human rights.

According to this scenario human rights would benefit from what is generally lacking in international law, namely a central enforcement or "police" authority. However, owing, if nothing else, to a lack of resources, the likelihood – which may be good or bad depending on the view one takes of Security Council activism in this field – of the Security Council ever becoming an efficient enforcer of human rights and humanitarian law is very small.

Even if the Security Council resumes its active stand on the issue of human rights the impact of its practice on the standing of human rights in general international law will to a certain degree depend on the consistency characterizing its application of Article 39 and Chapter VII of the UN Charter. If it becomes obvious that the Security Council, even though it sometimes does protect human rights, is applying the concept of threat to the peace arbitrarily and in an ad hoc manner, its labelling of some situations as a threat to the peace will most likely not contribute to an increased respect for human rights. Rather the opposite may be the

result; too much arbitrariness may lead to more cynicism and perhaps even to a decrease in respect for human rights around the world.

Concerning the issue of whether democracy has become a rule of international law the only case of direct relevance considered by the Security Council during the early 1990s is Haiti, where the Security Council explicitly authorized a military intervention in order to restore a democratic political system.[57] Again, this action says more about the breadth of the mandate of the Security Council than about the status of democracy in the "ordinary" international legal system outside Chapter VII of the UN Charter. Compared with the total number of cases during the same period in which the Security Council applied the concept of threat to the peace and decided on enforcement measures, it can be noted initially that the Security Council has invoked the lack of democracy in only two cases (Haiti and Sierra Leone). The indirect effect of the Security Council action in promoting democracy should probably therefore be smaller in the case of democracy than in the case of the protection of human rights.

These two issues are presumed to be separable; but in reality it would be difficult fully to realize the respect for human rights in any political system other than a liberal democratic one. In the context of the protection by the Security Council of human rights, the question has generally been one of fundamental human rights and not the full range of human rights of a modern state (although it can be noted that in the case of Haiti the Security Council expressly invoked violations of the right to freedom of expression, which is a rather refined human right in the context of the violations which have generally mobilized the Security Council to act to protect human rights). It should be possible to realize the right to life, the right not to be subject to torture and the right to liberty and security of person, for instance, even under a totalitarian political regime.

Since many states around the world changed from totalitarian systems of government to democratic ones after 1989, in Latin America even before then, and the majority of the members of the UN General Assembly since 1993 are democratic (at least formally)[58] it would perhaps be possible to argue that liberal democracy has established itself as a rule of customary international law. To become a rule of customary international law, however, democratic systems of government would need more time to become established in practice (in Africa, for instance, the

[57] Cf. above, section 3.8 note 105. The later case of Sierra Leone is also directly relevant to the issue of democracy as a rule of international law, although only non-military enforcement measures have been decided upon in that case (SC res. 1125, above section 3.5, note 61).
[58] Cf. above section 2.3.2 note 45.

new democracies with a few exceptions are very fragile) and it would also be necessary for a corresponding *opinio juris* to develop among a majority of the states of the world implying that this is the only system of government allowed under international law, or at least that a totalitarian system of government is prohibited.

Also in order to show that democracy has become customary law it would probably be necessary to perform some kind of empirical investigation of whether states were actually applying a democratic system of government in practice or whether they were only democratic on paper. Without undertaking any deeper investigation into the matter here it will be presumed that although liberal democracy became more common and gained a higher degree of respect internationally than ever before in the early 1990s, the time has not yet come for it to be declared a rule of customary international law.[59]

It can also be argued that democracy is the rule under the major global and regional international human rights treaties to which a majority of the countries in the world are parties (even though the right to democracy is not spelt out explicitly in these treaties). To the extent that one argues that the contents of the major treaties on human rights or even the Universal Declaration of Human Rights of 1948, through the necessary practice and *opinio juris,* have become customary international law, then to the extent that these instruments prescribe democracy, democracy has also become a rule of customary law.[60] As just noted, none of the human rights treaties, not even the Universal Declaration, directly prescribe democracy as the only lawful system of government, although most

[59] Cf. above section 2.1.1 note 8 concerning different opinions expressed on this issue.

[60] That in principle widespread and representative participation in an international treaty may show that a treaty rule has become a rule of customary law was laid down by the ICJ in the North Sea continental shelf cases, *ICJ Reports*, 1969, p 3, para. 73. Incidentally the way lawyers describe the formation of customary international law corresponds remarkably well with the development of an international regime, according to Robert O. Keohane: "It ... seems sensible to define *agreements* in purely formal terms (explicit rules agreed by more than one state) and to consider *regimes* as arising when states recognize these agreements as having continuing validity. This definition has 'thin' substantive content: a set of rules need not be 'effective' to qualify as a regime, but it must be recognized as continuing to exist. Using this definition [as opposed to one based on observed state behaviour], regimes can be identified by the existence of explicit rules that are referred to in an affirmative manner by governments, even if they are not necessarily scrupulously observed. Thus, establishing that a regime exists is an issue for descriptive inference, based on publicly available texts, rather than psychological insight or causal inference." "The Analysis of International Regimes", in *Regime Theory and International Relations*, ed. by Volker Rittberger, 1993, (pp 23–45), p 28; see also Rittberger, Volker, "Research on International Regimes in Germany. The Adaptive Internalization of an American Social Science Concept", in *Regime Theory* ..., ibid., pp 3–22, pp 10–11.

instruments are permeated with a democratic undertone – at least it is fairly easy to argue that they are if for no other reason than for the one cited above, namely, that the full realization of human rights is difficult to achieve in anything but a democracy.

In any case the argument that democracy has become a rule of general international law is a difficult argument to make, especially today when the democratic wave around the world seems to have halted temporarily, or for a longer period, and the post-Cold War enthusiasm for democracy seems likewise to have diminished somewhat. The Security Council pronounced a forceful argument in favour of democracy when it authorized a military intervention to support democracy, but to the extent that this does not become a more common feature of the Security Council's determinations of the existence of threats to the peace, or of its decisions on enforcement measures, the action of the Security Council under Chapter VII of the UN Charter has had little effect on the general standing of democracy as a rule of international law. In line with what has just been said it is also difficult to argue that as long as human rights are satisfactorily respected the very issue of the system of government of a state has moved beyond the borders of domestic jurisdiction and has become a matter of international concern.

4.7 Intervention through authorization

As we have seen the wide interpretation on the part of the Security Council of the concept of threat to the peace in Article 39 of the UN Charter has usually been followed up by the use of enforcement measures. In some cases the Security Council has even decided on military enforcement measures, the strongest kind of enforcement measure there is. The Security Council has devised a new way of applying military enforcement measures by authorizing willing Member States, usually led by one of them, to undertake the enforcement measures in question in cooperation in some form with the UN Secretary-General.

Thus, the Security Council has interpreted not only the concept of threat to the peace widely, but has also interpreted widely the way in which it may implement enforcement measures. The Member States who have taken the lead in the operations heretofore have been the United States (Haiti), France (Rwanda) and Italy (Albania). In the case of the former Yugoslavia the use of force took place through NATO. Only in one instance was the decision to authorize the use of force by the Member States not followed up by any action. This was the case of Zaire at

the end of 1996, even though Canada had offered to take the lead in the operation.[61]

The Security Council started authorizing the Member States to use military force in order to oust the Iraqi invasion forces from Kuwait,[62] but in that particular case there were also alternative legal bases which could be invoked to justify the intervention in the war by third states, such as, for instance, the strong legal argument of collective self-defence in cooperation with Kuwait.[63] In the case of Korea much earlier the Security Council "*[recommended]* that the Members of the United Nations 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".[64]

"Authorizes" seems to imply a stronger Security Council commitment than "recommends" and lends somewhat stronger international legal support to the action than does "recommends". In both cases, however, the Security Council expresses its approval of the action which, taken under any circumstances, strengthens the political underpinnings as well as the legal underpinnings of the action. In the case of Korea, too, there was the alternative legal justification of collective self-defence on behalf of South Korea.

In the cases under study here, the situations in which the Security Council authorized the use of military force were not such as to motivate the alternative justification of collective self-defence, either on the ground or in theory. At least the argument of collective self-defence has has not been alluded to in the Security Council resolutions, and to the knowledge of this author, it has not been raised in the doctrine concerning these cases, nor has it been invoked by any intervening state in order to defend its actions.

The justification of collective self-defence could have been invoked to support third party intervention in the case of Bosnia-Herzegovina, which as an independent state was attacked from abroad, both directly but primarily indirectly.[65] Before the ICJ Bosnia-Herzegovina has itself

[61] Cf. above section 3.10 note 126 and 130. In the case of the Inter-African peace-keeping force in the Central African Republic, France provides financial and logistical support to the operation which is led by an International Monitoring Committee chaired by the former President of Mali, General Amadou Toumani Toure (cf. SC res. 1125, above section 3.5 note 62).

[62] UN SC res. 678 of 29 November 1990, op. para. 2.

[63] Cf., for instance, Schachter, Oscar, "United Nations Law in the Gulf Conflict", *AJIL*, vol. 85, 1991, pp 452–473; Higgins, 1994, op. cit. section 1 note 3 pp 260–262; Dinstein, op. cit. section 3.1.3 note 158, pp 291, 295.

[64] UN SC res. 83 of 27 June 1950, op. para. 1.

[65] Judging from UN SC res. 752 and 757, above section 3.3 note 15 and 16 respectively.

invoked the right to – individual – self-defence when it has claimed that its right to self-defence was curtailed by the arms embargo placed on the whole of the territory of the former Yugoslavia.[66]

No other state tried to use the justification of – collective – self-defence in order to be able to intervene or justify foreign intervention in the war on the side of Bosnia-Herzegovina. Perhaps this was due to the complexity of the intra-national war turned inter-national and due to an unwillingness generally to intervene militarily in the former Yugoslavia on the part of the surrounding world.

It could be argued that the authorizations granted to the Member States to use force have been given for the purpose of self-defence in one sense, namely to protect peace-keepers and humanitarian workers already in place who have often been attacked in the cases where the Security Council subsequently has authorized the use of military force. One reason cited several times by the Council when authorizing the use of force has been that the intervening troops shall protect and assist peace-keepers in delivering humanitarian assistance.[67]

The self-defence line of argument will not be pursued here, firstly because the protection of deliverers of humanitarian aid is a situation very far from what is usually meant by self-defence in international law, and secondly because self-defence is a doubtful argument to invoke to protect people, such as peace-keeping troops and humanitarian aid workers, who are posted in a country on the condition that they have been given the consent of the authorities of that country.[68]

The logical response, at least from a legal point of view if peace-keepers and aid workers are attacked, would be either to withdraw or to

[66] Cf. above section 2.1.2 note 12.

[67] Cf. the case of Bosnia-Herzegovina (UN SC res. 770, above section 3.3 note 18); Somalia (res. 794, above section 3.4 note 46); Rwanda (res. 929, above section 3.7 note 72); Zaire (res. 1080, above section 3.10 note 126); Albania (res. 1101, above section 3.11 note 132).

[68] Another more speculative line of reasoning, which, it is true, to the knowledge of this author, has never been brought forward, would be to claim that gross violations of human rights constitute the equivalence of an armed attack, at least on the people in the state in question, but possibly also on the international community, i.e. also on other states. Then it would be possible to invoke collective self-defence to justify an intervention undertaken in order to protect the persecuted people or even individual self-defence if an "armed attack" on the people in a state is considered as an armed attack on the international community as a whole (concerning the existence of obligations of states *erga omnes*, i.e. towards the international community as a whole see the case of Barcelona Traction, Light and Power Company, Limited, *ICJ Reports,* 1970, p 3, paras. 33–34; cf. also the discussion by Yoram Dinstein and Karin Oellers-Frahm in *Archiv des Völkerrechts* vol. 30, 1992, in "The erga omnes Applicability of Human Rights", pp 16–21, and "Comment: The erga omnes Applicability of Human Rights", pp 28–37 respectively; and Hannikainen, op. cit. section 4.2 note 14, pp 723–727).

mount a military intervention on humanitarian grounds, but not to invoke self-defence. The Security Council has acted logically in this sense, in that it has not reasoned in terms of self-defence proper when it has authorized the use of military force, but in terms basically of a humanitarian intervention.

Authorizing individual Member States to use military force is a way of undertaking enforcement measures which was not foreseen in the UN Charter. Nevertheless such authorization is used and considering the wide powers generally of the Security Council and the way in which constituent instruments of international organizations are often interpreted in a flexible and functional way[69] it is easier from a legal perspective to accept the new practice than to argue against it.[70] The design of the way in which the Security Council may carry out military enforcement measures according to Chapter VII of the UN Charter has never been applied, and for all practical purposes is obsolete, so it is difficult to argue in favour of the actual application of the system as it was originally designed.

The difference in practice, moreover, between the old system and what is actually happening through authorization should not be all that great except that the UN has less control over the actual action than it would have if the procedure according to Chapter VII of the UN Charter was followed. The states who participate with troops and *matériel* in the UN authorized actions should reasonably be the same as those who would make troops and other facilities ready for UN Security Council use through

[69] According to *The Charter of the United Nations*, op. cit. section 1 note 8, the ICJ now qualifies charters of international organizations as "constitutions" and employs the functional method for their interpretation. This method, according to *The Charter of the United Nations*, is now the predominant one and is recognized as a method of interpretation oriented towards the purpose of the organization with elements of the *effet utile* and the implied powers doctrine (p 27). For a clear example cf. the case of Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949, *ICJ Reports*, 1949, p 174; cf. also the case of Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter) of 1962, above section 2.2.2 note 20, and the case of Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970) of 1971, above section 3.1.2 note 138. On the interpretation of the UN Charter in general by the ICJ, on the one hand, and by the Security Council and the General Assembly, on the other, see also Sohn, Louis B., "The UN System as Authoritative Interpreter of its Law", in *United Nations Legal Order*, ed. by Oscar Schachter and Christopher C. Joyner, 1995, pp 169–229.

[70] Freudenshuss, 1994, op. cit. above section 1 note 6, for instance, accepts them (pp 526–527) whereas Bothe, op. cit. section 2.1.2 note 9 argues strongly against them (pp 73–74); Higgins, 1994, op. cit. section 1 note 3, argues strongly in favour (p 266). Cf. the comment in *The Charter of the United Nations,* 1994, that the legal relevance of subsequent practice reduces the possibility of *ultra vires* action of the UN, above note 12.

the foreseen agreements concluded under Article 43 of the Charter. The poorer countries of the world would play a minor role as interveners in either case.[71]

Since the permanent members of the Security Council would have a decisive influence over the military action anyway – also through the assistance, according to Article 47 of the UN Charter, of the Military Staff Committee consisting of the Chiefs of Staff of the permanent members – the fact that one of the permanent members, or NATO, takes the lead in the authorized military actions is not as remarkable as it might first seem. If the permanent members did not want the action to be undertaken it would not be undertaken even if the Security Council commanded troops through agreements concluded under Article 43. Also, the permanent members who do not participate in the enforcement action nevertheless have to consent to or at least not vote against the action in the Security Council. Dimensions of *Realpolitik* in line with the relations of power which existed at the end of the Second World War were built into the very system of collective security of the UN Charter, so the difference between a certain number of countries acting fully in line with the commandments of the UN Charter or the same countries doing the same thing, although halfway outside the UN Charter system, is not that great.[72]

In view of the lack of agreements on standing UN forces under Article 43, and since it is probably the only way of carrying out military enforcement actions under the UN Charter the question is rather whether to accept the use of force through authorization or whether not to have any military enforcement action taken at all through the UN system.[73]

[71] The fact that economic resources are decisive as far as the ability to carry out military enforcement action through authorization is concerned is obvious already in the text of the Security Council resolutions. Often the resolutions state expressly that the cost of carrying out the military operation will be borne by the participating states (Albania res. 1101, above section 3.11 note 132, op. para. 7; Haiti res. 940, above section 3.8 note 105, op. para. 4; Rwanda res. 929, above section 3.7 note 72, op. para. 2; Zaire res. 1080, above section 3.10 note 126, op. para. 9; Central African Republic res. 1125, above section 3.5 note 62, op. para. 5).

[72] Cf. above 36.

[73] Concerning the difficulties of creating a standing military force available to the Security Council, see Luard, op. cit. section 1 note 4, pp 88–89, 93–105. Given the near impossibility from the very beginning of inducing the member states to conclude agreements under Article 43, Luard concludes "[i]t made it the more necessary for the infant organization to consider alternative means by which it could make its authority effective when the peace was threatened: to develop political skills rather than military enforcement power" (Luard, ibid., p 105). Now it can be said that in addition to developing political skills the Security Council has devised a new way of developing military enforcement power on a case by case basis through authorization.

Practical necessities do not make such authorizations legal, however, but it still is easier to argue in favour of its legality than against. If the Security Council has certain powers it certainly should have the capacity to delegate some of these powers to one or more states or to some other kind of agency.

It may be bad policy and be imperfectly carried out, but fundamentally it is not bad law.[74] Also, one may argue that since authorizations are in fact applied the UN Charter has been modified through that practice.[75]

Having the legitimacy of the Security Council in mind either solution could be detrimental. If it becomes obvious that the permanent members make use of the Security Council to rubberstamp interventions that they undertake more or less for their own particular interest then the Security Council risks losing a lot of legitimacy in the eyes of the other countries in the world.

If, on the other hand, the Security Council is never able to put military force behind its words the Council also risks losing, if not legitimacy, then at least credibility. It would probably be possible to argue, however, that it is on the whole better if the Security Council abstains from taking military enforcement measures rather than venture outside the strict limits of the original system. One advantage of a strict interpretation of the UN Charter would be to make the Member States renegotiate obsolete parts of it, but this is not a strong argument since the permanent members of the Security Council will always interpret their mandate in whatever way they want and probably have no interest in renegotiation.

Another argument why the Security Council should rather abstain altogether from using military force, at least in such cases as those under study here, is that, as noted earlier, the Council has not in reality been very successful in its efforts to remove humanitarian threats to the peace. Even the Third World countries, who have usually been the targets of humanitarian interventions by the Security Council, and who are also most critical of all forms of interventions in what are considered the internal affairs of states (which generally goes beyond what Western countries would consider as belonging to a country's internal affairs), would probably also be critical if the Security Council never even considered carrying out a military intervention, irrespective of the degree of seriousness of the humanitarian suffering taking place. On the other hand, perhaps the Third World states would not want the Security Council to intervene militarily at all, but would prefer to be left alone regardless

[74] Cf. Higgins, 1994, op. cit. section 1 note 3, p 266.

[75] Cf. Freudenschuss, 1994, op. cit. section 1note 6, p 526.

of the circumstances. The question whether it is better for the Security Council never to try than to try and fail will not be answered here.[76]

It is important that the UN keeps as much control as it can over action undertaken through authorization. Apart from that, for pragmatic reasons the use of military force through authorization has to and may be accepted also from a legal point of view. At least authorized action is a little inside the UN system – halfway inside as much as halfway outside – with the opportunity for public debate and some transparency that this still makes possible, as opposed to no debate and no transparency at all if the great powers do not even bother getting the Security Council's approval of their military interventions. This could be the case if it was made clear to the great powers that the Security Council would never allow any military enforcement action except according to the letter of the UN Charter. At the moment though, in contrast to the beginning of the 1990s, it does not seem as if the great powers are willing to take any military enforcement measures at all.

What differentiates the forms under which military enforcement action is undertaken from the original design are really the purposes for which it is undertaken. These purposes, namely all those which are covered by the broad construction of "threat to the peace" which the Security Council adheres to, have been discussed above in sections 2 and 3. Nowadays the Security Council intervenes, or authorizes interventions, in purely internal conflicts and for humanitarian purposes, which is a different matter and raises other and more complex problems than interventions in order to repel a foreign aggressor. Basically, what the Security Council has been carrying out are humanitarian interventions.

To revert to the preceding discussion concerning whether the Security Council should decide on military enforcement measures, even though

[76] Cf. Haas, Ernst B, "Beware of the Slippery Slope: Notes toward the Definition of Justifiable Intervention", in *Emerging Norms of Justified Intervention*, ed. by Laura W. Reed and Carl Kaysen, 1993, pp 63–89, who argues that the UN should abstain from intervening rather than trying if the personnel involved are not provided with adequate means. As a kind of illustration of the argument of Haas, cf. Rose, Sir Michael, "Field Coordination of UN Humanitarian Assistance, Bosnia, 1994", in *After Rwanda. The Coordination of United Nations Humanitarian Assistance*, op. cit. section 3.3 note 24, (pp 149–160) pp 157, 159 who argues in favour of a clear distinction between humanitarian and peacekeeping missions and military operations. Oliver Ramsbotham and Tom Woodhouse (op. cit., section 24 note 46, pp 113–114) seem to argue the opposite of Haas and Rose, and for that matter the opposite of the former UN Secretary-General, Boutros, Boutros-Ghali who in *Supplement to an Agenda for Peace*, op. cit. section 2.1.1 note 5, paras. 12–25 and 33–46, against the background of some less successful peace-keeping/peace-enforcing missions, argues against broad and in particular blurred mandates for UN peace-keeping troops, when they (Ramsbotham and Woodhouse) advocate the terminlogical choice of a very broad, all inclusive definition of "humanitarian intervention".

they would not be taken in accordance with the original Charter system, or whether the Security Council should abstain altogether if it cannot act wholly in line with the UN Charter, other arguments could be made along the same lines with respect to the fact that the armed conflicts the world is facing today are altogether different from the kind of conflicts that the world was facing, and had in fact faced, when the UN Charter was drawn up. As has already been mentioned the conflicts in the world today are largely civil wars combined with great humanitarian catastrophes being either the cause or the result of civil war, or both.[77] The kinds of armed conflict that the UN system was designed to deal with, however, were international wars of territorial conquest (which of course may also generate humanitarian catastrophes, but that was not the focus of attention as far as the Security Council was concerned).

On the one hand, one could argue that if the Security Council restricts its attention and especially its enforcement measures, to the "old" kind of conflict then the Security Council will become irrelevant to today's conflicts and security problems. On the other hand, one could argue that the Security Council should only deal with the kind of conflicts that it was designed to deal with and nothing else, at least as long as the collective security system is not formally redesigned; and if there are few international armed conflicts all the better. The new conflicts and problems will have to be dealt with in other ways than through the wide interpretation of "threat to the peace" and the subsequent taking of more or less efficient enforcement measures.

The old versus the potentially new role of the Security Council can also be discussed in terms of order or stability versus justice and substantive values.[78] The question then is how far the Security Council should venture into the field of justice.[79] The view that the Security Council

[77] Cf above section 2.1.1 note 3.

[78] Cf. Thomas Franck's discussion on justice in international law, Franck 1990, op. cit. note 3, chapter 13. Franck seems to develop his ideas on justice in "Fairness in the International Legal and Institutional System", General Course on Public International Law, *Recueil des Cours, Collected Courses of the Hague Academy of International law*, 1993, vol. III, p 9–498. See also Koskenniemi, 1990, passim, op. cit. section 2.3.1 note 34.

[79] Cf. Koskenniemi, 1995, op. cit. section 2.1.2 note 10, *passim*, and Freudenschuss, 1994, op. cit. section 1 note 6, pp 530–531 who starting from very different argumentative premises seem to arrive at the same conclusion on this issue, namely, that the Security Council should stick to its traditional function of keeping order. Cf. also the insightful analyss s of the role of the Security Council by Freudenschuss in "Article 39 of the UN Charter Revisited: Threats to the Peace and the Recent Practice of the UN Security Council", *Austrian Journal of Public and International Law*, vol. 46, 1993, pp 1–39). Others, however, like Fernando R. Tesón, 1996, op. cit. section 2.3.1 note 35, passim, argue the opposite way and strongly advocates a new role for the Security Council.

should stick to its old role of keeping the international order must reasonably be linked with the view that the international community remains fundamentally unchanged, it is the same kind of community of nation-states as it was when the UN Charter was drafted.[80]

The "minimalist" position as to the role of the Security Council may seem tempting today in the reality of the aftermath of the post-Cold War period. The enforcement of the common values – the "common public morality"[81] – of human rights and democracy which seemed possible in the immediate post-Cold War era seems less possible now some years later. It is the easiest position to take in that it leads to fewer mistakes and probably less criticism of the action of the Security Council than a "maximalist" position.[82] It is also more realist both in a theoretical – Realist – and in a "common sense" sense in that it is always more likely that things – in this case the international community of nation-states – have not changed than that they have.

Concerning one of the basic premises of the "minimalist" position, however, namely that the community of nation-states remains, or should remain, fundamentally unchanged, it is questionable whether in a long-term perspective this premise is actually realistic. The "minimalist" position is a fairly conservative and not very creative or forward-looking position; it is also one which may involve the risk of not noticing changes in the nature of the international community which may actually have taken place.

As opposed to the activist the analyst should nevertheless take a reactive rather than creative position when analyzing Security Council developments (depending of course on what goals are striven for in the case of the activist). The final word on what position – the "minimalist" order or the "maximalist" justice position – should be taken in relation to the activities of the Security Council will not be uttered here; only that the Council undisputably has ventured into the field of justice and has taken on a "maximalist" role in recent years. The question is what conclusions the Security Council will draw from its activities. Will it retreat to the field of order or will it carry on acting also in the field of justice?

Returning to what the Security Council has actually done; since the powers of the Security Council are so wide and the Council obviously is

[80] Some argue, however, that the international community has never been truly "Westphalian", Krasner, Stephen D., op. cit. section 3.4 note 50.

[81] Cf. above note 56.

[82] A very critical observer could claim that the Security Council has failed even in its traditional role as keeper of the international order as it failed to uphold the fundamental prohibition against the use of force and in particular the rule of "no fruits of aggression" in Bosnia-Herzegovina (cf. above note 39).

prepared to interpret its powers extensively, it has been discussed whether there is not a need for the spelling out of some criteria for when and how humanitarian interventions decided upon by the Security Council should be carried out.[83] This would probably be beneficial to the legitimacy of Security Council action, but the criteria would not be binding on the Council unless the Council itself adopted them in a binding resolution. It is unlikely, however, that the Security Council would like to tie its own hands and if it did decide on some criteria they would probably be formulated in such a general way that they would not restrict the freedom of decision or action of the Security Council anyway.[84] The formulation of criteria by the UN General Assembly, which is a more likely scenario, would not have any binding effect on the Security Council even if such criteria could constitute a political means of pressure on the Council.

The most realistic attitude towards the formulation of criteria for humanitarian interventions by the Security Council is a fatalistic one. Unless, of course, the Charter system is reformed, which seems unlikely, or the world changes dramatically, which is also unlikely. As pointed out earlier, the only "check and balance" with respect to the Security Council's powers is and will most likely remain the veto among the permanent members and the costs involved, economic, political and other, for the countries who take part in a military intervention.

[83] Cf., for instance, Gordon, Ruth, "Humanitarian Intervention by the United Nations: Iraq, Somalia, and Haiti", *Texas International Law Journal*, vol. 31, 1996, (pp 43–56) p 56; Fonteyne, Jean-Pierre L., "The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter", *California Western International Law Journal*, vol. 4, 1974, (pp 203–270) pp 258–268; Lillich, Richard B., "Humanitarian Intervention Through the United Nations: Towards the Development of Criteria", *ZaöRV*, vol. 53, 1993, pp 557–575; Nanda, Ved P., "Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti – Revisiting the Validity of Humanitarian Intervention Under International Law – Part I", *Denver Journal of International Law and Policy*, vol. 20, no. 2, 1992, (pp 305–334), p 330; Scheffer, op. cit. section 2.1.1 note 8, pp 286–293. Fonteyne discusses criteria for unilateral humanitarian intervention, undertaken outside the framework of the UN. Scheffer and Nanda discuss criteria both for collective humanitarian intervention under the *aegis* of the UN Security Council and for unilateral humanitarian intervention. In substance the criteria for collective and unilateral interventions respectively turn out fairly similar. The difference between the two is largely one of procedure (and legality presumably, but that is a discussion which will not be carried further here).

[84] Cf. Malanczuk, Peter, *Humanitarian Intervention and the Legitimacy of the Use of Force*, 1993 pp 30–31, who is also sceptical towards the formulation of criteria for humanitarian intervention, unilateral or collective.

5. Looking ahead

In the introduction to this study an author was quoted saying that a student of the role of the UN in international relations should be careful not to be carried away too much by current events. In order to achieve a better analysis of international relations one should strive for a broad long-term perspective.

Considering the complete surprise by which everyone, researchers and observers of international law and politics included, was taken by the fall of the Berlin Wall in 1989 and the subsequent demise of the Soviet bloc and later of the Soviet Union itself, one may conclude that it is very difficult to study current events and at the same time keep clear of the spirit of the times.

In the early 1990s observers of the UN tended to get carried away by the activities of the Security Council and to draw overly optimistic and perhaps incorrect conclusions as to the importance of the role of the Council in the management of international peace and security. Now, towards the end of the 1990s, one risks getting carried away by the seeming lack of activity of the Security Council and to draw overly pessimistic conclusions about its likely future role.

When the fiftieth anniversary of the UN organization was being celebrated in October 1995 the peak of the active period of the Security Council had already passed. The Dayton peace agreement concluding the war in Bosnia-Herzegovina, negotiated by the fighting parties and the United States and signed in November 1995, significantly terminated any UN involvement of importance in the area. Since then there have been no major actions taken by the UN Security Council anywhere in the world. The only enforcement action coming close to the series of measures decided upon in the early 1990s was the authorization by the Security Council of the Member States to intervene in Albania in 1997. Again, significantly, at least so it would seem, the Security Council did also authorize the Member States to undertake a humanitarian intervention to alleviate the suffering of the refugees in eastern Zaire in the winter of 1996–97, but the Member States, to be led by Canada, never took advantage of the authorization.

Significantly too, in the case of Burundi in 1996, where a scenario resembling the one that had taken place in Rwanda some years earlier was developing, the Security Council did not even authorize any intervention. No Member State was willing to risk getting bogged down once more in the swamp of an ethnically-based civil war and so subject itself to the political and other costs involved in a military intervention.

Now that the apparently temporary climax of Security Council activity in the early 1990s has passed, the emphasis as far as the maintenance and management of international peace and security is concerned seems to have moved away from the UN Security Council and over to NATO. As the number of member states and the number of countries associated in one form or another with NATO steadily increases, NATO seems to be taking over the role of the UN Security Council as the central organ of a comprehensive international security system. The membership ranks of NATO do not of course include representatives from all parts of the globe. If, however, NATO includes, in more or less tightly structured forms, North America, Europe and the states formerly making up the Soviet Union it will embrace a large part of the militarily and strategically important countries of the world, including four out of five of the permanent members of the UN Security Council.

China is the remaining and very important permanent member of the Security Council who is not associated with NATO in any way. The rest of the Third World countries also remain outside NATO, which in a way further stresses the degree of their marginalization considering their already marginalized position within the UN collective security system.

The likely partition of roles between NATO and the UN Security Council will be that NATO is the central organ where issues relating to the management of international security are discussed primarily between the members and associated countries, whereas the Security Council is an organ of residual importance which will be used on the occasions where China has to be included in any discussion, or where problems relating to the Third World have to be dealt with. The UN Charter allows for regional peace and security arrangements in Chapter VIII – of which NATO is considered to constitute one – with the important qualification that no enforcement action may be taken by the regional agencies without the authorization of the Security Council.

On the other hand, without the support of NATO no enforcement action, and in particular no miltary enforcement action, will probably be authorized in the first place. In view of the way the world has developed since the drafting of the UN Charter it would not be wrong to say, at least as far as military enforcement measures are concerned, that in reality it is not the decision by the Security Council to authorize enforcement measures

which is the crucial issue but rather the will of the dominating regional arrangement or agency, which happens to be NATO, i.e. the crucial question is whether NATO wants or does not want to undertake a military intervention in a particular situation. If the Security Council authorizes the use of force, but NATO does not want to take military measures, there will probably not be any measures taken. On the other hand, if NATO wants to intervene militarily somewhere, the Security Council will probably decide on an authorization, provided, of course, that the two non-NATO members among the permanent members of the Security Council do not oppose military enforcement action in the case being considered.

During the post-Cold War period Russia seemed to go along with the wishes of the Western powers and China has abstained but never voted against any of the military enforcement actions designed by the Security Council in the early or mid-1990s (the last three being the authorizations to intervene in Zaire, Albania and the Central African Republic respectively). In a few cases having to do with measures against Iraq, which have been rather different from the cases analyzed in this study, a split has surfaced among the permanent members between, on the one hand, the United States and the United Kingdom and, on the other hand, Russia, China and France.

Russia even more than France can be expected to disagree with the Western states in the Council in the future. China could similarly be expected to oppose more actively, i.e. vote against the Western line in many of the Security Council decisions, but China seems to prefer to abstain, on condition, it must be presumed, that China does not happen to have any direct stake in the action.

Given the existence of a general consensus among the permanent members of the Security Council there is no counterbalance to the enormous powers of the Council, and primarily its permanent members, which there was in a way when the veto was still being exercised. One may sympathize or not in practice with a powerful Security Council depending on one's views on the actions taken; in principle one may find the current situation unsatisfactory because of the largely unrestrained powers of the Security Council, or one may find the situation satisfactory for the same reason, because the Security Council should be powerful and able to act. As a constitutional arrangement the setup of the UN organization with an all-powerful unchecked executive is remarkable, but, on the other hand, the UN Charter is not a constitution comparable to national constitutions, but is the founding treaty of an international organization led by and designed to be led by the most powerful countries in the world.

The fact that neither China nor the rest of the Third World states are members of NATO illustrates that, as a forum for a truly global discussion and management of issues of international peace and security the UN, and in particular the Security Council as opposed to NATO, still has an important role to play. It is important that the other great powers do not affront China, and so they have to ensure that they have the support of, or at least the acceptance by China of any major peace and security effort in which China may have an interest. As far as the rest of the Third World is concerned such countries will make themselves felt in the field of international security since it is in the Third World that most threats to and breaches of the peace are generated for the time being.

As concerns the conflicts, mostly internal, which are taking place in the Third World the question is in what way these conflicts will be handled in the future. It is unlikely that the Security Council will from now on be able to mobilize First World countries to engage actively in any military intervention or even peace-keeping efforts in the complex situations in the Third World if such situations are of no direct threat or interest to First World states themselves. It is equally unlikely that NATO will carry out the interventions or peace-keeping missions decided upon by the Security Council outside the area of immediate geographic or otherwise strategic interest to that organization itself. Consequently, the way in which Third World security problems will in fact be handled remains an open question. Africa seems to be the continent most seriously affected by armed conflicts, and so far all efforts to create a regional African system for the management of peace and security problems, including the creation of a standing African peace-keeping force, seem to have failed.

Intermingled with the issue of the security problems in Africa is the problem of the disintegrating states. It is true that this is not a problem confined to the African continent, since disintegrating states have occurred also in Europe and Asia with the Soviet Union itself and, potentially, also some of its successor states as well as the former Yugoslavia as obvious examples. It does seem, however, as if the problem is most widespread in Africa. These disintegrating states constitute a serious threat to both national and international peace and security, but it is at present impossible to say how this problem can be solved in a relatively disinterested and distanced, unselfish and impartial way.

Recently, in 1996 and 1997, we have seen new stark examples of practically every aspect of the security problems in Africa. In a manner of speaking the parties concerned have taken care of these problems themselves by fighting out civil wars over who is going to take over power with more or less foreign involvement. This way of taking care of the

security problem is obviously not the one foreseen in the UN Charter which emphasizes the peaceful solution of conflicts, primarily international ones, but, if the argument is carried a little further, also as a general rule as far as wars going on within countries are concerned.

Zaire (renamed The Democratic Republic of Congo) was one example of a disintegrating state where the power holders in place headed by the former President the late Mobutu Sese Seko were ousted subsequent to a civil war. The forces fighting President Mobutu were led by Laurent Kabila allegedly supported by Rwanda and Angola, and perhaps some other countries.

The Republic of Congo (also called Congo-Brazzaville) is another example of a country in a state of disintegration with different armies or militias supporting different political leaders. The President Pascal Lissouba, who had been elected in democratic elections in 1992, was supported by one armed faction and the former President Denis Sassou-Nguesso, who had been removed from power following the elections in 1992, was supported by another armed faction. President Lissouba, who was eventually removed from power by Denis Sassou-Nguesso in October 1997, was supported by the Unita guerilla from Angola, while Denis Sassou-Nguesso, who has taken the place of Pascal Lissouba as President, was supported by the government and regular army of Angola. This in its turn illustrates the security problems of Angola, where the civil war is still raging despite long-standing peace negotiations under the auspices of the UN and numerous peace agreements signed by both sides in the war.

Evidently the engagement of the UN Security Council in the form of peaceful measures or through military enforcement action would be needed in Africa. Both the civil war in the former Zaire and even more so the war in the Republic of Congo were fought out without any substantial involvement on the part of the UN Security Council. Discussions were carried on concerning the establishment of military forces under the *aegis* of the UN Security Council in both cases, but in neither case were there any forces established. In the case of Congo-Brazzaville the Security Council did not even adopt any resolution on the matter. It could be claimed that the problems eventually solved themselves either permanently, or what is more likely, temporarily, by one party to the civil war in each country winning and taking over power and stabilizing the unruly situation. Again from the point of view of international law and the UN Charter this is not the way conflicts should be solved.

Thus, although its involvement would be greatly needed the Security Council, for the time being at least, seems unwilling or unable to tackle the largely internal security problems of Africa. Above all, the Security Council is unable to assess the problems promptly at an early stage of

their development. And unfortunately the Security Council also somehow seems unable to deal with the problems efficiently once it has actually started to consider them. The reluctance of the Security Council to get involved is no doubt due to the complexity of the civil war situations going on in Africa and the resulting reluctance of the Western states at the present time to participate in any kind of military intervention there. Other African or Third World states may not be unwilling to send troops but seem unable to carry out a military operation without strong support, at least in the form of military equipment from the Western world.

A more cynical explanation of the inability of the UN Security Council to act adequately in relation to the many theatres of conflict in Africa is that the Western countries, with NATO as their executive military arm, simply do not feel affected. The conflicts in Africa do not immediately threaten any Western country but are contained on the African continent and no Western country, except perhaps France so far, has any substantial economic, political or military interests in Africa which may be threatened or damaged by the ongoing civil wars. Perhaps the Western world is not willing to risk anything militarily when the prospects of gaining anything from it at all are so insignificant.

It is true that recently in 1997 the newly re-elected president of the United States decided to launch a comprehensive African Sub-Saharan policy of economic reconstruction, but this has not yet resulted in the United States having established any vested interests in Africa which it would itself be prepared to protect militarily. The comprehensive United States policy is nevertheless noteworthy for several other reasons, not least because if it succeeds economic reconstruction (or perhaps construction in the case of Sub-Saharan Africa) may in the long run promote the internal stability of states and thereby security in Africa. It could be argued that economic reconstruction is a form of preventive humanitarian intervention; at least one can imagine that stabilizing the African states will lead to fewer conflicts and thereby also to fewer humanitarian emergencies. The United States will of course also gain from its new African policy. More directly there are a lot of unexploited resources in Africa which American companies may be able to make use of. More indirectly, by building up the African countries economically the US will not have to face the demands it is facing today for a military intervention when the situations in Africa erupt into humanitarian catastrophes. It is also interesting to note how the United States is furthering its influence on the African continent at the expense, primarily, of France. Also it could be claimed that the United States is taking a more determined grip on Africa than the UN is and that the United States is again taking the lead. If so, that would only emphasize the prevailing current global trend.

If we return to the more cynical explanation of the seeming inactivity of the Security Council with respect to African peace and security, it may be held that it is easier to let the African warring parties fight out their own wars. Then, once the conflict is settled the UN Security Council might, perhaps, come in to supervise the ensuing peace if it is stable enough for there not to be any substantial risks involved. However, few conflicts in Africa seem ever to be definitively settled.

This, however, means that the Security Council will have to turn a blind eye to the African serious human rights crimes and the human suffering going on during the fighting of the civil wars. In principle this goes against the trend in the Security Council in the early 1990s to get involved in different conflicts by invoking precisely the protection of the very values of human rights and the termination of humanitarian catastrophes. What we are witnessing today seems to be a reversal to a less human-rights-oriented outlook on the world on the part of the Security Council, and it is more than likely that this will be the more persistent of the two different outlooks if we compare the former "idealist" one with the reborn "realist" one. We could also label the outlooks the "justice" outlook and the "order" outlook and, against the background of the earlier parts of this study, note that whether it is preferable that the Security Council lean one way or the other is a disputed issue. Given the state of the world and the economic and military means at the disposal of the UN Security Council, or rather the dearth of such means, the instrumental "realist" or "order" outlook seems, at least to this author, to be the most realistic one in the ordinary sense of the term.

Even so, one could claim that the Security Council is not even fulfilling a relatively more limited "order" mandate in Africa. This may be because the Security Council suffers from a lack of means in the form of troops and equipment to be able to put into effect any decisions on action it may have wanted to take. Therefore it would be desirable if the African countries themselves were able to set up peace-keeping troops, including troops able to perform humanitarian interventions if needed and if authorized by the UN Security Council, and so make it possible for the decisions of the Security Council to be realized. As we noted earlier, efforts are going on to create an African peace-keeping force, but these efforts so far have been fruitless. If no African peace-keeping or intervention force is created it is doubtful whether anyone will be prepared to send troops to deal with conflicts in Africa. The Western states evidently are no longer prepared to do so.

In order to complement the efforts of the Security Council in the area of the peaceful settlement of conflicts, preferably before any military fighting has even started, and perhaps in order to carry out this function

more efficiently thanks to knowledge of the local conditions, an African mechanism for conflict prevention, management and resolution was created by the OAU in 1993. To all appearances this mechanism has not worked very efficiently so far. The services of the African mechanism would no doubt be greatly needed, but considering its lack of efficiency the UN Security Council is still the only organization to rely upon in matters of the peaceful settlement of conflicts through negotiations and other peaceful means in Africa. It should be added that the Security Council is not always efficient or successful in its efforts to solve conflicts peacefully, but it is at least a functioning forum of some kind.

If the UN Security Council does not even try to manage the peaceful parts of conflict solving, i.e. for instance the adoption of resolutions on non-military sanctions or the opening of negotiations or mediation, to say nothing of the sending of any peace-keeping troops, then there will be a complete vacuum as far as peaceful conflict management in Africa is concerned. This may result in many full-scale internal and international armed conflicts yet to develop. It may also result in foreign powers becoming involved or trying to become involved in solving the conflicts since if there is a vacuum because of the absence of the UN Security Council this vacuum will probably be filled up by the presence of someone else. It can be presumed that any external actor other than the UN Security Council or the OAU will be less disinterested and neutral and will become involved, or interfere, for reasons which are more selfish than those of the UN Security Council or the OAU.

It may be that if they had a choice between the UN Security Council as conflict manager and the OAU, and given that the two agencies were equally able and prepared to manage the conflicts either by carrying out negotiations or by sending military troops, many African states would still prefer to turn to the Security Council since it is relatively more disinterested than the OAU. After all, any OAU action risks being dominated by one or other regional power with interests of its own in an African conflict, and so, in addition to the other reasons already discussed, also for this reason the presence on an international political level of the UN Security Council is greatly needed in Africa. The same goes for other Third World regions that have not been incorporated in the large NATO network.

Concerning the phenomenon of regional powers dominating the actions of regional organizations, and sometimes even nominally UN actions, it should be added that this is by no means a phenomenon confined to Africa. Nor is the wish of the parties most directly involved in a conflict that a global and more disinterested agency, rather than a regional agency, handles the conflict a uniquely African one.

The discussion of security problems in Africa generally and in this study has focused on Sub-Saharan Africa. As far as this study is concerned this can be explained by the Security Council not having adopted any resolutions recently dealing with threats to the peace in North Africa. The constantly deteriorating situation in Algeria, however, may perhaps prompt the Security Council to act in relation to the situation there. The same problems of principle would arise as in the case of the conflicts in Sub-Saharan Africa, with the Western world probably not being prepared to get involved in any military action. It may be that Algeria is an even more difficult case for the Security Council than some of the Sub-Saharan conflicts would have been since there are more and stronger international political interests involved in Algeria than in many of the Sub-Saharan countries. Algeria is also closer to Europe geographically, which, on the one hand, should prompt the Security Council and the Western world to act, according to the logic that if the Western states are or risk becoming directly affected by a conflict they are also prepared to act in relation to the conflict.

On the other hand, the stronger interests involved and the geographical location of Algeria also contribute to making an involvement of any kind by the Security Council in the Algerian conflict a more complex and sensitive issue than would be the case if the Security Council got involved in any of Sub-Saharan states in which there have been internal conflicts recently. The stakes are higher in the case of Algeria, which seems paradoxically to point to the Security Council abstaining rather than acting in any manner in this case. The problems of Algeria, it may be added, with Muslim fundamentalist movements fighting the powers that be, are problems which to varying degrees are present already, or may surface in several North African and other Arab states.

As we saw earlier in this study, the question was raised at the Annual Meeting of the American Society of International Law in 1993 as to whether it was time to revive *mutatis mutandis* the international trusteeship system under Chapter XII of the UN Charter particularly in view of the number of disintegrating states in Africa. This would imply a kind of recolonization of parts of the Third World under the *aegis* of the UN. There are good reasons to ask such a question, but the answer is all the more difficult to provide. On the one hand, it is uncertain whether the UN, and more precisely some of its more influential members, are prepared to take on such an important and expensive task, and, on the other hand, it is uncertain whether the recently decolonized countries would voluntarily agree to being placed under some form of foreign control again. Given the apparent wary or even reluctant attitude currently reigning in the UN Security Council as far as involvement in different conflicts

is concerned, and given, furthermore, the large number of internal conflicts going on in different regions of the world at present, the prospects that the trusteeship system will be revived in any form seem very slight. The limited success of some of the major undertakings of state reconstruction by the UN has also made it most unlikely that the trusteeship system could be revived. The only reliable trend that is noticeable also today – and it is a trend that emerged from among the many events of the early 1990s – seems to be that states continue to disintegrate. What if any international agency will manage all the disintegrating states and all the ensuing threats to the peace is more uncertain.

From the point of international law one may wonder if the world in the present period has entered into a phase where law counts less and force more than seemed to be the case during the significant but few post-Cold War years. If this assumption is correct the period that the world is currently living through will probably also be characterized by a retreat from all the talk of democracy and human rights. This is not perhaps a necessary consequence of force seeming to make its way forward at the expense of law, but it is likely that the rule of law, including the respect for human rights and democracy, will suffer both on the international and national level if the use of force is increasingly accepted or at least not actively counteracted, primarily in all the civil wars going on around the world. Also, in all the countries struck by violent internal conflict, democracy and the respect for human rights will inevitably suffer due to the actual fighting itself.

Obviously the situation in different regions in the world will differ greatly as far as the respect for law, human rights and democracy is concerned. Some will be peaceful and law-abiding whereas some regions will more or less implode in serious violence. To the extent that neither a regional nor a global security mechanism intervenes in order to try to stop the violence in some way by peaceful or military means the negative trend, for instance in several parts of Africa, cannot but become even worse.

Looking into the future as far as the interpretation by the UN Security Council of the notion of "threat to the peace" in Article 39 of the UN Charter is concerned, it seems likely that the interpretation by the Security Council will become narrower than it was during the early 1990s. The alternative is that the interpretation will remain as wide as before, but that it will rarely be applied to situations which, however, amount to a "threat to the peace" according to the wide interpretation.

The most consistent way of interpreting the notion on the part of the Security Council would be to interpret it narrowly, but to actually apply it to all situations constituting a "threat to the peace" according to a narrower

interpretation. This is because in present circumstances, lacking as it does the economic, military and political means, the Security Council will not in any case, even if the need arises, be able to follow up a wide interpretation of "threat to the peace" with enforcement action, assuming that such an interpretation is applied, if not to all then at least to several of the situations constituting a "threat to the peace" in a wide sense. If the Council is never able in a decisive manner to follow up its determinations of the existence of a "threat to the peace" with enforcement measures, the determinations themselves will lose significance and the Security Council will lose credibility. Therefore it would be best to use a narrow interpretation of "threat to the peace", but to apply it consistently and be prepared to follow up a determination by forceful measures of some kind.

As was suggested above, another possibility is that the Security Council stays with its wide interpretation of "threat to the peace", which was mirrorred in the many resolutions adopted during the first half of the 1990s, but that the Council applies the notion selectively. This would imply that most situations which do constitute a threat to the peace according to the wide interpretation will nevertheless not be determined as such by the Security Council, but that the Council will pick and choose out of many situations those that it will label a "threat to the peace". Such obvious inconsistency on the part of the Security Council cannot but dimininish its credibility as well. To ensure maximum consistency, at least in theory, a narrower interpretation of "threat to the peace" than the one used recently would be preferable.

Perhaps the most realistic expectation, however, is arbitrariness both in the interpretation of the concept and in the application by the Security Council of the label of a "threat to the peace" to different situations. When the big powers agree, as they mostly seem to do today, there is no need for the Security Council to invoke consistency in order to convince unwilling permanent members, or sceptical UN members generally, to agree to a particular decision. Given that its permanent members agree the Security Council can act basically in any way it wants and it is reasonable to expect that that is what the Council will do.

As far as the realization of the decisions of the Security Council involving military enforcement measures are concerned it is most probable that the authorization of willing and able states will be the road the Security Council will follow also in the foreseeable future. Here the difficulty may be to find states or regional organizations which are actually willing and able to carry out the decisions. The legality of this procedure is not so much in doubt. It is rather the tendency of the Security Council to authorize regional powers to intervene in their spheres of influence, or

in other places where they otherwise have a special interest in intervening, which may raise doubts as far as the authorization procedure is concerned. The doubts in this respect are not so much of a legal as of a political or policy character. In cases of authorization the Security Council may, on the one hand, seem to legitimize ordinary power politics, but, on the other hand, it is the only way at present for the Security Council to carry out military enforcement measures. It may after all be preferable that the Security Council is able to undertake military enforcement measures under certain circumstances even if it has to act through authorization.

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Annexes

Security Council Resolutions

Resolution 688 (1991) of 5 April 1991

The Security Council,

Mindful of its duties and its responsibilities under the Charter of the United Nations for the maintenance of international peace and security,

Recalling the provisions of Article 2, paragraph 7, of the Charter,

Gravely concerned by the repression of the Iraqi civilian population in many pans of Iraq, including most recently in Kurdish-populated areas, which led to a massive Dow of flees towards and across international frontiers and to crossborder incursions which threaten international peace and sty in the region,

Deeply disturbed by the magnitude of the human suffering involved,

Taking note of the letters dated 2 and 4 April 1991, actively, from the representatives of Turkey and France to United Nations addressed to the President of the Security Council

Taking note also of the letters dated 3 and 4 April 1991 Or the Permanent Representative of the Islamic Republic of to the United Nations addressed to the Secretary-General,

Reaffirming the commitment of all Member States to respect the sovereignty, territorial integrity and political independence of Iraq and of all States in the region,

Bearing in mind the report transmitted by the Secretary-General on 20 March 1991,

1. *Condemns* the repression of the Iraqi civilian population in many pans of Iraq, including most recently in Kurdish-populated areas, the consequences of which threaten international peace and security in the region;

2. *Demands* that Iraq, as a contribution to removing the threat to international peace and security in the region, immediately end this repression, and in the same context expresses the hope that an open dialogue will take place to ensure that the human and political rights of all Iraqi citizens are respected;

3. *Insists* that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and make available all necessary facilities for their operations;

4. *Requests* the Secretary-General to pursue his humanitarian efforts in Iraq and to report forthwith, if appropriate on the basis of a further mission to the region, on the plight of the Iraqi civilian population, and in particular the Kurdish population, suffering from the repression in all its forms indicted by the Iraqi authorities;

5. *Also requests* the Secretary-General to use all the resources at his disposal, including those of the relevant United Nations agencies, to address urgently the critical needs of the refugees and displaced Iraqi population;

6. *Appeals* to all Member States and to all humanitarian organizations to contribute to these humanitarian relief efforts;

7. *Demands* that Iraq cooperate with the Secretary-General to these ends;

8. *Decides* to remain seized of the matter.

Resolution 770 (1992) of 13 August 1992

The Security Council,

Reaffirming its resolutions 713 (1991) of 25 September 1991, 721 (1991) of 27 November 1991, 724 (1991) of 15 December 1991, 727 (1992) of 8 January 1992, 740 (1992) of 7 February 1992, 743 (1992) of 21 February 1992, 749 (1992) of 7 April 1992, 752 (1992) of 15 May 1992, 757 (1992) of 30 May 1992, 758 (1992) of 8 June 1992, 760 (1992) of 18 June 1992, 761 (1992) of 29 Jure 1992, 762 (1992) of 30 June 1992, 764 (1992) of 13 July 1992 and 769 (1992) of 7 August 1992,

Noting the letter dated 10 August 1992 from the Permanent Representative of the Republic of Bosnia and Herzegovina to the United Nations (S/24401),

Underlining once again the imperative need for an urgent negotiated political solution to the situation in the Republic of Bosnia and Herzegovina to enable that country to live in peace and security within its borders,

Reaffirming the need to respect the sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina,

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

Commending the United Nations Protection Force (UNPROFOR) for its continuing action in support of the relief operation in Sarajevo and other parts of Bosnia and Herzegovina,

Deeply disturbed by the situation that now prevails in Sarajevo, which has severely complicated UNPROFOR's efforts to fulfil its mandate to ensure the security and functioning of Sarajevo airport and the delivery of humanitarian assistance in Sarajevo and other parts of Bosnia and Herzegovina pursuant to resolutions 743 (1992), 749 (1992), 761 (1992) and 764 (1992) and the reports of the Secretary-General cited therein,

Dismayed by the continuation of conditions that impede the delivery of humanitarian supplies to destinations within Bosnia and Herzegovina and the consequent suffering of the people of that country,

Deeply concerned by reports of abuses against civilians imprisoned in camps, prisons and detention centres,

Determined to establish as soon as possible the necessary conditions for the delivery of humanitarian assistance wherever needed in Bosnia and Herzegovina, in conformity with resolution 764 (1992),

Acting under Chapter VII of the Charter of the United Nations,

1. *Reaffirms* its demand that all parties and others concerned in Bosnia and Herzegovina stop the fighting immediately;

2. *Calls upon* States to take nationally or through regional agencies or arrangements all measures necessary to facilitate in coordination with the United Nations the delivery by relevant United Nations humanitarian organizations and others of humanitarian assistance to Sarajevo and wherever needed in other parts of Bosnia and Herzegovina:

3. *Demands* that unimpeded and continuous access to all camps, prisons and detention centres be granted immediately to the International Committee of the Red Cross and other relevant humanitarian organizations and that all detainees therein receive humane treatment, including adequate food, shelter and medical care;

4. *Calls upon* States to report to the Secretary-General on measures they are taking in coordination with the United Nations to carry out this resolution, and invites the Secretary-General to keep under continuous review any further measures that may be necessary to ensure unimpeded delivery of humanitarian supplies:

5. *Requests* all States to provide appropriate support for the actions undertaken in pursuance of this resolution;

6. *Demands* that all parties and others concerned take the necessary measures to ensure the safety of United Nations and other personnel engaged in the delivery of humanitarian assistance:

7. *Requests* the Secretary-General to report to the Council on a periodic basis on the implementation of this resolution;

8. *Decides* to remain actively seized of the matter.

Resolution 781 (1992) of 9 October 1992

The Security Council,

Reaffirming its resolution 713 (1991) and all subsequent relevant resolutions,

Determined to ensure the safety of humanitarian flights to Bosnia and Herzegovina,

Noting the readiness of the parties, expressed in the framework of the London Conference, to take appropriate steps in order to ensure the safety of humanitarian flights and their commitment at that Conference to a ban on military flights,

Recalling in this context the Joint Declaration[1] signed at Geneva on 30 September 1992 by the Presidents of the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro), and in particular paragraph 7 thereof,

Recalling also the agreement reached on air issues at Geneva on I5 September 1992 among all the parties concerned in the framework of the Working Group on Confidence and Security-building and Verification Measures of the London Conference,[2]

Alarmed at reports that military flights over the territory of Bosnia and Herzegovina are none the less continuing,

Noting the letter of 4 October 1992 from the President of the Republic of Bosnia and Herzegovina addressed to the President of the Security Council,[3]

Considering that the establishment of a ban on military flights in the airspace of Bosnia and Herzegovina constitutes an essential element for the safety of the delivery o f humanitarian assistance and a decisive step for the cessation of hostilities in Bosnia and Herzegovina,

Acting pursuant to the provisions of resolution 770 (1992) aimed at ensuring the safety of the delivery of humanitarian assistance in Bosnia and Herzegovina,

1. *Decides* to establish a ban on military flights in the airspace of Bosnia and Herzegovina, this ban not to apply to United Nations Protection Force flights or to other flights in support of United Nations operations, including humanitarian assistance:

2. *Requests* the United Nations Protection Force to monitor compliance with the ban on military flights, including the placement of observers where necessary at airfields in the territory of the former Yugoslavia:

3. *Also requests* the United Nations Protection Force to ensure, through an appropriate mechanism for approval and inspection, that the purpose of flights to and from Bosnia and Herzegovina other than those banned by paragraph 1 above is consistent with Security Council resolutions;

[1] S/24476, annex.
[2] S/24634, annex.
[3] S/24616.

4. *Requests* the Secretary-General to report to the Council on a periodic basis on the implementation of the present resolution and to report immediately any evidence of violations:

5. *Calls upon* States to take nationally or through regional agencies or arrangements all measures necessary to provide assistance to the United Stations Protection Force, based on technical monitoring and other capabilities, for the purposes of paragraph 2 above;

6. *Undertakes* to examine without delay all the information brought to its attention concerning the implementation of the ban on military flights in Bosnia and Herzegovina and, in the case of violations, to consider urgently the further measures necessary to enforce this Dan:

7. *Decides* to remain actively seized of the matter.

Resolution 836 (1993) of 4 June 1993

The Security Council,

Reaffirming its resolution 713 (1991) of 25 September 1991 and all subsequent relevant resolutions,

Reaffirming in particular its resolutions 819 (1993) of 16 April 1993 and 824 (1993) of 6 May 1993, in which it demanded that certain towns and their surrounding areas in the Republic of Bosnia and Herzegovina should be treated as safe areas,

Reaffirming the sovereignty, territorial integrity and political independence of Bosnia and Herzegovina and the responsibility of the Security Council in this regard,

Condemning military attacks, and actions that do not respect the sovereignty, territorial integrity and political independence of Bosnia and Herzegovina, which, as a State Member of the United Nations enjoys the rights provided for in the Charter of the United Nations,

Reiterating its alarm at the grave and intolerable situation in Bosnia and Herzegovina arising from serious violations of international humanitarian law,

Reaffirming once again that any taking of territory by force or any practice of "ethnic cleansing" is unlawful and totally unacceptable,

Commending the Government of the Republic of Bosnia and Herzegovina and the Bosnian Croat party for having signed the Vance-Owen plan,

Gravely concerned at the persistent refusal of the Bosnian Serb party to accept the Vance-Owen plan, and calling upon that party to accept the peace plan for the Republic of Bosnia and Herzegovina in full,

Deeply concerned by the continuing armed hostilities in the territory of Bosnia and Herzegovina which run totally counter to the peace plan,

Alarmed by the resulting plight of the civilian population in the territory of Bosnia and Herzegovina, in particular in Sarajevo, Bihac, Srebrenica, Gorazde, Tuzla and Zepa,

Condemning the obstruction, primarily by the Bosnian Serb party, of the delivery of humanitarian assistance,

Determined to ensure the protection of the civilian population in safe areas and to promote a lasting political solution,

Confirming the ban on military flights in the airspace of Bosnia and Herzegovina, established by resolutions 781 (1992) of 9 October 1992, 786 (1992) of 10 November 1992 and 816 (1993) of 31 March 1993,

Affirming that the concept of safe areas in Bosnia and Herzegovina as contained in resolutions 819 (1993) and 824 (1993) was adopted to respond to an emergency situation, and noting that the concept proposed by France in document S/25800 and by others could make a valuable contribution and should not in any way be taken as an end in itself, but as a part of the Vance-Owen process and as a first step towards a just and lasting political solution,

Convinced that treating the towns and surrounding areas referred to above as safe areas will contribute to the early implementation of that objective,

Stressing that the lasting solution to the conflict in Bosnia and Herzegovina must be based on the following principles: immediate and complete cessation of hostilities, withdrawal from territories seized by the use of force and "ethnic cleansing", reversal of the consequences of "ethnic cleansing" and recognition of the right of all refugees to return to their homes, and respect for the sovereignty, territorial integrity and political independence of Bosnia and Herzegovina,

Noting the crucial work being done throughout Bosnia and Herzegovina by the United Nations Protection Force and the importance of such work continuing,

Determining that the situation in Bosnia and Herzegovina continues to be a threat to international peace and security,

Acting under Chapter VII of the Charter,

1. *Calls* for the full and immediate implementation of all its relevant resolutions;

2. *Commends* the peace plan for the Republic of Bosnia and Herzegovina as contained in document S/25479;

3. *Reaffirms* the unacceptability of the acquisition of territory by the use of force and the need to restore the full sovereignty, territorial integrity and political independence of Bosnia and Herzegovina;

4. *Decides* to ensure full respect for the safe areas referred to in resolution 824 (1993);

5. *Also decides* to extend to that end the mandate of the United Nations Protection Force in order to enable it, in the safe areas referred to in resolution 824 (1993), to deter attacks against the safe areas, to monitor the cease-fire, to promote the withdrawal of military or paramilitary units other than those of the

Government of the Republic of Bosnia and Herzegovina and to occupy some key points on the ground, in addition to participating in the delivery of humanitarian relief to the population as provided for in resolution 776 (1992) of 14 September 1992;

6. *Affirms* that these safe areas are a temporary measure and that the primary objective remains to reverse the consequences of the use of force and to allow all persons displaced from their homes in Bosnia and Herzegovina to return to their homes in peace, beginning, *inter alia*, with the prompt implementation of the provisions of the Vance-Owen plan in areas where those have been agreed by the parties directly concerned;

7. *Requests* the Secretary-General, in consultation, *inter alia*, with the Governments of the Member States contributing forces to the Force:

(a) To make the adjustments or reinforcement of the Force which might be required by the implementation of the present resolution, and to consider assigning elements of the Force in support of the elements entrusted with protection of safe areas, with the agreement of the Governments contributing forces;

(b) To direct the Force Commander to redeploy to the extent possible the forces under his command in Bosnia and Herzegovina;

8. *Calls upon* Member States to contribute forces, including logistic support, to facilitate the implementation of the provisions regarding the safe areas, expresses its gratitude to Member States already providing forces for that purpose, and invites the Secretary-General to seek additional contingents from other Member States;

9. *Authorizes* the Force, in addition to the mandate defined in resolutions 770 (1992) of 13 August 1992 and 776 (1992), in carrying out the mandate defined in paragraph 5 above, acting in self-defence, to take the necessary measures, including the use of force, in reply to bombardments against the safe areas by any of the parties or to armed incursion into them or in the event of any deliberate obstruction in or around those areas to the freedom of movement of the Force or of protected humanitarian convoys;

10. *Decides* that, notwithstanding paragraph 1 of resolution 816 (1993), Member States, acting nationally or through regional organizations or arrangements, may take, under the authority of the Security Council and subject to close coordination with the Secretary-General and the Force, all necessary measures, through the use of air power, in and around the safe areas in Bosnia and Herzegovina, to support the Force in the performance of its mandate set out in paragraphs 5 and 9 above;

11. *Requests* the Member States concerned, the Secretary-General and the Force to coordinate closely on the measures they are taking to implement paragraph 10 above and to report to the Council through the Secretary-General;

12. Invites the Secretary-General to raped to the Council, for decision, if possible within seven days of the adoption of the present Solution, on the modalities of its implementation, including its financial implications;

13. *Also invites* the Secretary-General to submit to the Council, later than two months after the adoption of the present resolution, post on the implementation of and compliance with the present Solution;

14. *Emphasizes* that it will keep open other options for new and tougher measures, none of which is prejudged or excluded from consideration;

15. *Decides* to remain actively seized of the manor, and undertakes to take prompt action, as required.

Resolution 794 (1992) of 3 December 1992

The Security Council,

Reaffirming its resolutions 733 (1992) of 23 January 1992, 46 (1992) of 17 March 1992, 751 (1992) of 24 April 1992, 767 1992) of 27 July 1992 and 775 (1992) of 28 August 1992,

Recognizing the unique character of the present situation l Somalia and mindful of its deteriorating, complex and extraordinary nature, requiring an immediate and exceptional response,

Determining that the magnitude of the human tragedy caused by the convict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security,

Gravely alarmed by the deterioration of the humanitarian situation in Somalia and underlining the urgent need for the quick delivery of humanitarian assistance in the whole country,

Noting the efforts of the League of Arab States, the Organization of African Unity, and in particular the proposal made by the current Chairman of the Assembly of Heads of state and Government of the Organization of African Unity at the forty-seventh regular session of the General Assembly for the organization of an international conference on Somalia, and the Organization of the Islamic Conference and other regional agencies and arrangements to promote reconciliation and political settlement in Somalia and to address the humanitarian needs of the people of that country,

Commending the ongoing efforts of the United Nations, its specialized agencies and humanitarian organizations and of on-governmental organizations and of States to ensure delivery f humanitarian assistance in Somalia,

Responding to the urgent calls from Somalia for the international community to take measures to ensure the delivery of humanitarian assistance in Somalia,

Expressing grave alarm at continuing reports of widespread violations of international humanitarian law occurring in Somalia, including reports of violence

and threats of violence against personnel participating lawfully in impartial humanitarian relief activities; deliberate attacks on non-combatants, relief consignments and vehicles, and medical and relief facilities; and the impeding of the delivery of food and medical supplies essential for the survival of the civilian population,

Dismayed by the continuation of conditions that impede the delivery of humanitarian supplies to destinations within Somalia, and in particular reports of looting of relief supplies destined for starving people, attacks on aircraft and ships bringing in humanitarian relief supplies, and attacks on the Pakistani contingent in Mogadishu of the United Nations Operation in Somalia,

Taking note with appreciation of the letters of 242'° and 29 November 1992 211 from the Secretary-General to the President of the Security Council,

Sharing the Secretary-General's assessment that the situation in Somalia is intolerable and that it has become necessary to review the basic premises and principles of the United Nations effort in Somalia, and that the Operation's existing course would not in present circumstances be an adequate response to the tragedy in Somalia,

Determined to establish as soon as possible the necessary conditions for the delivery of humanitarian assistance wherever needed in Somalia, in conformity with resolutions 751 (1992) and 767 (1992),

Noting the offer by Member States aimed at establishing a secure environment for humanitarian relief operations in Somalia as soon as possible,

Determined also to restore peace, stability and law and order with a view to facilitating the process of a political settlement under the auspices of the United Nations, aimed at national reconciliation in Somalia, and encouraging the Secretary-General and his Special Representative for Somalia to continue and intensify their work at the national and regional levels to promote these objectives,

Recognizing that the people of Somalia bear ultimate responsibility for national reconciliation and the reconstruction of their own country,

1. *Reaffirms* its demand that all parties, movements and factions in Somalia immediately cease hostilities, maintain a cease-fire throughout the country, and cooperate with the Special Representative of the Secretary-General for Somalia as well as with the military forces to be established pursuant to the authorization given in paragraph 10 below in order to promote the process of relief distribution, reconciliation and political settlement in Somalia;

2. *Demands* that all parties, movements and factions in Somalia take all measures necessary to facilitate the efforts of the United Nations, its specialized agencies and humanitarian organizations to provide urgent humanitarian assistance to the affected population in Somalia;

3. *Also demands* that all parties, movements and factions in Somalia take all measures necessary to ensure the safety of United Nations and all other personnel engaged in the delivery of humanitarian assistance, including the military

forces to be established pursuant to the authorization given in paragraph 10 below;

4. *Further demands* that all parties, movements and factions in Somalia immediately cease and desist from all breaches of international humanitarian law including from actions such as those described above;

5. *Strongly condemns* all violations of international. humanitarian law occurring in Somalia, including in particular the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population, and affirms that those who commit or order the commission of such acts will be held individually responsible in respect of such acts;

6. *Decides* that the operations and the further deployment of the three thousand five hundred personnel of the United Nations Operation in Somalia authorized by paragraph 3 of resolution 775 (1992) should proceed at the discretion of the Secretary-General in the light of his assessment of conditions on the ground; and requests him to keep the Council informed and to make such recommendations as may be appropriate for the fulfilment of the mandate of the Operation where conditions permit;

7. *Endorses* the recommendation by the Secretary-General in his letter of 29 November 19922" to the President of the Security Council that action under Chapter VII of the Charter of the United Nations should be taken in order to establish a secure environment for humanitarian relief operations in Somalia as soon as possible;

8. *Welcomes* the offer by a Member State described in the Secretary-General's above-mentioned letter concerning the establishment of an operation to create such a secure environment;

9. *Welcomes also* offers by other Member States to participate in that operation;

10. *Acting* under Chapter VII of the Charter of the United Nations, *authorizes* the Secretary-General and Member States cooperating to implement the offer referred to in paragraph 8 above to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia;

11. *Calls on* all Member States which are in a position to do so to provide military forces and to make additional contributions, in cash or in kind, in accordance with paragraph 10 above and requests the Secretary-General to establish a fund through which the contributions, where appropriate, could be channelled to the States or operations concerned;

12. *Also authorizes* the Secretary-General and the Member States concerned to make the necessary arrangements for the unified command and control of the forces involved, which will reflect the offer referred to in paragraph 8 above;

13. *Requests* the Secretary-General and the Member States acting under paragraph 10 to establish appropriate mechanisms for coordination between the United Nations and their military forces;

14. *Decides* to appoint an ad hoc commission composed of members of the Security Council to report to the Council on the implementation of the present resolution;

15. *Invites* the Secretary-General to attach a small Operation liaison staff to the field headquarters of the unified command;

16. *Acting* under Chapters VII and VIII of the Charter, *calls upon* States, nationally or through regional agencies or arrangements, to use such measures as may be necessary to ensure strict implementation of paragraph 5 of resolution 733 (1992);

17. *Requests* all States, in particular those in the region, to provide appropriate support for the actions undertaken by States. nationally or through regional agencies or arrangements, pursuant to the present and other relevant resolutions;

18. *Requests* the Secretary-General and, as appropriate, the States concerned to report to the Council on a regular basis, the first such report to be made no later than fifteen days after the adoption of the present resolution, on the implementation of the present resolution and the attainment of the objective of establishing a secure environment so as to enable the Council to make the necessary decision for a prompt transition to continued peace-keeping operations;

19. *Also requests* the Secretary-General to submit a plan to the Council initially within fifteen days after the adoption of the present resolution to ensure that the Operation will be able to fulfil its mandate upon the withdrawal of the unified command;

20. *Invites* the Secretary-General and his Special Representative to continue their efforts to achieve a political settlement in Somalia;

21. *Decides* to remain actively seized of the matter.

Resolution 929 (1994) of 22 June 1994

The Security Council,

Reaffirming all its previous resolutions on the situation in Rwanda, in particular its resolutions 912 (1994) of 21 April 1994, 918 (1994) of 17 May 1994 and 925 (1994) of 8 June 1994, which set out the mandate and force level of the United Nations Assistance Mission for Rwanda (UNAMIR),

Determined to contribute to the resumption of the process of political settlement under the Arusha Peace Agreement and *encouraging* the Secretary-General and his Special Representative for Rwanda to continue and redouble their efforts at the national, regional and international levels to promote these objectives,

Stressing the importance of the cooperation of all parties for the fulfilment of the objectives of the United Nations in Rwanda,

Having considered the letter of the Secretary-General of 19 June 1994 (S/1994/728),

Taking into account the time needed to gather the necessary resources for the effective deployment of UNAMIR, as expanded in resolutions 918 (1994) and 925 (1994),

Noting the offer by Member States to cooperate with the Secretary-General towards the fulfilment of the objectives of the United Nations in Rwanda (S/1994/734), and *stressing* the strictly humanitarian character of this operation which shall be conducted in an impartial and neutral fashion, and shall not constitute an interposition force between the parties,

Welcoming the cooperation between the United Nations, the Organization of African Unity (OAU) and neighbouring States to bring peace to Rwanda,

Deeply concerned by the continuation of systematic and widespread killings of the civilian population in Rwanda,

Recognizing that the current situation in Rwanda constitutes a unique case which demands an urgent response by the international community,

Determining that the magnitude of the humanitarian crisis in Rwanda constitutes a threat to peace and security in the region,

1. *Welcomes* the Secretary-General's letter dated 19 June 1994 (S/1994/728) and *agrees* that a multinational operation may be set up for humanitarian purposes in Rwanda until UNAMIR is brought up to the necessary strength;

2. *Welcomes also* the offer by Member States (S/1994/734) to cooperate with the Secretary-General in order to achieve the objectives of the United Nations in Rwanda through the establishment of a temporary operation under national command and control aimed at contributing, in an impartial way, to the security and protection of displaced persons, refugees and civilians at risk in Rwanda, on the understanding that the costs of implementing the offer will be borne by the Member States concerned;

3. *Acting* under Chapter VII of the Charter of the United Nations, *authorizes* the Member States cooperating with the Secretary-General to conduct the operation referred to in paragraph 2 above using all necessary means to achieve the humanitarian objectives set out in subparagraphs 4 (a) and (b) of resolution 925 (1994);

4. *Decides* that the mission of Member States cooperating with the Secretary-General will be limited to a period of two months following the adoption of the present resolution, unless the Secretary-General determines at an earlier date that the expanded UNAMIR is able to carry out its mandate;

5. *Commends* the offers already made by Member States of troops for the expanded UNAMIR;

6. *Calls upon* all Member States to respond urgently to the Secretary-General's request for resources, including logistical support, in order to enable expanded UNAMIR to fulfil its mandate effectively as soon as possible and *requests* the Secretary-General to identify and coordinate the supply of the essential equipment required by troops committed to the expanded UNAMIR;

7. *Welcomes*, in this respect, the offers already made by Member States of equipment for troop contributors to UNAMIR and *calls on* other Members to offer such support, including the possibility of comprehensive provision of equipment to specific troop contributors, to speed UNAMIR's expanded force deployment;

8. *Requests* Member States cooperating with the Secretary-General to coordinate closely with UNAMIR and *also requests* the Secretary-General to set up appropriate mechanisms to this end;

9. *Demands* that all parties to the conflict and others concerned immediately bring to an end all killings of civilian populations in areas under their control and allow Member States cooperating with the Secretary-General to implement fully the mission set forth in paragraph 3 above;

10. *Requests* the States concerned and the Secretary-General, as appropriate, to report to the Council on a regular basis, the first such report to be made no later than fifteen days after the adoption of this resolution, on the implementation of this operation and the progress made towards the fulfilment of the objectives referred to in paragraphs 2 and 3 above;

11. *Also requests* the Secretary-General to report on the progress made towards completing the deployment of the expanded UNAMIR within the framework of the report due no later than 9 August 1994 under paragraph 17 of resolution 925 (1994), as well as on progress towards the resumption of the process of political settlement under the Arusha Peace Agreement;

12. *Decides* to remain actively seized of the matter.

Resolution 940 (1994) of 31 July 1994

The Security Council,

Reaffirming its resolutions 841 (1993) of 16 June 1993, 861 (1993) of 27 August 1993, 862 (1993) of 31 August 1993, 867 (1993) of 23 September 1993, 873 (1993) of 13 October 1993, 875 (1993) of 16 October 1993, 905 (1994) of 23 March 1994, 917 (1994) of 6 May 1994 and 933 (1994) of 30 June 1994,

Recalling the terms of the Governors Island Agreement (S/26063) and the related Pact of New York (S/26297),

Condemning the continuing disregard of those agreements by the illegal de facto regime, and the regime's refusal to cooperate with efforts by the United Nations and the Organization of American States (OAS) to bring about their implementation,

Gravely concerned by the significant further deterioration of the humanitarian situation in Haiti, in particular the continuing escalation by the illegal de facto regime of systematic violations of civil liberties, the desperate plight of Haitian refugees and the recent expulsion of the staff of the International Civilian Mission (MICIVIH), which was condemned in its Presidential statement of 12 July 1994 (S/PRST/1994/32),

Having considered the reports of the Secretary-General of 15 July 1994 (S/1994/828 and Add. 1) and 26 July 1994 (S/1994/871),

Taking note of the letter dated 29 July 1994 from the legitimately elected President of Haiti (S/1994/905, annex) and the letter dated 30 July 1994 from the Permanent Representative of Haiti to the United Nations (S/1994/910),

Reiterating its commitment for the international community to assist and support the economic, social and institutional development of Haiti,

Reaffirming that the goal of the international community remains the restoration of democracy in Haiti and the prompt return of the legitimately elected President, Jean-Bertrand Aristide, within the framework of the Governors Island Agreement,

Recalling that in resolution 873 (1993) the Council confirmed its readiness to consider the imposition of additional measures if the military authorities in Haiti continued to impede the activities of the United Nations Mission in Haiti (UNMIH) or failed to comply in full with its relevant resolutions and the provisions of the Governors Island Agreement,

Determining that the situation in Haiti continues to constitute a threat to peace and security in the region,

1. *Welcomes* the report of the Secretary-General of 15 July 1994 (S/1994/828) and *takes note* of his support for action under Chapter VII of the Charter of the United Nations in order to assist the legitimate Government of Haiti in the maintenance of public order;

2. *Recognizes* the unique character of the present situation in Haiti and its deteriorating, complex and extraordinary nature, requiring an exceptional response;

3. *Determines* that the illegal de facto regime in Haiti has failed to comply with the Governors Island Agreement and is in breach of its obligations under the relevant resolutions of the Security Council;

4. *Acting* under Chapter VII of the Charter of the United Nations, *authorizes* Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti, and to establish and maintain a secure and stable environment that will permit implementation of the Governors Island Agreement, on the understanding that the cost of implementing this temporary operation will be borne by the participating Member States;

5. *Approves* the establishment, upon adoption of this resolution, of an advance team of UNMIH of not more than sixty personnel, including a group of observers, to establish the appropriate means of coordination with the multinational force, to carry out the monitoring of the operations of the multinational force and other functions described in paragraph 23 of the report of the Secretary-General of 15 July 1994 (S/1994/828), and to assess requirements and to prepare for the deployment of UNMIH upon completion of the mission of the multinational force;

6. *Requests* the Secretary-General to report on the activities of the team within thirty days of the date of deployment of the multinational force;

7. *Decides* that the tasks of the advance team as defined in paragraph 5 above will expire on the date of termination of the mission of the multinational force;

8. *Decides* that the multinational force will terminate its mission and UNMIH will assume the full range of its functions described in paragraph 9 below when a secure and stable environment has been established and UNMIH has adequate force capability and structure to assume the full range of its functions; the determination will be made by the Security Council, taking into account recommendations from the Member States of the multinational force, which are based on the assessment of the commander of the multinational force, and from the Secretary-General;

9. *Decides* to revise and extend the mandate of the United Nations Mission in Haiti (UNMIH) for a period of six months to assist the democratic Government of Haiti in fulfilling its responsibilities in connection with:

(a) sustaining the secure and stable environment established during the multinational phase and protecting international personnel and key installations; and

(b) the professionalization of the Haitian armed forces and the creation of a separate police force;

10. *Requests also* that UNMIH assist the legitimate constitutional authorities of Haiti in establishing an environment conducive to the organization of free and fair legislative elections to be called by those authorities and, when requested by them, monitored by the United Nations, in cooperation with the Organization of American States (OAS);

11. *Decides* to increase the troop level of UNMIH to 6,000 and establishes the objective of completing UNMIH's mission, in cooperation with the constitutional Government of Haiti, not later than February 1996;

12. *Invites* all States, in particular those in the region, to provide appropriate support for the actions undertaken by the United Nations and by Member States pursuant to this and other relevant Security Council resolutions;

13. *Requests* the Member States acting in accordance with paragraph 4 above to report to the Council at regular intervals, the first such report to be made not later than seven days following the deployment of the multinational force;

14. *Requests* the Secretary-General to report on the implementation of this resolution at sixty-day intervals starting from the date of deployment of the multinational force;

15. *Demands* strict respect for the persons and premises of the United Nations, the Organization of American States, other international and humanitarian organizations and diplomatic missions in Haiti, and that no acts of intimidation or violence be directed against personnel engaged in humanitarian or peacekeeping work;

16. *Emphasizes* the necessity that, *inter alia*:

(a) All appropriate steps be taken to ensure the security and safety of the operations and personnel engaged in such operations; and

(b) The security and safety arrangements undertaken extend to all persons engaged in the operations;

17. *Affirms* that the Council will review the measures imposed pursuant to resolutions 841 (1993), 873 (1993) and 917 (1994), with a view to lifting them in their entirety, immediately following the return to Haiti of President Jean-Bertrand Aristide;

18. *Decides* to remain actively seized of the matter.

Resolution 1080 (1996) of 15 November 1996

The Security Council,

Reaffirming its resolution 1078 (1996) of 9 November 1996,

Gravely concerned at the continuing deteriorating situation in the Great Lakes region, in particular eastern Zaire,

Taking note of the communiqué issued by the Fourth Extraordinary Session of the Central Organ of the Organization of African Unity Mechanism for Conflict Prevention, Management and Resolution held at the level of Ministers in Addis Ababa on 11 November 1996 (S/1996/922) as well as a communication dated 13 November 1996 from the Permanent Observer Mission of the Organization of African Unity (OAU) to the United Nations,

Stressing the need for all States to respect the sovereignty and territorial integrity of the States in the region in accordance with their obligations under the Charter of the United Nations,

Underlining the obligation of all concerned strictly to respect the relevant provisions of international humanitarian law,

Having considered the letter dated 14 November 1996 from the Secretary-General to the President of the Security Council (S/1996/941),

Reiterating its support for the Special Envoy of the Secretary-General, and *underlining* the need for all Governments in the region and parties concerned to cooperate fully with the mission for the Special Envoy,

Welcoming the efforts of the mediators and representatives of the OAU, the European Union and the States concerned, and *encouraging* them to coordinate closely their efforts with those of the Special Envoy,

Recognizing that the current situation in eastern Zaire demands an urgent response by the international community,

Reiterating the urgent need for an international conference on peace, security and development in the Great Lakes region under the auspices of the United

Nations and the OAU to address the problems of the region in a comprehensive way,

Determining that the present situation in eastern Zaire constitutes a threat to international peace and security in the region,

Bearing in mind the humanitarian purposes of the multinational force as specified below,

Acting under Chapter VII of the Charter of the United Nations,

1. *Reiterates* its condemnation of all acts of violence, and its call for an immediate ceasefire and a complete cessation of all hostilities in the region;

2. *Welcomes* the letter from the Secretary-General dated 14 November 1996;

3. *Welcomes* the offers made by Member States, in consultation with the States concerned in the region, concerning the establishment for humanitarian purposes of a temporary multinational force to facilitate the immediate return of humanitarian organizations and the effective delivery by civilian relief organizations of humanitarian aid to alleviate the immediate suffering of displaced persons, refugees and civilians at risk in eastern Zaire, and to facilitate the voluntary, orderly repatriation of refugees by the United Nations High Commissioner for Refugees as well as the voluntary return of displaced persons, and *invites* other interested States to offer to participate in these efforts;

4. *Welcomes* further the offer by a Member State (S/1996/941, annex) to take the lead in organizing and commanding this temporary multinational force;

5. *Authorizes* the Member States cooperating with the Secretary-General to conduct the operation referred to in paragraph 3 above to achieve, by using all necessary means, the humanitarian objectives set out therein;

6. *Calls upon* all concerned in the region to cooperate fully with the multinational force and humanitarian agencies and to ensure the security and freedom of movement of their personnel;

7. *Calls upon* the Member States participating in the multinational force to cooperate with the Secretary-General and to coordinate closely with the United Nations Coordinator for humanitarian assistance for eastern Zaire and the relevant humanitarian relief operations;

8. *Decides* that the operation shall terminate on 31 March 1997, unless the Council, on the basis of a report of the Secretary-General, determines that the objectives of the operation have been fulfilled earlier;

9. *Decides* that the cost of implementing this temporary operation will be borne by the participating Member States and other voluntary contributions, and *welcomes* the establishment by the Secretary-General of a voluntary trust fund with the purpose of supporting African participation in the multinational force;

10. *Encourages* Member States to contribute urgently to this fund or otherwise to give support to enable African States to participate in this force, and *requests* the

Secretary-General to report within 21 days of the adoption of this resolution to enable the Council to consider the adequacy of these arrangements;

11. *Requests* the Member States participating in the multinational force to provide periodic reports at least twice monthly, through the Secretary-General, to the Council, the first such report to be made no later than 21 days after the adoption of this resolution;

12. *Expresses* its intention to authorize the establishment of a follow-on operation which would succeed the multinational force, and *requests* the Secretary-General to submit for its consideration a report, no later than 1 January 1997, containing his recommendations regarding the possible concept, mandate, structure, size and duration of such an operation, as well as its estimated costs;

13. *Requests* the Secretary-General to initiate detailed planning and to determine the willingness of Member States to contribute troops for the anticipated follow-on operation;

14. *Decides* to remain actively seized of the matter.

Resolution 1101 (1997) of 28 March 1997

The Security Council,

Taking note of the letter of 28 March 1997 from the Permanent Representative of Albania to the United Nations to the President of the Security Council (S/1997/259),

Taking note also of the letter of 27 March 1997 from the Permanent Representative of Italy to the United Nations to the Secretary-General (S/1997/258),

Taking note of Decision 160 of the Permanent Council of the Organization for Security and Cooperation in Europe (OSCE) of 27 March 1997 (S/1997/259, annex II), including to provide the coordinating framework within which other international organizations can play their part in their respective areas of competence,

Recalling the statement of the President of the Security Council on the situation in Albania of 13 March 1997 (S/PRST/1997/14),

Reiterating its deep concern over the deteriorating situation in Albania,

Underlining the need for all concerned to refrain from hostilities and acts of violence, and *reiterating* its call to the parties involved to continue the political dialogue,

Stressing the importance of regional stability, and in this context *fully supporting* the diplomatic efforts of the international community to find a peaceful solution to the crisis, in particular those of the OSCE and of the European Union,

Affirming the sovereignty, independence and territorial integrity of the Republic of Albania,

Determining that the present situation of crisis in Albania constitutes a threat to peace and security in the region,

1. *Condemns* all acts of violence and *calls* for their immediate end;

2. *Welcomes* the offer made by certain Member States to establish a temporary and limited multinational protection force to facilitate the safe and prompt delivery of humanitarian assistance, and to help create a secure environment for the missions of international organizations in Albania, including those providing humanitarian assistance;

3. *Welcomes further* the offer by a Member State contained in its letter (S/1997/258) to take the lead in organizing and commanding this temporary multinational protection force and *takes note* of all the objectives contained in that letter;

4. *Authorizes* the Member States participating in the multinational protection force to conduct the operation in a neutral and impartial way to achieve the objectives set out in paragraph 2 above and, acting under Chapter VII of the Charter of the United Nations, *further authorizes* these Member States to ensure the security and freedom of movement of the personnel of the said multinational protection force;

5. *Calls upon* all those concerned in Albania to cooperate with the multinational protection force and international humanitarian agencies for the safe and prompt delivery of humanitarian assistance;

6. *Decides* that the operation will be limited to a period of three months from the adoption of the present resolution, at which time the Council will assess the situation on the basis of the reports referred to in paragraph 9 below;

7. *Decides* that the cost of implementing this temporary operation will be borne by the participating Member States;

8. *Encourages* the Member States participating in the multinational protection force to cooperate closely with the Government of Albania, the United Nations, the OSCE, the European Union and all international organizations involved in rendering humanitarian assistance in Albania;

9. *Requests* the Member States participating in the multinational protection force to provide periodic reports, at least every two weeks, through the Secretary-General, to the Council, the first such report to be made no later than 14 days after the adoption of this resolution, *inter alia* specifying the parameters and modalities of the operation on the basis of consultations between those Member States and the Government of Albania;

10. *Decides* to remain actively seized of the matter.

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This book analyzes the practice of the Security Council with respect to the notion of a "threat to the peace" and the kind of action taken in response to such threats. In both respects the practice of the Council is important but inconsistent.

Unstable states in an unstable world generate a lot of threats to the peace. The task of the Security Council of the United Nations is to locate and eliminate threats to the peace and it has powerful means of enforcement at its disposal. The question is, what constitutes a threat to the peace in the view of the Security Council?

Do crimes against human rights constitute a threat to the peace? Does a lack of democracy constitute a threat to the peace? Is the Security Council free to consider anything a threat to the peace as long as its permanent members can agree?

The unprecedented activity of the Council during the 1990s has resulted in a large number of resolutions illustrating the way in which the Council interprets the notion of "threat to the peace" in the UN Charter. The resolutions have often been followed by enforcement action, sometimes in the form of military interventions.

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