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(p. 227) Chapter 10 When the Security Council is Divided:

Imprecise Authorizations, Implied Mandates, and the 'Unreasonable Veto'

I. Introduction

MANY of the issues covered in this chapter are rooted in the failure of the collective security scheme embodied in the United Nations Charter to function as intended. Article 43 'special agreements' were never reached, Articles 44 and 45 became moot, (p. 228) and the Military Staff Committee has played a minor role. As a result, the Security Council has either been paralysed when it came to situations requiring the use of force, as it was during much of the Cold War and at critical post-Cold War moments, or it has innovated. The principal innovation during the Cold War was peacekeeping, but those missions rarely had occasion to use force. It was not until the post-Cold War era that the Security Council became active in authorizing forcible action. Two developments in particular have given rise to interesting questions about the scope and limits of the Security Council's competence: the delegation of enforcement action to regional organizations or coalitions of the willing; and the establishment or authorization of robust peacekeeping missions with some enforcement powers.

The UN Charter explicitly empowers the Security Council to delegate enforcement action to regional organizations, but the Council is often imprecise about the scope of powers it has delegated in particular cases. The Charter does not provide for delegation of enforcement to individual states or coalitions, but this has become common practice and is generally regarded as falling within the Council's competence. Both regional organizations and coalitions have sometimes acted on the basis of implicit authorizations to use force, or have claimed retroactive approval for their actions. Adding a layer of complexity, ambiguity in how the Council acts (or does not act) is often intentional, as a way of papering over or managing political differences. Most controversially, states have on occasion claimed a unilateral right to use force when—in the view of those states—the Council should have acted, but did not due to the veto.

This chapter proceeds as follows. Section II provides an overview of the Charter provisions on delegated enforcement action and the legal issues that have arisen in practice. The remaining three sections address three types of cases that tend to arise when the Security Council is divided: imprecise authorization; implied mandates; and the failure to act. The first covers cases when the Security Council expressly authorizes the use of force, but the objectives and scope of the authorization are unclear. Recent examples are the authorization in Resolution 1973 (2011) for the North Atlantic Treaty Organization (NATO)-led coalition to use force to protect Libyan civilians, and the reaffirmation in Resolution 1975 (2011) for the United Nations Operation in Côte d'Ivoire (UNOCI) and Operation Licorne to protect civilians there. The second set of cases, implied authorizations, are when the Security Council adopts a resolution that may or may not authorize the use of force at all, like Resolution 688 (1991) on a safe haven and no-fly zones in Iraq, Resolution 1441 (2002) on Iraq's weapons of mass destruction, and Resolution 2085 (2012) on Mali. The final section covers cases when, in not acting, the Security Council is accused of failing to discharge its responsibilities for the maintenance of international peace and security. Two theories have been invoked in these cases: unilateral enforcement of the collective will; and 'unreasonable' exercise of the veto. Both came up in Kosovo in 1999 and echoes were heard in Iraq 2003 and Syria 2011–12.

(p. 229) A thread that runs through these cases is the need to avoid Security Council paralysis while preserving its status as the principal international body responsible for international peace and security. On the one hand, there are good reasons for looking at ways to finesse the political divisions that often plague the Council, which after all is dominated by five countries that do not have a monopoly on wisdom or legitimacy when it comes to the use of force in international affairs. On the other hand, playing fast and loose with the Council's authority could lead to complete breakdown of the fragile system we have for regulating the use of force. While cases of uncertain authority are troubling, in the rough and tumble of Council politics, it is too much to expect perfect consistency. Indeed, what the cases considered in this chapter highlight is the discursive function of the Council, a place for contestation and deliberation when the international community is divided on how to address threats to the peace. This contestation has not led to a complete collapse of Charter-based law and institutions. If anything, it has reinforced the function of the Council as the centre of a discursive process that helps to manage tensions about the use of force that inevitably arise in a pluralistic world.

II. The UN Charter on Delegation of Enforcement Powers

A. Delegation to Regional Organizations

Chapter VIII, Article 53 of the UN Charter provides for the delegation of enforcement action to regional organizations as follows:

> The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council …

Much ink has been spilled over what constitutes a 'regional arrangement or agency' within the meaning of Chapter VIII, whether 'enforcement action' includes economic sanctions, the relative primacy of regional organizations versus the UN in peace operations, and the degree of control the Security Council must maintain over military action by regional organizations.[1] These issues are addressed elsewhere (p. 230) in this volume. For the purposes of this chapter, it is enough for me to join with scholars who assert that what matters is not the nature of the organization that is taking the action, but the nature of the action itself.[2] When NATO uses force, the important question is not whether NATO is a Chapter VIII regional organization (it insists it is not), but whether it is acting in collective self-defence in response to an armed attack. If so, then according to Article 51, it does not require Security Council authorization; if not, it does. Declaring that NATO was established on the basis of Article 51 rather than Chapter VIII does not exempt it from the rest of the Charter rules on the use of force.[3]

The most difficult legal questions arise not when a regional organization engages in a warlike military intervention, but rather in the context of robust peace operations. As originally conceived, peacekeeping was a consent-based, Chapter VI enterprise, in which force was used only in self-defence. The early missions were typically managed by the UN and had Security Council authorization, although strictly speaking that was not necessary as long as they had the reliable consent and cooperation of the main parties to the conflict.[4] However, in the post-Cold War era especially, peacekeeping missions became more robust: consent of the parties was not reliable, strict impartiality (defined as neutrality) was hard to maintain, and the use of force beyond self-defence was required. Many of the UN missions were deployed either wholly or partially under Chapter VII.

(p. 231) For regional organizations, a question that has arisen is whether peacekeeping constitutes 'enforcement action' within the meaning of Article 53. Some scholars argue that peace operations *within the organization's membership* never require Council authorization, while so-called out-of-area operations always do.[5] An alternative perspective is that the circumstances and purpose for which the peacekeepers use force is more important than where it is used. If it is to deliver humanitarian relief and the major parties have not consented to it, for example, then Security Council authorization is required.[6] This standard can be difficult to apply—for example, when the host government consents to the presence of the peacekeepers but not to each forcible act[7]—but a blanket rule one way or the other is not required by the UN Charter nor does it accord with practice. There are many examples of peacekeeping missions being deployed by regional organizations without Security Council authorization, to which no legal objection was raised.[8] Conversely, there are many cases of regional organizations seeking authorization for robust peace operations even when deployed in a member state of the organization.[9]

A final question about Article 53 is whether after-the-fact Security Council approval meets the requirement. The cases cited most often for this proposition are Liberia and Sierra Leone, where ECOWAS used force without Security Council authorization but the Council later welcomed both interventions.[10] Other cases some scholars point to are Kosovo (1999), the Central African Republic (2002), Côte d'Ivoire (2002), and Darfur (2004).[11] Thomas Franck argues that this cumulated (p. 232) practice amounts to a reinterpretation of Article 53.[12] Others claim that the relevant practice is too slim: even in Liberia and Sierra Leone the language used by the Security Council was equivocal; the main parties in Darfur, the Central African Republic and Côte d'Ivoire all consented to the initial deployment of the missions and, by the time they took robust action, the Security Council had granted Chapter VII authority.[13] There is nothing in the resolution that established the United Nations Mission in Kosovo (UNMIK) and the Kosovo Force (KFOR) in July 1999 to suggest *ex post* authorization of NATO's intervention in March.[14] Similarly, the first resolution adopted after the military action in Iraq in 2003 was carefully drafted to preclude any claim that it provided *ex post* authorization for the war.[15]

Either way, debate over when regional organizations require Security Council authorization for peace operations is likely to continue. At what point is a consent-based peacekeeping operation 'robust' enough that it requires Security Council authorization under Article 53? Whose consent matters? Consider Mali in June 2012, where ECOWAS was prepared to send an intervention force of some 4,000 troops provided by Nigeria, Niger, and Senegal, yet the Security Council was not ready to back it.[16] To deal with these situations, Bryan Kreykes proposes that the Security Council delegate Chapter VII enforcement powers to regional organizations *in advance*, as a way of getting around 'capricious use of the veto'.[17] While a creative proposal, it is unrealistic to expect the Security Council to write a blank cheque or to be able to agree on appropriate safeguards as he suggests.

B. Delegation to Individual States or Coalitions

The UN Charter is silent on delegated enforcement action by coalitions of the willing or member states. The first true case is military action by the US-led coalition to drive Iraq out of Kuwait in 1991. Smaller scale missions include the Unified Task Force (UNITAF) in Somalia (Resolution 794 (1992), para 10), the multinational (p. 233) force in Haiti (Resolution 940 (1994), para 4), the Australian-led coalition in East Timor (Resolution 1264 (1999), para 3), and the NATO-led coalition in Libya (Resolution 1973 (2011), paras 4 and 8). The Security Council has also authorized individual states to use force, like France's Operation Licorne in Côte d'Ivoire (Resolution 1528 (2004), para 16), Operation Serval in Mali (Resolution 2100 (2013), para 18), and Operation Sangaris in Central African Republic (Resolution 2127 (2013), para 50). The legality of the 1991 Iraq war was challenged by Cuba, Malaysia and by some scholars, but the weight of scholarly and official opinion is now that the Council can subcontract in this way.[18] Dan Sarooshi makes a strong legal case that it is an implied power of the Security Council, subject to limitations.[19] As these cases demonstrate, this quasi-constitutional reading of the UN Charter as a 'living tree' is confirmed by extensive Council practice and acquiescence to that practice by the vast majority of UN member states which have never objected to these 'subcontracted' operations.

While this interpretation of the Council's power is widely accepted, there is less evidence of state practice to support the limitations identified by Sarooshi, which he claims are rooted in general international law. He insists that the delegating resolution must be clear and specific, that the Security Council must retain supervisory power over the delegated action, and that the delegate must report to the Council often and extensively.[20] Other scholars have presented variations on this list, always with the emphasis on accountability—the notion that a principal (the Security Council) cannot delegate more power than it has, and must retain substantial control over the agent (states or coalitions).[21] Though questions about the degree of supervision and control are important, this chapter focuses on Sarooshi's first condition—that vague mandates are unacceptable and that the Security Council must spell out the scope and objectives of its delegation precisely. I now turn to cases where the Security Council has *not* satisfied that condition.

(p. 234) III. Imprecise Authorization

In 1950, the Security Council authorized 'members of the United Nations to furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack [from the North] and to restore peace and security in the area'.[22] Setting aside questions about the absence of the Soviet Union at the table (in protest against the absence of the People's Republic of China) and the later adoption of the Uniting for Peace resolution by the General Assembly,[23] what does 'the restoration of international peace and security in the area' mean? Could the US pursue the North Koreans across the 38th parallel in order to eliminate their ability to launch future attacks?[24] The US believed it could, although it ultimately submitted the issue to the General Assembly. In any case, this is an early example of the Security Council authorizing military action for an ill-defined objective, using the very words that became the subject of controversy in Iraq.

Resolution 678 authorized member states cooperating with Kuwait to 'use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area'.[25] The meaning of 'uphold and implement resolution 660' was well understood (drive Iraq out of Kuwait), but the implications of 'all subsequent resolutions' and 'restore international peace and security in the area' were less clear. Both became issues in the aftermath of the Gulf War, but even during the war itself there were debates over whether the resolution granted the US-led coalition the authority to use force in response to Iraqi war crimes, or to march on Baghdad and overthrow the government. Marc Weller finds good legal reasons for doubting these broad interpretations and notes

that most states, including the US and the UK at the time, did not read the resolution as providing a 'blank cheque' for the use of force to achieve objectives beyond the liberation of Kuwait.[26]

A striking recent case of the Security Council authorizing the use of force in terms that led to conflicting interpretations is Resolution 1973 (2011) on Libya, which imposed a no-fly zone and authorized 'all necessary means' to protect the civilian population. The vote on the resolution was ten in favour, with five abstentions from Russia, China, Germany, India, and Brazil. There were many motives for the intervention in Libya, not all humanitarian, but a strong argument can be made that the intervention would not have happened if the notion of a 'responsibility to protect' (R2P) had not been central to the discourse. It made it easier for reluctant interveners (p. 235) to approve the intervention and harder for the sceptics to say no. In other words, Libya's failure to protect its civilian population was the hook that made it possible to squeeze that resolution through the Security Council, regardless of motives—which are very difficult to define anyway. And without that resolution, there would have been no intervention.[27]

A separate question is whether in implementing the resolution the NATO-led coalition exceeded its terms. Russia and others were sharply critical of how the intervention was carried out. Many of the criticisms were expressed in legal terms—namely, that the actions of the NATO coalition went beyond the authority granted in Resolution 1973 (2011). For example, the resolution prohibits deployment of a 'foreign occupation force' (para 4): did that cover the special forces France and the UK had on the ground? Did the embargo imposed in Resolution 1970 preclude arming the rebels? Most consequentially, did the authorization to protect civilians (para 4) and impose a no-fly zone (para 8) permit regime change? The US, the UK, and France all claimed that targeting Gaddafi strongholds was necessary to protect civilians. Others, including Russia, China, and India, insisted that NATO's actions exceeded the mandate.

A more common type of imprecise authorization occurs in the context of robust peace operations. This can be traced back to the UN's expansion of the concept of self-defence employed in UN peacekeeping, to include defence of the mandate. Thus guidelines issued for the second United Nations Emergency Force (UNEF II) in 1973 state that 'self-defence would include resistance to attempts by forceful means to prevent the force from discharging duties under the mandate of the Security Council.'[28] While this expanded concept of self-defence was rarely invoked by commanders in the field during the Cold War (for fear of escalation), Ralph Zacklin—long-time Deputy Legal Counsel in the UN—states that it 'represents a major development in the use of force in peacekeeping'.[29] The implication is that even for Chapter VI missions, UN doctrine holds that use of force in defence of a mandate is permissible. The Security Council normally invokes Chapter VII nowadays when the use of force beyond the peacekeeper's defence of his person and property is contemplated. But there are exceptions, like Resolution 1701 (2006) on (p. 236) Lebanon, which—under Chapter VI—authorizes the United Nations Interim Force in Lebanon (UNIFIL) to 'take all necessary action' to protect civilians and to ensure its area of operations is not used for hostile activity.

Many peace operations have mixed Chapter VI and VII mandates. The most common is when a consent-based, multidimensional mission is given coercive power to protect civilians. The first UN mission to be given the mandate explicitly was the UN Assistance Mission in Sierra Leone in 2000, as a compromise between those who wanted the entire mission to be under Chapter VII given the insecure environment and those who feared the degree of commitment this would require and were reluctant to convert UN peacekeepers into fighting forces.[30] The Democratic Republic of the Congo (DRC) has been the most complex setting for robust peacekeeping. The UN operation there (Mission de l'Organisation de Nations Unies en République Démocratique du Congo, MONUC) went from being a small liaison mission of 90 observers, to a robust force of 20,000 with a mandate that got ever more complicated. In addition to all the civilian functions MONUC was tasked with performing, Resolution 1493, adopted in the aftermath of a crisis in eastern DRC in July 2003, delineated a set of purposes for which force could be used: in self-defence; to protect UN personnel and facilities; to ensure the security and freedom of movement of its personnel; to protect civilians under imminent threat of physical violence; and to contribute to the improvement of the security conditions in which humanitarian assistance is provided. These specific mandated tasks were followed by the more generic authorization for MONUC to use 'all necessary means to fulfill its mandate in the Ituri district and, as it deems within its capabilities, in North and South Kivu'.[31] Thus, in 2003 MONUC had Chapter VII authority for its entire mandate, full enforcement power in Ituri, and limited enforcement power 'within its capabilities' for the protection of civilians and in the Kivus. An army of lawyers would have trouble understanding, let alone implementing, that mandate.

This rather complicated formulation was simplified in subsequent resolutions that prioritized the protection of civilians. The robustness of the mandate was taken a significant step further in March 2013

when an 'Intervention Brigade' was attached to MONUSCO (Mission de l'Organisation des Nations Unies pour la Stabilisation en République Démocratique du Congo) with a mandate to carry out 'targeted offensive operations' to neutralize and disarm armed groups (Resolution 2098 (2013), para 12(b)). While the language is straightforward, its application is complicated by a provision earlier in the resolution that the Intervention Brigade is to operate 'without prejudice to the agreed principles of peacekeeping' (para 9). It is not easy to (p. 237) reconcile those principles with offensive operations, which are based on a peace enforcement or even war-fighting mandate, not peacekeeping.

The peacekeeping protection of civilians mandate was put to the test in Côte d'Ivoire, around the same time as the Libya intervention. UNOCI and Operation Licorne were first deployed in 2004 with a Chapter VII mandate to protect civilians while facilitating a transitional peace process that would culminate in presidential elections. After repeated delays, those elections were finally held in late 2010. Alasane Ouatarra was declared the winner by an independent electoral commission, the UN, the African Union (AU), and ECOWAS, but the incumbent Laurent Gbagbo refused to accept the results. In late 2010 and early 2011, ECOWAS called for the removal of Gbagbo by force, but the Security Council instead strengthened the mandates of UNOCI and Licorne to protect civilians. The Security Council vote on Resolution 1975 was unanimous, but in the explanation of votes, there were important differences of emphasis, displaying tension over the line between protection of civilians and regime change.[32] ECOWAS members (Nigeria and Gabon) wanted military action to install Ouatarra, but others like India, South Africa, Brazil, and China were not prepared to go that far. The Western powers and Russia were all quite cautious in their statements. Thus we have an example of 15 members of the Security Council unanimously agreeing to something quite far-reaching, namely the transfer of power away from an incumbent, while engaging with each other on how best to make that happen. After a protracted period of escalating violence, the UN and France interpreted Resolution 1975 as giving them the authority to prevent the use of heavy weapons against the civilian population.[33] A sustained period of bombardment, including with UN attack helicopters, cleared the way for Ouatarra supporters to enter Gbagbo's compound and arrest him on 11 April 2011.

To summarize, the previous cases signify not a failure to act on the part of the Security Council, but a failure to specify the scope of action. This can be troublesome for those executing the mandate, but it is an inevitable consequence of the Security Council being a political body that cannot be expected to anticipate every contingency, let alone agree on what to do about those contingencies. While perfect clarity would be helpful in implementing a mandate, that is asking too much of the Council and may be a recipe for paralysis. The same issue arises even more acutely when the Security Council adopts a resolution that does not expressly authorize the use of force, but is interpreted that way by some UN member states.

(p. 238) IV. Implied Mandates

This section considers cases of so-called implied authorizations to use force. The next section reviews some of the same cases under the heading of 'failure to act'. The difference is in the type of argument used to justify military action. The first employs a purposive approach to interpreting Security Council resolutions, claiming that the Council has acted, albeit ambiguously; the latter claims that the Security Council has failed to act in circumstances when it should have, thereby opening the door to unilateral action.

The first post-Cold War case to give rise to a dispute over whether the Security Council had authorized the use of force concerned the sanctions imposed on Iraq in 1990. The US and the UK claimed they had the authority to interdict ships that were in breach of Resolution 661, as well as on the basis of self-defence.[34] Canada and others insisted that only the Security Council could authorize the enforcement of sanctions by military force.[35] The matter was largely though not fully resolved with the adoption of Resolution 665, which 'call[ed] upon Member States cooperating with Kuwait…to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping.'[36] Because it was not explicitly adopted under Chapter VII, the Soviet Union and China expressed some doubt over whether the resolution authorized the use of force, but those views did not prevail.[37]

A more lasting division arose over interpretation of Resolution 688, adopted shortly after the so-called 'ceasefire' resolution that brought the Gulf War to an end in April 1991.[38] In a tightly worded eight paragraphs, the Council 'condemned' Iraq's repression of its Kurdish and Shia populations and declared the consequences to be a threat to international peace and security (para 1); it 'demanded' an end to the

repression (para 2); it 'insisted' that Iraq provide immediate access to those in need of assistance (para 3); and it 'appealed' to member states to contribute to the humanitarian relief effort (para 6). The resolution was not explicitly adopted under Chapter VII, but was interpreted by the US, the UK, and France as authorizing a safe haven in northern Iraq and no-fly zones in the north and south. The reaction in 1991 was relatively muted, but as time passed, the objections grew, prompting France to drop out of the triumvirate and the UK to shift away from an argument of implied authorization to one of humanitarian intervention in support of collective purposes (which I will return to in Section V below).[39]

(p. 239) Whether Resolutions 678 and 687 authorized coercive enforcement of the Iraq weapons inspection regimes was a major source of controversy long before the 2003 intervention. It came up first in 1993 when the US, the UK, and France launched missile and air attacks against suspect sites in response to Iraq's non-cooperation with the inspectors. In an extraordinary move, Secretary-General Boutros-Ghali declared that those carrying out the strikes 'had a mandate from the Security Council, according to resolution 678 (1990), and the cause of the raid was the violation by Iraq of resolution 687 (1991) concerning the cease-fire'.[40] The issue arose again in 1998 in the context of Operation Desert Fox, with the added twist that Resolutions 1154 (1998), 1155 (1998), and 1205 (1998) had been adopted, warning of serious consequences for non-cooperation, condemning Iraq for violations of the resolutions, and demanding compliance. The resolutions did not use the term 'material breach' that was so important later in 2003, but the US and the UK insisted that Iraq's non-compliance revived the authorization to use force contained in Resolution 678 (1990). The merits of this argument—including the reactions of other states—have been debated extensively in the scholarly literature and will not be repeated here.[41] Suffice to say that the argumentation revolved around differing interpretations of Resolutions 678 (1990), 687 (1991), and the later resolutions. There was no doubt that the actions of Iraq constituted a threat to international peace and security that *could* justify the use of force. The question was whether the resolutions *did* authorize the use of force, or whether a new Security Council decision was needed.

A similar question arose again several months later, when NATO launched a 14-week bombing campaign in response to Belgrade's violence against the civilian population in Kosovo. Much of the debate on Kosovo has been about the legality of humanitarian intervention *without* Security Council authorization, but the argument put forward by most participants in the intervention was that they had the authority to act based on Resolutions 1160 (1998), 1199 (1998), and 1203 (1998).[42] The resolutions, all adopted under Chapter VII, condemned the use of force by Serbs and made demands on Belgrade. According to the logic of the argument, failure of the Serbs to (p. 240) meet those demands triggered the right of NATO to use force. Germany presented the most nuanced position along these lines, claiming the action was in conformity with the 'sense and logic' of the resolutions, if not their precise terms.[43] The argument is a stretch, not only because the resolutions lack even an ambiguous reference to the use of force, but also because China, Russia, and others made it clear in debates before and at the time the resolutions were adopted that they did not read them that way.[44]

Resolution 1441 (2002) on Iraq sparked the greatest controversy. The US, the UK, and others attacked based on a combined reading of Resolution 678 (1990), 687 (1991), and 1441 (2002).[45] Some of the language in Resolution 1441 (2002) made the case for war stronger than it had been in 1993 and 1998: it recalled Resolution 678 (1990) and repeated the phrase 'all necessary means' in the preamble; it declared Iraq to be in material breach of its obligations under Resolution 687 (1991) and decided that non-cooperation with Resolution 1441 (2002) would be a 'further material breach'; it warned of 'serious consequences' for violations; and while it agreed to reconvene to 'assess' the situation and to 'consider' what to do in the event of non-cooperation, the resolution did not explicitly stipulate that the Security Council must 'decide' what to do. Thus the best argument that can be made for the US/UK position is that the authorization to use force in Resolution 678 was suspended by Resolution 687 (1991) only insofar as Iraq remained in compliance with the terms of the ceasefire. In Resolution 1441 (2002), the Council as a whole found that Iraq's non-compliance was not trivial but a 'material breach', reviving the right to use force without a new authorization.[46] Clever lawyers embellished the argument by claiming that while the Security Council does not authorize the use of force lightly, nor does it terminate that authorization lightly.[47] Further support comes from looking at the purpose of Resolution 687 (1991), which was disarmament. The only way of keeping pressure on Iraq to comply with its disarmament obligations was through the credible threat of force; the threat would not (p. 241) be credible if the Security Council had to decide collectively whether to act each time Iraq was being obstructive. Saddam Hussein would simply bide his time, cooperating only enough to drive a wedge between Council members. Thus, according to this line of argument, in order to achieve the object and purpose of Resolution 687 (1991), the resolutions

should be read broadly to permit the use of force until such time as the Security Council explicitly decides peace and security has been restored.

The counterarguments are at least as powerful. Resolution 687 (1991) did not merely suspend Resolution 678 (1990), but superseded it. When the conditions for a ceasefire were formally established and a framework for implementing those conditions was set out in Resolution 687 (1991), the authorization to use force expired. Resolution 1441 (2002) added nothing to the legal case for military action. It was a compromise, by which Council members agreed to put pressure on Iraq and, in the event of non-compliance, to reconvene. The Security Council may have declared Iraq to be in material breach, but it never declared it to be in 'further material breach' nor did it decide what to do about it.[48] As France, Russia, and China put it in a joint statement, the resolution contained 'no automaticity'. This line of reasoning is supported by the argument that an open-ended delegation of authority to individual member states would fly in the face of the Security Council's primary responsibility for the maintenance of international peace and security. A resolution that delegates something as fundamental as the use of force should be construed narrowly and in favour of the prerogatives of the Security Council as a collective decision-making body. In other words, if the Council wants to authorize military action, it should do so unambiguously.

The debate raged in policy and academic circles for many years, with repercussions that extend to today.[49] What is more important than who is right or wrong is that the Security Council 'knowingly adopted a resolution the language of which would permit both sides to claim victory'.[50] Both sides knew how the other would interpret the resolution if and/or when push came to shove. The unanimous adoption of the resolution (in the absence of Syria) was meant to send a strong message to Saddam Hussein, hoping either that he would comply without the need to force him to do so or that, when it became clear he would not comply, the passage of time would make it possible to agree on what to do about that non-compliance (ie agree on how to interpret the resolutions).

This take on events is reinforced by French Ambassador Jean-David Levitte's admission that, weeks before the US had planned to table the famous second resolution that would have explicitly authorized the use of force, he 'went to the State Department and to the White House to say, don't do it. First, because you'll split the (p. 242) Council and second, because you don't need it. Let's agree to disagree between gentlemen…'[51] Levitte was not signalling France's acceptance of the US interpretation of the resolution, but rather was trying to preserve the credibility of the Council. If the second resolution had been put to a vote and vetoed by France and Russia, the US and the UK going to war would have destroyed the Council as an institution. By allowing the US and the UK to claim legal authority based on existing resolutions and France and Russia to deny it—in other words by agreeing to disagree—then it was possible to return to the Council to help to clean up the diplomatic mess in the aftermath of the war.

What does this episode tell us about implied authorizations? As a matter of law, it is not hard to make the case for clarity over ambiguity.[52] And as a matter of policy, one can see the danger in finding the authority to use force too readily in ambiguous language, not only because international peace and security is better served by a presumption against the use of force, but also because the ability of the Security Council to send strong signals would be compromised. Indeed, there is evidence that the Council learned that lesson. Resolutions imposing sanctions on North Korea and Iran unusually included explicit references to Article 41 of the Charter, to pre-empt any argument that they could be read as implicitly authorizing the use of force under Article 42.[53] Conversely, the Council was unable to send a strong message to Syria in 2011. In vetoing a condemnatory resolution, Russia stated in reference to the Libya precedent, 'it is very important to know how [Resolution 1973] was implemented and how a Security Council resolution was turned into its opposite'.[54]

Mali is another case of implied authorization. As the situation in the north of the country deteriorated through the latter half of 2012, the UN, ECOWAS, and the AU were all busy trying to devise a plan for intervention. The result was Resolution 2085 (2012), which authorized an African-led International Support Mission to Mali (AFISMA) to deploy once certain preconditions were met. Paragraph 14 of the resolution 'urges Member States, regional organizations and international organizations to provide…any necessary assistance in efforts to reduce the threat posed by terrorist organizations.' Did that authorize military action by France? The question was put to the test in early January 2013, when Al Qaeda in the Islamic Maghreb and its allies seized the town of Konna, long before AFISMA had deployed. French forces intervened, engaging in major combat operations over a period of months. France presented three legal justifications: the invitation by Malian authorities to intervene; (p. 243) self-defence based on Article 51 of the UN Charter; and authority based on Security Council Resolution 2085.[55] None of the claims were put

forward in great detail, and they tended to be intermingled. Significantly, the Security Council tacitly endorsed the French position as follows:

> The members of the Security Council recall resolutions 2056 (2012), 2071 (2012) and 2085 (2012) adopted under Chapter VII of the Charter of the United Nations, as well as the urgent need to counter the increasing terrorist threat in Mali. The members of the SC reiterate their call to Member States to assist the settlement of the crisis in Mali and, in particular to provide assistance to the Malian Defence and Security Forces in order to reduce the threat proposed by terrorist organizations and associated groups.[56]

The implication seems to be that the French interpretation of Resolution 2085 (2012), as implicitly authorizing the use of force, was accepted.

A categorical position against implied authorizations seems overly formalistic as it assumes that the line between implicit and explicit authorization is self-evident. All words are in need of interpretation; 'plain' or 'ordinary' meanings are only plain or ordinary in the light of their context. Important terms in Security Council resolutions are and should be read in context, requiring an inquiry into object, purpose, subsequent practice, negotiating history, and all the other techniques of treaty interpretation.[57] When one delves into that kind of inquiry, the distinction between implicit and explicit authorization is question-begging. Moreover, sometimes the ambiguity is intentional. In the case of Iraq, Resolution 1441 (2002) was meant to kick the problem down the road, in the (perhaps vain) hope that it would not come to a head. Would the alternative—no resolution at all—have been better? That would have resulted in either continued paralysis with no weapons inspectors in Iraq, or US unilateral action without even the fig leaf of authority. As Michael Byers argues, deliberate ambiguity can protect international law from permanent harm by cushioning it from the effects of deep political differences.[58] This may be less than ideal, but it is better than demanding an unrealistic level of lawmaking precision from the Security Council, thereby rendering it irrelevant.

(p. 244) V. Failure to Act

The most controversial cases are when regional organizations or coalitions claim a right to use force with no Security Council authorization at all (and no plausible self-defence claim). The contestation occurs not when a state asserts a right to act unilaterally whenever its security interests are at stake—few officials or scholars make that broad claim—but when the Security Council is said to have failed in its responsibility to maintain peace and security.[59] The issue arises most frequently in the context of humanitarian intervention. It is captured by Thomas Franck who, in paraphrasing a Supreme Court Justice's comment on the US Constitution, quipped 'surely the UN Charter is not a genocide pact'.[60] Two related but distinct theories have been put forward to justify 'unauthorized' intervention: unilateral enforcement of the collective will expressed in Security Council resolutions; and the 'unreasonable' or 'capricious' veto.

The 'enforcement of the collective will' theory is close to but differs from implied authorization. The latter finds authority to use force implicit in a resolution; the former acknowledges that the Security Council did not authorize military action, but nevertheless expressed its will on objectives to be achieved. States relying on this theory claim the right to take military action in order to achieve the Council's purposes.[61] The argument was made with respect to the no-fly zones in Iraq, Operation Desert Fox in 1998, Kosovo in 1999, and Iraq again in 2003. On the no-fly zones, the US and the UK argued that they were 'consistent with' and 'in support' of UN Security Council Resolution 688, even if not authorized by it.[62] When force was used in response to Iraq's obstruction of UN weapons inspectors in 1998, British (p. 245) Prime Minister Tony Blair claimed that it 'was to enforce the Security Council's will'. The German position that NATO's intervention in Kosovo followed the 'sense and logic' of Security Council resolutions is a variant of the claim. So are UK statements that the resolutions were 'an important part of the legal framework within which NATO acted' and US views about the 'synergy' between NATO and the UN 'on behalf of an urgent common cause'.[63] Regarding Iraq 2003, the claim that a material breach of Resolution 687 triggers the right to use force is in effect an argument that enforcement authority devolves upon individual states in the event of Security Council paralysis.[64]

The majority of states did not accept the 'enforcement of the collective will' line of thinking in all of the previous cases. The sentiment is well captured by the Russian Permanent Representative to the UN in 1998: 'no [one] is entitled to act independently on behalf of the UN and even less to assume the functions of world policeman'.[65] Among scholars, Marc Weller observes 'that a general right of states to appoint

themselves the executors of the "will" of the Security Council would lead to very significant instability'.[66] Nico Krisch concludes that unilateral enforcement is more likely to threaten than enhance community interests.[67] Those who see merit in this approach believe adequate safeguards can be put in place, for example by insisting on a prior determination of the gravity of the humanitarian situation by the Security Council.[68] Carsten Stahn argues for a principled approach to 'unauthorized enforcement action', which would look at whether common interests enshrined in resolutions are being enforced, who the interveners are, and whether a participatory process of legal discourse involving all relevant actors was pursued.[69]

The 'unreasonable veto' theory has a long history. In San Francisco, France and other states proposed that UN member states should have the right to act 'in the interest of peace, right and justice' if the Security Council was paralysed by the veto.[70] This was not accepted then, but it became the basis for the General Assembly's Uniting for Peace resolution of 1950 (discussed in Chapter 13 of this volume). It resonated during the Cold War when the Security Council found it difficult to act on (p. 246) any threat to the peace because of the superpower rivalry. It also served a rhetorical purpose in the post-Cold War after the Security Council was criticized for doing too little in Bosnia and Rwanda. A version was invoked by the Dutch Permanent Representative to the UN at the start of the Kosovo crisis:

> [If] due to one or two permanent members' rigid interpretation of the concept of domestic jurisdiction, such a resolution is not attainable, we cannot sit back and simply let the humanitarian catastrophe occur. In such a situation we will act on the legal basis we have available, and what we have available in this case is more than adequate.[71]

The North Atlantic Parliamentary Assembly hinted at the doctrine with its resolution calling for NATO to 'stand ready to act should the UN Security Council be prevented from discharging its purpose of maintaining international peace and security'.[72]

The most full-bodied scholarly articulation of the concept is provided by Christopher Greenwood (now ICJ judge) in his testimony before the UK House of Commons Foreign Affairs Committee in June 2000:

> Under international law it is the Security Council which has the primary responsibility for maintaining international peace and security. That does not mean, however, that if the Security Council is unable to take action in a particular case—for example because of a veto, or the threat of a veto, by a permanent member of the Council—no action is possible. As demonstrated above, States have intervened on humanitarian grounds without the authorisation of the Security Council in extreme cases. Furthermore, an interpretation of international law which would forbid intervention to prevent something as terrible as the Holocaust, unless a permanent member could be persuaded to lift its veto, would be contrary to the principles on which modern international law is based as well as flying in the face of the developments of the last 50 years.[73]

The idea is that the threatened or actual use of an 'unreasonable' veto triggers a unilateral right to act. One can see the logic (if not necessarily the merit) of the argument when the motive for using the veto is unrelated to the issue at hand, for example when China vetoed the extension of the United Nations Preventive Deployment Force (UNPREDEP) because of Macedonia's relations with Taiwan, or when the US threatened to veto the UN police mission in Bosnia (United Nations Mission in Bosnia and Herzegovina, UNMIBH) unless the Security Council approved a blanket exemption for the US and other non-parties of the International Criminal Court (ICC) from investigation and prosecution by the ICC.[74]

The problem is that there are no criteria for determining when a veto is 'unreasonable'. The theory can be traced to Council inaction in the face of extreme humanitarian and human rights crises, like the Rwanda genocide. If a state or group of states had been (p. 247) prepared to act then and the Security Council was prepared to authorize it, but for the objection of one permanent member, would that veto not be 'unreasonable'? This is what stimulated the R2P phenomenon, including the six criteria set out by the International Commission on Intervention and State Sovereignty on when intervention would (and would not) be appropriate, ideally with Security Council authorization but if necessary without it.[75] In the context of discussions on Security Council reform, it inspired appeals for a gentlemen's agreement among the five permanent members of the Council (P5) not to use the veto to block humanitarian intervention.

The 'unreasonable veto' theory is also connected to the notion of humanitarian necessity as an excuse for violations of the law. Based on the 'defence of necessity' in common and civil law jurisdictions, as well as the International Law Commission Articles on State Responsibility,[76] the idea is that humanitarian intervention is not another exception to the prohibition against the use of force, but rather will be excused

in extreme cases of humanitarian need. In other words, the world will turn a blind eye to the violation and in effect pardon those responsible.[77] It is a difficult argument that assumes an amorphous 'interpretive community' is capable of making a subtle distinction between interventions that are legal, those that are illegal but excusable, and those that are both illegal and inexcusable. Arguably it did this in the Kosovo case: NATO's intervention was never condoned by the Security Council, General Assembly, or in the legal discourse surrounding them; but nor was it condemned in a manner that cost NATO a great price.[78] That still begs the question, is it possible for the international community to treat an act as illegal but excusable without fatally undermining the prohibition against the use of force? Elsewhere I have argued that it can, but there is certainly room for debate.[79]

In any case, the theory still has resonance even if it has not gained much traction among lawyers. Echoes of it were heard in Iraq 2003 and more recently in Syria. After the Houla massacre in May 2012, US Permanent Representative to the UN Susan Rice was quoted as saying states may have little choice but to pursue military options outside of the UN Security Council:

> I think we may be beginning to see the wheels coming off this bus … [The worst case scenario is that] the Council's unity is exploded, the Annan plan is dead, and this becomes a proxy (p. 248) conflict with arms flowing in from all sides. And members of this council and members of the international community are left with the option only of having to consider whether they're prepared to take action outside the Annan plan and the authority of this council.[80]

Russia and others would strongly disagree with the notion that their use of the veto was unreasonable in the circumstances, let alone that others would be justified in acting outside the Council because of the veto. But to suggest that there is no objective way of deciding between these two positions misses the point. The fact of the matter is that between early 2011 and mid-2012 there had been extended public contestation among the P5; emerging powers like India, Brazil, South Africa, and Turkey; those with a stake in the region like Qatar, Egypt, and Jordan; representatives of the Arab League, AU, the Organisation of Islamic Cooperation (OIC), the EU, and NATO; as well as a large constellation of non-governmental actors on what the 'responsibility to protect' requires and appropriate role of the Security Council in giving effect to the doctrine. There is no objective answer to the question when a veto is unreasonable, but reasoned deliberation about that question is possible. It is a fundamental principle of justice that like cases ought to be treated alike. Yet in the real world of international politics, perfect consistency is not possible: power matters and inequalities in power will inevitably result in inconsistency. That does not mean we must resign ourselves to hypocrisy and double standards. One of the functions of international law and norms is to generate more consistency, to serve as advocacy tools to pressure decision-makers to treat like cases alike. Consider R2P: a cynical view is that it is simply an excuse the powerful states use to intervene for ulterior motives; a less cynical view is that while the risk of abuse is real, norms like R2P can be a tool to minimize abuse, to make Security Council-authorized intervention a little more likely when appropriate and a little less likely when not.

VI. Conclusion

For reasons of both law and policy, it is tempting to denigrate strained interpretations of Security Council action and inaction as providing justification for the use of force. There are ample reasons for wanting the Security Council to say what it means and to mean what it says when it comes to something as fundamental as the use of force. Acting on the basis of imprecise authorizations, implied authorizations, and authorizations that *should* have happened deprives international law of (p. 249) determinacy.[81] Vague delegation of power may run afoul of basic principles of international institutional law,[82] as well as the UN Charter itself.[83] It abdicates responsibility for control over military operations[84] and raises legal questions about accountability for wrongful acts committed in the execution of those operations.[85] Expansive interpretations of Security Council (in)action may deter members from ever agreeing to strongly worded resolutions or even discussing contentious issues for fear of being accused of threatening an 'unreasonable' veto. This not only limits the range of instruments in the Security Council's toolbox, but undermines the stability that the rule of law is meant to bring to the international system.

All true, but as noted earlier, to expect perfect clarity from the Security Council is expecting too much. Undoubtedly clear, precise resolutions are better than vague, implied, or after-the fact authorizations to use force. But when Resolution 1441 was adopted, the choice was not between a vague and a more tightly worded resolution, but rather between that and no resolution at all. The likely impact of no resolution

would have been no weapons inspectors back in Iraq and unilateral US action with the support of a few allies. There would have been much less legal and justificatory discourse between November 2002 and March 2003. The Council itself would have been spared the rancour that characterized that period, but it would also have looked irrelevant. As it turns out, the Council was damaged by the Iraq episode, but not destroyed by it.[86] Even 'misuses' of concepts like R2P, such as Russia's claim that it justified intervention in Georgia in 2008 or France's claim that it justified intervention in Myanmar in the aftermath of Cyclone Nargis, can reinforce it if rejected in the discursive process; making clear what a norm is not gives it greater precision and can shore up support for what it is.[87]

Formalistic legal analyses of what the Council has and has not authorized tend to overlook the useful discursive function it plays. The Council is not just a decision- making body, but also a place where claims about appropriate international behaviour and the requirements of international law are proffered, challenged, defended, and criticized. In the discursive process, the rules of international life are interpreted, reinterpreted, and on occasion rewritten. Findings of (il)legality are not derived objectively, but inter-subjectively, through the push and pull of international politics (p. 250) framed by accepted understandings of the techniques of interpretation and the conventions of legal discourse.[88] This discourse includes not only Security Council members, but also other countries affected by what the Security Council and the broad constellation of intergovernmental and non-governmental actors who participate in or find a way of impacting what the Security Council does. The process, as I have argued elsewhere, is more inclusive than meets the eye.[89]

Viewing the Security Council in this way does not lead to any particular conclusion about the merits of narrow versus broad readings of Council acts and failures to act. A broad, purposive approach to Charter interpretation can cut both ways. It may remove any vestige of predictable behaviour that rules on the use of force are meant to provide. Or it may cushion the impact of deep political divisions over when the use of force is justified. The former perspective sees rigid adherence to explicit rules as the only way of protecting the law from subjective interpretation, hypocrisy, and irrelevance. The latter sees legal discourse as a vehicle for problem-solving— a way of managing the tensions and competing normative claims that characterize any pluralistic society. From either perspective, discourse in and around the Security Council about when the use of force is legal and appropriate reinforces the value of the institution rather than undermines it.

Footnotes:

* I would like to thank Jessica Dedic and Mumtaz Baloch for their research assistance. I would also like to thank Tom Weiss for his comments on this draft, and Marc Weller and Alexia Solomou for their perceptive edits.

1 Dan Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (Oxford: Oxford University Press, 1999); Ademola Abass, *Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter* (Portland, OR: Hart, 2004); Suyash Paliwal, 'The Primacy of Regional Organizations in International Peacekeeping: The African Example' (2010) 51 *Virginia Journal of International Law* 185; Monica Hakimi, 'To Condone or Condemn? Regional Enforcement Actions in the Absence of Security Council Authorization' (2007) 40 *Vanderbilt Journal of Transnational Law* 643; Niels Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by "Coalitions of the Able and Willing"' (2000) 11 *European Journal of International Law* 541; Marten Zwanenburg, 'Regional Organizations and the Maintenance of International Peace and Security: Three Recent Regional African Peace Operations' (2006) 11 *Journal of Conflict and Security Law* 490; Bryan D. Kreykes, 'A Case for Delegation: The UN Security Council. Regional Conflicts, and Regional Organizations' (2008) 11 *Touro International Law Review* 1; Ugo Villani, 'The Security Council's Authorization of Enforcement Action by Regional Organizations' (2002) *Max Planck Yearbook of United Nations Law* 535; Zsuzsanna Deen-Racsmany, 'A Redistribution of Authority between the UN and Regional Organizations in the Field of the Maintenance of Peace and Security' (2000) 13 *Leiden Journal of International Law* 297.

2 Christine Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 2008); Hakimi, 'To Condone or Condemn?', 9–10; Michael Akehurst, 'Enforcement Action by Regional Agencies, with Special Reference to the Organization of American States' (1967) 42 *British Yearbook of International Law* 175, 184.

3 As Bruno Simma asserts: 'Article 53 is not formally applicable to NATO but Chapter VII is'. Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 *European Journal of International Law* 1, 10.

4 This logic led the International Court of Justice (ICJ) to conclude in the *Certain Expenses* case that the UN General Assembly had the competence to establish peacekeeping missions, despite Art 11(2) of the Charter, since it was tantamount to a recommendation to all concerned to deploy and accept the deployment of troops for that purpose. *Certain Expenses of the United Nations*, Advisory Opinion, ICJ Rep 1962, 151.

5 Abass, *Regional Organisations and the Development of Collective Security*, 45, 157; Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (Philadelphia, PA: University of Pennsylvania Press, 1996), 342–43; Alexander Orakhelashvili, 'The Legal Basis of the United Nations Peace-Keeping Operations' (2002–3) 43 *Virginia Journal of International Law* 514; Alexander Orakhelashvili, *The Interpretation of Act and Rules in Public International Law* (Oxford: Oxford University Press, 2008).

6 Paliwal, 'The Primacy of Regional Organizations in International Peacekeeping', 219; Zwanenburg, 'Regional Organizations and the Maintenance of International Peace and Security', 490; Gray, *International Law and the Use of Force*.

7 The UN's Capstone Doctrine seeks to address this issue by distinguishing strategic from tactical consent: 'UN Peacekeeping Operations: "Principles and Guidelines"' (2008).

8 eg the Multinational Force in the Central African Republic (Force Multinationale en Centrafrique, FOMUC); the Organization for Security and Co-operation in Europe (OSCE) and now the EU in Georgia; the Organization of American States (OAS) in Colombia; and the Regional Assistance Mission to Solomon Islands (RAMSI). For a survey of current missions, see *Annual Review of Global Peace Operations 2013* (New York: Center on International Cooperation, New York University, 2013).

9 The AU in Burundi, Darfur, and Somalia; the OSCE in the Balkans; and the Economic Community of West African States (ECOWAS) in Côte d'Ivoire and Sierra Leone. See id and earlier *Annual Reviews of Global Peace Operations*.

10 SC Res 788 (19 Nov 1992) on Liberia; SC Res 1162 (17 Apr 1998) on Sierra Leone.

11 Thomas M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge: Cambridge University Press, 2002); Paliwal, 'The Primacy of Regional Organizations in International Peacekeeping'; Zwanenburg, 'Regional Organizations and the Maintenance of International Peace and Security'.

12 Franck, *Recourse to Force*, 162; See also Abass, *Regional Organisations and the Development of Collective Security*, 53–4; Paliwal, 'The Primacy of Regional Organizations in International Peacekeeping', 220; Simma, 'NATO, the UN and the Use of Force', 4; Deen-Racsmany, 'A Redistribution of Authority between the UN and Regional Organizations'; Ruth Wedgewood, 'NATO's Campaign in Yugoslavia' (1999) 93 *American Journal of International Law* 828, 832.

13 Zwanenburg, 'Regional Organizations and the Maintenance of International Peace and Security', 502–7; Villani, 'The Security Council's Authorization of Enforcement Action', 553.

14 SC Res 1244 (10 June 1999) on Kosovo.

15 SC Res 1483 (22 May 2003) on Iraq; Michael Byers, 'Agreeing to Disagree: The Security Council Resolution 1441 and Intentional Ambiguity' (2004) 10 *Global Governance* 165, 181.

16 Ange Aba, 'ECOWAS has Mali Force Troop Pledge, Still Lacks Backing', *Reuters,* 17 June 2012, available at <http://www.reuters.com/article/2012/06/17/us-mali-crisis-idUSBRE85G0HE20120617>.

17 Kreykes, 'A Case for Delegation'.

18 Oscar Schachter, 'United Nations Law in the Gulf Crisis' (1991) 85 *American Journal of International Law* 452; Blokker, 'Is the Authorization Authorized?'; Helmut Freudenschuss, 'Between Unilateralism and Collective Security: Authorizations of the Use of Force by the UN Security Council' (1994) 5 *European Journal of International Law* 492; Gray, *Use of Force*, 328; Sarooshi, *The United Nations and the Development of Collective Security*. For a contrary view see, Burns H. Weston, 'Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy' (1991) 85 *American Journal of International Law* 516.

19 Sarooshi, *The United Nations and the Development of Collective Security*.

20 Sarooshi, *The United Nations and the Development of Collective Security*, 32–46, 156–63.

21 Blokker, 'Is the Authorization Authorized?', 561–8; Gray, *Use of Force*, 333–4; Marc Weller, *Iraq and the Use of Force in International Law* (New York: Oxford University Press, 2010), 56–7; Jules Lobel and Michael Ratner, 'Bypassing the Security Council: Ambiguous Authorizations to Use of Force, Cease-Fires and the Iraqi Inspection Regime' (1999) 93 *American Journal of International Law* 124; Villani, 'The Security Council's Authorization of Enforcement Action'.

22 SC Res 83 (27 June 1950) on Korea.

23 GA Res 377 (V) (3 Nov 1950).

24 Lobel and Ratner, 'Bypassing the Security Council', 138–9.

25 SC Res 678 (29 Nov 1990) on Iraq, para 2.

26 See Weller, *Iraq and the Use of Forc*e, 43–4; Lobel and Ratner, 'Bypassing the Security Council', 140. Both cite the statements of various Security Council government officials.

27 For a good series of articles assessing the impact of R2P on the Libya intervention, see *Ethics in International Affairs*, Sept 2011: Alex J. Bellamy, 'Libya and the Responsibility to Protect: The Exception and the Norm' (2011) 25 *Ethics & International Affairs* 263–9; Simon Chesterman, '"Leading from Behind": The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention after Libya' (2011) 25 *Ethics & International Affairs* 279; Thomas G. Weiss, 'RtoP Alive and Well after Libya' (2011) 25 *Ethics & International Affairs* 287; Jennifer Welsh, 'Civilian Protection in Libya: Putting Coercion and Controversy Back into RtoP', (2011) 25 *Ethics & International Affairs* 255.

28 Report of the Secretary-General on the Implementation of Security Council Resolution 340 (1973), S/11052/Rev.1 (1973), 27 Oct 1973, para 4(d).

29 Ralph Zacklin, 'The Use of Force in Peacekeeping Operations' in Niels Blokker and Nico Schrijver (eds), *The Security Council and the Use of Force: Theory and Reality—A Need for Change?* (Leiden: Martinus Nijhoff, 2005), 91, 94.

30 Ian Johnstone, 'Dilemmas of Robust Peace Operations' (2006) *Annual Review of Global Peace Operations 2006* 7; SC Res 1289 (7 Feb 2000) on Sierra Leone, para 10.

31 SC Res 1493 (28 July 2003) on the Democratic Republic of the Congo, para 26.

32 Record of the Meeting of the Security Council on the Situation in Côte d'Ivoire held on 30 March 2011 in New York, S/PV.6508 (30 Mar 2011).

33 Cross-Cutting Report No 2 on Protection of Civilians in Armed Conflict, Security Council Report, 20 July 2011.

34 Weller, *Iraq and the Use of Force*, 24–5.

35 Weller, *Iraq and the Use of Force*, 25.

36 SC Res 665 (25 Aug 1990) on the situation between Iraq and Kuwait, para 1.

37 Freudenschuss, 'Unilateralism and Collective Security', 496; Weller, *Iraq and the Use of Force*, 27.

38 SC Res 688 (5 Apr 1991) on Iraq, paras 1–3.

39 Weller, *Iraq and the Use of Force*, 74–80; Gray, *Use of Force*, 349–50; Lobel and Ratner, 'Bypassing the Security Council', 133.

40 Press Release, United Nations Department of Public Information, 'Transcript of Press Conference by Secretary-General Boutros Boutros-Ghali, Following Diplomatic Press Club Luncheon in Paris on 14 January 1993', SG/SM/4902/Rev.1, 15 Jan 1993.

41 Ian Johnstone, *The Power of Deliberation: International Law, Politics, and Organizations* (New York: Oxford University Press, 2011), 125–6; Gray, *Use of Force*, 350–1; Sarooshi, *The United Nations and the Development of Collective Security*, 177–83; Weller, 'Iraq and the Use of Force', 115–30; Lori Fisler Damrosch and Bernard Oxman, 'Agora: Future Implication of the Iraq Conflict' (2003) 97 *American Journal of International Law* 553; Lori Fisler Damrosch and Bernard Oxman, 'Agora (continued): Future Implication of the Iraq Conflict' (2003) 97 *American Journal of International Law* 803.

42 The US, the UK, France, Germany, Italy, Belgium, Greece, the Netherlands, and Slovenia all claimed the resolutions provided legal authority for the action, though many invoked other legal justifications as well. Gray, *Use of Force*, 353–4; Michael W. Reisman, 'Acting Before Victims Become Victims: Preventing and Arresting Mass Murder' (2007) 40 *Case Western Reserve Journal of International Law* 57, 79–80; Nico Krisch, 'Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council' (1999) *Max Planck Yearbook of United Nations Law* 59, 81–3.

43 Simma, 'NATO, the UN and the Use of Force', 12.

44 Gray, *Use of Force*, 352–3.

45 Letter dated 20 March 2003 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, S/2003/350 (21 Mar 2003); Letter dated 20 March 2003 from the Permanent Representative of the United States to the United Nations addressed to the President of the Security Council, S/2003/351 (21 Mar 2003); William H. Taft and Todd F. Buckwald, 'Preemption, Iraq, and International Law' (2003) 93 *American Journal of International Law* 557; the US also sought to make the case for war on the basis of self-defence as an extension of the war on terrorism, but by March 2003 it had ceased making that claim to international audiences. Ian Johnstone, 'US–UN Relations After Iraq: The End of the World (Order) As We Know It?' (2004) 15 *European Journal of International Law* 813.

46 The US and the UK made much of the term 'material breach' because it signified the Council's judgement that a fundamental term of the ceasefire had been broken, pre-empting a counterargument that individual member states should not have the unilateral right to determine whether a particular violation of the resolution justified military action. As Sarooshi argues, the Security Council has been delegated the authority to determine whether a threat to the peace exists and cannot sub-delegate that. Sarooshi, *The United Nations and the Development of Collective Security*, 33, 179.

47 John Yoo, 'International Law and the War in Iraq' (2003) 97 *American Journal of International Law* 563, 567.

48 Weller, *Iraq and the Use of Force*; Gray, *Use of Force*, 363.

49 For a range of opinions on both sides, see the symposium 'Agora: Future Implications of the Iraq Conflict' (2003) 97 *American Journal of International Law*, issues 3 and 4.

50 Stephen D. Mathias, 'The United States and the Security Council' in Blokker and Schrijver, *The Security Council and the Use of Force*, 176, 176. Mathias was Assistant Legal Adviser for UN Affairs in the US Department of State at the time. He is currently Deputy Legal Counsel at the UN.

51 Quoted in Jane E. Stromseth, 'Law and Force After Iraq: A Transitional Moment' (2003) 97 *American Journal of International Law* 628, 631; Weller, *Iraq and the Use of Force*, 169. See also Byers, 'Agreeing to Disagree', 73; Johnstone, 'US–UN Relations After Iraq'.

52 Sarooshi, *The United Nations and the Development of Collective Security*.

53 SC Res 1874 (12 June 2009) on North Korea; SC Res 1929 (9 June 2010) on Iran.

54 Record of the Meeting of the Security Council, S/PV.6627 (4 Oct 2011), 4.

55 'Mali—Press conference given by M. Laurent Fabius, Minister of Foreign Affairs—excerpts', French Ministry of Foreign and European Affairs, Official Speeches and Statement of 14 Jan 2013, available at <http://basedoc.diplomatie.gouv.fr/exl-doc/FranceDiplomatie/PDF/baen2013-01-14.pdf>.

56 Security Council Press statement SC/10878, AFR/2502, 10 Jan 2013. See also SC Res 2100 (2013), preambular para 5, and ECOWAS Press Release No 006/2013, 12 Jan 2013.

57 This approach to interpretation borrows from Arts 31–2 of the Vienna Convention on the Law of Treaties (1969).

58 Byers, 'Agreeing to Disagree', 181; see also Mathias, 'The United States and the Security Council' in Blokker and Schrijver, *The Security Council and the Use of Force*, 177, who says the arguments over the interpretation of Res 678 (29 Nov 1990), 687 (3 Apr 1991), and 1441 (8 Nov 2002) on Iraq 'support rather than undermine the existing legal regime' because they are premised on the authority of the Security Council to authorize force.

59 By responsibility, I mean a Charter-based political responsibility not a legal obligation. The World Summit Outcome Document was carefully drafted to preclude an interpretation that R2P imposed a legal

obligation on the Security Council to end or prevent mass atrocities (UN General Assembly, World Summit Outcome Document: resolution/adopted by the General Assembly, A/RES/60/1 (24 Oct 2005)). See paras 138–9. For an analysis of the negotiation history of those paragraphs, see Johnstone, *The Power of Deliberation*, 71–2. On the other hand, Louise Arbour has argued that the Genocide Convention, as interpreted by the ICJ in the *Bosnia* case (ICJ (1993), 325) imposes an obligation on the P5 not to exercise their veto to end genocide. Louse Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (2008) 34 *Review of International Studies* 445.

60 Franck, *Recourse to Force*, 182; Michael W. Reisman, 'Kosovo Antinomies' (1999) 93 *American Journal of International Law* 860, 860; Mathias, 'The United States and the Security Council', 182.

61 Krisch, 'Unilateral Enforcement of the Collective Will'; Carsten Stahn, 'Enforcement of the Collective Will After Iraq' (2003) 97 *American Journal of International Law* 804, 809, 816–19; Weller, *Iraq and the Use of Force*, 81–8; Simma, 'NATO, the UN and the Use of Force', 9–13; Christian Henderson, *The Persistent Advocate and the Use of Force: The Impact of the United States upon the Jus ad Bellum in the Post-Cold War Era* (Farnham: Ashgate, 2010), 100.

62 For statements from various US and UK officials, see Henderson, *The Impact of the United States upon the Jus ad Bellum*, 99, 110–14; Weller, *Iraq and the Use of Force*, 75; Krisch, *Unilateral Enforcement of the Collective Will*, 75.

63 Simma, 'NATO, the UN and the Use of Force', 11–12; Krisch, *Unilateral Enforcement of the Collective Will*, 81–5; Henderson, *The Impact of the United States upon the Jus ad Bellum*, 105, 114–19; Christopher Greenwood, 'International Law and the NATO Intervention in Kosovo' (2000) 49 *International and Comparative Law Quarterly* 926, 927–9.

64 Weller, *Iraq and the Use of Force*, 160–72. See also Gray, *Use of Force*, 369.

65 For that statement and the position of other states, see Krisch, *Unilateral Enforcement of the Collective Will*, 67, 77–9, 82–5.

66 Marc Weller, 'The US, Iraq and the Use of Force in a Unipolar World' (1999) 41 *Survival* 81, 89.

67 Krisch, *Unilateral Enforcement of the Collective Will*, 92–4.

68 Vaughan Lowe, 'International Legal Issues Arising in the Kosovo Crisis' (2000) 49 *International and Comparative Law Quarterly* 934, 939.

69 Stahn, 'Enforcement of the Collective Will After Iraq', 815.

70 eg France and Australia. Ruth B. Russell, *A History of the United Nations Charter* (Washington DC: Brookings Institution, 1958); Stahn, 'Enforcement of the Collective Will After Iraq', 810.

71 Record of the Meeting of the Security Council on the Situation in Kosovo held on 24 March 1999 in New York, S/PV.3988 (24 Mar 1999), 8. Also quoted in Weller, *Iraq and the Use of Force*, 85.

72 Quoted in Simma, 'NATO, the UN and the Use of Force', 16.

73 Greenwood, 'NATO Intervention in Kosovo', 930.

74 The resolution on the ICC is SC Res 1422 (12 July 2002).

75 'Responsibility to Protect', Report of the International Commission on Intervention and State Sovereignty (2001).

76 Art 25 of Responsibility of States for Internationally Wrongful Acts, Annex to GA Res 56/83 (12 Dec 2001), corrected by A/56/49 (vol 1).

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88 See generally Johnstone, *The Power of Deliberation*; Henderson, *The Impact of the United States upon the Jus ad Bellum*; Stahn, 'Enforcement of the Collective Will After Iraq', 806, 808, 822; Stromseth, 'Law and Force After Iraq', 632–3.

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